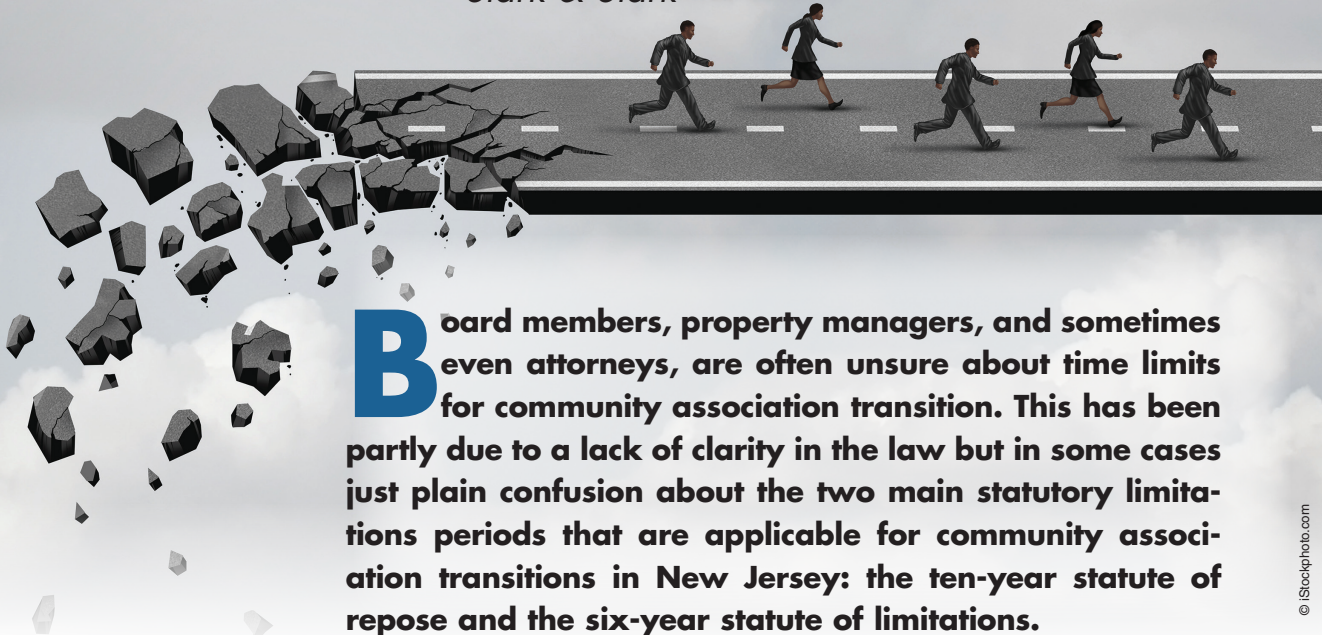


Community Trends®

UNDERSTANDING STATUTORY DEADLINES IN TRANSITION

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Board members, property managers, and sometimes even attorneys, are often unsure about time limits for community association transition. This has been partly due to a lack of clarity in the law but in some cases just plain confusion about the two main statutory limitations periods that are applicable for community association transitions in New Jersey: the ten-year statute of repose and the six-year statute of limitations.

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STATUTE OF REPOSE

The New Jersey statute of repose states that “no action... arising out of the defective and unsafe condition of an improvement to real property...shall be brought...more than 10 years after the performance or furnishing of such services and construction.” (N.J.S.A. 2A:14-1.1.) The statute of repose will begin to run at a specific time and allow a claim to be filed for ten years. After the repose period expires, no construction defect claim can accrue and none may be filed. The statute of repose cannot be tolled and once the ten years runs on an item, the association can pursue no further claims for construction defects against the developer and/or other parties such as subcontractors. In other words, once that ten years runs, it is “game over” for the transition claims.

Accordingly, it is critical to determine exactly when the ten-year statute of repose commences and when it will run out. The statute of repose begins to run upon substantial completion of construction. In a broad sense, substantial completion would be the date a certificate of occupancy is issued. The underlying construction contract may define substantial completion and in that case the date would be determined by that definition. For example, the construction contract may state that substantial completion is determined when the engineer issues a written certificate so the date of that certificate would determine when substantial completion was achieved and the statute of repose would start to run from that date. Also, each trade contractor that completes its work on the project may have its own substantial completion date – either by written certificate, certificate

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of occupancy, or otherwise. Thus, different portions of the community and different elements of the construction may be substantially completed at different times – especially in large or phased communities – and this date will be different for different areas and contractors. The grading and drainage work will be completed early on in the construction of the community, buildings 1 through 12 will most certainly be completed at different times, the framing work within each of the buildings will be completed at different times, and the clubhouse roof will be completed at yet another time. Each of these might have a different substantial completion date and, therefore, be subject to a different expiration date for the statute of repose.

Determining the earliest possible substantial completion date for the project will help the association preserve its claims until specific dates for specific defects are determined. You can estimate substantial completion of a building by obtaining the first certificate of occupancy issued. Keep in mind that date will not include earlier completion dates for trades within the building (e.g., framers). If construction started after the master deed or declaration was recorded that recording date may also be a good estimate of when the statute of repose may commence. The date of the initial grading work, if known, is a safe date to use for all building issues; however, even that date may not include substantial completion for design professionals (e.g., architects) as this work is typically completed before any shovel hits the ground. Whatever date you determine comprises substantial completion, add ten years and you will get the estimated date the statute of repose runs out. These are just rough estimates, of course. Remember that once the ten-year statute of repose period expires no claim can accrue and none may be filed on the defective construction work. In order to determine the date specific portions of the community were substantially completed or certain trades or professionals substantially completed their work, experienced legal counsel needs to be engaged early in the process to conduct an extensive evaluation and protect the association's legal rights.

STATUTE OF LIMITATIONS

The statute of repose is not the only potential time bar to transition litigation. These cases are also subject to a six-year statute of limitations. Unlike the rigid statute of repose, however, the six-year statute of limitations has more flexibility because it can be tolled until discovery of a deficiency. N.J.S.A. 2A:14-1 provides that actions "for any tortious injury to real or personal property...shall be commenced within 6 years next after the cause of any such action shall have accrued." This means that determining when the cause of action accrues is key. New Jersey follows what is called the "discovery rule," which states that a cause of action only accrues when one knows or *should have known* of a claim.

To understand the statute of limitations and, more importantly, accrual of a claim, in the community association context you must first understand the concept of homeowner control and discovery. When a community association is first developed, the developer will appoint its own non-homeowner representatives to the association's board of trustees. The board is said to be "developer controlled" at this time. As the developer sells homes, the homeowners are entitled to gradually elect their own homeowner representatives to the board of trustees. Once 75% of the homes in a community association are conveyed to owners other than the developer, these homeowners are entitled to elect all of the members of the board of trustees (except the developer may retain one seat as long as it is selling at least one home in the normal course of business). Thus, at this point the board of trustees has "transitioned" to be "homeowner controlled" and the homeowner board of trustees can make decisions for the association independent of the developer. One of the most important decisions the homeowner board of trustees will make is retaining an engineer to inspect the common property and prepare a report of any deficiencies. Once this "transition report" is finalized and presented to the homeowner board of trustees, the association is on notice of deficiencies identified in the report. This notice constitutes discovery for statute of limitations purposes.

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Unlike with the statute of repose, there has been some lack of clarity in New Jersey law as to when the statute of limitations accrues and runs for a community association and litigation attorneys were left guessing what a court would decide. Should the six years start to run at substantial completion? At homeowner control? Some hybrid of the two? Attorneys for community associations have continually argued that these causes of action could not accrue, and the six-year statute of limitations could not start to run, until after homeowner control and receipt of an engineer's report. In February, the New Jersey Appellate Division ended this speculation in a case that was very favorable to community association transitions. In this case, *The Palisades at Fort Lee Condominium Assoc., Inc. v. 100 Old Palisade, LLC, et al.*, 2016 N.J. Super. Unpub. LEXIS 193 (App. Div. Feb. 1, 2016), the association was substantially completed in 2002. It reached homeowner control in 2006 and the homeowner board received its engineer's report documenting deficiencies in 2007. The transition litigation was filed in 2009, more than six years after substantial completion. The contractor defendants argued that the statute of limitations should have expired in 2008, six-years after substantial completion. The plaintiffs argued that the association still had almost a year after receiving its engineer's report to file the complaint and by waiting to file the complaint until 2009, it was filed out of time. The *Palisades* court disagreed and held that the six-year statute of limitations does not accrue until after homeowner control *and* after the association has reasonable notice of the deficiencies (i.e., receives an engineer's transition report). Importantly, once the statute of limitations starts to run the association is entitled to its full six-year limitations period (except, of course, it could not run past the ten-year statute of repose which, in the *Palisades* case would have been 2012, ten years after substantial completion).

While this is an important decision for community associations it should be noted that the case is unreported and it has been appealed to the New Jersey Supreme Court. As

of press time there was not yet any word as to whether or not the Court would accept the case for review and we do not know how or if we can rely on this decision.

PUTTING THEM TOGETHER

Now that you understand how the ten-year statute of repose and the six-year statute of limitations work, you may wonder how the two statutory periods work together. Remember that no further claims can accrue after the statute of repose period expires. While the homeowner-controlled association may be entitled to its full six-year limitations period after receipt of the engineer's report, that is only the case if the ten-year statute of repose period will not expire for at least six years. Based on the *Palisades* case, which could still be reviewed and modified by the New Jersey Supreme Court, the ten-year statute of repose period would have expired in 2012 (ten years after substantial completion in 2002). However, six years after the homeowner-controlled association received its engineer's report in 2007 would be 2013, a year after the ten-year statute of repose expired. Thus, the association did not have a full six years to file its complaint – it had only five years after receiving its engineer's report in 2007 - and needed to file the complaint before the ten-year statute of repose expired in 2012. This is because unlike the statute of limitations, the ten-year statute of repose is rigid and cannot be extended under any circumstance.

THE BOTTOM LINE

A community association with any construction transition claims must ensure the claims are satisfactorily resolved or that litigation is filed before the six-year statute of limitations and the ten-year statute of repose runs. Failure to do so may cause the association's claims against the developer and subcontractors to be extinguished. Most transition matters settle amicably without litigation well before these limitations periods expire but it is critical that association board members and property managers understand these concepts and work with experienced legal counsel to help preserve the association's legal rights. ■