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April 29, 2008

Honorable Noreen Evans
Room 3152, State Capitol

## STATUTE OF LIMITATIONS: LAND SURVEYORS - #0806551

Dear Ms. Evans:

You have asked the following questions:

1. What are the applicable statutes of limitation that would apply to a cause of action for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon?

2. Is there a maximum period of time, or statute of repose, after which a land surveyor may not be held liable for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon?

By way of background, land surveyors are licensed pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code, to perform various services that locate and measure the size and dimensions of real property (see Sec. 8726, B.P.C). A licensed land surveyor is required to use a written contract when contracting to provide professional services to a client, subject to specified exemptions (Sec. 8759, B.P.C). These services may or may not result in any physical improvement to, or construction upon, the real property for which the land surveyor performs services, for example, lot-line adjustments or corner-records, but may result in a written document being produced by the surveyor and given to the client.

There is no special statute of limitations for damages to unimproved property. Rather, Chapter 3 (commencing with Section 335) of Title 2 of Part 2 of the Code of Civil

Procedure[1] sets forth different statutes of limitation that may apply depending on the theory of recovery.

In this regard, Sections 335, 337, 338, and 339 provide, in pertinent part, as follows:

> "335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"
>
> "337. Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing... .
>
> * * *"
>
> "338. Within three years:
>
> * * *
>
> "(b) An action for trespass upon or injury to real property.
>
> * * *"
>
> "339. Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing ... .
>
> * * *"

Thus, a cause of action based upon a written contract, such as a breach of contract, must be brought within four years (para. (1), Sec. 337). The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119). A cause of action based upon an oral contract must be brought within two years of the discovery of the loss or damage (Sec. 339). A cause of action to recover damages for injury to real property, for example, by negligence, must be brought within three years (subd. (b), Sec. 338). The claim commences to run when the plaintiff knows, or should have known, of the wrongful conduct at issue (*Angeles Chem. Co. v. Spencer & Jones*, supra, at p. 119).

In addition, statutes of repose set outside limits to liability for services performed in connection with the construction of an improvement to real property.

In this regard, Sections 337.1 and 337.15 provide, in pertinent part, as follows:

> "337.1. (a) Except as otherwise provided in this section, <u>no action shall be brought to recover damages from any person performing or furnishing</u> the design, specifications, <u>surveying,</u> planning, supervision or observation of construction or construction <u>of an improvement to real property more than four years after the substantial completion of such improvement for</u> any of the following:

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[1] All further section references are to the Code of Civil Procedure, unless otherwise specified.

"(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

"(2) Injury to property, real or personal, arising out of any such patent deficiency; or

"(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

"(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

"(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

"(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

"(e) As used in this section, 'patent deficiency' means a deficiency which is apparent by reasonable inspection.

"(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence." (Emphasis added.)

"337.15. (a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

"(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

"(2) Injury to property, real or personal, arising out of any such latent deficiency.

"(b) As used in this section, 'latent deficiency' means a deficiency which is not apparent by reasonable inspection.

"(c) As used in this section, 'action' includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for

> indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.
>
> "(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.
>
> "(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.
>
> "(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.
>
> "(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:
>
> "(1) The date of final inspection by the applicable public agency.
>
> "(2) The date of recordation of a valid notice of completion.
>
> "(3) The date of use or occupation of the improvement.
>
> "(4) One year after termination or cessation of work on the improvement.
>
> "The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement." (Emphasis added.)

Thus, a cause of action to recover for damages to real property caused by a patent defect in the construction of an improvement to the property must be brought within four years after the substantial completion of the improvement (subd. (a), Sec. 337.1).[2] Similarly, a cause of action to recover for damages to real property caused by a latent defect in the construction of an improvement to the property must be brought within 10 years after the substantial completion of the improvement (subd. (a), Sec. 337.15).[3]

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[2] This limitation, however, may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time a deficiency in the improvement causes injury or death, and does not apply to any owner-occupied single-unit residence (subds. (d) and (f), Sec. 337.1). The limitation may be extended to five years when the injury or wrongful death occurs during the fourth year after substantial completion (subd. (b), Sec. 337.1).

[3] This limitation, however, may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time a deficiency in the improvement causes injury or death, and does not apply to actions based on willful misconduct or fraudulent concealment (subds. (e) and (f), Sec. 337.15). A cross-complaint for indemnity may

(continued...)

The statutes of limitation and the statutes of repose are not mutually exclusive, and must both be considered in determining the viability of a claim. With regard to a claim based on a latent defect, the California Supreme Court has stated as follows:

> "[A] suit to recover for a construction defect generally is subject to limitations periods of three or four years, depending on whether the theory is breach of warranty (§ *337*, subd. *1* [four years: 'action upon any contract, obligation or liability founded upon an instrument in writing']) or tortious injury to property (§ 338, subds. *(b)*, *(c)* ... [three years: trespass or injury to real or personal property]). However, these periods begin to run only when the defect would be discoverable by reasonable inspection. (*Regents, supra*, at p. 630.) On the other hand, 'section *337.15* ... imposed an absolute requirement that a suit ... to recover damages for a [latent] construction defect be brought within 10 years of the date of substantial completion of construction, regardless of the date of discovery of the defect.' (*Regents, supra*, at p. 631, fn. omitted.) 'The interplay between these statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years ... or four years ... of discovery, but (2) in any event must be filed within ten years ... of substantial completion.' (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 27.)" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 369-370, citing *Regents of University of Cal. v. Hartford Acci. & Indem. Co.* (1978) 21 Cal.3d 624, 630-631; hereafter *Regents*).

Thus, it is a two-step analysis in first determining whether any applicable statutes of limitation have run, and then whether the claim has been extinguished by the running of the period of repose.[4]

The question that arises is whether the provision of land surveyor services, without any physical improvement to, or construction upon, the real property is an "improvement" for purposes of Sections 337.1 and 337.15. These statutes do not define "improvement." If something is physically constructed to completion on the property, it is likely safe to conclude that it is an improvement. However, at what point does the rendering of construction services, including land surveyor services, become an improvement for purposes of these statutes?

The term "improvement," as used in Section 337.15, has been given a very broad interpretation (*Gaggero v. County of San Diego* (2004) 124 Cal.App.4th 609, 615-618 (hereafter

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(...continued)

be filed in an action that has been brought within the 10-year time period (subd. (c), Sec. 337.15). Also, common interest developments and residential units first sold after January 1, 2003, are subject to separate statutes affecting the applicable limitations periods for suit upon latent defects in those projects (see Sec. 895 and following, and Secs. 941 and 1375, Civ. C.).

[4] The First District Court of Appeal has held that *Regents*' two-step analysis also applies to Section 337.1 relative to patent defects (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638).

*Gaggero*), in which the court held that a landfill constituted an improvement within the meaning of Section 337.15):

> "As used in *section 337.15* 'an improvement' is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an 'improvement' irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature." (*Gaggero*, supra, at p. 616, citing *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 771.)

Thus, the term "improvement" has been construed to refer separately to each of the individual changes or additions to real property. However, some language in *Gaggero*, which involved structural damage due to subsidence at a former county landfill, makes ambiguous the extension of its holding to property that is not physically improved or constructed upon:

> "While the county's primary goal may not have been to obtain a profit from eventual sale of the landfill, in filling it, covering it and selling it, the county was engaged in making the real property suitable for further use by others. Section 337.15 and the cases which have interpreted it make it clear, in enacting the statute, the Legislature's unambiguous intention was to put a temporal limit on liability for individuals and entities engaged in these sorts of purposeful alterations to and transfers of real property." (*Gaggero*, supra, at p. 618).

Thus, the court in *Gaggero* identified physical changes to the land, "in making the real property suitable for further use by others," as part of the "purposeful alterations" that led the court to conclude that the landfill constituted an improvement within the meaning of Section 337.15.

Nonetheless, the case law makes it abundantly clear that the legislative intent in enacting Sections 337.1 and 337.15 was to limit liability exposure to a finite period of time for certain activities in association with making improvements to real property:

> "[I]t appears the Legislature enacted section *337.1* in 1967 in response to the construction industry's fear that it could face virtually unending liability due to the advent of discovery-based accrual rules for statutes of limitation. ... Thus, the purpose of section *337.1* was not to promote harmony among contractors during construction, but rather 'to prevent "uncertain liability extending indefinitely into the future."...'" (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.*, supra, at pp. 646-647, citing *Regents*, supra, at p. 633, fn. 2).
>
> "Numerous opinions have noted that the purpose of section *337.15* is to shield members of the construction industry from liability of indefinite duration for property damage caused by their work." (*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1043).
>
> "Section 337.15 clearly and unambiguously expresses a legislative intent to put a 10-year limit on latent deficiency liability exposure for 'any person' performing certain activities in making improvements to real property. Among

> the activities covered by the statute are performing or furnishing the design or specifications of the improvement." (*Gaggero*, supra, at p. 617, citing *Magnuson-Hoyt v. County of Contra Costa* (1991) 228 Cal.App.3d 139, 143-144.)

Because surveyor services are expressly included among the construction services subject to Sections 337.1 and 337.15 (subd. (a), Sec. 337.1 and subd. (a), Sec. 337.15), it follows that those services are among those for which the Legislature intended to limit liability exposure to a finite period of time in enacting those statutes.

Moreover, while the statutes of limitation commence to run based on the discovery of the loss or injury, as described above, the statutes of repose commence to run upon "the substantial completion of the improvement" (Ibid.). Substantial completion has been construed, for purposes of Section 337.15, to commence as to each profession on the date its services to the improvement are substantially complete:

> "[T]he last sentence of Code of Civil Procedure section 337.15, subdivision (g) 'relates' the concept of substantial completion to services rendered to an improvement, and it relates this concept 'specifically' to the services rendered by 'each' profession. ... [T]he reasonably plain meaning of this sentence is that the limitations period commences as to each profession on the date its services to the improvement are substantially complete.
>
> * * *
>
> "A defendant's services with respect to an improvement may be completed well before the improvement itself is finished. If the limitations period does not commence until substantial completion of the improvement, construction industry members may be subject to liability for an indefinite time over 10 years after the substantial completion of their work. We do not believe that this was what the Legislature intended when it added subdivision (g) to the statute in 1981." (*Industrial Risk Insurers v. Rust Engineering Co.*, supra, at pp. 1042-1044)

Thus, for purposes of Section 337.15, and consistent with the legislative intent to limit liability to a finite period as described above, substantial completion commences as to each profession on the date its services to the improvement are substantially complete.

It is critical to note that no court has addressed the particular fact pattern at issue in this opinion, in which land surveyor services are performed on real property that is not otherwise physically improved or constructed upon. Significantly, as set forth above, the courts have repeatedly returned to legislative intent with each expansion of the statutes. In light of the foregoing case law, we think it would be inconsistent with the Legislature's clear intent to limit liability for construction services to a finite period, either four years or 10 years, if Sections 337.1 and 337.15 did not apply to land surveyor services as an improvement, even if there is no other physical improvement to, or construction upon, the real property. However, we must emphasize that the statutes on their face are not entirely clear, and that neither the statutes nor the case law are dispositive.

If faced with the fact pattern at issue in this opinion, we think the better construction would be to find that land surveyor services in themselves, without additional physical improvements or construction services being rendered, would constitute an "improvement" for purposes of Sections 337.1 and 337.15.

Accordingly, we conclude that a cause of action for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon, is subject to the two, three, and four year statutes of limitation described above, depending on the theory of recovery, but in any event, must be filed within four or 10 years of substantial completion of the services under the statutes of repose. Also, the maximum period of time for which a land surveyor may be held liable for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon, is 4 or 10 years from the substantial completion of the services.

Very truly yours,

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