STATUTES OF LIMITATION ON CLAIMS FOR CONSTRUCTION DEFECTS UNDER THE "RIGHT TO REPAIR ACT", or FOR CONTRACTOR NEGLIGENCE, FOR BREACH of CONTRACT, OR FOR FRAUD or WILFUL MISCONDUCT.

Most legal claims or lawsuits must be bought or filed in Court within some limited time period after the legal "claim" has arisen or the victim's legal damages or injuries are discovered, to avoid clogging the courts with old claims, where witnesses and documents concerning the claims have disappeared, memories have faded, and the evidence to support or defend those claims may no longer be available.

These limitations periods are referred to as "Statutes of Limitations" and "Statutes of Repose", as they are time limits or deadlines to sue created by the Legislature.

Suit must be filed on your claim within the applicable limitations or repose period, or your claims may be forever barred or precluded by the applicable Statute of Limitations or Repose.

Different Statutes of Limitation often apply depending on what legal theory or remedy you are pursuing, or the basis for your legal claims against the contractor, subcontractor or designers.

For example, different Limitation time periods or deadlines apply in California, depending on wether or not you are suing for breach of an oral or written contract with the Contractor, contractor or subcontractor, for negligence which has caused damages to your property, for fraud by a contractor, or for defects in mass-produced homes, etc.

However, statutory statutes of limitation may be lengthened or shortened by a contract, so in addition to the laws governing Statutes of Limitation, as are very generally discussed below, so parties must also carefully review the terms of any contract between them regarding deadlines within which claims must be made or lawsuits must be filed!

Statutes of Limitations on Breach of Contract Causes of Action

Obviously, if you hired a contractor yourself, and that contractor breached or violated your written or oral Construction Contract in some important or "material" way, then you may sue that contractor for damages that could have been foreseen for such a breach of contract.

Where the property owner has contracted directly with a contractor to perform construction work on the property, or where a developer has hired a contractor to build a project later purchased by a new owner, those property owners may also have a Breach of Contract claim or cause of action against the contractor or subcontractor, either directly or as an intended "Third Party Beneficiary" of those contracts or subcontracts etc., even though they were not a party to the Construction Contract.

Building Contractors and Subcontractors, and all other parties to contracts have a duty implied by the law to perform their work under the contract in a competent and non-negligent manner, so as to avoid causing

injuries to the other parties to that contract or to other persons lawfully on or at their property.

California Court cases have held that every Construction Contract includes an implied promise or provision that the contractors work will be performed consistent with local quality standards prevailing in the construction industry, and will function in according to those standards.

Material failure of your contractor's work to do so constitutes a breach of contract for which you may sue for the foreseeable damages that you sustain from that breach.

> "'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation]." (Roscoe Moss Co. v. Jenkins (1942) 55 Cal.App.2d 369, 376 [130 P.2d 477]; see North American Chemical Co. v. Superior Court (1997) 59 Cal.App.4th 764, 774 [69 Cal. Rptr. 2d 466].)" (Emphasis added).

Holguin v. Dish Network LLC (2014) 229 Cal. App. 4th 1310, 1324.

This duty or obligation need not be expressly written into the formal terms of the contract, and instead is implied and inserted into the contract by the Common Law.

Breach of this implied-at-law duty can give rise to a claim or Cause of Action in the other party to sue for Breach of Contract, even if the contract is verbal, and not written.

In California, suits for breach of an oral contract must be filed within two years of your discovery of the breach of contract, and suits for breach of a written contract must be filed in Court within four years of your discovery of a material breach of the written contract, that has caused you some damage.

As the Supreme Court also held in *Aas v. Superior Court*, one can recover "economic losses" - such as the cost to repair defective or substandard construction work - can be recovered on a Breach of Contract Cause of Action.

> "[D]eviations from standards of quality **that have not resulted in property damage** or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. . . ." (All emphasis added)

Aas v. Superior Court (2000) 24 Cal. 4th 627, 636.

As a matter of Law, the time limits in various Statutes of Limitation don't start to run until a claim or " Cause of Action" has **"accrued"** or ripened into a legal right to sue for damages or other relief.

> " As noted, the limitations periods of sections 337 [for breach of contract] and 338 start to run upon "discovery." Discovery occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing the injury (here, "wrong" is not used in a technical sense, but in a lay one). . . . In other words, "sections 337 and 338 begin to run only after the damage is sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies." . . . ." (Emphasis added)

Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc. (2009) 177 Cal.App.4th 257-258.

(See related article)

The "**Discovery Rule**" also applies to "toll" or suspend the running of Statutes of Limitations on Breach of Contract causes of action, until the breaches of contract and damages therefrom are discovered by the Plaintiffs.

> "Indeed, the delayed discovery rule has most often been described as an equitable doctrine designed to achieve substantial justice in situations where one party has an unfair advantage and it would be inequitable to deprive " 'an "otherwise diligent" plaintiff in discovering his cause of action.' [Citations.]" . . . It is normally applied in situations where there is a . . . privileged relationship"—basically, **where individuals hold "themselves out as having a special skill, or are required by statute to possess a certain level of skill" and it is manifestly unfair to deprive the plaintiffs of their cause of action before they are aware that they have been injured**. . . . ." (All emphasis added)

Brisbane Lodging, L.P. v. Webcor Builders, Inc. (2013) 216 Cal.App.4th 1249, 1261-1262; 3 Witkin, California Procedure , (5th Ed. 2008), Actions, § 529(d).

Claims for Negligent Construction

Property owners and others may also sue contractors or subcontractors whose work has caused them personal injury or property damage or loss, even if you had no direct contract with or dealings with that contractor or subcontractor.

But a legal claim (or "Cause of Action") for Negligent Construction doesn't accrue until the Construction work has caused physical injury or actual physical damage to other property, and until such resulting property damage is discovered by the Plaintiff.

" 'Generally, a cause of action accrues and the statute of limitation begins to run when a suit may be maintained. … "Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' " … In other words, "[a] cause of action accrues 'upon the occurrence of the last element essential to the cause of action.' " ' " (Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 815 [107 Cal. Rptr. 2d 369, 23 P.3d 601], citations omitted, italics added.) **A tort cause of action accrues only when "appreciable and actual harm" is caused by the wrongful conduct**. (Budd v. Nixen (1971) 6 Cal.3d 195, 201 [98 Cal. Rptr. 849, 491 P.2d 433].) "**If the [wrongful] conduct does not cause damage, it generates no cause of action in tort.**" (Budd, at p. 200.)
"**But the limitations period does not begin to run until the plaintiff discovers or should have discovered the cause of action. "The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause**. …."
"Since a cause of action accrues when the elements of the cause of action, including damage, occur (Howard Jarvis Taxpayers Assn. v. City of La Habra, supra, 25 Cal.4th 809, 815), the "**appreciable and actual harm" that results in accrual must be harm of the specific type that is recoverable as damages on that type of cause of action**. (Zamora v. Shell Oil Co. (1997) 55 Cal.App.4th 204, 209–210 [63 Cal. Rptr. 2d 762].)

. . . .

"The elements of a negligence cause of action are duty, breach, causation and damages. (Artiglio v. Corning Inc.. . . ." (All emphasis added)

County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 316-318.

In the *County of Santa Clara* case the Plaintiffs sued, inter alia, for negligence, and contended that the presence of lead in their building paint was a "*defect*" for which they were entitled to damages in the amount of the costs of removing the lead from their buildings.

In overruling summary judgment, the Court concluded that Plaintiffs had NOT stated a Negligence Cause of Action, because the mere presence of the lead in the building - the alleged defective condition or wrong - was not sufficient to state a Negligence Cause of Action, because the Plaintiffs had not alleged that this defective condition **had caused physical harm to the buildings themselves**.

"Plaintiffs' allegations of damage to their property **do not include any allegations of physical injury** (as that term has been construed), and **therefore their causes of action for negligence** and strict products liability, as alleged in the third amended complaint, **have never accrued**" (All emphasis added)

*County of Santa Clara v. Atlantic Richfield C*o., supra, 137 Cal.App.4th at 318.

In so holding, the Sixth District Court of Appeal relied on the landmark 2000 California Supreme Court decision in *Aas v. Superior Court* (2000) 24 Cal.4th 627, as to the application of the "economic loss

rule" to Construction Defect cases.

> "The California Supreme Court began with the proposition that "**[i]n actions for negligence, a manufacturer's liability is limited to damages for physical injuries**; no recovery is allowed for economic loss alone." (Id. at p. 636.) It cited Seely v. White Motor Co. (1965) 63 Cal.2d 9 [45 Cal. Rptr. 17, 403 P.2d 145] in support of this proposition. . . ." (All emphasis added)

County of Santa Clara v. Atlantic Richfield Co., supra, 137 Cal.App.4th at 319.

> "**When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury**. [Citation.] **The expenses of repair plaintiff has incurred, and will incur in the future, are purely economic damages**." . . . (Sacramento Regional Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 294 [204 Cal. Rptr. 736].) Plaintiffs' damages allegations can only be characterized as seeking the cost of repairing plaintiffs' buildings. Plaintiffs have simply **failed to allege that lead or lead paint physically injured their buildings.** As Aas held, only physical injury can support a negligence or strict liability cause of action, and **cost of repair does not constitute physical injury**." (All emphasis added)

County of Santa Clara v. Atlantic Richfield Co. , supra, 137 Cal.App.4th at 321.

Unless the contractor's or subcontractor's work has caused you physical injury or damage to your other property, you typically may not sue the contractor or subcontractor for negligence.

Physical property damages are an essential element of any construction negligence cause of action:

> "[D]eviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. **In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone**. . . ." (All emphasis added)

Aas v. Superior Court (2000) 24 Cal. 4th 627, 636.

Thus, a property owner cannot sue for negligent construction - which is typically covered by contractor's liability insurance - unless the Negligent Construction work has caused damage to other property other than the contractor's own work.

If there is just bad construction work, but no physical damages to other property has occurred or been discovered yet, there is normally no right to sue contractors or subcontractors etc for negligent Defective Construction!

Thus, ""a home with no resultant damages at all, but everybody agrees that the flashing's not lapped

properly under the industry standards, the [Uniform Building Code], whatever, but it hasn't resulted in any leaks; everybody agrees that the tile is overextended, that is, it doesn't have the overlap of three inches that's called for by the manufacturer; that you have a nailing pattern on the shear walls which does not comply with the applicable provision in the [Uniform Building Code], but the house is still standing and hasn't started swaying . . . ."' don't state a Cause of Action for Negligent Construction. *Aas v. Superior Court*, supra, 24 Cal.4th at 634, 636.

This holding in *Aas v. Superior Court* and its requirement for physical damage to other property for any tort negligence claim to accrue was elaborated upon in a recent California U.S. District Court decision.

> "Both parties agree that "**negligent performance of a construction contract, without more, [does not] justif[y] an award of tort damages**." Erlich v. Menezes, 21 Cal. 4th 543, 551, 550-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (1999). "[C]onduct amounting to a breach of contract [only] becomes tortious when it also violates a duty independent of the contract arising from principles of tort law. Aas v. Superior Court of San Diego, 24 Cal. 4th 627, 636, 101 Cal. Rptr. 2d 718, 12 P.3d 1125 (2000) (superseded by statute on other grounds). Tort damages were initially permitted in contract cases where a breach of duty directly caused physical injury. Erlich, 21 Cal. 4th at 552-552 (citing Fuentes v. Perez, 66 Cal.App.3d 163, 168, fn. 2, 136 Cal. Rptr. 275 (1977)). Recovery for negligence has since been expanded to include construction defects that cause property damage. Aas, 24 Cal. 4th at 637 (citing Stewart v. Cox, 55 Cal. 2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961) as the first case to allow recovery in negligence for construction defects which caused property damage, and extensively analyzing cases which have allowed recovery for property damage since Stewart)."
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> "**Property damage does not include mere economic loss, such as repair and replacement costs.** Aas, 24 Cal.4th at 635-636. "[T]he difference between price paid and value received, and **deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence**. In actions for negligence, a manufacturer's **liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone**." Id. . . . This principle is known as the economic loss rule. Aas, 24 Cal.4th at 635-636; see e.g., Zamora v. Shell Oil Co. 55 Cal.App.4th 204, 208-211, 63 Cal. Rptr. 2d 762 (1997) (finding homeowners were not allowed to recover in negligence for the cost of replacing water pipes known to be **defective, but which had not yet leaked**); Fieldstone v. Briggs Plumbing Products, Inc. 54 Cal.App.4th 357, 363-367, 62 Cal. Rptr. 2d 701 (1997) (finding that a general contractor could not be awarded the cost of replacing installed sinks that **rusted and chipped prematurely**, **because no other property had been damaged**); San Francisco Unified School Dist. v. W.R. Grace & Co., 37 Cal.App.4th 1318, 1327-1330, 44 Cal. Rptr. 2d 305 (1995) (finding that a public school district could not state a cause of action in negligence or strict liability based on the **presence of asbestos** products in its buildings, **when the products had not contaminated the buildings** by releasing friable asbestos).

"Accordingly, if a complainant alleges **property damage, i.e., a defect which causes harm to other portions of the property**, as a result of a contractor's negligence, the complainant has alleged a duty independent of the contract. Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 989, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004) (citing Jimenez v. Superior Court, 29 Cal.4th 473, 482-483, 127 Cal. Rptr. 2d 614, 58 P.3d 450 (2002)).

1. Duty Independent of The Contract.

a. Similarity of MID's Contractual Claims and Negligence Claim.

"**[U]nder California law "the same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts."** Erlich, 21 Cal.4th at 551 (emphasis added). A plaintiff is permitted to pursue remedies in both contract and tort law provided that the actions that constitute the breach "violate a duty independent of the contract arising from principles in tort law." Id. (conduct amounting to a breach of contract becomes tortious when "it also violates a duty independent of the contract."); Aas, 24 Cal.4th at 643; see also Robinson Helicopter Co., Inc., 34 Cal.4th at 990. Accordingly, **the same conduct alleged in a contractual claim may be alleged to constitute a negligence claim so long as the conduct also violates a tortious duty**.

b. Property Damage.

. . . .

"**[T]he economic loss rule allows a plaintiff to recover in. . . tort when a product defect causes damage to 'other property,' that is, property other than the product itself**." Robinson Helicopter Co., 34 Cal. 4th at 989 (citing Jimenez, 29 Cal.4th at 482-483). Several California courts have found that **a defectively constructed building is not a single defective product, but is comprised of multiple products**. See, e.g., Stearman v. Centex Homes, 78 Cal. App. 4th 611, 613, 92 Cal. Rptr. 2d 761 (2000) (plaintiff suffered property damage when **defective foundations damaged walls and ceilings** of newly constructed home); Jimenez, 29 Cal.4th at 483 ("the economic loss rule does not necessarily bar recovery in tort for **damage that a defective product (e.g., a window) causes to other portions of a larger product (e.g., a house)** into which the former has been incorporated"); Huang v. Garner, 157 Cal.App.3d 404, 411, 203 Cal. Rptr. 800 (1984) [(allowing a negligence claim based on physical damage to the structure of the plaintiffs property caused by "defected and cracked beams and dry rot damages.") (disapproved on other grounds). "**[P]hysical damage to plaintiffs' real property caused by defective construction.** . . . is [not solely] 'an injury to the product itself,' and [not] barred by the economic loss rule." Stearman, 78 Cal. App. 4th at 617." (All emphasis added)

Black & Veatch Corp. v. Modesto Irrigation Dist. (E.D.Cal. 2011) 827 F.Supp.2d 1130, 1137-1139.

Additionally, a Cause of Action for Negligence does not accrue - and the Statute of Limitations thereon is tolled - until **the "discovery**" by the Plaintiff of all elements of its cause of action, including - in construction defect cases - the **discovery of resulting physical damage or injury to the building**

itself or to other property or physical injury caused by the "defective" or negligent items of construction work.

> "The statute of limitations usually commences when a cause of action "accrues," and it is generally said that "an action accrues on the date of injury." (Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) Alternatively, it is often stated that the statute commences "upon the occurrence of the last element essential to the cause of action." (Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176, 187 [98 Cal.Rptr. 837, 491 P.2d 421]; Gutierrez v. Mofid (1985) 39 Cal.3d 892, 899 [218 Cal.Rptr. 313, 705 P.2d 886].) These general principles have been significantly modified by the common law "discovery rule," which provides that the accrual date may be "delayed until the plaintiff is aware of her injury and its negligent cause." (Jolly v. Eli Lilly & Co., supra, 44 Cal.3d at p. 1109.)" (Emphasis added)

Bernson v. Browning-Ferris Industries (1994) 7 Cal.4th 926, 931; *Davies v. Krasna* (1975) 14 Cal.3d 502, 512-513. See also, 3 Witkin, California Procedure (5th Ed. 2008) Actions, § 498(b), §§ 608-611.

Thus, the Statute of Limitations for negligence in construction begins only after the property owner discovers or reasonably should have discovered resulting property damage to his building caused by the negligent or "defective" construction.

> As noted, the limitations periods of [Code Civil Proc.] sections 337 and 338 [for breach of contract and real property damages] **start to run upon "discovery**." Discovery occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing the injury (here, "wrong" is not used in a technical sense, but in a lay one). (Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 397–398 [87 Cal. Rptr. 2d 453, 981 P.2d 79]; Landale, supra, 155 Cal.App.4th at p. 1407; Mills, supra, 108 Cal.App.4th at pp. 643–644.) "A plaintiff has reason to suspect when he has notice or information of circumstances to put a reasonable person on inquiry." (Landale, supra, 155 Cal.App.4th at pp. 1407–1408; see Norgart, supra, 21 Cal.4th at p. 398.) In other words, "sections 337 and 338 begin to run only after the damage is sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies." (North Coast, supra, 17 Cal.App.4th at p. 27, italics added; see Mills, supra, 108 Cal.App.4th at p. 646.)" (Emphasis added)

Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc. (2009) 177 Cal.App.4th 251, 257-258.

> "Only when the **consequential [resulting real property] damage is sufficiently appreciable to a reasonable man may we hold an owner to a duty of expeditiously pursuing his remedies**.' " (Ibid., citing Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 255 [73 Cal. Rptr. 127].

Mills v. Forestex Co. (2003) 108 Cal.App.4th 625, 649-650.

Thus, the Statute of Limitations on a claim or Cause of Action for Negligent Construction work

does NOT start to run unless and until the property owner knows or discovers - or should have known or should have discovered - that the defective work of the contractor has caused physical damages to other property.

Thus, such a claim might not need to be brought until years after the work was completed, but must be filed within three (3) years of the discovery of the negligent work and the resulting property damage or personal injury caused by the defective work!

However, Code Civil Procedure § 337.15 creates a "Statute of Repose" , or outside limit, on the time within which suit must be filed, which is within ten (10) years after "Substantial Completion" of the construction project as a whole. (See related article)

Additionally, even if one single "*defect*" or "*problem*", or item of bad workmanship or building code violation on a complex construction project is detected - such as "*ponding*" on the roof edge, or "*steel fastners are improperly used to secure copper panels*", or "*roof membrane is left exposed to ultraviolet light*" - that the Statute of Limitations does NOT begin to run for **ALL defects** on that same construction job, regardless of the size of the project or when - **if ever** - those other defects, or the consequential physical property damages resulting therefrom, are discovered.

In the real world, there may be several dates when causes of action, and the statutes of limitation, begin to accrue on the same job, depending on when such other defects or property damages are discovered.

These discoveries of resulting property damages to the property from different various "latent" "*defects"* can be up sued upon only to ten (10) years after "substantial completion" of the construction of the home or other structure! Code Civil Proc. § 337.15(a).

> "Centex also believes this case is analogous to cases where courts have allowed separate causes of action when the harm is progressively developing, or continuing. (See Anderson v. Brouwer (1979) 99 Cal.App.3d 176, 181 [160 Cal.Rptr. 65]; Avner v. Longridge Estates (1969) 272 Cal.App.2d 607, 616 [77 Cal.Rptr. 633].) In such cases, **a new limitations period begins to run with each manifestation of the defect**, unless reasonable inspection and further inquiry after discovery of the initial defect would have shown the extent of the deficiencies. (Ibid.)"
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> "[T]hough Winston Square's pleading was sufficient, applying the definition of "cause of action" strictly, one could probably set forth three causes of action -- one for drainage defects, one for

> defects causing water intrusion in the townhouse units, and one for defective balcony." (All emphasis added)

Winston Square Homeowner's Ass'n v. Centex W. (1989) 213 Cal. App. 3d 282, 289; *Mills v. Forestex Co.,* (2003) 108 Cal. App. 4th 625, 649-50 and fn. 15.

Additionally, it is not the discovery of a construction "***defect***" (such as "*ponding*" and those listed by Plaintiffs in the prior complaints) which causes the Cause of Action or Statutes of Limitations to accrue. Physical property damages are also an essential element of any construction negligence cause of action:

> "**[D]eviations from standards of quality that have not resulted in property damage** or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability **is limited to damages for physical injuries; no recovery is allowed for economic loss alone. . . ." (**All emphasis added)

Aas v. Superior Court (2000) 24 Cal. 4th at, 636.

> **It is the discovery of "property damage"** which causes the claim and limitations period to accrue."In other words, "sections 337 and 338 begin to run only after the damage is sufficiently appreciable to give a reasonable man notice that he has a duty to pursue his remedies." (North Coast, supra, 17 Cal.App.4th at p. 27, italics added; see Mills, supra, 108 Cal.App.4th at p. 646.)" (All emphasis added)

Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc., supra, 177 Cal. App. 4th at 258; *Mills v. Forestex Co.* , supra, 108 Cal. App. 4th at 646.

Thus, even though a few "*defects*" or poor quality construction work may be discovered, that doesn't mean that a Cause of Action or the limitation period has accrued began to run on a negligent property damage Cause of Action.

And different defects in the work and different types of resulting property damages, and different dates of discovery may result in different deadlines for filing suit for various defects.

However, once discovered, a lawsuit must usually be filed on those claims within three years or less of the "discovery" of the property damage Cause of Action for negligent construction or construction defects. (See related article).

Fraud or Concealment Claims or Causes of Action

Where the contractor or subcontractor has purposely performed defective work or has concealed negligent or defective work, there may be an exception to the ten-year statute of repose, discussed above, creating an outside time limit for bringing claims for negligent construction, which exception allows claims to be brought for concealed defects that have caused damages outside - or after - the ten year period of "repose" for seeking damages for such defective construction.

> "(f) This section [imposing the 10 year statute of repose on claims] shall not apply to actions based on willful misconduct or fraudulent concealment".

Code Civ. Proc., § 337.15(f).

The statute does not define the meaning of the terms " willful misconduct or fraudulent concealment", but some sense of their meaning can be gleaned from various construction-related State Court of Appeal and Supreme Court decisions.

> "In Ewing v. Cloverleaf Bowl (1978) 20 Cal.3d 389, 402, 143 Cal.Rptr. 13, 572 P.2d 1155, the Supreme Court stated: " '[W]illful misconduct implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences.' " (Accord, Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal.4th 965, 1016, 25 Cal.Rptr.2d 550, 863 P.2d 795 (conc. and dis. opn. of Kennard, J.).)
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> "[T]he Supreme Court, however, did recently discuss generally the issue of liability for willful or wanton behavior. (Calvillo–Silva v. Home Grocery (1998) 19 Cal.4th 714, 80 Cal.Rptr.2d 506, 968 P.2d 65, disapproved on another ground in Aguilar, supra, 25 Cal.4th at p. 853, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. 19 [Calvillo–Silva].) It noted that "the case law appears relatively uniform on the following points. First, it is generally recognized that willful or wanton misconduct is separate and distinct from negligence, involving different principles of liability and different defenses. [Citations.] Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it" involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. "[Citations.] So, for example, a person who commits an assault and battery may be guilty of willful misconduct [citations], but a person who fails to perform a statutory duty, without more, is not guilty. [Citations.] While the word willful implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done. [Citations.] Thus, even though some cases of negligence may involve intentional actions, the mere intent to do an act which constitutes negligence is not enough to establish willful misconduct. [Citations.] [¶] Second, willfulness generally is marked by three

> characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril. [Citations.] As the foregoing suggests, willful misconduct does not invariably entail a subjective intent to injure. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct. [Citations.]" (Calvillo–Silva, supra, at pp. 729–730, 80 Cal.Rptr.2d 506, 968 P.2d 65; see also Ewing v. Cloverleaf Bowl, supra, 20 Cal.3d at p. 402, 143 Cal.Rptr. 13, 572 P.2d 1155; Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 742–743, 15 Cal.Rptr.2d 815.) "Ordinarily whether an action constitutes willful misconduct is a question of fact." (Colich & Sons v. Pacific Bell (1988) 198 Cal.App.3d 1225, 1242, 244 Cal.Rptr. 714.)
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> "At a minimum, Felburg illustrates the proposition that a contractor or developer cannot avoid application of section 337.15, subdivision (f), by a claim of ignorance of the existence of a serious latent defect where the evidence permits the reasonable inference that he knew or should have known otherwise." (Emphasis added).

Acosta v. Glenfed Development Corp. (2005) 128 Cal.App.4th 1278, 1293–1296. See also, *Sieg v. Fogt* (2020) 55 Cal.App.5th 77, 90–91 (Discussing the meaning of "wilful" under Bus. & Prof. Code § 7109); *Tellis v. Contractors' State License Bd.* (2000) 79 Cal.App.4th 153, 158–159; *ACCO Engineered Systems, Inc. v. Contractors' State License Bd*. (2018) 30 Cal.App.5th 80, 91–93. (§ 7110).

However, bringing claims under this concealment or wilful misconduct provision or exception to the 10 year statute of repose under Section 337.15(f) also has its disadvantages.

Contractors' insurance companies and policies typically do not cover damages caused by the intentional, wilful or fraudulent acts of a contractor, unlike case with negligence generally, or a negligent breach of contract that causes property damage, which are typically covered by a contractor's liability insurance policy.

> "II. "Expected or intended" exclusion and Cal. Ins. Code § 533"
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> . . . .
>
> "[F]irst, it is generally recognized that willful or wanton misconduct is separate and distinct from negligence, involving different principles of liability and different defenses. [Citations.] Unlike negligence, which implies a failure to use ordinary care, and even gross negligence, which connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, willful misconduct is not marked by a mere absence of care. Rather, it involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. . . . Thus, even though some cases of negligence may involve intentional actions, the mere intent to do an act which constitutes negligence is not enough to

establish willful misconduct. [Citations.] [¶] Second, willfulness generally is marked by three characteristics: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril. [Citations.] As the foregoing suggests, willful misconduct does not invariably entail a subjective intent to injure. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct. [Citations.]" (Calvillo–Silva, supra, at pp. 729–730, 80 Cal.Rptr.2d 506, 968 P.2d 65; see also Ewing v. Cloverleaf Bowl, supra, 20 Cal.3d at p. 402, 143 Cal.Rptr. 13, 572 P.2d 1155; Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 742–743, 15 Cal.Rptr.2d 815.)

. . . .

"In Downey Venture, the California Court of Appeal held that "[a] 'wilful act' under section 533 will include either 'an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable or substantially certain to result.' It also appears that a wilful act includes an intentional and wrongful act in which '...the harm is inherent in the act itself.'**...** This standard is not meaningfully different from the Acosta court's articulation of "willful misconduct" under § 337.15(f) as "involv[ing] a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences" and "not invariably entail[ing] a subjective intent to injure. It is sufficient that a reasonable person under the same or similar circumstances would be aware of the highly dangerous character of his or her conduct." Acosta, 128 Cal.App.4th at 1294–95, 28 Cal.Rptr.3d 92.

"The Court concludes that the Association's allegations of Comac's willful misconduct bring the "Underlying Action within the scope of the "intended or expected" exclusion and Cal. Ins. Code § 533. The Association alleges in the Underlying Action that the construction defects would have been observable by any knowledgeable contractor or supervisor and "any contractor who chose not to remedy [the defects] would be doing so with actual or constructive knowledge that injury was a probable result" and "any knowledgeable construction supervisor who chose not to direct the contractor to remedy the condition would have done so with actual or constructive knowledge that injury was a probable result." Dkt. No. 33–6 at ¶ 53. Under § 533, willful acts include those "intentionally performed with knowledge that damage is highly probable or substantially certain to result," not merely acts performed with the intent to cause injury. Downey Venture, 66 Cal.App.4th at 500, 78 Cal.Rptr.2d 142; see also Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 746, 15 Cal.Rptr.2d 815 (1993) (holding policy language excluding coverage for damage that is "expected or intended" "connotes subjective knowledge of or belief in an event's probability. We see no material difference if the degree of that probability is expressed as substantially certain, practically certain, highly likely, or highly probable.")."

CONCLUSION

"Accordingly, the Court concludes that ZSLL has no duty to defend or indemnify Comac in the Underlying Action, and therefore the Court GRANTS plaintiff's motion for partial summary

judgment." (Emphasis added).

Swiss Re International SE v. Comac Investments, Inc. (N.D. Cal. 2016) 212 F.Supp.3d 797, 804–807

Claims for Construction Defects Under the "Right to Repair Act"

In response to the Supreme Court's holding in *Aas v. Superior Court*, discussed above, that a negligence claim for defective construction requires that there must be resulting property damage caused by the defective construction work in order to sue the builder for negligence, the General Assembly adopted the "Right to Repair Act", sometimes referred to as "SB800" or "Civil Code § 895".

It applies only to new residential construction constructed by a developer of property for sale where a contract to purchase was signed in 2003 and after.

It establishes "standards" for what constitutes defective construction or sub-standard construction under Sections 896 and 900, and contains time limitations within which claims for violations of those standards may - or must - be brought or raised.

(https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=896).

Under the Act, property owners may bring claims against the contractor or "builder" under this statute, even though the defective work has not yet caused any resulting property damage.

The Act applies against persons who are in the business of constructing multiple homes or condominium units for sale to the general public at retail, and does not apply to a normal remodeling or single construction project not to be offered for sale to the public.

The 'claim" is initiated by serving a written claim describing the construction defects in detail, by certified mail, overnight mail or personal delivery to the "builder" or developer under Section 910, and the builder then has a limited time to investigate the claims and decide whether or not to repair the defect.

The claims process tolls - or suspends - any otherwise applicable other Statutes of Limitations by

45 or 100 days after expiration of the statutory deadlines for the builder to respond to the claim or do the repairs . (See related Article).

If the builder fails to timely acknowledge receipt of the "claim" for violations of the Section 896 Standards, the property owner is free to proceed in Court to obtain damages for violations of the building Standards, even though no 'resulting property damage' has been sustained yet.

Similarly, if the builder fails to agree to perform repairs of the defects or the violations of the standards, the property own then is also free to pursue his or her remedies for the defects or violations in Court, within the applicable Limitations period.

The builder may do the repair with its own forces, or the property owner may ask for proposals from three other contractors to perform the repairs.

The builders' offer to repair must be accompanied by an offer to mediate any disputes, and the repair work may be filmed by the property owner.

In lieu of doing any repairs, the builder may propose a monetary payment or settlement, which the property owner is free to accept or reject.

And if the builder fails to satisfactorily perform the repairs within the agreed or a reasonable time, the property owner then is also free to pursue his or her remedies for the defects or violations in Court, within the Limitations period for that defect in the Act.

CONCLUSION

As can be gleaned from the above very general discussion, the question of what Statutes of Limitation apply in a particular situation, and when a claim or cause of action has "accrued", and when and for how long a statute of limitations might be temporarily suspended or "tolled", can be quite complex and often difficult to determine in a particular factual situation.

Therefore, property owners, builders, contractors and subcontractors and design professionals should consult with experienced, competent, construction defect legal counsel promptly soon upon defects being discovered or suspected, so that rights to sue and defend are not accidently or inadvertently waived or forever lost.

N.B. The contents of this Article **do not constitute legal advice** or create an attorney-client relationship, and **you may NOT rely on it** without seeking legal advice regarding your particular, unique situation from a competent Construction Lawyer or Construction Defects attorney.

Please also note that factual situations vary, and statutes, regulations and case law are frequently changing and evolving, and these materials thus also may now be or may become outdated or incorrect.

For further information on this topic and how the current law may apply to your particular contract, project or issues, Contact Us via email, phone (415)788-1881 or visit our website at www.wolfflaw.com for other contract information.