



IS THE RETROACTIVE STATUTE OF REPOSE FOR CONSTRUCTION DEFECT CLAIMS CONSTITUTIONAL?

BY GREGORY KING, ESQ. AND SARAH J. ODIA, ESQ.

With the February 24, 2015, enactment of Assembly Bill 125 (2015 Nevada Laws, Ch. 2), much has changed in the world of residential construction defect litigation. One of the most dramatic shifts has been the reduction of the statute of repose period for construction defect claims from a maximum of 12 years to six years from the date of substantial completion of a newly constructed improvement. Not only did AB125 dramatically shorten the statute of repose period, but it did it *retroactively*.

This begs the question of whether it is constitutional for the Legislature to retroactively shorten the time a plaintiff has in which to file lawsuit, especially for claims that had already accrued before AB125 went into effect. As it turns out, this is not the first time that the Nevada Legislature has enacted a retroactive statute of repose for

construction defect actions. In fact, the Nevada Supreme Court has previously addressed the constitutionality of a retroactive statute of repose and has given the Nevada Legislature clear guidance on what is required to clear constitutional hurdles. Although the Nevada Supreme Court has not ruled on the constitutionality of AB125's retroactive statute of repose, the statute appears to follow the guidelines that were set forth by the court decades ago.

AB125's Retroactively Applied Repose Period for Construction Defect Claims

AB125 dramatically shortened the statutes of repose period for construction defect actions in Nevada. Under the previous statutes of repose, NRS 11.202 through 11.205, a claimant had from six to 12 years from the date of substantial completion of a property to file a construction defect action, depending upon the type of defect. Under the new statute of repose, a construction defect claimant has only six years from the date of completion of the property to file an action, regardless of the type of defect.

AB125 provides that the shortened statute of repose applies retroactively to all actions involving properties that were completed before the February 24, 2015, effective date of the act. The act does, however, provide an exception to its

retroactive application. If a claim accrued prior to February 24, 2015, and if the corresponding action was commenced no later than February 24, 2016, then the new, six-year repose period does not apply to that action. Conversely, if a construction defect action was not commenced by February 24, 2016, the new, shortened repose period applies to that action, even if the claim accrued before AB125's effective date. In other words, AB125 provided a claimant with a one-year grace period within which to file a lawsuit relating to his or her accrued claim, in order to avoid the effects of the new statute of repose.

Is it Constitutional to Apply a Limitations Period Retroactively?

The obvious question is whether it is constitutional for a legislature to retroactively reduce a limitations period, especially for persons who have already accrued claims. At first blush, this change may seem unfair. However, numerous courts throughout the country, and even the U.S. Supreme Court, have held that a party does not have a vested right in the time for the commencement of an action nor in the running of the statute of limitations prior to its expiration.¹ These courts have found that it is constitutional for a legislature to retroactively reduce a limitations period, as long as a "reasonable" time is given for the commencement of an action before the new limitation period takes effect.

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These courts reason that a change in a limitations period merely effects a change in procedure, which is within the constitutional power of a legislature.

What is a “Reasonable” Grace Period?

Having established that it is constitutional for a legislature to enact a retroactive limitations period as long as a reasonable grace period is provided, we now turn to the question of what constitutes a “reasonable” grace period. Courts around the country have generally held that grace periods ranging from six months to a year are reasonable.² The courts have generally deferred to the legislature as the judge of the reasonableness of the grace period, ruling that they will not interfere with the legislature’s judgment as to the reasonableness of the grace period unless it is so short that it is tantamount to a denial of justice.

Nevada’s History of Unconstitutional Statutes of Repose

AB125 is not the first retroactive statute of repose enacted by the Nevada Legislature. The Nevada Legislature has a history of failed attempts to enact a constitutional statute of repose for construction defect claims.

In 1983, the Nevada Supreme Court struck down the statute of repose for construction defect claims that was in effect at that time. The court held that the statute violated the equal protection and due process clauses of the state and federal constitutions, because it arbitrarily excluded certain owners and material suppliers from its protections.³ Thus, the statute of repose was unenforceable, void ab initio, afforded no protections and conferred no rights.

In response to this ruling, the Nevada Legislature enacted new statutes of repose later in 1983.⁴ The new statutes cured the equal protection and due process violations. Moreover, the

Legislature attempted to apply these new statutes retroactively. This is where it ran into problems.

In *Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 1117, 1122, 843 P.2d 834 (1992), the Nevada Supreme Court held that the 1983 statutes of repose could not be applied retroactively, because they did not provide a grace period. More specifically, the court held that in order for the 1983 statutes of repose to be applied retroactively, the statutes must afford a claimant a reasonable period of time in which to file an action, thereby avoiding the new repose period.

The result of the *Alsenz* ruling was that the 1983 statutes of repose could not apply retroactively to properties that were completed prior the statutes enactment. Moreover, the Nevada Supreme Court had already held that the pre-1983 statute of repose was unconstitutional and void. Accordingly, after the ruling in *Alsenz*, there was no statute of repose that could be applied to construction defect actions involving properties that were built prior to 1983! This left real estate developers



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and contractors exposed to a significant and indefinite risk of exposure for pre-1983 properties.

In response to this conundrum, the Nevada Legislature passed Senate Bill 554 on July 9, 1993; it explicitly provided that the statutes of repose enacted in 1983 applied retroactively to pre-1983 improvements to real property. This time, the Nevada Legislature got it right by including a one-year grace period during which claimants could file actions for accrued claims. Thus, SB554 passed the constitutional litmus test provided by the Nevada Supreme Court for retroactively applied statutes of repose.⁵

AB125's Retroactive Statute of Repose is Constitutional

Although the Nevada Supreme Court has not specifically ruled on the constitutionality of AB125's retroactive statute of repose period, it does appear to pass constitutional muster because it provided claimants with a one-year grace period in which to file actions for accrued claims, thereby avoiding the effects of the shortened repose period. The one-year grace period is the exact same grace period that was

provided under SB554, which the Nevada Supreme Court determined was constitutional.⁶ In fact, the relevant text of SB554 is identical to that of AB125's retroactive statute of repose. Both acts specify that the statutes of repose will apply retroactively, and both provide one-year grace periods from the effective dates of the acts for claimants with accrued claims to commence actions.

It appears that the Nevada Legislature learned its lessons from its prior to attempts to enact retroactive statutes of repose and the Nevada Supreme Court's rulings related thereto. **NL**

1. See, *Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, 323–24 (1900); *Terry v. Anderson*, 95 U.S. 628, 632–34 (1877); *Liptak v. Diane Apartments, Inc.*, 167 Cal. Rptr. 440, 446 (Cal. Ct. App. 1980); *Carlson v. Blatt*, 105 Cal. Rptr. 2d 42, 45 (Cal. Ct. App. 2001).
2. See, *Terry*, 95 U.S. at 632–34 (noting that a nine-month period was reasonable); *Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, 323–24 (1900) (holding that a six-month period was reasonable); *Brown v. Angelone*, 150 F.3d 370, 373–75 (4th Cir. 1998)(holding that one year is reasonable); *Curie v. Schon*, 704 F. Supp.

- 698, 701 (E.D. La. 1989)(holding that a six-month period was reasonable).
3. *State Farm v. All Electric, Inc.*, 99 Nev. 222, 660 P.2d 995 (1983).
4. The statutes of repose that were enacted in 1983 were the same statutes of repose for construction defect claims that were in effect prior to the 2015 enactment of AB125.
5. See, *G and H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 269, 937 P.2d 229 (1997).
6. *Id.*



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