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A Periodic Legal Update from the
Construction & Surety Law Practice Group

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Fuzzy Math?

Recent N.C. Case Holds That a 20-Year Warranty Only Provides Damage Protection for 6 Years

By Matthew C. Bouchard | (919) 719-8565 | mattbouchard@lewis-roberts.com | @MattBouchardEsq

Ten years ago, you had the roof on your office building replaced. Your roofer had assured you that the new membrane would be waterproof, wouldn't crack and would be well-suited for your building over the long-haul. He even backed up these representations with a document stating that both the membrane and his workmanship were "fully warranted for 20 years."

The work was substantially complete on September 15, 2003, and until recently, the new membrane hadn't given you any problems. After storms passed through your neck-of-the-woods last week, however, your "new" roof leaked. Big Time.

Turns out you're going to need to replace your roof immediately, ten years earlier than expected. Adding insult to injury, interior spaces were damaged, including common areas and rented space, and the operations of some of your tenants were disrupted. They might seek rent abatement, maybe more. Good thing you kept that 20-year warranty in a safe place, right?

Kind of.

Under a recent North Carolina appellate decision, you might be able to compel the roofer to replace the roof, but you're not likely to succeed in recovering any monetary damages from him.

The July 16, 2013 decision of the North Carolina Court of Appeals in *Christie v. Hartley Construction, Inc.* stands for the proposition that North Carolina's six-year statute of repose for construction defects, which bars damages actions asserted more than six years after substantial completion, effectively trumps an express warranty of a longer duration. *See* N.C. Gen. Stat. § 1-50(a)(5).

> ***Both the statute of limitations and the statute of repose apply to limit when construction defect claims can be asserted.***

What is a "statute of repose?" It's a drop-dead deadline for asserting a claim that runs from an event other than discovery of the plaintiff's damage. By contrast, a "statute of limitation" typically runs from the event causing the damage in question. Both apply to limit when construction defect claims can be asserted. Let's use our roof failure hypothetical to illustrate the difference.

Under the applicable three-year statute of limitation for breach of contract cases, an action for breach of warranty would begin to run from the event giving rise to the cause of action — i.e., the failure of the roofer to honor the warranty once you made a demand thereunder. If the only limiting statute that applied were the statute of limitations, you could conceivably bring an action as late as 23 years after substantial completion, so long as the failure occurred within the 20-year warranty period and your lawsuit was asserted within three years of your acquiring notice of the claim.

North Carolina's six-year statute of repose, however, began to run from the date of substantial completion of the work — i.e., September 15, 2003. That means your "drop dead" date for filing a claim for damages expired six years later on September 15, 2009. Even though you just found out about your damage, and would otherwise have plenty of time under the applicable statute of limitation to assert your claim, you're unfortunately four years too late to seek any monetary damages for breach of warranty under the statute of repose.

Unfair? Arguably. As a general proposition, I think statutes of repose serve a useful purpose in the construction industry, since they provide certainty to contractors (as well as their bonding companies) about when their exposure on any given project ends. They also bar stale claims that are difficult to defend. But it's difficult to accept a strict application of the statute of repose when a contractor fully warrants its product for a period longer than six years. Such a warranty

is made as an inducement to win the business of a customer; shouldn't the customer gain the benefit of its bargain?

I therefore agree with the dissenting opinion in the *Christie* opinion, which argues that an express warranty longer than six years should serve as a waiver of the protection provided by the statute of repose. That being said, the majority opinion is the law of the land, and effectively prohibits recovery of money damages under a construction warranty more than six years after substantial completion in the absence of gross or willful and wanton negligence by the contractor in the installation of the warranted building component.

It bears noting that the statute of repose, by its own terms, applies only to damages claims, not specific performance claims, and so the twenty-year warranty might still be of help in compelling the roofer to replace the damaged roof system. If the roofer is still in business but refuses to fix the work in accordance with the language of the warranty, you may have an action to compel him to perform under threat of contempt of court.

The *Christie* decision has been appealed to the North Carolina Supreme Court, and so there's a possibility the rule might change. I will keep you posted on further developments.

This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at www.nc-construction-law.com.