

## Statutes of Limitations and Repose: Deadlines for Taking Action for Construction Defects

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It is dangerously easy for an association to “blow the statute of limitations” when defective construction is at issue. It has been our impression that boards of directors generally have a tendency to believe the builder is going to do the right thing, because “that is what the builder promised us when the roofs leaked last year.” Boards prefer not to hire attorneys when communications with the builder appear to be going smoothly. We have observed that boards have a tendency to put matters off when the rains stop falling. Many board members in this situation do not know there is a time clock clicking away at their association’s legal rights. There is a crazy quilt-work of statutes of limitations and statutes of repose that can destroy an association’s legitimate claims for defective construction.

### Statutes of Limitations

The most basic statute of limitations is the three-year statute for “damage to real property.” An association has three years in which to take action for any activity that causes property damage. Two questions immediately arise. The first question: Three years from when? Answer: Three years from the date the property damage is “discovered.” “Discovery” occurs when the association’s board of directors suspects, or reasonably should suspect, that someone has done something wrong, causing harm. A board of directors has reason to suspect when it has “notice or information of circumstances to put a reasonable person on inquiry.” Said another way, discovery of the damage occurs when the damage is “sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies.”

In a 2007 case (*Landale*) involving an eight-unit, single building condominium association, the board president had in 1997 observed rain water collecting on the roof above her unit and rainwater leaking into her unit and two other units. She also saw a handyman apply tar to the roof of the building in an effort to prevent further leaks. Suit was filed against the builder in 2001, four years after the president’s observations. The court dismissed the association’s case due to the three-year statute.

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Contrast that with a 2009 case (*Creekridge*) involving a 61-unit, 11-building condominium community. There, one homeowner wrote a letter to the board in 1997 complaining of a roof leak in her unit and “several broken tiles.” Her letter was discussed at the next board meeting. Nothing else ever occurred regarding roofs until the winter of 2003 (six years later) when numerous roof leaks throughout the community were reported. Following those leaks the board hired a roofing consultant who found multiple causes for the leaks and multiple types of roof defects. Suit was filed in 2003. The court in that case refused to dismiss the association’s case, holding that the single homeowner’s 1997 experience did not amount to “discovery;” the board did not have a duty to undergo expensive, community-wide roof investigations based upon that single 1997 event.

As one can see from these two cases, whether “discovery” has occurred is a matter of degree.

The second question arises: “Take action” – what must be done within three years of discovery? Answer: The usual answer is: file suit. But in the case of community associations written notice to the builder pursuant to Civil Code section 910 or 1375, or both, is required, depending on when sales occurred. The California Legislature has enacted laws that require community associations to follow certain procedures when seeking redress for construction defects. By giving the builder written notice the association temporarily “tolls” the statute of limitations, *i.e.*, prevents the statute from continuing to run.

### **Statutes of Repose**

In addition to the three-year statute of limitation, overlying that statute, are statutes of “repose.” Statutes of repose impose certain deadlines beyond which no action is permitted regardless of when the problems are discovered, indeed even if they are never discovered before the deadline runs. The traditional statutes of repose are four years for “patent” deficiencies and ten years for “latent” deficiencies. (A patent defect is one that is open and obvious to an average person at the time construction is complete; a latent defect is not open and obvious at that time.) These statutes begin to run upon “completion of construction,” as narrowly defined by the statute. These statutes can eliminate an association’s construction defect claims even if the construction defects are not discovered until after the four or ten year periods of time (as several condominium associations plagued by polybutylene plumbing found out in the 1990s).

With the passage of SB-800 in 2002 the California Legislature added a minefield of other statutes of repose for various and sundry building components:

- Five years for exterior paint
- Four years for plumbing and sewer systems
- Four years for electrical systems

- Four years for “exterior pathways, driveways, hardscape, sidewalks, sidewalks and patios”
- Four years for fences
- Two years for untreated wood posts
- Two years for landscaping systems
- Two years for dryer ducts
- One year for “irrigation systems and drainage”
- One year for excessive sound transmission

The SB-800 statutes of repose commence at the “close of escrow.” For community associations the “close of escrow” is the date the developer no longer has “control over the association’s ability to decide whether to initiate” a construction defect claim. (Some sophisticated developer CC&R provisions contain rather unnoticeable “poison pill” provisions on the definition which substantially shortens the applicable deadlines.)

### **Tolling Agreements: An Easy Solution**

Statutes of limitations and repose can present real problems. But there is an easy solution to these problems: a tolling agreement. A tolling agreement signed by the association and the builder (and perhaps others) stops the statute of limitations from continuing to run for an agreed upon period of time. In every case where our firm has encountered construction defect problems and builders willing to discuss the problems we have entered into a tolling agreement with the builder. This allows the parties and their experts to investigate, communicate and negotiate without fear that the association’s legal rights may be slipping away due to one or more of those quirks known as statutes of limitations and repose. Tolling agreements are simple and inexpensive to prepare. They should be employed at the initial stage of virtually every construction defect investigation.

As this article implies, even after narrowing down the issues to the most basic points, these concepts are confusing even to experienced construction defect litigators. The lesson to be learned is to get professional help early on. When presented with construction defect problems or potential construction defect problems boards should not endeavor to deal with the builder or contractor without help from attorneys specializing in this field.