



# “8 Years and You’re Out” Arizona’s Statute of Repose

By Jack Barone

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Everyone in the legal profession is familiar with statutes of limitation and how they work. Depending on our area of practice, many of us may be aware of statutes of repose, but may not understand exactly what they are, and more specifically, what is Arizona’s Statute of Repose, A.R.S. §12-552, and how does it apply.

A statute of repose provides a date upon which a cause of action no longer exists, whether it has accrued or not. For this reason, a statute of repose is a stricter deadline than a statute of limitation because it may not be tolled by fraud, discovery of injury or damage, etc. A statute of repose is neither an avoidance nor a defense to a cause of action, because the cause of action does not exist once the period of repose passes. While a statute of limitation allows a party to avoid a suit, it does not affect the validity of the claim. On the other hand, once the period of repose has expired, there is no suit to avoid because a statute of repose actually extinguishes the cause of action. Furthermore, failure to plead the statute of repose as an affirmative defense does not resurrect a cause of action that no longer exists.

## A statute of repose provides a date upon which a cause of action no longer exists, whether it has accrued or not.

A quick survey reveals that although all fifty states currently have statutes of repose, they vary in the nature of the action covered by the statute, as well as in the repose period. While most states, forty-six including Arizona, apply a statute of repose to actions involving real property design, engineering and construction, a number of states (currently nineteen) also have statutes of repose limiting product liability claims.<sup>1</sup> A handful of states have expanded the scope of their statutes of repose to cover various other tort claims. The period of time for which these statutes of repose apply range from a minimum of 4 years to a maximum of twenty years, with the vast majority of the states favoring a ten year period of repose. Many states provide an initial repose period, followed by an extension, when the condition giving rise to the claim is discovered in the final year. Arizona falls in this category with an 8-year statute, extendable to 9 years when the condition is discovered during the eighth year.

The Arizona legislature enacted A.R.S. §12-552, Arizona’s Statute of Repose for real property design, engineering and construction of improvements, in 1989. The public policy basis was to provide an absolute cut off for contract-based claims arising out of construction projects, and to give Arizona architects, engineers and contractors an established deadline for liability for latent construction defect claims. The heart of the statute, section A., currently reads as follows:

Notwithstanding any other statute, no action or arbitration based in contract may be instituted or maintained against a person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of

<sup>1</sup> Arizona previously had a statute of repose for product liability claims, but it was found to be unconstitutional.

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construction of an improvement to real property more than eight years after substantial completion of improvement to real property.

Section B adds up to one additional year to the statute in cases where the injury occurred during the eighth year after the substantial completion, or in the case of latent defects not discovered until the eighth year after substantial completion. Then the action may be brought within one year after the date on which the injury occurred or latent defect was discovered, but in no event, more than nine years after substantial completion of construction.

What is the practical application of the statute? Typically, claims for defective construction, whether it be of a single-family home, a condominium or an apartment complex, are brought by an owner against the builder and/or developer of the property in the form of either a breach of contract action or breach of implied warranty of habitability, fitness or workmanship action. Such actions usually arise from either a purchase contract or a construction contract for the property. By the statute's own language in Section C., these are precisely the type of claims that the statute was designed to cut off. So what type of actions do not fall within the scope of the statute? Claims for personal injury or death are specifically excluded in the statute, and since the statute's inception, the Arizona courts have expanded the exceptions to include all property damage tort claims. Another key limitation of the statute is that it does not in any way operate to shorten the period of an express written warranty, so a written ten-year warranty on all or some part of the construction, such as the roof assembly, would outlive the statute of repose. Finally, the statute of repose does not extend any other statutes of limitation that may be applicable. Thus if a shorter period of limitation is prescribed for a cause of action, the shorter period governs.

In summary, understanding Arizona's statute of repose, and knowing when a claim for defective construction falls outside the parameters of what the Arizona legislature has determined to be reasonable, can be a powerful tool for plaintiffs and defense lawyers alike.



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