Construction Defects

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FORUM ON THE
CONSTRUCTION
INDUSTRY

Cover design by ABA Publishing/Bobbie Sanchez.

Printed in the United States of America.

16 15 14 13 12 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

McSorley, Sue.
Construction defects / by Sue McSorley. — 1st ed.
p. cm.
ISBN 978-1-61438-439-7 (print : alk. paper) — ISBN 978-1-61438-440-3 (ebook)
1. Construction industry—Insurance—Law and legislation—United States. 2. Property insurance—Law and legislation—United States. 3. Casualty insurance—Law and legislation—United States. I. Title.
KF1190.M37 2012
346.73'08681--dc23

2012010037

Discounts are available for books ordered in bulk. Special consideration is given to state bars, CLE programs, and other bar-related organizations. Inquire at Book Publishing, ABA Publishing, American Bar Association, 321 North Clark Street, Chicago, Illinois 60654-7598.

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ACKNOWLEDGMENTS

A book like this doesn't "just happen." It reflects hours of effort by a long list of distinguished attorneys, who may be competitors and rivals in their day jobs, but who selflessly did their part to advance the knowledgebase available to construction professionals.

This book was the brainchild of former Forum Chair Adrian Bastianelli, who saw the need for a solid primer on the topic of construction defects for practitioners with little or infrequent experience with such work. The project received the enthusiastic support of the Forum's Publications Committee, and Roland Nikles and Stephen Reisman were selected as editors due to burgeoning litigation in California and Florida over construction defects. Later on, Richard Tyler and Sue McSorley were added to the editorial team.

We extend our thanks to all of our contributing authors. The editors truly appreciate the time, expertise, and scholarship that this talented group brought to bear on this endeavor. We also appreciate their patience, understanding, and good humor as we requested changes to their work.

We are grateful for the patience, encouragement, and guidance we received from Andrew Ness, Carol Patterson, and Harper Heckman who served as Chair of the Forum's Publications Committee during the lifespan of this project. We are also grateful for the support and encouragement of Frank Elmore during his term on the Publications Committee.

Individual draft chapters or chapter-sized portions of this book were reviewed by Michael Drew, Mark Herbert, Peter Torcicollo, Deanna Koestel, Damien Santomauro, and Mark Wiechnik, all of whom provided a well-needed "reality check" and helpful criticism and suggestions that improved the end product. In addition, we want to thank other Forum members who put time and effort into this book by providing editorial and other contributions, notably Stephen Hess, Deb Ballatti, and Kathryn Oliver. Having said that, none of these generous colleagues should be held responsible for the final manuscript, which reflects, ultimately, our editorial decisions.

Finally, we thank ABA Publications and acknowledge our editor, Sarah Forbes Orwig, for her consistent encouragement and assistance in bringing this project to completion.

We are honored to have had the opportunity to be part of the editorial team for this book. It has required more time and effort than any of us imagined, but due to the industry, professionalism, and determination of its many contributors, we have finally arrived. In this regard, we particular acknowledge Sue McSorley who, as the publication deadlines loomed, kept the rest of us on course with wit, grace, and—as near as the rest of us could tell—very little sleep.

This book is a paradigm of the Forum and its mission: construction lawyers joining together and contributing to the profession by creating a resource for industry practitioners. We hope that in the years to come this book will prove a useful reference to both lawyers new to the subject as well as those who are "seasoned."

Roland Nikles
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CHAPTER 4

Statutes of Limitation and Repose

STEVEN SIEGFRIED
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I. Introduction

This chapter discusses statutes of limitation and repose and the issues that arise from these concepts in the context of defect litigation. A statute of limitations starts to run on the date a cause of action accrues; it sets forth a time period within which an action must be brought. A statute of repose, on the other hand, is the outer limit within which any claim can be brought, whether or not a cause of action has accrued. Despite a general policy that favors allowing parties to litigate matters on the merits,[1] courts must dismiss a claim brought beyond the time periods designated in statutes of limitation and repose.

The application of a statute of limitations or repose to a construction defect requires the parties to determine whether the deficiency is a patent or latent defect. They must also identify the party or parties responsible for the deficiencies and the applicable time periods for bringing suit. While plaintiffs must be concerned that suits are brought timely, and defendants must evaluate whether they may avail themselves of a possible limitations defense, the analysis is the same for both. Each party must identify the defect, the date when the defect was first observed or should have been observed, the parties that share liability for the defect, and the applicable time periods for asserting claims. Practitioners must carefully note the jurisdiction's statute of limitations and repose applicable to a construction defects claim, which may vary depending on the type of claim, or the party against whom a claim is asserted. This chapter focuses on the common threads with respect to statutes of limitation and repose[2] and provides a framework for addressing issues that will, or should, be raised in every case involving a limitations issue.

II. Statutes of Limitation and Statutes of Repose

In a construction defects case, interpretation and application of the statutes of limitation and repose can be broken down into five parts: (1) identification of the applicable statutes, (2) identification of the type of construction project, (3) identification of the events that trigger the time calculations under the statutes, (4) identification of the parties responsible for the claimed construction and/or design deficiencies, and (5) determination of the applicable time periods provided by the statutes. In determining whether a defect claim is time barred, the practitioner must first determine whether the claim is barred by the statute of limitations and, if not, whether it would be timely under the statute of repose. If the construction defect is barred by the statute of limitations,

1. *See, e.g.,* Angrand v. Fox, 552 So. 2d 1113 (Fla. 3d DCA 1989).

2. A survey of the time periods governing the statute of limitations and repose in different jurisdictions prepared by the ABA Forum on the Construction Industry can be found at http://www2.americanbar.org/Forums/Construction/Knowledgebase/50_State_Survey_philadelphia2009.pdf (last visited January 15, 2012).

it is unnecessary to determine whether the claim is brought within the statute of repose.

The most complex part of this analysis is the identification of the event that triggers the statutes of limitation and repose and the proof required to establish that event. For example, in determining the triggering event of the statute of limitations in a roofing case involving multiple deficiencies, the attorney will have to consider the following questions:

A. Project Identification:
1. Is the project a commercial or residential project?
2. If it is a residential project, is it a single-family home, a multi-family rental project, or a condominium?

B. History:
1. What is the history of prior roof work?
2. When was the current roofing project completed?

C. Manifest Deficiencies:
1. What are the manifest deficiencies?
2. Is there water intrusion?
3. Are there workmanship and/or material deficiencies?
4. Are there design deficiencies?

D. Parties:
1. What parties were involved in the design and construction of the roof, and what specifically was the scope of their performance?
2. What were their contractual obligations, and do the identified deficiencies correlate to the scope of their work or materials supplied?

E. Limitations:
1. What are the applicable statutes of limitation and repose?
2. Are there other statutes that affect the statutes of limitations or repose?
3. Are there specific statutes of limitations and repose that pertain only to certain parties?

These factual questions serve only as a brief starting point in reviewing a construction defect matter.

III. Identifying the Applicable Statute of Limitations

In any given state, statutes of limitation can be many and varied. Identifying the correct one is not always self-evident or intuitive. Moreover, different types of projects may have special rules that dictate the applicable statute of limitations. It is important, therefore, to identify the correct statute of limitations and to take into account the type of project involved.

A. Statute of Limitations Identification

In conducting an electronic search for applicable statutes of limitation and repose in a construction defects action, practitioners should not limit their search to the term "construction defect." Terms such as "design," "planning," "construction of an improvement to real property,"[3] "injury to personal property,"[4] "substantial completion,"[5] "injury to property,"[6] and even "performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property," should also be used when identifying a jurisdiction's statute of limitations. Although certain jurisdictions' statutes of limitation are well organized, others include construction defects claims in statutes that also provide limitations of actions for personal injury and foreclosures.[7] Also, as between parties to a written contract, the statute of limitations for contract actions may not apply to a construction defects claim.[8] It should not be assumed without verification, therefore, that the statute of limitations for contract actions is the applicable statute to a construction defects claim. The focus should be on the nature of the deficiency, such as a design deficiency, and any pertinent statute that applies to that deficiency. In addition, practitioners should investigate whether there are other statutes that may affect the commencement of the statute of limitations.[9]

Dubin v. Dow Corning Corp[10] illustrates what can be at stake. In *Dubin*, a contractor agreed in February 1977 to install a Dow Corning roof on an office building. Following completion of construction, the roof began to blister and leak. The contractor made repairs to the roof, but these were ineffective. In December of 1982, more than five years after the contract was signed, the owner filed suit against the contractor and Dow Corning alleging breach of a written warranty. Dow and the contractor filed motions for summary judgment arguing that the action was barred by the four-year statute of limitations

3. Fla. Stat. Ann. § 95.11(3)(c)(2008).
4. Nev. Rev. Stat. § 11.203 (2008).
5. Cal. Code Civ. Pro. § 337.1 (2008).
6. N.Y. Law § 214(4) (2008).
7. N.Y. Law § 214(5) (2008).
8. Agway Insurance Company v. P and R Truss Company, Inc., et al., 11 A.D.3d 975, 783 N.Y.S.2d 189 (holding that the claim for the allegedly defective construction of the roof was not recoverable based on breach of contract because the damages were not contemplated by the parties when they entered into the contract. Therefore, the correct statute of limitations was the limitations period for injury to property and not the statute of limitations for contract actions).
9. *See, e.g.*, Florida's "Condominium Act," which provides: "[t]he statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration." Fla. Stat. Ann. § 718.124.
10. 487 So. 2d 71 (Fla. 2d DCA 1985).

applicable to actions founded on the design, planning, or construction of an improvement to real property. The trial court granted the motions for summary judgment, and the owner appealed on the basis that the longer, five-year statute of limitations for breach of contract should govern. The court of appeal agreed that the shorter, more specific statute of limitations controlled over the more general statute of limitations for breach of contract and further held that the shorter limitations period applied to any action arising out of improvements to real property, whether it sounded in contract or in tort.

Compare that to a Georgia court's analysis of two competing statutes of limitation in *Stimson v. George Laycock*.[11] In *Stimson*, the owners entered into a contract with a builder for a new home. The project called for the builder to apply synthetic stucco to the exterior. Georgia had a specific four-year statute of limitations that applied to recovery of damages resulting from synthetic stucco siding. Before closing, the owners inspected the home and found that the dining room was wet as a result of a leak under the floor and that there was a water stain at one of the wall outlets. More than four years later, the owners retained an expert to inspect the synthetic stucco, and on inspection, the expert concluded that the stucco was improperly installed and also that the repairs were improper. The court analyzed the application of a four-year statute of limitations for synthetic exterior siding and a six-year statute of limitations for contract actions and limited the applicability of the shorter statute to tort actions. The court held that the six-year statute applied to the owner's causes of action for breach of contract, noting that if the legislature intended to have the four-year statute apply to all claims, it would have expressly so provided.

B. Project Identification

The type of project may affect the applicable statute of limitations or statute of repose or the commencement of the running of the statute. For example, the Florida Condominium Act provides that the statute of limitations will not begin to run until a developer has transferred control of the condominium to a homeowner's association.[12] Identification of the use and type of the project involved, therefore, is absolutely necessary in determining whether there are specific statutory provisions that affect application of the statute of limitations or statute of repose.

11. 247 Ga. App. 1, 542 S.E.2d 121 (2001).
12. Fla. Stat. Ann. § 718 (2008).

IV. Identifying the Events That Trigger the Statute of Limitations

Once the applicable statute of limitations has been identified, the next step is to identify the applicable events that trigger the commencement of the limitations period. Triggering events are separated into two categories: (1) fixed events based on dates identifiable from the project records, including building department records (general triggering events) and (2) events based on the nature and characterization of the construction defect and the date that the construction defect is identified (patent or latent defects). Once a triggering event is identified in either of these categories, the analysis turns on proving whether the statute of limitations commenced on a certain date. The type of triggering event may also determine whether an engineering or architectural expert will be required in proving the start date, or whether a project executive or building department official will suffice. Generally, events falling into the first category will be evidenced by project records and building department records, while events falling into the second category will require the assistance of an expert.

A. General Triggering Events

Statutes of limitation or repose for construction defects may identify specific events that trigger the commencement of the running of the statute that are usually supported by project or building department records. Such events may be the date when the project obtained a certificate of occupancy, the date the contractor abandoned the project, the date the project was turned over to the owner, or the date of substantial completion.

For example, Florida's statute of limitations provides, in part, the following specific events that trigger the start of the running of the statute of limitations:

> [Actions shall be commenced as follows:] . . . 3. Within four years: . . . (c) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the *date of actual possession*[13] by the owner, the date of the issuance of a *certificate of occupancy*, the *date of abandonment* of construction if not completed, or the date of completion or termination of the contract between the professional engineer . . . (Emphasis added).[14]

Note that the foregoing statute enumerates specific events that may be established through project records or building department records. The

13. Sabal Chase Homeowners Ass'n Inc. v. Walt Disney World, et al., 726 So. 2d 796 (Fla. 3d DCA 1999) (providing that the turnover of control of property to the unit owners is "analogous to the date on which a property owner assumes actual possession for purpose of section 95.11(3)(c))").

14. Fla. Stat. Ann. § 95.11(3)(c).

identification of such dates does not generally require the assistance of an architectural or engineering expert, but rather the assistance of project executives and building department officials. For example, the building department will issue a certificate of occupancy on a certain date, thus providing a concrete date. On the other hand, establishing the date of abandonment of construction or the date of completion or termination of the contract may require reference to any number of project documents including applications for payment, applications for permit, permit approvals, final approvals, invoices, daily project logs, meeting minutes, work schedules, lien notices, and project correspondence. The point, however, is that establishing the start of the statute of limitations period under the Florida statute ordinarily will not require expert testimony. Rather testimony from project executives, laborers, and building department officials will, in most cases, be more than sufficient.

In *Alexander v. Suncoast Builders, Inc.*,[15] a Florida court allowed an action to proceed even though it was commenced more than four years after discovery of a defect. The court held that under the Florida statute of limitations,[16] the analysis hinged on when the roofing contractor abandoned the work of the project. The court concluded that the roofing contractor abandoned the project on the date when it last promised to complete the project. As this was within four years of the action being filed, the court allowed the action to proceed.

In *Bicknell v. Richard M. Hearn Roofing & Remodeling, Inc.*,[17] however, a Georgia court strictly applied a statutorily identified triggering event to bar an owner's claim against a roofing contractor. On March 16, 1978, a commercial building owner entered into a contract with a roofing contractor for the installation of a new roof. The roofer completed the installation of the roof on April 7, 1978. On February 12, 1981, the owner observed a leak in the roof that caused damage to the interior of the building. The contractor attempted to repair the roof on three separate occasions but failed in making permanent repairs. On April 7, 1982, the owner filed suit against the contractor for breach of contract and negligence. The court reviewed the applicable statute of limitations[18] and found that "[a]ll actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues."[19] The cause of action for negligent construction accrued at the time of completion and not when the defect was discovered. Accordingly, the claim was not brought within the statute of limitations and was time barred (by one day).

Other jurisdictions also provide fixed triggering events similar to Florida's and Georgia's statutes of limitations. For example, California's statute of limitations provides as follows:

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15. 837 So. 2d 1056 (Fla. 3d DCA 2003).
16. Fla. Stat. Ann. § 95.11(3)(c).
17. 171 Ga. App. 128, 318 S.E.2d 729 (1984).
18. Ga. Stat. § 9-3-30.
19. 171 Ga. App. *supra* at note 17, 318 S.E. 2d at 732.

> [e]xcept as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the *substantial completion* of such improvement for any of the following:
>
> (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 (Emphasis added).[20]

It is apparent that analysis of the applicability of the above statute turns on identifying the date of "substantial completion" and the determination as to whether the deficiency is or was "patent" at that time or sometime thereafter.[21] In addition, application of the statute depends, at least in part, on the definition of the salient terms, such as "substantial completion." Thus, for example, in *Eden v. Van Tine*,[22] the court looked beyond the statute of limitations found in California's Code of Civil Procedure[23] to other statutory provisions—in this case to the Civil Code[24]—to define "substantial completion." The Civil Code section to which the court referred provides, in part, that

> "completion" means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion:
>
> (a) The occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation of labor thereon.
>
> (b) The acceptance by the owner, or his agent of the work of improvement.[25]

The section specifically makes "occupation" or "acceptance" an alternative to "actual completion." The notion of "substantial completion" as a triggering

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20. Cal. Code Civ. Pro. § 337.1 (2008).
21. Tomko Woll Group Architects. Inc. v. Superior Court, 46 Cal. App. 4th 1326, 1332, 54 Cal. Rptr. 2d 300 (1996).
22. 83 Cal. App. 3d 879, 148 Cal. Rptr. 215 (1978).
23. Cal. Code Civ. Pro. § 337.1 (2008).
24. Cal. Civ. Code § 3086.
25. *Id.*

event for the statute of limitations is certainly compatible with these two alternatives.

The lesson here is that it is not enough to assume the definition of the terms "substantial completion" or "improvement" in determining the commencement of the running of the statute of limitations. Each term may be defined by other statutory provisions or by cases that have defined the term, and careful practitioners will examine these sources before concluding their analysis.

B. Patent Defects

Construction deficiencies are generally categorized as either patent or latent. Patent defects can be described as those defects that are known or that would be observable upon reasonable inspection of the property. Florida law, for example, identifies a patent defect as one actually known to the owner or that would have been known to the owner after a reasonably careful inspection.[26] California law similarly defines a patent deficiency as one that is apparent by reasonable inspection[27] or, stated otherwise, as "one which can be discovered by such an inspection as would be made in the exercise of ordinary care and prudence."[28] Nevada defines a patent deficiency or "known deficiencies" as a deficiency "which is known or through the use of reasonable diligence should have been known."[29]

Correctly distinguishing deficiencies on this basis is crucial in bringing a timely cause of action or in establishing defenses. The prosecution or defense of claims for patent defects is based not only on the nature and characterization of the construction defect, but also on (1) determination of the period during which an action on the claim may be brought against specific trades or professions, [30] and (2) the occurrence of a specific event enumerated in the statute of limitations that commences the limitations period.

Consider the following hypothetical: In 2000, a contractor completed the construction of a three-story commercial building, and the owner occupied the building. In 2001, the owner observed watermarks on the ceiling of the commercial unit right below the roof. The owner also observed exterior cracks

26. Slavin v. Kay, 108 So. 2d 462 (Fla. 1959).

27. Cal. Code Civ. Pro. § 337.1 (2008).

28. Geertz v. E. Ausonio, 4 Cal. App. 4th 1363, 6 Cal. Rptr. 2d 318 (1992).

29. Nev. Rev. Stat. § 11.203.

30. Fla. Stat. Ann. § 95.11(4)(a) provides that "Actions other than for recovery of real property shall be commenced as follows: . . . (4) Within two years.—(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional."

at several locations at the second floor of the building. In this hypothetical, would the water intrusion or the stucco cracks qualify as a patent deficiency?

A key question is whether the patency of a deficiency should be analyzed on the basis of a subjective or an objective standard. One California court concluded that "the test to determine whether a deficiency is patent is not a subjective one, applied to each individual user; rather, it is an objective test based on the reasonable expectations of the average consumer."[31] Another California court, however, concluded that what constitutes a reasonable inspection "is a matter to be determined from the totality of circumstances of the particular case and must vary with the nature of the thing to be inspected and the nature and gravity of the harm which is sought to be averted."[32]

The reasonable inspection analysis is not always easy to apply. In *Kelley v. School Board of Seminole County,*[33] the Florida Supreme Court addressed an owner's knowledge of the defective design and installation of a roofing system. In 1969 and 1970, the school board contracted with the architect, among other parties, to provide design and construction services for installation of the roofs at several schools. The roofs started leaking in 1970 or 1971 and required extensive repairs until the roofs could not be repaired any further and were ultimately replaced by the school board.

In August of 1977, the school board filed suit against the architect, the general contractor, the roofing subcontractor, and the roofing material manufacturer. The appellate court held that because the architect was continuously attempting to resolve the issues with the roof, and the school board was relying on the professional services and assurances of the architect that the problem was being resolved, it was a question of fact as to when the school board knew or should have known that the "problem was permanent and irreparable."[34]

The Florida Supreme Court, however, rejected the appellate court's analysis and held that the statute of limitations barred the school board's causes of action. The court noted that the specific nature of the defect causing the problem need not first be identified before the statute begins to run. It concluded that the school board had knowledge of the defective roofs prior to August of 1973, and that the four-year statute of limitations barred the claim.

The Florida Supreme Court's decision in *Kelley* notwithstanding, ultimately what constitutes a reasonable inspection and notice of the deficiency in identifying a patent or latent defect is generally a question of fact for the

31. Geertz v. E. Ausonio, 4 Cal. App. 4th 1363, 6 Cal. Rptr. 2d 318 (1992).

32. Renown, Inc., v. Hensel Phelps Construction Co., 154 Cal. App. 3d 413, 420, 201 Cal. Rptr. 242 (1984).

33. 435 So. 2d 804 (Fla. 1983).

34. *Id.* at 805.

jury.[35] In *Tomko Woll Group Architects, Inc. v. Superior Court*,[36] the plaintiff filed suit against the architect and the contractor for personal injuries sustained as a result of the plaintiff tripping over raised pavement. The court analyzed the patent deficiency statute pursuant to the California statute of limitations,[37] and held that the section applied to actions involving patent deficiencies existing at the time of substantial completion and patent deficiencies arising after substantial completion. The court found that the plaintiff tripping on a visibly defective paver met the statutory definition of a patent defect (i.e., that the defect was readily apparent), and its "detection required neither inspection nor expertise."[38] Since the project had been completed for more than four years at the time of the accident, the action was barred.

When reviewing a potential construction defects claim, consider whether there are sufficient facts that would put the claimant on notice that it has a cognizable claim and not whether an exact cause of the defect has been identified. A Texas court in *Cornerstones Municipal Utility District v. Monsanto Company*[39] reviewed a municipality's actions upon first observing a potential construction defect and the municipality's use of an expert to specifically identify the cause of the defect. On March 6, 1978, the municipality contracted with the engineer for the design services associated with the construction of a sewer system. The sewer system was completed in April 1984. By December 1985, the municipality became aware of settling issues with the major sewer line. In January 1986, the municipality videotaped the line and applied dye to determine the cause of the defect. The inspection revealed a hole in the line. In February 1987, the municipality commenced the repair of the line and identified several other cracks that appeared to be the result of insufficient cement bedding below the pipes. Samples of the damaged pipe were removed for further analysis. During a March 1987 meeting between the municipality and the engineer, the engineer identified that the damage was caused by the failure to properly apply the cement sand bedding below the line. On July 24, 1987, a videotaped inspection further revealed that a substantial portion of the pipe was in poor condition.

Two years later, on July 13, 1989, the municipality filed suit against the engineer and the suppliers of the pipes for negligence, strict liability, fraud, breach of warranty, and violations of the deceptive trade practices act. The defendants filed their motions for summary judgment on grounds that the two-year statute of limitations barred the municipality's causes of action. The lower court granted the defendants' motions. In reviewing the lower court's ruling,

35. Kala Investments, Inc. v. Sklar, 538 So. 2d 909 (Fla. 3d DCA 1989). *But see* A.J. Aberman, Inc. v. Funk Building Corporation, 278 Pa. Super. 385, 420 A.2d 594 (1980) (holding that "whether the statute has run on a claim is usually a question of law for the judge").

36. 46 Cal. App. 4th 1326, 1332, 54 Cal. Rptr. 2d 300 (1996).

37. Cal. Code Civ. Pro. § 337.1.

38. 46 Cal. App. 4th at 1139.

39. 889 S.W.2d 570 (Tex. App. 14th Dist. 1994).

the appellate court focused its analysis on whether there were genuine issues of material fact as to when the municipality discovered or should have discovered the defects and whether the municipality exercised reasonable diligence in discovering the defects.

The municipality argued that the statute of limitations was not triggered until the municipality knew it suffered from system-wide defects, as identified on July 24, 1987. It asserted that it had diligently performed its investigation and pointed out that one of the defendant's own engineers testified that he did not know what caused the hole in the pipe until July of 1987. The municipality's engineer similarly stated by affidavit that the municipality did not have facts showing that the defects were a result of any design or construction defect in the period March through May 1987.

The *Cornerstones* court rejected the municipality's argument. It concluded that the municipality was put on notice of the defect in February 1987 and that the defect could have been discovered through the exercise of reasonable diligence at that time. Thus, the municipality's claim was time barred.

It is important to analyze each construction deficiency under the applicable statute of limitations and avoid consolidating all deficiencies within a single time period. Certain deficiencies may be time barred while others survive. This issue was addressed by a California appellate court in *Winston Square Homeowner's Assn. v. Centex West, Inc.*[40] In *Winston*, the homeowner's association brought suit against a developer and subcontractors for deficiencies claimed in the drainage, plastering, gutters, downspouts, chimney crickets, valley gutters, trim boards, and balcony railings of a residential complex. The court bifurcated the trial so that the first phase would address the defendant's statute of limitations defense. The evidence at trial showed that the date of completion of the project was December 3, 1975. The homeowner's association brought suit on August 25, 1982, and amended its complaint on August 8, 1983. The trial court analyzed each construction deficiency to determine whether each deficiency was brought within the applicable statute of limitations and concluded that the alleged drainage defects were patent and time barred. However, the court also concluded that the remaining defects were timely because the contractor's repairs tolled the statute of limitations. The homeowner's association appealed, arguing that it had one cause of action for all the damages sustained at the property and that the statute of limitations must be uniformly applied to that single cause of action. The appellate court, however, disagreed and affirmed the trial court, holding that the application of the statute of limitations to separate areas of damage was proper.

In revisiting the hypothetical posited in the beginning of this section, the watermarks identified on the ceiling of the commercial unit would arguably be a patent deficiency, as they were readily observable through a reasonable inspection, thus imputing knowledge to the owner. Conversely, the

40. 213 Cal. App. 3d 282, 261 Cal. Rptr. 605 (1989).

identification of the stucco cracks would not qualify as a patent deficiency, because the cause of the deficiency was not readily observable and required expert analysis in determining the cause.

Analysis as to what would be a reasonable inspection and knowledge of the deficiencies should commence with the identification of the type of project. If the project is a single-family home, then it is reasonable to expect a homeowner to conduct an inspection of all the components through maintenance of the property. However, a reasonable inspection does not include conducting such an extensive investigation as to determine building code violations.[41]

If a project is a condominium or commercial project, then it is reasonable to expect that the property manager and its maintenance personnel will conduct routine inspections of the building envelope and the internal components, such as the mechanical, electrical, and plumbing components. However, reasonable inspection does not necessarily require an expert combing through the building to find deficiencies,[42] although an argument can be made that experts are necessary for conducting routine inspections of certain components, such as annual inspections of the roof or mechanical systems.

C. Latent Defects

While the limitations period for patent deficiencies is generally triggered by fixed events identified in the statute of limitations itself, such as the date of substantial completion or issuance of a certificate of occupancy, the date on which the statute begins to run for latent defects is usually based, in contrast, on (1) general triggering events or (2) the date a latent defect is discovered. Generally, the statutes of limitations themselves include specific language regarding the identification of a latent defect and the time period for bringing suit, as illustrated in the following Florida Statute:

> [a]n action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner . . . except that, when the action involves a *latent defect*, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence.[43] (Emphasis added).

41. Slavin v. Kay, 108 So. 2d 462 (Fla. 1959) (holding that owners are allowed to rely on building department records and certificates of occupancy).

42. Markell v. Mi Casa, LTD., 711 So. 2d 583 (Fla. 4th DCA 1998) (holding that there is no duty in the state of Florida to retain experts regarding installation of components or the condition of the property).

43. Fla. Stat. Ann. §95.11(3)(c)(2008).

The equivalent California statute does not provide "date of discovery" language comparable to that found in Florida, but it nevertheless provides for a general triggering event:

> [n]o 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.[44] (Emphasis added).

The statutory time periods for bringing an action for latent defects range from four years from the date of discovery,[45] to eight years,[46] and even ten years.[47] While these time periods and the triggering events vary among jurisdictions, the definitions of "latent defect" are similar and are commonly defined by statute as "a deficiency which is not apparent by reasonable inspection[,]"[48] or by the courts as those defects "generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge."[49] A Florida appellate court has defined a latent defect as "one which is hidden and which would not be discovered by a reasonably careful inspection."[50] (But beware; courts have also held that a defect located by an engineer does not automatically qualify as a latent defect.[51])

As discussed above in the *Patent Defects* section, while it is a relatively straightforward analysis to determine that a leak solely emanating from the roof qualifies as a patent defect, what if the water intrusion cannot be directly attributed to one source or construction component? In *Performing Arts Center Authority v. Clark Construction Group, Inc.*,[52] an owner entered into a contract with a general contractor for the construction of a performing arts center.

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44. Cal. Code Civ. Pro. §337.15(a)(1)(2)(2008).
45. Fla. Stat. Ann. §95.11(3)(c) (2008).
46. Nev. Rev. Stat. §11.204(1)(a) (2009).
47. Cal. Code Civ. Pro. §337.15(a)(1) (2008).
48. Nev. Rev. Stat. §11.204(4) (2009); Cal. Code Civ. Pro. §337.15.
49. Lakes of the Meadow Village Homes Condominium Maintenance Ass'ns, Inc. v. Arvida/JMB Partners, L.P., 714 So. 2d 1120 (Fla. 3d DCA 1998).
50. Geertz v. E. Ausonio 4 Cal. App. 4th 1363, 6 Cal. Rptr. 2d 318 (1992).
51. Chadwick v. Fire Ins. Exchange, 17 Cal. App. 4th 1112, 21 Cal. Rptr. 2d 871 (1993).
52. 789 So. 2d 392 (Fla. 4th DCA 2001),

Construction was completed in 1991, and the owner occupied the center thereafter. In February 1995, the owner observed water on the floor of the facility. The owner contacted the roofing contractor to inspect the leak, and the roofing contractor determined that the leak was a result of cracks in the wall system.

In June 1995, the owner-plaintiff in *Performing Arts* retained a building diagnostic company to inspect the exterior wall and provide repair specifications. The inspection revealed problems with the stucco that would prevent painting. In August 1995, the owner observed extensive cracking and movement of the exterior walls. An engineering firm inspected the exterior walls and concluded that the wall system had been improperly designed and constructed.

Nearly four years later, on May 14, 1999, the *Performing Arts* owner filed suit against the general contractor and the stucco contractor. The defendants moved for summary judgment on grounds that the statute of limitations had expired in February 1999. The trial court granted the defendants' motion, but the appellate court reversed, holding that where the manifestation of the defect is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred. The court further opined that because it could not infer notice as a matter of law, the question became an objective question of whether the facts and circumstances were sufficient to put the plaintiff on notice that a cause of action existed.

Thus, where there is an obvious manifestation of a construction defect, notice of the defect begins at the time of manifestation, irrespective of whether the plaintiff had knowledge of the exact nature of the defect.[53] Although the term "manifestation" is not defined by the courts, the manifestation of a defect is the *showing* of the defect, such as a mysterious water leak. The analysis then moves to whether the manifestation is obvious or not. Are the leaks coming from the roof, the windows, or the walls? Notice is inferred when defects become obvious, such as identifying the source of the leak.

A classic example of a latent defect roofing claim can be found in *E.J. Korvette v. Esko Roofing Company,*[54] in which an Illinois court had to determine whether the owner's cause of action accrued on the date the roof was completed or later, when the owner was expected to have discovered defects with the roof. The salient facts are as follows: On July 3, 1964, the roofing system was completed, and on November 26, 1965, February 15, 1967, and July 26, 1969, winds damaged the roofing system. On November 25, 1970, the owners brought suit against the general contractor, the roofing contractor, and product supplier for defective construction, products, and design of the roofing system. The defendants filed motions to dismiss, arguing that the owner's cause of action accrued on the date when the work was completed and that the claim was therefore time barred by the five-year statute of limitations. The

53. Wishnatzki v. Coffman Construction, Inc., 884 So. 2d 282 (Fla. 2d DCA 2004).
54. 38 Ill. App. 3d 905, 350 N.E.2d 10 (1976).

owner, on the other hand, argued that its cause of action accrued on November 26, 1965, when it first experienced wind damage that first put it on notice of the issues with the roof. The lower court granted the defendants' motions to dismiss, and the owner appealed. In reviewing the very limited record, the appellate court concluded that there was nothing that showed that the owner failed to exercise due diligence by not discovering the defects prior to the windstorm. As such, the appellate court rejected the defendants' position that the statute of limitations began to run on the date of completion. It therefore concluded that the owner's causes of action were filed within the five-year statute of limitations and accrued when the owner "knew or should have known of defendant's error."[55]

The court in *Geertz v. E. Ausonio*[56] addressed the identification of a hidden drainage issue on the deck located at the second floor of a commercial building. In December 1978, the contractor completed a two-story multiuse building with commercial spaces on the first floor and apartments and a deck on the second floor. In 1979, the owners of the building experienced issues with leaves clogging the deck's drains, causing water to overflow into the kitchen of an adjacent apartment on the second floor. To correct the problem, the owners cleared the leaves from the deck drains. The problem did not reoccur until April 25, 1989, when water flowed from a second-floor apartment into one of the commercial units on the first floor. The commercial unit's tenant surveyed the incoming water and damage and, while doing so, fell and was injured. After the incident, the tenant learned from the owner that the deck did not have a secondary drainage system to handle overflow of water, should the primary system become clogged. The tenant filed suit against several parties, including the contractor that constructed the building. The contractor moved for summary judgment and presented evidence that the owner had previously experienced flooding from the deck and that therefore the defect was patent and the claim was barred by the four-year statute of limitations. The trial court granted the motion and the tenant appealed, arguing that the defect was latent.

On appeal, the *Geertz* court noted that, although the owner was aware of flooding, the owner did not allege that flooding was the construction defect but rather that it was the manifestation of the defect. The court also opined that the owner's observation of the flooding did not make the defect patent. Indeed, the owner thought that the flooding was a maintenance issue and not something due to the lack of a secondary drainage system. Accordingly, the appellate court reversed the trial court, holding that reasonable minds "could differ concerning whether the flooding as experienced by the [tenant] renders the cause, i.e., the alleged defect in the deck, reasonably apparent to the average consumer."[57] The

55. *Id. at* 909.
56. 4 Cal. App. 4th 1363, 5 Cal. Rptr. 2d 318 (1992).
57. *Id.* at 1371.

court further noted that, had the contractor built the deck without any drains, then the defect may have been deemed patent. "However, in the absence of knowledge that a deck should have a secondary overflow system, flooding caused by the leaves clogging the main drains of the deck does not as a matter of law make the lack of such a system an obvious or patent defect."[58]

V. Statutes of Repose

"Statutes of repose differ from statutes of limitations in that statutes of repose potentially bar a plaintiff's suit before the cause of action arises, whereas statutes of limitation limit the time in which a plaintiff may bring a suit after the cause of action accrues."[59] The purpose of a statute of repose may be summed up in one word: finality. Although a construction defect claim may not be barred by the statute of limitations, it may be barred by the statute of repose. The statute of repose is distinguished from the statute of limitations in that the nature and characterization of a defect as latent or patent is generally not a factor in triggering the statute. Instead, the statute of repose hinges on fixed events identified in the statute regardless of the character of the claimed defect. The key, therefore, is in determining where the claimed defect stands in relation to the events enumerated within the statute of repose.

Thus, for example, the Florida statute of repose establishes a cutoff for construction defect claims of 10 years after the latest of a series of potential triggering events, i.e., the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between a design professional or contractor.[60] California's statute of repose similarly provides for a specific triggering event: [61]

> [t]he 10 year period. . . 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 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 the work on the improvement.[62] (Emphasis added).

The Texas statute of repose in comparison is triggered simply by substantial completion, providing that claims must be brought "not later than 10

58. *Id.*
59. McConnaughey v. Bldg. Components, Inc., 637 A.2d 1331, 1331 n.3 (Pa. 1994).
60. Fla. Stat. Ann. § 95.11(3)(c) (2008).
61. Cal. Code Civ. Pro. § 337.15(g) (2008).
62. *Id.*

years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment."[63]

The language of the New Jersey statute of repose suggests that the New Jersey statute is triggered simply by "the performance or furnishing of . . . services and construction[.]"[64] It provides, in part, that:

> [n]o action, . . . to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than *10 years after the performance or furnishing of such services and construction*. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought. (Emphasis added).[65]

By case law, however, New Jersey courts interpret this statute of repose as being triggered by "substantial completion" of the work of the target of the defect claim.[66]

A typical statute of repose precludes actions after 10 years,[67] but some states prescribe eight years,[68] while others permit claims to be brought as many as twelve years after substantial completion.[69] The wise practitioner

63. Tex. Civ. Prac. & Rem. Code §16.008(a).

64. N.J.S.A. 2A: 14-1.1.

65. *Id*.

66. Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 117, 675 A.2d 1077 (1996) (noting that generally the statute of repose commences to run on the date of "substantial completion" of the initial construction). *See also* Hein v. GM Constr. Co., 330 N.J. Super. 282, 284, 749 A.2d 422 (App. Div. 2000) (statute starts to run when an owner can occupy or utilize the building, generally indicated by the issuance of a certificate of occupancy).

67. *See e.g.,* Fla. Stat. Ann. § 95.11(3)(c) (2008); Cal. Code Civ. Pro. § 337.15(a)(1)(2)(b) (2008).

68. *See* Nev. Rev. Stat. § 11.204 (2009).

69. *See, e.g.,* 42 Pa. Cons. Stat. Ann. § 5536(a).

will stay current with legislative developments, however, since legislatures amend these time periods from time to time.[70]

To elaborate on the relationship between a statute of repose and statute of limitations, consider the following hypothetical: substantial completion of a building is achieved in 1990, and a latent defect is discovered in 1999; how long does the plaintiff have to bring suit for the latent defect? If the statute of repose is ten years, then the plaintiff would have one year to bring suit, as opposed to the typical four years to bring suit for a latent defect.

The basic analysis applicable to this hypothetical is illustrated in *Sabal Chase Homeowners Ass'n Inc. v. Walt Disney World, et al.*,[71] in which a condominium association brought suit against a developer for latent defects identified after Hurricane Andrew severely damaged the condominium in 1992. The last certificate of occupancy was issued on September 6, 1978, and suit was brought in August 1994, nearly 16 years later. The developer moved for summary judgment, arguing that the 15-year statute of repose barred the association's causes of action. In this regard, it presented testimony from a representative of the department of planning, development, and regulation that certificates of occupancy were only issued to the owners of the property. The association argued that the developer failed to establish the date of possession for purposes of triggering the Florida statute of repose. The trial court disagreed and granted summary judgment to the developer. The appellate court affirmed, noting that the certificates of occupancy were issued after the owner had actual possession of the property and therefore showed that 1978 was the proper year for calculating the statute of repose.

The plaintiff in *Sabal Chase* had also argued that the Florida Condominium Law,[72] which provides that the "statute of limitations for any actions" that a condominium or cooperative association may have does not begin to run until the unit owners elect a majority of the board of directors, operated to lengthen the statute of repose. The court, however, disagreed, concluding that the provisions of the condominium law only tolled the statute of limitations and not the statute of repose. The court remarked upon the fundamental difference between the statute of limitations and the statute of repose: "[r]ather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, [statutes of repose] cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of the notice of the invasion of a legal right."[73]

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70. For example, in 2006 Florida amended its statute of repose to remove the 15-year limitation and substitute a 10-year limitation period.

71. 726 So. 2d 796 (Fla. 3d DCA 1999).

72. Fla. Stat. Ann. § 718.124.

73. *Id.* at 798.

It is important to note that the time periods enumerated in the statute of limitations will not affect the statute of repose. A California court addressed the relationship between the statute of limitations and the outer limits of the statute of repose in *Chevron U.S.A., Inc., v. Disalvo Trucking Co.*[74] In that case, a property owner bought and contracted with an oil company for the installation of underground fuel storage tanks sometime before 1976. In 1989, the owner removed the tanks and discovered contaminated soils. At the direction of the local authorities, the owner spent hundreds of thousands of dollars attempting remediation. In 1993, the owner sued the oil company for the damages already sustained as a result of the cleanup and for the costs it expected to incur in the future to complete the cleanup, alleging, among other things, a continuing nuisance.

The oil company moved for summary judgment, arguing that the statute of limitations for latent defects had run. The trial court denied the motion, ruling that the three-year statute of limitations for continuing nuisance controlled. The oil company appealed the ruling.

On appeal, the owner argued that the 10-year statute of repose for latent defects did not apply to the continuing nuisance claims, as California's statute of repose applied only to the original wrong and continuing nuisance principles would override the 10-year repose period. Conversely, the oil company asserted that the 10-year statute of repose controlled because it specifically applied to latent construction defects.

In reconciling the statute of limitations for continuing nuisance (three years) and the limitations period for latent construction defects (10 years), the appellate court observed that resolution of the conflict required the court to engage in a two-step analysis. First, the court had to determine whether the action for continuing nuisance was timely, and, if the court found it to be timely, then it had to determine whether the action was filed within the outer 10-year limitation period. The appellate court held that the 10-year outer limit for bringing an action for latent defects was the controlling statute and broadly applied to causes of action ranging from breach of contract to tort actions, including the property owner's causes of action for continuing nuisance and continuing trespass.

In certain jurisdictions, the statute of repose may not apply to all construction defects claims. For example, in *Port Imperial Condominium Association, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc.*,[75] a New Jersey court observed that that state's statute of repose applied only to claims "arising out of the defective *and* unsafe condition of an improvement."[76] The *Port Imperial* court ultimately concluded that the statute of repose operated to bar the claims brought in that action by a condominium association and a

74. 44 Cal. App. 4th 1009, 54 Cal. Rptr. 2d 324 (1995).
75. 419 N.J.Super. 459, 17 A.3d 283 (App. Div. 2011).
76. *Id.* at 289.

developer-builder against certain subcontractors since their claims asserted that the alleged defects rendered the building's foundations unsafe. However, the court observed that the statute of repose might not have operated to bar claims where the alleged defect had created economic injury without causing an unsafe condition.

In determining whether a claim for a construction defect is barred by the statute of repose, therefore, it is important to consider not only the time period for bring the claim, but also whether the defect fits within the language of the statute of repose. The decision in *Ebert v. South Jersey Gas Company*[77] turned on this issue, i.e., whether the type of damage alleged by the plaintiff was covered by the language of the statute of repose. In *Ebert* the issue was whether construction of a gas line qualified as an "improvement" within the meaning of the New Jersey statute of repose. The court held that the service line indeed qualified as an improvement because the line was functional, permanent, and enhanced value, and it accordingly found that the defendant was entitled to the protection of the statute and that the claim was barred.

VI. Tolling the Statute of Limitations and the Statute of Repose

Statutes of limitation and repose may be tolled by statute[78] or by agreement. In addition, fraudulent behavior, undertaking repairs, and equitable estoppel may all operate similarly to toll these statutes.

A. Pre-suit Requirements and Statutory Tolling

Several states have enacted statutes imposing presuit notice and opportunity to cure requirements on plaintiffs in construction defect litigation.[79] Typically, these statutory schemes also provide for tolling of the statutes of limitation and repose during the notice and repair period. For example, the California statute, which requires common interest development associations to provide notice of construction defects to builders before initiating suit, tolls "all statutory and contractual limitations against all parties who may be responsible" for 150 days "or a longer period agreed to in writing by the parties.[80]

In one California case,[81] the court analyzed the tolling provisions of this statute and its effect on parties not signatory to a written tolling agreement. At trial the court found that certain defendant subcontractors had negligently

77. 157 N.J. 135, 723 A.2d 599 (1999).

78. For example, pre-suit statutes in certain jurisdictions that mandate sending a notice of claim for construction defects to the responsible parties, as a prerequisite to filing suit, typically toll a statute of limitations. See discussion of pre-suit notice statutes in Chapter 8.

79. See discussion of these statutes in Chapter 8.

80. Cal. Civ. Code § 1375. For another tolling provision, see Cal. Civ. Code § 928.

81. El Escorial Owners' Ass'n, v. DLC Plastering, Inc., et al. 154 Cal. App. 4th 1337, 65 Cal. Rptr. 3d 524 (2007).

performed their work. These parties argued that the plaintiff's claim against them was nevertheless barred by the statute of limitations, and that the written tolling agreement that certain parties had executed with the plaintiff did not apply to them because they had not signed it. They also argued that the tolling agreement in any event was invalid because it was signed after the expiration of the automatic 150-day tolling period provided by the statute.

The court disagreed, holding that "[t]he broad tolling provisions [of the statute] apply to the builder and 'all parties who may be responsible for the damages' whether or not they are named in the notice."[82] It observed that the interpretation of the statute urged by the defendants would undermine the purpose of the preaction notice statute, discourage settlement, and force associations to initiate suit prior to completing meaningful negotiations. However, the court acknowledged that unlimited tolling may prejudice the rights of the subcontractors, thus, "[w]here a homeowners association and builder unreasonably delay the settlement process or act in bad faith," the written extension of the statutory 150-day tolling would be inappropriate.[83] In this case, however, the court upheld the written tolling agreement and its applicability to the nonsigning subcontractors because the association and the general contractor acted in good faith in attempting to resolve the construction issues.

Florida's Construction Defect Notice Statute[84] similarly tolls the statute of limitations (but not the statute of repose) relating to any person covered by the statute:

> [a] claimant's mailing of the written notice of claim under subsection (1) tolls the applicable statute of limitations relating to any person covered by this chapter and any bond surety until the later of: (a) *Ninety days*, or *120 days*, as applicable, after receipt of the notice of claim pursuant to subsection (1); or (b) Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, *the period may be extended and the statute of limitations is tolled during the extension*. (Emphasis added).[85]

New York also provides a notice procedure for construction defects matters.[86] The New York statute requires that the owner provide notice of its claim and provide the builder with a reasonable opportunity to inspect, test, and repair the defect as a prerequisite to the commencement of suit. It also provides that "an action for contribution or indemnification may be commenced

82. *Id.* at 1354.
83. *Id.* at 1355.
84. Fla. Stat. Ann. §558.
85. Fla. Stat. Ann. §558.004(10).
86. N.Y. Gen. Bus. Law §777-a.

at any time prior to the expiration of one year after the entry of judgment in an action for damages" brought by the property owner against the builder.[87]

B. Tolling Agreements

Considering the complexities involved in identifying construction defects and allocating responsibility to the proper parties that designed and constructed the project, an agreement to toll statutes of limitations and repose may be useful in preserving claims without need to file suit. If parties are working in good faith to identify and resolve construction defects, there should be no issue as to execution of an agreement to toll the statute of limitations. Tolling agreements are based in contract[88] or are statutorily provided for as identified in the preceding section. A tolling agreement must clearly state that the statutes of limitations and repose will be tolled starting with a certain date and for a certain period of time and, if necessary, identify the claims to be tolled. Consideration should be given to the inclusion of language that provides notice procedures for deactivating the tolling agreement and initiating suit.

C. Fraud

After receiving statutory notice of construction defects or a formal demand, recipients sometimes negotiate with claimants in an effort to achieve delay rather than resolution of the defects or attempt to make repairs or conceal deficiencies without first obtaining permission from a claimant or without a claimant's knowledge. In general, statutes of limitations or of repose may not be applicable when such conduct occurs.

Nevada statutorily addresses willful misconduct and the fraudulent concealment of construction deficiencies[89] as follows:

> 1. An action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property *at any time* after the substantial completion of such an improvement, for the recovery of damages for: (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement which is the result of his willful misconduct or which he fraudulently concealed . . . (Emphasis added).

87. *Id.*

88. Hughes Aircraft Company v. National Semiconductor Corporation, 850 F. Supp. 828 (N.D. Cal. 1994).

89. Nev. Rev. Stat. § 11.202(1)(a).

In *G and H Associates v. Ernest W. Hahn, Inc.*,[90] the owners of a commercial building brought suit against a general contractor, architect, and several subcontractors after a section of the building's roof collapsed. This occurred 16 years after construction was completed. Accordingly, all defendants raised Nevada's eight-year statute of repose as a defense.[91] The Nevada Supreme Court agreed that the statute of repose barred all claims except claims for willful misconduct and fraudulent or intentional concealment. The court noted, however, that in this case, the cause of the collapse was apparently that glue-laminated beams had almost no glue. Accordingly, if plaintiffs could prove that this defect was due to willful misconduct, or involved fraudulent concealment, then the statute of repose would not bar the claims.

As with pleading any cause of action, close attention must also be given to the specific elements required for pleading fraud within the construction defect context. In *Gropper v. STO Corporation*,[92] a Georgia court held that in order to toll the statute of limitations, the homeowners must prove "(1) actual fraud on the part of the defendant involving moral turpitude, (2) which conceals the existence of the cause of action from the plaintiff, and (3) plaintiff's reasonable diligence in discovery his cause of action, despite his failure to do so within the time of the applicable statute of limitations."[93] The court noted that in order to prove fraud there must be something more than mere concealment; there must be "'some trick or artifice.'"[94]

Although fraud and intentional misconduct may be difficult to prove, such causes of action should be considered when traditional causes of action may be time barred, but for such conduct. In the absence of a statute addressing fraud or intentional conduct, consideration should also be given to traditional fraud, intentional misconduct, or estoppel theories in order to survive a statute of limitations defense.

D. Repairs

The practitioner should also determine whether repairs have been made to the property that might avoid the applicable period of repose.[95] In *Horosz v. Alps Estates, Inc.*,[96] homeowners noticed structural problems on June 14, 1977. At that point they contacted the builder to address the issues. In 1982, the contractor jacked up the house and removed large tree trunks and construction debris from under the home. These repairs were completed in 1983. Nearly six

90. 113 Nev. 265, 934 P.2d 229 (1997).

91. Nev. Rev. Stat. § 11.204

92. 250 Ga. App. 820, 552 S.E.2d 118 (2001).

93. *Id.* at 123.

94. *Id.*

95. Winston Square Homeowners' Association v. Centex West Inc., 213 Cal. App. 3d 282, 261 Cal. Rptr. 605 (1989).

96. 266 N.J. Super. 382, 629 A.2d 1350 (App. Div. 1993).

years later, early in 1989, the homeowners noticed that certain portions of the house had a downward slant. The homeowners asked the builder to correct the new identified issue, but the builder failed to do so. The homeowners filed suit on September 28, 1989, after expiration of the applicable 10-year statute of repose. The court, however, held that the statute of repose should be measured not from when the property was sold but from 1983, when the builder completed repairs. From that point, the time period governing the statutes of limitations and repose started anew.

E. Equitable Estoppel

Equitable estoppel may also serve to breathe new life into an otherwise lifeless claim extinguished by the statute of limitations or repose. Equitable estoppel may be based on fraudulent concealment, fraud, misrepresentations, and reliance. One example where equitable estoppel did not toll the statute of limitations, however, can be found in *Dionisio v. Geo. De Rue Contractors, Inc.*[97] In *Dionisio*, a contractor agreed to construct a roadway with a binder depth of two inches. After discovering that the roadway did not meet the required binder depth, the owner filed suit. The contractor moved for summary judgment, alleging that the claim was barred by the statute of limitations. The owners then moved to amend the complaint to add fraud as a cause of action. The owner argued that equitable estoppel based on the proposed fraud count tolled the statute of limitations. The court, however, ruled that estoppel is only appropriate where there is a fiduciary relationship that required the contractor to inform the owner of the facts underlying the claim. In *Dionisio* the court found no evidence that such a relationship existed between the owner and the contractor and, therefore, it declined to apply equitable estoppel.

In *J. Amodeo v. Ryan Homes, Inc.*,[98] homeowners observed water on the basement floor and contacted the contractor to investigate the problem. The contractor addressed the source of the water and instructed the owners on how to prevent future issues. However, for the next six years the problem worsened and, despite the contractor's attempts to repair the interior drainage system and related components, the issue was not resolved. The owners filed a complaint against the contractor, and the court found that the contractor attempted to correct the defect up to two years before the complaint was filed. During each repair, the contractor represented that the problem was corrected, and the owner relied on those representations. Under these facts, the court held that the repair efforts were sufficient to toll the statute of limitations. The court held that for the repair doctrine to apply the following elements must be established: (1) repairs were attempted, (2) representations were made that the defects would be corrected, and (3) the plaintiff relied on

97. 38 A.D.3d 1172, 833 N.Y.S.2d 786 (4th Dept. 2007).
98. 407 Pa. Super. 448, 595 A.2d 1232 (1991).

those representations. Accordingly, the owner's claim was timely filed and well within the four-year statute of limitations.

VII. Conclusion

Whether the practitioner represents a community association, developer, general contractor, or subcontractor, managing the issues relevant to the applicable statutes of limitations and repose is essential in the prosecution or defense of a construction defect case. The complexities involved in detecting construction defects, identifying the parties responsible for deficiencies, and properly preserving a claim are easily clouded when negotiations are ongoing, repairs are being made, and new deficiencies are being identified. To organize the factual and legal issues effectively, the practitioner should take care to identify (1) the statutorily provided general and specific triggering events, (2) the nature of the defect and responsible parties, (3) the applicable time periods, and (4) any applicable statutory or equitable tolling provisions.