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ARIZONA SUPREME COURT DECIDES NO STATUTE OF REPOSE TOLLING: A WIN FOR HOMEBUILDERS

By Bill Nebeker, Rachel Nies and Melissa England

In a favorable legal development for homebuilders, the Arizona Supreme Court has unanimously ruled that the statute of repose period (A.R.S. § 12-552) provides a date certain for construction defect exposure to homebuilders and cannot be tolled. This means that homeowners must bring their construction-related claims within eight years of the date of final home inspection or else the claims are barred, except in the limited circumstance of discovery within the eighth year.

In *Albano v. Shea Homes Limited Partnerships, et al.*, plaintiff homeowners filed a putative class action against Shea Homes in superior court in June 2003, but did not move for class certification until 2005. In 2006, the superior court denied the motion for class certification on the basis that the motion was untimely, along with other substantive reasons. The named plaintiffs later settled their claims.

A group of homeowners that had not joined the first action later filed suit against Shea, and Shea filed a motion for summary judgment asserting that the statute of repose barred the homeowners' claims. The homeowners argued that the statute of repose had been tolled during the period of time between the filing of the original class action suit and the denial of class certification, a period of over two years. The court refused to toll the statute of repose, finding "such prolonged tolling unwarranted."

The plaintiff homeowners appealed this ruling to the Ninth Circuit Court of Appeals, and the Ninth Circuit asked the Arizona Supreme Court to rule on the tolling issue. The Court ruled that although the timely filing of a class action complaint in Arizona may toll the applicable statute of limitations for all non-named putative class members from the date the complaint is filed until an order denying class certification is entered, such tolling does not apply to the absolute bar of the statute of repose. *Albano v. Shea Homes Limited Partnership*, Arizona Supreme Court CV-11-006-CQ.



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The Court reasoned that class action tolling was not “consonant with the legislative scheme” underlying Arizona’s construction defect statute of repose. The Court found that the statute of repose defines a substantive right that cannot be altered by a court-adopted rule of procedure. Of note, the Court calculated the beginning of the repose period from the date of final inspection rather than the much later close of escrow date.

This decision is exciting for Arizona construction industry personnel, in that it affirmatively holds that the statute of repose is a substantive right and provides a date certain on which homebuilders may rely. Moreover, the decision indicates that the trigger date for the statute of repose is the earlier date of the final inspection or Certificate of Occupancy, and not the much later close of escrow date. This decision can be heralded for bringing clarity to the law and upholding the plain language of Arizona’s statutory law guaranteeing homebuilders an end to indeterminable periods of liability exposure.

Bill Nebeker, Rachel Nies, Troy Allen, and Melissa England of Koeller Nebeker Carlson & Haluck, LLP’s Phoenix, Arizona office each contributed to preparing an amicus brief on behalf of the Home Builders Association of Central Arizona for this landmark case. The *Albano* decision is a victory for homebuilders across the state of Arizona and Bill, Rachel, Troy and Melissa are excited to have contributed to this decision.