

Statute of Repose
New Court Decision
D'Allessandro v. Lennar Hingham
Holdings, LLC

ACEC/MA

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Statute of Repose vs. Statute of Limitations

*A Statute of Limitation sets a limit on when a claim may be commenced, beginning on a trigger event (**accrual**) and subject to discovery of the claim (**tolling**).*

Statute of Limitations

What is accrual?

Accrual is a defined event that varies by type of action. It is the date when the Statute of Limitations begins to run.

Types of events that determine when a cause of action accrues:

- Date of Incident
- Date of Breach
- Date of Substantial Completion

The Statute of Limitations period begins to run on the “***date of accrual of the cause of action.***”

Statute of Limitations

What is tolling?

Tolling delays the *start* (accrual) of the defined period for when a cause of action must be brought. Reasons for tolling include:

- Discovery Rule - injury was not discovered
- Discoverability – injury was not reasonably discoverable (i.e., hidden defect)
- Fraud
- Control of Interested Party
- Other equitable considerations

With respect to claims against Design Professionals, the Statute of Limitations is typically three (3) years, but accrual may be tolled ***indefinitely***.

Statute of Repose vs. Statute of Limitations

- Unlike a Statute of Limitations, Statute of Repose:
 - Sets an ***absolute time bar*** (6 years) after which claims cannot be brought
 - No tolling
 - No requirement of discovery or discoverability
 - Applies in limited context of improvements to real property
 - Will protect engineers, architects and others
 - After SOR expires, ***absolute protection*** against claims

Statute of Repose

“Without limiting the duration of liability, architects, contractors, and others engaged in the design and construction of real property may have to, years after completing their work, mount a defense when architectural plans may have been discarded, previous versions of applicable building codes may no longer be available, memories may have faded, and witnesses may have disappeared.”

Klein v. Catalano, 386 Mass. 701 (1982).

- Explicit purpose of SOR is to protect design professionals by setting an ***absolute time bar*** against construction-related claims.

Statute of Repose

An “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*” cannot 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. ch. 260, § 2B

D'Allessandro v. Lennar – U.S. Dist. Ct.

- In *D'Allessandro v. Lennar Hingham Holdings, LLC*, plaintiff condominium association asserted claim of defective construction at a phased condominium development in Hingham, MA (Hewitts Landing).
- Defendant was the developer of the 150-unit condominium. The development included 28 buildings, built in 24 phases between 2008 and 2015.
- Defendant moved for partial summary judgment - arguing some of the claims were barred by the Statute of Repose.
- No dispute that six of the 28 buildings had been completed more than 6 years prior to commencement of the action in 2017.

D'Allessandro v. Lennar – U.S. Dist. Ct.

- Plaintiff asserted that control of the condominium was not turned over to the unit owners until the last phase was concluded in 2015. (An “accrual” argument- more appropriate to SOL.)
- Question raised whether Architect’s certificate of completion triggered the 6-year repose period; or whether certificate of occupancy was necessary. (This relates to interpretation of Statute of Repose – *not* “accrual” under SOL)
- Trial court’s ruling: ***The project constituted “one endeavor to build a single Condominium development,”*** not 28 separate buildings (or 150 individual units). Factors cited by court include: (i) all units were within scope of original project; (ii) there was one general contractor and one architect, and (iii) a single condominium trust controlled all common elements of Condominium.
- District court held: ***“As a result, the repose period starts running upon completion of the entire improvement.”***

D'Allessandro v. Lennar – U.S. Dist. Ct.

- Court acknowledged “dearth of caselaw” concerning the specific issue presented, namely, whether a large project should be segregated into separate, completed phases for purposes of the Statute of Repose.
- No “reasonably clear” precedent from the Massachusetts Supreme Judicial Court.
- Federal court agreed to submit (“certify”) the question to the SJC.
- Question presented:

“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?”

D'Allessandro – MA Supreme Judicial Court

- Donovan Hatem, LLP submitted an *amicus* (friend of the court) Brief on behalf of ACEC/ MA and AIA/ MA to present the perspective of the design professional community.
- Court agreed with the arguments asserted in the Brief, that the Statute of Repose struck a reasonable balance between the public's right to a remedy for defects in design and construction with the need to place an absolute outer limit on liability for defects.

“Where a condominium development is comprised of multiple buildings... each building constitutes a discrete ‘improvement’ for purpose 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... triggers the Statute...”

D'Allessandro v. Lennar Hingham Holdings, LLC, 486 Mass. 150 (2020)

D'Allessandro – MA Supreme Judicial Court

- SJC rejected the idea that the SOR is not triggered until the *entire* multi-phase, multi-building condominium is completed: SOR intended to avoid open-ended exposure.
- Tolling arguments do not apply – i.e., lack of control, equitable or other factors.
- There are two triggers for the 6-year limitation period; SOR begins to run upon the earlier of:
 - (i) “the opening of the improvement for use;” or
 - (ii) “substantial completion” and “the taking of possession for occupancy by the owner.”
- NOTE: Affidavit of substantial completion is not sufficient to trigger SOR. Instead, a certificate of occupancy is required.

Legislative Proposals

2019 Massachusetts House Bill No. 3260

“An Act relative to construction defect claims by condominium owners”

- If passed, House bill would tie Statute of Repose to substantial completion of ALL phases of the condominium and the turning over of the condominium from developer to unit owners.

2019 Massachusetts Senate Bill No. 930

“An Act relative to statutes of repose”

- If passed, Senate bill would generally extend the length of the Statute of Repose, from six (6) to ten (10) years.