

CONSTRUCTION
GOVERNMENT CLAIMS AGAINST CONTRACTORS AND DEVELOPERS SUBJECT TO STATUTE OF REPOSE FILING DEADLINES, ARIZONA COURT OF APPEALS RULES

by J. Gregory Cahill

In a matter of first impression, the Arizona Court of Appeals recently ruled that government claims against contractors and developers are subject to the time limits set forth in the Construction Statute of Repose.

The Construction Statute of Repose (CSR) statute prevents contract-based claims regarding the development or construction of real property from being asserted more than eight years after substantial completion. The statute has a "safe harbor" that allows claims first discovered in the eighth year to be brought within one year after their discovery. However, in no instance may a claim be asserted more than nine years after substantial completion.

The statute covers claims for breach of contract, breach of the implied warranty, and indemnity.

In the matter of *City of Phoenix v. Glenayre Electronics, Inc., et al*, the Court of Appeals addressed the issue of whether the City of Phoenix (City) was subject to these time limits.

In 2013, Plaintiff Carlos Tarazon sued the City, and others, alleging that he had developed mesothelioma as a result of long-term exposure to asbestos while performing pipe installation and repair work for the City and numerous other defendants on various construction projects. The City answered the complaint and also filed third-party claims for indemnity against 82 developers and eight contractors.

The City contended that the developers and contractors were responsible for planning, designing, or constructing various projects that Mr. Tarazon had worked on between 1968 and 2013. To the extent that Mr. Tarazon developed mesothelioma while working on any of those projects, the City contended that it was entitled to be indemnified for any liability it might ultimately have for the plaintiff's illness. Notably, the last project was completed more than 20 years before Mr. Tarazon brought suit against the City.

The developers and contractors successfully moved to dismiss the third-party claims as violating the CSR. The City appealed, arguing that it was not subject to the time limits because of another statute that provides that the state and other governmental entities are not subject to statutes of limitation. The Court of Appeals rejected this argument, holding that the CSR's plain language, unambiguously states that it applies "notwithstanding any other statute." The court reasoned that the legislature, in enacting the CSR almost ninety years after enacting the statute of limitations exception, had the ability to exempt the state from the statute of repose and it did not.

The court addressed an interesting secondary issue dealing solely with the City's claims against the developers and whether those claims were "based in contract." No party disputed that the City's claims against the contractors were based in contract as the City had, in fact, entered into contracts with the contractors. However, the basis of the indemnity claim against the developers was less clear.

The City claimed that it was entitled to indemnity from the developers because it issued various building permits for the construction projects that were conditioned upon the developers' agreement to perform all work in accordance with certain plans and specifications. Included in the specifications were the Maricopa Association of Government (MAG) specifications which, in turn, required the permittee to comply with "all ordinances," including a Phoenix ordinance requiring the developers to indemnify the City from loss.

The City contended that this requirement to indemnify was not based in contract because it was not a "dickered deal." The Court of Appeals rejected this argument as well, finding that the developers' agreement to indemnify the City was part of the *quid pro quo* for the City having issued the permits.

The City also argued that its claim was not contract-based because the issuance of building permits was an exercise of its "police powers." The Court of Appeals rejected this argument as well, holding that the City's power to issue permits was not at issue. What was at issue was the City's claim for the performance of a promise conditioned on issuing the permits -- the promise to indemnify from loss -- and that claim was based in contract.

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J. Gregory Cahill is a Member in Dickinson Wright's Phoenix office. He can be reached at 602.889.5350 or gcahill@dickinsonwright.com.