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Construction Defects, Latent Defects and Causes of Action

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I. LIABILITY FOR CONSTRUCTION DEFECTS

The ancient doctrine of caveat emptor has been abolished in all but two states for the sale or lease of residential real property. Caveat emptor means "let the buyer beware".[1] For nearly 300 years[2] it was the controlling principle of law in any sale of real property. However, today this is no longer true. Developers must now assume that they will be liable for damages if the newly constructed houses or condominiums they sell are defective.[3] The word developer is being used for ease of reading. While there are vast differences between a developer, builder, and seller, the terms are being used interchangeably for the purposes of explaining liability during this seminar. For clarification, a builder is defined as a person who builds homes on land he owns and sells those units to the public. A developer can be either a builder or the owner of the land who hires someone else to actually do the construction and then sells those homes to the public. A general contractor may be hired by the developer to construct the home at the developer's direction. A seller does not participate in any manner in the construction.

The most common reasons cited by courts for imposing an implied warranty on a builder are:

1. The importance of purchasing a home, which is generally the largest single purchase made during one's lifetime;
2. The developer is in a better position to know the defects in a new home, while the average purchaser is particularly ill-suited to detect flaws by inspecting the premises for latent defects and therefore must rely upon the expertise and reputation of the developer;

3. The average purchaser has no other remedy available to them other than under an implied warranty because of the inequality of the bargaining power between the purchaser and the developer; and
4. The developer is more capable of distributing the cost of his mistakes through insurance or increasing the purchase price than the purchaser.

A developer can be held liable for damages for defective residential homes under the following theories: (1) the implied warranty of habitability or fitness; (2) negligence; (3) express warranties; and (4) strict liability.

II. IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS

The most common theory for imposing liability on a developer for construction defects is implied warranty of merchantability and fitness. What constitutes fitness and merchantability for a home or condominium unit is not clearly defined; however, it is generally accepted that the home or condominium unit should be able to be used for the purposes or uses intended. The home or condominium unit should be in substantial compliance with the applicable building and housing codes and failure to comply with applicable building codes would constitute a breach of the implied warranty.[4] A home should provide the purchaser with a reasonably safe place to live and if a home is not structurally sound because of a construction defect, then this would be a breach of the implied warranty.[5] These defects may be any number of items, such as structural problems, an unsuitable site, improperly functioning air-conditioning units, corroded heating pipes, leaking roofs and the like.

Implied warranties may be established by statute or case law. Traditionally, implied warranties only applied to merchandise, but were later extended to real property as well. In California the doctrine of implied warranty of "reasonable workmanship in design and

construction that applies to the sale of newly constructed real property" was established in *Pollard v. Saxe &Yolles Development Co.*[6] The court stated:

> The doctrine of implied warranty in a sales contract is based on the actual and presumed knowledge of the seller, reliance on the sellers' skill or judgment, and the ordinary expectations of the parties. In the setting of the marketplace, the builder or seller of new construction- not unlike the manufacturer or merchandiser of personalty-makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident to the construction industry. Therefore, we conclude that builders and sellers of new construction should be held to what is impliedly represented-that the completed structure was designed and constructed in a reasonably workmanlike manner.[7]

The doctrine of implied warranty established in *Pollard* was later codified in California statutory law. Similar statutes exist in many states including Florida[8] and New York[9].

III. PREVAILING ON A CLAIM OF BREACH OF IMPLIED WARRANTY

Proof will obviously vary from state to state, but in general, to prevail on a claim of a breach of implied warranty an owner should be prepared to prove that:

1. They are the original owner of the unit;

2. They purchased directly from the builder or developer;
3. Construction was defective at the time of sale so as to render it unfit (deviation from the building code, deviation from plans and specifications, deviation from good construction practice); and
4. Their lack of knowledge of the defect prior to purchase; and
5. Damages.

Depending upon the defenses raised by the developer, the following additional factual issues may have to be addressed by the owner to in the course of prosecuting the claim:

6. Owner's lack of expertise or training in building construction;
7. Lack of inspection by an agent of the owner qualified in the construction trades;
8. Owner's complaints to the developer and the developer's failure to remedy the effect; and
9. Owner's lack of knowledge of the defect prior to purchase.

IV. NEGLIGENCE

Although the vast majority of cases that impose liability on a developer do so on the theory of implied warranty, there are other cases that impose liability under other theories. Negligence is the most prevalent of these theories.[10] [11] [12] [13] [14] Negligence involves different elements of proof from implied warranty. Generally, the elements requisite to a cause of action for negligence are:

1. A legal duty to conform to a reasonable standard of conduct for the protection of others against unreasonable risks;
2. A failure to conform to the standards;
3. A reasonably close causal connection between the conduct and the resulting injury; and
4. Actual loss or damage.[15]

V. EXPRESS WARRANTY

Developers may be liable for defects covered by their express written warranties. Whether express oral warranties given by the developer prior to sale are binding on the developer is dependent of the facts surrounding the transaction and must be decided on a case by case basis. Developers have potential liability under any express warranty that they give. Developers have generally tried to avoid express warranties by arguing that the warranty usually placed in the contract for sale does not survive the passing of the deed. With respect to express warranties, the general rule is that all covenants in a contract for sale merge with the deed, except those that are "collateral". Many courts, however, have held that although most of the contract does merge with the deed, any written warranties are collateral to the agreement and therefore do not merge.[16] Generally, if an express warranty is in writing, the courts have held that the developer is liable for that warranty if the defects in the dwelling appear during the period for which the warranty is given. Typically, a developer will disclaim all warranties in the contract that are not contained in the deed or conveyance, or any warranties that are not statutorily mandated.[17]

VI. STRICT LIABILITY

Very few courts have held developers liable under a theory of strict liability. Those courts which have imposed strict liability against builders generally require the purchaser to show that:

1. The developer is in the business of selling new dwellings;
2. The new dwelling was expected to and did reach the purchaser without substantial change in the condition in which it was sold; and
3. The defective condition was unreasonably dangerous.

The most difficult problem a purchaser faces in asserting liability based on strict liability is proving the "unreasonably dangerous" condition of the home.

In one Florida case[18], the court did hold the distributor of construction materials strictly liable in tort for damage to various properties. In this case, the defendant was a distributor of construction materials, including cement, which, when combined with sand and water, produced stucco. Each of the plaintiffs in the case was involved in the construction or sale of residential properties to which the stucco mixture was applied.[19] The plaintiffs did not directly hire the distributor, but rather, they hired subcontractors to apply a stucco finish the buildings under construction. When the stucco was applied to the buildings, a 'pop-out' phenomenon occurred. The stucco pops ranged from dime sized holes to those the size of a half dollar and covered the entire exterior of the buildings.

The development of strict liability initially arose out of cases involving personal injury resulting from contact with or proximity to products that were either defective or dangerous where the one damaged had no other place to turn for recompense. In the above example, the end result was damage to property, rather than person. Nonetheless, the court held that "a retail or wholesale seller may be held strictly liable in tort for damage occasioned to the property of one who purchases the product and prepares it for use by an ultimate consumer."[20] [21] [22]

VII. LATENT DEFECTS

Claims against the developer may arise from defects which are obvious to a purchaser or claims may arise from defects that are latent. A latent defect is one that is not obvious to the average purchaser such as certain leaks or water seepage where the cause and location is not readily observable. The determination of whether a defect is latent can be crucial in a case. In Florida, as well as in other states such as California and Texas, whether a defect is considered

latent determines the period when the statute of limitations begins to run on a purchaser's claim. By the time water damage or rusting of steel in a concrete column appear, there may be extensive structural damage to the building that will likely be extremely expensive to correct. Typically, the trier of fact will determine whether a defect is considered latent. The court will consider a variety of factors, including the type of defect, the sophistication of the home owner and the due diligence required to determine the specific cause of the defect. In some instances, in the case of a leaky roof on a new structure, the problem may be considered so obvious that courts will not pursue further inquiry as the specific cause of the defect.[23]

A. FLORIDA STATUTORY AND CASE LAW

An owner bringing a cause of action founded on the design, planning or construction of an improvement to real property must do so within four (4) years. Section 95, Florida Statutes, states, in part:

> Actions other than for recovery of real property 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 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, registered architect or licensed contractor and his employer, whichever is the latest; 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. In any event, the action must be commenced within 15 years after the date of actual possession by the [Start Date].

This four (4) years statute of limitations applies to both contractual and negligence actions arising out of the improvements of real property. In *Performing Arts Center Authority v. The Clark Construction Group, Inc.,*[24] the owner noticed puddles on the floor after it had rained in February 1995. Believing that a roof leak caused the water intrusion, the owner contacted the roofing subcontractor who inspected the roof and reported that the leaks were caused by cracks in the exterior stucco. A subsequent inspection revealed 12 cracks in the stucco. However, the plastering subcontractor viewed the cracks as minor and stated that the cracks were the result of the building's natural settling process. After heavy rains, the owner noticed extensive cracking and movement in the exterior walls. A subsequent inspection by an independent firm revealed that the wall system had been improperly designed and constructed.

The owner filed suit for breach of contract, for negligent design and construction. The circuit court granted summary judgment in favor of the contractor and subcontractor, holding that the owner had notice at the time of the manifestation of the defects (the water intrusion and visible cracks), and therefore the four (4) year period of limitations for negligence had expired in February 1999. The owner appealed, and the District Court reversed holding that "where the manifestation is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred."[25]

Consider this scenario: if an engineer could find the cause of the defect using specialized equipment, but a lay person would not be able to, is the defect considered latent? In one such case[26], condominium owners sued a contractor claiming that the contractor was negligent in the construction of the mansard roof on the building. They claimed that the contractor "failed to construct the roof in accordance with the building code, the plans and specifications,

workmanlike principles, or sound engineering and construction practices."[27] The condominium owners obtained control of a condominium building on May 1, 1974 and discovered water leaks in their building around 1976. Condominium association meeting minutes from the December 4, 1979 meeting stated:

> We have conducted an active surveillance of the roof, mansards and parapet and have taken steps to stop all reported leakages. We are sure that much of all the trouble is the result of inadequate and shoddy construction and we will recommend that the next Board determine the feasibility of correcting construction defaults so that the possibility of leakage will be minimal and easily remedied.

There were ongoing expenses shown for repairs to the roof beginning in 1979 and continuing through 1985. The owners were unsuccessful in their attempt to repair the leaks in building and finally obtained an engineering report in 1982. The owners alleged that the defect was latent and that they did not have knowledge of the construction defects until receipt of the engineering report. The court held that the unit owners' cause of action (and the tolling of the statute of limitations) began when the owners began spending money to repair the roof, rather than when they received the engineer's report stating that the roof was defective.

In the case of *Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard Architects/Planners, Inc,.*[28] the owner "knew the roof was leaking" when it took possession of a newly constructed manufacturing facility. Despite inspections and repairs by the roofer, the roof leaked more or less continuously for the next four-and-one half (4 1/2) years, when an independent consultant finally reported that the defect was complex and not easily discoverable. The owner thereafter sued the architect, contractor, subcontractors, materialmen, and the

contractor's bonding company. The appellate court, affirming a summary judgment for the defendants, held that the owner "cannot rely on lack of knowledge of the specific cause of the problem to protect it against expiration of the four (4) year statute of limitations."[29] The court rejected any suggestion that one must have "knowledge of the specific nature of the defect causing an obvious problem before the statute of limitations commences to run."[30]

In the case of *Almand Construction Co., Inc. v Evans,*[31] homeowners notified their seller/builder in 1978 of structural damage that had resulted from settling during the previous six (6) years. The seller attempted repairs in 1979. Three (3) years later, an engineer stated that the settling and resultant damage was caused by construction of the house on unsuitable fill. The owners sued the seller in 1985. The seller moved for summary judgment, arguing that notice of a defective condition, rather than knowledge of its specific cause, starts the limitations period. The Florida Supreme Court agreed, stating that "[t]he [owners'] knowledge of the settling of the house and resultant damage, which they concede they might have had as early as 1978, was sufficient to put them on notice that they had, or might have had a cause of action.[32]

In the case of *City of Fort Lauderdale v. Ross, Saarinen, Bolton & Wilder, Inc.,*[33] the City retained the defendant to serve as consulting engineer for the design and construction of a one (1) mile water transmission main. Between 1974 and February 1987, the City used the pipeline to transmit potable water, unaware of any defect in its design and construction. On July 9, 1985, a rupture occurred in the water transmission main, which was quickly replaced and the main returned to service. On February 4, 1987, a second rupture occurred. Following the second rupture, the City conducted an investigation, which revealed that a latent design defect rendered the entire pipeline worthless. The City filed a negligence and breach of contract action against the Defendant for design and construction of the water pipe. The court found that the "cause of

action was not barred by the four (4) year statute of limitations applicable to actions arising out of improvements to real property, even though the first occurred more than four (4) years before the action was filed, where prior knowledge of a single leak in a one (1) mile stretch of pipe would not imply notice of defects in the pipe design."[34]

B. FLORIDA CONDOMINIUM LAW AND LATENT DEFECTS.

An owner may bring a cause of action either singularly or the condominium association may bring a cause of action on behalf of the unit owners in matters of common interest. Under Florida law, a cause of action is granted to the owners statutorily. Section 718.203, Florida Statutes, creates a statutory cause of action for a breach of warranty of fitness in condominium construction. Under Section 718.203, Florida Statutes, two warranties are created: (1) warranties of "fitness and merchantability for the purposes or uses intended" that are deemed to run from the developer to each condominium purchaser; and (2) "warranties of fitness as to the work performed or materials supplied" running from the contractor, all subcontractors, and suppliers to both the developer and each unit purchaser. Thus, a purchaser may be able to bring a cause of action against the developer, the contractor, all subcontractors, and the suppliers of the materials used in the construction of the building.

Section 718.203, Florida Statutes also provides that the warranty established applies to defects that occur during the lifetime of the warranty. Here, that period is three (3) years from the date of completion of the construction of the condominium[35]. That time frame is not a statute of limitations on the claim; the warranty period only indicates the time frame during which the developer will be responsible for a breach that may occur. If a breach of the warranty occurs during the established warranty period, the owners must bring that cause of action against the developer in the time limitations set forth in Chapter 95 of the Florida Statutes. Section 95.11

limits the period for bringing an action founded on the design, planning or construction of an improvement to real property to four years. Thus a suit filed under a breach of implied warranty must be filed within four (4) years from the latest of the date of possession by the owner or the date of the issuance of a certificate of occupancy, whichever is later.

However, an exception to this four (4) year limitation exists for defects which are latent. If the action involves a defect that is latent, the time frame within which an owner must file a claim runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. Therefore, the determination of whether a defect is considered latent is of extreme importance to both the owners and the developer being sued.

One particularly interesting case involving a latent defect is *SeaWatch*[36]. Seawatch Condominium consists of three five-story buildings that were constructed between 1981 and 1983. Certificates of occupancy were issued on February 19, 1982, April 12, 1982, and April 8, 1983. Control of the condominium association passed from the developer to the unit owners on August 10, 1985. The condominium association filed suit on May 13, 1988 against the developer, the general contractor, the manufacturer and supplier of the concrete and the manufacturer of the metal decking system; more than five years after the last certificate of occupancy was issued. The suit was based on the breach of implied warranties deemed to have been granted to the owners by Section 718.203, Florida Statutes. The condominium association filed the suit as the "lawful representative of the class of owners of parcels or units comprising the [c]ondominium". The owners alleged that damages were caused throughout the condominium by defective concrete and metal decking during construction. The owners alleged that the concrete supplied contained a high content of chloride causing the reinforcing steel embedded within the concrete to rust. This caused the concrete to crack, spall, delaminate and

break off. They alleged that these construction defects resulted in the cracking of the stucco surfaces, cracking of ceramic tiles attached to the concrete slabs and the seepage of rust-stained water onto automobiles parked below.

The court first determined that this case was governed by Section 718.203, Florida Statutes and, as discussed above, created a cause of action for breach of implied warranty of fitness in condominium construction. As noted above, the warranty established by Florida Statutes applies to defects that occur during the lifetime of the warranty; i.e. within three years of completion of construction of the condominium. The applicable law in Florida was stated by the court as follows:

> The law governing the right of condominium unit owners and associations to sue is set out in chapter 718, Florida Statutes (1987), and the time limits for filing suit are contained in chapter 95, Florida Statutes (1987).
>
> A. Rights of the Association
>
> Section 718.203, Florida Statutes (1987), creates a statutory cause of action for breach of implied warranty of fitness in condominium construction:
>
> 718.203 Warranties.-
>
> (1) The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:
>
> (a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.
>
> (e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or

a building, except mechanical elements *924 serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

2) The contractor and all subcontractors and suppliers grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:

(a) For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.

As noted in the statute, the right to exercise this implied warranty belongs to the unit purchaser, i.e., the unit owner.

A separate statutory section within the same chapter specifically grants to condominium associations the power to file lawsuits on behalf of the unit owners in matters of common interest:

718.111 The association.-

(3) POWER TO MANAGE CONDOMINIUM PROPERTY AND TO CONTRACT, SUE, AND BE SUED.-The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers.... After control of the association is obtained by unit owners other than the developer, *the association may institute, maintain, settle, or appeal actions or hearings in its*

name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities.... If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. § 718.111(3), Fla.Stat. (1987) (emphasis added). *See also* Fla.R.Civ.P. 1.221.

[1]Section 718.111's grant of power to associations to sue on behalf of unit owners is plainly and broadly worded and we see no reason to give this provision a cramped reading. Accordingly, we conclude that under the express provisions of chapter 718, the right to bring an implied warranty claim belongs to the unit owners, and this right may be exercised by the unit owners in the aggregate through their condominium association in matters of common interest.

A lawsuit based upon the defects alleged must be filed within the general time limits set out in Chapter 95, Florida Statutes. Because Chapter 95 limits the time for filing an action based upon the "design, planning or construction of an improvement to real property" to four years from the date of "actual possession by the owner" or "issuance of a certificate of occupancy" (whichever is later), the condominium association's suit would have been barred. The developers moved to dismiss the suit arguing that the statute of limitations had expired since the construction had been completed at least five years prior. The court held as follows:

B. Time Limits

[2][3] As noted in section 718.203 above, the guarantee established in that section applies to defects that occur during the lifetime of the warranty, i.e., within three years of the date of completion of construction of the condominium or improvement.[FN2] *Cf. Terren v. Butler,* 134 N.H. 635, 597 A.2d 69, 71 (1991) ("We do not construe the one-year life of the statutory warranty to be a statute of limitations or even a time limit on the delivery of effective notice. The one-year period describes the life of the duty, that is, the period during which breach may occur."). A lawsuit based on such a defect must be filed within the general time limits set out in chapter 95, Florida Statutes (1987). *See, e.g., Naranja Lakes Condominium No. 2, Inc. v. Rizzo,* 463 So.2d 378 (Fla. 3d DCA 1985) (suit for construction defects in condominium barred by section 95.11(3)(c), Florida Statutes (1981)); *Biscayne Roofing Co. v. Palmetto Fairway Condominium Ass'n, Inc.,* 418 So.2d 1109 (Fla. 3d DCA 1982) (suit for breach of warranty in condominium construction timely filed under section 95.11(3)(c), Florida Statutes (1975)).

FN2. The warranty also applies to defects occurring under certain other circumstances not relevant to our discussion here. *See* § 718.203, Fla.Stat. (1987).

*925 The chapter 95 limitations period for bringing an "action founded on the design, planning, or construction of an improvement to real property" is four years:

95.11 Limitations other than for the recovery of real property.-Actions other than

for recovery of real property 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 by the owner, [or] the date of the issuance of a certificate of occupancy ... whichever date is latest; 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. In any event, the action must be commenced within 15 years after the date of actual possession by the owner, [or] the date of the issuance of a certificate of occupancy ... whichever date is latest.

§ 95.11, Fla.Stat. (1987). Accordingly, a suit for breach of implied warranty under section 718.203 ordinarily must be filed within this four-year period.

[4] The legislature has further provided in chapter 718 that the running of the limitations period on suits filed by a condominium association is tolled until control of the association passes from the developer to the unit owners:

718.124 Limitation on actions by association.-The 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.

§ 718.124, Fla.Stat. (1987).

[5] The purpose of this tolling provision was explained in *Regency Wood Condominium, Inc. v. Bessent, Hammack & Ruckman, Inc.*, 405 So.2d 440 (Fla.

1st DCA 1981):

> [T]he obvious purpose of § 718.124 was to lengthen the limitations period for particular causes of action. Section 718.124 was intended to prevent a developer from retaining control over an association long enough to bar a potential cause of action which the unit owners might otherwise have been able and willing to pursue. To this end, the statute provides that an association's cause of action does not accrue until the unit owners have acquired control over the association.

Id. at 443.

> As noted above, chapter 718's tolling provision by its own terms applies to "any action[ ] in law or equity" filed by "a condominium association," and we conclude that this broad language embraces the implied warranty claims authorized in the same statutory chapter.

The court disagreed with the developer and the concrete supplier's position that the three year warranty was also a limit on the time for filing the claim as well (i.e. a statute of repose) and held that the "legislature has...provided in Chapter 718[124] that the running of the limitations period on suits filed by a condominium association is tolled until control of the association passes from the developer to the unit owners". Specifically, the court relied on the rationale of the court in *Regency Wood Condominium, Inc. v. Bessent, Hammock & Ruckman, Inc.,*[37], which stated:

> [T]he obvious purpose of Section 718.124 was to lengthen the limitations period for particular causes of action. Section 718.124 was intended to prevent a developer from retaining control over an association long enough to bar a potential cause of action which the unit owners might otherwise have been able

and willing to pursue. To this end, the statute provides that an association's cause of action does not accrue until the unit owners have acquired control over the association.[38]

In *Seawatch*, the condominium association was able to show that the concrete was defective from the time of installation because of its high chloride content and they were able to show that the defects were not known until receipt of an engineering report reflecting the results of testing of the concrete. Thus, the court determined that this defect was a latent defect. Chapter 95 provides an exception for latent defects. Once the court determined that the defect is latent, then the time to file suit begins to run "from when the defect is discovered or should have been discovered". Here the court determined that the association discovered the defect within four years of filing the suit. In its conclusion the court determined that the defect occurred within the three year warranty period, the association timely filed suit within four years from discovery, and thus the suit was timely.

C. CALIFORNIA LAW

Under California residential housing law[39], the statute of limitations for latent construction defects is ten (10) years from the completion of the development or improvement. Once a defect is discovered, (latent or patent) a shorter three (3) or four (4) year statute of limitations applies.[40] In 1995, the California Legislature passed the Calderon Act which requires common interest development associations to give notice to builders about construction defects before suing.[41] [42] The Calderon Act was based upon the former California Civil Code section 1375 which states, in part:

> (b)(3)(a) ...not withstanding any other provision of law, the notice by the association shall, upon mailing, toll all statutory and contractual limitations on

actions against all parties who maybe responsible for the damages claimed, whether named in the notice or not, including claims for indemnity applicable to the claim, for a period of 150 days or a longer period agreed to in writing by the association and the builder.[43]

The Calderon Act was later amended to extend the period to 180 days. The Calderon Act "promotes the goal of encouraging settlements, repairs and discouraging unnecessary litigation."[44] Therefore, courts have held that the provision applies to all parties that may be responsible for damages, whether they were included in the agreement or not, including subcontractors. Interestingly, courts have held that the Calderon Act neither limits when the agreement must be made nor what language the parties may use about the tolling period.[45] In the following case, the court held that the agreement was valid, although it was signed two years after the initial notice was provided in June of 1996. The agreement did not have to be signed within the 150 (now 180) days after giving notice to the builder.[46] Additionally, the court held that although the agreement was not signed until 1998, the tolling period extends retroactively back to 1996.[47]

In one California case[48], a condominium association filed a claim for construction defects against multiple contractors and subcontractors. The condominium consists of apartments that were converted to 261 condominiums in 3-story buildings. Between 1990 and 1996, the apartments were converted to condominiums. The condominium association assumed management of the association in July of 1995 and assumed voting control of the board in June of 1996. It then discovered a series of construction defects. In June of 1996, the association gave notice that it was proceeding under the Calderon Act. During the period between providing notice under the Calderon Act and filing suit, the association attempted to negotiate a resolution

with the developer. Although the association provided notice in 1996, it did not sign an agreement until 1998. In March of 2000, the condominium association filed a construction defect suit against 35 contractors and subcontractors alleging causes of action for negligence, nuisance, and breach of implied warranties. In this case, water was seeping in between the newly constructed walls and the original construction. This caused water intrusion and dry rot damage. Through the testimony of various experts, it was determined that some framing work was defective. The construction experts determined that the developer should have used metal clips to structurally tie the upper plates into the walls, rather than the nails it used to create a "nail ledger". The nails were considered to create an inadequate structure for the purpose of making the area water tight. As noted above, although the association discovered various construction defects in 1996, it did not file suit against the developer until March of 2000. The defendants argued that: (i) the statute of limitations began running on November 25, 1996 (150 days after the association gave notice under the Calderon Act); the association had until November 25, 1999 to file suit; however, it did not file until March of 2000 and therefore the association's suit was untimely.

The court rejected this argument and went on to state that, tolling aside, because the association could not have discovered the latent construction defects until 1997, the filing was still timely, thus rejecting the developer's statute of limitations defense. The court stated that knowledge of obvious defects does not mean the homeowners had either the access or ability to detect other deficiencies hidden in multiunit areas.

Additionally, the court noted that contractors must use reasonable skill and judgment when constructing a building. One defendant in this case contended it was exempt from liability because it followed the plans for constructing the project. However the court found that the

defendant was negligent because it did not secure a "water tight connection between newly constructed and the original construction." The plans did not detail how the defendant was to attach the structures; however, the court held that one could reasonably infer that it was the defendant's responsibility as a contractor. The court stated that the defendant is "not exempt from liability for defective work because it had a duty implied by law to make sure that it did not damage the condominium complex.[49]

D. NEW YORK LAW

A cause of action for implied warranty for new homes also exists statutorily in New York. General Business Law Article 36-B, Section 777-a, in part, states:

1. [A] housing merchant implied warranty is implied in the contract or agreement for the sale of a new home and shall survive the passing of title. A housing merchant implied warranty shall mean that:
    a. One year from and after the warranty date the home will be free of construction defects due to a failure to have been constructed in a skillful manner;
    b. Two years from and after the warranty date the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner; and
    c. Six years from and after the warranty date the home will be free from material defects.
2. However, unless the contract or agreement by its terms clearly evidences a different intention of the seller, this housing warranty does not extend to:

a. Any defect that does not constitute (i) defective workmanship by the builder or by an agent, employee or subcontractor of the builder, (ii) defective materials supplied by the builder or by an agent, employee or subcontractor of the builder, or (iii) defective design provided by a design professional retained exclusively by the builder; or

b. Any patent defect which an examination ought in the circumstances to have revealed, when the buyer before taking title or accepting construction as complete has examined the home as fully as the buyer desired, or has refused to examine the home.

The statue requires that the owner must provide notice of its claim as a condition to the commencement of suit. It states:

4.a. Written notice of a warranty claim for breach of a housing merchant implied warranty must be received by the builder prior to the commencement of any action under paragraph b of this subsection and no later than thirty days after the expiration of the applicable warranty period...The owner and occupant of the home shall afford the builder reasonable opportunity to inspect, test and repair the portion of the home to which the warranty claim relates.

b. An action for damages or other relief caused by the breach of a housing implied warranty may be commenced prior to the expiration of one year after the applicable warranty period, as described in subdivision one of

this section, or within four years after the warranty date, whichever is later.

The following case provides an example of how this statute would apply to a claim of implied warranty. In *Finnegan v. Brooke Hill, LLC*[50], individual unit owners in a condominium complex brought an implied warranty suit against the developer alleging breach of the housing merchant implied warranty. The unit owners closed on title to their respective units in 1999. They later found alleged defects in the common elements in the buildings and, on February 14, 2005, served notices of claim of breach of the housing merchant implied warranty. The notice was served within 6 years of the "warranty date". The unit owners alleged that General Business Law Article 36-B, Section 777-a (1)(c) applied, and thus contended that its six year statute of limitations period was applicable. The court however disagreed and held that the defects alleged in the complaint did not relate to any "major structure" and that they do not "affect the building(s) load bearing functions to the extent that any of the plaintiff's units became unsafe, unsanitary" or uninhabitable.[51] Therefore, the court found that the unit owners would have to avail themselves of either the one or two year warranty, thus rendering the notices of claim untimely. Since the notices were served more than two years after the expiration of the "warranty period" the notices were untimely. The court also dismissed all of the warranty claims finding that the statute excludes "all other...warranties".

E. TEXAS LAW

In one Texas case[52], a condominium association brought suit against the contractors for construction defects in the condominium building and garage in 1993. The construction of the condominium was substantially completed in 1981. The building sustained damage from Hurricane Alicia in 1983. Both before and after the hurricane, the building had water leaks in

the roof, windows and around the precast concrete walls. The condominium association claimed that the leaks and resulting damage were the result of defective construction. The condominium owners' suit alleged negligence, breach of implied warranties and violation of the Texas Deceptive Practices-Consumer Protection Act ("DTPA").[53] Negligence and DTPA have two (2) year limitation periods, and breach of warranty is governed by the four year statute of limitations.[54] The condominium association contended that the construction defects were latent defects. They alleged that although they were aware of leaks in the condominium in 1982, they were unable to discover that construction defects were the cause of those leaks. They did not discover the actual cause of the leaks until 1990 when they hired an expert to determine the cause and extent of the damage. The association contended that the statute of limitations was tolled until it discovered the cause of the leaks. The condominium association specifically claimed that there were latent defects in precast concrete siding used in the construction of the condominium. It contended that it could not have discovered the defects in the panels until the 1990 expert inspection. The association contended that the concrete was not of the correct mix and the structural steel was incorrectly placed, which left the structure unstable. It argued that "because of improper caulking of the panels and placement of the steel rods in the panels, the rods rusted and expanded, causing pieces of concrete to break off."[55] However, the court noted that there was a previous investigation by the insurer of the condominium after Hurricane Alicia. The insurance company refused to cover the costs of all repairs because it believed some of the damage had been caused by construction defects, not just the hurricane. According to the court, the general rule for a tort action in Texas is:

> that it accrues when the tort is committed, notwithstanding the fact that the full range of damages are not ascertainable until a later date. A party need only be

> aware of enough facts to apprise him of his right to seek judicial remedy...When applied, the discovery rule operates to toll the running of the period of limitations until the time that the plaintiff discovers, or through the exercise of reasonable care and diligence should have discovered the nature of his injury. The discovery rule imposes a duty on the plaintiff to exercise reasonable diligence to discover facts of negligence or omission. The discovery rule applies in cases where the injured party did not and could not know of its injury at the time it occurred, that is, when the injury is inherently undiscoverable.[56]

The condominium association argued that "limitations should have been tolled until it had an opportunity to discover not only the cause of the defects, but also the parties responsible."[57] However, the court held that the association's suit was barred by the statute of limitations because it is the discovery of the injury (the leaks) and not the discovery of all the elements of a cause of action that starts the running of the clock for limitations purposes.

In another Texas case,[58] the statute of limitation applicable under DTPA began to run on the date purchasers first discovered multiple leaks in their pipes. According to the court, the purchasers were aware of the fact that there was a serious problem with many of the pipes in the house, despite the fact that it was months later that a claims adjuster examined the pipes and alerted the owners to the extent of the damage to the house. The court dismissed the claims stating that it does not matter that the owner may not be able to determine the total amount of damages when determining limitations period.

In another Texas case[59], limitations period began when the plaintiffs first noticed cracks in the sheetrock and bricks pulling loose, even thought they did not hire an expert to investigate the foundation problems until over five years later.

VIII. DEFENSES TO CLAIMS OF BREACH OF IMPLIED WARRANTY

A developer may defend a claim of breach of implied warranty of fitness by asserting that the claim is barred by the statute of limitations. Additionally, a determination by the court that a defect is not latent significantly shortens the period of time during which an owner may bring a cause of action. A developer may also assert that an owner failed to maintain the property or that the defect is a result of ordinary wear and tear to the property.[60]

XIV. CONCLUSION

Today, many developers are large, financially and legally insulated corporations and they leave little contractual negotiating room for a purchaser. As a result, legislators and courts have significantly eroded the concept of caveat emptor and increasingly held the developer liable for construction defects, sometimes many years later. As seen in the cases covered here today, it is entirely up to the court to determine whether a defect is latent, and, as noted, if a defect is considered latent, it can extend the tolling period for a construction defect claim significantly for the purchaser. This can result in a developer being held liable long after they have completed the project and turned over control to the owner or to the association.

It is important for developers and their respective attorneys to be aware of the methods by which an owner may assert a claim for construction defects, and in turn, how to best defend such a claim. Similarly, owners must take responsibility for examining their property and immediately contacting the developer, with the appropriate notice, if necessary, regarding any problems or potential defects they may encounter. Many statutes (such as the one in New York, California and Florida) require owners to allow a period of time for the developer to remedy the problem. Courts also encourage (and look favorably on) parties who attempt to negotiate a

resolution to the dispute, by having the developer repair the damage, or by negotiating a settlement outside of court.

Although laws will obviously vary by state, the points here should generally apply in most cases and can be used as a guide on how to protect yourself, whether you are a developer, owner, or attorney representing either party.

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[1] BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

[2] For a history of the doctrine, see Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931).

[3] *See* Annot., *Liability of Builder-Vender or Other Vendor of a New Dwelling for Loss, Injury, or Damage Occasioned by the Defective condition Thereof,* 25 A.L.R. 3dd 383 (1969). [hereinafter cited as *Liability*]

[4] *Goggin v. Fox Valley Construction Corp.*, 48 Ill. App. 3d 103, 365 N.E. 2d 509 (1979).

[5] *Id.* at 106, 365 N.E. 2d at 511.

[6] *Pollard v. Saxe &Yolles Development Co.*, 12 Cal. 3d 374, 525 P.2d 88 (1974).

[7] *Id.* at 380.

[8] F.S. 718.203.

[9] N.Y. BUS. LAW ART. 36-B §777-a.

[10] *See generally Liability, supra* note 4.

[11] In one Florida case, owners alleged that damages were caused to their buildings (both condominiums and homes) by defective concrete supplied by the defendant during construction. The owners alleged that the concrete supplied contained a high content of chloride, causing the reinforcing steel embedded within the concrete to rust. This caused the concrete to crack, spall, delaminate and break off. The owners sued under a negligence theory. The court held that the

supplier could not be held liable under tort law because its product did not cause personal injury or damage to any property other than itself. Rather, the court determined that the owners could only recover under the economic loss rule. Economic loss is defined as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property." In this case, the court reasoned that the concrete did not damage "other property", despite the cracking concrete, because buyers were purchasing a completed dwelling, not the individual components comprising of the structure. Additionally, the court noted that potential injury from the falling concrete was insufficient to meet the requirement that an injury must occur before a negligence action exists. *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 642 So.2d 1244 (Fla. 1994). *Casa Clara* has been effectively overruled by *Indemnity Insurance co. of North America v. American Aviation, Inc.*, 344 F.3d 1136 (11th Cir. 2003); 891 So. 2d 532 (Fla. 2004). In this case, the owner of a damaged aircraft and its insurer appealed the dismissal of their tort claims against the mechanics firm that had serviced the aircraft prior to its sustaining damage, which the trial court held to be barred under the economic loss rule. The plaintiff filed four causes of action based on the negligent maintenance and inspection of the aircraft's landing gear. As a result of the defendant's failure to maintain the aircraft properly, the plaintiff argued that the landing gear failed to extend, thereby causing severe damage to the plane during landing. The court analyzed the application of the economic loss rule in *Casa* Clara and *Moranais v. Heathman*, 744 So. 2d 973 (Fla. 1999), among other cases. In *Moranais*, the court held that the economic loss rule did not preclude actions for professional negligence despite the lack of direct contract between the parties. The court provided a lengthy analysis of actions in tort for economic damages founded in products liability law, warranty law, and the evolution of the

negligence standard of reasonable care into the doctrine of strict liability. The court held that a "manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself." The court also reiterated that the economic loss rule does not apply to causes of action in tort, when the defective product causes damages to other property or causes personal injury. The court's rationale for its products liability analysis is that warranty law is more appropriate than tort law for addressing economic damages. The court then certified five questions to the Supreme Court of Florida. The Supreme Court accepted certification and rephrased and joined the first two certified questions as follows: "Whether the economic loss doctrine bars a negligence action to recover purely economic loss in a case where the defendant is neither a manufacturer nor a distributor of a product and there is no privity of contract." The court declined to address the remaining questions. The court rephrased the question in the negative and concluded: "...the economic loss rule bars a negligence action to recover solely economic damages only in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product...". The court held that the case did not fall within either the contractual privity economic loss rule or the products liability economic loss rule, and therefore, the case should be decided on the traditional negligence doctrine.

[12] In a California case, homeowners asserted that two window manufacturers had designed and manufactured defective windows that were installed in their homes and that the defects caused damage to the stucco, insulation, framing, drywall, paint, wall coverings, floor coverings, as well as other parts of their homes. The court considered whether the economic loss rule applied or whether the homeowners could recover in tort. The manufacturer argued that the window was not a separate product, but rather, the entire house was the product and thus, any damage cause to

other parts of the house was simply damage to the product itself and the economic loss rule should apply. The court disagreed, citing another case in which a builder was held liable in tort for damages a defective foundation caused to a home. The court noted that "California law has long recognized that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product (e.g., a window) causes to other portions of a larger product (e.g., a house)." Thus, the court concluded that the manufacturer may be held strictly liable in tort for damage that the window's defect caused to other parts of the home. *Jimenez v. Superior Court,* 29 Cal. 4th 473 (2002).

[13] In a Texas case, homeowners sued the builder of their home because the house they were promised and paid for was not the house they received. In the lower court, the jury found that the builder "breached the warranty of good workmanship...and was grossly negligent in the supervision of the construction of the house and awarded the homeowners actual damages as well as exemplary damages. The Superior Court noted that "when the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." Thus, the court concluded that the homeowners injury could only be characterized as "a breach of contract, and breach of contract cannot support recovery of exemplary damages." *Jim Walter Homes, Inc. v Reed,* 711 S.W. 2d 617 (1986).

[14] In a New York case, a manufacturer of an allegedly defective component of a generator was sued for damages the defective part caused to the generator and "to adjacent generators, floors, ceilings, furniture and other items of real and personal property on the floor in which the generators were situated." The manufacturer argued that New York law did not allow for tort-based recovery for purely economic losses, stating that they are contractually based. However, the court concluded that the other generators, floors, etc. were "other property" and thus, a tort-

based may be permitted. *Arkwright Mutual Insurance Co. v. Bojoirve, Inc. v. Woodward Governor Co.*, No. 93 Civ. 3068, WL 361535 (S.D.N.Y. 1996).

[15] *Fisher v. Simon,* 15 Wis. 2d 207, 112 N.W. 2d 705 (1961).

[16] *Campbell v. Rawls,* 381 So. 2d 744 (Fla. 1st DCA 1980); *Milu, Inc. v. Duke,* 204 So. 2d 31 (Fla. 3d DCA 1967); *Meyers v. Antone,* 227 A.2d 56 (D.C.App. 1967); *Davis v. Tazewell Place Associates,* 254 Va. 257 (1997); *Russ v. Lakeview Development,* 133 N.Y.S.2d 641 (N.Y. App. 1954); *Mills v. Richmond Co., Inc.,* 56 Cal. App. 774 (P.2d 1922). .

[17] Florida does not allow a disclaimer of implied warranties. *See* F.S. 718.203(1) which states "the developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability...". By negative implication, this statute permits the disclaimer of other warranties, whether express or implied. New York law similarly creates an implied warranty. *See* N.Y. BUS. LAW ART. 36-B §777-a which states "...a housing merchant implied warranty is implied in the contract or agreement...and shall survive the passing of title."

[18] *Adobe Building Centers, Inc. v. Reynolds,* 403 So.2d 1033 (Fla. 4th DCA).

[19] At the time of the trial, one of the plaintiffs held title to a home with defective stucco. The remaining plaintiffs had extended express warranties to the home buyers and thus were required to remedy the defective stucco. *Id.* at 1033.

[20] *Id.* at 1034.

[21] This case may not be controlling law in Florida. It was distinguished by the court in *Casa Clara,* 642 So.2d 1244.

[22] In a New Jersey case, an infant received severe scalding when he came in contact with excessively hot water drawn from the bathroom sink, resulting in the infant spending seventy-four days in the hospital. The developer installed a heating system which produced water

ranging in temperature from 190 degrees upward. The manufacturer of the heating system cautioned the developer that "mixing valves", costing under $10, should be installed to mix cold water into the hot water to reduce the water temperature to a safer 140 degrees prior to the water being transported to the faucets. However, the developer ignored this advice and simply distributed a Homeowner's Guide stating "You will find the hot water in your Levittown home much hotter than that which you are accustomed...We have provided at each fixture, mixing type faucets...The proper procedure at any faucet is to first open the cold water tap part way, and then turn on the hot water." The court held that the developer could be sued under a theory of strict liability. *Schipper v. Levitt & Sons, Inc.* 44 N.J. 70 (1965). *See also, supra* note 12.

[23] *Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard Architects/Planners, Inc.*, 417 So. 2d 703 (Fla. 2d DCA 1982).

[24] 837 So. 2d 579 (Fla. 5th DCA 2003).

[25] Id. at 394.

[26] *Conquistador Condominium VIII Ass'n, Inc. v. Conquistador Corp.*, 500 So. 2d 346 (Fla. 4 DCA 1987).

[27] *Id.* at 347.

[28] 417 So. 2d 703 (Fla. 2d DCA 1982).

[29] *Havatampa,* 417 So. 2d at 704.

[30] *Id.*

[31] 547 So. 2d 626 (Fla. 1989).

[32] *Almand,* 547 So. 2d at 628.

[33] 815 F. Supp. 444 (S.D. Fla. 1992).

[34] *City of Fort Lauderdale,* 815 F. Supp. at 444.

[35] Section 718.203 (2)(b)(3) defines "Completion of a building or improvement" as issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

[36] *Seawatch at Marathon Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 658 So. 2d 922 (Fla. 1994).

[37] 405 So. 2d 440 (Fla. 1st DCA 1981)

[38] *Seawatch,* 658 So. 2d at 925 (Fla. 1994).

[39] Code Civ. Proc., §§ 337, 338

[40] Code Civ. Proc., § 338

[41] *El Escorial Owners' Ass'n, v. DLC Plastering, Inc.*, 154 Cal. App.4 1337 (Cal. 4 DCA 2007).

[42] Florida law requires residential owners follow a similar pre-suit notice procedure. Florida Statute § 558.004 requires that a residential owner serve notice on the contractor, subcontractor, supplier or design professional at least 120 days before filing an action (on residences containing more than 20 parcels; residences comprising of 20 parcels or less require notice be served at least 60 days prior to filing an action).

[43] Former Civ. Code § 1375, subd. (b)(3)(a).

[44] *El Escorial,* 154 Cal. App. 4 at 1344 (Cal. 4 DCA 2007).

[45] *Id.* at 1355.

[46] *Id.* at 1357.

[47] *Id.* at 1355.

[48] *Id.* at 1344.

[49] *Id.* at 1358.

[50] *Finnegan,* 38 A.D. 3d 491 (2007).

[51] *Id.* at 492.

[52] *Bayou Bend Towers Council of Co-Owners v. Manhattan Construction Co.,* 866 S.W. 2d 740 (Tex. App. –Hous. [14th Dist.] 1993).

[53] *See* TEX. BUS. & COM. CODE ANN. §17.41-63 (Vernon 1987 &Supp. 1993).

[54] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§16.003(a); 16.004(a) and 16.051 (Vernon 1986); TEX. BUS. & COM. CODE ANN §17.565 (Vernon 1987).

[55] *Bayou,* 866 S.W. 2d at 745 (Tex. App. –Hous. [14th Dist.] 1993).

[56] *Bayou,* 866 S.W. 2d at 742 (Tex. App. –Hous. [14th Dist.] 1993).

[57] *Id.* at 743.

[58] *Tenowich v. Sterling Plumbing Co.,* 712 S.W. 2d 188 (Tex. App.-Houston 14th Dist. 1986).

[59] *Polk Terrace, Inc. v. Curtis,* 422 S.W. 2d 603 (Tex. Civ. App. 1967).

[60] *See* F.S. 718.203(4) which states that the implied warranties of fitness and merchantability in this section are "conditioned upon routine maintenance being performed…".