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Governor Murphy Signs Amendment To Statute Of Limitations Tolling Claims For Construction Defects Until Transition Of Control Of Planned Real Estate Development Associations

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On October 28, 2020, we wrote an article reporting on [*Riva Pointe at Lincoln Harbor Condo. Ass'n, Inc. v. Tishman Constr. Corp.*](#), decided by the New Jersey Appellate Division on June 15, 2020. In *Riva Pointe*, the Appellate Division applied the legal precedent set forth by the New Jersey Supreme Court in [*The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC*](#) and held that the statute of limitations begins to run on a construction defect claim when the plaintiff knows or reasonably should know of the claims against an identifiable party, and that the statute of limitations can begin to run before control of the condominium association is transitioned to the unit owners. The Appellate Division recognized in *Riva Pointe* that the post-transition condominium association would not be prejudiced by a typical application of the statute of limitations because the association could pursue claims for fraudulent concealment or breach of other duties against the developer if it did not timely address alleged defects before transition occurred.

On January 18, 2022, Governor Murphy signed into law Senate Bill 396, which amends the New Jersey statute of limitations, N.J.S.A. 2A:14-1 (the "Amendment"), for planned real estate development associations, including condominium and cooperative associations (the "Associations"), and for those Associations alone. The Amendment provides that the time period for Associations to file a claim against "a developer or any person acting through, on behalf of or at the behest of the developer" shall be tolled until the date of transition of control of the Association from the developer to the unit owners. The Amendment applies to any cause of action involving an Association "that has not been subject to a final judgment dismissing the claim" as of the effective date of the Amendment. The official Statement that accompanies the Bill states that the intent was "to allow the owner-controlled board more time to file a construction defect claim by requiring the statute of limitations to begin running upon transition of developer control" rather than upon substantial completion of the project.

The Amendment creates a number of significant concerns for developers, and design professionals and contractors retained directly by developers. First, the Amendment tolls the statute of limitations for an Association's direct claims against the contractees, *i.e.*, direct contractors, of a developer but not against subcontractors of those contractors, that is, those acting "through, on behalf of, or at the behest of" not the developer but the developer's *contractors*. Although a claim for contribution or indemnification may not accrue until after the Association sues and obtains a judgment against the developer and its direct contractees, the statute of limitations for ordinary negligence and breach of contract claims by a developer or contractor against its subcontractors could expire before the Association's claims against the developer and contractor even accrue under the Amendment.

Second, the Amendment only tolls the statute of limitations for claims brought by an Association. The Amendment does not toll the statute of limitations on a developer's contractual and/or tort claims against its own contractors if the Association chooses not to sue them directly. This could leave the developer with limited recourse in certain circumstances against the parties that actually performed the allegedly defective work. By way of example, if substantial completion of a building occurs on January 1, 2020, and an inspection report is served on January 1, 2021 that raises alleged construction defects, and transition occurs on January 1, 2022, under the Amendment, the Association's action against the developer is tolled until transition. The

Association can then file a timely lawsuit against the developer on January 1, 2028. If the Association chooses to not also sue the developer's contractors, the developer's causes of action against those that actually performed the allegedly defective work will not be so tolled, and the statute of limitations on the developer's claims (likely other than contribution and indemnification) will expire a year earlier.

Third, the Amendment applies to causes of action that have not been subject to "final judgment" by the effective date of the bill. The Amendment, therefore, invites the reopening of cases that were previously resolved by way of settlement agreement, voluntary dismissal, or other order that does not rise to the level of a final judgment.

The pre-Amendment six-year statute of limitations, with the application of the "discovery rule" tolling the statute in appropriate cases for unknown, latent defects, provided adequate protection to Associations for alleged construction defects. If the pre-transition board did not address known defects in a timely manner, the post-transition board already had adequate means to hold the board accountable for any breaches of their duties. The transition of control in a common interest community is already a costly and sometimes contentious process. The Amendment, unfortunately, creates a number of circumstances, which we suspect are unintended, that could increase legal and insurance costs, and contribute to an overall lack of affordability in New Jersey. Developers are well-advised to keep close track of all of the dates related to alleged defects, transition and substantial completion, and move quickly to ensure all potentially responsible parties are timely joined in Association transition litigation.

If you have questions about construction defects in New Jersey, contact [Don Taylor](#) at 732.855.6434 or [Dan Kluska](#) at 732.855.6033.

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