The Case Against Strict Enforcement of Statutes of Limitations in Community Association Latent Construction Defect Actions

By: SAMUEL J. MCNULTY, ESQ.
HUESTON MCNULTY & MUELLER, P.C.
FLORHAM PARK and TOMS RIVER, NEW JERSEY

I. INTRODUCTION

Each state has enacted limitations on when a plaintiff may commence an action based upon various legal theories.[1] The goal of these statutes of limitation is to discourage the prosecution of stale claims, when the memories of witnesses may have dimmed and relevant documents may be unavailable. In certain types of cases, the determination of when the statute has run, i.e., whether the case was timely filed, is rather straightforward. In such cases, summary disposition without discovery and without a plenary hearing is appropriate. However, the author argues in this article that latent construction defect cases involving community associations should be treated differently by the courts and by legislatures.[2] The fiduciary relationship existing between the association and the developer and the nature of latent construction defects justifies an exception to the general rule of summary disposition.[3] This article will seek to advance the concept that in latent construction defect

cases involving community associations the question of timely commencement of the action should properly be resolved only after facts are determined through limited discovery and through a plenary hearing.

II. STATUTES OF LIMITATION AND REPOSE/ TOLLING AND ACCRUAL ISSUES - AN OVERVIEW

A. Accrual of a Cause of Action

Generally, a cause of action accrues on the date of occurrence of the accident or other happening which causes damage, whether personal or to property.[4] Various theories allow a plaintiff's cause of action to be saved, despite the apparent filing of the complaint after the passage of the legislatively allowed time for the commencement of the action. When confronted with a motion to dismiss or for summary judgment based upon the affirmative defense of statute of limitations, a plaintiff may allege that the limitations period has been "tolled" or that by operation of the "discovery rule" the accrual of the cause of action has been assigned a later date than that urged by the moving party.

"Tolling" of the statute of limitations suspends time during a condition or disability which would prevent the

filing in a timely fashion, such as based upon the infancy, insanity, imprisonment of the plaintiff or the absence from the jurisdiction of the defendant.[5] The State of Florida provides a statutory tolling for condominium associations until control of the board passes from the developer to the association.[6] This statutory provision has been held to extend the period in which the association might assert claims for breach of statutory implied warranties for damage to condominium common elements.[7] The "discovery rule" on the other hand is a rule of equity which provides that "in an appropriate case a cause of action will be held not to accrue until the injured party discovers or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.[8]

The "discovery rule" has been primarily analyzed through the years in the context of medical malpractice cases and in product liability cases.[9] In certain situations, such as where "mental state" is in question, it is generally accepted that limited discovery and a plenary hearing are appropriate to decide the proper application of the discovery rule.

In New Jersey, in 1973, the Supreme Court established the procedure for determining whether the "discovery rule" applied to a medical malpractice case.[10] The court held

> *[I]n each case the equitable claims of opposing parties must be identified, evaluated and weighed. Where, as is often the case, they cannot be wholly reconciled, a just accommodation must be reached. We think this can better be done by a judge than by a jury. In the first place the question as to the application of the statute of limitations is ordinarily a legal matter and as such is traditionally within the province of the court. Furthermore, submission of the issue to the jury is in every sense awkward. It is true that the time of discovery is a question of fact, and so could be left to a jury. But. . . the matter does not rest there. It is not every belated discovery that will justify an application of the rule lifting the bar of the limitations statute. The interplay of the conflicting interests of the competing parties must be considered. The decision requires more than a simple factual determination; it should be made by a judge and by a judge conscious of the equitable nature of the issue before him.*
>
> *The determination . . . should ordinarily be made at a preliminary hearing and out of the presence of the jury. Generally, the issue will not be resolved on affidavits or depositions since the demeanor may be an important factor where credibility is significant. Where credibility is not involved, affidavits, with or without depositions, may suffice. . . All relevant facts and circumstances should be considered. The determinative factors may include but need not be limited to: the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest on the party claiming the indulgence of the rule.*[11]

It is the "discovery rule" which plays an important role in community association latent construction defect actions. The fundamental concern must be the "equitable nature of the

issue." However, only one state, California, recognizes the difference between a patent and a latent construction defect and provides a claimant additional time to file when the defects are discovered in the last year permitted for the action.

B. Invoking the Defense of Statute of Limitations

Generally, statutes of limitations have been held to be affirmative defenses which must be pleaded to be preserved. They are not self-executing.[12] Accordingly, in many jurisdictions it is an accepted defense to be raised prior to the filing of an answer by the defendant.[13] It may be raised by way of motion to dismiss the complaint without reference to any facts via affidavits or certifications outside of the face of the pleadings. Moreover, where a defendant seeks to rely upon matters which are not set forth on the face of the complaint, the motion to dismiss is converted by operation of rule to a summary judgment motion.

The standard in many jurisdictions under summary judgment motions is similar to the federal standard and allows the motion judge to determine whether as a matter of law any reasonable jury could disagree as to the disputed facts and to resolve those issues.[14] It is therefore within the discretion of the court to dispose of a cause of action

without the plaintiff having been permitted to conduct any discovery or for the court to have assessed the credibility of witnesses.

In appropriate cases, the mechanical application of the statute of limitations as a rule is appropriate. The court is free to hold in effect "If A is true, then X shall be the result". For example, in an automobile accident case based upon tort theories, the court would be free to determine when the accident took place and when the complaint was filed to assess whether the plaintiff filed the action within the time period allowed by that particular state's statute of limitation.

However, there are accepted situations where the inquiry of the court will not be as straightforward and rule-like as the example set forth above.[15] Generally, a court would be justified in deciding simple factual determinations where obvious events triggering liability are involved in a "rule-like" manner. However, the application of a standard, i.e., the application of judicial discretion is generally accepted where the action involves a special relationship of the parties; complex subject matter; complex causation issues; misrepresentation and where the mental state of parties is in issue. It is the author's contention that the determination

of latent construction defects involving community associations should be added to this latter category.

III. APPLICATION OF THE DISCOVERY RULE IN COMMUNITY ASSOCIATION LATENT CONSTRUCTION DEFECT CASES

A. Latent vs. Patent Construction Defects.

A patent construction defect has been defined by one legislature as "one such as is apparent by reasonable inspection." [16] "Latent" is defined as:

> *hidden, dormant, but capable of being developed; present, but not seen until some change occurs.*[17]

For the purposes of this article, any construction defect or deficiency which is not apparent to an engineer on a visual inspection of the common elements of a condominium is considered a latent construction defect.

The "discovery doctrine," has long been used in construction defect actions to prolong the statutory period provided by state legislatures for the commencement of civil actions. The underlying concept of this doctrine is based upon fairness and equity, i.e., that the plaintiff is the

unknowing victim of a wrong committed by one in a superior position of knowledge.

However, in the context of community association construction defect actions, courts recognize that the property owner, the community association, is oftentimes represented by engineers, attorneys, architects, consultants and others who can provide the expertise that the single property owner otherwise would not have. They also recognize that many community associations have engineering inspections at or near the time of transition. Moreover, the courts recognize and apply the legislative goal of statutes of limitations, i.e., predictability and the provision of a reasonable cut-off date beyond which developers no longer need be concerned about litigation. These facts taken together with the prevailing concern by courts about overcrowded civil dockets has led to an apparent eagerness on the part of some courts to dispose of cases involving statute of limitations issues in a summary fashion. The "underlying concept" of the discovery doctrine then is many times used against the association and the distinction between a patent construction defect and a latent construction defect is blurred or ignored.

The question of whether a community association alleging construction defects filed its action in time is often the threshold and dispositive issue in the case. However, many jurisdictions consider such determinations to be proper for summary judgment disposition, allowing discovery and plenary hearing only when the mental state of a party is in issue. There is no established case law, rule or statute which differentiates between a patent and latent defect. The trial court's inquiry is often limited to affidavits and briefs.[18] Accordingly, the disposition of latent construction defect cases on such undeveloped records does nothing to increase the perception by the public of fairness in the judiciary or legislature.

B. Special Relationship Between Developer and Association

The director or trustee of a community association, like the director of a business corporation, is a "fiduciary."[19] The fiduciary status, condensed to its essence, entails "a duty to act for the good of others rather than for one's own benefit."[20] Generally, the trustee of a community association is granted specific duties and powers under either the master deed or declaration and bylaws of the community association.

It has been opined that the directors "stand to the members almost in the position of full trustees."[21] On the

other hand, in discussing the degree of care which the directors must exercise, it has been argued that "part-time voluntary servants" such as the directors of a nonprofit corporation should not be held to the high standard "applicable to a man who is running his own business."[22] The question then becomes whether the developer who is 'running his own business' and is simultaneously serving on the board of trustees of a community association should be held to a higher or to a lower standard of care than the volunteer member of the board of trustees.

The developer of a community association generally controls the actions of the board of trustees until a predetermined percentage of sales of units to persons unaffiliated with that developer. After that point in time, it is generally argued that any cause of action against the developer begins to accrue.[23]

Generally, the developer remains a visible presence in the community after this "transition" from developer to unit owner control of the board of trustees. Often the developer is still permitted to designate one or more members of the board of trustees. Further, the developer may still maintain a sales office on the property and continue to actively engage in the sale of units pursuant to the public offering

statement. Moreover, the developer may continue to have a foreman or working representative on the site who is engaged in completing punch-list items either on the common elements or within the units of the community association. It is not unheard of for a developer for the year or more after transition to continue to respond to unit owner demands for repairs to buildings, units or common areas.

Accordingly, the developer wears many hats and fulfills many functions at the inception of the life of a community association. The developer is many times, builder, board member, property manager and unit owner all at once. The representations of the public offering statement as well as the fiduciary duties inherent in the position as board of trustee all apply to the developer.

1. The Duty to Investigate - Should There be a Duty to Perform Invasive Testing?

Is the developer with all of his conflicting duties of care, duty bound to disclose to the association latent defects in the common elements? For example, should he or she ensure that the initial reserve study shows a decreased life expectancy for those components which may require repair or reconstruction in the 7th year of a normally expected 25 year life? Should the developer who sits on and controls a board of trustees require an expensive, independent, invasive

engineering inspection of the common elements to uncover potential latent construction defects? If so, who should pay for the cost of the inspection?

The fiduciary relationship encompasses a duty of care and loyalty.[24] If during the construction of the roadways in the community association, an unanticipated delay in the delivery of material causes the surfacing materials to be installed at the wrong temperature and in the wrong manner, should the developer disclose this to the association? Should the public offering statement be amended to include this information which may result in unacceptable raveling of the surface of the roadways in several years? It appears highly unlikely that a developer who is seeking to sell the last of the units in a community association would do anything which would decrease the price of the units sold or increase the carrying costs of the project. For each disclosure there will be cost incurred by the developer which decreases his or her eventual profit.

In fairness to some developers, there are situations in which the developer must believe that his or her staff cannot do enough to satisfy the demands of the association. Clearly, there must be a balance drawn between what is appropriate for the business concerns of the developer and

what is consistent with the obligation of that developer to the present and future members of the community association.

The same concerns which led to the development of the "discovery doctrine" and which supports the concept of equitable estoppel are present in the context of a community association alleging damages for a latent construction defect. First, there is a fiduciary relationship that exists between the developer who acts as an initial board of trustees member and the unit owners.[25] Second, the developer issues a public offering statement which sets forth specific representations regarding the construction and design of the development. Third, latent construction defects may be known or should be known to the developer who thereafter acts in several capacities in the beginning life of the community association, but would not be reasonably discoverable by a board of trustees in all cases. Finally, the primary method for a community association to discover latent construction defects - an invasive engineering inspection - is not the current industry custom and generally is prohibitively expensive compared to the customary visual engineering inspection.

Accordingly, the fiduciary relationship between the developer and the community association justifies more

careful scrutiny by a trial court in determining the threshold issue of whether the "discovery rule" applies to a particular action. Limited discovery and a plenary hearing in these cases should be the normal course in our civil courts. As a practical matter, these types of cases cannot be properly resolved by applying the statute of limitations as a rule, i.e., strictly. Established parameters for decision of questions of tolling, discovery and accrual recognizes this fact. Courts generally must exercise discretion in applying the case law surrounding those issues. However, in the unique circumstances of a community association, with the fiduciary relationship between the developer and unit owners, the present method of courts exercising their discretion on an incomplete record is efficient for the purpose of docket control, but upon examination, unjust. The parties, practitioners representing the parties and the appellate courts would be better served by a uniform recognition that in such cases the courts cannot properly enforce statutes of limitations as rules, i.e., strictly, and that a full record is necessary to properly apply the standard.

V. CONCLUSION

The temptation of overworked courts to dispose of matters summarily based in part upon docket control concerns must be resisted. Latent construction defect cases involving community associations are quite appropriate matters for disposition, not summarily, but by application of judicial discretion based upon an appropriate record. Only after facts are determined through limited discovery and through a plenary hearing, if appropriate, can that discretion be properly exercised. Accordingly, practitioners must seek to expand case law and to encourage legislation consistent with this proposition.

[1] **ALABAMA**. Ala. Code §6:5-218 (1975) establishes a 7 year limitations period against persons who performed or furnished design, planning, supervision or construction of improvements to real property. Ala. Code §6:5-227 (1975) establishes a 2 year limitations period for actions against architects, engineers and certain licensed general contractors. All actions occurring more than 13 years after substantial completion of construction are barred.

ALASKA. Alaska Stat. §09.10.050 (1997) establishes a 6 year limitations period for actions involving trespass to real property. Alaska Stat. §09.10.050(1997) establishes a 6 year limitation on actions for waste or trespass to real property. Alaska Stat. §45.02.725 (1997) establishes a 4 year action for breach of any contract for sale. Alaska Stat. §09.10.053 establishes a 3 year limit on actions on contract. (1997).

ARIZONA. Ariz. Rev. Stat. Ann. §12-552 (1956) establishes an 8 year limitation for action or arbitration based upon contract against person who developed real property or who designs, engineers or contracts improvements. Ariz. Rev. Stat. Ann. §47-6110 (1956) establishes a 1 year limitation for injury to real or personal property. Further, Arizona Rules of Civil Procedure 8(c) states that the statutes of limitation is an affirmative defense which must be pleaded in order to be available.

ARKANSAS. Ark. Code Ann. §16-56-101-127 (Michie 1987) states that actions must be commenced within the following periods after respective causes of actions accrue. Ark. Code Ann. §16-56-111 (Michie 1987) establishes a 5 year limitation for actions to enforce written obligations, duties or rights. Ark. Code Ann. §16-56-112 (Michie 1987) establishes a 5 year limitation for actions for deficiency in design, planning, supervision or observation of construction. These actions must be commenced within 5 years after substantial completion of construction.

CALIFORNIA. Cal. Civ. Proc. Code §337.15 (West 1998) establishes a 10 year limitation on actions based on latent defects or deficiency in development or improvement of real property, including action against construction surety or action for indemnity but excluding actions based on willful misconduct or concealment. Cal. Civ. Proc. Code §337.1 (West 1998) establishes a 4 year limitation on actions for damages for patent deficiency(such as is apparent by reasonable inspection) in design, supervision, survey or construction of improvement to real property or injury to person or property therefrom within 4 years after substantial completion of improvement, except that if injury to person or property occurs during the 4th year, action may be commenced within one year after the date of the injury but not more than 5 years after substantial completion of improvement.

COLORADO. Colo. Rev. Stat. §13-80-104 (1998) establishes a 6 year limitation on actions for damages to persons or property and against architects, engineers, contractors, builders or building vendors, or inspectors caused by design, planning, supervision, inspection or construction after substantial completion of improvement. In no case may an action be commenced more than 6 years after substantial completion in which case the action must be commenced within 2 years of when it arises.

CONNECTICUT. Conn. Gen. Stat. § 52-584(a)(1995) establishes a 7 year limitation on actions against architects, professional

engineers, and architectural designers by anyone other than the possessor of the improvement. The 7 years is accrued after substantial completion of an improvement to real property. Conn. Gen. Stat. § 52-576 (1995) establishes a 6 year limitation on the commencement of actions based upon written contract or simple or implied contract.

DELAWARE. Del. Code Ann. tit.10, §8127(b) (1974) establishes a 6 year statute for actions resulting from deficiency in construction, supervision or planning of improvement in real property, from whichever of several specified dates is earliest. Del. Code Ann. tit.10, §8107 (1974) establishes a 2 year limitation for actions for injury to personal property.

DISTRICT OF COLUMBIA. D.C. Code Ann. §12-310 (1981) establishes a 10 year limitation on the commencement of actions for injury to real property resulting from defective or unsafe condition of improvement to real property. The limitation does not apply to any action based on contract or any action brought against owner or person in actual possession or control of such property or any manufacturer or supplier of equipment or machinery installed upon real property. D.C. Code Ann. §12-301(1981) establishes a 3 year limitation on actions for breach of contract for injury to real property.

FLORIDA. Fla. Stat. Ann. §95.11(2) (West 1988) establishes a 5 year limitation on the commencement of legal or equitable actions on an obligation, contract or liability founded on a written instrument. Fla. Stat. Ann. §95.11(3) (West 1988) establishes a 4 year limitation for actions founded on design, planning or construction or real property improvement, with the time running from the date of actual possession by the owner, issuance of a certificate of occupancy, abandonment of construction if not completed or date of completion or termination of the contract between professional engineer, architect or licensed contractor and his employer (where latent defect is involved time runs from time defect is or should have been discovered but in any event within 15 years from the issuance of certificate of occupancy, date of completion, abandonment if not completed, termination of contract to build, design or engineer improvement whichever is latest. Fla. Stat. Ann. §718.124 (West 1988) "Limitation on actions by association" states in relevant part: The statute of limitations for any actions in law or equity which a condominium association . . . may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration.

GEORGIA. Ga. Code Ann. §51-1-11 (1981) establishes a 10 year limitation for actions against manufacturer for injury to person or property from date of first sale of new personal property to active user. Ga. Code Ann. §9-3-51 (1981) establishes an 8 year limitation for commencement of actions for damages and injuries resulting from deficiencies in improvements to real property including indemnification claims unless injury occurs during seventh or eighth year after substantial completion, in which case action may be brought up to two years from date of injury. Ga. Code Ann. §9-3-24 (1981) establishes a 6 year limitation on simple contract in writing (except negotiable instruments and contracts for the sale of goods). Ga. Code Ann. §9-3-25 (1981) establishes a 4 year limitation on open account or for breach of contract not in writing or on any implied promise or undertaking. Ga. Code Ann.

§9-3-30,31 (1981), 4 years for trespass on or damage to realty or injury to personalty; Ga. Code Ann. §11-2-725 (1981) for common law fraud on contract of sale under UCC; Ga. Code Ann. §9-3-29 (1981) for breach of covenant restricting land use that accrues as result of failure to pay assessments or fees.

HAWAII. Haw. Rev. Stat. §657-7 (1998) establishes 2 year limitation for compensation of damages to person or property; for personal injury or damage to property resulting from improvement to real property; Haw. Rev. Stat. §514A-50 (1998) for action under horizontal property regime statute. *caveat* Causes of action for negligent injury to person or property accrue when injured party knew or in exercise of reasonable care should have discovered that an actionable wrong has been committed. Haw. Rev. Stat. §501-217 (1998) establishes 6 year limitation on contract for compensation for loss, damage, deprivation of land, estate, or interest therein caused by fraud, error, omission, mistake, or misdescription in certificate of title to registered land or entry of memorandum covering registered land.

IDAHO. Idaho Code §5-241 (1998) establishes 6 year limitation on action for performing or furnishing design, plan supervision or construction of improvements on real property, if action is tort, if not previously accrued, shall accrue and begin to run six years after completion, and if action in contract, action shall accrue and period begin to run at time of final completion. Times fixed shall not be asserted by way of defense by any person in actual possession or control at time of any deficiency which caused injury. Idaho Code §5-218 (1998) establishes a 3 year limitation for injury to real or personal property; for relief on ground of fraud or mistake, time running from discovery thereof.

ILLINOIS. Ill. Rev. Stat. 735-5/13-205 (1991) establishes a 5 year limitation on actions for injuries to real or personal property: actions to recover possession of or damages for detention or conversion of personal property: and all civil actions not otherwise expressly provided for. Ill. Rev. Stat. 735-5/13-214 (1991) establishes a 4 year limitation on actions involving improvements to Real Property. With exemptions, any actions arising from design planning, supervision, observation, management or construction of improvements to real property, including negligence and Structural Work Act claims of worker injured at contract site, must be commenced within four years from date plaintiff knew or should have know of action, but in no event more than ten years after improvements made unless defendant expressly warranted or promised improvements fro longer period.

INDIANA. Ind. Code Ann. §34-15-1-2 (West 1998) establishes 12 year limitation from date of completion of real estate improvement and submission of plans and specifications to owner for action based on deficiency of design; Ind. Code Ann. §34-15-1-3 (West 1998) provides plaintiffs with additional two year period for personal injury or wrongful death occurring during ninth and tenth years following completion of improvements. Ind. Code Ann. §34-15-1-2 to 3 (West 1998)provides 10 year limitation from date of substantial completion of improvement, action based on any deficiency, or alleged deficiency, in design, planning, supervision, construction or observation of construction of improvement to real property, with certain exceptions for injuries occurring during ninth and tenth years following substantial

improvements. Ind. Code Ann. §34-11-2-7 (West 1998) establishes 6 year limitation for injuries to real property.

IOWA. Iowa Code § 614.1(11) (1998) establishes a 15 year limitation for injury to person or property related to usage or defective condition of improvement to real property, except against owner, occupant, or operator of improvement.

KANSAS. Kan. Stat. Ann. §84-2-725 (1998) establishes a 4 year limitation for actions for breach of any contract for sale after cause of action has accrued, and by original agreement parties may reduce period of limitation to not less than one year but may not extend it. Kan. Stat. Ann. §60-513 (1998) establishes a 2 year limitation for an action for taking, detaining or injuring personal property, including actions for specific recovery thereof, and action for injury to rights of another, not arising on contract, and not herein enumerated.

KENTUCKY. Ky. Rev. Stat. Ann. §413.135(2)(Baldwin 1998) establishes an 8 year limitation for actions for wrongful death or damage to person or property from deficiency in construction components, design, planning, supervision, inspection or construction of any improvement to real property, occurring within seventh year from substantial completion, must be brought within one year from date of injury or eight years after substantial completion, whichever is sooner. Ky. Rev. Stat. Ann. §413.135(1)(Baldwin 1998)
Establishes a 7 year limitation for actions for wrongful death or damage to person or property from deficiency in construction components, design, planning, supervision, inspection or construction of any improvement to real property, must be brought within seven years following substantial completion of such improvement. (Caveat, apparent conflict created by KRS 413.135[2]; which allows additional time to bring action for injury occurring during seventh year from substantial completion.)

LOUISIANA. La. Rev. Stat. Ann. §9-2772 (West, 1990) establishes a 10 year limitation on actions against any person performing land surveying, architectural, or construction services are prescribed by ten years unless fraud is shown. La. Rev. Stat. Ann. §3500-173 (West, 1990) establishes a limitation on actions against contractor or architect for construction, renovation or repair of defects in buildings and other works is prescribed in ten years.

MAINE. Me. Rev. Stat. Ann. tit. 14, §752-D (West, 1998) establishes a 4 year limitation on actions for malpractice or professional negligence against duly licensed architects or engineers must be commenced within four years of discovery but in no event more than ten years after substantial completion of construction contract or of services unless valid contract provides for other limitation period. Me. Rev. Stat. Ann. tit. 14, §752-D (West, 1998) establishes that actions for professional negligence against duly licensed land surveyors must be commenced within four years of discovery, but in no event more than 20 years after completion of plan or professional services.

MARYLAND. Md. Code Ann. Courts § 5-108 (1998) establishes in actions dealing with improvements to real property - Except for cause of action against manufacturer or supplier for personal injury or death caused by asbestos or for property damage to property owned by government or educational institutions, no cause of action for damages accrues, and person may not seek

contribution or indemnity fort damages, when death, personal injury, or injury to property resulting from defective or unsafe condition of improvement to real property occurs more than 20 years after date entire improvement becomes available for intended use. When defendant is architect, professional engineer or contractor limit is ten years. Cause of action for such injury accrues when injury or damage occurs, and action must be filed within three years thereafter. Provisions do not apply if defendant is in actual possession and control of property when injury occurs.

MASSACHUSETTS. Mass. Gen. L. ch. 260, §2B (West 1998) establishes the following for actions involving a claim of tort for damages arising out of any deficiency or neglect in design, planning, construction or general administration of improvement to real property shall be commenced only within three years next after cause of action accrues: provided however, that in no event shall such actions be commenced more than six years after earlier of opening of improvement to use, or substantial completion and taking of possession by owner.

MICHIGAN. Mich. Comp. Laws § 600.5839 (1998) establishes a 6 year limitation on actions charging defective or unsafe conditions of improvement to real property against licensed architect, professional engineer, land surveyor or contractor (limitation period commencing after first occupancy, use or acceptance of improvement)(alternative limitation period, one year from discovery of defect or when defect should have been discovered).

MINNESOTA. Minn. Stat. § 327a.02 (1998) establishes a 2 year limitation for actions involving Real Property Improvements. -- Unless fraud or breach of certain statutory or written warranties involved, action for damages for injury to real or personal property, or for injury or death, arising from defective and unsafe condition of improvement to real property barred after two years of discovery of injury (or, in case of action for contribution or indemnity, after accrual of cause of action) against person performing or furnishing design, planning, supervision, materials, construction or observation of construction, except no action may be brought more than ten years after substantial completion of construction. Cause of action accrues upon discovery of injury or, in case of indemnity and contribution, upon payment of final judgment, arb. award or settlement. Limitation not applicable to action for damages from negligence in maintenance, operation or inspection of real property improvement against owner or person in possession or to action for damages from negligence in maintenance, operation or inspection of real property improvement against owner or person in possession. If action accrues in ninth or tenth year after substantial completion of construction, action may be brought within two years after date action accrues. Minn. Stat. § 541.0051 (1998) Actions based on breach of certain statutory and express written warranties to be brought, within two years of discovery of breach.

MISSISSIPPI. Miss. Code Ann. §15-1-41 (1998) establishes a 2 year limitation on actions for personal injury or property damage due to construction deficiencies(wrongful death actions excepted). Miss. Code Ann. §15-1-36 (1998) establishes a 3 year limitation for all actions for which no other period presented and for latent injury or disease, following discovery.

MISSOURI. Mo. Rev. Stat. §516.097 (1998) establishes a 10 year limitation for any action against person whose sole connection with improvement is performing or furnishing design, planning or construction, including architectural, engineering or construction services to recover damages for personal injury, property damage or wrongful death arising out of defective or unsafe condition of any improvement to real property, including for contribution or indemnity must be commenced within ten years of date improvement is completed. Mo. Rev. Stat. §516.120 (1998) establishes a 5 year limitation on all actions for trespass or injury to real estate.

MONTANA. Mont. Code Ann. §27-2-208 (1998) establishes a 10 year limitation for actions sounding in tort arising from design supervision, inspection, or construction of improvement to realty. Mont. Code Ann. §27-2-202 (1998) establishes a 5 year limitation on actions upon contract, account or promise, not founded upon instrument in writing. Mont. Code Ann. §27-2-204 (1998) establishes a 3 year limitation for actions involving torts for general and personal injury. Mont. Code Ann. §27-2-207 (1998) establishes a 2 year limitation on actions for injury to or trespass on real or personal property.

NEBRASKA. Neb. Rev. Stat. §25-223 (1998) Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in design, plan, supervision or observation of construction commenced within 4 years from alleged act or omission constituting such breach of warranty or deficiency. This statute provides that if the defect could not be discovered within such 4 year period or within 1 year preceding the expiration of the period, the cause of action may be commenced within 2 years from the discovery. No action may be commenced following the expiration of 10 years from substantial completion.

NEVADA. Nev. Rev. Stat. §11.205 (1998) establishes a 6 year limitation on actions commenced against designer or builder of improvements on real property for faulty design or construction or for personal injury or wrongful death cause by deficiency apparent by reasonable inspection more than six years after substantial completion of such improvements. Nev. Rev. Stat. §11.190 (1998) establishes a 3 year limitations on actions for waste or trespass on real property.

NEW HAMPSHIRE. N.H. Rev. Stat. Ann. §508-4-b(1998) establishes that actions for injuries resulting from creation of improvement to real property must be commenced within eight years after substantial completion of improvement.

NEW JERSEY. N.J.S.A. 2A:14-1 establishes a 6 year limitations period for trespass to real property. Bar of the statute must be pleaded, N.J. Court Rules 4:5-4.

NEW MEXICO. N.M. Stat. Ann. §37-1-27 (Michie 1998) establishes a limitation of 10 years on actions to recover damages for defective or unsafe condition of improvements to realty. N.M. Stat. Ann. §37-1-4 (Michie 1998) establishes a 4 year limitation for injuries to real or personal property or for the conversion of personal property, or for relief upon the ground of fraud and all other actions not specified.

NEW YORK. N.Y. Civ. Prac. L. & R. 213-a (McKinney 1998) establishes a 6 year limitation where no limitation is specifically prescribed; on a contractual obligation or liability express or implied, except as provided in N.Y. Civ. Prac. L. & R.

214-b, and 214-c and 215 (McKinney 1998) establishes a 3 year limitation to recover for injury to property except as provided in

NORTH CAROLINA. N.C. Gen. Stat. §I-50 (1998) establishes a 6 year limitation on actions to recover damages based upon or arising out of defective or unsafe condition of improvement to real property shall be brought more than six years from later of specific last act or omission of defendant giving rise to cause of action or substantial completion of improvement.
N.C. Gen. Stat. §I-52 (1998) establishes a 3 year limitation on actions, unless otherwise provided, for personal injury or physical damage to claimant's property, time running from when bodily harm or physical damage becomes apparent or ought to have been apparent(provided no cause of action shall accrue more than ten years from last act or omission giving rise to cause of action).

NORTH DAKOTA. N.D. Cent. Code §28-01-16 (1998) establishes a 5 year limitation for actions involving the design or construction of improvement to real estate or injury caused by deficiency in design or construction ten years after substantial completion; unless injury incurred in tenth year, then action must be commenced within two years of injury.

OHIO. Ohio Rev. Code Ann. §2305.131 (1998) establishes a 15 year limitation for injury to real or personal property, bodily injury or wrongful death arising out of defective and unsafe condition of improvement on to real property against persons, other that owners, who performed services for improvement or furnished design, planing, supervision of construction or construction.

OKLAHOMA. Okla. Stat. tit. 12, §109 (1998) establishes a 5 year limitation for actions in tort to recover damages from design, planning or construction of improvement to real property. Okla. Stat. tit. 12, §95 (1998) establishes a 2 year limitation for actions on trespass on real property or to recover same; for taking, detaining or injuring personal property.

OREGON. Or. Rev. Stat. §12.135 (1998) establishes a 10 year limitation for damages arising from improvements to real property commencing from date of discovery unless otherwise established by law.

PENNSYLVANIA. 42 Pa. Cons. Stat. Ann. §5536 (1998) - Construction Projects.-- Civil suits against those involved in construction must be commenced within 12 years of construction completion to recover damages for deficiency in construction; property damages, personal injuries, and wrongful death arising from such deficiency; and contribution or indemnity relation to such damages.

RHODE ISLAND. R.I. Gen. Laws §9-1-29 (1998) - Ten Years: Actions against contractors, engineers, or architects based on design. R.I. Gen. Laws §6A-2-725 (1998)- Four Years: Breach of warranty claims(contract based).

SOUTH CAROLINA. S.C. Code Ann. §15-3-530 (Law Co-op 1998) - Three Years: Action for trespass on or damage to real property.

SOUTH DAKOTA. S.D. Codified Laws Ann. §15-2A-3 (1998) -Ten Years: For action for construction errors, ten years after substantial completion of construction. S.D. Codified Laws Ann. §15-2A-13 (1998)- Six Years: For trespass upon real property.

TENNESSEE. Tenn. Code Ann. §28-3-202(1998) - Four Years: Actions to recover damages for deficiency in design, planning,

supervision, observation of construction or construction of improvement to real property, for injury to property or person or wrongful death arising out of such deficiency shall be brought against person unless occurring in fourth year after substantial completion, then within one year from date of occurrence. Tenn. Code Ann. §28-28-3-105 (1998)- Three Years; For injury to real or personal property.

TEXAS. Tex. Civ. P. Rem. Code §16.009 (West 1998)-Ten Years: To recover damages arising out of defective or unsafe conditions of real property against one performing construction or repair thereto.

UTAH. Utah Code Ann. §78-12-25.5 (1998) establishes a 6 year limitation for actions involving defective design or construction of improvement -- Action must be commenced within six years after completion; no action may be commenced more than 12 years after completion; five years after date aggrieved party discovers or should have discovered wrongful conduct; exceptions. (78-

VERMONT. Vt. Stat. Ann. tit. 12, §511 (1998) - Six Years: A civil action shall be commenced within six years after the cause of action accrues and not thereafter. Cause of action accrues upon discovery of injury and cause. Vt. Stat. Ann. tit. 12, §512 (1998) Three Years: For injury to personal property.

VIRGINIA. Va. Code Ann. §8.01.243 (Michie 1998)-Five Years: Action for injury to property, for damages for any injury to property , real or personal, or for bodily injury or wrongful death, arising out of defective and unsafe condition of improvement to real property, or actions for contribution against any person performing or furnishing design, planning, surveying, supervision of construction, or construction of such improvement, but this limitation does not apply to manufacturers or suppliers of equipment that becomes part of real property after Mar. 13, 1968.

WASHINGTON. Wash. Rev. Code §4.16.300-,320 (1998) -Real Property Improvements -- Claims arising from services rendered in connection with improvements to real property barred unless they accrue, and applicable statute of limitations begins to run, within six years from substantial completion of construction or termination of services.

WEST VIRGINIA. W.Va. Code § 55, Art.2, Sec. 6a (1998)- Ten Years: Actions for deficiencies, injuries or wrongful death resulting from any improvements to real property.

WISCONSIN. Wis. Stat. §893.89 (1998)- Ten Years: Actions for contribution or indemnity against owner, occupier, or other person involved in improvements to real property, but time for commencing such actions extended for three years after substantial completion of improvements all other personal actions on contact, not other wise limited. Wis. Stat. §893.50(1998).

WYOMING. Wyo. Stat. §1-3-111(a) (1998)-Ten Years: Unless parties to contract agree otherwise, action in tort or contract or otherwise to recover damages must be brought within ten years of "substantial completion" of improvement to real property against person constructing, altering or repairing improvement, manufacturing or furnishing materials incorporated in improvement, or performing or furnishing services in design, planning, surveying, supervision, observation or management of construction, or administration of construction, supervision, observation or management of construction, or administration of construction

contacts for: (i) any deficiency in design, planning, supervision, construction, surveying or manufacturing or supplying of materials or observation or management of construction.

[2] California's statute does recognize the difference between patent and latent construction deficiencies at Cal. Civ. Proc. Code §337.15 (West 1998) which establishes a 10 year limitation on actions based upon latent defects and Cal.Civ. Proc. Code §337.1 (West 1998) which provides a 4 year limitations period for patent deficiency (such as is apparent by reasonable inspection) in construction related actions. The latter statute also provides that if the injury occurs in the 4th year, an action may be commenced within 1 year after the date of injury but not more than 5 years after substantial completion of the improvement.

[3] Uniform Common Interest Ownership Act § 3-103 (imposing fiduciary duties upon board members appointed by a declarant/developer because as the commentary explains, "there is a great potential for conflicts of interest between the owners and the declarant; Scott, The Fiduciary Principle, 37 Calif. L. Rev. 539 (1949); H. Olek, Non-Profit Corporations, Organizations and Associations, § 192 at 461 (3d ed. 1974); Fla. Stat. Ann. §718.111(a) (West 1999)states in relevant part: "The officers and directors of the association have a fiduciary relationship to the unit owners."; Maillard v. Dowdell, App. 3 Dist., 528 So.2d 512 (1988), review denied 539 So.2d 475.

[4] Fla. Stat. Ann. §718.124 (West 1988) "Limitation on actions by association" states in relevant part: The statute of limitations for any actions in law or equity which a condominium association . . . may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration. See generally Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L.Rev. 917 (1992); See also Cutujian v. Benedict Hills Estates Association, 41 Cal.App.4th 1379, 49 Cal. Rptr. 2d. 166(1996)(Statute of limitations to enforce covenants running with the land commences when demand for performance is made and does not bar action to recover costs relating to soil erosion); Country Estates Homeowners Association, Inc. v. McMillan, 915 P.2d. 806 (S.C.Mont. 1996)(Action to force homeowners to comply with restrictive covenant to complete lot construction began upon the expiration of a specific limitations period and limitations period commences after expiration of the deadline.

[5] N.J.S.A. 2A:14-21 (providing that if a cause of action accrues while a person is under the age of 18, the limitations period is tolled until the person is of "full age," i.e., the age of majority in New Jersey; Green v. Auerbach Chevrolet Corp., 127 N.J. 591 (1992); Mueller v. Parke Davis, 252 N.J. Super. 347 (App.Div. 1991); Hadden v. Eli Lilly and Co., 208 N.J. Super. 716 (App.Div.), certif. den. 104 N.J. 441 (1986)(Twenty year old plaintiff sues for in utero damage when mother ingested DES). As to tolling by reason of insanity, see N.J.S.A. 2A:14-21, which states that where a person is "insane" at the time of the accrual of the cause of action, the limitations period is tolled until his being "of sane mind." See Kisselbach v. County of Camden, 271 N.J.Super. 558 (App.Div. 1994).

[6] Fla. Stat. Ann. §718.124 (West 1988).

[7] Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Association, Inc., 658 So.2d 922 (1994).

[8] Fla. Stat. Ann. §718.124 (West 1988); Cal. Civ. Proc. Code §337.1 (West 1998); Lopez v. Swyer, 62 N.J. 267, 272 (1973). *as cited in* Dreier, Goldman & Katz, *New Jersey Products Liability and Toxic Tort Law*, Gann (1995) at 17.2-6; Woodmoor Improvement Association v. Brenner, 919 P.2d 928 (1996); Barker v. Jeremiasen, 676 P.2d 1259 (Ct.App.CO. 1984).

[9] *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 Calif. L. Rev. 965, 1014 (1988); *Statutes of Limitation and Corporate Fiduciary Claims: A Search For Middle Ground on the Rules/Standards Continuum*, 63 Brook. L. Rev. 695, 797 (1997); Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 Colum. L. Rev. 157, 165 (1927); *Developments in the Law-Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950); Fox v. Passaic General Hospital, 71 N.J. 122 (1976)(Plaintiff discovered a foreign body left after surgery); Lynch v. Rubacky, 85 N.J. 65 (1981)(Medical malpractice claim where plaintiff did not discover that ankle pain was caused by doctor's fault and not natural course of healing); Abboud v. Viscomi, 111 N.J. 56 (1988)(Dental patient was deliberately mislead into thinking pain was normal);Products Cases: Burd v. New Jersey Telephone Company, 76 N.J. 284 (1978)(Plaintiff gluing lengths of pipe together in a deep, narrow, open trench on a hot day became dizzy after several hours of work and then suffered a heart attack. After time ran, he sued the manufacturer of the glue. The court held that the discovery rule delayed accrual of action because the plaintiff did not know that he had a cause of action); Viviano v. CBS, Inc., 101 N.J. 538 (1986)(Plaintiff's hand crushed in a defective record press. Discovery rule inapplicable because the plaintiff knew a defect in the machine caused her injury, though she did not know which part of the machine was defective.

[10] Lopez v. Swyer, 62 N.J. 267, 272 (1973). This case involved the claim of the plaintiff that she did not discover the cause of her pain until more than five years after her last radiological treatment when she overheard another doctor state, "And there you see, gentlemen, what happens when the radiologist puts a patient on the table and has a cup of coffee."

[11] Id. at 274-276.

[12] Arizona Rules of Civil Procedure 8(c) states that the statutes of limitation is an affirmative defense which must be pleaded in order to be available;
See Fees v. Trow, 105 N.J. 330 (1987); Zaccardi v. Becker, 88 N.J. 245 (1982); Dreier, Goldman & Katz, *New Jersey Products Liability and Toxic Tort Law*, Gann (1995) at 17.1.

[13] Many jurisdictions follow in most respects the federal procedural model. F.R.Civ. Pro. 12(b) states in relevant part: . . the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief may be granted. . A motion making any of these defenses shall be made before pleading if a further pleading is permitted . . . If, on the motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

[14] See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Commander Oil v. Advance Food Serv. Equip., 991 F.2d 49, 51 (2d

Cir. 1993); *Cf.* Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995).

[15] *Statutes of Limitation and Corporate Fiduciary Claims: A Search For Middle Ground on the Rules/Standards Continuum*, 63 Brook. L. Rev. 695, 797 (1997). The author of this law review article discusses in some detail at pages 720-730, the different application of rules and standards in regard to statutes of limitations.

[16] Cal. Civ. Proc. Code §337.15 (West 1998) which establishes a 10 year limitation on actions based upon latent defects and Cal.Civ. Proc. Code §337.1 (West 1998) which provides a 4 year limitations period for patent deficiency (such as is apparent by reasonable inspection) in construction related actions. The latter statute also provides that if the injury occurs in the 4th year, an action may be commenced within 1 year after the date of injury but not more than 5 years after substantial completion of the improvement.

[17] *The New Lexicon Websters Dictionary of the English Language*, 557 (1989 Edition).

[18] F.R.Civ.Pro. 12(b).

[19] See H. Oleck, *Non-Profit Corporations, Organizations and Associations* § 192 at 461 (3d ed. 1974) (citing at note 30 Pepper v. Litton, 308 U.S. 295 (1939)); Rivkin v. Platt, 824 P. 2d 32 (Colo.App. 1991); Woodmoor Improvement Association v. Brenner, 919 P.2d 928 (Colo.App.1996); Board of Managers of the Fairways at North Hills Condominium v. Fairway at North Hills, 193 A.D.2d 322, 603 N.Y.S.2d 867 (1993); Carney v. Donley, 261 Ill.App.3d 1002, 633 N.E. 2d 1015, 199 Ill.Dec. 219 (Ct.App.2nd Dist. 1994).

[20] Id. at 462.

[21] H. Oleck, supra note 96, § 40 at 85 and § 202 at 476 (citing, inter alia, at note 23 Briggs v. Spaulding, 141 U.S. 132 (1891)).

[22] Id. § 202 at 477 (also suggesting that good faith alone may insulate the nonprofit director from personal liability, even when his or her judgment is poor).

[23] Fla.Stat. Ann. §718.124 (West 1998).

[24] Avila S. Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977); Cohen v. S&S Construction, 151 Cal.App.3d. 943, 201 Cal.Rptr. 173 (1983)(holding that a developer's liability to homeowners association for breach of fiduciary duty to act in good faith, exercise proper management and avoid conflicts, extends to the individual homeowners, not just the association.

[25] Uniform Common Interest Ownership Act § 3-103; Fla. Stat. Ann. §718.111(a) (West 1999); Maillard v. Dowdell, App. 3 Dist., 528 So.2d 512 (1988), review denied 539 So.2d 475.