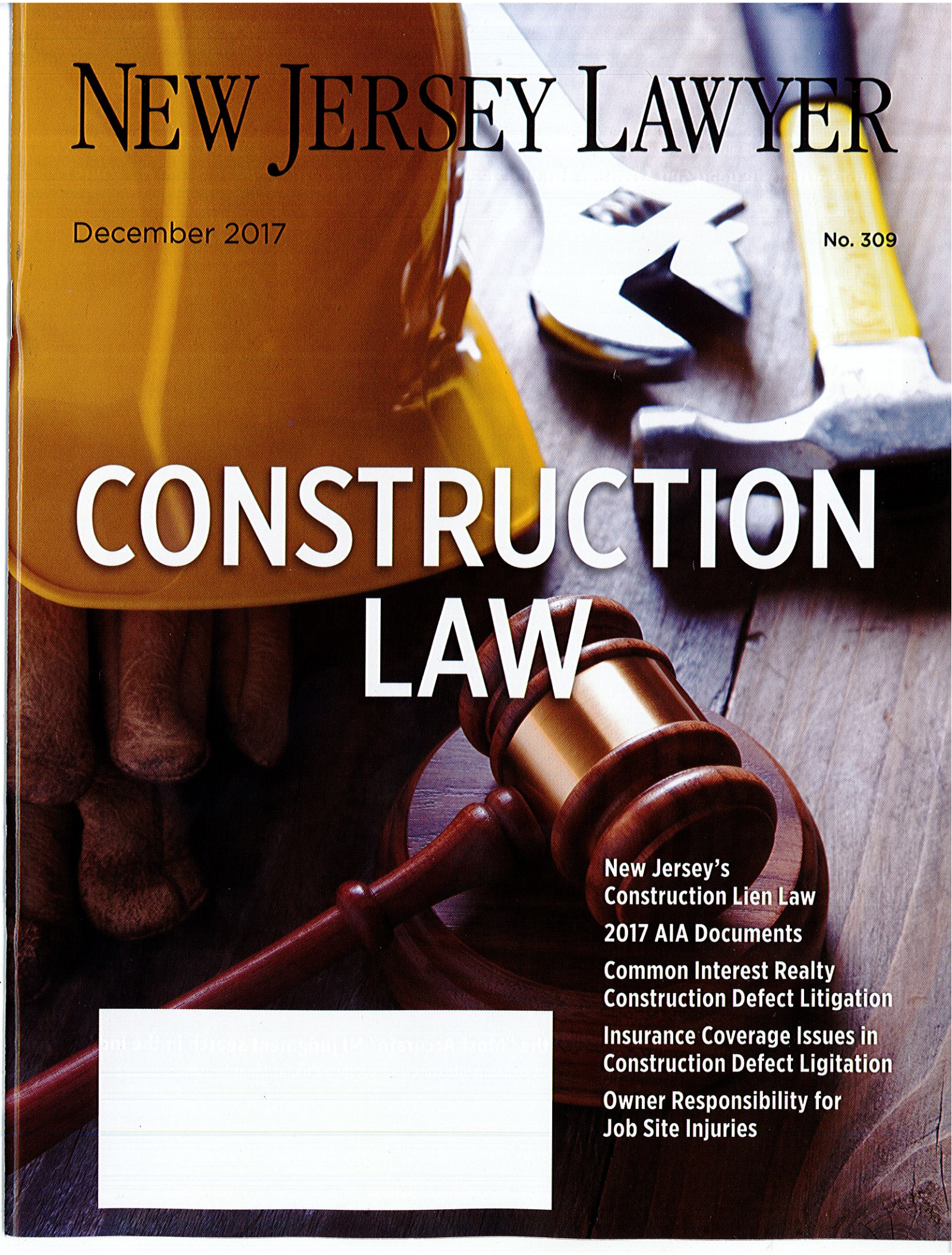
NEW JERSEY LAWYER

December 2017

No. 309



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Common Interest Realty Construction Defect Litigation

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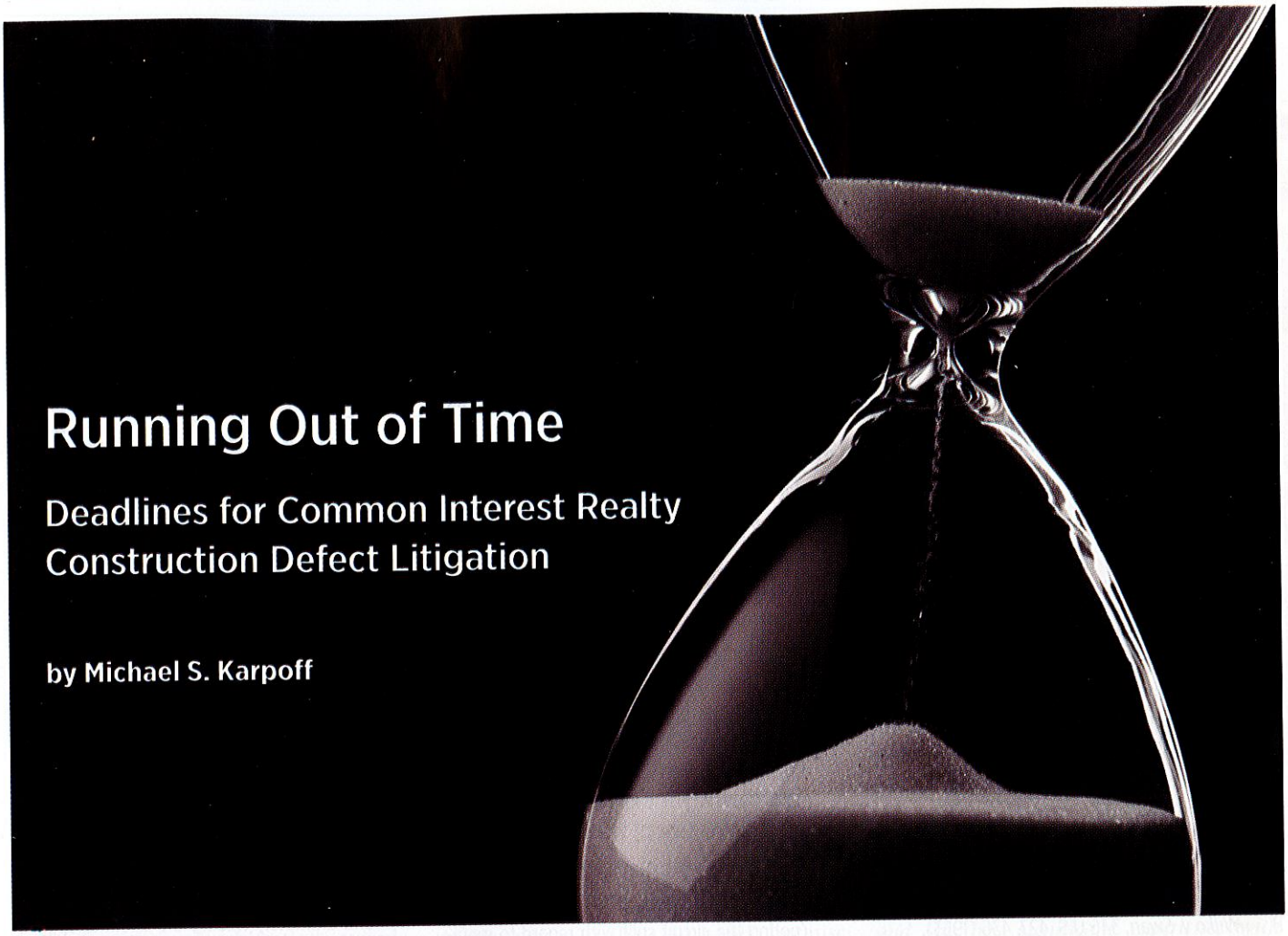

Running Out of Time

Deadlines for Common Interest Realty Construction Defect Litigation

by Michael S. Karpoff

Lawsuits claiming construction defects in improvements on real property often become extremely complex, with multiple defendants bringing in multiple third-party defendants who in turn bring in multiple fourth-party claims, and so forth, so that a substantial number of parties with various arguments, issues and defenses participate. Plaintiffs' attorneys expect and generally plan for these adversaries. Regardless of the number of parties, though, plaintiffs' attorneys in construction defect cases also face another adversary, which they easily can overlook, particularly when pursuing claims against numerous parties: time.

Common deadlines with which a plaintiff's attorney must be concerned are the statute of limitations and the statute of repose. The limitations periods may become more imprecise and may create additional issues for attorneys when a common interest realty development, or community association—that is, a condominium association, homeowners association or cooperative—is the plaintiff. In such a case, generally, the construction of the community has been contracted and overseen by a developer/sponsor who is sued by an association of owners (or a cooperative corporation) that was not involved in, and had no control over, the construction. Indeed, the plaintiff may have been under the control of the developer/sponsor for most of the construction. The issues become more complicated when the property is a conversion from a pre-existing building, perhaps even built by an entity other than the developer/sponsor of the community.

As a result of these typical scenarios, before filing suit, the association usually has only limited knowledge, if any, about the identity of parties involved in the construction other than the developer/sponsor and its principals and agents, and most likely no knowledge of the timing of the contractors' involvement and the construction details. Only by filing a complaint and obtaining discovery can the plaintiff association establish the full history of the construction, identify all or most of the responsible persons, and ascribe particular liability to the various parties. In addition, in such situations, it can be difficult to determine when damage occurred and the association discovered it or should reasonably have been able to discover it. The statute of limitations and the statute of repose may determine whether the association can pursue its claims, but their applicability may not be fully known until the lawsuit is underway. This article will address the application of these

deadlines in these kinds of construction defect cases.

Statute of Limitations

New Jersey has a number of statutes of limitations for various types of claims. Some are listed independently.[1] Others are contained in particular statutes concerning the described subject matter.[2] Furthermore, contractual agreements may establish shorter limitations periods, so contracts creating the relationships among the parties must also be examined. Counsel must analyze each claim made in a complaint to determine which limitations period applies to that claim and when the limitations period began to run. If direct claims are made against the third-party and fourth-party defendants who are brought into the case, the statute of limitations regarding those parties will need to be evaluated.

Most claims in construction defect cases allege damages for repair and replacement costs of real property improvements or loss in value, and come under the general six-year statute of limitations.[3] This article, therefore, focuses on that statute of limitations.

N.J.S.A. 2A:14-1 reads:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

The six-year period begins to run upon "the accrual" of the cause of action. Unlike a statute of limitations that sets a specific starting point, such as the statute of limitations for breach of contract for the sale of goods, which states that the cause of action accrues upon the breach even if the purchaser was unaware of the breach,[4] the general statute of limitations requires that the date of the accrual of the cause of action be determined.

Statutes of limitations are intended to encourage diligence on the part of plaintiffs and allow defendants a fair opportunity to respond and protect their interests.[5] Typically, the date of accrual for a construction matter is the substantial completion of the structure.[6] However, equitable principles govern the accrual date of a legal claim.[7] Thus, the New Jersey Supreme Court has held that the limitations period does not begin to run until a plaintiff has actually discovered, or through the exercise of reasonable diligence should have discovered, facts that form the basis for an actionable claim against an identifiable defendant.[8] As a result of this 'discovery rule,' the limitations period may extend to different dates for different defendants, depending upon when the plaintiff became aware or reasonably should have become aware of its causes of action against the defendants.[9]

At least one court had held that when a prospective plaintiff discovered a cause of action late but still had a reasonable opportunity to file suit within the balance of the six years after substantial completion, it could not claim the benefit of the discovery rule and had to file the complaint within the time remaining.[10] Indeed, that was one of the arguments of the defendants in the recent case of *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC*.[11] However, the Supreme Court eliminated that argument, holding that if the cause of action could not be reasonably discovered earlier, the plaintiff has the full six years after discovery to file suit.[12]

In addition to the tolling of the statute of limitations by the discovery rule, the limitations period may be equitably tolled as a result of actions by the defendant. Conduct by a defendant that misleads or lulls a plaintiff into failing to file the complaint within the limitations period, or prevents the plaintiff from being able to pursue the claim, may toll the deadline due to equitable reasons.[13]

Statute of Repose

New Jersey also has a statute of repose that limits actions regarding the design and construction on real property. The statute reads, in pertinent part:

> a. No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.[14]

The statute of repose bars any lawsuit against anyone performing or furnishing design, planning, surveying, super-

vision of construction or actual construction of improvements to real property for claims arising out of defective and unsafe conditions more than 10 years after the services were performed or furnished. The statute of repose differs in effect from a statute of limitations in that it is not related to the accrual of the cause of action and is not subject to the discovery rule.[15] Rather, the statute expressly states that any such action is barred after 10 years. In other words, after 10 years the statute prevents what otherwise may have been a cause of action from arising.[16]

The statute of repose commences to run with substantial completion of the party's service.[17] Generally, the professionals and contractors involved in construction of a building will become immune from claims arising from defective and unsafe construction after 10 years, following substantial completion of the building. Substantial completion generally is deemed to have occurred upon issuance of the certificate of occupancy[18] or a temporary certificate of occupancy.[19]

However, if a contractor has completed its task earlier than substantial completion of the building, the statute of repose for that contractor will begin to run earlier.[20] Thus, an architect who continues to provide services through substantial completion, such as supervising the project, remains potentially subject to suit until 10 years after substantial completion.[21] On the other hand, an architect who provides only design services before construction begins is subject to potential liability only for 10 years after the plans have been delivered to and accepted by the developer.[22]

Despite the unwavering nature of the statute of repose, the inability to identify a responsible party within time may not preclude relief. Where the name of a particular party who caused damage or injury is unknown, filing suit against a fictitious party within the appropriate limitations and repose periods will prevent the running of the deadlines as long as the plaintiff makes a diligent effort to discover the defendant's name and amends the complaint to identify the party in a timely manner.[23]

Accrual of Cause of Action for Community Association

Community associations are initially controlled by their developers/sponsors by means of selecting all, and later, the majority of members of the governing board. Either pursuant to statute or the governing documents, as units, lots or apartments are conveyed to purchasers, that control is phased out until the owners or shareowner/tenants control the association or corporation. It has been suggested that where sales are slow so that a developer or a successor retains control for a period longer than the statute of limitations, the statute should be tolled until the owners take control, because a developer is unlikely to sue itself or its contractors for construction defects.[24] In addition, where filing a lawsuit is delayed because the contractor has attempted to make repairs, equitable tolling of the statute of limitations may be appropriate.[25]

However, the Supreme Court recently limited the ability of a community association to toll the statute of limitations until after its owners take control of the association from the developer. In *The Palisades,*[26] the Court addressed when the cause of action by an association accrues against contractors involved in construction of the building.

In that case, the building had been developed by A/V Acquisitions, who later sold it to 100 Old Palisade. 100 Old Palisade converted the rental units into condominium units. The condominium association later sued 100 Old Palisade and numerous other entities and people for damages arising from construction defects. The cases against all parties except A/V Acquisitions' general contractor and certain of its subcontractors were resolved prior to the matter reaching the Supreme Court. The issue before the Court was when the association's cause of action arose against the general contractor and its remaining subcontractors, and whether it had filed its complaint against them within the statute of limitations.

The Court held that a successor property owner receives only the rights of the prior owner, including the rights of the prior owner to sue for defects in the property that arose during the prior owner's ownership, and that the accrual of a cause of action does not renew each time ownership changes. The Court held that the cause of action for defective construction accrues when any prior owner of the property first knows that it has a cause of action against an identifiable defendant or, through the exercise of reasonable diligence, should know. If a prior owner knew or should have known of the cause of action, the successor owner is bound by that date of accrual for purposes of its claim.[27] Accordingly, the Court remanded the case for a *Lopez* hearing,[28] to determine whether A/V Acquisitions or 100 Old Palisade knew of the defects or reasonably should have known of the defects more than six years before the association filed suit.

Significantly, the issue on appeal involved claims against contractors hired by a prior developer, not claims against the condominium developer or its contractors. If the statute of limitations against the contractors had run it would be because they had performed their work earlier and the cause of action could be determined earlier. That reasoning would not necessarily apply to a developer/sponsor itself, who may be liable for breach of contract made or warranties provided at a later date, or its contractors that performed work on the building more recently, regardless of the age of the building.

Also, the Court commented that in certain circumstances, a purchaser of property may have a claim against the seller for fraudulent concealment of a known deficiency.[29] In the case of a community association, an association may have a claim for fraudulent concealment against a developer/sponsor who knew of a deficiency, did not disclose it and took no action to remediate it. In addition, the sponsor-appointed directors or trustees who control the association before the turnover of control to the unit owners are fiduciaries to the owners.[30] If they had knowledge of construction deficiencies and failed to arrange for the association to pursue claims against the contractors for damages to enable repairs, they may be held liable for breach of their fiduciary duty for failure to protect the owners' and the association's interests.

Waiver and Tolling Agreements

A statute of limitations defense must be raised by the defendant as an affirmative defense.[31] Where a defendant fails to assert the defense, or facts supporting it, or participates extensively in the litigation for a lengthy period of time before seeking dismissal, the defendant may be estopped from raising, or may be deemed to have waived, the statute of limitations defense.[32]

Since a defendant must actively pursue a statute of limitations defense, it appears reasonable that it may voluntarily enter into an agreement with the plaintiff to toll the statute for a time. Courts appear to have accepted such agreements.[33] Accordingly, a plaintiff and defendant who wish to attempt to settle the claim before getting into litigation may be able to enter into a tolling agreement. However, the tolling will be effective only against those defendants who agreed to the tolling; the statute will continue to run against others.

Agreeing to toll the statute of repose may be another matter. As of the preparation of this article, no New Jersey case could be found that has addressed whether the statute of repose may be voluntarily tolled by agreement of the parties. However, courts in other states have considered the question, applying differing justifications for allowing or rejecting tolling agreements. The Mississippi Supreme Court, for example, concluded that a tolling agreement that did not set a definite extension period was invalid.[34] An Illinois appellate court found that the phrase "in no event shall such action be brought more than 5 years" [after the act or omission] in the statute of repose for professional negligence actions did not prohibit tolling because other statutes and courts provided exceptions.[35] The Colorado Supreme Court discussed earlier cases in a number of states, pointing out that in two of them tolling agreements were allowed because the subject statutes of repose were not jurisdictional.[36] These cases also have demonstrated that notwithstanding their agreement to toll the statute of repose, defendants sometimes renege and argue that the tolling agreement is not valid, so entering into a tolling agreement carries at least some risk.

In New Jersey, the Supreme Court has rejected equitable and statutory tolling of statutes of repose. In a case regarding the Parentage Act, the Court explained that because there are no exceptions found in the repose statute, barring suits after the child turns 23,[37] it would not ordinarily be tolled for equitable reasons.[38] In *O'Connor v. Altus*,[39] the Court denied tolling of the design/construction statute of repose based on the plaintiff's infancy, and stated, "We conclude the purpose of N.J.S.A. 2A:14-1.1 is to cut off all claims of the sort referred to in the statute at the end of ten years from completion of the work." This language suggests that the statute is jurisdictional. Based on these statements by the Court, the author believes that New Jersey's courts would not accept an agreement to toll a statute of repose. In any event, even if a court would accept it, it would not toll the statute for claims against parties that did not sign the agreement.

Conclusion

In preparing a complaint for a construction defects case, the plaintiff's attorney must bear in mind the statutes of limitations applicable to the claims being made, and must assure that the claims are filed within time. To make that determination, it is helpful to examine the dates that site plans were approved, land development approvals were granted, the association's certificate of incorporation was filed, the public offering statement was issued, the governing documents were prepared or recorded and the certificates of occupancy for the units were issued, to learn when construction of each building was substantially completed and to get a sense of how long the community was under construction. In addition, counsel should obtain maintenance and repair records and consultants' reports that may exist relative to construction, and should consult with association management and board members to learn whatever history of deficiencies they know.

The attorney must familiarize him- or herself with the underlying damage to evaluate when the association actually discovered or should have reasonably discovered the damage, to assure the complaint is filed within the limitations period. Where an association has existed for more than nine years before deciding to file suit, particularly where the developer has retained control for much of that time, the attorney must be concerned about the 10-year statute of repose, to assure timely filing so the cause of action will not be lost. If there is any doubt about the exact date of an approaching limitations or repose deadline, filing the complaint immediately

and investigating the actual deadlines later may preserve the cause of action for the client and avoid a great deal of heartache caused by the running of time.

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ENDNOTES

1. N.J.S.A. 2A:14.
2. *E.g.,* Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21, *et seq.;* Uniform Commercial Code, N.J.S.A. 12A:1-101, *et seq.*
3. N.J.S.A. 2A:14-1.
4. N.J.S.A. 12A:2-725.
5. *The Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC,* __ N.J. __, __ A.3d __, 2017 W.L. 4051812, at *8 (2017).
6. *Id.* at *4.
7. *Id.* at *8.
8. *O'Keefe v. Snyder,* 83 N.J. 478, 493, 416 A.2d 862, 870 (1980); *Caravaggio v. D'Agostini,* 166 N.J. 237, 246, 765 A.2d 182, 187 (2001).
9. *The Palisades, supra,* n. 5, 2017 W.L. 4051812, at *10.
10. *Torcon, Inc. v. Alexian Brothers Hospital,* 205 N.J. Super. 428, 437, 501 A.2d 182, (Ch. Div. 1985), *aff'd.,* 209 N.J. Super. 239, 507 A.2d 289 (App. Div.), *certif. denied,* 104 N.J. 440, 517 A.2d 431 (1986).
11. *Supra,* n.5, 2017 W.L. 4051812.
12. *Id.* at *11.
13. *E.g., Price v. New Jersey Manufacturers Insurance Company,* 182 N.J. 519, 867 A.2d 1181 (2005); *Dunn v. Borough of Mountainside,* 301 N.J. Super. 262, 693 A.2d 1248 (App. Div. 1997), *certif. denied,* 153 N.J. 402, 708 A.2d 795 (1998).
14. N.J.S.A. 2A:14-1.1
15. *Town of Kearny v. Brandt,* 214 N.J. 76, 93, 67 A.3d 601, 611 (2013).
16. *Daidone v. Buterick Bulkheading,* 191 N.J. 557, 565, 924 A.2d 1193, 1198 (2007).
17. *Russo Farms, Inc. v. Vineland Board of Education,* 144 N.J. 84, 118, 675 A.2d 1077, 1094 (1996).
18. *Id.* at 119, 675 A.2d at 1094.
19. *Brandt, supra,* n. 15, 214 N.J.at 83, 67 A.3d at 605.
20. *Id.* at 93, 67 A.3d at 611.
21. *Id.* at 94, 67 A.3d at 612.
22. *Hopkins v. Fox & Lazo Realtors,* 242 N.J. Super. 320, 322, 576 A.2d 921, 922 (App. Div. 1990). *See also Daidone, supra,* n. 16, 191 N.J. 557, 924 A.2d 1193.
23. *Greczyn v. Colgate-Palmolive,* 183 N.J. 5, 17, 869 A.2d 866, 873 (2005).
24. *E.g., Terrace Condominium Association v. Midlantic National Bank,* 268 N.J. Super. 488, 503, 633 A.2d 1060, 1068 (Law Div. 1993).
25. *Id.* at 500-01, 633 A.2d at 1066-67.
26. *Supra,* n. 5, 2017 W.L. 4051812.
27. *Id.* at *13.
28. *Lopez v. Swyer,* 62 N.J. 267, 300 A.2d 563 (1973).
29. *The Palisades, supra,* n. 5, 2017 W.L. 4051812, at *11.
30. N.J.A.C. 5:26-8.3(b).
31. *Zaccardi v. Becker,* 88 N.J. 245, 256, 440 A.2d 1329, 1334 (1982).
32. *Id.* at 257, 440 A.2d at 1335; *White v. Karlsson,* 354 N.J. Super. 284, 806 A.2d 843 (App. Div.), *certif. denied,* 175 N.J. 170, 814 A.2d 635 (2002).
33. *E.g., Gere v. Louis,* 209 N.J. 486, 494, 38 A.3d 591, 596 (2012); *Smith v. Estate of Kelly,* 343 N.J. Super. 480, 493, 778 A.2d 1162, 1170, n. 6 (App. Div. 2001).
34. *Townes v. Rusty Ellis Builder, Inc.,* 98 So.3d 1046, 1055 (Miss. 2012).
35. *McRaith v. BDO Seidman, LLP,* 391 Ill.App.3d 565, 578-79, 909 N.E.2d 310, 323 (5 Dist. 2009).
36. *Lewis v. Taylor,* 375 P.3d 1205, 1210 (Colo. 2016). *See also First Interstate Bank of Denver, N.A. v. Central Bank & Trust Company of Denver,* 937 P.2d 855, 861-62 (Colo. App. 1996).
37. N.J.S.A. 9:17-45b.
38. *R.A.C. v. P.J.S., Jr.* 192 N.J. 81, 101, 927 A.2d 97, 108 (2007).
39. 67 N.J. 106, 123, 335 A.2d 545, 553-54 (1975).