

Legal Pipeline

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Exterior view of modern apartment building offering luxury rental units in Silicon Valley; Sunnyvale, San Francisco bay area, California (Exterior view of modern apartment building offering luxury rental units in Silicon Valley; Sunnyvale, San Francis

Is the Claim Timely?

A look at limitation on actions in multibuilding developments.

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December 6, 2021

Whenever a client speaks to me for the first time about a potential construction case, I almost always ask them to prepare a “back of the envelope” timeline. This timeline reflects a number of dates, such as contract execution, receipt of building permit, commencement of work, conclusion of work (for whatever reason), substantial completion and final completion (if applicable).

While this type of timeline will become more formalized and detailed as the case progresses, at the outset I am primarily interested in timeliness. Is the prospective lawsuit timely, or is it time-barred by the applicable limitation on actions statute

(*i.e.*

, statute of limitation and/or statute of repose)? And how is this question answered when we are dealing with a multi-phase, multi-building development, such as a condominium complex?

In

D’Alessandro v. Lennar Hingham Holdings, LLC,

156 N.E.3d 197 (Mass. 2020), the Supreme Judicial Court of Massachusetts considered this very question in a construction and design defect case.

Since the court looked solely at the statute of repose, it is instructive to quote the applicable Massachusetts statute:

“Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property ... shall be commenced only within three years next after the cause of action accrues; provided, *however, that in no event shall such 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.*”

Mass. Gen. Laws ch. 260 § 2B (2021) (

emphasis added

).

Standard analysis of claim

This statute actually includes both limitation on action statutes. The statute of limitation is the three-year period, and the statute of repose is the six-year period. While there are important distinctions between the two statutes, that topic is left for another day. Each statute serves as a defense to claims that were asserted too late.

To analyze the timeliness of a claim, one must determine the accrual point (

i.e.,

when the statute begins to run) and the length or period of time (

i.e.,

how long from the accrual point a claimant may wait before being time-barred from asserting the claim). Since the court in

D'Allessandro

only looked at the statute of repose, we will only focus on that statute.

According to the Massachusetts statute, one must bring a construction defect action (

i.e.

, file a complaint in court) no more than six years after the earlier of the project's opening for use, or substantial completion and occupancy by the owner. Let's apply this statute to a simple example using the timeline described above.

Our hypothetical project involves the construction of a single-family residence. The parties signed their contract on Jan. 2, 2014; the project was substantially complete (and a temporary certificate of occupancy was obtained) on Jan. 31, 2015. That was the date on which the family moved into the home. After the remaining punchlist work was finished, the owner obtained a final certificate of occupancy on March 1, 2015.

On Feb. 1, 2021, after Hurricane Steven hit, the house inexplicably took on water in the basement and water penetrated the windows around the perimeter of the house. The owner immediately called the builder, who was only mildly responsive. The builder returned the owner's calls, but it soon became apparent that the builder was "dragging his feet" and had no intention of remediating the latent defects that gave rise to the water intrusion.

On Oct. 1, 2021, the owner brought a lawsuit seeking damages against the builder in Massachusetts Superior Court. Is this lawsuit timely or subject to dismissal by way of a motion for summary judgment?

In the hypothetical case, the dates in (1) and (2) are the same — the project was opened on the same date as substantial completion and occupancy by the owner: Jan. 31, 2015. Six years from this date is Jan. 31, 2021. The action was commenced on Oct. 1, 2021. Based on this analysis, the lawsuit was started eight months too late; the action is time-barred under the statute of repose and the defendant would prevail on a motion for summary judgment.

Multiphase/multibuilding analysis

Turning back to

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, Massachusetts' highest state court applied the above analysis to a multiphase, multibuilding condominium development. The local federal court certified the following question of state law to the Supreme Judicial Court of Massachusetts:

“Where the factual record supports the conclusion that a builder or developer was engaged in the continuous construction of a single condominium development comprising multiple buildings or phases, when does the six-year period for an action of tort relating to the construction of the condominium’s common or limited common elements start running?”

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, 156 N.E.3d at 198.

The Supreme Judicial Court cut right to the chase early on in its decision, responding as follows:

“Where a condominium development is comprised of multiple buildings, regardless of how many phases of the development there may be or how many buildings are within each phase, each building constitutes a discrete improvement for purposes of [the statute of repose], such that the opening of each individual building to its intended use, or the substantial completion of the individual building and the taking of possession for occupancy by the owner or owners, triggers the statute of repose with respect to the common areas and the limited common areas of that building. In addition, where a particular improvement is integral to, and intended to serve, multiple buildings (or the condominium development as a whole), the statute of repose begins to run when that discrete improvement is substantially complete and open to its intended use.”

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, 156 N.E.3d at 198-99.

Defendants prevail in

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In

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, the Hewitts Landing Condominium consists of 150 units, contained in 28 buildings, built over the course of 24 phases between 2008 and 2015. As individual units or entire buildings were complete, the architect certified that such units or buildings were “substantially complete.”

The plaintiffs, trustees of the condominium association, filed suit in Superior Court on Nov. 3, 2017, seeking damages for alleged design and construction defects to the common elements and limited common elements of the condominium.

Not surprisingly, the defendants moved for partial summary judgment, arguing that the trustees’ claims were partially barred by the six-year statute of repose. More specifically, the defendants argued that the statute of repose barred claims relating to six of the development’s 28 buildings.

In some sense, the issue came down to how the court defines an “improvement” in the statute of repose. Are we talking about one improvement or multiple improvements for purposes of the timeline analysis? As the Supreme Judicial Court framed the inquiry:

“[T]he question is whether the statute of repose was triggered only once (when the entire condominium satisfied the statutory requirements of being [1] open to use, or [2] substantially complete and taken for occupancy by the owner); or whether the statute was triggered multiple times, as each individual building (or other relevant component) of the project met those statutory requirements. Ultimately, we conclude that the latter approach adheres most closely to the statutory language and the underlying legislative intent.”

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, 156 N.E.3d at 201.

Thus, the developer prevailed and the claims relating to six of the 28 buildings were dismissed.

What does this all mean?

Regardless of whether you are dealing with a single unit or multiunit development, if you are looking to assert a limitation on actions defense, then you need to take a number of steps: (1) perform a timeline analysis; (2) identify the statute of limitation and statute of repose (if there is one) for your jurisdiction; (3) define the scope of the work or improvement that is the subject of the claim; (4) determine how your jurisdiction treats limitation on actions statutes with respect to different participants in construction (

i.e.

, developer, contractor, construction manager, subcontractor, design professional, supplier, etc.); and finally, (5) if the project has multiple phases or buildings, determine how such a project is treated in your jurisdiction.

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addresses these steps based on the law in Massachusetts. Other states may treat these issues differently. At a minimum, however, you now know the issues that need to be addressed in order to assert a limitation on actions defense.