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In a Word: Define With Care

By Judon Fambrough

On Sunday, May 18, 1997, a second-floor balcony at the University of Virginia collapsed. The people standing on the balcony were seeking a better view of the graduation ceremony. A rusted support rod appears to have snapped on the building designed by Thomas Jefferson in 1822. Eighteen people were injured, and one was killed.

If a similar incident occurs in Texas, should the agent who listed and sold the structure worry about a lawsuit? Should heirs worry about liability?

The answers can be found in the difference between the statute of limitations and the statute of repose. The distinction affects real estate practitioners.

The *statute of limitations* defines the prescribed time allowed for an aggrieved party to file a suit after the right arises. (This is sometimes stated as "after the cause of action accrues.") Generally speaking, the right accrues when an injury occurs, a contract is breached or a misrepresentation is discovered.

In Texas, the variations in the length of the statute of limitations are broad. For example, the statute of limitations for filing a taking action against the government under the Texas Private Real Property Rights Preservation Act of 1995 is 180 days while under one of the adverse possession statutes it is 25 years.

The statute of limitations is not an automatic bar against filing a lawsuit. Instead, the statute of limitations is an affirmative defense that the defendant must plead and prove. Many times it takes the form of a motion for summary judgment. If it is not raised, the defense is waived. The plaintiff may proceed to a valid enforceable judgment against the defendant.

Frequently, the courts mistakenly interchange the statute of repose with the statute of limitations. The terms are similar but distinctly different.

The statute of limitations specifies the time in which the suit must be filed **after the right to sue arises**. The statute of repose also limits the time in which an action may be brought, but it is **unrelated to when the right to sue accrues**. The Texas statute of repose absolutely bars a lawsuit after a specified time.

Legal treatises word the distinction another way. The statute of limitations bars a cause of action if not brought within a certain period. The statute of repose prevents a cause of action from ever arising after a given time.

Texas has four statutes of repose found in the Texas Civil Practices and Remedies Code. The statutes are designed to relieve certain professionals and manufacturers from the burden of indefinite potential liability.

Architects and engineers are protected from latent defects in designing, planning or inspecting construction after ten years from the time the project is substantially completed. Persons who furnish construction or repair improvements are protected from latent defects after the same period. A 1989 statute protects surveyors after ten years following a completed survey. Finally, a 1993 statute protects manufacturers and sellers of manufacturing equipment after 15 years from the date of sale. The 75th Legislature added interior designers and landscape architects to the list effective September 1, 1997.

Under the first three statutes, if a person presents a written claim for damages during the ten-year period, a two-year extension from the time of presentation may be added.

The statute of limitations is an affirmative defense. If not timely raised, it

is waived. The statute of repose is an absolute bar to a lawsuit. It can and should be raised as an affirmative defense. If not timely raised, it could be used conceivably to set aside a judgment after a trial concludes. No Texas case law addresses this issue, however.

The statute of limitations generally, but not always, has a discovery rule attached. This means the statute of limitations begins when a misdeed occurs or when the misdeed is discovered, whichever is later. For example, one section of the Texas Business and Commerce Code, better known as the Texas Deceptive Trade Practices Act (DTPA), states that any DTPA action must be brought (filed) "within two years after the date on which the false, misleading or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."

The statute of repose has no discovery rule associated with it. The statute may cut off the right of action before the injured party discovers or reasonably should have discovered the defect or injury.

The statute of repose can never extend but can shorten the applicable statutes of limitations. For example, suppose someone is injured in a faulty building designed and completed nine years earlier. The statute of limitation for filing a personal injury against the architects and engineers is two years. In this situation, however, the injured party must file within one year because of the ten-year statute of repose.

The statute of repose has successfully withstood judicial challenges. One court ruled that the statute did not violate due process. Another court held that it did not violate the plaintiffs' right of access to court.

In Texas, the statute of repose would protect Jefferson and his heirs starting ten years after the structure was substantially completed. Real estate practitioners are not protected. Consequently, if the licensee knew the balcony was defective when the property was listed and sold and did not disclose this fact to the buyer, he or she faces potential DTPA liability for the next

two years or two years after the nondisclosure is discovered, whichever is later.

However, the statute of repose that protects contractors is worded slightly differently from the one protecting architects and engineers. Contractors (persons furnishing construction or repair of improvements) are not protected against willful misconduct or fraudulent concealment. Architects and engineers are

protected. Evidently, the legislature was more concerned about fraudulent concealment in the **performance** of the construction or repairs than in the **design**. ☐

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