ARTISAN/CONSTRUCTION DEFECT LAW REVIEW



2022

50-STATE SURVEY

WILSON ELSER

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May 16, 2022

Dear Clients, Friends and Colleagues:

We are pleased to provide the 2022 Wilson Elser Artisan/Construction Defect Law Review, a collaborative effort of our attorneys across the country. The Review addresses certain issues in this line of business by reviewing applicable statutes, where they exist, and common law developments in all 50 states and the District of Columbia. Some of the specific areas of construction and design defect law that we address include statutes of limitation, statutes of repose, certain applicable defenses, and in some cases, specific peculiarities of a given state.

It must be recognized that the law on this subject matter constantly changes and this document should be used for reference purposes only. Should any matter arise involving construction and design defect litigation, the law in the particular jurisdiction should be reviewed as to its current status before any position is taken.

As always, we are happy to direct you to our Wilson Elser attorneys, many who contributed to this manual, who are experienced coverage counsel and litigators in this practice area. We look forward to comments and welcome the opportunity to assist you.

Respectfully yours,

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Alabama

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Alabama, a construction defect claim sounding in tort or contract must be commenced within two years. Alabama has adopted the "discovery rule," which allows an action to be commenced, in certain instances, within two years from the date of the plaintiff's discovery of any latent damage or defects. It should be noted that the discovery rule is limited to actions against an architect, engineer, or builder. Additionally, Alabama's Statute of Repose provides that no claims in tort, contract or otherwise against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction of an improvement to real property may be brought more than seven years after the substantial completion of such improvement.

B. Statute of Limitations

A cause of action in tort, e.g., negligent construction, accrues only when actual injury or damages are sustained. *See Matthews Bros. Const. Co. v. Stonebrook Develop.*, 854 So. 2d 573 (Ala. Civ. App. 2001). In a breach of contract action, the cause of action accrues at the time of the breach regardless of whether actual damage is sustained. *Id*. *See also Alabama Power Co. v. Cummings*, 466 So.2d 99 (1985) (holding that a homeowner's cause of action for construction defects in her home accrued only when the defects manifested themselves).

1. Statute of Limitations Regarding Alleged Construction Defects

All civil actions in tort, contract, or otherwise against any architect or engineer performing or furnishing the design, planning, specifications, testing, supervision, administration, or observation of any construction of any improvement on or to real property, or against builders who constructed, or performed or managed the construction of, an improvement on or to real property designed by and constructed under the supervision, administration, or observation of an architect or engineer, or designed by and constructed in accordance with the plans and specifications prepared by an architect or engineer, for the recovery of damages for: (i) any defect or deficiency in the design, planning, specifications, testing, supervision, administration, or observation of the construction of any such improvement, or any defect or deficiency in the construction of any such improvement; (ii) damage to real or personal property caused by any such defect or deficiency; or (iii) injury to or wrongful death of a person caused by any such defect or deficiency shall be commenced within two years next after a cause of action accrues or arises, and not thereafter. Alabama Code §6-5-221.

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2. Statute of Limitations of a Claim Brought Pursuant to the Deceptive Trade Practices Act

No action may be brought pursuant to Alabama's Deceptive Trade Practices Act more than one year after the person bringing the action discovers, or reasonably should have discovered, the act or practice which is the subject of the action, but in no event may any action be brought more than four years from the date of the transaction giving rise to the cause of action, unless the contract or warranty is for more than three years. If the contract or warranty is for more than three years, no action may be brought more than one year from the expiration date of the contract or warranty or more than one year after the person bringing the action discovered or reasonably should have discovered the act or practice which is the subject of the action, whichever occurs first. Alabama Code §8-19-14.

3. Statute of Limitations of a Claim Brought Pursuant to a Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a breach of implied warranty of habitability claim, while limited to a reasonable time, may not extend beyond the period allowed for filing suit on an express warranty, which is six years. *Sims v. Lewis*, 374 So. 2d 298 (1979) (citing Alabama Code §6-2-34).

4. Statute of Limitations of a Claim Brought Pursuant to a Breach of Express Warranty

The statute of limitations in Alabama for a breach of express warranty action is six years. Alabama Code § 6-2-34(9).

5. Statute of Limitations of a Claim Based on Fraud

Fraud claims are subject to a two-year statute of limitations. That statute of limitations is subject to the "saving clause," which states that actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action. Alabama Code §6-2-38(l); Alabama Code §6-2-3.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Alabama Code §6-5-220(e) permits certain plaintiffs to file an action within two years from the date of discovery of any latent damage or defect. This discovery rule is limited to actions against an architect, engineer, or builder, as defined in Alabama Code §§6-5-220 through -228. *Turner v. Westhampton Court, L.L.C.*, 903 So.2d 82 (2004).

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D. Statute of Repose

Alabama's statute of repose bars construction claims commenced after 7 years. The statute of repose does not apply if the builder had actual knowledge of the defect and failed to disclose it. Alabama Code § 6-5-221. Additionally, Alabama has a second statute of repose that applies only to "improvement" of real property that bars construction claims commenced after seven years from the date of substantial completion. Alabama Code §6-5-218(a).

II. Common Law Related to Construction Defect Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Supreme Court of Alabama has held that, "as a general rule the time of an 'occurrence' of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed but the time the complaining party was actually damaged." *American States Ins. Co. v. Martin*, 662 So.2d 245 (1995).

It is well settled in Alabama that an insurer's duty to defend is more extensive than its duty to indemnify. *United States Fid. & Guar. Co. v. Armstrong*, 479 So. 2d 1164 (1985). An insurance company's duty to provide a defense in proceedings instituted against the insured is determined primarily by the allegations contained in the complaint. *Id*. If the allegations of plaintiff's complaint allege an accident or occurrence within the coverage of the policy, the insurer is obligated to defend. *Ladner & Co. v. Southern Guar. Ins. Co.*, 347 So. 2d 100, (1977) (citing *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148 (1948)). However, the Supreme Court of Alabama has rejected the argument that the insurer's obligation to defend must be determined solely from the facts alleged in the complaint in the action against the insured. *Ladner*, 347 So. 2d at 103. A court may look to facts which may be proved by admissible evidence. *Pacific Indemnity Co. v. Run-A-Ford Co.*, 276 Ala. 311 (1964).

In *United States Fidelity & Guaranty Co. v. Bonitz Insulation Co. of Alabama*, the Supreme Court of Alabama held that the term "accident" or "occurrence" as found in an insurance policy does not necessarily exclude negligence. *United States Fidelity & Guaranty Co. v. Bonitz Insulation Co. of Alabama*, 424 So. 2d 569 (Ala. 1982) (holding that when property damage was sustained due to leaks in the roof that the insured installed, there was an occurrence as defined under the subject insurance policy). The Courtwent on to state that "there can be no doubt that, if the occurrence or accident causes damage to some *other* property than the insured's product, the insured's liability for such damage becomes the liability of the insurer under the policy." *Id*. Faulty workmanship itself is not property damage caused by or arising out of an occurrence. *Owners Insurance Co. v. Jim Carr Homebuilder, LLC.*, 157 So.3d 148, 155 (Ala. 2014). The cost of repairing or replacing faulty workmanship is not the intended object of a CGL policy issued to a builder or contractor. *Id.* at 156.

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Alaska

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

The statute of limitations for torts, including personal injury and injury to personal property, is two years under Alaska law. *Alaska Stat.* §09.10.070. Alaska has adopted the discovery rule, which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002). Alaska's statute of repose precludes a person from bringing an action for personal injury, death or property damage unless commenced within ten years of the earlier of the date of substantial completion of the construction alleged to have caused the personal injury, death, or property damage or the last act alleged to have caused the personal injury, death, or property damage. *Alaska Stat*. §09.10.055.

B. Statute of Limitations

The statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. *Lamb*, 46 P.3d at 1031. The relevant inquiry is the date when the claimant reasonably should have known of the facts supporting her cause of action. *Id*. The Supreme Court of Alaska looks to the date "when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights." *Id.*

1. Statute of Limitations Regarding Alleged Construction Defects

Except as otherwise provided by law, a person may not bring an action for personal injury or death or for injury to personal property unless the action is commenced within two years of the accrual of the cause of action. *Alaska Stat.* §09.10.070. As previously discussed, the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002).

2. Statute of Limitations of a Claim Brought Pursuant to the Unfair Trade Practices Act

The Unfair Trade Practices Act bars damages claims filed more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by *Alaska Stat.* §45.50.471. *Alaska Stat.* §45.50.531(f).

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Alaska courts have not been called upon to adopt the warranty of habitability. However, the statute of limitations for claims arising out of tort is two years, *Alaska Stat.* §09.10.070, and three years for claims arising out of contract, *Alaska Stat*. §09.10.053.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Please see above at section B (3).

5. Statute of Limitations of a Claim Based on Fraud[1]

Claims of Fraud or Misrepresentation are tort claims and are subject to a two-year statute of limitations. *Bauman v. Day*, 892 P.2d 817, 825 (Alaska 1995). However, the discovery rule requires that the party had actual knowledge of the deception. *Id. See also Alaska Stat.* § 09.10.070. A party should be charged with knowledge of the fraudulent misrepresentation or concealment only when it would be *utterly unreasonable* for the party not to be aware of the deception. *Gefre v. Davis Wright Tremaine, LLP,* 306 P.3d 1264, 1277 (Alaska 2013). Until the party is shown to have actual knowledge, the limitations clock does not begin to run. *Id.*

Claims of Fraudulent Conveyance are subject to a limitation period of ten years, which does not begin to run until the party has actual knowledge of the deception. *Id.* In order for a party to get a ten year limitation period for a fraudulent conveyance claim, the party must have a right or claim to in interest in real property. *Id. See also Alaska Stat.* §09.10.230.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Under Alaska's discovery rule, there are two possible dates on which the statute of limitations can begin to run and in some cases a third part to the rule. The first potential date is the date when the claimant reasonably should have discovered the existence of all essential elements of the cause of action. The second potential accrual date is the date when the plaintiff has information which is sufficient to alert a reasonable person to begin an inquiry to protect his rights. The third part of the discovery rule comes into play when a person makes a reasonable inquiry that does not reveal the elements of the cause of action within the statutory period at a point where there remains a reasonable time within which to file suit. In such circumstances, the limitations period is tolled until a reasonable person discovers actual knowledge of, or would again be prompted to inquire into, the cause of action. *Lamb*, 46 P.3d at 1031-1032.

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D. Statute of Repose

Alaska's statute of repose precludes a person from bringing an action for personal injury, death or property damage unless commenced within ten years of the earlier of the date of substantial completion of the construction alleged to have caused the personal injury, death, or property damage or the last act alleged to have caused the personal injury, death, or property damage. However, the statute of repose does not apply to personal injury, death, or property damage caused by (A) prolonged exposure to hazardous waste; (B) an intentional act or gross negligence; (C) fraud or misrepresentation; (D) breach of an express warranty or guarantee; (E) a defective product (in this subparagraph, "product" means an object that has intrinsic value, is capable of delivery as an assembled whole or as a component part, and is introduced into trade or commerce); or (F) breach of trust or fiduciary duty. Furthermore, the statute of repose does not apply if the facts that would give notice of a potential cause of action are intentionally concealed. *Alaska Stat.* § 09.10.055.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage Under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Supreme Court of Alaska has accepted the general proposition that improper or faulty workmanship constitutes an accident under a CGL policy thus triggering coverage when applicable. *See, generally, Fejes v. Alaska Insurance Company, Inc., et al.*, 984 P.2d 519 (Alaska 1999). Alaska case law defines the term "accident" as anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected." *United Services Auto. Ass'n v. Neary*, 307 P.3d 907, 913 (Alaska 2013)

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Arizona

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

The Arizona statute of limitations for tort actions, including injury to property, is two years from the time a claimant knows, or should know, of the facts underlying the cause of action. A.R.S. §12-542. Generally, a cause of action based on contract must be brought within six years of the date the cause of action arises.

A.R.S. §12-548. However, actions based on construction defects arising from a contract against the person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property must be brought within eight years after "substantial completion" of the improvements. If the injury occurs during the eighth year after substantial completion of the improvements, or, in the case of a latent defect, was not discovered until the eighth year after substantial completion, the injured party has an additional year to bring the action. A.R.S. §12-552. This statutory provision applies only to cases arising in contract, and not to tort actions. *Fry's Food Stores of Arizona, Inc. v. Mather and Assoc., Inc.*, 183 Ariz. 89 (Ct. App. 1995).

B. Statute of Limitations

This statute of limitations begins to run when the claimant knows or should have known of the negligent conduct, or when the claimant is first able to sue. *Hall v. Romero*, 141 Ariz. 120 (Ct. App. 1984). A cause of action "accrues" when a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a particular defendant's negligent conduct; the cause of action does not accrue until a plaintiff knows or should have known both the what and who elements of causation. *Lawhon v. L.B.J. Institutional Supply*, 159 Ariz. 179 (Ct. App. 1988).

1. Statute of Limitations Regarding Alleged Construction Defects

Construction defect actions based on a contract against the person who develops or develops and sells real property, or performs or furnishes the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property must be brought within eight years after "substantial completion" of the improvements. If the injury occurs during the eighth year after substantial completion of the improvements, or in the case of a latent defect was not discovered until the eighth year after substantial completion, the injured party has an additional year to bring the action.

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A.R.S. §12-552. This statutory provision applies only to cases arising in contract, and not to tort actions. *Fry's Food Stores of Arizona, Inc. v. Mather and Assoc., Inc.*, 183 Ariz. 89 (Ct. App. 1995).

2. Statute of Limitations of Claim Brought Pursuant to Consumer Fraud Act

The Attorney General of the State of Arizona has the right to enforce the Consumer Fraud Act. A.R.S. §44-1524. A consumer fraud action is created by statute and can only be brought one year after the cause of action accrues. A.R.S. §12-541. Injured individuals have an implied private right of action.

3. Statute of Limitations of Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a cause of action arising out of breach of implied warranty of habitability must be brought within eight years after "substantial completion" of the improvements to real property. If the injury occurs during the eighth year after substantial completion of the improvements, or in the case of a latent defect was not discovered until the eighth year after substantial completion, the injured party has an additional year to bring the action. A.R.S. §12-552. However, if the implied warranty is based on a contract between purchasers, the six-year statute of limitations applies as it would to any normal contract. *Woodward v. Chirco Const. Co, Inc.*, 141 Ariz. 514 (1984).

Implied warranty claims are limited to defects that become manifested after the subsequent owner's purchase and that were not discoverable had a reasonable inspection been made prior to purchase. If a defect is discovered or manifests before the owner purchases, no warranty would exist. Knowledge of prior owner is imputed to the current owner. *Maycock v. Asiolmar Dev., Inc.*, 207 Ariz. 495 (Ct. App. 2004).

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a cause of action arising out of the breach of an express warranty is six years as governed by A.R.S. §12-548. However it should be noted that breach of express warranty in a construction contract must be brought within eight years after "substantial completion" of the improvements to real property pursuant to A.R.S. §12-552. This rule does not shorten the length of the warranty, but rather serves as an additional means to bring a cause of action for the breach.

5. Statute of Limitations of a Claim Based on Common-Law Fraud

The statute of limitations for a cause of action based on common-law fraud is three years, but does not begin to run until discovery by the aggrieved party of facts constituting fraud. A.R.S. §12-

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543(3). Punitive damages are available as in a regular fraud case but are not provided for by statute. Consumer fraud is separate and distinct from common law fraud.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In tort cases involving personal injury or injury to property, the cause of action does not accrue until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she had been injured by the defendant's negligent conduct. *Kenyon v. Hammer*, 142 Ariz. 69 (1984). The discovery rule has also been applied to contract cases. *Walk v. Ring*, 202 Ariz. 310 (2002). The important inquiry in applying the **discovery rule** is whether the plaintiff's injury or the conduct causing the injury is difficult for plaintiff to detect. *Id* at 315.

D. Statute of Repose

Arizona has an eight-year statute of repose for actions for breach of contract or warranty in connection with a construction defect. The statute of repose is not limited to actions brought by property owners but also applies to bar third-party actions brought by the contractor for common law indemnity against subcontractors. A.R.S. §12-552.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

According to Arizona law, there can be no "occurrence within the meaning of an insurance policy until a plaintiff sustains actual damage." *State v. Glens Falls Ins. Co.*, 125 Ariz. 328 (App. 1980). Arizona law specifies that "faulty workmanship, standing alone, cannot constitute an occurrence as defined in [a CGL] policy, nor would the cost of repairing the defect constitute property damages." *United States Fid. & Guar. Corp. v. Advance Roofing & Supply Co.*, 163 Ariz. 476, 482 (App. 1989). However, in *Lennar Corp. v. Auto-Owners Ins. Co.*, the Court held that because the plaintiff alleged that defendants' faulty workmanship resulted in property damage, and did not merely stand alone, such allegations were sufficient to constitute an occurrence under the policies at issue. *Lennar Corp. v. Auto-Owners Ins. Co.*, 214 Ariz. 255 (Ct. App. 2007).

Virtually all of the policies at issue in *Lennar Corp.* defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. The Court held that when "accidental" property damage results from continued exposure to faulty construction, that property damage is an "occurrence" as defined by the plain terms of the policy. *Id*.

Pursuant to Arizona common law, if a complaint alleges faulty workmanship resulting in property damage to property other than the work-product, and that property damage results from continued exposure to faulty construction, the occurrence warrants coverage under a general liability policy.

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Arkansas



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Arkansas has a five-year statute of limitations for any cause of action based on a written contract, duty, or right. A.C.A. §16-56-111. Actions based on torts must be commenced within three years of when the action accrues. A.C.A. §16-56-105. All actions not specifically provided for by statute have a five-year statute of limitations. A.C.A. §16-56-115. The Arkansas Supreme Court has held that §16-56-105 of the Code governing contractual disputes also includes torts. *Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (Ark. 1983).

There is a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property, which period commences after a substantial completion of the improvement; but, in bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. *East Poinsett County School Dist. No. 14 v. Union Std. Ins. Co.*, 800 S.W.2d 415 (Ark. 1990). Under Arkansas law, absent concealment of alleged wrong, the statutory limitations period begins to run when the wrongful act occurs and not when it is discovered. *Norris v. Baker*, 899 S.W.2d 70, 72 (Ark. 1995).

B. Statute of Limitations

The statute of limitations begins to run when a cause of action accrues. As previously discussed, the Arkansas Supreme Court has held that §16-56-105 of the Code governing contractual disputes also includes torts. *Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc.*, 278 Ark. 467, 646 S.W.2d 696 (Ark. 1983). The Code covering tort claims includes a carve-out for claims occurring in the third year following substantial completion of the work. A.C.A. §16-56-112. The Arkansas Supreme Court has found that the legislature actually meant "fourth year" instead of "third year." *Dooley v. Hot Springs Family YMCA, 301 Ark. 23, 781 S.W.2d 457 (Ark. 1989).*

1. Statute of Limitations Regarding Alleged Construction Defects

No action in contract for construction defect for injury to real or personal property shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five years after substantial completion of the improvement. A.C.A. §16-56-112.

2. No action in tort or contract to recover damages for personal injury or wrongful death caused by construction defect shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction and repair of the

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improvement more than four years after substantial completion of the improvement. *Id*. In the case of personal injury or an injury causing wrongful death, which injury occurred during the third year after the substantial completion, an action in tort or contract to recover damages for the injury or wrongful death may be brought within one year after the date on which injury occurred, irrespective of the date of death, but in no event shall such an action be brought more than five years after the substantial completion of construction of such improvement. *Id*.

3. Statute of Limitations of a Claim Brought Pursuant to the Deceptive Trade Practices Act

Any civil action brought under the Deceptive Trade Practices Act may be brought during a period of five years commencing on the date of the occurrence of the violation or the date upon which the cause of action arises. A.C.A. §4-88-115.

4. Statute of Limitations Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

An action for breach of the implied warranty of habitability is an action in contract. *Curry v. Thornsberry*, 128 S.W.3d 438, 445 (Ark. 2003). As such, a cause of action for breach of implied warranty of habitability is subject to a five-year statute of limitations. A.C.A. §16-56-112(a).

5. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

A cause of action for breach of express warranty is subject to a five-year statute of limitations. *A.C.A*. §16- 56-111.

6. Statute of Limitations of a Claim Based on Fraud

A cause of action for fraud is subject to a three-year statute of limitations. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568, 583 (Ark. 2002).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Absent concealment of an alleged wrong, the statutory limitations period begins to run when a wrongful act accrues and not when it is discovered. A.C.A. § 16-56-112. In Arkansas, the cause of action begins to accrue when the injury occurs, and the statute of limitations is tolled until fraud is discovered or should have been discovered with the exercise of reasonable diligence. *Norris v. Bakker,* 899 S.W.2d 70 (Ark. 1995). In order to toll the statute of limitations, plaintiffs are required to show something more than a continuation or a prior nondisclosure. *Curry v. Thornsberry*, 98

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S.W.3d. 477, 481 (Ark. App. 2003). There must be evidence creating a fact question related to "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Id.*

D. Statute of Repose

As previously discussed, there is a maximum five-year period within which an injured party can bring suit against a person who deficiently constructs or repairs an improvement to real property, which period commences after a substantial completion of the improvement; but, in bringing such a suit, the injured party must still bring the action within the statute of limitations for that type of cause of action. *East Poinsett County School Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415, 417 (Ark. 1990); A.C.A. § 16-56-112. A.C.A § 16-56-112 has been construed by the Arkansas Supreme Court as a statute of repose. *Curry* at 441.

II. Common Law Related to Construction Defect Claims: Property Damage Allegedly Caused by an Insured Is Not Covered Under a CGL Policy

Arkansas law consistently has defined an accident as an event that takes place without one's foresight or expectation, an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. Faulty workmanship is not an accident; instead, it is a foreseeable occurrence. As such, the Supreme Court of Arkansas has held that defective workmanship standing alone − resulting in damages only to the work product itself − is not an occurrence under a CGL policy. *Essex Ins. Co. v. Holder*, 261 S.W.3d. 456 (2008).

Based on the Court's decision in *Essex*, it is unclear whether property damage caused by an insured constitutes an occurrence, thus triggering coverage under a CGL policy. However, it is clear that defective workmanship that results in damage only to the insured's work product is not an occurrence under a CGL policy. A.C.A. §23-79-155 effectively overruled Essex in 2011. *See*, *J. McDaniel Construction Co v. Mid- Continent*, 761 F.3d 916.

In Arkansas, however, a commercial general liability insurance policy offered for sale shall contain a definition of "occurrence" that includes: (1) Accidents, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) Property damage or bodily injury resulting from faulty workmanship. A.C.A. §23-79-155.

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California

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

California's statute of limitations for bringing a cause of action for breach of a written contract is four years. Cal. Code Civ. Proc. §337. For breach of an oral contract, the statute of limitations is two years. Cal. Code Civ. Proc. §339. For causes of action sounding in negligence for injury to real or personal property, the applicable statute of limitations is three years. Cal. Code Civ. Proc. §338.[1] California has implemented the delayed discovery rule, which provides that a cause of action does not accrue until the plaintiff discovers or should have discovered the cause of action. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292 (2006). The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of the injury and its negligent cause. *Id.* at 334. A plaintiff is held to have actual knowledge as well as knowledge that could be discovered through investigation of sources available to plaintiff. *Id.* California has implemented a statute of repose for patent defects and for latent defects. A cause of action for personal or property injury arising out of a patent defect(s) must be brought within four years. Cal. Code Civ. Proc. §337.1. Causes of action arising out of a latent defect(s) must be brought within ten years of substantial completion of the project. Cal. Code Civ. Proc. §337.15 **The 10 year statute of limitations is not subject to discovery of the latent defect. Any claim for a latent defect must be brought within 10 years regardless of when it was discovered.**

B. Statute of Limitations

The statute of limitations period generally begins to run when the cause of action accrues, i.e., when all essential elements are present and the claim becomes legally actionable. *Glue-Fold, Inc. v. Slautterback Corp.*, 82 Cal. App. 4th 1018 (2000). The applicable statute of limitations will vary depending on the allegation(s) brought forth in the complaint.

1. Statute of Limitations Regarding Alleged Construction Defects

Regarding latent defects, no cause of action may be brought against any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more

[1] An act to amend Section 338 of the Code of Civil Procedure, relating to civil actions was approved by Governor and filed with the Secretary of State on September 23, 2021. *2021 Bill Text CA A.B. 287.* The amendment to Section 338 is limited to address actions brought pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). MAUCRSA consolidates the licensure and regulation of commercial medicinal and adult-use cannabis activities. MAUCRSA imposes a civil penalty on a person engaging in commercial cannabis activity without a license required by MAUCRSA of up to 3 times the amount of the license fee for each violation. MAUCRSA does not supersede or limit state agencies from exercising their existing enforcement authority. MAUCRSA authorizes a local jurisdiction to enforce its provisions and the regulations promulgated by a licensing authority if delegated the power to do so by the licensing authority, as specified. Existing law generally requires an action upon a statute for a penalty or forfeiture to commence within one year. The amendment to Section 338 of the Code of Civil Procedure would require a civil action for a penalty described above to commence within 3 years. *Id.*

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than ten years after the substantial completion of the development or improvement. Latent defect is defined as a defect that is not apparent by reasonable inspection. Cal. Code Civ. Proc. §337.15.

Regarding patent defects, no cause of action may be brought against any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement. Cal. Code Civ. Proc. §337.1 A patent defect is a defect that is apparent by reasonable inspection. This statute of repose applies to causes of action seeking damages for injury to real or personal property. *Id.* If the injury to property or person occurs during the fourth year after substantial completion, an action in tort may be brought within one year after the date on which such injury occurred, but in no event may such action be brought more than five years after substantial completion of the project. *Id.* The statute of limitations provided in this section will be tolled in the event that the contractor attempts to make repairs, however, it is only tolled with respect to the particular defects which the contractor attempts to repair or repairs.

2. Statute of Limitations of a Claim for Unfair Business Practices

A cause of action for unfair business practices must be brought within four years of when the cause of action accrued. *Cal. Bus. & Prof. Code* §17208**.**

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a cause of action for breach of implied warranty of habitability is two years. Cal. Code Civ. Proc. §339.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a cause of action for breach of express warranty is two years. Cal. Code Civ. Proc. §339. However, if the warranty is in writing it falls under a four-year statute of limitations as an obligation founded upon an instrument of writing. Cal. Code Civ. Proc. §337.

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for a cause of action based on fraud or mistake is three years, but is tolled until discovery. Cal. Code Civ. Proc. §338(d).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

California has implemented the delayed discovery rule, which provides that a cause of action does

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not accrue until the plaintiff discovers the injury and its negligent cause, or could have discovered it through the exercise of reasonable diligence. *San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318 (1995).

D. Statute of Repose

See analysis provided in section B(1).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under California Law, a comprehensive general liability policy may provide coverage for property damage caused by an insured, if the damage is to property other than the insured's product or coverage is not otherwise excluded by the language of the policy. California courts will look to the terms of the insurance policy to determine whether or not there is coverage, however, where there is ambiguity in the policy, the courts have the right to interpret the meaning of the coverage. *See, generally, Geedes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 51 Cal. 2d 558 (1959).

Generally, there needs to be an occurrence to trigger coverage. Under California law, an "occurrence" in the context of a liability insurance policy is simply an unexpected consequence of an insured's act, even if due to negligence or faulty work; however, an intentional act is not an accident within the plain meaning of the word. *Id.* California courts have defined the term "accident" to include unintentional acts or conduct. *Ray v. Valley Forge Ins. Co.*, 77 Cal. App. 4th 1039 (1999). An accident is an event occurring unexpectedly or by chance. *Id.* An accident is never present when the insured performs a deliberate act, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause the injury. *Id.*

An insurer has a duty to defend only if the facts disclosed to the insurer raise a potential that the lawsuit against its insured seeks damages within the scope of the policy coverage. *Id.* The duty to defend is broader than the duty to indemnify; insurer may owe a duty to defend its insured in an action in which no damages are ultimately awarded. *North Counties Engineering, Inc. v. State Farm General Insurance Co.*, 224 Cal. App. 4th 902 (2014).

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Colorado

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

All claims against a contractor performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property must be brought within two years after the claim for relief arises. A claim for relief arises at the time the claimant or the claimant's predecessor in interest discovers, or in the exercise of reasonable diligence should have discovered, the physical manifestations of a defect in the improvement which ultimately causes the injury. Colo. Rev. Stat. §13-80-104. Colorado has a six-year statute of repose for any and all actions in tort, contract, indemnity or contribution for any deficiency in the design, planning or construction of any improvement to real property. Colo. Rev. Stat. §13-80-104(1)(c)(I).

B. Statute of Limitations

The statute of limitations does not begin to run until a cause of action accrues. A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Colo. Rev. Stat. §13-80-108.

1. Statute of Limitations Regarding Alleged Construction Defects

All claims against a contractor performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property must be brought within two years after the claim for relief arises. A claim for relief arises at the time the claimant or the claimant's predecessor in interest discovers, or in the exercise of reasonable diligence should have discovered, the physical manifestations of a defect in the improvement which ultimately causes the injury. Colo. Rev. Stat. §13-80-104.

All third-party claims by a construction professional against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person are timely irrespective of both the two- year statute of limitations and the six-year statute of repose, so long as the claims are brought during the construction defect litigation or within 90 days following the date of judgment or settlement. *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 401 (Colo. 2017).

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Protection Act

Actions brought under the Consumer Protection Act must be commenced within three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred, or within three years after the consumer

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discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. Colo. Rev. Stat. 6-1-115.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a claim brought pursuant to breach of implied warranty of habitability is three years. Colo. Rev. Stat. §13-80-101.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a claim brought pursuant to breach of express warranty is three years. *Hersh Cos. v. Highline Vill. Assocs.*, 30 P.3d 221 (2001); Colo. Rev. Stat. §13-80-101.

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for a claim based on fraud is three years. Colo. Rev. Stat. §13-80-101.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Colorado's discovery rule provides that a cause of action for injury to a person or property shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Colo. Rev. Stat. §13-80-108(1).

D. Statute of Repose

Colorado has a six-year statute of repose for any and all actions in tort, contract, indemnity or contribution for any deficiency in the design, planning or construction of any improvement to real property. Colo. Rev. Stat. §13-80-104(1)(c)(I). If the defect is discovered in either the fifth or sixth year, the repose period may be extended two additional years from the date of discovery, but in no case more than eight years. Colo. Rev. Stat. §13-80-104(2).

The 90-day period of time to assert an indemnity claim following settlement or judgment applies to both claims for which the statute of limitations and statute of repose has otherwise expired.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

C.R.S.A. § 13-20-808 affects insurance policies issued to construction professionals. In interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to

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the work itself or other work, is an accident unless the property damage is intended and expected by the insured. Colo. Rev. Stat.
§ 13-20-808 (3). Nothing in this section requires coverage for damage to an insured's own work; or creates insurance coverage that is not in the insurance policy. *Id.*

Upon a finding of ambiguity in an insurance policy, a court may consider a construction professional's objective, reasonable expectations in the interpretation of an insurance policy issued to it. Colo. Rev. Stat.
§ 13-20-808 (4)(a). In construing an insurance policy to meet a construction professional's objective, reasonable expectations, the court may consider the following: the object sought to be obtained by the construction professional in the purchase of the insurance policy; and whether a construction defect has resulted, directly or indirectly, in bodily injury, property damage, or loss of the use of property. Colo. Rev. Stat. § 13-20-808 (4)(b).

It should be noted that this section of law was drafted specifically to overrule the holding in *General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo. App. 2009). However, because a statute cannot be enacted to change actions that already took place, *Colorado Pool Systems, Inc.*
v. Scottsdale Ins. Co., 317 P.3d 1262 (Colo. App. 2012)[2], ruled that it was unconstitutional to apply this new section retrospectively; therefore this section is only effective on current policies prospectively from May 21, 2010. *Id.*

[2] This action was appealed to the Colorado Supreme Court and *certiorari* was granted in part for the issue of retrospective applicability and the interpretation of the CGL policy. However, on January 31, 2014, an order was issued for a Stipulation for Dismissal with Prejudice and the Case was returned to the Court of Appeals. Colo. Pool Sys. v. Scottsdale Ins. Co., 2014 Colo. LEXIS 77 (2014).

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Connecticut

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Connecticut, a cause of action based on a written contract is six years. Conn. Gen. Stat. § 52-576. For actions based on tort, the statute of limitations is three years from the date of the complained of act or omission. Conn. Gen. Stat. § 52-577. The tolling of the limitations period begins when the act or omission complained of occurs, not when the plaintiff discovers it. *Id.* No action to recover damages for injury to the person, or to real or personal property, caused by negligence or by reckless or wanton misconduct, or malpractice, shall be brought but within two years from the date when the injury is first sustained or discovered or, in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the complained of act or omission. Conn. Gen. Stat. § 52-584. Pursuant to Connecticut case law, a cause of action does not accrue until the plaintiff has discovered or should have discovered the identity of the tortfeasor. *See Tarnowsky v. Socci*, 271 Conn. 284 (2004).

B. Statute of Limitations

1. Statute of Limitations Regarding Alleged Construction Defects

In Connecticut, the statute of limitations for a cause of action based on a written contract is six years. Conn. Gen. Stat. § 52-576. For actions based on tort, the statute of limitations is three years from the date of the complained of act or omission. Conn. Gen. Stat. § 52-577. Construction defect claims for latent defects must be brought within seven years from substantial completion of such improvement. Conn. Gen. Stat. § 52-584a. If the injury occurs during the seventh year after such substantial completion, an action in tort may be brought within one year after the date on which such injury occurred, but in no event may such an action be brought more than eight years after the substantial completion of construction of such an improvement. *Id.*

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

A cause of action brought pursuant to the Unfair Trade Practices Act must be brought within three years of the occurrence of a violation. Conn. Gen. Stat. § 42-110g(f).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a claim under breach of implied warranty of habitability is six years. Conn. Gen. Stat. § 52-576.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a claim under breach of an express warranty is six years. Conn. Gen. Stat. § 52- 576.

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for a civil claim based on fraud is three years. Conn. Gen. Stat. § 52-577.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

As discussed above, a cause of action does not accrue until the plaintiff has discovered or should have discovered the identity of the tortfeasor. *Tarnowsky v. Socci*, 271 Conn. 284 (2004).

D. Statute of Repose

A claim of construction defect must be brought within seven years from substantial completion of such improvement. Conn. Gen. Stat. § 52-584a. If the injury occurs during the seventh year after such substantial completion, an action in tort may be brought within one year after the date on which such injury occurred, but in no event may such an action be brought more than eight years after the substantial completion of construction of such an improvement. *Id.*

An improvement to real property shall be considered substantially complete when (1) it is first used by the owner or tenant thereof or (2) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first. Conn. Gen. Stat. §52-584a.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Connecticut common law, negligence may constitute an "occurrence," giving rise to a cause of action alleging liability under a CGL policy. *See generally Barbar v. Berthiaume*, 2009 Conn. Super. LEXIS 2477 (Conn. Super. Ct. Aug. 25, 2009). The Connecticut Supreme Court has held that, as a matter of first impression, defective workmanship can give rise to an "occurrence" or "accident" under a CGL policy. *Capstone Bldg. Corp. v. American Motorist Ins. Co.*, 308 Conn. 760, 776 (Conn. 2013). Physical injury to or loss of use of the insured's property is within the initial grant of coverage for "property damage" under a CGL policy. *Id.* However, absent resulting damage to other, non-defective property, faulty workmanship does not constitute physical injury to tangible property. *Id.* at 785-76. Faulty workmanship, standing alone, is not property damage under a CGL policy that would trigger coverage. *Id.* at 779-84. Additionally,

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absent policy language that invokes coverage, there is no coverage for the repair of defective work. *Id.* at 787. The determination of whether or not an insured party makes a viable claim for property damage is highly fact dependent on a case-to-case basis. *Id.* at 790.

Under the well-established four corners doctrine, the duty to defend is broader than the duty to indemnify. *Travelers Cas. And Sur. Co. of America v. Netherlands Ins. Co.*, 312 Conn. 714, 739 (Conn. 2014) (citations omitted) (internal quotations omitted). An insurer's duty to defend is triggered if at least one allegation of the complaint falls even possibly within the coverage. *Id.* A liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered. *Id.* The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts that bring the injury within the coverage. *Id.* If the latter situation prevails, the policy requires the insurer to defend, irrespective of the insured's ultimate liability. *Id.*

The duty to indemnify is narrower; it depends upon the facts established at trial and the theory under which judgment is actually entered in the case. *Travelers*, 312 Conn. 739. Thus, the duty to defend is triggered whenever a complaint alleges facts that potentially could fall within the scope of coverage. *Id.* Since the duty to defend is significantly broader than the duty to indemnify, where there is no duty to defend there is no duty to indemnify. *DaCruz v. State Farm Fire and Cas. Co.*, 268 Conn. 675, 688 (Conn. 2004) (citation omitted) (internal quotations omitted).

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Delaware



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Delaware provides a six-year limitations period for construction defect claims. 10 Del. C. §8127(b). The Delaware statute of repose, referred to as the "Builder's Statute," serves as a substantive bar to any action brought more than six years after the construction is performed or services rendered. *See* 10 Del. C. §8127. Under Delaware's discovery rule, the statute of limitations begins to run upon the discovery of facts "constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery" of such facts. *Coleman v. Pricewaterhousecoopers, LLC*, 854 A.2d 838, 842 (Del. 2004). The statute of limitations will run, "even if the plaintiff is ignorant of the cause of action." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

B. Statute of Limitations

A cause of action for breach of contract accrues at the time of breach and the cause of action in tort accrues at the time of injury. *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. 1969).

1. Statute of Limitations Regarding Alleged Construction Defects

The statute of limitations for construction defect claims is governed by 10 Del. C. §8127(b), which provides:

> No action, whether in or based upon a contract…in tort, or otherwise, to recover damages or for indemnification or contribution for damages, resulting from any alleged deficiency in the construction or manner of construction of an improvement to real property and/or in the designing, planning, supervision, and/or observation of any such construction or manner of furnishing, or causing the performance or furnishing of, any such construction of such an improvement or against any person performing or furnishing, or causing the performing or furnishing of, any designing, planning, supervision, and/or observation of any such construction or manner of construction of such an improvement after the expiration of six years….

10 Del. C. §8127(b). The six-year statute period begins with the earliest of the following dates, irrespective of the date of injury:

> a) The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;

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b) The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract in which the alleged deficiency occurred, where such date for such phase or segment of work has been specifically provided for in the contract itself;

c) The date when the statute commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself.

d) The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which such alleged deficiency occurred;

e) The date the person against whom the action is brought has received final payment in full, under the contract for the construction or for the designing, planning, supervision, and/or observation of construction, as the case may be, called for by contract;

f) The date when the construction of such an improvement as called for by the contract has been substantially completed;

g) The date when an improvement has been accepted, as provided in the contract, by the owner or occupant thereof following the commencement of such construction;

h) For alleged personal injuries also, the date upon which it is claimed that such alleged injuries were sustained; or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires prior to the expiration of two years from whichever of the foregoing dates is earliest.

The Supreme Court of Delaware has defined "construction" as the building, erection, act of devising and forming, fabrication, and composition. *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982). The statute defines construction to include "construction, erection, building, alteration, reconstruction and destruction of improvements to real property." 10 Del. C. §8127 (a)(2).

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade and Consumer Practices Law

Private actions regarding Unfair Trade and Consumer Practices law must be brought within three years of the accrual of the cause of action. 10 Del. C. §8106; *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 Del. Ch. LEXIS 59 (Del. Ch. May 4, 2005). However, actions brought by the Attorney General must be brought within five years. 6 Del. C. 2506.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Breach of implied warranty claims must be brought within three years. 10 Del. C. §8106(a).

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

Breach of express warranty claims are subject to a three-year statute of limitations. 10 Del. C. §8106(a).

5. Statute of Limitations of a Claim Based on Fraud Has Long Since Passed

The statute of limitations for claims based on fraud is three years pursuant to 10 Del. C. §8106.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Delaware has adopted a discovery rule that tolls the statute of limitations in construction defect cases. *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646 (Del. Super. 1985) (where roof manufacturer was contractually obligated to inspect and repair roof, statute of limitations on breach of warranty did not begin to run until manufacturer notified plaintiff of inherent defect in roof). Under this rule, the statute of limitations does not begin to run until the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery of such facts. *Estate of Buonamici v. Morici*, 2010 Del. Super. LEXIS 223, 2010 WL 2185966 (Super. Ct. June 1, 2010).

D. Statute of Repose

The Delaware statute of repose, referred to as the "Builder's Statute," serves as a substantive bar to any action brought more than six years after the construction is performed or services rendered. 10 Del. C.
§8127. Since construction defects often do not become apparent until more than ten years after the completion, the statute of repose serves as a strong defense to construction defect claims. To successfully assert that a claim is barred by the statute of repose, a defendant must establish (1) the condition that allegedly caused the injury and/or damages is an improvement to real property; (2) more than six years have elapsed from the earliest of the eight designated dates; and (3) the activity of the movant must be within the class that is protected by the statute. 10 Del. C. §8127. *City of Dover v. International Tel. & Tel.*, 514 A.2d 1086, 1089 (Del. 1986).

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Delaware courts have articulated that construction constitutes an improvement to property when the construction is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Windley v. Potts Welding & Boiling Repair Co. Inc.*, 888 F. Supp. 610, 612 (D. Del. 1995) (*citing Standard Chlorine of Delaware Inc. v. Dover Steel Co.*, No. 87C- Fe-98, letter op. at 3 (Del. Super. 1983) (citations omitted)). Delaware courts also have held that manufacturers or suppliers of raw materials are not entitled to the statute's protection. *Id.* at 612.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Prior to 2020, an "accident" is an event happening without human agency, or, if happening through such agency, an event which under circumstances, is unusual and not expected by the person to whom it happens. *See State Farm Fire and Cas. Co. v. Hackendorn*, 605 A.2d 3 (Del. Super. Ct. 1991). Under that standard, insurers argued that intentional acts did not trigger coverage. On January 29, 2020, the Delaware Supreme Court overruled *Hackendorn* to find that "whether an incident is an 'accident' in the context of the homeowners' insurance policies must be determined from the viewpoint of the insured." *USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357, 362 (Del. 2020).

Conduct that leads to the damage of the property of another that is clearly within the control of a contractor or construction company, and is not a fortuitous circumstance happening without human agency, will not be found to be an "occurrence" and not trigger coverage under a commercial general liability policy. *Westfield Ins. Co., Inc., v. Miranda & Hardt Contracting and Building Services, L.L.C.*, 2015 WL 1477970, at 4 (Del. Super. 2015).

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District of Columbia

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Actions based on contract, express or implied, must be brought within three years of accrual. D.C. Code §12-301. Tort actions for personal injuries or injuries to real or personal property also must be brought within three years of the time the action accrues. *Id*. The statute of limitations may be tolled if the breach or the injury is not readily apparent due to fraud or fraudulent concealment. *Diamond v. Davis*, 680 A.2d 364 (D.C. App. 1996). The statute of limitations also will be tolled in non-fraud-related tort or contract claims that arise out of latent deficiencies in construction. *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192 (D.C. App. 1984). The discovery rule does not tell the limitation period when plaintiff knew or in the exercise of reasonable diligence should have known of the injury. *Id*. at 1201. The District of Columbia's statute of repose states that any action to recover damages for personal injury or injury to real or personal property will be barred if not brought within ten years from the date the improvement was substantially completed. D.C. Code §12-310(a)(1)(B).

B. Statute of Limitations

Where the fact of an injury can be readily determined, a claim accrues for purposes of the statute of limitations at the time the injury actually occurs. A cause of action accrues when its elements are present, so that a plaintiff could maintain a successful suit. *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308 (D.C. App. 2008).

1. Statute of Limitations Regarding Alleged Construction Defects

Construction defect claims are considered breach of contract claims and barred by a three-year statute of limitation. D.C. Code § 12-301(7). The breach accrues when the defective work is completed. *Ehrenhaft v. Malcolm Price Inc.*, 483 A.2d 1192 (D.C. App. 1984).

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Protection Procedures Act

The Consumer Protection Act does not provide any specific limitations period. *See generally* D.C. Code §§ 28-3901 to 28-3913. Thus the default three year statute of limitations apply. M*urray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 323 (D.C. App. 2008) (*citing* D.C. Code § 12-301(8)); *Koker v. Aurora Loan Servicing, LLC*, 915 F. Supp. 2d 51, 59 (D.D.C. 2013).

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a cause of action brought under breach of implied warranty of habitability is three years. D.C. Code §12-301.

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a cause of action brought under breach of express warranty is three years. D.C. Code §12-301.

5. Statute of Limitations of Claim Based on Fraud

There is no statute which specifically defines limitations for claims based on fraud. Thus, the default 3 years period applies, pursuant to D.C. Code §12-301(8).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In the District of Columbia, the discovery rule will not toll the statutory limitation period when plaintiff knew, or in the exercise of reasonable diligence, should have known of the injury. *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192 (D.C. App. 1984). The discovery rule was extended to include contract, warranty and negligence claims when the parties have relied upon, to their detriment, the skill of a professional, which includes contractors. *Id*.

D. Statute of Repose

The District of Columbia's statute of repose states that any action to recover damages for personal injury, injury to real or personal property, or wrongful death resulting from the defective or unsafe condition of an improvement to real property, and for contribution and indemnification as a result of such injury or death, shall be brought within ten years from when the improvement was substantially completed. D.C. Code §12-310(a)(1)(B).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

There is no case law for the District of Columbia that provides authority for the trigger for coverage under a general liability policy in the context of a construction defect claim. However it is clear that for coverage to be triggered there must be an "occurrence" which is defined as an "accident." As such, property damage arising from expected or intended acts of the insured would not trigger coverage. *See generally Western Exterminating Co. v. Hartford Accident & Indem. Co.*, 479 A.2d 872 (D.C. App. 1984).

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Florida

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Florida's statute of limitations is five years for a legal or equitable action based upon a written contract. Fla. Stat. §95.11(2)(b). The limitations period begins to run from the date the cause of action accrues.

There is a four-year statute of limitations for any action founded on the design, planning or construction of an improvement to real property. This statute of limitations period runs from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor, and his or her employer, whichever date is latest, except with regard to latent defects. Fla. Stat. §95.11(3)(c).

Where the defect is latent, the statute of limitations runs from the time the defect is discovered or should have been discovered with the exercise of due diligence; however, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. Fla. Stat. §95.11(3)(c).

B. Statute of Limitations

1. Statute of Limitations Regarding Alleged Construction Defects

In Florida, a construction defect claim must be commenced within four years. Fla. Stat. §95.11(3)(c).

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

The statute of limitations for a cause of action founded on a statutory liability, such as the Unfair Trade Practices Act, is four years. Fla. Stat. §95.11(3)(f).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Workmanlike Performance

The statute of limitations for claims brought pursuant to breach of implied warranty of habitability and workmanlike performance is four years. *See Elizabeth N. v. Riverside Group, Inc.*, 585 So.2d 376 (Fla. 1st DCA 1991).

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

An action for breach of a legal or equitable action on a contract, obligation, or liability founded on a written instrument, must be brought within five years. Fla. Stat. §95.11(2)(b). However, an action for a legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts, must be brought within four years. Fla. Stat. §95.11(3)(k).

5. Statute of Limitations of a Claim Based on Fraud

A legal or equitable action based on fraud must be brought within four years. Fla. Stat. §95.11(3)(j).

C. The Discovery Rule in Relation to Tolling of the Statute of Limitations in Actions Involving Construction Defects

In Florida, if the construction defect is latent, the statute of limitations is tolled until such time as the defect was discovered or should have been discovered with the exercise of due diligence. Fla. Stat. §95.11(3)(c).

D. Statute of Repose

Florida has a statute of repose that bars construction claims brought after ten years, including actions involving latent defects. Fla. Stat. §95.11(3)(c). The time period begins to run on the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. *Id*.

Recently, *Gindel v. Centex Homes*, 267 So. 3d 403 (Fla. 4th DCA 2018) held that compliance with the pre-suit notice requirements of Section 558.004, *Florida Statutes*, tolls the statute of repose in addition to the statute of limitations.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Florida law, faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an "accident" and thus an "occurrence" under a post-1986 standard form CGL policy. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007). Furthermore, physical injury to a completed project that occurs as a result of the defective work can constitute "property damage" as defined in a CGL policy. *Id.*

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Georgia

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Actions in tort for negligent damage to property must be brought within four years. Ga. Code Ann. §9-3-30(a). Actions based on breach of a written contract must be brought within six years. Ga. Code Ann. §9- 3-24, and if a contract was executed under seal, an action must be brought within twenty years. Ga. Code Ann. §9-3-23. The six-year period begins to run on the date the contract is breached and the wrongful acts occur—not the date the actual damage results or is discovered. *Old Republic Nat. Ins. Co. v. Darryl J. Panella, LLC*, 319 Ga. App. 274, 276 (2012).

Georgia has adopted the discovery rule, which applies to actions concerning cases involving the negligent design or installation of synthetic exterior siding. Ga. Code Ann. §9-3-30(b). Further, Georgia has a statute of repose that bars construction claims commenced after eight years. Ga. Code Ann. §9-3-51.

B. Statute of Limitations

The general rule for determining when a cause of action accrues and the statute of limitations begins to run is well settled in Georgia. The true test to determine when a cause of action accrues is to ascertain the time when a plaintiff could have first maintained his or her action to a successful result. *Scully v. First Magnolia Homes*, 279 Ga. 336 (2005). Damage to property arising out of construction is generally considered to occur at the time of "substantial completion" of the project. *Colormatch Exteriors v. Hickey*, 275 Ga. 249, 251 (2002).

For any action accruing before July 14, 2020, there may be a 122-day toll on the statute of limitations as a result of the Supreme Court of Georgia's Emergency Judicial Order, which tolled all statutes of limitations from March 14, 2020 to July 14, 2020 as a result of the COVID-19 pandemic.

1. Statute of Limitations Regarding Alleged Construction Defects

A construction defect claim must be commenced within four years. Ga. Code Ann. §9-3-30.

2. Statute of Limitations Claim Brought Pursuant to Deceptive Trade Practices Act and Fair Business Practices Act

Georgia has a Deceptive Trade Practices Act and a Fair Business Practices Act. Ga. Code Ann. §§10-1-372 (injunctive relief is the sole remedy under this section) and 10-1-393. Suit must be commenced under these Acts within two years of the date the plaintiff knew or should have known of the violation. Ga. Code Ann. §10-1-401.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Actions based on breach of an implied warranty of habitability must be brought within four years. Ga. Code Ann. §9-3-26; *Gropper v. STO Corp.*, 552 S.E.2d 118 (Ga. Ct. App. 2001).

If a breach of an implied warranty stems from a contract, however, that claim is governed by the six year statute of limitations. *Id.* The statute of limitations for an implied warranty claim begins to run on the date of substantial completion. *See Feinour v. Ricker Co.*, 255 Ga. App. 651, 653 (2002).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Actions for breach of written construction contracts must be brought within six years from the date of substantial completion of the project. Ga. Code Ann. §9-3-24. *See Feinour v. Ricker Co.*, 255 Ga. App. 651, 653 (2002).

The "start date" for a breach of express warranty claim runs from the date that defendant was notified of the alleged defects. *Southern States Chemical v. Tampa Tank & Welding,* 359 Ga. App. 731 (2021).

If not based on a written construction contract, all other actions for breach of an express warranty must be brought within four years. Ga. Code Ann. §9-3-26.

5. Statute of Limitations of a Claim Based on Fraud

In Georgia, there is a four-year statute of limitations for fraud. *Evans v. Dunkley*, 728 S.E.2d 832 (Ga. App. 2012); *Serchion v. Capstone Partners, Inc.*, 298 Ga. App. 73, 75 (2009). However, the presence of fraud may serve to toll the statute of limitations where a defendant or his or her agents are guilty of fraud which deters or prevents a plaintiff from bringing an action. In these instances of fraudulent concealment, the statutory period will not begin to run until such fraud is discovered or could have been discovered by the exercise of ordinary care and diligence. See Ga. Code Ann. §9-3-96; *Daniel v. Amicalola Elec. Mbrshp. Corp.,* 289 Ga. 437 (2011).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In certain claims, Georgia has adopted the discovery rule which tolls the applicable statute of limitations until such time as the defect is discovered, or in the exercise of reasonable diligence, should have been discovered, whichever occurs first. Ga. Code Ann. §9-3-30(b). See *Demere*

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Marsh Assocs., LLC v. Boatright Roofing & Gen. Contr., Inc., 343 Ga. App. 235, 240-41 (2017); *citing Scully v. First Magnolia Homes*, 279 Ga. 336 (2005).

However, the discovery rule in Georgia is limited to cases involving bodily harm and in actions for recovery of damages to a dwelling due to the manufacture of, or the negligent design or installation of, synthetic exterior siding. The discovery rule does not apply to actions alleging only property damage. *Corp of Mercer Univ. v. Nat'l Gypsum Co.*, 368 S.E.2d 732 (Ga. 1988).

D. Statute of Repose

Georgia has a statute of repose that bars construction claims commenced after eight years. Ga. Code Ann. §9-3-51. The statute of repose begins to run upon substantial completion of the realty, and the statute does not extend the limitation period found in Ga. Code Ann. §9-3-30. *Armstrong v. Royal Lakes Assoc.*, 502 S.E.2d 758 (Ga. Ct. App. 1998) (noting that Georgia courts have never interpreted the statute of repose applicable to construction cases as a separate statute of limitation nor as extending the statute of limitation period); *see also Colormatch Exteriors v. Hickey*, 275 Ga. 249, 252 (2002) ("O.C.G.A. § 9-3-51 establishes a reasonable outside time limit beyond which builders are insulated from liability.").

In 2020, this statute was updated to clarify that the Code section does not apply to actions for breach of contract, including, but not limited to, actions for breach of express contractual warranties. Ga. Code Ann. §9-3-51 (c).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Georgia Supreme Court has stated that an "occurrence" can arise where faulty workmanship causes unforeseen or unexpected damage to other property. *American Empire Surplus Lines Ins. Co. v Hathaway Dev., Co.*, 288 Ga. 749, 752 (2011). This definitively established that faulty workmanship sometimes can amount to an "occurrence". *Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co.*, 293 Ga. 456, 459 (2013). The Court has defined occurrence simply as "an accident including continuous or repeated exposure to substantially the same, general harmful conditions." *Id.* It has defined accident by its common usage, as an unexpected happening without intention or design. *Id.* at 460. Therefore, an occurrence, as used in a standard CGL policy, does not require damage to the property or work of someone other than the insured. *Id.* Finally, in order to trigger coverage there must be an accident or occurrence and property damage. This includes faulty workmanship. *Id.* at 465.

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Hawaii



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

The statute of limitations for tort claims is two (2) years under Hawaii law. Haw. Rev. Stat. §657-7. Breach of contract actions must be brought within six (6) years. Haw. Rev. Stat. §657-1. Hawaii has adopted the "discovery rule" that tolls that running of the statute of limitations until the time when the plaintiff knew or should have known of the defendant's negligence. *Board of Directors of Assn. of Apartment Owners v. Regency Tower Venture*, 635 P.2d 244, *cert. denied*, *Board of Directors v. Regency Tower Venture*, 64 Haw. 689 (1981).

B. Statute of Limitations

The statute of limitations begins to run from the time the cause of action accrues. *Board of Directors of Assn. of Apartment Owners supra*. A cause of action accrues when the plaintiff knows, or, in the exercise of reasonable care, should have discovered that an actionable wrong has been committed. *Assn. of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, 115 Haw. 232,167 P.3d 225, 270 (Haw. 2007).

1. Statute of Limitations Regarding Alleged Construction Defects

Hawaii imposes a two (2) year limitations period for actions for damages based on construction improvements to real property. Haw. Rev. Stat. §657-8. It provides:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any deficiency or neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action has accrued, but in any event not more than ten years after the date of completion of the improvement. *Id*.

2. Statute of Limitations for Claims Arising Out of Unfair Competition and Deceptive Acts or Practices

Hawaii has separate acts that prohibit unfair competition and deceptive acts or practices. See Haw. Rev. Stat. Ann. §§480-2, 481A-3. Consumers, the attorney general, or the director of the Office of Consumer Protection may bring an action based upon unfair or deceptive acts or practices. An action under the unfair competition law must be brought within four (4) years of the date the cause of action accrues. Haw. Rev. Stat. Ann. §480-24.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Although there is no specific statute of limitations for breach of implied warranty of habitability, actions for recovery based upon breach of an obligation must be brought within six (6) years. See Haw. Rev. Stat. Ann. §657-1; *see Association of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, *supra*.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Breach of express warranty claims must be brought within six (6) years. Haw. Rev. Stat. Ann. §657-1, four year period of limitation applies on actions for sale of goods.

5. Statute of Limitations of a Claim Based on Fraud

Hawaii does not have a specific statute pertaining to claims based on fraud, and as such is subject to the "catch-all" six (6) year statute of limitations. Haw. Rev. Stat. Ann. §657-1(4); *see also Au v. Au*, 63 Haw. 210, 626 P.2d 176, 179-180 (Haw. 1981).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Hawaii has adopted the "discovery rule" whereby the applicable statute of limitations may be tolled until the point in time when the complaining party knew, or reasonably should have known, of the wrongdoing. *Association of Apartment Owners of Newtown Meadows v. Venture 15, Inc.*, *supra.*

D. The Statute of Repose

Hawaii has adopted a statute of repose that requires actions "arising out of any deficiency or neglect in the planning, design, construction, supervision, and administering of construction, and observation of construction relating to an improvement to real property" to be commenced within ten (10) years. Haw. Rev. Stat. §657-8.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Hawaii common law, construction defect claims grounded in breach of contract, specifically claims based on allegations of shoddy performance, are not covered under CGL policies, nor are tort-based claims, derivative of breach of contract claims. *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Haw. 142, 231 P.3d 67 (Haw. Ct. App. 2010).

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Idaho

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

An action based on written contract must be brought within five (5) years from the date of completion of construction. Idaho Code §5-216. An action based on oral contract must be brought within four (4) years following the date of completion of construction. Idaho Code §5-217. Actions arising in tort must be brought within two years following accrual or the date of discovery, but not more than six (6) years following completion of the construction. Idaho Code §5-219(4); Idaho Code §5-241. An exception to this rule is where the defect is concealed from the injured party by the wrongdoer, who at the time of the incident was in a professional relationship with the injured party. Idaho's discovery rule states that in cases of concealment, the cause of action accrues when the injured party knows or in the exercise of reasonable care should have been put on inquiry of the injury. Idaho Code §5-219(4). Idaho's statute of repose applies to causes of action arising out of design or construction of improvements to real property. For actions arising in contract, accrual occurs at the completion of construction. For actions in tort, the action accrues six (6) years after completion of construction, provided the cause of action did not previously accrue. Idaho Code §5-241.

B. Statute of Limitations

Under Idaho law, a cause of action accrues, and the statute of limitations begins to run, when one party may maintain a lawsuit against another. *Western Corp. v. Vanek*, 144 Idaho 150, 151, 158 P.3d 313 (Ct. App. 2006).

1. Statute of Limitations Regarding Alleged Construction Defects

Idaho has enacted the Notice and Opportunity to Repair Act (NORA) for claims involving construction defects. The act states:

> Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect. Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. If a written notice of claim is served under this section within the time prescribed for the filing of an action under this chapter, the statute of limitations for construction-

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related claims is tolled until sixty (60) days after the period of time during which the filing of an action is barred. Idaho Code §6-2503.

Actions will be deemed to have accrued and the statute of limitations shall begin to run as to actions against any person by reason of his having performed or furnished the design, planning, supervision or construction of an improvement to real property, as follows:

(a) Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement.

(b) Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement. Idaho Code §5-241.

2. Statute of Limitations Claim Brought Pursuant to Consumer Protection Act

Causes of action arising under Idaho's Consumer Protection Act must be brought within two (2) years of the date when the cause of action accrues. Idaho Code §48-619.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Generally, an implied warranty of habitability acts as a contract, therefore, the statute of limitations governing contracts would govern the implied warranty of habitability. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); Idaho Code § 5-241(b). However, the Idaho Supreme Court has stated that subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, may maintain an action against the builder, or builder-developer, of the dwelling based upon the implied warranty of habitability, despite lack of privity of contract between the two. *Tusch Enterprises*, Id at 50-51.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for any action upon any contract, obligation or liability founded upon an instrument in writing is five (5) years. Idaho Code §5-216.

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5. Statute of Limitations of a Claim Based on Fraud

The statute of limitation for a cause of action based on fraud is three (3) years. Idaho Code §5-218. The cause of action accrues upon discovery by the aggrieved party of facts constituting fraud. Idaho Code §5-218(4).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Unless previously accrued, tort actions "shall accrue and the applicable limitation statute shall begin to run six (6) years after the final completion of construction of such an improvement." *Hibbler v. Fisher*, 109 Idaho 1007, 1012, 712 P.2d 708 (Ct. App. 1985) (citing Idaho Code § 5-241(a)). However, this section provides a limited discovery rule for tort claims arising out of the design or construction of improvements to real property. *Id.* This tolling only applies to latent defects, as patent defects are deemed discovered. *Id.*

Additionally, cases involving fraud (or concealment) provide the ability to toll the statute of limitations in actions involving construction defects. *Lindberg v. Roseth*, 137 Idaho 222, 46 P.3d 518 (2002). In the case of concealment, the cause of action accrues when the injured party knows or is put on notice of injury. *Id.*

Other than these limited exceptions, the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission, or at the time of the final completion of construction of an improvement. Idaho Code § 5-219(4); Idaho Code § 5-241(b).

D. Statute of Repose

As previously discussed, Idaho's statute of repose applies to causes of action arising out of design or construction improvements to real property. For actions arising in contract, accrual occurs at the completion of construction. For actions in tort, the action accrues six (6) years after completion, provided the cause of action did not previously accrue. Idaho Code §5-241.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Supreme Court of Idaho has held that in order to trigger coverage under a CGL policy there must be an occurrence that caused the damage. *Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc*, 103 Idaho 377, 378, 647 P.2d 1249 (1982). The Court went on to define an occurrence as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. *Id.* at 379. Unless a policy specifically defines "accident," Idaho courts will interpret the term "accident" as the word is commonly understood. *Id.* at 380. In *Millers*, however, the Court stated that the

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occurrence must take place during the policy period and did not extend this coverage to faulty (or defective) work that was discovered after the policy period ended. *Id.* at 380-381.

The duty of an insurance company to defend its insured arises when a complaint is filed against the insured which, reading the allegations in the complaint broadly, reveals a potential for liability that would be covered by the policy. *Shunn Const., Inc. v. Royal Ins. Co. of America*, 127 Idaho 97, 98, 897 P.2d 89 (1995).

There is no legal authority that specifically explains if faulty work alone without property damage triggers coverage under a CGL policy. However, it can be inferred from the above cases that the Courts will look to the specific insurance policy language on a case-to-case basis to determine coverage. Further, the courts will interpret any ambiguity in the policy language based on the general dictionary meaning of the terms. Case law in Idaho implies that CGL coverage will not be triggered by faulty work standing alone. There must be evidence of an occurrence that happened during the policy period.

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Illinois

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Illinois has a four-year statute of limitations period for most construction claims. 735 Ill. Comp. Stat. 5/13-
214(a). Exceptions for claims based on fraud and the Consumer Fraud and Deceptive Business Practices Act are discussed below. The statute of limitations begins to run when the plaintiff knows, or should have known, of the injury. *LaSalle Nat'l Bank v. Edward M. Cohon & Assoc. Ltd.*, 532 N.E.2d 314 (Ill. App. 1988).

Illinois also has a ten-year statute of repose for all construction claims, but if an alleged wrongful action or omission is discovered within the ten-year period, the claimant will have at least four years from the discovery in which to file a cause of action. 735 Ill. Comp. Stat. 5/13-214(b). This ten-year period may be extended by contract Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal. *Id.*

B. Statute of Limitations

1. Statute of Limitations Regarding Alleged Construction Defects

As discussed above, Illinois has a four-year statute of limitations for all causes of action, whether based in tort, contracts, or otherwise, against a person for an act or omission by said person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property. 735 Ill. Comp. Stat. 5/13-214(a). The statute of limitations on such claims begins to run when the plaintiff knows, or reasonably should have known, of the injury. *LaSalle Nat'l Bank v. Edward M. Cohon & Assoc. Ltd.*, 532 N.E.2d 314 (Ill. App. 1988).

2. Statute of Limitations Claim Brought Pursuant to Consumer Fraud and Deceptive Business Practices Act

The statute of limitations for a claim brought under Illinois' Consumer Fraud and Deceptive Business Practices Act is three years from the date the cause of action accrues. A notice of the action must be served thirty days prior to the filing of the action. 815 Ill. Comp. Stat. 505/10a(e).

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for a claim brought under an implied warranty of habitability is four years. 735 Ill. Comp. Stat. 5/13-214(a). Additionally, the ten-year statute of repose for claims arising from act or omission in connection with construction of improvement to real property applies to actions based on breach of implied warranty of habitability. *Andreoli v. John Henry Homes, Inc.*, 297 Ill. App. 3d 151, 152- 155 (1998); 735 Ill. Comp. Stat. 5/13-214(b). The ten-year statute of repose begins to run on the date of conveyance of the home. *Andreoli*, 297 Ill. App. 3d at 155.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a claim brought under breach of express warranty is four years. 735 *Ill. Comp. Stat.* 5/13-214(a). The ten-year statute of repose also applies to express warranty claims. *See generally Stelzer v. Matthews Roofing Co., Inc.*, 117 Ill. 2d. 186 (1987); 735 Ill. Comp. Stat. 5/13-214(b).

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for fraud is five years. 735 Ill. Comp. Stat. 5/13-215. The action may be commenced at any time within five years after the person entitled to bring the action discovers the fraud.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The statute of limitations starts to run when a person knows, or reasonably should know, of his injury and also knows or reasonably should know that it was wrongfully caused. At that point the burden is upon the injured person to inquire further as to the existence of a cause of action. *Witherell v. Weimer*, 85 Ill. 2d 146 (1981); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161 (1981).

D. Statute of Repose

Illinois has a ten-year statute of repose for construction claims. No such action may be brought after ten years have elapsed from the time of the alleged wrongful act or omission. However, any person who discovers such act or omission prior to expiration of the ten-year repose period shall in no event have less than 4 years to bring an action. 735 Ill. Comp. Stat. 5/13-214(b). This ten-year period may be extended by contract. 735 Ill. Comp. Stat. 5/13-214(d).

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Illinois Law, if an occurrence is pled, absent exclusions in the policy, an insurance company owes a duty to defend its insured. *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524, 532 (Ill. App. 1st 2011). There is no coverage under a CGL policy where the complaint alleges only construction defects and not property damage or an occurrence within the terms of the policy. *Id.* at 526. Further, courts have found there is no occurrence when a subcontractor's defective workmanship necessitates removing and repairing work. *Id.* at 531.

However, the case law indicates that damage to something other than the project itself does constitute an "occurrence" under a CGL policy. *Id.* at 532. So faulty workmanship, alone, does not trigger coverage under a CGL policy but, if defective workmanship damages something other than the project itself, this faulty work could trigger coverage under a CGL policy. *Id.*

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Indiana

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Indiana a cause of action based upon a written contract must be brought within ten years. Ind. Code §34-11-2-11. However, if the claim is for payment of money (including promissory notes), the cause of action must be brought within six years. Ind. Code §34-11-2-9. A cause of action in tort, i.e., personal injury or injury to personal property, must be brought within two years after the cause of action accrues. Ind. Code §34-11-2-4. A tort cause of action accrues when the plaintiff becomes aware, or, in the exercise of ordinary diligence could have discovered, that he has suffered an injury as a result of the tortious conduct of another. City of Marion v. London Witte Group, LLC, 169 N.E.3d 382, 391 (Ind. 2021). To the extent that a cause of action is related to real property, Indiana's six-year statute of limitations may apply. Ind. Code, § 34-11-2-7. Indiana's statute of repose requires that a claim for construction defect be commenced within the earlier of ten years after the date of substantial completion of the improvement, or twelve years after the completion and submission of the plans and specifications to the owner if the action concerns deficiencies in the improvement's design. Ind. Code §32-30-1-5(d).

B. Statute of Limitations

In Indiana a cause of action accrues and the statute of limitations begins to run when a plaintiff knew or, in the exercise of ordinary diligence could have discovered, that an injury had been sustained as a result of the tortious act of another. City of Marion v. London Witte Group, LLC, 169 N.E.3d 382, 391 (Ind. 2021).

1. Statute of Limitations Regarding Alleged Construction Defects

Indiana does not have a statute of limitations specifically governing construction defect claims, however, it does have a statute of repose which bars claims alleging deficiency in the design and improvement of real property brought within the earlier of ten years after the date of substantial completion of an improvement or twelve years after the completion and submission of plans and specifications if the action is for a deficiency in the design of the improvement. Ind. Code §32-30-1-5(d). The homeowner is required to provide a statutorily defined notice to the construction professional before initiating litigation against the construction professional. Ind. Code §32-27-3-2; 32-27-3-6. In addition, a home owner is not required to serve an additional written notice for any additional defects discovered after the home owner has served an initial written notice of a construction defect. *Id.* In certain cases involving a homeowner's claim against construction professionals, including contractors, the applicable statute of limitations is tolled consistent with the time allowed to cure defects under the "right to cure" statute. See Ind. Code §32-27-3-1 et seq; 32-27-3-14

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2. Statute of Limitations Claim Brought Pursuant to the Deceptive Trade Practices Act

A claim brought pursuant to Indiana's Deceptive Trade Practices Act must be brought within two years of the deceptive act. Ind. Code §24-5-0.5-5(b). Additionally, as to deceptive acts that are curable, the consumer must give the supplier written notice of the act within the sooner or six months from discovery of the act, one year from the transaction, or the time period of any applicable warranty. Ind. Code §24-5-0.5-5(a).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

A claim for breach of the implied warranty of habitability is subject to a six-year statute of limitations with the claim accruing and the statute beginning to run when the injured party knows or, in the exercise of ordinary diligence could have known, that he or she had sustained an injury. Ind. Code §34-11-2-7.

4. Statute of Limitations of a Claim Based on Fraud

An injured party has six years after the cause of action accrues to file an action based upon fraud. Ind. Code §34-11-2-7. This provision is only applicable where fraud was the primary cause of an action and not when fraud was only incidentally involved. Wilson v. Brookshire, 25 N.E.131 (Ind. 1890). This six-year statute of limitations applies to constructive, as well as actual, frauds. Wells v. Stone City Bank, 691 N.E.2d 1246 (Ind. Ct. App. 1998).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

As previously discussed, in Indiana, a tort cause of action accrues when the plaintiff becomes aware, or, in the exercise of ordinary diligence could have discovered, that he has suffered an injury as a result of the tortious conduct of another. Habig v. Bruning, 613 N.E.2d 61 (Ind. Ct. App. 1993). This includes actions predicated upon allegedly fraudulent conduct where the fraud is concealed and the injured party remains in ignorance through no fault of his own. Dorsey Mach. Co. v. McCaffrey, 38 N.E. 208 (Ind. 1894).

D. Statute of Repose

Indiana's statute of repose states that an action to recover damages, whether based on contract, tort, or otherwise, for (1) deficiency of alleged deficiency in the design, supervision, planning, construction, or observation of construction of any improvement to real property, (2) injury to real or personal property arising out of any deficiency, or (3) injury or wrongful death of a person arising out of a deficiency may not be advanced unless the action is initiated with the earlier of

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ten years after the date of substantial completion of the improvement or twelve years after the completion and submission of the plans and specifications to the owner if the action concerns deficiencies in the improvement's design. Ind. Code, §32-30-1-5(d).

Additionally, if notwithstanding section 5 of this chapter, an injury to or wrongful death of a person occurs during the ninth or tenth year after substantial completion of an improvement to real property, an action in tort to recover damages for the injury or wrongful death may be brought within two (2) years after the date on which the injury occurred, irrespective of the date of death. However, an action may not be brought more than: twelve years after the substantial completion of construction of the improvement; or fourteen years after the completion and submission of plans and specifications to the owner, if the action is for a deficiency in design, whichever comes first. Ind. Code, §32-30-1-6.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage Under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

In Indiana improper or faulty workmanship constitutes an accident thereby triggering coverage under a standard CGL policy, so long as the resulting damage is an event that occurs without expectation or foresight. Sheehan Constr. Co. v. Cont'l Cas. Co., 935 N.E.2d 160 (Ind. 2010).

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Iowa

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

The statute of limitations for unwritten contracts, including implied contracts, and torts causing property damage is five years. I.C.A. §614.1(4). The statute of limitations for personal injuries is two years. I.C.A. §614.1(2). The statute of limitations for written contracts is ten years. I.C.A. §614.1(5). Generally, a cause of action does not accrue until the wrongful act causes injury or loss to the claimant. *Bob McKiness Excavating and Grading, Inc. v. Morion Buildings, Inc.*, 507 N.W.2d 405 (Iowa 1993). The discovery rule provides that the cause of action accrues when the plaintiff discovers or should have known of an injury to person or property. *Id.* Iowa has a fifteen-year statute of repose for actions arising out of the unsafe or defective condition of an improvement to real property, whether based on tort or implied warranty. I.C.A. § 614.1(11).

B. Statute of Limitations

Generally, a cause of action does not accrue until the wrongful act causes injury or loss to the claimant. *Bob McKiness Excavating and Grading, Inc. v. Morion Buildings, Inc.*, 507 N.W.2d 405 (Iowa 1993).

1. Statute of Limitations Regarding Alleged Construction Defects

The statute of limitations for torts and oral contracts causing property damage is five years; an action on a written contract must be brought within ten years. I.C.A §614.1(4) & (5). In addition to limitations contained elsewhere in this section, an action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than fifteen years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death. However, this subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property. I.C.A., §614.1 (11).

2. Statute of Limitations Claim Brought Pursuant to the Consumer Fraud Act

The statute of limitations for a claim brought pursuant to Iowa's Consumer Fraud Act is two years. I.C.A. §714.16, et seq.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Workmanlike Construction

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The statute of limitations for a claim of breach of workmanlike construction is five years. I.C.A. §614.1(4). The implied warranty of workmanlike construction is also covered by the fifteen-year statute of repose. I.C.A., §614.1(11).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a claim of breach of express warranty is ten years. I.C.A. §614.1(5).

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for a claim based on fraud is five years. I.C.A. §614.1(4).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The discovery rule provides that the cause of action accrues when the plaintiff discovers or should have known of an injury to person or property. *Bob McKiness Excavating and Grading, Inc. v. Morion Buildings, Inc.*, 507 N.W.2d 405 (Iowa 1993).

D. Statute of Repose

Iowa has a fifteen-year statute of repose for actions arising out of the unsafe or defective condition of an improvement to real property, whether based on tort or implied warranty. I.C.A. §614.1(11) states in pertinent part:

> [A]n action arising out of the unsafe or defective condition of an improvement to real property based on tort and implied warranty and for contribution and indemnity, and founded on injury to property, real or personal, or injury to the person or wrongful death, shall not be brought more than 15 years after the date on which occurred the act or omission of the defendant alleged in the action to have been the cause of the injury or death. However, this subsection does not bar an action against a person solely in the person's capacity as an owner, occupant, or operator of an improvement to real property. I.C.A. §614.1(11).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

In *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, the Supreme Court of Iowa held that defective workmanship standing alone, that is, resulting in damages *only to the work product itself*, does not constitute an "occurrence" under a CGL policy, and, therefore, coverage for such defective

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workmanship will not be afforded. *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (1999).

In 2015, the Court of Appeals of Iowa stated faulty workmanship can lead to an occurrence under a CGL policy, if occurrence constitutes an "accident" and causes property damage beyond the work product itself. *National Surety Corp. v. Westlake Investment, LLC*, 872 N.W.2d 409 (Iowa Ct. App. 2015)

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Kansas

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Kansas has a five-year statute of limitations for any cause of action based upon a written contract, K.S.A.
§60-511. There is a three-year statute of limitations for any action based on an express or implied but unwritten contract, obligation or liability. K.S.A. §60-512. Most actions based on negligence are subject to a two-year statute of limitation from the date of discovery of the injury. This applies to actions for damage to personal property, injury to the rights of another not based on contract, and personal injury, including wrongful death. K.S.A. §60-513. There is no statute of repose pertaining specifically to construction defect actions. However, with respect to most actions for injury to persons or property not based upon contract, a cause of action shall not be deemed to have accrued until the act first causes substantial injury, or the injury becomes reasonably ascertainable to the injured party. K.S.A. §60-513(b). This act further provides that such actions must be brought within ten years from the time the act gives rise to a cause of action.

B. Statute of Limitations

Under Kansas statutes, the statute of limitations begins when the cause of action accrues. K.S.A. §60-510. Generally, in contract causes of action, the statute of limitations begins to run at the time of the breach, regardless of when a party first learns of the breach. For actions in tort, the statute of limitations generally begins to run upon discovery, when the party should have discovered, the tortious conduct or condition. Construction contracts are subject to the general rule that a cause of action accrues when the plaintiff "could first have filed and prosecuted his action to a successful conclusion." *Edward Kraemer & Sons, Inc. v. City of Overland Park*, 880 P.2d 789 (Kan. Ct. App. 1994) (citing *Yeager v. Nat'l Corp. Refinery Ass'n*, 470 P.2d 797 (Kan. 1970)).

1. Statute of Limitations Regarding Alleged Construction Defects

Kansas has enacted the Kansas Residential Construction Defect Act which primarily addresses notice requirements that must be met by a homeowner prior to filing a lawsuit against a contractor for construction defects. K.S.A. §60-4701, *et seq.* The Act is silent concerning the legal theories upon which such a lawsuit may be based. *Prendiville v. Contemporary Homes, Inc.*, 32 Kan. App. 2d 435 (Kan. Ct. App. 2004). The nature of the cause of action for the defect determines the statute of limitations. In 2011, the Kansas Supreme Court found that *Prendiville* was overruled as to the economic loss doctrine and that homeowners could recover economic damages when suing contractors for negligence. *David v. Hett*, 293 Kan. 679, 270 P.3d 1102 (2011).

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2. Statute of Limitations Claim Brought Pursuant to the Consumer Protection Act

The statute of limitations for a claim for civil penalties brought under Kansas's Consumer Protection Act is one year. K.S.A. § 60-514(c). There is a three-year statute of limitations for claims for actual damages. K.S.A. § 60-512(2).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Workmanlike Construction

Action for breach of implied warranty of workmanlike performance is subject to a three-year statute of limitations for actions upon implied contracts. *Zenda Grain & Supply Co. v. Farmland Industries, Inc.*, 20 Kan.App.2d 728, 740 (1995); K.S.A. § 60-512.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

A cause of action based upon a builder's express warranty to repair or replace construction defects in a newly built house must be brought within five years of the date the builder breached the warranty by refusing or failing to repair or replace the defects. *Hewitt v. Kirk's Remodeling and Custom Homes, Inc.*, 49 Kan.App.2d 506, 507 (2013); K.S.A. § 60-511. However, if the express warranty is not written, the statute of limitations is three years. K.S.A. § 60-512.

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for claims based on fraud is two years. The statute of limitations does not begin to run until the fraud is discovered. K.S.A. §60-513(a)(3).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The causes of action listed in subsection (a) of K.S.A. §60-513 shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until sometime after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than ten years beyond the time of the act giving rise to the cause of action.

Additionally, K.S.A. § 60-4702 (Construction Defect Act), provides that if the statute of limitations would expire during the time period necessary to allow the parties to comply with the provision of this act, the statute of limitations will be tolled if the claimant gives notice of the claim to the

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contractor within 90 days of entry of the order of dismissal of the action without prejudice pursuant to subsection (a). Further, the claimant's notice of claim shall serve to toll the statute of limitations for 180 days after the latest of the following three dates: (1) the date the claimant personally serves or mails the notice of claim; (2) the date agreed upon for the contractor to make payment under subsection (c)(3) of (g)(2) of K.S.A. § 60- 4704, and amendments thereto; or (3) the date agreed upon for the contractor to completely remedy the construction defect under subsection (c)(2) or (g)(1) of K.S.A. § 60-4704, and amendments thereto.

D. Statute of Repose

As previously discussed, there is no statute of repose pertaining specifically to construction defect actions. However, with respect to most actions for injury to persons or property not based upon contract, a cause of action shall not be deemed to have accrued until the act first causes substantial injury, or the injury becomes reasonably ascertainable to the injured party. K.S.A. §60-513(b). This statute further provides that non-contractual actions upon a construction defect must be brought within ten years from the time the act gives rise to a cause of action.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Pursuant to Kansas law, damage occurring as a result of faulty or negligent workmanship constitutes an "occurrence," thereby triggering coverage under a CGL policy, so long as the damage incurred is both unforeseen and unintended by the insured. *See generally Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (2006). This is a minority position, as most other jurisdictions hold that claims of faulty workmanship do not constitute an "occurrence."

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Kentucky

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Kentucky, the statute of limitations for tort claims is one year. K.R.S. §413.140(1)(a). Kentucky has adopted the "discovery rule" whereby the applicable statute of limitations may be tolled until the point in time when the complaining party knows or reasonably should have known of the injury. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 818-819 (Ky. 1991).

An action upon a written contract executed after July 15, 2014, unless otherwise provided by statute, and an action for relief not provided for by statute can only be commenced within ten (10) years after the cause of action accrued. K.R.S. § 413.160. (written contracts executed before July 15, 2014, have a fifteen-year statute of limitations. K.R.S. § 413.090 (2)). **Although Kentucky has a statute of repose, KRS 413.135, it has been repeatedly found to violate multiple provisions of the Kentucky Constitution**, most recently in *Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 813 (Ky. 1991).

B. Statute of Limitations

The statute of limitations immediately begins to run on the date the cause of action accrues, unless there is justification for tolling. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 66-67 (Ky. 2010).

1. Statute of Limitations Regarding Alleged Construction Defects

In any action alleging defective building design, construction, materials, or supplies where the injury, death, or property damage occurs more than five (5) years after the date of completion of construction or incorporation of materials or supplies into the building, there shall be a presumption that the building was not defective in design, construction, materials, or supplies. This presumption may be overcome by a preponderance of the evidence to the contrary. *K.R.S.* § 198B.135.

No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection, or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement. *K.R.S.* §413.135. However, if the injury occurs in the seventh year, then no action shall be brought more than eight years after the substantial completion of such improvement. *Id.*

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2. Statute of Limitations of Claim Brought Pursuant to the Consumer Protection Act

A private action under Kentucky's Consumer Protection Act must be brought within two years of the violation or one year after an action by the attorney general has been terminated, whichever is later. *K.R.S.* §367.220(5).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

There is a five-year statute of limitations for actions based "upon a contract not in writing, express or implied," and actions "created by statute when no other time is fixed by the statute creating liability." *K.R.S.* §413.120(1)-(2).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

For breach of a written contract, the statute of limitations period is 10 years from when the action accrues, if the contract was executed after July 15, 2014. *K.R.S.* §413.160 (if the contract was executed before July 15, 2014, the statute of limitations is fifteen years. *K.R.S.* §413.090(2)). The limitation period is five years from accrual for breach of an oral contract. *K.R.S.* §413.120(1). Thus, the pertinent statute of limitations for breach of express warranty claims depends on whether the underlying contract is written or oral. Moreover, the cause of action for breach of contract accrues on the date of the contract breach or the date of its promised performance. *Hoskins' Adm'r. v. Ky. Ridge Coal Co.*, 305 S.W.2d 308, 311 (Ky. 1957); *Finley v. Thomas*, 107 S.W.2d 287, 288 (Ky. 1937).

5. Statute of Limitations of a Claim Based on Fraud Long Since Passed

The statute of limitations for a claim based upon fraud is five years from accrual. *K.R.S.* §413.120(11). The statute of limitations begins to run when the victim discovers the fraud or should have discovered the fraud through the exercise of ordinary diligence. *K.R.S.* §413.130(3); Hernandez v. Daniel, 471 S.W.2d 25, 26 (Ky.App. 1971).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The limitations period may be tolled for construction defect actions brought by homeowners against builders. If the homeowner properly serves a written notice of claim to the builder, the limitations period is tolled for seventy-five days after the last date of the timetable, inspection date, or fourteen days after inspection, whichever occurs later. *K.R.S.* §411.264.

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Kentucky has adopted the "discovery rule" in construction defect cases. This rule tolls the statute of limitations in cases involving construction defects to the date that the plaintiff knew, or should have known of the injury, and that the injury was caused by the defendant's conduct. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 819 (Ky. 1991).

D. Statute of Repose

As a result of pressure applied by the Kentucky construction industry, the Kentucky legislature has repeatedly enacted, with minor variations, a statute of repose intended to limit claims for construction defects, all of which have been codified at KRS 413.135. Just as repeatedly, the Supreme Court of Kentucky has found that the statute violates multiple provisions of the Kentucky Constitution, including fundamental jural rights. The most recent and comprehensive rejection of the concept of a statute of repose is contained *Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 813 (Ky. 1991). In *Perkins,* the U.S. District Court for the Western District of Kentucky certified to the Kentucky Supreme Court the following Questions of Law at issue in the above-styled case: "(1) whether KRS 413.135 violates Kentucky Constitution §§ 14, 54, 59, and/or 241; and (2) whether KRS 413.135 applies to latent disease cases and, if so, whether the statute of limitations commences from the date the plaintiff knows or should have discovered the injury or disease." The Kentucky Supreme Court found that the statute of repose violates the Kentucky Constitution, but that KRS 413.135 does not nullify the "discovery rule" which applies "to tort actions for injury from latent disease caused by exposure to a harmful substance." *Louisville Trust Co. v. Johns Manville Products, Ky*., 580 S.W.2d 497, 501 (1979).

Although found to violate the Kentucky Constitution, there is a current statute of repose "on the books," which provides in pertinent part:

KRS 413.135 Action for damages arising out of injury.

> (1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or arising out of any deficiency in the construction components, design, planning, supervision, inspection, or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person after the expiration of seven (7) years following the substantial completion of such improvement.
>
> (2) Notwithstanding the provisions of subsection (1) of this section, in the case of such an injury to property or the person or wrongful death resulting from such injury, which injury occurred during the seventh year following substantial completion of such improvement, an action to recover damages for such injury or wrongful death may only be brought within one (1) year from the date upon which such injury occurred (irrespective of the date of death), but

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in no event may such an action be brought more than eight (8) years after the substantial completion of construction of such improvement.

(3) Nothing in this section shall be construed as extending the period prescribed by statute for the bringing of any action for damages.

(4) As used in this section, the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated association, or joint stock company; the term "substantial completion" shall be construed to mean the date upon which the owner of the structure, project, or facility first entered upon the occupancy or commenced the use thereof. Effective: July 13, 1990

II. Common Law Related to Construction Defects Claims: Trigger for Coverage Under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Kentucky common law, a claim for faulty workmanship, in and of itself, is not an "occurrence" under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident. *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (2010).

It is unclear whether a claim for faulty workmanship resulting in damage to property other than the insured's faulty work product constitutes an "occurrence" under a CGL policy. In *Cincinnati Ins. Co.,* the Court stated that "as we construe it, application of the general rule *could* lead to coverage" if the faulty workmanship had damaged another's property. *Id.* at 80 n.45. However, the Court did not officially address this issue.

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Louisiana

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Louisiana, both prescriptive and peremptive periods may apply to a single action for construction defects. A prescriptive period is the period of time during which a person may bring a claim, also known as a statute of limitations. A peremptive period is the time at which a cause of action is extinguished, similar to a statute of repose. Close attention is required to time requirements for a claim, as it is possible for an action to become preempted before the cause of action has even accrued. This is particularly true as it relates to claims for indemnity once the main demand has been filed.

Claims for breach of contract are typically subject to a ten-year statute prescriptive period. La. Civ. Code art. 3499. Claims such as failure to complete the job or abandoning the work site are typically brought under this theory. Actions based on negligence are subject to a prescriptive period of one year. La. Civ. Code art. 3492. Claims against a contractor or architect for construction, renovation, or repair defects is subject to a ten-year prescriptive period. La. Civ. Code art. 3500. When damage is caused to immovable property, prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage. La. Civ. Code art. 3493. Louisiana has adopted a five-year peremptive period for claims related to construction or improvement of immovables. See La. R.S. §9:2772. The commencement of the five year period begins to run from acceptance of the work or occupancy. Further, if the construction involves a home, the New Home Warrant Act (the "NHWA") provides the exclusive remedy for construction defects. La. R.S. §9:3141, *et. seq.* The NHWA sets forth minimum warranty periods ranging from one year to five years as well as a peremptive period for suit running thirty days from the end of the applicable warranty period. *Id.*

B. Statute of Limitations

In Louisiana, statutes of limitation are referred to as "prescriptive periods." A prescriptive period is interrupted when suit is filed in a court maintaining proper jurisdiction and venue. La. C.C. art. 3462. If suit is commenced and either jurisdiction or venue is later found to be improper, prescription is interrupted only as to those defendants served by process within the prescriptive period. *Id.* Statutes of repose, which extinguish a right of action and are not subject to renunciation, interruption, or suspension, are called "peremptive periods."

1. Statute of Limitations Regarding Alleged Construction Defects

A number of statutes govern construction claims in Louisiana, mandating when such claims may be brought and for how long contractors may be held liable. Which statute will apply depends, in part, on what has been constructed and the theory of recovery.

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La. R.S. §9:2772, sets forth a peremptive period for actions involving deficiencies in surveying, supervision, or construction of immovables or improvements thereon of five years after the date of registry in the mortgage office of acceptance of the work by owner. If no such acceptance is filed, the peremptive period runs five years from occupancy by the owner. There are exceptions such as fraud and wrongful death.

La. R.S. §38:2189 establishes a five-year prescriptive period for bringing construction claims involving public projects. This period accrues from either substantial completion, acceptance of the work, or notice of default of the contractor, whichever occurs first.

La. R.S. §9:3141 *et. seq.* (the NHWA) is the exclusive remedy between an owner and a builder of a home as defined in the statute for construction defects. It sets out peremptive periods of one year plus thirty days for defects due to noncompliance with building standard; two years plus thirty days for plumbing, electrical, heating, cooling and ventilating systems; and five years plus thirty days for major structural defects. The owner must provide notice to the contractor prior to filing suit.

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices and Consumer Protection Law

A cause of action under Louisiana's Unfair Trade Practices and Consumer Protection Law is subject to a one-year prescriptive period from the time of the transaction. La. R.S. §51:1409.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

La. Civ. Code art. 2762 provides the following:

> If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks.

It should be noted that this statute may conflict with other time periods, such as the peremptive period in La. R.S. §9:2772 or the prescription period set forth in La. Civ. Code art. 3500. Although the Legislature has not addressed this issue, the Louisiana Supreme Court has held that La. Civ. Code art. 2762 sets forth a cause of action when construction falls to ruin within the applicable time period, not a prescriptive or peremptive period. *Orleans Parish School Bd. v. Pittman Const. Co.*, 260 So.2d at 666 (La. 1972).

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

In Louisiana, causes of action based for breach of contract are considered personal actions which enjoy a ten-year prescriptive period. LSA-C.C. Art. 3499. There is no distinction among prescriptive periods based on whether the contract was written or oral. The prescriptive period begins to run when the error that causes the breach is discovered, not when its consequences are discovered. *New Hotel Monteleone v. First Nat'l Bank*, 423 So.2d 1305, 1309 (La. App. 4th Cir. 1982). Although the NHWA provides the sole remedy for construction defects between owner and builder, a breach of contract claim may still lie.

5. Statute of Limitations of a Claim Based on Fraud

Louisiana does not have a specific statute of limitations relating to claims based on fraud. However, all delictual actions are subject to a one-year prescriptive period after the damage or injury occurred. LSA-
C.C. Art. 3492. The presence of fraud may toll the statute of limitations to the point in time where the plaintiff has actual or constructive notice of the tortious act, the resulting damage, and the causal connection between the two. *Krolick v. State, Department of Health and Human Resources*, 790 So.2d 21, 26 (La. App. 1 Cir. 2000). Peremptive periods, such as those laid out in the NHWA, however, cannot be tolled.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Louisiana has adopted the discovery rule, or doctrine of *contra non valentum*, which suspends the running of prescriptive periods in four situations: (1) there was some legal cause that prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings that prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of the cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *See Corsey v. State through Dept. of Corrections*, 375 So.2d 1319 (La. 1979); *State ex rel. Div. of Admin. v. McInnis Bros. Const. Inc.*, 701 So.2d 937, 940 (La. 1997). The doctrine of *contra non valentum* is only applied in exceptional circumstances and does not suspend peremptive periods.

D. Statute of Repose

Statutes or repose are called "peremptive" periods in Louisiana. Suits arising out of the construction of immovable property against a contractor, design professional, or surveyor are extinguished after the five-year peremptive period described in La. R.S. §9:2772 expires. *See*

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supra. Moreover, this statute includes a peremptive period of five years for suits related to construction projects based on tortious causes of action. *See id.*, *supra.* Finally, the NHWA lays out a variety of peremptive periods, depending on the type of defect alleged, ranging from two to five years.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Louisiana Courts have found no coverage where the liability of a contractor is based solely on improper construction or defective workmanship. This is based on the well-settled principle that liability policies are not intended to serve as performance bonds. *Rivnor Properties v. Herbert O'Donnell, Inc.*, 633 So. 2d 735 (La. Ct. App. 1994).

Louisiana Courts will determine coverage through a review of the exclusions and definitions in the policy. Typical exclusions such as the "injury to work" and "work product" exclusions have consistently been held to eliminate coverage, when applicable. Any inconsistencies are typically resolved in favor of coverage.

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Maine

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Maine has a general statute of limitations of six years for civil actions. 14 M.R.S.A. §752. C 14 M.R.S.A. §752-A. Maine has adopted the "discovery rule" which tolls the statute of limitations for construction defect claims. *Id*. Maine's statute of repose bars an action for malpractice or professional negligence against an architect, engineer, or land surveyor if brought more than ten years after substantial completion. See 14 M.R.S.A. §§752-A and 752-D.

B. Statute of Limitations

Generally, a cause of action accrues, and the statute of limitations begins to run, when a party suffers a judicially cognizable injury. *Chiapetta v. Clark Assoc., 521 A.2d 697, 699 (Me. 1987)*. Thus, a contract cause of action accrues at the time of breach. *Kasu Corp. v. Blake, Hall & Sprague, Inc.*, 582 A.2d 978, 980 (Me. 1990). A tort action accrues when the plaintiff suffers harm to a protected interest. *Johnston v. Dow & Coulombe, Inc.*, 686 A.2d 1064, 1066 (Me. 1996). "When the Legislature does not give explicit directions, definition of the time of accrual ... remains a judicial function." *Nevin v. Union Trust Co.,* 726 A.2d 694, 699 (Me. 1999).

1. Statute of Limitations Regarding Alleged Construction Defects

Maine has two statutes of limitations that may apply to construction defect claims:

> 14 M.R.S.A. §752A. All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within four years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than ten years after the substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved. The limitation periods provided by this section shall not apply if the parties have entered into a valid contract which by its terms provides for limitation periods other than those set forth in this section.
>
> 14 M.R.S.A. §752. All civil actions shall be commenced within six years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state, or of a justice of the peace in this State, and except as otherwise specially provided.

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2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

Actions under Maine's Unfair Trade Practices Act are governed by a six-year statute of limitations. 14 M.R.S.A. §752.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Breach of implied warranties must be brought within six years. 14 M.R.S.A. §752; *Dunelawn Owners' Ass'n v. Gendreau***,** 750 A.2d 591 (Me. 2000).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for a breach of a contract or warranty subject to Maine's Uniform Commercial Code is four years. 11 M.R.S.A. §2-725.

Breach of express warranty outside of this action must generally be brought within six years. 14 *M.R.S.A.* §752.

5. Statute of Limitations of a Claim Based on Fraud

Generally, causes of action based in fraud must be brought within six years. 14 M.R.S.A. §752. When a cause of action is "fraudulently concealed," the statute of limitations is six years and does not commence until the patient "discovers" the cause of action. 14 M.R.S.A. §859. The statute of limitations will begin to run "when the existence of the cause of action or fraud is discovered or should have been discovered by the plaintiff in the exercise of due diligence and ordinary prudence." *Westman v. Armitage*, 215 A.2d 919, 922 (Me. 1966).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Maine has enacted a form of the discovery rule with respect to design professionals. 14 M.R.S.A. §752- A, supra. The statute of limitations will begin to run when cause of action is discovered or should have been discovered by the plaintiff in the exercise of the due diligence and ordinary prudence. *See Westman*, *supra.*

D. Statute of Repose

No action for malpractice or professional negligence against an architect, engineer, or land surveyor may be commenced more than ten years after the substantial completion of the

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construction contract or, if a written contract is not involved, the substantial completion of the services provided. 14 M.R.S.A. §§752- A and 752-D.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Maine common law, property damage resulting from an "occurrence" of harm occasioned by negligent workmanship is insured under a standard comprehensive general liability policy. Repair or replacement of the faulty work is not covered. *Baywood Corp. v. Maine Bonding & Casualty Co.*, 628 A.2d 1029 (1993) (*citing Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (1989).

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Maryland

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

A civil action for both tort and contract claims must be filed within three years of the date of when the cause of action accrues, unless otherwise provided by statute. Md. Code Ann., Cts. & Jud. Proc. §5-101. Maryland has a general 20-year statute of repose and a ten-year statute of repose for actions against an architect, professional engineer, or contractor. Md. Code Ann., Cts. & Jud. Proc. §5-108(b). Under Maryland's discovery rule, the statute of limitations begins to run when a claimant gains knowledge sufficient to put him or her on inquiry. As of that date, he or she is charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation. *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000).

B. Statute of Limitations

In Maryland, the general statute of limitations begins to run when the cause of action accrues. *Am. Gen. Assur. Co. v. Pappano*, 374 Md. 339 (2003). A cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong. *Anne Arundel County v. Halle Dev., Inc.*, 408 Md. 539 (2009).

1. Statute of Limitations Regarding Alleged Construction Defects

The statute of limitations for a cause of action for injury to person or property occurring after completion of improvement, upon accrual of cause of action, to realty is three years. Md. Code Ann., Cts. & Jud. Proc.
§5-108(c).

2. Statute of Limitations Claim Brought Pursuant to the Consumer Protection Act

The Maryland Consumer Protection Act prohibits the use of certain defined unfair, abusive, or deceptive trade practices in the sale, lease, rental, or loan of consumer goods and realty. Md. Code Ann., Com. Law
§13-303. A private right of action pursuant to the Act must be brought within three years of the discovery of the cause of action. Md. Code Ann., Cts. & Jud. Proc. §5-101.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Workmanlike Construction

By Maryland statute, the sale of every newly constructed home includes an implied warranty that the home is free from faulty materials, constructed according to sound engineering standards, constructed in a workmanlike manner, and fit for habitation. Md. Code Ann., Real Prop. §10-

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203(a). A claim for breach of these implied warranties is subject to a two-year statute of limitations that begins to run after the date of completion, delivery, or taking possession, whichever occurs first. Md. Code Ann., Real Prop. §10- 204(b)(3).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Unless an express warranty specifies a long period of time, a cause of action for breach of an express warranty made in the sale of a newly construed home must be brought within two-years, which begins to run after the date of completion, delivery, or taking possession, whichever occurs first. Md. Real Property Code Ann. §10-204(b)(3).

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for claims based on fraud is three years. Md. Code Ann., Cts. & Jud. Proc. §5-
101. Claims based in fraud are not deemed to accrue until the party discovers, or by the exercise of ordinary diligence should have discovered the fraud. Md. Code Ann., Cts. And Jud. §5-203.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Maryland's discovery rule applies generally in all actions. The discovery rule provides that an action does not accrue until the plaintiff knows or reasonably should know of the wrong. *Am. Gen. Assur. Co. v. Pappano*, 374 Md. 339 (2003).

D. Statute of Repose

Maryland' statute of repose bars claims against architects, professional engineers, and contractors for personal injury or property damage that occurs more than 10 years after the completion of construction:

> Except as provided by this section, a cause of action for damages does not accrue and a person may not seek contribution or indemnity from any architect, professional engineer, or contractor for damages incurred when wrongful death, personal injury, or injury to real or personal property, resulting from the defective and unsafe condition of an improvement to real property, occurs more than 10 years after the date the entire improvement first became available for its intended use.

Md. Code Ann., Cts. & Jud. Proc. § 5-108(b). "Contractor" includes subcontractors as well. *Hartford Ins. Co. of Midwest v. American Automatic Sprinkler Sys., Inc.*, 23 F.Supp.2d 623 (D. Md. 1998).

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The statute of repose also features a general 20-year bar on claims resulting from defective construction, which would apply to property owners, developers, realtors, and managers:

> Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

Md. Code Ann., Cts. & Jud. Proc. §5-108(a). However, the statute of repose does not protect a defendant who was in actual possession and control of the property, as an owner, tenant, or otherwise, when the alleged injury occurred. Md. Code Ann., Cts. & Jud. Proc. §5-108(d)(2)(i).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Maryland Courts have stated that faulty work standing alone does not constitute an "accident" or an "occurrence" that would trigger coverage under a CGL policy since they are not unforeseen or unexpected. *Lerner Corp. v. Assurance Co. of America*, 120 Md. App. 525 (1998). Additionally, the cost to repair these latent defects caused by faulty work would not trigger coverage. *Id.* However, if the defect causes unrelated and unexpected personal injury or property damage to something other than the defective object itself, the resulting damages, subject to the terms of the applicable policy, may be covered. *Id.*

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Massachusetts

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Massachusetts bars tort claims and contract claims for personal injuries asserted more than three years after the cause of action accrues. M.G.L.A. 260, §2A. Causes of action based upon written contracts must be commenced within six years of their accrual. M.G.L.A. 260, §2. Massachusetts has implemented a "discovery rule" whereby a statutory period does not begin "until a plaintiff has first, an awareness of [his] injuries and, second, an awareness that the defendant caused [his] injuries." *Doe v. Creighton*, 786 N.E.2d 1211 (Mass. 2003).

B. Statute of Limitations

In Massachusetts, the statute of limitations begins to run when a plaintiff has knowledge or sufficient notice that he was harmed and knowledge or sufficient notice of the cause of the harm. *Koe v. Mercer*, 450 Mass. 97 (2007).

1. Statute of Limitations Regarding Alleged Construction Defects

In Massachusetts, the statute of limitations for construction defects is three years after the cause of action accrues, however, in no event shall actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner. M.G.L.A. 260 §2B.

2. Statute of Limitations Claim Brought Pursuant to the Consumer Protection Laws

Causes of action brought pursuant to Massachusetts's consumer protection laws must be brought within four years of the act at issue. M.G.L.A. 260, §5A.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Workmanlike Construction

Causes of action founded upon contracts or liabilities, express or implied, have a six-year statute of limitations. M.G.L.A. 260, §2.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Causes of action founded upon contracts or liabilities, express or implied, have a six-year statute of limitations. M.G.L.A. 260, §2.

5. Statute of Limitations of a Claim Based on Fraud

Causes of action based on fraud have a three-year statute of limitations. M.G.L.A. 260, §2A.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

As previously discussed, Massachusetts has implemented a "discovery rule" whereby a statutory period does not begin "until a plaintiff has first, an awareness of [his] injuries and, second, an awareness that the defendant caused [his] injuries." *Doe v. Creighton*, 786 N.E.2d 1211 (Mass. 2003).

D. Statute of Repose

Massachusetts has two statutes of repose:

> For construction defects to real property, a cause of action must be commenced within six years of the earlier of the dates of: (1) the opening of the improvement to use; or (2) the substantial completion of the improvement and the taking of possession for occupancy by the owner.
>
> For construction defects to real property of a public agency, an action must be commenced within six years of the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority. M.G.L.A. 260, §2B.

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Massachusetts law, if language contained in a complaint alleges property damage caused by an "occurrence," it is sufficient to trigger coverage under a CGL policy, but only to the extent that it triggers a duty to defend the insured. *See generally Nat'l Union Fire Ins. Co. v. Modern Cont'l Constr. Co.*, 27 Mass. L. Rptr. 16 (2009).

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Michigan



I. General

The law in Michigan with respect to professional liability for design professionals, including Architects and Engineers, is a constantly developing area of law. Typical claims alleging losses as the result of construction defects, product defects, personal injury, economic loss, loss/damage to personal or real property, and wrongful death have traditionally been evaluated and litigated under theories of product liability, ordinary and gross negligence, and contract/UCC claims. All of which have varying statutory periods of limitations, tolling, repose, and savings provisions. Further, under Michigan law the period of limitations may be contractually reduced, which will be enforced by the Court provided the reduction in time is reasonable, and in the case of warranties, not less than one year from an established date. MCL 440.2725 (2022); *Rory v. Continental Ins.*, 473 Mich. 457; 703 N.W.2d 23 (2005).

In addition to the importance of identifying the type of claim with respect to the period of limitations, Michigan law follows the Economic Loss Doctrine. *Neibarger v. Universal*, 439 Mich. 512; 486 N.W.2d 612 (1992). Under the Economic Loss Doctrine, if the alleged/resulting loss is purely economic, the claimant is precluded from pursuing a tort claim, and is instead limited to a claim based on contract and/or the Uniform Commercial Code where the claim is based on a defective product purchased for commercial purposes. The inability to pursue a tort claim, forcing the claimant to pursue a contract or UCC claim necessarily affects the statute of limitations, especially if the contract/warranty period of limitations is reduced in the contract or sales agreement. It is, however, undecided under Michigan law if a claim alleging professional negligence of a design professional based on a defective product caused by the designer's negligence is precluded by the economic loss doctrine.

Further, a claimant's ability to recover under a theory of professional liability for design professionals may occur if the breach alleged in tort is not separate and distinct from a duty that is contractually owed. *Fultz v. Union-Commerce*, 470 Mich. 460; 683 N.W.2d 587 (2004); *Loweke v. Ann Arbor Ceiling*, 489 Mich. 157; 809 N.W.2d 553 (2011). In other words, under Michigan law the claimant cannot pursue both a tort and a breach of contract claim, if the alleged breach is a breach of the same duty owed under a contract and theory of negligence. The claimant is limited to a contract claim, which may, or may not, be beneficial to the defendant. Additionally, punitive damages are not permitted under Michigan law, and consequential and extra-contractual damages (expectation damages) may be contractually limited, or eliminated. *Association Research & Development v. CNA Financial*, 123 Mich.App. 162; 333 N.W.2d 206 (1983).

II. Statute of Limitations/Repose/Wrongful Death Savings

Under Michigan law, the period of limitations begins to run when the claim accrues. MCL 600.5827 (2022). The accrual date is defined by statute for various types of claims, and the accrual date can be defined by contract in some instances. *Rory, supra*; MCL 600.5827 – MCL 600.5837

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(2022). The period of limitations may also be contractually reduced, or shortened. *Rory, supra.* Michigan has abolished the common law discovery rule, and will only apply a discovery rule if prescribed by statute. *Trentadue v.Gorton*, 479 Mich. 378; 738 N.W.2d 664 (2007). Currently, Michigan law applies a statutory discovery rule to legal malpractice, medical malpractice and, in limited instances – construction defect claims. MCL 600.58338; MCL 600.5838a; MCL 600.5839 (2022). Michigan also provides statutes of repose for general (wrongful death savings), professional liability, and construction defect claims. *Id*.

A. Ordinary/Gross Negligence

The statute of limitations for a claim sounding in ordinary/gross negligence is three (3) years from the accrual date. MCL 600.5805(2) (2022). The three (3) year period of limitations begins to run on the date the claim accrues, and the claim accrues at the "time the wrong upon which the claim is based was done ***regardless*** of the time when the damage results." MCL 600.5827 (2021). The "time the wrong" was done is defined to mean the date on which the **initial** injury occurs. *Henry v. Dow*, 501 Mich. 965; 905 N.W.2d 601 (2018); *citing to and adopting the dissent as law in Henry v. Dow*, 319 Mich.App. 704; 905 N.W.2d 422 (2017). Michigan has abolished the continuing wrongs doctrine, and there is no discovery rule under Michigan law for a claim based on ordinary/gross negligence. *Trentadue, supra; Garg v. Macomb Co CMHS*, 472 Mich. 263; 696 N.W.2d 646 (2005).

Equally as harsh under Michigan law, is that the plaintiff need not know of the injury, but, objectively, there must be reason to know. *Henry v. Dow*, 501 Mich. 965; 905 N.W.2d 601 (2018); *citing to and adopting the dissent as law in Henry v. Dow*, 319 Mich.App. 704; 905 N.W.2d 422 (2017). Objective proof that there is reason to know of a first injury that follows from the defendant's conduct is sufficient to start the three (3) year statute of limitations, and the three (3) year period cannot be saved by later discovery, or subsequent injuries/damages. *Id*.; *Trentadue v. Gorton*, 479 Mich. 378; 738 N.W.2d 664 (2007).

B. Product Liability

Product liability claims have been significantly limited under Michigan tort reform over the past 30 years. Non-economic damages are limited by statute to $500,000 for death or permanent loss of a vital body function, or $280,000 or all other injuries. MCL 600.2946a (1) (2022). The damage caps are adjusted yearly by the State of Michigan based on the consumer price index, currently the damage caps are
$476,000 and $851,000. There are limitations on certain economic damages as well under MCL 600.2946a. Also of equal importance, Michigan does not recognize a cause of action for strict liability for products liability. *Johnson v. Chrysler*, 74 Mich.App. 532; 254 N.W.2d 569 (1977); *Prentis v. Yale Mnf*., 421 Mich. 670; 365 N.W.2d 176 (1984). Plaintiff is required to prove negligence as an element of a claim based on products liability, including defective design.

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Product liability claims arise out of two classes of breach, contractual (warranties) and tort (negligence). The breach and damages alleged will determine the type of claim and the applicable period of limitations. In general, the statute of limitations for a claim sounding in products liability based upon negligence is three (3) years. MCL 600.5805(12) (2022)[1]. A claim sounding in tort based on product liability accrues in a similar fashion to a claim in ordinary negligence, *i.e. when the claimant suffers the initial injury*. For claims based on product liability sounding in contract or warranty, the claim accrues when the breach is discovered, or reasonably should have been discovered. MCL 600.5833 (2022). However, a statute of repose ultimately limits claims against architects, engineers and contractors, and may apply in products liability cases as well. MCL 600.5839 (2022).

Under MCL 600.5839, the statute of repose is complex with respect to product liability claims and claims against professional architects and engineers. In general the statute of repose is six (6) years after the occupancy or use of the improvement, unless the cause is the result of gross negligence in which case the claim must be brought within one (1) year of the discovery of the defect, but not more than ten (10) years after the occupancy or use. The statute uses the terms improvement to real property which has been held to mean equipment, and/or the addition to or design and manufacture of equipment for commercial purpose. *Phillips v. Langston*, 59 F.Supp.2d 696, 701 (ED Mich. 1999); *Pendzsu v. Beazer East*, 219 Mich.App. 405; 557 N.W.2d 127 (1996). There are four factors that must be considered and addressed before the statute of repose is applied, 1) whether the modification adds value to the land, 2) nature of the improvement, 3) relationship to the land and its occupants, and 4) permanence. *Id*.

C. Professional Liability

The statute of limitations for claims sounding in professional liability is two (2) years. MCL 600.5805(8) (2022). For actions asserted against state licensed architects or professional engineers or licensed surveyors arising out of professional services, the period of limitations is also two (2) years. MCL 600.5805(13) (2022). Subsection (13) refers back to the limitations period in subsection (8) of two (2) years. A claim for malpractice sounding in professional liability accrues at the time the professional ceased serving the client in a professional or pseudo-professional capacity. MCL 600.5838 (2022). MCL 600.5838(1) & (2) provide a statutory discovery rule that allows a claim for malpractice against a state licensed professional to be filed within six (6) months of discovery of the cause of action that is the basis of the claim, but it is the burden of the plaintiff to prove that he/she did not know, or have reason to know, of the basis for the malpractice claim more than six (6) months before the expiration of the original period of limitations. Also, where the claim is based on the alleged professional negligence of an architect or engineer, the statutory discovery provision and period of repose in MCL 600.5839(1) (a) & (b) apply.

[1] Pending legislative change as of 07/2021. 2021 Bill Text MI H.B. 4306

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D. Wrongful Death Savings Provision

Under MCL 600.5852, if a person dies within the initial period of limitations, or within thirty (30) days after the initial period terminates, and the action survives by law the claim may be brought at any time within two (2) years of the date the letters of authority are issued. However, at no time may the claim be brought more than three (3) years after the original period of limitations has expired. For example, for a professional malpractice claim, if the claimant dies within the two (2) year period under MCL 600.5805(8) & (13), or thirty (30) days after that period expires, the claimant will have an additional three (3) years to file a complaint, but may do so ONLY after the Letter of Authority are issued by a Probate Court, and when issued ONLY within two (2) years of the issuance.

III. Damages

A. Economic Loss Doctrine

Michigan follows the Economic Loss Doctrine, which limits the claimant to a breach of contract or warranty claim if the alleged damages are purely economic. *Neibarger v. Universal*, 439 Mich. 512; 486 N.W.2d 612 (1992). There is no statutory provision, or binding case law, that states a claim for professional liability of a design professional, which is a tort based on professional negligence, is precluded under Michigan's recognition and application of the Economic Loss Doctrine. However, at present a tort claim cannot be pursued if the damages are ONLY for economic loss.

As indicated previously, applying the Economic Loss Doctrine and steering the claims pleaded toward contract/UCC/warranty will affect the damages and the statutes of limitations and repose, potentially to the benefit of the design professional.

B. Comparative Fault

Michigan has adopted a modified comparative fault system. MCL 600.2959 (2022). In all matters sounding in tort and alleging personal injury or property damage, the trier of fact must assess a percentage of fault to all parties or entities that may have caused the alleged injuries/damages, including the plaintiff/claimant. MCL 600.6304 (2022). If damages are assessed to the plaintiff in an amount that is greater than the aggregate fault of all other persons, parties or not, economic damages are reduced by the percentage fault of the plaintiff/claimant and non-economic damages cannot be recovered. MCL 600.2959 (2022). If suit is filed, and the plaintiff is found to be more than 50% at fault, plaintiff cannot recover non- economic damages and the economic damages will be reduced by plaintiff's percentage of fault.

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C. Punitive Damages and Exemplary Damages

Punitive/Exemplary damages may be available to compensate a plaintiff where an adequate means to make the plaintiff whole is not available. *Kewin v. Mass Mut*. 409 Mich. 401; 295 N.W.2d 50 (1980).

The purpose of an award of damages in Michigan is to compensate the plaintiff in a manner so as to place the plaintiff in the same, or as good of, a position he/she was in before the alleged breach occurred. Therefore, the general measure of damages will be limited to that which can be proven as a direct and/or foreseeable loss.

D. Joint and Several

Michigan has abolished joint and several liability except in very limited circumstances which are preserved by statute. MCL 600.2956 and MCL 600.6304 (2022). Medical malpractice and in cases involving gross negligence, commission of a crime, or involving violation of controlled substance law. MCL 600.6312 (2022). In general, claims involving professional liability for design professional will be several, and fault will apportioned to all persons (whether a party or not) and liability and indemnity will be assessed accordingly. MCL 600.2925b (2022). Contribution is possible, but will depend on whether a defendant ultimately pays for more than its share that is determined by the apportionment of fault. It is exceptionally important to note that a release or covenant not to sue that is entered into, in good faith, with one of two or more liable parties for the same injury or wrongful death, 1) does not discharge the other liable parties, only the release party, and 2) relieves the discharged party of any contribution to the other liable parties. MCL 600.2925d (2022). Common law and contractual indemnity are enforced under Michigan law.

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Minnesota



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Under Minnesota law, no cause of action, whether in contract, tort or otherwise, for bodily injury, injury to property or wrongful death, arising out of a construction defect may be brought against the person performing or observing the construction more than two years from discovery of the injury, or, in the case of an action for contribution and indemnification, accrual of the cause of action (except when fraud is involved). M.S.A. §541.051. Minnesota's statute of repose states that a cause of action cannot accrue more than ten years after substantial completion of the construction. "Substantial completion" is defined as the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the intended purpose. Id. The statute of limitations period in M.S.A. §541.051 begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action. *Greenbrier Village Condominium Two Asso. v. Keller Invest., Inc.*, 409 N.W.2d 519 (Minn. App. 1987).

B. Statute of Limitations

As discussed above, the statute of limitations period in M.S.A. §541.051(1) begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action. *Greenbrier Village Condominium Two Asso. v. Keller Invest., Inc.*, 409 N.W.2d 519 (Minn. App. 1987).

1. Statute of Limitations Regarding Alleged Construction Defects

Pursuant to Minnesota law, the statute of limitations for bodily injury, injury to property or wrongful death, arising out of a construction defect, claims must be brought against the person performing or observing the construction within two years of discovery of the injury, or, in the case of an action for contribution and indemnification, accrual of the cause of action. M.S.A. §541.051.

2. Statute of Limitations of Claim Brought Pursuant to the Deceptive Trade Practices Act

Claims brought pursuant to the Deceptive Trade Practices Act are subject to a six-year statute of limitations. Minn. Stat. § 541.05.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Claims based on breach of the statutory warranties set forth in section 327A.02 (1) during the

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one-year period from and after the warranty date, the home improvement shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards and (2) during the ten-year period from and after the warranty date the home improvement shall be free from major construction defects due to noncompliance with building standards] are subject to a two-year statute of limitations. M.S.A. §541.051(4)

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Claims brought pursuant to breach of express warranty in causes of action for damages based on construction to improve real property are subject to a two-year statute of limitations. M.S.A. §541.051(4).

5. Statute of Limitations of a Claim Based on Fraud That Has Long Since Passed

Minnesota Law provides a six year limitation for fraud, however, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. M.S.A.
§541.05(6).[1]

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The statute of limitations period in M.S.A. §541.051(1) begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action. *Greenbrier Village Condominium Two Asso. v. Keller Invest., Inc.*, 409 N.W.2d 519 (Minn. App. 1987).

D. Statute of Repose

Minnesota's statute of repose states that a cause of action cannot accrue more than ten years after substantial completion of the construction. "Substantial completion" is defined as the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the intended purpose. M.S.A. §541.051(1)(a). Under this section, a cause of action accrues: (1) for a bodily injury or wrongful death action, upon discovery of the injury; and (2) for an action for injury to real or personal property, upon discovery of the injury, but in no event does a cause of action accrue earlier than substantial completion, termination, or abandonment of the construction or the improvement to real property. M.S.A. §541.051(1)(c). A cause of action that accrues during the ninth or tenth year after substantial completion may be brought two years after the accrual, but cannot be brought more than twelve years after substantial completion. M.S.A. §541.051(2). No

[1] Pending legislation as of 04/22 enforcing a **4 year** limitation instead of 6 years. 2021 Bill Text MN H.B. 930

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action for contribution or indemnity arising out of the defective or unsafe condition of an improvement to real property shall be brought more than fourteen years after the substantial completion of the property. M.S.A. §541.051(1)(b).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Minnesota common law, replacement costs related to defective work and materials do not fit within the policy definition of "property damage" for the purposes of triggering coverage under a CGL policy. *See generally Thermex Corp. v. Fireman's Fund Ins. Cos.*, 393 N.W.2d 15 (Minn. Ct. App. 1986). Claims for faulty workmanship which caused physical damage to other property may be covered. *See Federated Mutual Insurance Co. v. Concrete Units, Inc.*, 363 N.W.2d 751 (Minn. 1985) (damage to reinforcing rods and slip forms caused by insured's defective concrete); *Ohio Casualty Insurance Co. v. Terrace Enterprises, Inc*, 260 N.W.2d 450 (Minn. 1977) (settling of building due to negligent laying of footings and foundation).

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Mississippi

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Any action without a prescribed statute of limitations must be brought within three years after the cause of action accrues. Miss. Code Ann. §15-1-49. Mississippi's statute of repose for construction defect claims is six years. Miss. Code Ann. §15-1-41. A cause of action is barred after six years, even if the defect does not become known until such time and the owner had no reason to suspect that a defect was present. *Id*. However, where fraudulent concealment is present, the action is tolled until discovery. *Lampkin v. Thrash*, 81 So.3d 1193, 1198 (Ct. App. Miss. 2012); see also Miss. Code Ann. §15-1-67. In causes of action for which no other period of limitation is prescribed and which involve latent injury, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. Miss. Code. Ann. §15-1-49.

B. Statute of Limitations

A breach of contract claim in Mississippi is subject to a statute of limitations of six years. Miss. Code. Ann. §15-1-41. This period begins to run upon the occupancy or acceptance of the building or work completed by the owner/buyer. *McMichael v. Nu-way Steel & Supply, Inc.*, 563 So. 2d 1371 (Miss. 1990). Acceptance of a subcontractor's work by the contractor is insufficient to meet this standard, as there must be acceptance or occupancy of the site by the owner/buyer for the statute of limitations to begin to run. *Id.* This means that, if there is a dispute between a contractor and owner as to acceptance of the work completed, a contractor will remain liable for the full duration of that dispute, even if the work was completed by a subcontractor.

1. Statute of Limitations Regarding Alleged Construction Defects

As previously discussed, any action without a prescribed statute of limitations must be brought within three years after the cause of action accrues. Miss. Code Ann. §15-1-49. However, Mississippi's statute of repose for construction defect claims is six years. Miss. Code Ann. §15-1-41. A cause of action is barred after six years, even if the defect does not become known until such time and the owner had no reason to suspect that a defect was present. *Id*.

2. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Though the implied warranty of habitability arises because of a contractual relationship, breaches of the warranty sound in tort. *Martin v. Rankin Circle Apts.*, 941 So.2d 854 (Miss. Ct. App. 2006). Therefore, the applicable statute of limitations is three years pursuant to Miss. Code Ann. §15-1-49. This warranty is subject to the six-year statute of repose. Miss. Code Ann. §15-1-41.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of

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Express Warranty

Under the U.C.C. a breach of express warranty claim is subject to a six-year statute of limitations. Miss. Code Ann. §15-1-41.

4. Statute of Limitations of a Claim Based on Fraud

In Mississippi, a claim of fraud has a three-year statute of limitations. *Sullivan v. Tullos*, 19 So. 3d 1271 (2009); Miss. Code Ann. §15-1-49.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

As previously discussed, in causes of action for which no other period of limitation is prescribed and which involve latent injury, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury. Miss. Code. Ann. §15-1-49.

D. Statute of Repose

Mississippi's statute of repose for construction defect claims is six years. Miss. Code Ann. §15-1-41. A cause of action is barred after six years, even if the defect does not become known until such time and the owner had no reason to suspect a defect was present. *Id*. The statute of repose does not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury. *Id*. Furthermore, the statute of repose applies only to causes of action accruing from and after January 1, 1986. *Id*. However, fraudulent concealment tolls the statute of repose. *See Anderson v. LaVere*, 81 So. 3d at 1198.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

In Mississippi, property damage that is proximately caused by an accident (an inadvertent act) constitutes an "occurrence," thus triggering coverage under a CGL policy. *See generally Architex Ass'n v. Scottsdale Ins. Co.*, 27 So.3d 1148 (Miss. 2010). The Court of Appeals has stated that faulty work causing property damage can be a covered act so long as the faulty work constitutes an occurrence. *W.R. Berkley Corp. v. Rea's Country Lane Const. Inc.*, 140 So.3d 437 (Miss. Ct. App. 2013). However, even if there has been property damage caused by an "occurrence," coverage is not automatic under a CGL policy; it also must be ascertained, under the facts specific to each case, if no other exclusions and/or exceptions to exclusions apply. *Id.* When allegations trigger coverage under a CGL policy, the insured is entitled to a defense of such allegations, even though the facts later reveal that the claims presented were not within coverage. *American Guarantee and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605 (5th Cir. 2001).

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Missouri



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Missouri has a five-year statute of limitations for any cause of action based upon contracts, obligations or liabilities, express or implied. V.A.M.S. §516.120. The statute of limitations begins to run when a cause of action accrues. A cause of action accrues when damage is sustained and capable of ascertainment. If more than one item of damage is sustained, then the cause of action accrues when the last item of damage is sustained and capable of ascertainment. V.A.M.S. §516.100. Missouri has a five-year statute of limitations for negligence actions. V.A.M.S. §516.120(4). Missouri has enacted a statute of repose which states that causes of action arising out of a defective or unsafe condition of improvement to real property must be brought within ten years from the date on which any improvement is completed. V.A.M.S. §516.097.

B. Statute of Limitations

As discussed above, the statute of limitations begins to run when a cause of action accrues. A cause of action accrues when damage is sustained and capable of ascertainment. V.A.M.S. §516.100.

1. Statute of Limitations Regarding Alleged Construction Defects

The statute of limitations for alleged construction defects is ten years, unless an exception applies. V.A.M.S. §516.097. This section shall not apply:

(1) if an action is barred by another provision of law;
(2) if a person conceals any defect or deficiency in the design, planning or construction, including architectural, engineering or construction services, in an improvement for real property, if the defect or deficiency so concealed directly results in the defective or unsafe condition for which the action is brought;
(3) to limit any action brought against any owner or possessor or real estate or improvements on such real estate. V.A.M.S. §516.097(4).

2. Statute of Limitations for a Claim of Deceptive or Unfair Practices

The statute of limitations for a claim of deceptive or unfair practices in connection with the sale of merchandise in trade or commerce is five years. V.A.M.S. §516.120

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Missouri has a five-year statute of limitations for any cause of action based upon contracts, obligations or liabilities, express or implied. V.A.M.S. §516.120.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Missouri has a five-year statute of limitations for any cause of action based upon contracts, obligations or liabilities, express or implied. V.A.M.S. §516.120.

5. Statute of Limitations of a Claim Based on Fraud

The statute of limitations for claims based on fraud is five years. A cause of action in such case is deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. V.A.M.S. §516.120(5).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

As discussed above, the statute of limitations begins to run when a cause of action accrues. A cause of action accrues when damage is sustained and capable of ascertainment. If more than one item of damage is sustained, then the cause of action accrues when the last item of damage is sustained and capable of ascertainment. V.A.M.S. §516.100.

D. Statute of Repose

Missouri has enacted a statute of repose which states that causes of action arising out of a defective or unsafe condition of improvement to real property must be brought within ten years from the date on which any improvement is completed. V.A.M.S. §516.097.

II. Common Law Related to Construction Defects Claims:

A. Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Missouri common law, it appears coverage under a CGL policy will be afforded for any accidental or consequential damage to another's property. *See generally Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74 (1998).

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B. Literal performance not demanded

In *Davis v. Clearly Building Corp.*, 143 S.W.3d 659 (Mo. App. 2004), the court held that literal and precise performance is not demanded. Slight or trivial defects, imperfections or variations will not preclude the contractor's recovery of the contract price if the contractor has made an honest endeavor to comply and has substantially done so. A party's performance is deemed substantial when the deviation from the contract is slight and if the other party receives substantially the same benefit it would have from literal performance.

C. Negligence

1. Privity of Contract

Generally, in the context of construction contracts a party is not liable in negligence to a third party with whom the party is not in privity. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). In Summer Chase, a subcontractor that constructed an allegedly defective retaining wall could not be held liable for negligent construction to the homeowners association with which it was not in privity of contract, where only damage complained of was economic costs of making repairs to the wall. However, Missouri courts will consider the policy concerns of exposing the defendant to an unlimited, indeterminate or excessive number of potential claimants and depriving parties' control over their contracts. Presuming neither of these concerns are present, the courts will consider the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and injury sustained, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

2. Design Professionals

The theory of recovery against a design professional can be expressed as either a contract claim or a tort claim because the alleged conduct can be both a breach of contractual obligations and a breach of tort duties.
Generally, a design professional is required to provide plans and designs that are prepared with a reasonable degree of technical skill. A design professional also has a duty to the client to use that degree of ordinary and reasonable skill that another design professional would use in the same or similar circumstance. *Rowe v. Moss*, 656 S.W.2d 318 (Mo. App. 1983).

A design professional may be liable to a party to which he or she is not in privity when the following factors are present: the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm. *Westerhold v. Carroll*, 419

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S.W.2d 73 (Mo. 1967). However, the Missouri Court of Appeals has indicated that any extensions of liability for one not in the privity with the claimant must be done on a "case by case basis" with "careful definition" *Hardcore Concrete, LLC v. Fortner Ins. Services, Inc.*, 220 S.W.3d 350 (Mo. App. 2007).

Recently, the Missouri Court of Appeals ruled on two issues of first impression in a construction contract case involving a school district and its design professionals. In *Penzel Construction Company, Inc. v. Jackson R-2 School District*, 2017 WL582663 (Mo. Ct. App., February 14, 2017), the general contractor, under a liquidating agreement with the electrical subcontractor, sued the School District based on breach of implied warranty for furnishing "defective and inadequate plans and specifications." The School District filed a third-party claim against its architect and the company to which the architect subcontracted the electrical plans and specifications. Penzel, the general contractor, relied on the *Spearin* Doctrine to establish a breach of contract action against the School District. Under the *Spearin* Doctrine, a governmental entity impliedly warrants that if the plans and specifications are followed, the resulting product will not be defective or unsafe. If the product is defective or unsafe, the performing contractor(s) is not liable for the consequences.

In this case, Penzel argued that it could use the *Spearin* Doctrine as a sword rather than a shield, i.e., offensively, and was entitled to an award of damages from the School District as a result of delays and additional costs incurred by the electrical subcontractor due to inadequate and defective plans and specifications. The School District argued that the *Spearin* Doctrine could not be used offensively to support a breach of contract action. The court ruled that the *Spearin* Doctrine can serve as a basis for a breach of contract against a public entity, damages resulting from delays are compensable under such a theory, and a contractor, under certain circumstances, can use the total cost method or the modified total cost method in determining its delay damages. The court held that "[e]ffectively, the *Spearin* Doctrine places the risk of loss stemming from defective plans and specifications on the owner who renders the plans to the contractor…The owner in a construction contract is better positioned to assess the accuracy and adequacy of the project's plans and specifications; therefore, it is better positioned to prevent losses from ever occurring." The court held that "[p]lacing the burden on contractors to ensure the adequacy of an owner's plans…is incongruent with contract principles and general notions of fairness."

The *Penzel* case is especially significant for construction practitioners and contractors which deal with delay claims resulting from, among other things, perceived ambiguities in architectural plans and specifications requiring, among other things, an extensive RFI process. Very few published cases examine acceptable damages in the context of delay claims as many of these types of cases are determined in the federal administrative or arbitration forums. The *Penzel* case comprehensively examines the methodology necessary to prove delay damages and, in the context of this particular case, allows use of the total cost methodology which has traditionally been deemed inferior and dubious. The outcome of *Penzel* is that both owners and design professionals are likely to see an uptick in cases in the state of Missouri and other states which adopt *Penzel* as good law.

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D. Breach of Warranty

1. Breach of Implied Warranty

Missouri will imply a warranty of quality and fitness to the builder-contractor in certain situations. Missouri courts have found warranties when houses were defectively built. *Hershewe v. Perkins*, 102 S.W.3d 73 (Mo. App. 2003). However, the warranty is defined narrowly. The implied warranty will only apply to latent structural defects. A Missouri court has interpreted this term to apply to defects in items which are an integral part of the structure or immediately supports it. *Schulze v. C & H Builders*, 761 S.W.2d 219 (Mo. App. 1988). However, privity between the plaintiff and the design professional is necessary to successfully maintain the warranty claim. *O'Dell v. Custom Builders Corp.,* 560 S.W.2d 862 (Mo. 1978).

Implied warranties of quality and fitness do not apply to the transfer of a home to subsequent purchasers. Implied warranties of quality and fitness apply in the purchase of a new home by the first purchaser from a vendor-builder; this theory of recovery is a limited departure from the strict application of the doctrine of *caveat emptor*. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). With respect to alleged breach of implied warranty of fitness for particular use of house plans supplied to plaintiffs by builder, in light of the details specified therein, a reasonable construction of the contract plans was that builder, holding itself out as expert in design and providing that design, would determine necessity for modification of the design and make any changes necessary for the particular lot.,. *O'Dell v. Custom Builders Corp.*, 560 S.W.2d 862 (Mo. 1978).

E. Misrepresentation

Privity of contract is not required to be liable for negligent misrepresentation. *AAA Excavating, Inc. v. Francis Construction, Inc.*, 678 S.W.2d 889 (Mo. App. 1984). The court found that privity was not an element of the claim for negligent misrepresentation. If a party supplies false information upon which a party relies causing a pecuniary loss, they will be liable for the loss. Fraud might be alleged under similar circumstances when a party fails to provide all applicable information and conditions expected are in fact different than encountered by the contractor.

To state a claim for negligent misrepresentation, a plaintiff must plead facts that establish: (1) the speaker supplied information in the course of his or her business; (2) because of a failure by the speaker to exercise reasonable care, the information was false; (3) the information was intentionally provided by the speaker for the guidance of a limited group of persons in a particular business transaction; (4) the listener justifiably relied on the information; and (5) due to the listener's reliance on the information, the listener suffered a pecuniary loss. *Summer Chase*, *supra*.

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F. Fraud

A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively. *Davis v. Clearly Building Corp.*, 143 S.W.3d 659 (Mo. App. 2004). A victim of fraud can either return what he purchased or keep what he purchased and sue for damages measured as the difference between its value as represented and its true value as of the date of purchase. This is known as the doctrine of election of remedies. The purpose of the election of remedies doctrine is to prevent double recovery for a single injury. The doctrine of election of remedies maintains that one may not obtain both damages for fraudulent inducement to enter into a contract and a remedy prohibiting the enforcement of the contract.

G. Unjust Enrichment

Elements of a claim for unjust enrichment are: (1) a benefit conferred upon the defendant; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable. In construction cases, a party other than one in privity of contract with the owner must plead non-payment by the owner in order to state a claim for unjust enrichment. *Mays-Maune & Associates, Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201 (Mo. App. 2004).

H. Tortious Interference with Contract

Unlike many jurisdictions, Missouri law allows design professionals to be sued for tortious interference with a contract. *Killian Constr. Co. v. Jack D. Ball & Assoc.*, 865 S.W.2d 889 (Mo. App. 1993). There does not need to be a contract; however, there must be reasonable expectations of economic advantage or commercial relations. A design professional may be able to interfere with a contract between a contractor and owner if there is justification.

I. Strict Liability Claims

The economic loss doctrine which prohibits liability for purely economic losses due to defects in the building also applies to strict liability claims.

J. Indemnity claims: Missouri's Anti-Indemnity Statute

Missouri legislated against "broad form indemnity" in public and private construction contracts in 1999. § 434.100, R.S.Mo. Such clauses, customarily found in agreements between the owner and the general contractor and between the general and its subcontractors, compel either the general to indemnify the owner or a subcontractor to indemnify the general for the owner's or general's own negligence or intentional acts or omissions. The Missouri legislature has not invalidated

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subrogation waivers nor does the current statute void any provisions in a construction contract which requires a party to provide liability coverage as an additional insured for another. In fact, Missouri's anti-indemnity statute expressly allows a construction contractor to name another as an "additional insured" on its insurance coverage.

The statute legislating against broad form indemnification does not apply to, among other things, "an agreement containing a party's promise to indemnify, defend or hold harmless another person, if the agreement also requires the party to obtain specified limits of insurance to insure the indemnity obligation and the party had the opportunity to recover the cost of the required insurance in its contract price; provided, however, that in such case the party's liability under the indemnity obligation shall be limited to the coverage and limits of the required insurance."434.100.2(8), R.S.Mo.; and

A Commercial General Liability (CGL) policy provides a party to a construction contract with the greatest opportunity to avoid the broad reach of the Anti-Indemnity Statute. Terry J. Galganski, The Insurance Exceptions of the Anti-Indemnity Statute, THE JOURNAL OF THE MISSOURI BAR, February-March 2002. This opportunity is usually implemented by selecting a standard "additional insured" endorsement. *Id.*

III. Other Damages Issues

A. Statute of Repose/Statute of Limitations

Any action to recover damages for personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property must be commenced within ten (10) years of the date on which the improvement was completed. § 516.097, R.S.Mo. All actions upon contracts obligations or liabilities must be commenced within five (5) years of the breach. § 516.120, R.S.Mo.

B. Economic Loss Doctrine

The economic loss doctrine states that where the only damage complained of is an economic loss resulting from a defect in an item built pursuant to a contract, a negligence action does not lie. *Summer Chase Second Addition Subdivision Home Owners Ass. v. Taylor-Morley, Inc.*, 146 S.W. 3d 411 (Mo. App. 2004). If relief is available to a plaintiff through contract for damage to an item constructed pursuant to a contract, an action for negligence is improper. *Korte Const. Co. v. Deaconess Manor Assc.*, 9927 S.W.2d 395, 404-05 (Mo. App. 1996).

In *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. banc 1986), a contracting company brought suit against a crane manufacturer for property damage which occurred when the crane's counterweight broke and crushed the crane's cab. The court held

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that a plaintiff cannot recovery on a theory in tort where the only damage is to the subject product or construction when there is no personal injury or other item of damage. *Id.*

In *Summer Chase*, *supra*, the court reaffirmed the economic loss doctrine in Missouri. The plaintiff filed suit against several defendants alleging a defectively designed and constructed retaining wall. In one count of the petition, the plaintiff asserted negligent construction against the general contractor and its subcontractor. The defendants challenged the petition based on the economic loss doctrine and the trial court dismissed the negligence claims and stated that "under these circumstances, the nature of the injury claimed by [plaintiff] precludes liability." *Id.*

C. Liquidated Damages

Liquidated damages provisions are generally enforceable unless the damages are considered a penalty rather than a reasonable estimation of the actual damages the owner would face as a result of a delay in the project's completion. *Taos Const. Co., Inc. v. Penzel Const. Co., Inc.*, 750 S.W.2d 522 (Mo. App. 1988).

D. Missouri's "Prompt Payment Act"

Missouri's Public Prompt Payment Act, codified at § 34.057, R.S.Mo., promotes timely payment of contractors, subcontractors, and suppliers on contracts with public owners for public work construction projects. *Leo Journagan Const. Co. v. City Utils.*, 116 S.W. 3d 711, 724 (Mo. App. 2003). This law "requires public owners and contractors to make prompt payments and limits amounts withheld as retainage." *Envtl. Prot., Inspection, Consulting, Inc. v. City of Kansas City*, 37 S.W.3d 360, 369 (Mo. App. 2000). "The Prompt Payment Act is considered a remedial statute and therefore requires liberal interpretation." Leo Journagan Const. Co. v. City Utils.at 725. "The threshold requires of this act are the payment due dates, which are the events that trigger the remedies available for untimely payment." *Id.*

The Act provides that general contractors shall be paid by the public owner 30 days after receipt of invoice. 34.057.1(1). General contractors shall pay subcontractors 15 days after receipt of payment from the public owner. 34.057.1(7). A 2014 amendment of the Act requires the public owner to also pay engineers, architects, landscape architects, and surveyors within 30 days. 34.057.5.

In the 2014 amendment, the legislature also capped retainage which may be withheld from a general contractor, subcontractor, or lower tier contractor on a public works project at 5%. 34.057.1(1). A higher percentage not to exceed 10% may be withheld only on a public works contract less than $50,000. *Id.* The Prompt Payment Act provides that retainage shall be released to an early-performing subcontractor if the public owner, architect or engineer, and the general contractor believe that the subcontractor has completed its work and the subcontractor can be

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released without risk to the public owner. 34.057.1(3). The Act also allows a public owner to reduce or eliminate retainage if the owner believes work is "proceeding satisfactorily." *Id.* Upon substantial completion and acceptance of the work, the public owner is now required to pay 98% of retainage to the general contractor. 34.057.1(4). If the public owner fails to accept the work as substantially complete, the owner is required to give written explanation within 14 days to the general contractor. *Id.* If no such written explanation is provided, 98% of the retainage must be paid within 30 days. If the public owner fails to pay the retainage or is in default under any other payment due under the contract, interest at 1.5% per month shall be paid on the amount of any such unpaid amount. 34.057.1(5).

Under Missouri's Private Prompt Payment Act, any party to a private construction contract is required to make all "scheduled payments." 431.180, R.S.Mo. In the event the contract does not provide for a payment schedule, the Act does not apply. Where the contract does provide for scheduled payments and such payments are not made, the damaged party may bring an action and seek the principal amount along with interest at 1.5% per month and reasonable attorneys' fees. The trial court has the discretion whether to award interest and/or attorneys' fees.

Under Missouri law, retainage on a private construction project may not exceed 10% unless additional amounts are required "to protect the owner's interest." Such retainage shall be held "in trust" for the benefit of the general contractor. 436.303, R.S.Mo. General contractors, subcontractors, and lower tier contractors may tender substitute security in lieu of withholding of retainage. 436.306, R.S.Mo. Substitute security may consist of a certificate of deposit, a retainage bond, or an irrevocable letter of credit. 436.312, R.S.Mo. Like the public act, an early completing subcontractor may apply for release of retainage if the work has been "satisfactorily completed" and the owner is no longer considered at risk. 436.321, R.S. Mo.

E. Prejudgment Interest

Prejudgment interest is permitted by statute. § 408.020, R.S.Mo. states:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and demand for payment is made….

However, § 408.030, R.S.Mo. allows parties to contract for an increased rate of interest, not to exceed ten percent per annum. Furthermore, § 408.092, R.S.Mo. allows attorney's fees to be recovered in actions enforcing credit agreements, provided that the fees are included in the written credit agreement, do not exceed fifteen percent of the outstanding credit balance, and the attorney is licensed to practice in Missouri and a member of the Missouri bar.

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A liquidated claim for which prejudgment interest is authorized by statute is one which is fixed and determined or easily determined by computation or some recognized standard. *Baris v. Layton*, 43 S.W.3d 390 (Mo. App. 2001). The entitlement to prejudgment interest accrues only after a demand for payment is made. While the form of the demand is not required to be in any certain form, it must be definite regarding the amount and time. *Id.*

F. Lost Profits

A contractor is entitled to recover the specified amount of the contract with the owner because contract prices include profit and overhead. *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924 (Mo. App. 1992). Whether a subcontractor may recover its profit and overhead and the extent to which they may do so is determined by the type of claim.

In a mechanic's lien situation, even though the measure of damages is not the subcontractor's contract price, a lien claimant subcontractor still may recover profit and overhead in addition to the reasonable value of its labor, materials, and services in a damages action. In *Fuhler v. Gohman & Levine Constr. Co.*, 142 S.W.2d 482 (Mo. 1940) the lien claimant was a subcontractor who was permitted to recover not only reasonable compensation for his labor and material, but allowed to recover a percentage for profit and overhead. However, the subcontractor was required to show that profit and overhead were included in the value of the labor and materials and that the amount sought was reasonable.

In order to recover damages for lost profits and overhead, the plaintiff must submit evidence that will provide a basis for estimating the lost profits with reasonable certainty without resort to speculation. *Manor Square, Inc. v. Heartthrob of Kansas City, Inc.*, 854 S.W.2d 38 (Mo. App. 1993). The amount of lost profits is the same as the amount of net profits that plaintiff would have realized if the business had not been interfered with or stopped due to the actions or inactions of the defendant. *Refrigeration Industries, Inc. v. Nemmers,* 880 S.W.2d 912 (Mo. App. 1994). See also *Gorman v. Walmart Stores, Inc.*, 19 S.W.3d 725 (Mo. App. 2000).

G. Punitive Damages

Missouri courts confine punitive damages to cases of "willful wrongdoing, or recklessness which is the legal equivalent of willfulness." *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. banc 1990). Punitive damages are imposed to punish and deter; and the remedy should be applied sparingly. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

Punitive damages may be awarded in a negligence case only if the defendant, at the time of the negligent act, "knew or had reason to know that there was a high degree of probability that the action would result in injury." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 338 (Mo. banc 1996), quoting *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426,

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436 (Mo. banc 1985). The defendant must have displayed complete indifference to, or conscious disregard for, the safety of others. *Id.* at 339. The evidence must meet the clear and convincing standard of proof. *Rodriguez*, 936 S.W.2d at 111.

H. Attorney's fees

Attorney's fees are recoverable only by statute or contract terms. Attorney's fees are special damages which must be pled specifically in order to recover. In addition, facts showing entitlement to attorney's fees must also be pled. *Reeves v. Kessler*, 921 S.W.2d 16 (Mo. App. 1996). In awarding attorney fees, the trial judge is considered to be the expert on the reasonableness of the amount of fees awarded, and the judge's decision to award fees is rarely reviewed by the appellate courts absent finding an abuse of discretion. *Evans v. Werle*, 31 S.W.3d 489, 493 (Mo. App. 2000).

I. Expert Fees and Costs

In *George v. Eaton*, 789 S.W.2d 56, 61 (Mo. App. 1990), the Western District Court of Appeals determined that the then-existing language of Missouri Rule of Civil Procedure 56.01(b) (4) (b) required a "party seeking to depose an expert witness . . . to pay a reasonable fee for time spent in preparation for the deposition," depending on the trial court's consideration of certain factors. *Id*. at 61-62. In relevant part, the Rule stated "unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for responding to discovery by deposition." *Id.*

The Eastern District, ten years later, found the application of *George* to be limited because the relevant language of that Rule is more restrictive. The relevant provision of Rule 56.01(b)(4)(b) applicable now states: "unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed." This language expressly limits the payment of a deposed expert witness's fees to fees for hours spent in the deposition and does not include the payment of fees for any time the expert witness spent preparing for the deposition. *Fairbanks v. Weitzman*, 13 S.W.3d 313 (Mo. App. 2000).

J. Liquidated Damages

The accepted and general rule in Missouri is that liquidated damages clauses in construction contracts are valid and enforceable. However, penalty clauses are invalid. Liquidated damages are an amount of compensation that the parties agree at the time of contracting will represent the damages incurred in the event of a breach. Penalty clauses are designed to punish a party for breaching the contract. *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878 (Mo App. 1994).

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Missouri has adopted the Restatement of Contracts rules on liquidated damages which define the difference between liquidated damages clauses and penalty clauses. For a liquidated damages clause to be valid:

1. The amount agreed upon must be a reasonable prediction of the harm that will be caused by the breach. To be considered reasonable, a court stated that "it must not be unreasonably disproportionate to the amount of harm anticipated when the contract was made." *Burst v. R.W. Beal & Co.*, 771 S.W.2d 87, 90 (Mo. App. 1989).

2. The harm must be of a kind that is difficult to accurately estimate. It has been held by Missouri courts that actual damages for the breach of a construction contract are uncertain and difficult to prove. See e.g. *Paragon Group, Inc. v. Ampleman*, *supra*.

3. The party claiming liquidated damages must show some harm or damage resulting from the breach in order to trigger the liquidated damages clause. Thus, Missouri courts require the plaintiff to establish (1) that a breach occurred and (2) damages have actually accrued as a result of the breach. *Strouse v. Starbuck*, 987 S.W.2d 827 (Mo. App.1999)

4. A party may recover either liquidated damages or actual damages but not both as compensation for the same breach. Liquidated damages are simply a stipulated amount of actual damages as a replacement for the need to prove, with specificity, the actual amount of damages.

K. Diminution in Value

In recent years, Missouri appellate courts have found that the facts and circumstances of construction cases, where there is substantial but defective performance by a contractor, dictate a measure of damages different from the measure of damages in customary cases involving injury to real property. "In real property cases, courts generally utilize the 'diminution in value' test, turning only to the 'cost of repair' test when it constitutes a lower amount of recovery." *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438, 450 (Mo. App. 1994), affirmed after remand and transfer 984 S.W.2d 501 (Mo. banc 1999). "In defective construction cases, on the other hand, the 'cost of repair' test is favored, so that courts normally determine the damages by assessing the cost of correcting the defects or supplying the omissions." Id. However, a court cannot apply cost of repair damages until after it hears evidence of value. *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322, 324 (Mo. App. 1998). *Compare White River Dev. v. Meco Systems*, 806 S.W.2d 735, 741 (Mo. App. 1991) (holding that the general rule for damages in construction cases is the cost of repair, and that diminution in value is only appropriate where the cost of reconstruction would involve unreasonable economic waste) and *Lawing v. Interstate Budget Motel, Inc.*, 655 S.W.2d 774, 778 (Mo. E.D. 1983)(holding that the general rule for damages in construction cases is the cost of repair) with *Tull v. Housing Auth. of City of Columbia*, 691 S.W.2d 940, 942 (Mo. App. 1985) (holding that, in non-construction situations, the general test for damages is diminution in value).

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IV. Insurance Coverage for Construction Claims

In *St. Paul Fire & Marine Ins. Co. v. Building Constr. Enters.*, Inc., 484 F. Supp. 2d 1004 (W.D. Mo. 2007), affirmed the holding in *St. Paul Fire & Marine Ins. Co. v. Building Constr. Enters., Inc.*, 526 F.3d 1166 (8th Cir.) that the substandard work performed by the insured contractor's subcontractor on a governmental contract is not an "accident" and thus not an "occurrence" under the policy. Therefore, in *St. Paul*, there was no coverage for the insured's cost of performing required repairs in order to satisfy its contract.

In *Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co.*, 645 F. Supp. 596 (E.D. Mo. 1986), aff'd, 822 F.2d 1093 (8th Cir. 1987), the settling of a slab caused by an insured homebuilder's negligence was ruled an occurrence despite allegations of breach of warranty against the insured.

In *Columbia Mut. Ins. Co. v. Gary Epstein*, et al., 239 S.W.3d 667 (Mo. App. E.D. 2007), the purchase of defective concrete by the insured contractor was an occurrence; therefore, the loss of use of framing and the sub-floor that had to be replaced as a result of the defective concrete was covered property damage.

In *National Union Fire Ins. Co. of Pitts., Pa. v. Structural Sys. Tech., Inc.*, 964 F.2d 759 (8th Cir. 1992), the court upheld coverage for the damage to a radio tower that collapsed due to the faulty workmanship of a subcontractor under the subcontractor exception to Exclusion l, the "Your Work" Exclusion.

In *Amerisure Mut. Ins. Co. v. Paric Corp.*, 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005), the faulty workmanship of a subcontractor of the insured general contractor was an "occurrence" under the general contractor's CGL policy. Furthermore, the court upheld coverage pursuant to the subcontractor exception to Exclusion l, the "Your Work" Exclusion, as to the faulty workmanship of a subcontractor that installed EIFS.

Missouri courts have typically taken an insurer-friendly approach in concluding that a simple breach of contract for poor construction does not constitute an occurrence. Contrary to the position often taken by Missouri courts and liability insurance carriers in Missouri, the Missouri Supreme Court in *D.R. Sherry Construction, LTD v. American Family Mutual Insurance Company*, 316 S.W.3d 899. (Mo. banc 2010), seems to have taken a large step in clarifying that negligent construction (e.g., construction defect) claims are in fact occurrences and held that progressive damage which begins during the policy period is an occurrence even though the damage was not apparent until after the policy period has expired.

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V. Mechanic's Liens

Mechanic's liens did not exist under Missouri common law. *Maran-Cooke, Inc. v. Purler Excavating, Inc*., 585 S.W.2d 38 (Mo. banc 1979). Rather, they are solely creatures of statute. *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 9 (Mo. banc 2003). In Missouri, the construction mechanic's lien is codified at § 429.010, R.S.Mo., et.seq.. This statute grants a lien to any person who performs any "work or labor" or who furnishes any material, fixtures, engine, boiler, machinery, tree, shrubs, bushes, other plants, or outdoor irrigation systems for any "building, erection, or improvements upon land, or for repairing the same." The work or materials must be supplied in accordance with a contract with the owner of the property or the owner's "agent, trustee, contractor, or subcontractor."

The theory behind most construction liens is than an unpaid contractor should be entitled to recoup the value of its work from the improvements the contractor has made to the owner's real estate. *Arthur Morgan Trucking Co. v. Shartzer*, 174 S.W.2d 226, 227 (Mo. App. 1943). Therefore, actually physical improvement to the property is an essential element of a mechanic's lien. *Independent Plumbing & Heating Supply Co. v. Glennon*, 287 S.W. 824 (Mo. App. 1926).

In order to create an enforceable mechanic's lien, one must first satisfy the statutory prerequisites. "Original Contractors" must put the owner of the property on notice that mechanic's liens are possible by explicitly providing the language contained in § 429.012.1, R.S.Mo. This Notice to Owner requirement is a condition precedent to a lien by the "Original Contractor" and is considered jurisdictional. Courts have dismissed lien claims *sua sponte* when the Notice to Owner was not given timely. *Bledsoe Plumbing & Heating, Inc. v. Brown*, 66 S.W.3d 169, 171-72 (Mo. App. 2002).

A subcontractor's notice requirement is found is § 429.100, R.S.Mo. A subcontractor must serve a notice of its intent to file a mechanic's lien on the owner at least ten days before filing the lien. *Id.* The notice must include the legal description of the property, the amount owed, and from whom the money is owed. *Id.* Service of the subcontractor's ten-day notice on the owner may be accomplished "by any officer authorized by law to serve process in civil actions, or by any person who would be a competent witness." § 429.100, R.S.Mo. See also *Fulkerson v. W.A.M. Invs.*, 85 S.W.3d 745 (Mo. App. S.D. 2002) (personal service is required).

A mechanic's lien must be perfected by filing same with the Clerk of Court in the county in which the property is located within 6 months of the last date labor and/or materials were supplied to the project. 429.080, R.S.Mo. The last date does not include repair of work already completed, punch list, warranty work, or unnecessary work. The mechanic's lien statement must include the legal description of the property, a proper description of the parties, a "just and true" account, and a verification by sworn oath. *Id.* A "just and true account" typically includes the costs of labor, materials, equipment, and supplies, employee benefits attributable to the project, insurance attributed

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to the project, and taxes together with overhead and profit. Once filed, mechanic's liens must be enforced by the filing of a lawsuit to enforce the lien within six months after the lien was filed. 429.170-190, R.S.Mo.; *H.B. Deal Constr. Co. v. Labor Disc. Ctr., Inc.*, 418 S.W.2d 940 (Mo. 1967). Mechanic's liens lawsuits must also be prosecuted without delay to be enforceable. *Hinchey v. Sentinel Fed. Sav. & Loan Ass'n*, 584 S.W.2d 146 (Mo. App. 1979).

Missouri's mechanic's lien statute provides unique rules for perfecting liens on new residential property (429.016, R.S.Mo.) and for the repair, remodeling, or addition to owner-occupied residential property of four units or less (429.013, R.S.Mo.). Care must be taken to comply with the unique notices and procedures which are required to properly perfect such residential liens. Missouri law also provides unique notice requirements and procedures for perfecting liens governing rental equipment. 429.010.2, R.S.Mo.

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Montana

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Montana does not maintain a statute of limitations specific to construction defect claims. Rather, it will apply corresponding limitations periods for the specific legal theory (i.e., tort, contract) under which the claim is asserted. In Montana, a construction defect claim sounding in tort must be commenced within three years. Mont. Code Ann. § 27-2-204. For actions sounding in contract, the claim must be commenced within eight years. Mont. Code Ann § 27-2-202. Montana has adopted a "discovery rule" which allows the accrual of an action to be tolled if the defect, by its nature, is concealed or self-concealing or if the defendant took action to prevent the injured party from discovering the injury or its cause. Mont. Code Ann. § 27-2-102(3). Additionally, Montana's statute of repose provides that no claims (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) against any person performing the construction of an improvement to real property may be brought more than ten years after the substantial completion of such improvement. Mont. Code Ann. § 27-2-208(1). However, if the injury occurred during the tenth year after completion, the injured party must bring an action within one year. Mont. Code Ann. § 27-2-208(2).

B. Statute of Limitations

A cause of action accrues when all elements of the claim exist or have occurred, the right to maintain an action on the claim is complete, and a court or other agency is authorized to accept jurisdiction of the action. Mont. Code Ann. § 27-2-102. Lack of knowledge of the cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation; the period of limitation begins when the claim or cause of action accrues. *Id*. The beginning of the period of limitation is only tolled in certain enumerated circumstances, including when the defect, by its nature, is concealed or self-concealing or if the defendant took action to prevent the injured party from discovering the injury or its cause. Mont. Code Ann. § 27-2-102(3).

1. Statute of Limitations Regarding Alleged Construction Defects

An action premised upon any contract, obligation or liability founded upon an instrument in writing must be brought within eight years. Mont. Code Ann. § 27-2-202. An action based upon a contract, account or promise not founded on an instrument in writing must be brought within five years. *Id*. An action brought upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing must be filed within three years. *Id*. See also Mont. Code Ann. § 27-2-204. However, an action involving waste, damage to or trespass on real or personal property must be brought within two years. Mont. Code Ann. § 27-2-207.

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"[W]here there is a substantial question as to which of two or more statutes of limitation should apply, the general rule is that the doubt should be resolved in favor of the statute containing the longest limitation." *Demarest v. Broadhurst*, 321 Mont. 470 (2004). This general rule serves the public policy of affording a plaintiff party-litigant maximum free access to the court system. *Ritland v. Rowe*, 861 P.2d 175, 178 (Mont. 1993).

Montana's construction defect statute provides a pre-suit notice process before claims against a construction professional may be asserted for residential construction defect claims. Mont. Code Ann. § 70-19-427.

2. Statute of limitations of a Claim Brought Pursuant to the Montana Unfair Trade Practices and Consumer Protection Act of 1973

Claims brought under Montana's Unfair Trade Practices Act, Mont. Code Ann. § 30-14-101, *et seq.,* are subject to the two-year time limitation set forth at Mont. Code Ann. § 27-2-211. *See Osterman v. Sears, Roebuck & Co., et. al.*, 80 P.3d 435, 441 (Mont. 2003).

3. Statute of Limitations of a Claim Brought Pursuant to a Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

4. Statute of Limitations of a Claim Brought Pursuant to a Breach of Express Warranty

A claim for breach of an express warranty that does not guarantee future performance accrues on tender of delivery, regardless of the aggrieved party's lack of knowledge of the breach, and must be brought within four years of tender of delivery. Mont. Code. Ann. § 30-2-725. *See also Williston Basin Inter. Pipeline v. Rockwell International*, 1993 Mont. Dist. LEXIS 660 at 15. By the original agreement, the parties may reduce the period of limitation to not less than one year, but may not extend it. *Id.*

5. Statute of Limitations of a Claim Based on Fraud

An action for the relief of fraud or mistake must be commenced within two years pursuant to Mont. Code Ann. § 27-2-203. *Assoc. of Unit Owners of the Deer Lodge Condominium, et al. v. Big Sky of Montana, Inc., et al.*, 798 P.2d 1018, 1027 (Mont. 1990).

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C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Pursuant to Montana's "discovery rule," the statutory period of limitations can be tolled if the facts constituting a claim are, by their nature, concealed or self-concealing, or when a defendant acts to prevent the injured party from discovering injury or cause. Mont. Code Ann. § 27-2-102. *See also Vipperman v. Walsh*, 2010 Mont. Dist. LEXIS 151 at 11-12.

D. Statute of Repose

In Montana, an action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the construction of any improvement to real property may not be commenced more than ten years after completion of the improvement. Mont. Code Ann. § 27-2-208. However, an action for damages for an injury that occurred
during the tenth year after the completion of the improvement or land surveying may be commenced within one year after the occurrence of the injury. *Id*. The term "completion" refers to (a) the degree of completion at which the owner can use the improvement for the purpose for which it was intended or (b) when a completion certificate is executed, whichever is earlier. *Id*.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Under Montana common law, CGL policies that define "occurrence" by reference to those accidents or conditions that result in damage that was "neither expected nor intended" focus on the insured's expectations regarding damages. Thus, acts that cause unexpected damage fall within the definition of an "occurrence" and are entitled to coverage.[1] *See generally Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 50 (2005).

It appears the trigger for coverage for a construction defect claim focuses on whether the damage was the result of an accidental or unintentional event. Additionally, the courts seem eager to find coverage under a general liability policy if it appears the expectations of the parties were to do so, although not clearly explained by case law. *See generally Wellcome v. Home Ins. Co.*, 257 Mont. 354 (1993). Specifically, under Montana law, any ambiguities in contracts are construed against the insurer (i.e., "accident"). Additionally, "exclusions from coverage will be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy." *Id*.

The *Wellcome* court, in reviewing this issue, was persuaded by those cases that provide coverage under similar circumstances. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), which provided a comprehensive discussion of standard-form CGL policy revisions

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vis-à-vis the subcontractor exception to the "your work" exclusion. The *Lamar* court stated that "when a general contractor becomes liable for damage to work performed by a subcontractor − or for damage to the general contractor's own work arising out of a subcontractor's work − the subcontractor exception preserves coverage that the 'your-work' exclusion would otherwise negate." *Revelation Industries, Inc. v. St. Paul Fire & Marine Ins. Co.*, 350 Mont. 184, 198 (2009).

[1] *Travelers* involved the wrongful disposal of toxic chemicals by a biopharmaceutical company. While not addressing construction defect claims, the Supreme Court of Montana's analysis pertaining to CGL policies generally suggests that its holding would likely apply to construction defect claims as well.

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Nebraska

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Nebraska's statute of limitations for actions based on written contracts is five years. Neb. Rev. St., §25-205. The period for actions based on a contract not in writing is four years. Neb. Rev. St., §25-206. Actions based in tort must be brought within four years. Neb. Rev. St., §§ 25-207, 25-212. Nebraska has adopted a "discovery rule" which provides that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. Neb. Rev. St., §25- 223 Nebraska's statute of repose precludes a person from bringing an action unless commenced within ten years after the incident giving rise to the cause of action. Neb. Rev. St., §25-223

B. Statute of Limitations

A statute of limitations begins to run as soon as a claim **accrues**, and an action in tort **accrues** as soon as the act or omission occurs. *Rania K. Shlien v. The Bd. of Regents of the Univ. of Neb.*, 263 Neb. 465, 640 N.W.2d 643, 650 (2002). In certain categories of cases, the **statute of limitations** begins to run on the date when the party holding the claim discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury. *See Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376, 381 (2007) (in a continuing tort case, the statute of limitations begins to run from the date of last exposure to alleged hazard).

1. Statute of Limitations Regarding Alleged Construction Defects

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the construction of an improvement to real property, except improvements to real property subject to the Nebraska Condominium Act, shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. Neb. Rev. St. §25-223. The statute runs from the date of substantial completion of the project. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. *Id.* This section, as a special **statute of limitations** concerning negligent construction of an improvement on real estate, applies only to actions, whether based on negligence or breach of warranty, brought against contractors and builders. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992).

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2. Statute of Limitations of a Claim Brought Pursuant to the Uniform Deceptive Trade Practices Act

A civil action arising under the Uniform Deceptive Trade Practices Act must be brought within four years from the date of the purchase of goods or services. Neb. Rev. St. §87-303.10. *See also Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1, 4 (1996).

3. Statute of Limitations of a Claim Brought Pursuant to Br each of Implied Warranty of Habitability

Any action to recover damages based on any alleged breach of warranty on improvements to real property, except improvements to real property subject to the Nebraska Condominium Act, shall be brought within four years. Neb. Rev. St., §25-223.

4. Statute of Limitations of a Claim Brought Pursuant to Br each of Express Warranty

Any action to recover damages based on any alleged breach of warranty on improvements to real property, except improvements to real property subject to the Nebraska Condominium Act, shall be brought within four years. Neb. Rev. St., §25-223.

5. Statute of Limitations of a Claim Based on Fraud

A civil action arising under fraud must be brought within four years from the date the fraud is discovered. Neb. Rev. St. §25-207. *See also Meyer Bros. v. Travelers Ins. Co.*, 250 Neb. 389, 551 N.W.2d 1, 4 (1996).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Under Nebraska law, the discovery rule simply provides an exception to a statute of limitations for a claim that would otherwise be outside the statutory period. The **statute of limitations** for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. *Grand Island Sch. Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979). The discovery rule is best understood as a "tolling doctrine." *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

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D. Statute of Repose

Nebraska's statute of repose bars claims brought to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the construction of an improvement to real property which are brought more than ten years beyond the time of the act giving rise to the cause of action. Neb. Rev. St. §25-223.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

In Nebraska, courts have held that faulty workmanship, standing alone, is not covered under a standard commercial general liability policy because it is not a fortuitous event. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571, 577 (2004). Notwithstanding, if faulty workmanship causes bodily injury or property damage to something other than the insured's work product, an unintended and unexpected event has occurred, and coverage exists. *Id*. at 578.

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Nevada

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Nevada's statute of limitations for torts is two years. Nev. Rev. St., §11.190(4). Actions based on a written contract must be brought within six years. Nev. Rev. St., 11.190(1). Actions based on contracts not in writing must be brought within four years. Nev. Rev. St., §11.190(2). This state has adopted a "discovery rule" which provides that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. *Siragusa v. Brown*, 971 P.2d 801, 806-07 (Nev. 1998). Nevada's statute of repose precludes a person from bringing an action unless commenced within ten years after the substantial completion of the construction giving rise to the cause of action. Nev. Rev. Code §11.202(1).

One unusual wrinkle in Nevada is the application of a four (4) year statute of limitations to surveyors pursuant to Nev. Rev. St., §11.220, though the courts will look only to the time that the survey error was identified regardless of the time lag. In a case that remains good law, a survey performed in 1965 was challenged as negligent based upon a subsequent homeowner (the property had been transferred or sold) determining in 1981 that the earlier survey was in error. Despite a lag of at least 16 years from the time of the survey, and despite changes in property ownership, the Nevada Supreme Court allowed the suit to stand as long as it was filed within four (4) years of the homeowner learning of the error. As suit was filed in 1984, it was literally nineteen (19) years after the survey that suit was filed, and the Nevada Supreme Court allowed the litigation to proceed despite a motion as to the delay between survey and suit. The court stated the following:

> Surveyors may be held liable for the damages that result from their mistakes, misrepresentations, or negligence. *See generally* Dag E. Ytreberg, Annotation, *Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property,* 35 A.L.R.3d 504 (1971). Lack of contractual privity between the parties is not a defense in an action for tortious negligence. *Long v. Flanigan Warehouse Co.,* 79 Nev. 241, 245, 382 P.2d 399, 402 (1963) (the absence of contractual privity is not a defense to tort liability). A surveyor's duty has been held to extend to subsequent purchasers who relied upon the survey to their detriment. *Rozny v. Marnul,* 43 Ill.2d 54, 250 N.E.2d 656 (1969); *Cook Consultants, Inc. v. Larson,* 700 S.W.2d 231 ((Tex.Civ.App. – Dallas 1985, writ ref'd n.r.e.)). Downer fully understood that his survey would affect future purchasers of the divided Jacobsen tract.
>
> We conclude, consistent with the authorities cited above, that

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> Downer indeed had a duty to the Hannemans as foreseeable subsequent purchasers of the property, and that Downer breached that duty, thereby causing damage to the Hannemans.

Hanneman v. Downer, 110 Nev. 167, 179–80, 871 P.2d 279, 287 (1994). The court was clear to the effect that filing suit within four (4) years of being placed on notice of the problem is sufficient in Nevada.

> The Hannemans were placed on notice that they may have had a cause of action against Downer in 1981. The complaint against Downer was filed by the Hannemans in 1984, well within the four-year period of limitations specified under NRS 11.220. Therefore, Downer's attempt to avoid liability based upon the expiration of the period of limitations is meritless.

Hanneman v. Downer, 110 Nev. 167, 180–81, 871 P.2d 279, 287 (1994). While this case has not been broadly applied to other design professionals, the possibility remains that a clever attorney could advance such an argument. Additionally, when considering the timing of viable claims against surveyors in Nevada, the above cited case provides no outside time limit at which a surveyor is protected from suit, regardless of changes in home ownership or lack of any true contractual relationship.

B. Statute of Limitations

Nevada recognizes that a cause of action does not **accrue,** and the statute does not begin to run until a litigant discovers, or reasonably should have discovered, facts giving rise to the action. *Beazer Homes Nevada, Inc. v. The Eighth Judicial Dist. Ct. of Nev., et al., 97 P.3d 1132, 1138-39 (Nev. 2004)*. In construction defect cases, the **statute of limitations** does not begin to run until the plaintiff learns, or in the exercise of reasonable care should have learned, of the harm to the property. *Id*.

1. Statute of Limitations Regarding Alleged Construction Defects

Actions based upon a breach of a written contract must be brought within six years after the breach occurred. Nev. Rev. Stat. Ann. §11.190(1). An action on a contract, obligation or liability not reduced to a writing must be brought within four years. Nev. Rev. Stat. Ann. §11.190(2)(c) An action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another must be brought within two years of such act. Nev. Rev. Stat. Ann. §11.190(4)(e). In the residential construction context, the four year limitation period in Nev. Rev. Stat. Ann. §11.190(2)(c) controls and begins to run when the homeowner knew or should have known of the harm to the property caused by the construction defect. *Tahoe Village Homeowners Association v. Douglas County,* 106 Nev. 660, 662-664, 799 P.2d 556, 558 (1990),

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citing *Oak Grove Investment v. Bell & Gossett Co., 99 Nev. 616621-623, 669 P.2d 1075, 1078-1079 (1983);* also see *G and H Associates, 113 Nev. at 272, 934 P.2d at 233,* citing *Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 800. 801 P.2d 1377, 1383 (1990)* (statutes of limitations are procedural bars to a plaintiff's action; the time limits do not commence and the cause of action does not accrue until the aggrieved party knew or reasonably should have known of the facts giving rise to the damage or injury); *Beazer Homes Nevada. Inc. v. District Court, 120 Nev. 575, 587, 97 P.3d 1132, 1139 (2004)* ("For constructional defect cases, the statute of limitations does not begin to run until 'the time the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the harm to the property.'").

2. Statute of Limitations of Claim Brought Pursuant to Deceptive Trade Practices

The statute of limitations for an action brought against a person alleged to have committed a deceptive trade practice in violation of Nev. Rev. Stat. Ann. §598.0903, *et. seq.*, shall be four years pursuant to Nev. Rev. Stat.11.220, but the cause of action shall be deemed to accrue when the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice. Nev. Rev. Stat. Ann. §11.190(2)(d).

3. Statute of Limitations of Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Actions for breach of implied warranty of habitability and workmanship must be brought within four years in residential construction claims. Nev. Rev. Stat. Ann., 11.220. Nevada's "catch all" statute of limitations provision applies to residential construction claims even if the plaintiff is suing under theories of express and implied warranties. *Hartford Insurance Group v. Statewide Appliances. Inc*., 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

Actions for breach of express warranty must be brought within four years. Nev. Rev. Stat. Ann., §11.220.

5. Statute of Limitations of a Claim Based on Fraud

An action for relief on the ground of fraud must be brought within three years, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud. Nev. Rev. Stat. Ann. §11.190(d).

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C. The Discovery Rule in Relation to Tolling the Statute of Limitations for Actions Involving Construction Defects

In Nevada, the discovery rule tolls the statute of limitations until the injured party discovers or reasonably should have discovered fact supporting the cause of action. *G&H Assocs. v. Ernest W. Hahn, Inc.*, *934 P.2d 229, 233 (Nev. 1997)*. Also, in the residential construction context, the statutes of limitation and repose are tolled until (a) one year after the notice of the claim is given or (b) thirty days after mediation is concluded or waived in writing. Nev. Rev. Stat. Ann., §40.695(1). Tolling under this statute can be for a longer period of than one year, if after expiration of the statute of limitation or repose, the claimant establishes to the court good cause for extending the period beyond one year. Nev. Rev. Stat. Ann., §40.695(2).

D. Statute of Repose

The 2019 Nevada Legislature amended Nev. Rev. St. §11.202. The amendment became effective October 1, 2019, and these revisions must be retroactively applied. Now under Nev. Rev. St. §11.202, no action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than ten (10) years after the substantial completion of such an improvement, for the recovery of damages for:

(a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;

(b) Injury to real or personal property caused by any such deficiency; or

(c) Injury to or the wrongful death of a person caused by any such deficiency.

Nev. Rev. St. 11.202 also provides in subsection 2 that (except as otherwise provided in this subsection), an action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement. The provisions of this subsection do not apply to any lower-tiered subcontractor who performs work that covers up a defect or deficiency in another contractor's trade if the lower-tiered subcontractor does not know, and should not reasonably know, of the existence of the alleged defect or deficiency at the time of performing such work. As used in this subsection, "lower-tiered subcontractor" has the meaning ascribed to it in NRS 624.608.

Under Nev. Rev. St., §11.2055, the date of substantial completion of an improvement to real property shall be deemed to be the date (whichever occurs later) on which:

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(a) The final building inspection of the improvement is conducted;

(b) A notice of completion is issued for the improvement; or

(c) A certificate of occupancy is issued for the improvement.

Absent none of these events, the rules of common law will be applied to determine the date of substantial completion.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The United States District Court for the District of Nevada has held that property damage suffered by a third party due to a contractor's defective construction will be classified as an "occurrence" under a commercial general liability policy if the cause of the property damage was unforeseen by the insured contractor. *See Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.,* 459 F. Supp. 2d 1039, 1047 (D. Nev. 2006). In *Gary*, the court analyzed Nevada state law and held that water intrusion was an occurrence under a framing contractor's CGL policy because the damage incurred was not expected, foreseen, or intended by the contractor.

While the holding in *Gary* is merely persuasive in Nevada state actions, there does not appear to be any state case law criticizing the holding in *Gary*.

The Nevada Supreme Court in *Jackson v. State Farm Fire and Casualty Company*, 108 Nev. 504, 835 P.2d 786, endorsed the "manifestation" trigger for first-party property damage claims and specifically embraced the California decision of *Prudential-LMI v. Superior Court*, 798 Pac. 2d 1230 (Cal. 1990). In *Jackson*, the Court held that the policy in effect on the date of manifestation is the policy that must respond
– and must respond to the full amount of damages, even if some of the damages arguably took place before and after the manifestation date. See 108 Nev. at 506-508. The *Jackson* court quoted favorably from *California Union Insurance Company v. Landmark Insurance Company*, 145 Cal. App. 3d 462, which stated that:

> In a "one occurrence" case involving continuous progressive and deteriorating damage, the carrier in whose policy period the damage first becomes apparent remains on the risk until the damage is finally and totally complete, notwithstanding a policy provision which purports to limit the coverage solely to those accidents/occurrences within the time parameters of the stated policy term. 108 Nev. at 507, *citing Landmark*, 193 Cal. Rptr. at 469.

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California Union v. Landmark also relied heavily upon *Snapp v. State Farm Fire & Casualty Company*, 206 Cal. App. 2d 827 (1962), a decision the *Landmark* court read as "standing for the proposition that an insurer's liability for a still-insured and continuing event is not terminated by the expiration of the policy term." *See* 145 Cal. App. 3d at 475, *citing Snapp*, 206 Cal. App. 2d at 831.

Although the manifestation trigger generally governs first-party property damage claims, the actual injury or continuous trigger (if actual injury is continuing throughout several policy periods) governs third-party liability insurance issues. In a liability insurance matter, the trigger is actual injury, rather than manifestation, but other principles of *Jackson* are the same. The triggered insurer may not avoid or reduce its coverage obligations because some portion of the injury falls outside the policy. If there is property damage during an insurer's policy period, the policyholder's liability insurance is triggered and does not become de-triggered by subsequent sale of the damaged property and further ongoing injury. Most commercial builders purchase completed operations insurance for just this sort of risk of litigation.

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New Hampshire

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

New Hampshire's statute of limitations for all personal actions is three years. RSA § 508:4. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the injury, and that the injury was proximately caused by the defendant. *Id*. Unless the time period is extended in writing, New Hampshire's statute of repose precludes a person from bringing an action unless it is commenced within eight years after the completion of the construction giving rise to the cause of action. RSA §508:4-b. In cases of fraud, no claim may be brought if the fraud was, or should have been, discovered eight years prior to the date a claim was brought. *Id*. There is no statute of repose applicable in cases involving the construction of nuclear power plants.

B. Statute of Limitations

In New Hampshire, statutes of limitations "… place a limit on the time in which a plaintiff may bring suit after a cause of action accrues." *Big League Entm't v. Brox Indus.*, 821 A.2d 1054 (N.H. 2003). Although a cause of action arises as soon as all of the necessary elements are present, it does not accrue "…until the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered both the fact of his injury and the cause thereof." *Conrad v. Hazen*, 665 A.2d 372 (N.H. 1995). In contract actions, the cause of action arises and the statute of limitations begins running at the time of breach. *West Gate Village Ass'n v. Dubois*, 145 N.H. 293, 298 (2000). A breach of contract occurs when there is a failure without legal excuse, to perform any promise which forms the whole or part of a contract. *Id*.

1. Statute of Limitations Regarding Alleged Construction Defects

All personal actions, except actions for slander or libel, must be brought within three years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within three years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of. RSA §508:4.

2. Statute of Limitations of a Claim Brought Pursuant to the New Hampshire Unfair Trade Practices Act

In New Hampshire, a claim under the Unfair Trade Practices Act must be brought within three years. N.H. Rev. Stat. §358-A:3 (IV)(a).

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3. Statute of Limitations Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

See §B(1) above.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Under New Hampshire's discovery rule exception to the statute of limitations, when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the limitations period begins to run only when "…the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of." *Big League Entm't v. Brox Indus.*, 821 A.2d 1054 (N.H. 2003); See also RSA. §508:4, I. This two-pronged rule requires that, before the statute of limitations will begin to run, the plaintiff must know or reasonably should have known that he has been injured and that his injury was proximately caused by conduct of the defendant. *Id.*

D. Statute of Repose

All actions to recover damages for injury to property, injury to the person, wrongful death or economic loss arising out of any deficiency in the creation of an improvement to real property shall be brought within eight years from the date of substantial completion of the improvement, and not thereafter. RSA
§508:4-b. "Substantial completion" means that construction is sufficiently complete so that an improvement may be used by its owner or lawful possessor for the purposes intended. *Id*. In the case of a phased project with more than one substantial completion date, the eight-year period of limitations for actions involving systems designed to serve the entire project shall not begin until all phases of the project are substantially complete. *Id.*

However, if an improvement to real property is expressly warranted or guaranteed in writing for a period longer than eight years, the period of limitation set out in paragraph I shall extend to

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equal the longer period of warranty or guarantee. *Id*.

If an improvement to real property is expressly warranted or guaranteed in writing for a period longer than eight years, the eight year period is to extend to equal the longer period of warranty or guarantee. *Id*.

Additionally, actions involving fraudulent misrepresentations, or the fraudulent concealment of material facts upon which a claim might be based shall be brought within eight years after the date on which all relevant facts are, or with due care ought to be, discovered by the person bringing the action. *Id*.

Finally, there is no applicable statute of repose for actions arising out of any deficiency in the construction of improvements which are for nuclear power generation, nuclear waste storage, or the long-term storage of hazardous materials. *Id*.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in New Hampshire have held that defective work, standing alone, does not trigger an "occurrence" under a commercial general liability policy. High Country Assocs. v. New Hampshire Ins. Co., 648 A.2d 474, 477 (N.H. 1994). This is because an occurrence must be an "accident" and "[t]he fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." McAllister v. Peerless Ins. Co., 124 N.H. 676, 680, 474 A.2d 1033 (1984); see also 9A Steven Plitt et al., Couch on Insurance § 129:4 (3d ed. 2016). Cases applying this principle demonstrate that an insurer has no obligation to defend a claim that seeks to recover only the cost of repairing defective work. Instead, when considering claims for damages caused by defective work, an insurer must defend only claims that seek compensation for additional damages that fortuitously result from the defective work. See, e.g., Concord Gen. Mut. Ins. Co., 160 N.H. at 694 (no coverage for repairs to defective chimneys required to prevent carbon monoxide infiltration); Webster v. Acadia Ins. Co., 156 N.H. 317, 322, 934 A.2d 567 (2007) (coverage for damage to roof rafters produced by snow accumulation on defective roof); High Country Assocs. (coverage for damage to walls caused by water seepage resulting from defective workmanship); McAllister, 124 N.H. at 680-81 (no coverage for cost of repairing defective landscaping and leech field); Hull v Berkshire Mut. Ins. Co., 121 N.H. 230, 427 A.2d 523 (1981)(no coverage for repair of defective masonry work); see also Fletch's Sandblasting and Painting, Inc. v. Colony Ins. Co., 2017 DNH 097, 10 (2017) (no coverage for repair of defective work).

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New Jersey

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

New Jersey's statute of limitations for actions sounding in contract is six years. N.J.S.A. 2A:14.1. This statute of limitations also applies to any tortious injury to personal or real property. *Id*. The statute of limitations applicable to actions at law for personal injuries is 2 years from the date the cause of action accrued. N.J.S.A. 2A:14-2. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. *Knauf v. Elias*, 327 N.J. Super. 119 (A.D. 1999). New Jersey's statute of repose precludes a person from bringing an action unless commenced within ten years after the completion of the construction giving rise to the cause of action. N.J.S.A. 2A:14-1.1.

B. Statute of Limitations

The Supreme Court of New Jersey has held that the date of "substantial completion" is to be used for statute of limitations accrual purposes in construction defect actions. *Russo Farms v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1092 (N.J. 1996) (citing *Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp.*, 460 A.2d 149 (App. Div. 1983)). "[I]t is not necessary that the injured party have knowledge of the extent of injury before the statute begins to run." *P.T.&L Constr. Co. v. Madigan & Hyland, Inc.,* 584 A.2d 850 (App. Div.), *certif. denied,* 598 A.2d 888 (N.J. 1991).

"Substantial completion" occurs when the architect certifies such to the owner and a certificate of occupancy is issued certifying the building's fitness. *Perini Corp. v. Greate Bay Hotel [&] Casino, Inc.*, 610 A.2d 364 (N.J. 1992), *overruled on other grounds* by *In re Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc.*, 640 A.2d 788 (N.J. 1994).

1. Statute of Limitations Regarding Alleged Construction Defects

In New Jersey, every action for recovery upon a contractual claim or liability, express or implied, shall be commenced within six years from the date the claim accrued. N.J.S.A. §2:A14-1.

Notwithstanding, provisions shortening the length of time parties may bring suit have been held to be enforceable, if reasonable. *Eagle Fire Protection Corp. v. First Indem. of Am. Ins. Co.*, 678 A.2d 699 (N.J. 1996). Such provisions are accepted by the courts so long as they do not violate public policy. *A.J. Tenwood Assoc. v. Orange Senior Citizens Housing Co.*, 491 A.2d 1280 (App. Div.), *certif. denied,* 501 A.2d 976 (N.J. 1985).

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Similarly, every action for tortious injury to real or personal property shall be commenced within six years from the date the action accrued. N.J.S.A. §2A:14-1. However, every action for an injury to the person caused by the wrongful act, neglect or default of any person shall be commenced within two years from the date the claim accrued. N.J.S.A. §2A:14-2.

2. Statute of Limitations of a Claim Brought Pursuant to the New Jersey Consumer Fraud Act

Six (6) years. See § B(1) above. *Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 2006 N.J. Super. Unpub. LEXIS 2924 at *9. See also N.J.S.A. §§ 56:8-1, et seq.

3. Statute of Limitations of a Claim Brought Pursuant to the Breach of Implied Warranty of Habitability and Reasonable Workmanship

Six (6) years. See §B(1) above.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Six (6) years. See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

Six (6) years. See §B(1) above and §C below.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

New Jersey courts have adopted a discovery rule: "[I]n 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." *Lopez v. Swyer*, 300 A.2d 563, 565 (N.J. 1973).

The discovery rule does not extend the ten-year statute of repose because such statute was specifically passed to protect architects and other construction professionals from the potential "liability for life" potential posed by the discovery rule. *Russo*, *supra*, 675 A.2d 1077. *See also Greczyn v. Colgate- Palmolive*, 869 A.2d 866 (N.J. 2005). Likewise, the discovery rule does not operate to toll the statute of repose based on alleged fraudulent concealment, since its fundamental purpose is "to counteract the effect of the discovery rule." *County of Hudson v. Terminal Constr. Corp.*, 381 A.2d 355 (App. Div. 1977), *certif. denied,* 384 A.2d 835 (1978).

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D. Statute of Repose

New Jersey's statute of repose bars all actions, whether in contract, tort, or otherwise, for damages related to any deficiency in the construction of an improvement to real property, for any injury to property, real or personal, for an injury to the person arising out of the defective and unsafe condition of an improvement to real property, and for actions of contribution or indemnity for damages sustained on account of such injury which were brought more than ten years after the performance or furnishing of such services and construction was provided. N.J.S.A. §2A:14-1.1.

New Jersey law specifies different standards for when the ten-year statute of repose begins based on the construction professional's role in the project. For sub-contractors, the statute runs when its specific purposes were complete whereas for a general contractor, the statute of repose starts after the date of substantial completion. *Town of Kearny v. Brandt*, 214 N.J. 76 (2013). "Substantial completion" occurs when a certificate of occupancy has been issued. *Russo*, *supra*, 675 A.2d 1077.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in New Jersey have held that a commercial general liability policy covers tort liability for physical damage to third parties, not the insured's contractual liability for economic losses resulting from breaches of a duty to perform as bargained. *Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 904 A.2d 754, 759-760 (N.J. Super. 2006). Accordingly, an insured assumes the risk of replacing or repairing defective goods as part of the cost of doing business, but passes the risk of personal injury or damage to property of third parties caused by such goods on to the insurer. *Id*. at 760.

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New Mexico

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In New Mexico, the statute of limitations for personal injury is three (3) years. N.M. STAT. ANN. § 37-1-8. Actions arising out of a written contract shall be brought in six (6) years. N.M. STAT. ANN. § 37-1-3. Actions for property damage shall be brought within four (4) years. N.M. STAT. ANN. § 37-1-4. This state has adopted a limited "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of specific causes of action. N.M. STAT. ANN. § 37-1-7. New Mexico's statute of repose precludes a person from bringing an action unless commenced within ten (10) years after the "substantial completion" of the construction giving rise to the cause of action. N.M. STAT. ANN. § 37-1-27.

B. Statute of Limitations

In New Mexico, a statute of limitations begins to run when an action accrues or is discovered. *Saez v. Belin School Dist.*, 827 P.2d 102, 116 n.12 (N.M. 1992).

1. Statute of Limitations Regarding Alleged Construction Defects

Lawsuits founded upon a written contract must be brought within six (6) years. N.M. STAT. ANN. § 37-1-3. Legal actions based upon unwritten contracts, injuries to property, the conversion of personal property or fraud have a statute of limitations of four (4) years. N.M. STAT. ANN. § 37-1-4. The statute of limitations applicable to personal injury actions is three (3) years. N.M. STAT. ANN. § 37-1-8.

2. Statute of Limitations of Claim Brought Pursuant to the Trade Practices and Fraud Act of the Insurance Code

Claims made under the Trade Practices and Fraud Act carry a statute of limitations of four (4) years. *Martinez v. Cornejo*, 208 P.3d 443, 451–52 (N.M. App. 2008); *see also* N.M. STAT. ANN. § 37-1-4.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See § B.1. above.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See § B.1. above.

5. Statute of Limitations of a Claim Based on Fraud

Legal actions based upon claims of fraud have a statute of limitations of four (4) years from the date the fraud was discovered. N.M. STAT. ANN. § 37-1-4.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

New Mexico's discovery rule provides that in actions for relief on the ground of fraud or mistake and in actions for injuries to or conversion of property, the cause of action will not be considered accrued until the fraud, mistake, injury or conversion complained of has been discovered by the injured party. N.M. STAT. ANN. § 37-1-7.

D. Statute of Repose

The statute of repose applicable in New Mexico bars actions to recover damages for any injury to property, real or personal, or for injury to the person arising out of the defective or unsafe condition of a physical improvement to real property, any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction of such improvement to real property which are brought after ten (10) years from the date of substantial completion of such improvement. N.M. STAT. ANN. § 37-1-27.

However, the ten (10) year limitation does not apply to actions based on a contract, warranty or guarantee which contains express terms increasing or decreasing such limitation. *Id*.

The "date of substantial completion" is defined as (a) the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, (b) the date on which the owner does so occupy or use the improvement or (c) the date established by the contractor as the date of substantial completion—whichever date occurs last. *Id*.

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

A review of case law in this jurisdiction resulted in ambiguous findings best explained by one example provided. Unexpected rainfall which causes property damage to a third party's residence while its roof is being replaced qualifies as an "accident" and triggers coverage under a contractor's liability policy. *O'Rourke v. New Amsterdam Casualty Co.*, 362 P.2d 790, 795 (N.M. 1961). Thus, it appears in New Mexico coverage is triggered by accidental or unexpected events, but it is unclear (and fact specific) as to what type of event constitutes an accident outside the example provided herein.

III. Specific Statutory Issues Related to Contractual Indemnity Provisions

New Mexico has a construction anti-indemnity statute. N.M. STAT. ANN. § 56-7-1. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract (including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees), arising out of damages caused by or resulting from the negligence, act or omission of the indemnitee is void, unenforceable and against the public policy of the state. N.M. STAT. ANN. § 56-7-1(A). Indemnity provisions for construction contract are only enforceable when the provision (1) limits the liability, damages, losses or costs caused by the acts or omissions of the indemnitor; or (2) if the provision requires a party to purchase a project-specific insurance policy (including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance). N.M. STAT. ANN. § 56-7-1(B).

Further, a party found liable without active fault may seek restitution from someone who was actively at fault or the party who created the dangerous condition. *Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 368 P.3d 389, 399, 2016-NMSC-009, ¶ 29 (N.M. 2016). If the contractor discovered, or should have discovered, the dangerous condition and did not remedy the dangerous condition, that is active conduct, and indemnification is not available. *Id.*

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New York



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

New York's statute of limitations for breach of contract is six years. New York Civil Practice Law and Rules ("CPLR") §213. Actions regarding damage to property must be brought within three years. CPLR § 214. Absent allegations of fraud, there is no "discovery rule" tolling that statute of limitations applicable to construction defect claims. New York does not have a statute of repose (although in early 2021 bills were introduced in the New York State Assembly and Senate that would create a 10 year statute of repose).

B. Statute of Limitations

A cause of action against a contractor for construction defects generally **accrues** upon completion of the actual physical work. *State v. Lundin*, 60 N.Y.2d 987 (1983). Such work may be complete even though incidental matters relating to the project remain open. *Id*. The issuance of a final certificate is not controlling for purposes of tolling a statute of limitations. *Id*.

1. Statute of Limitations Regarding Alleged Construction Defects

Causes of action based on a contractual obligation or liability, whether express or implied, must be brought within six years after the cause of action accrues. CPLR §213.

2. Statute of Limitations for Claims Brought Pursuant General Business Law §349 (Consumer Protection from Deceptive Acts and Practices)

A cause of action brought pursuant to violations of New York's Consumer Protection from Deceptive Acts and Practices must be brought within three years from the accrual of such statutory claim. CPLR §214(2).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B (1) above.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B (1) above.

5. Statute of Limitations of a Claim Based on Fraud

An action based upon fraud must be commenced within six years from the date the cause of action accrued or two years from the time plaintiff discovered or, with reasonable diligence, could have discovered the fraud, whichever is longer. *Gutkin v. Siegal*, 85 A.D.3d 687 (1st Dep't 2011), CPLR § 213.

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C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

New York does not have a "discovery rule" with respect to the accrual of claims involving **construction** defects. *Menorah Campus, Inc. v. Frank L. Ciminelli Constr. Co.*, 2004 NY Slip Op 51919(U) [18 Misc 3d 1135(A)]. *See also Gelwicks v Campbell,* 684 N.Y.S.2d 264 (2d Dep't 1999).

D. Statute of Repose

There is no statute of repose that applies to construction defect claims brought in New York. However, personal injury/property damage claims arising out of professional services provided by engineers and architects more than 10 years prior to the claim are subject to N.Y. C.P.L.R. § 214-d. The statute requires plaintiff to serve a pre-suit notice of claim on the design professional 90 days prior to the commencement of action and the design professional may seek dismissal of the lawsuit through summary judgment under
C.P.L.R. § 3212(i). Such a motion is granted a preference in the hearing by the court and plaintiff has to demonstrate a "substantial basis" to oppose such a motion. *Castle Village Owners Corp., v. Greater New York Mutual Insurance Company*, 58 A.D.3d 178 (1st Dep't 2008).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

New York's Appellate Division has held that commercial general liability policies are not intended to provide contractual indemnity for economic losses suffered by an insured due to defective workmanship. *George A. Fuller Co. v. United States Fidelity & Guar. Co.*, 200 A.D.2d 255, 259 (1st Dep't 1994), see also *QBE Ins. Co. v. Adjo Contracting Corp.*, 121 A.D.3d 1064 (2nd Dep't 2014). Instead, such policies provide coverage for **faulty workmanship** when the defective work product causes bodily injury or property damage to something other than the work product. *Id.*

Furthermore, the requirement of a fortuitous loss is a necessary element of insurance policies based on either an "accident" or "occurrence." *National Union Fire Company of Pittsburgh, PA v. Turner Const. Co.*, 119 A.D.3d 103, 108 (1st Dep't 2014). A claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident. *Id.*

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North Carolina

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

North Carolina's statute of limitations for contracts and torts is three years. N.C. Gen. St. §1-52. This state has adopted a "discovery rule" which states that causes of action shall not accrue until bodily harm or damage is apparent or reasonably should be apparent to the plaintiff. N.C. Gen. St., §1-52(16) (statute of repose for discovery is 10 years). North Carolina's statute of repose generally precludes a person from bringing an action unless commenced within six years after the completion of the construction giving rise to the cause of action. N.C. Gen. St. §1-50(f).

B. Statute of Limitations

A defective construction claim accrues upon the completion of performance, regardless of whether such claim was brought as a negligence, malpractice or breach of contract action. *Boor v. Spectrum Homes, Inc.,* 675 S.E.2d 712, 717 (N.C. App. 2009).

1. Statute of Limitations Regarding Alleged Construction Defects

A cause of action arising out of the defective or unsafe condition of an improvement to real property shall be brought within three years. N.C. Gen. Stat. 1-50(f).

2. Statute of Limitations of Claim Brought Pursuant to the Unfair and Deceptive Trade Practices Act

Any civil action brought to enforce provisions of North Carolina's Unfair and Deceptive Trade Practices Act shall be barred unless commenced within four years after the cause of action accrues. N.C. Gen. Stat.
§75-16.2. A cause of action under this statute accrues when the violation occurs. *Hinson v. United Financial Services, Inc.*, 473 S.E.2d 382, 387 (N.C. App. 1996).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

A claim for the breach of an implied warranty must be brought within three years. N.C. Gen. Stat., 1- 52(1).

4. Statute of Limitations of Claim Brought Pursuant to Breach of Express Warranty

A claim for the breach of an express warranty must be brought within three years. N.C. Gen. Stat., 1- 52(1).

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5. Statute of Limitations of Claim Based On Fraud

A cause of action for fraud shall be brought within three years. *N.C. Gen. Stat.* §1-52 (9).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

A cause of action involving allegations of fraud shall not be deemed to have accrued until the aggrieved party discovers, or should have discovered, the facts constituting such fraud. N.C. Gen. Stat. §1-50(9). *See also Hyde v. Taylor*, 320 S.E.2d 904, 908 (N.C. App. 1984). Additionally, causes of action shall not accrue until bodily harm or damage is apparent or reasonably should be apparent to the plaintiff, but is limited by a 10 year statute of repose. N. C. Gen. Stat. §1-50(16).

D. Statute of Repose

In North Carolina, no action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of (a) the specific last act or omission of the defendant giving rise to the cause of action or (b) substantial completion of the improvement. N.C. Gen. Stat. §1-50.

Actions applicable to the statute of repose include but are not limited to:

- Actions to recover damages for breach of a contract to construct or repair an improvement to real property
- Actions to recover damages for the negligent construction or repair of an improvement to real property
- Actions to recover damages for personal injury, death or damage to property
- Actions to recover damages for economic or monetary loss
- Actions in contract or in tort or otherwise
- Actions for contribution and/or indemnification
- Actions involving the construction of an improvement to real property, or a repair to an improvement to real property. *Id*.

A repair doesn't constitute a last act under N.C. Gen. Stat. §1-50 unless it is required by an improvement contract. *Monson v. Paramount Homes, Inc.*, 133 N.C. App. 241, 244 (1999).

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The term "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract) at which point the owner can use the same for the purpose for which it was intended. The applicable date of substantial completion may be established by written agreement. *Id*. at 235.

Notably, the statute of repose may not be asserted as a defense by any person who is guilty of fraud, or willful/wanton negligence in the construction of an improvement to real property or a repair to an improvement to real property, or to any person who wrongfully concealed any such fraud, or willful or wanton negligence. N.C. Gen. Stat., §1-50(e).

Additionally, in actions for personal injury or physical damage to a claimant's property, the cause of action shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. However, no cause of action shall accrue more than ten years from the last act or omission of the defendant giving rise to the cause of action. N.C. Gen. Stat. §1-52(16).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in North Carolina have interpreted the term "**property damage**" in a commercial general liability policy to mean damage to property that was formerly undamaged, and not the expenditure of repairing the property or completing a project that was not done correctly or according to a contract in the first place. *Prod. Sys. v. Amerisure Ins. Co.*, 605 S.E.2d 663, 666 (N.C. App. 2004). As such, a claim which merely seeks damages to repair the item which was defectively constructed does not trigger coverage under a commercial general liability policy. *Id*. at 667. This view represents the minority opinion, in which defective workmanship may not constitute an "occurrence" under a commercial policy.

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North Dakota

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

North Dakota's statute of limitations for construction defect torts is six years from the accrual of a claim. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence. North Dakota's statute of repose precludes a person from bringing an action unless commenced within ten years after the completion of the construction giving rise to the cause of action.

B. Statute of Limitations

A statute of limitations begins to run when a cause of action accrues. *Abel v. Allen*, 651 N.W.2d 635, 638 (N.D. 2002). In North Dakota, an action based on tort or contract accrues when both (1) a wrongful act occurs and (2) a plaintiff suffers damages as a result thereof. *Jacobsen v. Haugen*, 529 N.W.2d 882, 885 (N.D. 1995).

1. Statute of Limitations Regarding Alleged Construction Defects

In North Dakota, an action involving personal injury, fraud, a contract or an obligation/liability, whether express or implied, shall be brought within six years from the accrual of the claim. *N.D.C.C,* §28-01-16.

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Fraud and Unlawful Credit Practices Act

See §B(1) above. However, North Dakota's Consumer Fraud Act is generally limited to instances of false advertising of merchandise marketed and sold within the state. *N.D.C.C,* §51-10-01, *et. seq*.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

See §B(1) above, subject to the discovery rule below.

C. The Discovery Rule in Relation to Tolling of the Statute of Limitations in Actions Involving Construction Defects

North Dakota's discovery rule is an exception to the statute of limitations and, if applicable, determines when the claim accrues for the purpose of computing limitations. *Wells v. First Am. Bank West*, *598 N.W.2d 834, 838 (N.D. 1999).* Generally, the discovery rule postpones a claim's accrual until the plaintiff knew, or should have known, of (a) the wrongful act and (b) its resulting injury. *Id*. Courts generally apply the discovery rule when it is difficult for the plaintiff to have learned of the negligent act or omission that gave rise to the legal injury. *Id.*

Claims of fraud shall not be deemed accrued until the injured party discovers the facts constituting the fraud. *N.D.C.C,* §28-01-16. There is no limitation upon the time for discovery of a cause of action based on fraud. *Phoenix Assurance Co. v. Runck*, 366 N.W.2d 788 (N.D. 1985). As such, an action based on fraud is not barred by the passage of time until six years after discovery of the facts constituting the fraud. *Id*.

However, the word "discover" is not convertible with the word "knowledge." If there is notice of facts, or if there is information that puts plaintiff on inquiry that would have led to knowledge, such facts are deemed discovered and the plaintiff must be charged with notice of everything to which inquiry might have led. *Roether v. National Union Fire Ins. Co.*, 200 N.W. 818 (N.D. 1924). As such, when a plaintiff is aware of his/her injury, but not the full extent of such injuries, a "discovery rule" should not be applied to toll the statute of limitations. *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990).

D. Statute of Repose

In North Dakota, no action to recover damages, whether in contract, oral or written, in tort or otherwise, may be brought due to a deficiency in the construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, against any person performing or furnishing the construction of such an improvement more than ten years after substantial completion of such an improvement. *N.D. Cent. Code*, §28-01-44.

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However, in the event that such injury to property or person occurred during the tenth year after such substantial completion, an action in tort to recover damages for such an injury may be brought within two years after the date on which such injury occurred, but in no event may such an action be brought more than 12 years after the substantial completion of construction of such an improvement. *Id*.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage Under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in North Dakota have held that, under a commercial general liability policy, property damage caused by an insured's faulty workmanship may be a covered "occurrence" if such faulty workmanship caused bodily injury or property damage to property other than the insured's defective work product. *ACUITY v. Burd & Smith Constr., Inc.*, 721 N.W.2d 33, 39 (N.D. 2006), *overruled in part by K and L Homes, Inc. v. Am. Family Mart.*, 2013 ND57.

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Ohio

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Ohio's statute of limitations for actions sounding in written contract is six years. O.R.C. § 2305.06. Actions sounding in contract that are not written shall be brought in four years. O.R.C. § 2305.07(A). Actions sounding in tort shall be brought in two years. O.R.C. § 2305.10. An action for relief on the ground of fraud must be commenced within four years. O.R.C. § 2305.09(C). Ohio has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of injury. Ohio's statute of repose generally precludes a person from bringing an action unless commenced within ten years after substantial completion of the construction giving rise to the cause of action. O.R.C. § 2305.131. However, the statute of repose may not be used as a defense to parties whose construction defect is due to fraudulent actions. *Id*. "Substantial completion" of the construction is defined as the date improvement to the real property is first used by the owner or tenant or when the real property is first available for use after improvement is completed in accordance with the contract. O.R.C. § 2305.131(G).

B. Statute of Limitations

A cause of action based on defective construction accrues when there is a cognizable event whereby the plaintiff discovers or should have discovered the injury was related to the defendant's act or omission or when the relationship between the parties terminates for that particular transaction, whichever occurs later. *Bd. of Educ. of Cleveland City School Dist. v. Lesko & Assoc.*, 1990 Ohio App. LEXIS 1452 at *20-21. If the cause of action is based on contract, a claim accrues upon the fulfillment or completion of the contract. *Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co.*, 470 N.E.2d 950, 956 (Ohio App. 1984). However, the accrual of action sounding in contract is left to the discretion of the court. *Id.*

1. Statute of Limitations Regarding Alleged Construction Defects

In Ohio, an action upon an agreement, contract, or promise in writing shall be brought within six years after the cause thereof has accrued. O.R.C. § 2305.06. However, an action upon an oral contract, whether express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within four years after the cause thereof accrued. O.R.C. § 2305.07.

The general statute of limitations for personal injury and property damage negligence actions is two years. O.R.C. § 2305.10.

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2. Statute of Limitations Claim Brought Pursuant to the Consumer Sales Practices Act

The statute of limitations for claims brought under Ohio's Consumer Sales Practices Act is the latter of two years from the occurrence of the violation which is the subject to the lawsuit, or one year from the termination of proceedings brought by the attorney general. *O.R.C. Ann.* 1345.10. *See also Varavvas v. Mullet Cabinets, Inc.*, *923 N.E.2d 1221, 1225 (Ohio App. 2009).*

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for claims brought pursuant to the implied duty that contractors construct in a workmanlike manner is four years. O.R.C. 2305.09(D). *See also Martin v. Design Constr. Servs.*, *2009 Ohio App. LEXIS 2433 at *8.*

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Breach of warranty claims are subject to the same statute of limitations as breach of contract. Actions for breach of express warranties shall be brought in six years. O.R.C. § 2305.06

5. Statute of Limitations of a Claim Based on Fraud

Actions for relief on the basis of fraud shall be brought within four years after the cause thereof accrued. O.R.C. 2305.09. *See also Glen Homeowners' Ass'n v. Towne Properties*, 1995 Ohio App. LEXIS 5321 at *16-17.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In Ohio, a cause of action does not accrue until damage to the property is discovered or, through the exercise of reasonable diligence should have been discovered. *Harris v. Liston*, 714 N.E.2d 377, 380 (Ohio 1999). As such, when negligence does not immediately result in damages, a cause of action for damages arising from negligent construction does not accrue until actual injury or damage ensues. *Id*.

Ohio's discovery rule generally applies to claims of fraud. *Glen Homeowners' Ass'n*, *supra*, 1995 Ohio App. LEXIS 5321 at *16-17. A cause of action for fraud accrues when the fraud is discovered. *Id*. For purposes of the **discovery rule,** a "discovery" that will cause the **statute of limitations** to begin to run is an actual discovery, or what might, by the exercise of due diligence, have been discovered. *Id*. If by an ordinary degree of discretion the fraud could have been discovered, such opportunity is equivalent to knowledge. *Id.*

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D. Statute of Repose

No cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property, and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the construction of the improvement to real property later than ten years from the date of substantial completion of such improvement. O.R.C. § 2305.131(A).

The term "substantial completion" means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first. *Id*.

Notwithstanding, a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period but less than two years prior to the expiration of that period may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition. *Id*.

However, Ohio's statute of repose is not available as an affirmative defense if the defendant engages in fraud in regard to furnishing the construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property. *Id*.

Moreover, the statute of repose does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than ten years and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of that warranty or guarantee. *Id*.

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in Ohio generally conclude that commercial general liability policies are intended to insure the risks of an insured causing damage to other persons and their property. *Heile v. Herrmann*, 736 N.E.2d 566, 568 (Ohio App. 1999). As such, the policies do not insure an insured's work; instead, the policies generally insure consequential risks that stem from the insured's work. *Id*.

In light of these principles, courts in Ohio have concluded that defective workmanship does not constitute an "occurrence" in commercial general liability policies, nor is it what is meant by the term "accident" under the definition of "occurrence." *Id*. Moreover, Ohio's courts conclude that the subject policies do not provide coverage where the damages claimed are the cost of correcting the work itself. *Id*. *But see Erie Insurance Exchange v. Colony Development Corp.*, 136 Ohio App.3d 406, 736 N.E.2d 941 (Ohio App. 1999).

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Oklahoma

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Oklahoma's statute of limitations for claims sounding in written contract is five years. 12 Okla. Stat. § 95 (A)(1). Actions sounding in tort have a two-year statute of limitations. *Id.* at (A)(3). While this state has adopted a "discovery rule" which tolls the statute of limitations, the rule does not apply to construction contracts. Oklahoma's statute of repose precludes a person from bringing an action unless commenced within ten years from the substantial completion of the construction giving rise to the cause of action. 12 Okla. Stat. § 109.

B. Statute of Limitations

In Oklahoma, a cause of action accrues when the party owning it has a legal right to sue. *Loyal Order of Moose, Lodge 1785 v. Cavaness,* 563 P.2d 143, 146 (Okla. 1977). For construction contract actions, the general rule is that a claim accrues when the work is completed. *Samuel Roberts Noble Fund. v. Vick*, 840 P.2d 619, 623 (Okla. 1992).

1. Statute of Limitations Regarding Alleged Construction Defects

Civil actions involving construction defects can only be brought within five years for actions founded upon a written contract, or within three years for actions founded upon an oral contract, whether express or implied. 12 Okla. Stat. §95 (A) (1-2). An action for injury to personal property not based on contract must be brought within two years. *Id.* At (A)(3).

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Protection Act

In civil actions brought by private parties pursuant to Oklahoma's Consumer Protection Act, the statute of limitations is three years. 12 Okla. Stat. §95(A)(2). *See also Brashears v. Sight N Sound Appliance Ctrs., Inc.*, 981 P.2d 1270, 1273-1274 (Okla. App. 1999).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

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5. Statute of Limitations of a Claim Based on Fraud

In an action for relief on the ground of fraud, the statute of limitations begins to run at the time the fraud is discovered. *Mid-State Homes v. Johnston*, 547 P.2d 1302, 1305 (Ok. Civ. App. 1974). However, this limitation does not apply to raise a bar against a party who is seeking merely to defend his rights on the ground that a contract or transaction sought to be enforced by his opponent is fraudulent. *Id.*at 1306.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

A statute of limitations may be tolled until a defect or injury is discovered or should have been discovered under Oklahoma's discovery rule. *Kirby v. Jean's Plumbing, Heat and Air*, 222 P.3d 21, 27 (Okla. 2009). However, the discovery rule is not applicable to suits based on breach of construction contracts. *Id*.

D. Statute of Repose

No action in tort to recover damages for any deficiency in the construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the construction of such an improvement more than ten years after substantial completion of such an improvement. 12 Okla. Stat. §109.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Oklahoma Supreme Court has held that property damage suffered by a third party due to a contractor's work product will trigger commercial general liability coverage if the cause of the damage incurred was unforeseen by the insured contractor. *U.S. Fid. & Guar. Co. v. Briscoe,* 239 P.2d 754, 758 (Okla. 1951). In *Briscoe*, the insured contractor emitted concrete dust into the air while constructing a concrete roadway. *Id*. at 755. This act, in turn, caused personal injury and property damage to nearby third parties. *Id*. The court held that the contractor was aware that dust was being created, thus its creation was not an unforeseen event, and CGL coverage was not triggered. *Id*. at 758.

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Oregon

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Oregon's statute of limitations states that actions sounding in contract or property damage shall be brought in six years. *O.R.S.* § 12.080. If the action does not arise from contracts and is not covered by other more specific statute of limitations, the applicable statute of limitations is set forth in the "catch-all statute of limitations," *O.R.S.* §12.110(1). *Goodwin v. Kingsmen Plastering, Inc*., 359 Ore. 694, 700 (2016). *O.R.S.* §12.110 prescribes that any action for personal injury not sounding in contract should be brought within two years. *O.R.S.* §12.110(1).Actions for damage to the property itself shall be brought within two years, unless another period stated in §12.110 applies.

Oregon adopted a "discovery rule" which tolls the statute of limitations; however, this rule does *not* apply to construction defect actions brought pursuant to a contract. *Waxman v. Waxman and Assocs.*, 198 P.3d 445, 453 (Ore. App. 2008).

Oregon's statute of repose precludes a person from bringing an action unless commenced within ten years after the "substantial completion" or abandonment of the construction giving rise to the cause of action for small commercial structures, residential structures, or large commercial structures owned or maintained by a homeowners association or association of unit owners. *O.R.S.* §12.135(1)(b). The statute of repose for all other large commercial structures is six years after the "substantial completion" or abandonment of construction. *O.R.S.* § 12.135(1)(c).

B. Statute of Limitations

In Oregon, an action must be commenced within the applicable period after a cause of action accrues. *O.R.S.* §12.010. In actions based on a contract, a claim accrues upon breach. *Vega v. Farmers Ins. Co.,* 895 P.2d 337 (Ore. 1995), *aff'd,* 918 P.2d 95 (1996), *superseded by statute* (on other grounds), *O.R.S.* 742.542. If not based in contract and not subject to another limitation under the statute, then a discovery rule applies to determine the date of accrual.

1. Statute of Limitations Regarding Construction Defects

An action upon a contract or liability, express or implied, written or oral, or an action upon injury to personal property, shall be commenced within six years. *O.R.S.* §12.080.

Negligent construction constitutes a claim for damage to the property itself, and is subject to the two-year limitation period in *O.R.S.* §12.110. *Goodwin v. Kingsmen Plastering, Inc*., 359 Ore. 694, 714 (2016). Personal injury

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actions must be brought within two years. *O.R.S.* §12.110.

2. Statute of Limitations for Injury to an Interest in Property:

"Interest in real property" is subject to the six year statute of limitations set forth in *O.R.S.* § 12.080. *Goodwin*, 359 Ore. 694, at 696. Waste and trespass are actions that trigger the six year statute of limitations, unless the claims fall under the category associated with design professionals identified in *O.R.S.* § 12.135(3), discussed below. *Id.*

3. Statute of Limitations of Claim Brought Pursuant to the Unlawful Trade Practices Act

Private actions brought under Oregon's Unlawful Trade Practices Act shall be commenced within one year from the discovery of the unlawful method, act or practice actionable under the statute. *O.R.S.* §646.638. The court may award reasonable attorney fees and costs at trial and on appeal to a prevailing party under the statute. *O.R.S.* §646.638(3).

Whenever any complaint is filed by a prosecuting attorney to prevent, restrain or punish pursuant to violations of the Act, the running of the statute of limitations with respect to the private rights of action and based in whole or in part on any matter complained of in such proceeding shall be tolled during the pendency thereof. *O.R.S.* §646.638(3).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Oregon's Court of Appeals has held that an action for breach of the implied warranty of habitability sounds in contract and, therefore, is governed by the six-year statute of limitations applicable to contract actions. *Beveridge v. King*, 623 P.2d 1132 (1981). *See also O.R.S.* §12.080(1).

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5. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

6. Statute of Limitations of a Claim Based on Fraud

An action for fraud shall be commenced within two years. However, this limitation shall be deemed to commence only from the discovery of the fraud. *O.R.S.* §12.110.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

There is no discovery rule for actions brought pursuant to a breach of contract. *Waxman v. Waxman and Assocs.*, 198 P.3d 445, 453 (Ore. App. 2008).

Generally, construction defect claims that do not arise under contract fall under a two-year statute of limitations subject to the discovery rule. Under the discovery rule, the litigation period begins to run from the earlier of two possible events: (1) the date of the plaintiff's actual discovery of the injury; or (2) the date when a person exercising reasonable care should have discovered the injury, including learning facts that an inquiry would have disclosed. *Riverview Condo. Ass'n v. Cypress Ventures, Inc.,* 266 Ore. App. 574, 576, 339 P.3d 447, 450 (2014).

In actions for fraudulent concealment, the statute of limitations will be tolled until the plaintiff discovered, or reasonably should have discovered, the breach. *Chaney v. Fields Chevrolet,* 503 P.2d 1239 (Ore. 1972).

D. Statute of Repose

Any action (contract, tort or otherwise) arising from a defendant's construction, alteration or repair of any improvement to real property must be brought within ten years of the substantial completion or abandonment of the construction, alteration or repair for small commercial structures, residential structures, or large commercial structures owned or maintained by a homeowners association or association of unit owners. *O.R.S.* §12.135(1)(b). The statute of repose for all other large commercial structures is six years after the "substantial completion" or abandonment of construction. *O.R.S.* § 12.135(1)(c).

The statue of repose set forth in *O.R.S.* §12.135(1) and (2) runs not from the date of the act or omission complained of, but from the date of substantial completion. The statutory definition of "substantial completion" requires construction to be complete. The date of completion turns on

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whether there is written acceptance of the work. If there is no written acceptance, courts will look to when the contractee takes from the contractor responsibility for the maintenance, alteration, and repair of the improvement, which typically, if not invariably, will be the point at which little or no work remains to be done by the contractor. *Riverview Condo. Ass'n*, 266 Ore. App. 574 at 576.

As defined in the statute, "substantial completion" means the earliest of:

(a) The date when the contractee accepts, in writing, the construction, alteration or repair of the improvement to real property as having reached that state of completion when it may be used or occupied for its intended purpose. *O.R.S.* §12.135. If there is no such written acceptance, substantial completion shall be the date of acceptance of the completed construction, alteration or repair by the contractee. *Id.*

(b) The date when a public body issues a certificate of occupancy for the improvement. *Id*.

(c) The date when the owner uses or occupies the improvement for its intended purpose. *Id.*

There are some changes to applicable time frames depending on cause of action and identity of plaintiff and/or defendant.

1. Application of Statute of Repose When Plaintiff Is Not A "Public Body:"

"Public body" refers to state government bodies, local government bodies and special government bodies. *O.R.S.* §174.109.

The action (contract, tort, or otherwise) must be brought within ten years of the substantial completion or abandonment of the work to a "small commercial structure." *O.R.S.* §12.135 (1)(b). Generally, a "small commercial structure" means a nonresidential structure with a ground area of 10,000 square feet or less, a nonresidential leasehold or rental unit part of a larger structure that is 12,000 square feet or less, or a nonresidential structure of any size for which the price of work performed was not more than $250,000. *See O.R.S.* §701.005(17)(a-d).

If the action arises from a defendant's construction, alteration or repair of a "large commercial structure," it must be brought within six years after substantial completion or abandonment. A "large commercial structure" means a structure that is not a residential structure or small commercial structure. *O.R.S.* § 701.005(11)

2. When Plaintiff Is a "Public Body:"

The action must be brought within ten years after substantial completion or

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abandonment of such construction, alteration or repair of the improvement to real property. *O.R.S.* §12.135(2).

3. Causes Of Action Against a Person Registered to Practice Architecture, Landscape Architecture, or Engineering (*O.R.S.* §12.135(3))

O.R.S. §12.135(3)(a-c) addresses causes of action arising for injury to person, property or to any interest in property (including waste and trespass) brought against architects, landscape architects, or engineers. Claims arising under this section of the statute must be brought within the earliest of (a) two years of when the plaintiff knew or should have known of the defect, or per the statute of repose, (b) no later than ten years after substantial completion of construction. *O.R.S.*§12.135(3). Essentially, plaintiff has two years from the date they knew or should have known of the defect to bring the claim; so long as that two year date is within 10 years of construction being completed.

Claims arising ten years after substantial completion or abandonment against buildings owned or maintained by a homeowners association, or an association of unit owners must also be commenced within ten years. *Id*. The ten year time frame decreases to six years if the construction was for a large commercial structure (A structure that is not a residential structure or small commercial structure, pursuant to *O.R.S.* § 701.005(11), other than those specifically identified in *O.R.S.*§12.135(3)(b)).

II. Common Law Related to Construction Defects Claims

A. Economic Loss Doctrine and Vicarious Liability Considerations in Construction Disputes

The economic loss doctrine precludes a party from bringing a negligence claim for solely economic losses. Typically seen in products liability, the doctrine is discussed here as a recent case arising out of losses in the construction industry was addressed by Oregon courts. Under the doctrine, a negligence claim brought solely on economic loss will be barred. When the focused of claimed negligence is physical property *and* economic loss, the economic loss doctrine does not apply. *JH Kelly, LLC v. Quality Plus Servs*., 305 Ore. App. 565, 577, 472 P.3d 280, 289 (2020) (emphasis added).

In *JH Kelly*, a maintenance company typically used by the manufacturer was brought in by an owner entity to service pipes. The maintenance company errored while servicing a machine, which resulted in a replacement cost of over $800,000. The owner entity asserted a negligence claim against the maintenance company and sought to hold the machine manufacturer

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vicariously liable for the maintenance company's negligence. One of the issues on appeal was whether the owner entity's negligence claim was barred by the economic loss doctrine. The Court of Appeals held that the doctrine did *not* apply, because the loss at issue was not purely economic (property damage to pipes, in addition to lost profits and expenses of removal and replacement).[1] *Id.* at 576. The owner entity's negligence claim was not barred by the doctrine.

The holding in *JH Kelly* also demonstrated a rather broad application of the vicarious liability doctrine. The court pointed to the manufacturer's service manual as one means to show that the manufacturer retained some degree of control over the manner of performance by the maintenance company. *Id.* at 583. When viewed as a whole, the court stated that a jury could find that the manufacturer retained control over the manner of performance" of the maintenance company to a degree that is characteristic of the employee-employer relationship, and that the maintenance company was acting as an agent when it negligently serviced the pipes. *Id.* When manufacturers maintain significant relationships with other companies, including regular maintenance companies, the manufacturer could be held liable for the other company's negligence.

B. Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Oregon Supreme Court has held that third-party property damage caused by the insured contractor's negligent performance of its contract is damage suffered pursuant to an "accident" within the meaning of a commercial general liability policy. *Ramco, Inc. v. Pacific Ins. Co.*, 439 P.2d 1002, 1003 (Ore. 1968). However, third-party property damage caused by the insured contractor's untimely performance of its contract is not damage suffered pursuant to an accident within the meaning of a CGL policy because the breach of performance is based in contract, not tort. *Kisle v. St. Paul Fire & Marine Ins. Co.,* 495 P.2d 1198, 1200 (Ore. 1972).

In *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254 (Ore. 2000), the Oregon Supreme Court held that CGL policies that cover property damage caused by an "occurrence," which is usually defined as an accident, had a "tortious connotation" and did not constitute a breach of contract. The contractor in *Oak Crest* incurred property damage as a result of the subcontractor's defective work. *Id.* at 1258. The Court determined the damage was not an occurrence within the meaning of a CGL policy; instead, the damage was based on the contractor's failure to perform pursuant to the construction contract. *Id.*

[1] To escape the economic loss rule, if the losses are purely economic, a plaintiff can establish a source of duty outside of the common law as a limiting principle. This was not addressed in *JH Kelly* because the losses were to property and economic.

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Pennsylvania

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

The statute of limitations for tort claims, including personal injury claims, is two years under Pennsylvania law. 42 Pa. C.S.A. § 5524. Actions sounding in contract must be brought within four years. 42 Pa. C.S.A. § 5525. Pennsylvania has adopted the "discovery rule" whereby the applicable statute of limitations may be tolled until the point in time when the complaining party knows or reasonably should have known of the injury. *Baumgart v. Keene Bldg. Products Corp.*, 430 PA. Super. 162 (1993). Additionally, Pennsylvania's statute of repose provides that claims brought under any person lawfully performing or furnishing the design, planning, supervision or observation of construction of any improvement to real property must be commenced within twelve years after completion of construction. 42 Pa.C.S.A. § 5536(a).

B. Statute of Limitations

The statute of limitations begins to run from the time the cause of action accrues. 42 Pa. C.S. § 5502 *see Packer Soc. Hill Travel Agency, Inc. v. Presbyterian Univ.*, 635 A.2d 649, 652 (Pa. Super. 1993). The test for when a cause of action accrues is to establish when a plaintiff could have first maintained the action to a successful conclusion. *McCauley v. Owens-Corning Fiberglass Corp.*, 715 A.2d 1125 (Pa. Super. 1998). The statute of limitations is dependent on the type of claim(s) or allegations brought in a complaint. A suit typically accrues when the initial injury occurs. *See Pocono Int'l Raceway v. Pocono Produce, Inc.*, 468 A.2d 468 (Pa. 1983).

1. Statute of Limitations Regarding Alleged Construction Defects

In the case of a latent defect in construction, the statute of limitations will not start to run until the injured party becomes aware, or by exercise of reasonable diligence should have become aware of the defect. *Romeo & Sons v. P.C. Yezbak & Son,* 539 Pa. 390, 652 A.2d 830 (1995). Generally, actions for construction defects shall be brought within two years. 42 Pa. C.S.A. § 5524.

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade and Consumer Practices Law

A cause of action under the Unfair Trade Practices and Consumer Protection Law (hereinafter "UTPCPL") is governed by Pennsylvania's six-year "catch-all" statute of limitations. 42 Pa. C.S.A. § 5527.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

A four-year statute of limitations period applies to a breach of implied warranty of habitability and reasonable workmanship claim. 42 Pa. C.S.A. § 5525(4).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

A cause of action for breach of express warranty is subject to a four-year statute of limitations period. 42 Pa. C.S.A. § 5525(8). The discovery (of defects) rule does not apply to breach of warranty claims. *Northampton County Area Community College v. Dow Chemical USA*, 566 A.2d 591, 599 (Pa. Super 1989), *aff'd*, 598 A.2d 1288 (Pa. 1991).

5. Statute of Limitations of a Claim Based on Fraud Has Long Since Passed

Under Pennsylvania law, a plaintiff must commence a fraud action within two years of the claim's accrual. 42 Pa. C.S.A. § 5524(7).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Pennsylvania has adopted the "discovery rule" whereby the applicable statute of limitations may be tolled until the point in time when the complaining party knows or reasonably should have known of the injury. *Crouse v. Cyclops Indus.*, 745 A.2d 606, 611 (Pa. 2000). Note, the discovery rule does not apply to every claim (e.g., breach of warranty claims).

D. Statute of Repose

Pennsylvania's statute of repose serves as a substantive bar to any construction defect action brought more than 12 years after construction is completed and extends to contractors and design professionals alike. 42 Pa. C.S. §5536(a); *See Vargo v. Koppers Company,* 715 A.2d 423 (Pa. 1998). The statute completely eliminates the cause of action. *Noll v. Harrisburg Area YMCA*, 643 A.2d 81, 84 (Pa. 1994).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Pennsylvania courts have generally adopted the "manifestation" theory to determine when insurance coverage under an occurrence policy is triggered. The general rule is that damages "occur" for insurance purposes when they "first manifest themselves in a way that could be

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ascertained by reasonable diligence." *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857 (Pa. Super 1986); *Keystone Automated Equipment v. Reliance Ins. Co.*, 535 A.2d 648, 651 (Pa. Super. 1988). An occurrence happens when the injury is reasonably apparent, not at the time the injury occurs. The cause and the injury may happen at distinct time[s]. *D'Auria* at 862. The test for determining when the injurious effects resulted is the "effect" test. *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982). In essence, an occurrence happens when the injurious effects of the negligent act *first manifest themselves* in a way that would put a reasonable person on notice of injury.

Generally, an insurer's duty to defend is decided under the "four corners" doctrine by comparing the complaint with the plain language of the policy. An insurer has a duty to defend against allegations that state a claim which would potentially fall within policy coverage (e.g., negligence claims against the named insured related to property damage which is not necessarily excluded from coverage). To the extent that property damage may fall within coverage, it must be alleged to be the result of negligence or an "accident or occurrence." If allegations of negligence are determined to actually be allegations grounded in breach of contract (e.g., faulty workmanship) then a court may find, upon review of the policy language and consideration of *only* the allegations of the four corners of the complaint no duty to defend. *Redevelopment Authority of Cambria Cty. v. International Ins. Co.*, 685 A.2d 581 (Pa. Super. 1986).

Whether the work of a contractor that has led to a defect in the property can be considered an "occurrence" seems to be focused on whether the defect was caused by intentional versus unintentional acts of the contractor. *See Gene & Harvey Builders v. PMA*, 517 A.2d 910 (Pa. 1986); *Barber v. Harleysville Mut. Ins. Co.*, 450 A.2d 718 (Pa. Super. 1982). Currently in Pennsylvania it is not clear whether a negligent act by a contractor in the construction of the work might constitute an "occurrence." However, claims for intentional acts such as fraudulent misrepresentation or intentional concealment of a defective condition would not be found to constitute an "occurrence." *See State Farm Fire & Cas. Co. v. Tomie*, 1998 U.S. Dist. LEXIS 16601 (E.D. Pa. 1988); *Redevelopment*, 685 A.2d 581.

A significant case addressing whether there is an "occurrence" triggering coverage is *Kvaerner v. Commercial Union Insurance Co.*, 825 A.2d 641 (Pa. Super. 2003), *appeal granted*, 848 A.2d 925, 2004 Pa. LEXIS 743 (2004), *reversed*, 908 A.2d 888, 2006 Pa. LEXIS 2064 (Pa. 2006). Kvaerner had entered into a contract to provide a battery for Bethlehem Steel but ultimately failed to perform. When sued, Kvaerner sought coverage under its CGL policy which the insurer declined. The lower court held in favor of the insurer on the basis that the claims asserted against Kvaerner by Bethlehem Steel were not within the coverages afforded by the CGL policy because there had been no "occurrence" as required under the policy to invoke coverage but rather only a failure to perform pursuant to contractual requirements. Ultimately, the Pennsylvania Supreme Court reversed the Superior Court and held that because the underlying suit alleged only property damage from faulty workmanship, it did not constitute an accident or "occurrence" under the

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policies.

Other courts have followed *Redevelopment; see e.g., Pennsylvania Manufacturers' Association Insurance Company v. L.B. Smith, Inc.*, 831 A.2d 1178 (Pa. Super. 2003). The court in *Kvaerner* distinguished the facts of *Redevelopment* (citations omitted).

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Rhode Island



I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Rhode Island's statute of limitations for personal injuries is three years. R.I. Gen. Laws §9-1-14. However, in general, all civil actions must be commenced within 10 years. R.I. Gen Laws §9-1-13.This state has adopted a "discovery rule" for construction defect cases in which the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. Rhode Island's statute of repose generally precludes a person from bringing an action unless commenced within ten years after the completion of the construction giving rise to the cause of action. R.I. Gen. Laws §9-1-29.

B. Statute of Limitations

Rhode Island's statute of limitations accrues when evidence of an injury to property, which resulted from a negligent act upon which the action is based, is sufficiently noteworthy to alert the injured party to the possibility of a defect. *Boghossian v. Ferland Corp.*, 600 A.2d 288, 290 (R.I. 1991).

1. Statute of Limitations Regarding Alleged Construction Defects

In Rhode Island, all civil actions shall be commenced within ten years from the date a cause of action accrues. R.I. Gen. Laws §9-1-13. However, personal injury actions must be commenced within three years from the date of injury. R.I. Gen. Laws §9-1-14.

2. Statute of Limitations of Claim Brought Pursuant to the Deceptive Trade Practice Act

Rhode Island's Deceptive Trade Practices Act does not have its own **statute of limitations**. *Kennedy v. Acura & Am. Honda Motor Co.*, 2002 R.I. Super. LEXIS 121 at 15. However, the Rhode Island Supreme Court has held that the appropriate period of limitations for claims filed under the Act is dependent on the nature of the underlying claim. *Id.*

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Claims for personal injury related to implied warranty of habitability must be brought within three years of accrual. R.I. Gen. Laws § 9-1-14. However, in general they must be within ten years. R.I. Gen. Laws § 9-1-13.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B above.

5. Statute of Limitations of a Claim Based on Fraud

If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from [a claimant] the existence of the cause of action, the cause of action shall be deemed to accrue at the time when the person entitled to sue thereon first discovered its existence. R.I. Gen. Laws §9-1-20.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Rhode Island's discovery rule pursuant to improvements upon real property allows a statute of limitations to start running when a plaintiff discovered the injury or, through the exercise of reasonable diligence, should have discovered it. *Lee v. Morin*, 469 A.2d 358, 360 (R.I. 1983).

D. Statute of Repose

Unless brought within ten years from an improvement's completion, no action in tort to recover damages shall be brought against any contractor or subcontractor for deficiencies in the construction of any such improvements or injury to property, real or personal, arising out of any such deficiency, for injury to the person, for wrongful death arising out of any such deficiency, or for contribution or indemnity. R.I. Gen. Laws §9-1-29.

However, the ten-year statute of repose limitation is inapplicable to contract-based breach-of-implied- warranty claims between a builder and a subsequent homeowner where the subject of the lawsuit is a latent defect. *Nichols v. R.R. Beaufort & Assocs.*, 727 A.2d 174, 181 (R.I. 1999). When a latent defect is discovered, or could have been discovered, within ten years from the date the construction/improvement had been completed, a plaintiff has three years to bring suit as a result of such defect. *Id*. at 181-182.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in Rhode Island have held that an insurer cannot be held liable under a commercial general liability policy for an insured's negligently performed work. *WM Hotel Group, LLC v. Pride Constr., Inc.*, 2008 R.I. Super. LEXIS 9 at 14-15. However, property damage suffered by a third party (excluding the property furnished in the construction itself) due to the negligently performed work would trigger coverage under a CGL policy. *Id*.

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South Carolina

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

South Carolina's statute of limitations for actions sounding in contract and tort is three years. *S.C. Code Ann.* § 15-3-530. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. South Carolina's statute of repose precludes a person from bringing an action unless commenced within eight years after the substantial completion of the construction giving rise to the cause of action. However, the statute of repose defense is not available to a defendant who engaged in fraud.

B. Statute of Limitations

All actions involving construction defects accrue when a plaintiff knows or, by the exercise of reasonable diligence, should have known that he/she has a cause of action. *S.C. Code Ann.* §15-3-535. *See also McAlhany v. Carter*, 415 S.C. 54, 63 (S.C. Ct. App. 2015).

1. Statute of Limitations Regarding Alleged Construction Defects

South Carolina's statute of limitations is three years for claims brought pursuant to an action upon a contract, obligation, or liability, whether express or implied, fraud, an action for damage to real property and an action for personal injury or wrongful death. *S.C. Code Ann.* §15-3-530.

Contract provisions, whether written or oral, which shorten the time period for stated under this statute of limitations are unenforceable. *S.C. Code Ann.* §15-3-140.

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

South Carolina's Unfair Trade Practices Act carries a statute of limitations three years pursuant to *S.C. Code Ann*. §15-3-530. *Dorman v. Campbell*, 500 S.E.2d 786, 788-789 (S.C. Ct. App. 1998).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

The three-year statute of limitations applies to any action for relief on the ground of fraud. However, the cause of action in such cases is not considered to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. *S.C. Code Ann*. §15-3-530.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Under South Carolina's discovery rule, the statute of limitations runs from the date the injured party either knows or should have known, by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Watters v. Terminix Serv.*, 658 S.E.2d 110, 112 (S.C. Ct. App. 2008).

D. Statute of Repose

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. *S.C. Code Ann.* §15-3-640.

The term "substantial completion" is that degree of completion of a project, improvement, or a specified area or portion thereof which, upon attainment, the owner could use the same for the purpose for which it was intended. *S.C. Code Ann.* § 15-3-630.

An action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

- An action to recover damages for breach of a contract to construct or repair an improvement to real property
- An action to recover damages for the negligent construction or repair of an improvement to real property
- An action to recover damages for personal injury, death, or damage to property
- An action to recover damages for economic or monetary loss
- An action in contract or in tort or otherwise
- An action for contribution or indemnification for damages sustained on account of an action described in this section

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- An action against a surety or guarantor of a defendant described in this section
- An action brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest in the real property or improvement; and
- An action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plan, specifications surveying, planning, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property. *S.C. Code Ann.* §15-3-640.

However, the statute of repose may not be asserted as a defense by any person guilty of fraud, gross negligence, or recklessness in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action. *S.C. Code Ann.* §15-3-670(A).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in South Carolina have held that liabilities incurred because of faulty workmanship are part of an insured's contractual liability and are not an insurable event under a commercial general liability policy. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33, 35 (S.C. 2005). Further, while CGL polices do not provide coverage for damages to the work product itself, such policies may provide coverage when the faulty workmanship causes personal injury or property damage to a third party. *See L-J*, 621 S.E.2d at n. 4.

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South Dakota

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

South Dakota's statute of limitations for actions sounding in contract is six years. *S.D. Codified Laws* § 15-2-13. Actions for personal injury shall be brought within three years. *S.D. Codified Laws* § 15-2-14. This state has adopted a "discovery rule" which states that a claim accrues when the injured party has actual or constructive knowledge of the injury. South Dakota's statute of repose precludes a person from bringing an action unless commenced within ten years after the completion of the construction giving rise to the cause of action. *S.D. Codified Laws*, § 15-2A-3. However, there is no statute of repose applicable in fraud cases or where a contract extends the time for a lawsuit to be filed.

B. Statute of Limitations

In South Dakota, civil actions may only be commenced after a cause of action has accrued except where, in special cases, a different limitation is prescribed by statute. *S.D. Codified Laws* **§ 15-2-1.** A claim accrues when a plaintiff has notice of his/her cause of action, an awareness either that he/she has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to the plaintiff. *Wissink v. Van De Stroet*, 598 N.W.2d 213, 216 (S.D. 1999).

1. Statute of Limitations Regarding Alleged Construction Defects

A statute of limitations of six years applies to actions upon a contract, obligation, or liability, whether express or implied, and actions for relief on the basis of fraud. *S.D. Codified Laws* § 15-2-13. Personal injury claims must be brought within three years. *S.D. Codified Laws* § 15-2-14.

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

No private remedy or right of action may be brought under South Dakota's Unfair Trade Practices Act due to unfair/deceptive insurance practices or unfair/deceptive practices in dealing with the insured. *S.D. Codified Laws* § 58-33-69.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

In an action for relief on the ground of fraud, a cause of action shall not be deemed to have accrued until the aggrieved party discovers, or has actual or constructive notice of, the facts constituting the fraud. *S.D. Codified Laws* § 15-2-3. Actions for fraud shall be brought within six years. *S.D. Codified Laws* § 15-2-13.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Absent claims of fraud, South Dakota does not appear to apply a discovery rule for actions involving construction defects. *Holy Cross Parish v. Huether*, 308 N.W.2d 575, 577-78 (S.D. 1981).

D. Statute of Repose

No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the construction of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the construction of such an improvement more than ten years after substantial completion of such construction. *S.D. Codified Laws* §§ **15-2A-1, 15-2A-3. Unless the injury occurs in the tenth year, then the injured party has one year to bring the claim. *S.D. Codified Laws* § 15-2A-5.**

The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended. *S.D. Codified Laws* §**15-2A-3.**

Notwithstanding, this limitation shall not be available as a defense for (a) persons involved in the construction of the improvements was guilty of fraud, fraudulent concealment, fraudulent misrepresentation, willful or wanton misconduct or (b) persons involved in the construction of improvements to real estate whom expressly warranted or guaranteed the improvement for a longer time period. *S.D. Codified Laws* §§ **15-2A-1, 15-2A-7, 15-2A-8.**

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage Under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Courts in South Dakota have held that when a contractor's subcontractor performs work in a defective manner which damages the work of the contractor, the contractor's commercial general liability policy will provide coverage for the contractor's resultant property damage. *Corner Constr. Co. v. United States Fid. & Guar. Co.,* 638 N.W.2d 887, 894 (S.D. 2002). However, the "occurrence" which caused damage to the contractor's work must have been unforeseen by the contractor. *Id*.

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Tennessee

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Tennessee's statute of limitations for claims sounding in contract is six years. Tenn. Code Ann. §28-3-109. The statute of limitations for claims sounding in tort is one year for personal injury and three years for property damage. Tenn. Code Ann. §§ 28-3-104, 28-3-105. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. Tennessee's statute of repose generally precludes a person from bringing an action unless commenced within four years after the substantial completion of the construction giving rise to the cause of action.

B. Statute of Limitations

NOT APPLICABLE

1. Statute of Limitations Regarding Alleged Construction Defects

Personal injury actions shall be commenced within one year after the cause of action accrued. Tenn. Code Ann. §28-3-104(a)(1). Actions for injuries to personal or real property shall be commenced within three years after the cause of action accrued. Tenn. Code Ann. §28-3-105(1). Contract actions shall be commenced within six years after the cause of action accrued. Tenn. Code Ann. §28-3-109(a)(3).

To determine whether suit is for tort or contract and therefore whether a respective one- or six-year statute of limitations applies, the court must look to plaintiff's assertion to see whether personal injuries are claimed, regardless of how the action is styled and even though some contract damages are claimed. *Bland v. Smith*, 277 S.W.2d 377 (Tenn. 1955).

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices and Unfair Claims Act

Under Tennessee's Unfair Trade Practices and Unfair Claims Act, any private action commenced against a defendant shall be brought within one year from a plaintiff's discovery of the unlawful act or practice, but in no event shall any action be brought more than five years after the date that the consumer transaction giving rise to the claim for relief occurred. Tenn. Code Ann. §47-18-110. *See also Citicapital Commer. Corp. v. Coll*, 2010 Tenn. App. LEXIS 26 at 17.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

Tennessee's statute of limitations for claims based on fraud is three years. Tenn. Code Ann. § 28-3- 105(1),(2).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The discovery rule applies only in cases where the plaintiff does not discover and reasonably could not be expected to discover that he has a right of action; it does not permit a plaintiff to wait until he knows all of the injurious effects or consequences of a tortious act. The statute is tolled only during the period when the plaintiff has no knowledge at all that a wrong has occurred, and, as a reasonable person, is not put on inquiry. *Woods v. Sherwin-Williams Co.*, 666 S.W.2d 77, (Tenn. Ct. App. 1983).

In order for a statute of limitations to be tolled based of allegations of fraud, there must be an averment that (1) the cause of action was known to the defendant and fraudulently concealed by him, (2) the running of the statute would not be prevented by mere ignorance of the plaintiff, (3) the failure to discover the existence of the cause of action within the statutory limitation would not prevent its running, and (4) had plaintiff either known or neglectfully failed to discover the cause of action the statute would not be tolled. *Ray v. Scheibert*, 450 S.W.2d 578, 580-581 (Tenn. 1969).

D. Statute of Repose

All actions to recover damages for any deficiency in the construction of an improvement to real property, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the construction of such an improvement within four years after substantial completion of such an improvement. Tenn. Code Ann. §**28-3-202.**

However, should an injury to property or person or such injury causing wrongful death occur

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during the fourth year after an improvement's substantial completion, an action in court to recover damages for such injury or wrongful death shall be brought within one year after the date on which such injury occurred, without respect to the date of death of such injured person. Tenn. Code Ann. §**28-3-203** [shall] be brought within five years after the substantial completion of said improvement. *Id*.

The term "substantial completion" means the degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with a contract) for which the owner can use the same for the purpose for which it was intended. Tenn. Code Ann. §28-3-201. The date of substantial completion may be established by written agreement between the contractor and the owner. *Id*.

It should be noted that the statute of repose will bar an action four years after **substantial completion,** regardless of when the plaintiff may have reasonably discovered the injury. *Chrisman v. Hill Home Dev.*, 978 S.W.2d 535, 539 (Tenn. 1998). The discovery rule, used to ascertain when a cause of action has accrued under a statute of limitations, does not toll the statute of repose. *Watts v. Putnam County*, 525 S.W.2d 488, 491 (Tenn. 1975).

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Supreme Court of Tennessee has held that an "occurrence" is an accident that is unforeseen by the insured. *Travelers Indem. Co. of Am. v. Moore & Assocs.*, 216 S.W.3d 302, 310-311 (Tenn. 2007). As such, it also held that (1) defective workmanship may constitute an "occurrence" under a commercial general liability policy, (2) damages caused by faulty workmanship (other than the defective workmanship) may constitute "property damage" and (3) an insured contractor's damages resulting from the faulty workmanship of a subcontractor are not excluded from CGL coverage. *Id*. at 311.

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Texas

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Texas's statute of limitations for claims sounding in contract is four (4) years. TEX. CIV. PRAC. & REM. CODE § 16.004. Claims sounding in tort for personal injury or property damage must be brought within two (2) years from the date the action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003(a). Generally, a wrongful act accrues "when a wrongful act causes some legal injury." *First Gen. Realty. Corp. v. Maryland Cas. Co.*, 981 S.W.2d 495, 501 (Tex. App.—Austin 1998, pet. denied). There are two exceptions to this general rule. In the case of continuing torts, the Texas Supreme Court has held that the action does not accrue until the tortious conduct ceases. *Coinmach Corp. v. Aspenwood Apt. Corp.*, 417 S.W.3d 909, 924 (Tex. 2013). The second exception is for cases in which invoke the Discovery Rule because an injury is inherently undiscoverable despite due diligence. *See* Discovery Rule discussion below.

Texas's statute of repose generally precludes a person from bringing an action against an architect, engineer, interior designer, or landscape architect, unless commenced within ten (10) years after the substantial completion of the construction giving rise to the cause of action. TEX. CIV. PRAC. & REM. CODE § 16.008(a). However, this statute of repose is not applicable in certain fraud cases and in instances where a contract extends the period of time available to file a civil action. TEX. CIV. PRAC. & REM. CODE § 16.009.

B. Statute of Limitations

In Texas, an action accrues when a wrongful act causes an injury, regardless of whether the plaintiff learns of the injury or whether all resulting damages have occurred. *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998) (see also, *KPMG Peat Marwick v. Harrison County Fin. Corp.*, 988 S.W.2d 746, 749–50 (Tex. 1999) (holding that a cause of action accrues when a plaintiff knows or should know, through the exercise of reasonable diligence, of a wrongful injury). As such, a plaintiff need not know the full extent of such injury before a statute of limitations begins to run. *Id*.

1. Statute of Limitations Regarding Alleged Construction Defects

A person must bring suit for personal injury, injury to real or personal property within two (2) years from the date the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.003(a). For personal injury actions involving death, a cause of action accrues on the death of the injured person. TEX. CIV. PRAC. & REM. CODE § 16.003(b). A person must bring suit for the specific performance of a contract or for fraud within four (4) years from the date the cause of action accrues. TEX. CIV. PRAC. & REM. CODE § 16.004.

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Most contract actions accrue at the time of breach. *See Via Net v. ZTIG Ins.*, 211 S.W.3d 310, 314 (Tex. 2006). Notwithstanding, every other action for which there is no express limitations period, except an action for the recovery of real property, must be brought within four (4) years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE §16.051.

It should be noted that any stipulation, contract, or agreement which seeks to shorten a statute of limitations to less than two (2) years is void. TEX. CIV. PRAC. & REM. CODE § 16.070. It should also be noted that the dates of accrual for negligence claims and breach of contract claims related to the same alleged injury will likely not be the same.

2. Statute of Limitations of Claim Brought Pursuant to the Deceptive Trade Practices Consumer Protection Act

A plaintiff cannot sue a professional under Texas's Deceptive Trade Practices Consumer Protection Act ("DTPA") based on the professional's advice, judgment, opinion, or similar professional skill. TEX. BUS. & COM. CODE § 17.49(c). The definition of a professional statutorily includes licensed architects, licensed professional engineers, registered professional land surveyors and registered landscape architects. TEX. BUS. & COM. CODE § 150.001(1).

Actions against non-professionals brought under Texas's DTPA must be commenced within (a) two (2) years after the date on which the false, misleading, or deceptive act or practice occurred or (b) two (2) years after the consumer discovered or, in the exercise of reasonable diligence, should have discovered the occurrence of the false, misleading, or deceptive act or practice. TEX. BUS. & COM. CODE § 17.565.

Still, this period of limitation may be extended for a period of 180 days if the plaintiff proves that failure to commence a timely civil action was caused by the defendant's knowingly engaging in conduct specifically calculated to induce the plaintiff to refrain from or postpone the commencement of an action. *Id.*

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The **statute of limitations** for breach of an implied warranty of construction in a good and workmanlike manner arising out of a written contract is four (4) years. *Certain-Teed Products Corp. v. Bell*, 422 S.W.2d 719, 721 (Tex. 1968). A cause of action for breach of an implied **warranty of habitability** accrues when the buyer discovers or should have discovered the injury. *Richman v. Watel*, 565 S.W.2d 101, 102 (Tex. Civ. App. 1978).

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

A breach of express warranty shall be brought within four (4) years. TEX. CIV. PRAC. & REM. CODE § 16.004.

5. Statute of Limitations of a Claim Based on Fraud

Unlike Texas's discovery rule (see below), which determines when the limitations period begins to run, the doctrine of fraudulent concealment suspends the running of the statute of limitations because the defendant concealed facts necessary for the plaintiff to know that a claim existed. *Booker v. Real Homes, Inc.*, 103 S.W.3d 487, 493 (Tex. App. 2003). However, the estoppel effect of fraudulent concealment is temporary. *Id*. Instead, the statute of limitations begins to run when a claimant, using reasonable diligence, discovered or should have discovered the injury. *KPMG Peat Marwick v. Harrison County Fin. Corp.*, 988 S.W.2d 746, 750 (Tex. 1999). Accordingly, knowledge of facts that would make a reasonable person inquire and discover a concealed cause of action is synonymous to knowledge of the cause of action for limitations purposes. *Booker*, 103 S.W.3d at 493. Claims for fraud shall be brought within four (4) years. TEX. CIV. PRAC. & REM. CODE § 16.004.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In Texas, the discovery rule is applied when the nature of the injury is essentially undiscoverable and the evidence of injury/damages are objectively verifiable. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996). As such, the discovery rule is applied only when it is difficult for the injured party to learn of the negligent act or omission. *Id*. Under common-law causes of action, accrual occurs when the plaintiff knew or should have known through the exercise of reasonable diligence of the wrongful injury. *KPMG*, 988 S.W.2d at 749. Therefore, a plaintiff need not know the full extent of the injury before limitations begin to run. *Id*.; *Murphy v. Campbell*, 964 S.W.2d 265, 273 (Tex. 1997).

An injury is inherently undiscoverable if, by its nature, it is unlikely to be discovered within the prescribed limitations period despite the plaintiff's exercise of due diligence. *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734–35 (Tex. 2001). The question is not whether the particular injury was actually discovered by the claimant within the limitations period but rather if "it was the type of injury that generally is discoverable by the exercise of reasonable diligence…" *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998). Further, "the discovery rule does not linger until a claimant learns of actual causes and possible cures." *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93 (Tex. 2004). Instead, the rule tolls

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limitations only until a claimant learns of a wrongful injury, at which point the limitations clock begins to run (even if the claimant does not yet know the specific cause of the injury, the party responsible for it, or the chances of avoiding it). *Id*. at 93–94. A plaintiff's knowledge of facts, conditions, or circumstances that would cause a reasonable person to make inquiry leading to the discovery of the concealed cause of action is equivalent to knowledge of the cause of action for limitation purposes. *Kizer v. Meyer, Lytton, Alen & Whitaker, Inc.*, 228 S.W.3d 384, 389 (Tex. App. 2007).

D. Statute of Repose

A claimant must bring suit for damages for a claim involving (a) injury, damage, or loss to real or personal property, (b) personal injury, (c) wrongful death, (d) contribution or indemnity against a person who constructs or repairs an improvement to real property not later than ten (10) years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement. TEX. CIV. PRAC. & REM. CODE § 16.009.

If the claimant presents a written claim for damages, contribution, or indemnity to the person performing or furnishing the construction or repair work during the ten-year limitations period, the period is extended for two (2) years from the date the claim is presented. *Id*.

Moreover, if the damage, injury, or death occurs during the last year of the applicable limitations period, the claimant may bring suit not later than two (2) years after the day the cause of action accrues. *Id*.

However, the statute of repose does not bar an action (a) on a written warranty, guaranty, or other contract that expressly provides for a longer effective period, or (b) based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair. *Id*.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The Supreme Court of Texas has held that coverage under a commercial general liability policy may exist for (1) damages suffered by the insured due to his own defective workmanship and (2) property damage suffered by a third party as a result of the insured's defective workmanship. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007). Coverage appears to be triggered when such workmanship resulted in an unanticipated happening or consequence of the insured's negligent behavior. *Id*. As such, if an "occurrence" has caused property damage, it is irrelevant if the ultimate remedy for that claim lies in contract or in tort. *Id*.

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III. Specific Statutory Issues Related to Contractual Indemnity Provisions

A. General Indemnity

An indemnity provision in a construction contract that purports to require an indemnitor to indemnify, hold harmless, or defend a party against a claim caused by the negligent or at-fault party is void and unenforceable. TEXAS INS. CODE § 151.102.

B. Contractor indemnifying an architect or engineer provision

A covenant or promise in connection with a construction contract is void and unenforceable if the covenant or promise provides for a contractor, who performed the work that is the subject of the construction contract, to indemnify and/or hold harmless an registered architect or licensed engineer from liability and damage that is caused by a defect in the plans, designs, or specifications prepared, approved, or used by the architect; and arises from personal injury/death, property injury, or, any expenses arising from the former. TEXAS CIV. PRAC. & REM. CODE § 130.001 *et seq*.

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Utah

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Utah's statute of limitations on actions sounding in contract is six years for written agreements and four years for oral contracts. Utah Code Ann. §78B-2-309 (written contracts) and Utah Code Ann. § 78B-307. Actions not sounding in contract for construction defects must be brought within two years of discovery. Utah Code Ann. §78B-2-225. This state has adopted a "discovery rule" which states that in certain circumstances, the discovery rule may operate the period of limitations until the discovery of facts forming the basis for the cause of action. *Berenda v. Langford*, 914 P.2d 45, 50-51 (1996). The discovery rule applies when mandated by statute, when a defendant has concealed a plaintiff's cause of action, or when exceptional circumstances exist. *Id*. Utah's statute of repose generally precludes a person from bringing an action unless commenced within nine years after the completion of the construction giving rise to the cause of action. Utah Code Ann. §78B-2-225. If the event or cause of action is discovered in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence the action. *Id*. However, there is no statute of repose applicable in certain fraud cases. Both the statute of limitations and the statute of repose may be changed pursuant to the terms of a valid contract. *Id*.

B. Statute of Limitations

In Utah, a cause of action **accrues** upon the happening of the last event required to complete the cause of action. *Berenda v. Langford*, 914 P.2d 45, 50 (Utah 1996). Specifically, a cause of action begins to accrue at the first instance when the plaintiff could have maintained the action to a successful conclusion. *Valley Colour v. Beuchert Builders*, 944 P.2d 361 (Utah 1997).

1. Statute of Limitations Regarding Alleged Construction Defects

An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Utah Code Ann. §**78B-2-225.** However, where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period. *Id*. The six-year statute of limitations also applies to actions involving any other type of contract, obligation, or liability founded upon an instrument in writing. Utah Code Ann. §**78B-2-309.**

The term "completion of improvement" is defined as the date of substantial completion of an improvement to real property as established by the earliest of (a) the issuance of a Certificate of Substantial Completion, (b) the issuance of a Certificate of Occupancy by a governing agency or (c) the date of first use or possession of the improvement. Utah Code Ann. §**78B-2-225.**

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All other actions by or against any person contributing to the construction of an improvement shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. *Id*. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment. *Id*.

Notwithstanding, this statute does not extend the period of limitation otherwise prescribed by a valid and enforceable contract. *Id*.

2. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations for breach of implied warranty is four years. Utah Code Ann. §78B-2-307(1)(a).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for breach of express warranty is six years. Utah Code Ann. §78B-2-309.

4. Statute of Limitations of a Claim Based on Fraud

Claims for fraud must be brought within three years. Utah Code Ann. §78B-2-305(3). The cause of action does not accrue until the discovery by the aggrieved party of the facts constituting the fraud. *Id*.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Utah's discovery rule tolls a statute of limitations until the discovery of the facts forming the basis for a cause of action. *Sevy v. Sec. Title Co.*, 902 P.2d 629, 634 (Utah 1995). In other circumstances, where the statute of limitations would normally apply, Utah courts have held that proof of concealment or misleading by the defendant precludes the defendant from relying on the statute of limitations. *Myers v. McDonald*, 635 P.2d 84, 86 (Utah 1981). Utah courts, in some circumstances, have applied the discovery rule toward exceptional circumstances or causes of action where the application of the general rule would be irrational or unjust. *Id*. at 87.

D. Statute of Repose

An action may not be commenced against a person contributing to the construction of an improvement more than nine years after completion of the improvement or abandonment of construction. Utah Code Ann. §**78B-2-225.** In the event the cause of action is discovered or

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discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two (2) additional years from that date to commence an action. *Id*.

The statute of repose is not applicable in an action against a person contributing to the construction of an improvement (1) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty or (2) for a willful or intentional act, error, omission, or breach of duty. *Id.*

Notwithstanding, this statute does not extend the period of repose otherwise prescribed by a valid and enforceable contract. *Id.*

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

The United States District Court for the District of Utah has held that damages suffered by an insured contractor pursuant to its negligent construction do not constitute an "occurrence" under a commercial general liability policy when the damages incurred are a natural and expected result of the defective work product. *H.E. Davis & Sons, Inc. v. North Pac. Ins. Co.,* 248 F. Supp. 2d 1079, 1084 (D. Utah 2002). As such, it appears that CGL coverage would be triggered if the damages incurred by the insured contractor were an unnatural and/or unexpected result from its defective work product. *Id*. *See also Green v. State Farm Fire & Cas. Co.*, 127 P.3d 1279, 1284 (Utah App. 2005).

Further, Utah's district court has held that the determination as to whether an "accident" has occurred pursuant to a CGL policy is determined from the viewpoint of the insured, not the actor causing injury. *Great Am. Ins. Co. v. Woodside Homes Corp.,* 448 F. Supp. 2d 1275, 1281 (D. Utah 2006). A party is a victim of an accident when, from the victim's point of view, the occurrence causing the injury is not an ordinary and likely a result of the victim's own acts. *Id.* As such, an insured's own viewpoint controls in determining whether there has been an "occurrence" which triggers insurance coverage. *Id*. While the federal court recognized that an insured contractor's own negligent work is not considered an "occurrence" under a CGL policy, the negligent work of a subcontractor may be considered an occurrence if the insured's injury incurred pursuant to the subcontractor's faulty work product was not an ordinary and likely result. *Id*. at 1281, 1283.

While the above-referenced federal court holdings are merely persuasive in Utah state actions, there does not appear to be any state case law which criticizes the holdings in *Davis* or *Woodside*.

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Vermont

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Vermont's statute of limitations states claims sounding in contract or tort, but not for personal injury or personal property damage, must be brought within six years. 12 V.S.A. §511. All claims for personal injury and property damage must be brought in three years. 12 V.S.A. §512. This state has adopted a "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. There is no statute of repose in Vermont.

B. Statute of Limitations

In Vermont, a cause of action accrues upon (a) the discovery of facts satisfying the basis of a cause of action; or (b) the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts. *Galfetti v. Berg, Carmolli & Kent Real Estate Corp*., 756 A.2d 1229, 1231 (Vt. 2000).

1. Statute of Limitations Regarding Alleged Construction Defects

Vermont's statute of limitations in personal injury and property damage actions is three years from the date the injury accrues. 12 V.S.A. §512. All other civil actions shall be commenced within six years after the cause of action accrues. 12 V.S.A. §511. The nature of the harm done, rather than plaintiff's characterization of the action, is the determining factor in construing which statute of limitations will apply. *Stevers v. E.T. & H.K. Ide Co.*, 527 A.2d 658, 659 (Vt. 1987).

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Fraud Act

Claims brought pursuant to Vermont's Consumer Fraud Act must be filed within six years from the date the discovery of the fraudulent activities. 12 V.S.A. §511. *See also Kaplan v. Morgan Stanley & Co.*, 987 A.2d 258, 263 (Vt. 2009).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

12 V.S.A. §512

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

12 V.S.A. §512

5. Statute of Limitations of a Claim Based on Fraud

When a plaintiff is prevented from bringing a claim by the fraudulent concealment of the cause of such action by a defendant, the period prior to the discovery of such cause of action shall be excluded in determining the time limited for the commencement thereof. 12 V.S.A. §555. Accordingly, fraudulent concealment can overcome the statutory bar of the limitations defense. *South Burlington Sch. Dist. v. Goodrich*, 382 A.2d 220, 223 (Vt. 1977).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Vermont's discovery rule for construction defect cases provides that a cause of action accrues when a plaintiff knows, or reasonably ought to know, of the damage allegedly caused by defendant, regardless of when the negligent act occurred. *Congdon v. Taggart Bros.*, 571 A.2d 656, 657 (Vt. 1989).

D. Statute of Repose

Vermont does not have a statute of repose for construction defect actions. However, as stated in §B(1) above, all actions must be brought within six years of a claim accruing.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Notwithstanding any exclusions to the contrary, courts in Vermont have held that coverage under a commercial general liability policy is afforded to a contractor who is sued by a third-party claimant for property damage incurred pursuant to the contractor's defective workmanship (but not mere economic damages incurred pursuant to said "occurrence"). *Stratton Corp. v. Engelberth Const. Inc.*, 199 Vt. 388 (2015).

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Virginia

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Virginia's statute of limitations for torts ranges from two years for personal to five years for property damage. Va. Code Ann. §8.01-243. All claims sounding in contract must be brought within three to five years, depending on whether the contract is in writing and signed by the party against whom enforcement is sought. Va. Code Ann. §8.01-246. This state has adopted a limited "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action. Virginia's statute of repose precludes a person from bringing an action unless commenced within five years after the completion of the construction giving rise to the cause of action.

B. Statute of Limitations

The right of action accrues when the injury is sustained in the case of injury to the person or damage to the property. Va. Code Ann. §8.01-230. A breach of contract claim accrues when the breach of contract occurs, not when the resulting damage is discovered. *Id.*

1. Statute of Limitations Regarding Alleged Construction Defects

In Virginia, an action for personal injuries must be brought within two years after the cause of action accrues. Va. Code Ann. §8.01-243(A). Actions for injuries to property must be brought within five years. *Id*. at (B). Similarly, a five-year statute of limitations exists for actions brought under a written contract, if it is signed by the party against whom enforcement is sought. Va. Code Ann. §8.01-246. Effective July 1, 2019, written contracts unsigned by the party against whom enforcement is sought is subject to a three year statute of limitation only. Actions upon any unwritten contract, whether express or implied, must be brought within three years. Va. Code Ann. §8.01-246.

In Virginia, a cause of action accrues upon the occurrence of the last event needed to provide the plaintiff with a right to file suit. For example, a property damage claim based on defective plans or specifications upon delivery and approval of the plans. A property damage claim due to negligent supervision accrues once the last opportunity has passed for the design professional to observe and correct any deficiencies. The accrual of a claim for breach of contract against a general contractor is fact-specific, but generally the statute of limitations does not begin to run against a right of action until the time for final performance fixed by the contract has passed. *Suffolk City Sch. Bd. v. Conrad Bros.*, 495 S.E.2d 470, 471-72 (Va. 1998).

Where a contract covenants that the laws of another state govern the writing, the statute of limitations of the other state will be applied by Virginia courts if it is more restrictive than the

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statute applicable in Virginia. *Hansen v. Stanley Martin Cos.*, 585 S.E.2d 567, 572 (Va. 2003).

The statute of limitations under the Virginia Consumer Protection Act is two years from the date of accrual or breach of contract. Va. Code Ann. §59.1-204.1(A). Claims for violation of the Act based on fraud theories accrue on (a) the date of discovery or (b) the date when, pursuant to the exercise of due diligence, it reasonably could be discovered. Va. Code Ann. §8.01-249.

2. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Virginia law imposes implied warranties for workmanship and materials in construction contracts in the absence of clear disclaimers. *Mann v. Clowser*, 59 S.E.2d 78 (1950). Owners can have a cause of action for breach of implied warranties in Virginia. The statute of limitations on these actions is governed by the statute of limitations which applies to contracts, three or five years, depending on whether it is oral or written, and whether the written contract is signed by the parties. Va. Code Ann. §8.01-246.

Even in the absence of a specific contractual provision, Virginia has provided for an implied warranty on new homes. Va. Code Ann. §55-70.1. The implied warranty of workmanship and habitability runs for one year after the transfer of title or the buyer's taking possession, whichever occurs first and a buyer has two years from the date of the breach in which to bring an action for breach of warranty. Va. Code Ann. §55- 70.1(E). If a buyer notifies the builder of defects covered by this implied warranty within one year and the builder fails to remedy the defect, the buyer has two years from the date of notifying the builder of the defect to file an action for breach of the warranty. *Davis v. Tazewell Place Assoc.,* 492 S.E.2d 162 (1997).

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

The statute of limitations for express warranties is three or five years, depending on whether the warranty was made orally or in writing, and whether the writing was signed. Va. Code Ann. §8.01-246.

4. Statute of Limitations of a Claim Based on Fraud

A two-year statute of limitations applies to actions based on fraud. Code §8.01-243(A). Causes of action involving fraud accrue on (a) the date of discovery or (b) the date when, pursuant to the exercise of due diligence, it reasonably should have been be discovered. Va. Code Ann. §8.01-249.

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C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Virginia does not apply a "discovery rule" for personal injury actions, *Smith v. Berman*, 78 Va. Cir. 310 (Loudoun, 2009) or for contracts actions. Va. Code Ann. §8.01-230. However, for actions involving fraud, please see §B(5) above.

D. Statute of Repose

No action to recover for any injury to property, real or personal, 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 as a result of such injury, shall be brought against any person performing or furnishing the construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. Va. Code Ann. §8.01-250.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Virginia Courts have held that a general liability policy covering accidents causing bodily injury or property damage does not cover poor workmanship. *American Fire & Cas. Ins. Co. v. Doverspike*, 36 Va. Cir. 263 (Fairfax, 1995).

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Washington

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Washington's statute of limitations for claims sounding in written contract is six years. Wash. Rev. Code § 4.16.040. Actions sounding in tort/personal injury or contracts not in writing shall be brought within three years. Wash. Rev. Code § 4.16.080.

This state has adopted a limited "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of the cause of action.

Washington's statute of repose precludes a person from bringing an action unless the action accrues within six years after the substantial completion of the construction, or during the period within six years after the termination of the services enumerated in the Revised Code of Washington ("RCW"), § 4.16.300, whichever is later. The phrase "substantial completion of construction" means the state of completion reached when an improvement upon real property may be used or occupied for its intended use. RCW § 4.16.310.

Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred so long as this limitation is not asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW § 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW § 64.50.020 within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW § 64.50.020 plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section. RCW § 4.16.310.

B. Statute of Limitations

In Washington, a statute of limitations runs from the time a claim accrues; a claim accrues when a party has the right to apply to a court for relief, which may be at the time the claim is discovered. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 209 P.3d 863, 870 (Wash. 2009). Accrual of a contract action occurs on breach. *1000 Virginia Ltd. P'ship v. Vertecs*, 146 P.3d 423, 428 (Wash. 2006).

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1. Statute of Limitations Regarding Alleged Construction Defects

While an action upon a contract in writing must be commenced within six years, an action upon an oral contract or liability, whether express or implied, must be brought within three years. Wash. Rev. Code §§ 4.16.040, 4.16.080.

An action for injury to person or property must be brought within three years from the date of accrual. Wash. Rev. Code § 4.16.080.

In July 2003, RCW § 4.16.326(1)(g) went into effect, requiring that construction defect claims be *filed* within six years of substantial completion of construction or termination of services, whichever is later, *regardless of when the claim was discovered*. RCW 4.16.326(1)(g). The provision is not retroactive. *1000 Va.*, 158 Wn.2d at 587. As of July 2003, a claim must both accrue and be filed within six years of substantial completion or termination of services, whichever is later. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.,* 209 P.3d 863, 870, 166 Wn.2d 475, 485 (2009).

Actions involving fraud must also be brought within three years. RCW § 4.16.080(4). However, such cause of action will not accrue until the aggrieved party has discovered the facts constituting the fraud. *Id*.

2. Statute of Limitations of Claim Brought Pursuant to the Consumer Protection Act

Washington's Consumer Protection Act provides a four-year statute of limitations**.** RCW § 19.86.120. However, whenever any action is brought by the attorney general, the running of the statute of limitations in private actions is tolled if such private actions are based in whole or part on any matter being prosecuted by the attorney general.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

The statute of limitations in an implied warranty of habitability lawsuit is three years from the date of discovery. Wash. Rev. Code § 4.16.080. That statute should operate, however, as of the time the homeowners actually knew or reasonably should have known of the defects that comprised the elements of their causes of action. *Id. See also Stuart v. Coldwell Banker Commercial Group*, 745 P.2d 1284, 1288 (Wash. 1987).

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4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See § B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

Three years. See § B(1) above.

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

In construction defect cases *based on a contract*, the discovery rule will only apply to causes of action brought pursuant to a latent defect. *1000 Virginia Ltd. P'ship.,* 146 P.3d at 430. See, also, § B(1) above. The action accrues when the plaintiff discovers the "salient facts" underlying the elements of the cause of action (accrual does not occur when plaintiff learns she has a cause of action). *Id*.

D. Statute of Repose

In construction defect claims, a statute of repose terminates an action for construction defects which do not accrue six years from (a) the time of substantial completion of construction or (b) the termination of services, whichever is later. RCW § 4.16.310. The phrase "substantial completion of construction" is defined as the state of completion reached when an improvement upon real property may be used or occupied for its intended use. *Id*.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

An insurer's duty to defend its insured against claims of defective construction arises when an action is filed against the insured contractor alleging facts that, if proved, would render the insurer liable to the insured under the policy. *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 760 (Wash. 2002). If the complaint against the insured is ambiguous, it is liberally construed in favor of triggering the insurer's duty to defend. *Id*. An insurer is not relieved of its duty to defend unless the allegations against the insured clearly are not covered under the policy. *Id*.

If coverage is not apparent from the face of the complaint, but may exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether there is a duty to defend. *Id*. at 761. Facts outside the complaint may be considered if (1) the

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allegations in the complaint conflict with facts known to or readily ascertainable by the insurer or (2) the allegations in the complaint are ambiguous or insufficient. *Id.* The insurer may not, however, rely on facts extrinsic to the complaint to deny its obligation to defend if the complaint can be interpreted as triggering the duty to defend. *Id.* When an insurer is uncertain as to its duty to defend, its remedy is to file a declaratory judgment action. *Id.*

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West Virginia

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

West Virginia's statute of limitations for tort actions is two years. W. Va. Code §55-2-12. Actions sounding in contract must be brought within ten years. W. Va. Code §55-2-6. This state has adopted a tort-based "discovery rule" which states that the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the injury, the wrongdoer, and the causal relation. West Virginia's statute of repose precludes a person from bringing an action unless commenced within ten years after the completion of the construction giving rise to the cause of action.

B. Statute of Limitations

In West Virginia, a cause of action accrues when a tort occurs. *Dunn v. Rockwell*, 689 S.E.2d 255, 262 (W. Va. 2009). Contract actions accrue when the breach of the contract occurs or when the act breaching the contract becomes known. *Gateway Communications, Inc. v. John R. Hess, Inc.*, 541 S.E.2d 595, 599 (W. Va. 2000). In construction defect actions based on contract, the statute of limitations begins to run when the work is completed. *Id*.

1. Statute of Limitations Regarding Alleged Construction Defects

West Virginia's statute of limitations for tort actions is two years. W. Va. Code §55-2-12. However, unless the tort expressly falls within the classification of property damage, personal injury, or fraud or deceit, a one-year statute of limitations governs rather than a two-year period. *Noland v. Va. Ins. Reciprocal*, 686 S.E.2d 23, 34 (W. Va. 2009).

Actions based on a written contract must be brought within ten years; all other actions based on contract, whether express or implied, must be brought within five years. W. Va. Code §55-2-6.

Where an action could reasonably be construed as being in tort or in contract, and construction as a tort action would result in dismissal due to the statute of limitations, the action will be construed as being in contract. *Smith v. Stacy*, 482 S.E.2d 115 (W. Va. 1996). However, under such circumstances, when a plaintiff charges that the defendant "negligently, carelessly, and unskillfully" performed the service or act complained of and does not aver a reference to a breach of contract, such action sounds in tort and will be governed by the two-year limitation. *Family Savings & Loan, Inc. v. Ciccarello*, 207 S.E.2d 157 (W. Va. 1974), *overruled on other grounds*, *Hall v. Nichols*, 400 S.E.2d 901 (W. Va. 1990).

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2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade Practices Act

The statute of limitations for a first-party claim under West Virginia's Unfair Trade Practices Act is one year. W. Va. Code §55-2-12. See also W. Va. Code §§33-11-1 et seq.

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

See §B(1) above.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

See §B(1) above.

5. Statute of Limitations of a Claim Based on Fraud

Where a cause of action is based upon a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury. *Goodwin v. Bayer Corp.*, 624 S.E.2d 562, 567 (W. Va. 2005).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Under West Virginia's discovery rule for tort actions, a statute of limitations begins to run when a plaintiff knows, or by the exercise of sensible diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the action of that entity has a causal relation to the injury. *Roberts v. W. Va. Am. Water Co.*, 655 S.E.2d 119, 125 (W. Va. 2007).

D. Statute of Repose

No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the construction of any improvement to real property, or to recover damages for any injury to real or personal property, or for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction. W. Va. Code §55-2-6a.

This period of limitation shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever occurs first. *Id*.

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Defective workmanship that causes a bodily injury or property damage is an occurrence under a CGL policy. *Cherrington v. Erie Ins. Property and Cas. Co.*, 231 W. Va. 470 (2013).

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Wisconsin

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

In Wisconsin, actions based on a contract or for damages to real or personal property must be commenced within six years. Wis. Stat. §§893.43, 893.52. Claims for personal injury must be filed within three years. Wis. Stat. §893.54. Wisconsin is also has a right to cure statute with a specific process a person must follow before commencing an action against a contractor or supplier regarding a construction defect. Wis. Stat. §101.48 and §895.07. Wisconsin has adopted the discovery rule to toll the statute of limitations until the person knows or reasonably should know of the injury and must act with reasonable diligence. *Christ v. Exxon Mobil Corp.*, 2015 WI 58 (Wis. 2015). Wisconsin has adopted a seven-year statute of repose, barring actions that commence more than seven years after substantial completion of an improvement to real property to recover damages for property injury, personal injury, or wrongful death. Wis. Stat. §893.89(2).

B. Statute of Limitations

A statute of limitations begins to run when a cause of action accrues. *Hocking v. City of Dodgeville*, 2010 WI 59 (Wis. 2010). Accrual begins when a breach of contract occurs, regardless of when the breach is discovered by plaintiff. *CLL Assoc. v. Arrowhead Pacific*, 171 Wis.2d 604, 609, 497 N.W.2d 115 (1993). A cause of action does not accrue until the plaintiff knows, or as a reasonably prudent person should know, that he or she has a particularly diagnosed problem and that the conduct of the defendant has caused it, i.e., perceives the role which the defendant has played in inducing that condition. A hunch or a belief that is not presently supportable does not constitute the kind of knowledge that charges a possible plaintiff with the immediate duty to commence an action. *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397 (Wis. 1986).

1. Statute of Limitations Regarding Alleged Construction Defects

There is no statute of limitations specific to construction defect claims. However, as discussed above, Wis. Stat. §893.43 provides that any action on contract, obligation, or liability, express or implied, including action to recover fees for professional services, except those mentioned in section 893.40, shall be barred unless commenced within six years after the accrual of the cause of action.

An action not arising in contract to recover damages to real or personal property shall be commenced within six years after the accrual of the cause of action. Wis. Stat. §893.52. Claims for personal injury must be filed within three years. Wis. Stat. §893.54.

As noted above, there is a statutory process, e.g., notice, time for contractor to perform inspection and testing, time allotted for an offer to settle and/or repair, and acceptance/declination time

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periods, that must be followed before an action against a contractor or supplier regarding a construction defect may commence. Wis. Stat. §§ 101.48 and 895.07. During this time, the statute of limitations may be tolled. Specifically, Wis. Stat. § 895.07(9) states:

> If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitation period would otherwise expire, the limitation period is tolled pending completion of the notice of claim process described in this section. This subsection shall not be construed to revive a limitation period that has expired before the date on which a claimant's written notice of claim is served or extend any applicable statute of repose.

2. Statute of Limitations of Claims Brought Pursuant to the Consumer Act

Wisconsin prohibits any advertising statement that is untrue, deceptive, or misleading. Wis. Stat. §100.18. Any person suffering a loss may bring an action to recover damages, including costs and attorney fees. *Id.* Actions must be brought within three years of the occurrence of the unlawful act or practice. *Id.*

3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Claims brought for implied warranty of habitability and reasonable workmanship must be brought within six years. Wis. Stat. §893.43.

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

Actions based upon breach of an express warranty or contract must be brought within six years. Wis. Stat.
§893.43.

5. Statute of Limitations of a Claim Based on Fraud Has Long Since Passed

The statute of limitations for actions based on fraud is six years. Wis. Stat. §893.93(1)(b). Moreover, the cause of action for fraud is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. *Id.*

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

Wisconsin has adopted a common-law discovery rule for all tort actions other than those already governed by a legislatively created discovery rule. *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578,

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583 (Wis. 1983). Such tort claims accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. *Id*.

D. Statute of Repose

Wisconsin's statute of repose provides (Wis. Stat. §893.89) in pertinent part:

> **(1)** In this section, "exposure period" means the 7 years immediately followingthe date of substantial completion of the improvement to real property.
>
> **(2)** Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

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(3)

(a) Except as provided in pars. (b) and (c), if a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of the exposure period, the statute of limitations applicable to the damages applies.

(b) If, as the result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the 5th year and ending on the last day of the 7th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.

(c) An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended under par. (b). Wis. Stat. §893.89.

II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Wisconsin courts have held that a commercial general liability policy does not cover faulty workmanship, only faulty workmanship that causes damage to the property of others. *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169, 172 (Wis. Ct. App. 1999). Faulty work itself is not an occurrence. *Glendenning's Limstone & Ready Mix Co., Inc. v. Reimer*, 295 Wis. 2d 556 (Wis. Ct. App. 2006).

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Wyoming

I. Statute of Limitations/Statute of Repose/Discovery Rule

A. General

Wyoming provides for a four-year limitations period on tort claims for negligent services, claims for injury to real or personal property, or for breach of implied warranty. Wyo. Stat. Ann. §1-3-105(a)(iv). An action in a written contract is subject to a ten-year limitations period and actions for implied contracts must be brought within eight years. Wyo. Stat. Ann. §1-3-105(a)(i), (ii). Wyoming has adopted a statute of repose that prohibits actions against construction professionals for construction defects where the action is brought more than ten years after substantial completion of an improvement to real property. Wyo. Stat. Ann. §1-3-111.

B. Statute of Limitations

Generally, a cause of action accrues when a claimant is chargeable with knowledge of an "act, error or omission." *Reed v. Cloninger*, 131 P.3d 359, 366 (Wyo. 2006). The occurrence of damage satisfies the requirement that an injured party knows or reasonably ought to know that some damage has resulted from the wrongful act; however, it is not necessary for a claimant to know that someone may be legally responsible for his injury. *Id.; See Ogle v. Caterpillar Tractor Co.,* 716 P.2d 334, 337 (Wyo. 1986).

1. Statute of Limitations Regarding Alleged Construction Defects

Licensed or certified construction professionals are subject to a two-year statute of limitations which applies to a cause of action arising from "an act, error or omission in the rendering of licensed or certified professional … services." Wyo. Stat. Ann. §1-3-107. The limitations period begins to run from the date of the act, error or omission giving rise to the cause of action. Aside from construction defect actions against certified professionals, Wyoming also provides a four-year limitations period for general tort claims for negligent services or claims for injury to real or personal property. Wyo. Stat. Ann. §1-3-105(a)(iv).

2. Statute of Limitations of Claim Brought Pursuant to the Unfair Trade and Consumer Practices Law

Wyoming's Consumer Protection Act prohibits knowing unfair or deceptive acts or practices in consumer transactions. Wyo. Stat. §40-12-105. Persons relying on uncured deceptive trade practices may recover their actual damages and may bring a class action if appropriate. Wyo. Stat. §40-12-108. Prior to bringing an action, the consumer must be given written notice to the alleged violator of the act within one year of the discovery of the trade practice or within two years following the consumer transaction, whichever occurs first. Wyo. Stat. §40-12-109.

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3. Statute of Limitations of a Claim Brought Pursuant to Breach of Implied Warranty of Habitability and Reasonable Workmanship

Actions based on implied warranties must be brought within four years. Wyo. Stat. Ann. §1-3-105(a)(iv). Actions based on implied contracts must be brought within eight years. Wyo. Stat. Ann. §1-3-105(a)(ii).

4. Statute of Limitations of a Claim Brought Pursuant to Breach of Express Warranty

An action in a written contract is subject to a ten-year limitations period. Wyo. Stat. Ann. §1-3-105(a)(i). Actions based on an express contract not in writing must be brought within eight years. Wyo. Stat. Ann.
§1-3-105(a)(ii).

5. Statute of Limitations of a Claim Based on Fraud

Actions for fraud must be brought within four years. Wyo. Stat. Ann. §1-3-105(a)(iv).

C. The Discovery Rule in Relation to Tolling the Statute of Limitations in Actions Involving Construction Defects

The statute of limitations will be tolled by the "discovery rule" if the plaintiff can show that the act, error or omission was not discoverable within the applicable statute of limitations, or that the plaintiff failed to discover it within that period despite the exercise of due diligence. Wyo. Stat. Ann. §1-3-107; *See McCreary v. Weast*, 971 P.2d 974, 980 (Wyo. 1999) ("We have had no equivocation in articulating the proposition that the claim does not arise so as to start the period of the statute of limitations running until the element of damage is discovered.").

D. Statute of Repose

Wyoming has adopted a statute of repose that prohibits actions against construction professionals for construction defects where the action is brought more than ten years after substantial completion of an improvement to real property. Wyo. Stat. Ann. §1-3-111. Parties may contract for a longer or shorter period of repose. *Nuhome Investments, LLC v. Weller*, 81 P.3d 940 (Wyo. 2003)(contractually-shortened limitations periods "are prima facie valid and will be enforced absent a demonstration by the party opposing enforcement that the clause is unreasonable ..."). The plaintiff has one year to file suit if a defect occurs within the ninth year after substantial completion. Wyo. Stat. Ann. §1- 3-111.

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II. Common Law Related to Construction Defects Claims: Trigger for Coverage under a CGL Policy for Property Damage Allegedly Caused by an Insured's Work

Wyoming's federal court has held that natural and foreseeable property damage incurred by an insured as a result of a contractor's negligent and defective construction does not constitute an "occurrence" which would trigger coverage under a commercial general liability policy. *Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming,* 2006 U.S. Dist. LEXIS 94826 at 22-23, 30 (D. Wy. Oct. 20, 2006). As such, it appears that CGL coverage would be triggered if the damages suffered by the insured were due to unnatural and/or unexpected events which occurred as a result of negligent construction. *Id.*

While the above-referenced federal court holding is merely persuasive in Wyoming state actions, there does not appear to be any state case law which criticizes the holding in *Bitterroot*.

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