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Law in Hand

TICKING TIME BOMBS: CONSTRUCTION DEFECT STATUTES OF LIMITATIONS

From community managers to landscape contractors, everyone seems aware of the importance of California's ten-year statute of limitations when it comes to evaluating the possibility of pursuing a lawsuit for construction defect claims.

The statutes of limitations act as an absolute bar to construction defect claims. If a lawsuit has been filed ten years after the substantial completion of an improvement or development, then a dismissal of the lawsuit will result. However, due to other statutes of limitations that apply to construction defect claims, the ten-year statute is not the only law that should be relied upon. Other statutes of limitations are three and four years long.¹ Depending on the facts and circumstances of each case, these statutes can seriously impede or altogether prevent recovery for construction defect damages. The clock on these statutes can be stopped or "tolled" in certain circumstances. The following is a discussion of each statute and its application.

Four-Year Patent Defect Statutes of Limitations

Injury to property (also known as property damage), personal injury and wrongful death caused by a defect that is "patent" is subject to a four-year statutes of limitations in California.² The word "patent" simply means the defect is clearly visible or visible upon "reasonable inspection." This four-year statute of limitations, similar to the ten-year statute, runs from the time of substantial completion of construction.

¹ The standards for original construction set forth in California Civil Code §896 may also have application. Consult your attorney for further information.

²California Civil Code of Civil Procedure §337.1

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The question of whether the construction defect is "latent" (hidden) or patent is one of fact. Accurate records should be kept regarding when a patent or latent defect was first discovered. If the defect was not visible until two years after construction was completed, most courts would start the clock on the four-year statute from the time of discovery. In doing so, the court may shift the burden of proof and require the association or homeowner to provide evidence that the defect was not discoverable until that later date.

Three-Year Statute of Limitations for Injury to Real Property

Because this statute of limitations is the shortest, it is important to pay attention to the time that goes by once any construction defect is discovered. This three-year statute of limitations begins to run once "the damage is sufficiently appreciable to give a reasonable person notice that he has a duty to pursue his remedies."³ In the eyes of the court, this means discovery of the defect and an understanding of the cause of the defect. This statute of limitations is of particular importance because recovery of damages under this statute provides the broadest and most easily obtained measure of damages available. Under the law, this "tort" recovery includes "all detriment proximately caused thereby, whether anticipated or not;" except that attorneys' fees are typically not recoverable.

Negligence, strict liability, misrepresentation and fraud are all "tort" causes of action. Since these are primary means of recovery in a construction defect suit, it is extremely important to be mindful of the timeframe once a construction defect has been detected. If the three-year statute expires once a defect has been detected, the defendant (e.g. builders, contractors or subcontractors) can challenge the defect, and the recovery of damages for a time-barred defect may be lost.

Four-Year Statute of Limitations for Breach of Contract in Writing

Claims for breach of contract, when the contract is in writing, are subject to a four-year statute of limitations.⁴ However, this statute may provide limited or no relief to win on a breach of contract action unless there is a contract between the plaintiff and defendant. There must also be a material term in the contract that has been breached by the existence of construction defects.

The measure of damages is less extensive in a breach of contract action than a tort cause of action. Damages are limited to those which were likely to result from the breach and must be "clearly ascertainable." However, if a breach of contract action survives and the contract contains a provision awarding attorneys' fees arising from a breach, attorneys' fees may be recovered as part of the claim.

When construction defects breach the "implied warranty of habitability" in the home sales agreement, attorneys may be able to pursue recovery for a breach of contract. A warranty of habitability is implied by law into every contract for sale or lease of residential property in California. Although there is no appellate decision directly on point regarding construction

³ California Civil Code of Civil Procedure §338

⁴ California Civil Code of Civil Procedure §337. Note §339 governs breaches of oral contracts which have a two-year statute of limitations.

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defect claims, such a claim may succeed in the right instance. Given that most construction defect claims are resolved before trial and few trial judgments are appealed, all meritorious legal theories should be exercised.

The Water Stain Example

This example illustrates how some of the previously discussed legal principles apply to a typical construction defect claim.

Mrs. Smith notices a yellowish water stain in the drywall ceiling of her home after a February rainstorm. Suspecting the cause is a roof leak, she calls the property manager who tells her proposals are being gathered from roof maintenance contractors who will inspect and make maintenance-related repairs on all roofs. Mrs. Smith waits patiently as the board of directors selects a contractor and begins repair to her building in late March. Mrs. Smith is notified that the roof is repaired.

Following a surprise rain shower in April, the water stain triples in size. After notifying the property manager, who notifies the roofer, Mrs. Smith is told that the stain is not caused by a roof leak. Mrs. Smith calls a handyman to diagnose and hopefully correct the problem. The handyman comes out at the beginning of May and finds out that the air conditioning condensation line terminates in the attic and has been dripping onto the ceiling. Not only is the drywall damaged, the water has caused dry rot to the framing members. The handyman notifies Mrs. Smith of the problem.

This is the last straw for Mrs. Smith, who has other construction problems. She joins other unhappy neighbors to begin looking for an attorney. However, the four-year anniversary from the time of construction was in February. Can she include this item and the damage it caused within the statute of limitations? The answer is yes. This is not an obvious defect. Although the damage was obvious, the cause was not. The damage wasn't obvious from time of construction and the defective cause was discovered following reasonable investigation. This item should be characterized as a latent defect. Therefore, Mrs. Smith has ten years from completion of construction and three years from the time of her discovery of the cause of the stain to file for obtaining a "tolling agreement" from the developer prior to repairs being made. This type of agreement states that the statute of limitations against the developer will stop running for the period of time that the developer is making repairs.

Stopping the Clock

A number of circumstances exist that stop the applicable statute(s) of limitations from running out. If there are circumstances under which it is unjust to apply the statute of limitations against a plaintiff, the court may find that the statute was tolled (stopped for a period of time). The amount of tolled time will depend on the facts and principles of fairness. Usually, this is due to an act on the part of the defendant. Examples include the following:

- The developer promised to make repairs over a period of time and did not.
- The developer made repairs that proved to be inadequate or didn't correct the defective cause of damage.

- The developer was in control of the homeowners' association for some period of time.
- The developer actively concealed or misrepresented the nature or cause of construction defects.
- The developer made a promise to "work it out" with the association or homeowner and did not.

Although the previous examples may seem rather clear-cut, sometimes the facts are ambiguous. When the developer makes repairs and the same problems resurface later, or worse, new problems arise, it may be difficult to determine whether these were original defects or new defects caused by defective repairs. This is a good reason for obtaining a "tolling agreement" from the developer prior to repairs being made. This type of agreement states that the statute of limitations against the developer will stop running for the period of time that the developer is making repairs. Please note that rarely, if ever, can the 10 year statute of repose be tolled.

Another example is in an apartment to condominium conversion. Some developers intentionally wait for a number of years to pass before conversion to condominiums in order to run the time out on construction defect claims. Tolling agreements can be helpful, but the best defense against the statute of limitations is timely investigation and action.

Conclusion

Do not ignore the possibility of construction defects in the communities you manage or live in. If you believe there might be problems, don't ignore your suspicions. The expense, inconvenience, and frustration that come with a construction defect lawsuit against the builder is minor compared to a lawsuit naming you as a defendant. When construction defects are realized, but it is too late to seek redress, the homeowners and association will share in the decrease of property values until they can afford to repair them. Due to stringent disclosure law, it is increasingly unlikely that the existence of construction defects can be undisclosed and unremedied without serious repercussions.

Be proactive, seek legal advice and seek information from the homeowners in the association. Consulting a construction defect attorney, at no obligation, regarding your concerns might prove to be the wisest course of action. Plenty of options exist, but ignoring construction defects should not be one of them.

If you think you have potential construction defects, contact Burdman & Ward for a free, no obligation inspection with a licensed contractor.

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