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A HOMEOWNER'S GUIDE TO CONSTRUCTION DEFECT, WATER INFILTRATION & RESIDENTIAL STUCCO CASES

PROTECTING YOUR RIGHTS: THE MOST IMPORTANT ISSUES FACING HOMEOWNERS

Claims by Minnesota homeowners against builders can generally be divided into two main types. They are New Home Warranty Claims, described in Minnesota Statutes Section 327A.02, *et seq.*, and non-warranty claims, such as Negligence or Breach of Contract. Individuals faced with construction defects in their homes, whether related to water intrusion or other damage, must be aware of strict time limitations that apply to all claims involving construction defects. As described below, the time limitations for claims based on non-warranty allegations are governed by Minnesota Statutes Section 541.051, subd. 1, and claims brought under the statutory warranty are governed by Minnesota Statutes Section 541.051, subd. 4, and Minn. Stat. § 327A. Homeowners must be aware that stopping these clocks and preserving any right to compensation typically requires very specific actions beyond mere meetings or telephone conversations with their builder.

This article provides homeowners with a summary of the Minnesota statute of limitations for construction defects and the statutory New Home Warranty laws, and provides background information regarding various court interpretations on these subjects. Each case is different and this article is not to be relied upon as legal advice. Instead, homeowners faced with these issues should consult with an attorney experienced in this area of law.

Some homeowners are under the incorrect belief that ongoing discussions or negotiations with a builder or its insurers regarding resolution of a problem will automatically stop or toll the statute of limitations and provide additional time to commence suit. Generally, this is not the case. Very strict deadlines (discussed below) must be met to preserve warranty and non-warranty claims. Homeowners should know that if the time limitations lapse, under the law they

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are not entitled to recovery for the damages to their home – regardless of the extent of those damages. Homeowners must also be extremely wary of entering into even the simplest conversations with representatives of builder insurers (including adjusters and engineers), as history has shown that these representatives are generally focused solely on minimizing their liability and creating statute of limitations defenses.

Very often, insurers will offer a settlement that appears satisfactory at face value, but in reality does not take into account the complex and hidden nature of the damage. Homeowners should consult an attorney before they give any statements to these insurers. No recorded statement by the homeowner or other official statement sought by a builder's insurer will likely have any benefit to a homeowner – and there is no prerequisite to giving a "timeline" in order to recover for this type of damage. The questions in such an interview often will not seek to identify the problem suffered by the homeowner but, instead, will be focused on the date of discovery of the issue so that the insurer can start building a statute of limitations defense.

TWO COMMON MISTAKES HOMEOWNERS SHOULD AVOID

Homeowners frequently make two central mistakes that may result in a complete inability to recover the cost of repair for damages in the home. The first involves a misunderstanding of what homeowners commonly refer to as the "ten-year warranty" on their home. Homeowners often presume that the Minnesota New Home Warranty (described below) gives them the right to make a claim any time within ten years of the completion of their home. Instead, the New Home Warranty is restricted by both the statute of limitations and the statute of repose found at Minn. Stat. § 541.051. What this means, according to the case law, is that if homeowners wish to bring a warranty claim under the New Home Warranty they must do so within two years of the breach of that warranty. For example, if homeowners with a five-year old home discover a warranted defect, satisfy their written notice requirement (which is important and described below), receive information from the builder that the warranty will not be honored (*i.e.*, a breach of the warranty), and wait three years before taking any action, the owners of the now eight-year old home could be found to have waited past their statute of limitations to make their claim. In that circumstance, the homeowners can make no recovery under the New Home Warranty – or even under a common law theory. In truth, likely they will have absolutely no ability to recover.

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The "ten-year" language often referred to in the New Home Warranty does not give homeowners ten years within which to make claims for problems discovered. Instead, it protects *builders* in that it restricts homeowners from making a claim for any defect or injury (including breach of warranty) <u>discovered</u> more than ten years after the substantial completion of the home. The two-year "statute of limitations" falls within this ten-year period.

The second very common mistake that has often injured homeowners involved in construction defect and water infiltration claims involves interaction with builders and insurers – and the mistaken belief that contacting the insurer or builder without written notice somehow constitutes an initial claim, stopping the statute of limitations clock. Further complicating the issue is a false impression that written notice alone preserves all rights. Instead, written notice is a prerequisite to a claim.

Homeowners also often mistakenly believe that the investigators, engineers, and adjusters acting on behalf of the builder's insurers have an interest other than the builder's in mind when negotiating a resolution. The builder's representative's central interest will be two-fold: (1) document information which they can use to support a defense against the homeowners for statute of limitations (they will interview or even record a homeowner making statements regarding the history of the problem in an attempt to argue that the problem was discovered more than two years prior to the date when the homeowner formalizes a legal claim), and (2) to dissuade the homeowners from seeking their own representation in the form of an engineer or legal representation so that a negotiated settlement of the claim will be based on *as narrow a scope of repair as they can convince the homeowners to accept* which often differs from the proper complete scope of repair.

Homeowners can avoid these two key errors by seeking the representation of a qualified structural engineer to evaluate the scope of the damage properly, and by seeking legal advice regarding their legal rights and obligations. Following rounds of intense conversations with insurers, many homeowners have been very surprised to receive correspondence informing them that the conversations will cease based on statements made by the homeowners, which support the conclusion that more than two years passed since the discovery of the injury or the alleged breach. These letters are typically plain and to the point – specifically informing the homeowners that the conversations are over and that no offer whatsoever will be presented.

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This hard fast rule regarding the enforcement of deadlines also applies to the six-month written notice requirement described below, which requires that a homeowner making a 327A.02 warranty claim notify the builder **in writing** within six months of the discovery of the injury. Telephone calls, interviews, meetings, and even negotiations for settlement do not satisfy the *written* notice requirement. The strict application of these deadlines was recently relied upon by the Minnesota Court of Appeals in *Collins v. Buus*, 2006 WL 1985411. In this matter, the court found that a homeowner who had met with the builder's engineers at his home and offered a recorded statement regarding the history of issues, and had held other meetings with the builder and the builder's insurer, did not meet the written notice requirement despite the fact that the homeowner's statement had been reduced to writing. Cases like *Collins* demonstrate the strict requirements with regard to satisfaction of deadlines on legal claims.

THE MINNESOTA HOME WARRANTY: MINNESOTA STATUTE SECTION 327A.02

The statutory warranty for defects in construction of a property is found in Minnesota Statutes Section 327A.02, which provides the following warranty for home or "dwelling" owners:

> **Subd. 1. Warranties by vendors.** In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that: (a) during the one-year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to non-compliance with building standards; (b) during the two-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems due to non-compliance with building standards; and (c) during the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects due to non-compliance with building standards.

* * *

Minn. Stat. § 327A.02 defines "major construction defects" as referenced above in part (c) as follows:

> Major construction defect means actual damage to load bearing portion of dwelling of the home improvement, including damage due to subsidence, expansion or lateral movement of soil, which

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> effects the load bearing function and which vitally affects or is eminently likely to vitally use of the dwelling or the home improvement for residential purposes. Major construction defect does not include damage due to movement of soil caused by flood, earthquake or other natural disaster.

This statute creates a new construction warranty for homeowners even where none has been expressly offered by the builder. Homeowners faced with water intrusion claims and other construction defects often bring a lawsuit alleging breach of this warranty, as well as the non-warranty (common law) claims such as negligence and breach of contract. As set forth below, however, additional time restrictions and obligations on the part of the homeowner apply to bringing a breach of statutory warranty claim in Minnesota. Specifically, under Minnesota Statute 327A.03 entitled "Exclusions," the following obligation is placed on homeowners as a *first step* in the breach of statutory warranty claim process. In relevant part, the statute reads:

> The liability of the vendor or home improvement contractor under Sections 327A.01 to 327A.07 is limited to the specific items set forth in Sections 327A.01 to 327A.07 and does not extend to the following:
>
> (a) Loss or damage not reported by the vendee or the owner to the vendor or the home improvement contractor in writing within six months after the vendee or the owner discovers or should have discovered the loss or damage; unless the vendee or owner establishes that the vendor or home improvement contractor had actual notice of the loss or damage.

This provision is a change effective in 2011 which no longer requires *written* notice to the builder. However, "establishing" that the vendor (builder) had notice would be much easier if the notice is provided in writing and a copy of that writing is saved by the homeowner. As such, while actual notice to the vendor is now sufficient in order to avoid this exclusion with the warranty claim, prudence suggests that notification in writing may be the best way to satisfy the obligations under this provision.

The 2011 changes to the warranty also place additional obligations on the homeowner. Under Minn. Stat. § 327A.02, subd. 4 entitled "Response from Vendor or Home Improvement

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Contractor to Notice of Claim; Right to Inspect" the following was included as a means to promote resolutions of these claims without litigation:

> (a) The vendee [homeowner] or owner must allow an inspection for purposes of the preparation of an offer to repair the alleged loss or damage under subdivision 5. This inspection must be performed by the vendor or home improvement contractor within 30 days of the notification under § 327A.03, clause (a) [see above]. Any damage to the property caused as a result of an inspection must be promptly repaired by the inspecting party to restore the property to its pre-inspection condition.

Although courts have yet to interpret this new statutory provision, it can be presumed that once the builder has been provided with notice (typically written) of the warranty claim, they have 30 days from receipt of said notice to conduct an inspection. They will be responsible for any damage caused as a part of that inspection. The purpose of the inspection is to give them an opportunity to make an offer to repair the complained of issue if they so choose. After this notice is provided to the builder and the inspection process has begun, the statute of limitations clock is tolled from the date of that notice until the latest of the following: (1) the date of completion of any home warranty disputes resolution process under 327A.051 or (2) 180 days, or (3) completion of the repairs as described in an offer to repair. It should be noted that pursuant to Minn. Stat. § 327A.02, subd. 5, the builder must provide to the homeowner (if they so choose) a written offer to repair which must include the scope of the proposed work, and the proposed date on which the work would begin, as well as an estimated date of completion.

It is important to note that under the new version of the Minnesota New Home Warranty Statute, a "Home Warranty Dispute Resolution" process has been included under Minn. Stat. § 327A.051. Under this Home Warranty Dispute Resolution process, when a homeowner and a contractor do not agree that any written offer of repair by the builder is sufficient, they must enter the Home Warranty Dispute Resolution process. If no offer to repair is made by the builder/vendor whatsoever, suit may be commenced immediately. The Home Warranty Dispute Resolution is a **non-binding** process whereby the process begins upon written application to the Commissioner at the Department of Labor to enter the process. Under Minn. Stat. § 327A.051, subd. 2 entitled Dispute Resolution Process, the "request must include the complete current

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address and full name of the contact person for each participating party." Homeowners may certainly utilize an attorney to assist them with this process. The process includes in pertinent part, the following:

> (b) Within ten days of receiving a written request, the Commissioner shall provide each party with a written list of three qualified neutrals randomly selected from the panel of neutrals established under subd. 1. The Commissioner shall provide complete contact information for each qualified neutral.
>
> (c) Within five business days after receipt of the list from the Commissioner the parties shall mutually select one of the three qualified neutrals identified by the Commissioner to serve as the qualified neutral for their dispute. If the parties cannot mutually agree on a neutral, the vendor or home improvement contractor shall strike one of the neutrals from the list, the vendee or the owner shall subsequently strike one of the remaining neutrals from the list, and the remaining neutral shall serve as the qualified neutral for the dispute resolution process. The parties shall notify the selected qualified neutral and the Commissioner of the selection.

After the neutral has been selected, the parties attend an in-person conference, said conference must occur 30 days after the neutral selection unless the parties agree otherwise. There is a $25.00 fee for each party to enter into this process. Then the following procedure must occur:

> (b) At least seven days before the conference, each party must provide the qualified neutral and other party with all information and documentation necessary to understand the dispute, or the alleged the loss or damages.
>
> (c) After reviewing the information and documentation provided by the parties and after consulting with the parties at the conference, the neutral shall issue to the parties a **non-binding** [emphasis added] written determination which must include to the extent possible findings and recommendations on the scope and amount of repairs necessary, if any. The qualified neutral shall mail the

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determination to each party within ten days after the conference.

(d) The parties shall share the expense of the qualified neutral's billed time equally unless otherwise agreed. The neutral's billed time for evaluation of documents, meeting with the parties, and issuing a determination must not exceed six hours unless agreed to in writing by the parties. The neutral must identify the neutral's hourly rate to the parties.

This procedure is designed to avoid litigation in certain circumstances. While this process would not go forward if no written offer is made by the vendor, the intent of the Legislature was to create a process whereby, at a minimum, smaller disputes can be resolved without litigation. It is important to note that the process, however, is non-binding and if either party disagrees with the findings of the neutral, they both could enter into litigation on a standard warranty and/or common law claim. The written determination by the neutral is not admissible as evidence in any future legal action. An attorney can provide assistance with this process in many circumstances.

THE STATUTE OF LIMITATIONS AND STATUTE OF REPOSE FOR DEFECTS IN CONSTRUCTION

The statute of limitations for making a legal claim (a lawsuit) for defects in the construction or repairs of a home is set forth in Minn. Stat. § 541.051. For non-warranty claims, such as a claim for negligence, homeowners must commence an action within two years from the "date of discovery of the injury" or their claims may be barred. To bring a warranty action (often done simultaneously with a non-warranty action) the homeowners must first satisfy their "written notice" obligation discussed above and bring their action within two years of any breach of the warranty rather than discovery of the injury. All claims should be preserved and legal advice should be received when negotiating this complex issue.

Individual builders often have good intentions when engaging in ongoing discussions regarding the resolution of a claim. However, once they inform their insurers of the claim, the focus is often shifted to creating a statute of limitations defense. **A homeowner should never presume that a builder's insurer or a builder's insurer's engineer has the homeowner's**

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best interests in mind. These insurers or engineers will often interview the homeowners and focus the questioning on the subject of "date of discovery" (the date the statute of limitations clock began to run). The scope of the defect, or how the defect has affected the homeowners' lives, is of little interest to them. Extreme caution should be exercised when responding to questions from builders or their insurers which begin "[W]hen did you first notice …" or "[H]ow long has 'x' been going on." The questions are asked solely to form a basis to deny a claim and, in truth, should alert a homeowner that legal advice is necessary. **Except in rare circumstances, the only way to stop the statute of limitations clock is to commence a lawsuit**.

The statute of limitations for home defect cases (Minnesota Statutes § 541.051) states (in relevant part) the following:

Chapter 541. Limitation of time, commencing action.

541.051. Limitation of action for damages based on services or construction to improve real property.

1(a) Except where fraud is involved, no action by any person in contract, tort, or otherwise, to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of any improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, materials or observation of construction or construction of the improvement to the real property or against the owner of the real property **more than two years after the discovery of the injury** [emphasis added], nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when the construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

Courts have generally interpreted this paragraph to mean that a homeowner must bring a lawsuit for defective construction within two years after the date of the discovery of the injury in

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construction, and only if the injury has been discovered no more than 10 years after the completion of the construction itself.

Subdivision 4 of this statute applies to actions for breach of the New Home Warranty and states:

> **Subd. 4. Applicability**. For the purposes of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach. **In the case of an action under section 327A.05, which accrues during the ninth or tenth year after the warranty date, as defined in section 327A.01, subdivision 8, an action may be brought within two years of the discovery of the breach, but in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date . . . .**

Under this section, the clock for warranty claims begins to run upon the breach of warranty and not upon discovery of the injury.

A SELECTION OF CASES ADDRESSING THE STATUTE OF LIMITATIONS AND STATUTE OF REPOSE FOR WARRANTY AND NON-WARRANTY CLAIMS

Many homeowners presume that "discovery" date is not the date the effects of the defect are discovered (for example, pooling water or staining below a window) but, instead, the date the cause of the defect is discovered. Courts often disagree with this argument.[1] The cases below provide insight as to how Minnesota courts have treated the issue of date of discovery and statute of limitations.

***Vlahos v. R and I Construction of Bloomington*, 658 N.W.2d 917 (Minn. Ct. App. 2003) (*rev'd* 676 N.W.2d 672 (Minn. 2004))**. This case involves a homeowner with water rot problems. The facts were similar to many other Minnesota water infiltration problems in homes throughout the State of Minnesota. The home was constructed in 1991 for the Rovicks, the first

[1] But, *see* ***Wittmer v. Ruegemer*, 402 N.W.2d 187 (Minn. Ct. App. 1987)** which found that the statute of limitations began to run not upon the discovery of water from the defective septic system but instead upon receipt of a report from an expert stating that the system was defective. (This case should not be relied upon when a

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purchasers. While residing in the home the Rovicks experienced various water leakage problems, including condensation and leaky windows. They made efforts to correct these problems through the use of dehumidifiers and caulking. In 2000, the Vlahoses, the second owners, purchased the home and began a large remodeling project. During this project, they discovered a large amount of water damage in the interior walls of the home. Vlahos commenced a lawsuit in 2001 and the builder sought to have the case dismissed based on the two-year statute of limitations, arguing that the discovery by the Rovicks began the statute of limitations period.

The trial court and the Minnesota Court of Appeals found that the Vlahos' claim was barred by the statute of limitations. Essentially, it was found that the statute of limitations clock under Minnesota Statute 541.051, subd. 1, began to run upon the discovery of the damage by the previous homeowners. The Minnesota Supreme Court, however, reversed the decisions of the trial court and the Minnesota Court of Appeals and ruled in favor of Vlahos, finding that the claim was still viable.

The Minnesota Supreme Court found that the statute of limitations clock for a warranty claim does not begin upon discovery of the injury (as with a non-warranty claim such as

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homeowner is at or near two years since the initial discovery of water in a water infiltration case as other courts have decided the issue differently, as set forth above.)

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negligence or breach of contract) but, instead, the warranty statute of limitation clock begins to run when the homeowners discover or should have discovered the builder's refusal or inability to ensure the home is free of major construction defects.

The *Vlahos* court also clarified the definition of "major construction defect" as referenced in the Minnesota New Home Warranty Statute. Prior to this decision, builders had argued that warranty claims could only be asserted for structural damage that was present at the time of construction. For example, they argued that a defect in the structural support system of the home needed to be present at the time construction was completed. The court in *Vlahos* clarified that this definition extended to actual damage of the load bearing portions of the dwelling occurring after the completion of construction, for example, damage to the load bearing portions of the building which occurred as a result of water infiltration which caused the load bearing portions of the dwelling to become water saturated or rotted.

This is a landmark case for homeowners facing water infiltration and construction defect issues.

***Independent School District No. 775 v. Holm Brothers Plumbing & Heating, Inc.*, 660 N.W.2d 146 (Minn. Ct. App. 2003)**. A school district brought claims related to an alleged defect in the heating system of a school building built in 1993. The heating system was completed in 1994. Between 1996 and 1998, a heating, ventilation and air contractor was called twelve times to make repairs to the system. In 1999, the school district hired an engineer to analyze the cause of the failure. In 2000, the engineer stated that the reason for the failure was due to improper installation. The school district (the building owner) commenced an action in 2001. The trial court dismissed the property owner's action as barred pursuant to the statute of limitations. Significant to homeowners with water infiltration issues, the Court of Appeals noted that:

> For an action brought in court, the limitations period under Minnesota Statute Section 541.051, subd. 1, begins to run when actionable injury is discovered, or with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known.

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***City of Minneapolis v. Architectural Alliance,* 2006 WL 234804 (Minn. App. August 15, 2006) (unpublished).** This case differs from earlier cases which found that the discovery of *any* injury began the clock for all injuries or defects in the property. In this matter, the court found that a "question of fact" existed as to whether or not the clock began to run on a separate defect based on the discovery of defects in the concrete work on the property.

***Hoffman v. Van Hook,* 2007 WL 1053816 (Minn. App. April 10, 2007) (unpublished).** This matter involves a claim by a homeowner based on water infiltration and stucco defects. The homeowner had been told in 2000 that stucco failure was the result of a structural issue on the home. More than two years later, the homeowner had the home tested by a water testing company where the test revealed several areas of high moisture. The homeowner argued that the discovery of the defect occurred upon the moisture testing. The court found that upon notice of the structural issue more than two years prior to commencement of the lawsuit, the homeowner's clock began to run and found that the homeowner's claim was barred by the statute of limitations.

It should be noted, however, that this case could create a question of fact, thereby giving the homeowner the right to have a jury decide the case on the issue of whether cosmetic cracks in a stucco façade actually would begin the running of the statute of limitations. Some defendants and builders would argue that the discovery of cracks in stucco constitutes a discovery of a structural defect. This case appears to require a more specific knowledge of structural defects in the property for the clock to begin to run. This case may assist a homeowner in arguing that specific information related to structural defects or damages are required in order for the statute of limitations clock to begin to run while at the same time it goes against the homeowner's belief that moisture testing results are necessary to begin the clock when previous knowledge of structural damage existed.

***Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487 (Minn. Ct. App. 2002)**. In this case, the county was aware of minor defects (leaking) in a building it owned shortly after the project was complete. Later, it became aware of highly significant defects in the building. The county brought an action against the contractors and architects who designed and constructed the building. The defendants immediately brought a motion to have the case dismissed based upon the expiration of the statute of limitations. The court found that the applicable two-year statute of

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limitations began to run when "with due diligence the injury **should have been discovered**, regardless of whether the precise nature of the defect causing the injury was known." Builders will often rely on this case to attempt to establish that a homeowner's time deadlines have not been met.

***Koes v. Advanced Design, Inc.*, 636 N.W.2d 352 (Minn. Ct. App. 2001)**. In this "date of discovery" case under the New Home Warranty laws, the homeowner moved into the residence in 1997 and found drain tile and heating problems in July 1999. In late 1999, the homeowner provided written notice to the builder of the problems.

The court faced the issue of whether a homeowner who brings claims that are barred pursuant to Minn. Stat. § 327A.02 (the Minnesota two-year New Home Warranty) but otherwise complies with the statute of limitations in Minn. Stat. § 541.051 (*i.e.*, sues within two years from the date of discovery) may recover damages. The court decided in favor of the homeowner and essentially left an open question regarding homes that are more than ten years old. The issue of claims for homes which are older than ten years was decided as of August 1, 2004 by an amendment to the statute of limitation found at Minn. Stat. § 541.051, Subd. 4, as described above. As stated above, Minn. Stat. § 541.051 sets forth a ten-year statute of repose which requires that any claim be brought within ten years after the completion of the construction (or eleven or twelve years if the defect is discovered in the ninth or tenth years).

***Metropolitan Life Insurance Co. v. M. A. Mortenson Companies, Inc.*, 545 N.W.2d 394 (Minn. Ct. App. 1996)**. This case is often utilized by builders seeking a harsh result against homeowners on the statute of limitations issue. In this case, the building owner noted water leakage in late 1987 and early 1988. Thereafter, water leakage was common in the building. In 1992 and 1994, experts retained by the building owner reported that the leakage was the result of defects in the building's windows. Ultimately, a variety of defects were identified, all of which constituted separate, distinct sources of water. The property owner brought suit and was confronted with a motion to dismiss its case based upon the statute of limitations. The property owner argued that each defect constituted a separate and distinct issue and the beginning of separate statute of limitations clocks.

The *Metropolitan Life* court focused on the continuing nature of the problem and refused to allow the property owners to go forward with their claims.

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The *Metropolitan Life* case suggests to homeowners that even if the defects are from a variety of sources, courts may find that the statute of limitations began to run on the date of the discovery of the first problem.

***Thorpe v. Price Brothers Company*, 441 N.W.2d 817 (Minn. Ct. App. 1989)**. Mr. Thorpe's leg was injured by a defect in a building at his place of employment. Mr. Thorpe brought a lawsuit more than two years after the injury occurred, claiming that he did not "discover" the defect to the property until he and his attorney inspected the property.

In *Thorpe*, the Minnesota Court of Appeals held that:

> Given these facts, Thorpe either discovered or with reasonable diligence should have discovered the defective and unsafe condition [of the improvement to real property] on the date he was injured. The fact that he was unaware of the exact nature of the defective and unsafe condition until he was allowed to inspect it [property] does not preclude [dismissal of his case on the basis of statute of limitations] . . . .

In the context of a water intrusion case, it is expected that a builder who is arguing for the application of *Thorpe* would argue that the discovery of any water in a house and not the *reason* for water in the house, constitutes the date of discovery.

***Lake City Apartments v. Lund Martin Company*, 428 N.W.2d 110 (Minn. Ct. App. 1988)**. The property owner experienced water leaks from pipes in 1981 and 1982. After a repair, the leaks stopped until 1984. The builder argued that because there had been some leaks more than two years prior to the commencement of a lawsuit, the building owners should recover nothing.

Ultimately, the court found that the date of discovery is a "question of fact" for a jury. The issue of "question of fact" is highly relevant for homeowners faced with a builder's statute of limitations defense. Builders will often cite a variety of cases supporting the proposition that signs of any damage constitute date of discovery. Homeowners will often cite this case (*Lake City)* and others for the proposition that "date of discovery" is not an issue for a judge to decide but instead is an issue for a jury to decide. In that context, if the court accepts this argument, the homeowner's case is not immediately dismissed. The best protection against having to rely upon this argument is commencing a lawsuit within two years of any signs of defects in a home.

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CASES ADDRESSING "TOLLING OF STATUTE OF LIMITATIONS"

Many homeowners work with their builder or their builder's insurers upon discovery of issues with their home to try to resolve the issues. If this process takes more than two years from the discovery of the first sign of a problem, the homeowner may ultimately recover nothing. If the homeowner waits more than six months from the discovery of the issue before writing a simple letter notifying the builder of the problem, their New Home Warranty claim may also be waived. Every homeowner should be aware that once they discover a problem they have six months to send a brief letter notifying the builder of the problem and giving the builder an opportunity to repair.

There are only two possible ways for a homeowner to bring an action for a non-warranty claim more than two years after the date of discovery. The first is fraud, which is essentially self-explanatory (the builder must commit fraud against the homeowner in relation to the defect). The second is known as "estoppel" or equitable tolling whereby the clock is stopped due to some action of the builder.

Under the doctrine of estoppel and equitable tolling, if *during* the two years after the date of discovery certain prerequisites are met, the builder may not be able to successfully argue expiration of the statute of limitations upon commencement of a lawsuit. Many homeowners believe that simple discussions or even negotiations with the builder will somehow automatically stop the statute of limitations clock. As the *Oreck* case below clearly states, this is generally false. Instead, some very clear conduct by the builder must occur for the statute of limitations to be stopped.

A property owner should never assume that the clock has been stopped by equitable tolling. If the two-year anniversary of discovery of the defect is approaching, suit must be immediately commenced. Relying on a tolling or equitable estoppel argument is generally considered a major gamble for a homeowner. The court decisions are far too inconsistent for any homeowner to allow the two-year clock to lapse following the date of discovery on their simple belief that they may assert an estoppel argument.

Even if a homeowner is in negotiations with a builder and believes that the builder has made assurances that a repair will occur, and an important anniversary is approaching, legal

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counsel should be sought to confirm that all rights are preserved. Since many cases have found that inspections, meetings, and half promises do not stop the statute of limitations clock, homeowners should be aware of the inconsistent court decisions. The only surefire absolute way to stop the statute of limitations clock from ticking is to commence a lawsuit.

***City of Fergus Falls v. Sirny Architects LLP,* 2006 WL 330162 (Minn. App.) (unpublished).** In this matter, a claim was brought by the City of Fergus Falls against architects for the design of a city building. The court addressed the scope of an estoppel in this matter, wherein the builder or defendant commenced an act tolling the statute of limitations clock, estopping the defendant from arguing statute of limitations. The court noted the following:

> When a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired, that party may be estopped from asserting a statute of limitations defense if the injured party reasonably and detrimentally relied on the assurances or representations (citing *Rhee*).
>
> *Estoppel* is an equitable doctrine addressed to the discretion of the court and is intended to prevent a party from taking unconscionable advantage of his own wrongs by asserting strict legal rights. To establish a claim of estoppel, plaintiff must prove that the defendant made representations or inducements upon which plaintiff reasonably relied and that plaintiff will be harmed if the claim of estoppel is not allowed. (*Citing, Petro Chemical Company v. U.S. Fire Insurance Co.,* 277 N.W.2d 408, 410 (Minn. 1979).)
>
> Estoppel does not continue indefinitely if the circumstances relied on to justify estoppel cease to be operational. At that time, a defendant must proceed with due diligence to assert its claim against defendant. Estoppel depends on the facts of each case and is ordinarily a fact question for the jury to decide. However, when only one inference can be drawn from the facts, it becomes a question of law.

This means that typically the jury will decide whether the defendant is estopped from arguing statute of limitations given a certain set of facts. However, when reasonable people could not disagree on the issue, the court may dismiss the case and end the homeowner's claim.

***Fuhr v. D. A. Smith Builders, Inc.,* 2005 WL 3371035 (Minn. App.) (unpublished).** This case involves a typical stucco water infiltration claim in a residence. It is significant in the

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context of the written notice deadline which requires notice to the builder within six months of discovery of the injury or structural issue in order to go forward with a New Home Warranty claim. In this case, the court gave a possible exception to the hard and fast written notice requirement in its footnote, where it noted:

> There is no claim that the Fuhrs gave any written notice to Smith's insurer. In an appropriate case, there might be a basis for estoppel or waiver of a written notice when the builder or the insurer, as its agent, acknowledges the homeowner's claim. We do not consider this argument because it was not presented in this case.

Thus, *Fuhr* suggests that some homeowners who have failed to provide written notice may benefit from an estoppel argument. *But*, *see, Collins v. Buus,* 2006 WL 1985431 (July 18, 2006) (unpublished), wherein the Court of Appeals found that a homeowner who had met several times with the builder's insurer, had allowed the builder's insurer to inspect his home, had given a recorded statement that was later typed by the insurer, and who had allowed the builder's insurer's engineer to inspect the home had not satisfied the written notice requirement under 327A.02 (the New Home Warranty) and, therefore, could not go forward with a New Home Warranty claim. *Fuhr* differs slightly than the typical estoppel claim in that it gives hope to some homeowners who have not provided written notice of the defect but have interacted significantly with the builder. Decisions like *Collins* convince homeowners that written notice immediately following discovery of an injury is required under the statute.

Iverson v. Chicilo Homes, Inc., **2006 WL 1891130 (Minn. App. July 11, 2006) (unpublished).** In the *Iverson* case, the court found that the statute of limitations began to run not on first discovery of an apparent sign of a defective septic system (*i.e.*, sewage seepage) but, instead, upon notification from the building official that the septic system did not comply with the building code. This is a different scenario than the typical equitable tolling case in that the typical equitable tolling case stops the clock when the builder promises to repair a discovered defect or, in the alternative, attempts to repair the discovered defect and the property owner reasonably relies that the repairs have worked.

All of the equitable tolling cases are very fact sensitive. The concept of equitable tolling should be pursued only when a claim is being prosecuted by a property owner when an argument against an affirmative defense of statute of limitations is needed.

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***Fueling v. City of Plymouth,* 2006 WL 2129772 (Minn. App. August 1, 2006) (unpublished).** In this matter, the property owner argued that the statute of limitations had been equitably tolled as a result of the city's effort to repair. The court found that the statute of limitations and statute of repose (the two-year deadline to bring a claim and the rule that nothing can be brought more than ten years after completion of the projection) were not revived by later efforts of the contractor to address the problem. An example of this in the context of a construction defect on a residence would be if a contractor were to make an attempt to repair or promise to repair after the statute of limitations had passed, it would not revive the statute of limitations for the property owner and allow them to go forward successfully with the claim in theory. Again, fact situations in specific cases differ and this case reveals how equitable tolling should not be relied upon by a property owner who owns a ripe claim within the statute of limitations.

***Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618 (Minn. Ct. App. 2000)**. The owners of a newly constructed home brought an action against the builder alleging construction defects. The homeowners observed leakage from the floors and windows during heavy rains and they complained to the builder, who made repeated assurances that the defect would be repaired and tried unsuccessfully for several years to repair the problem.

The homeowners bought the home from the builder in December 1993 and the following spring (1994) discovered water leakage during heavy rains. The builder assured the homeowner that the problems would be fixed beginning in 1994 and continued to make these assurances, along with several unsuccessful repair attempts, until 1998. Because the problems continued, the homeowners began a lawsuit in 1998. The builder claimed that the homeowners were entitled to no recovery because the homeowners' claims were barred under the statute of limitations. The trial court dismissed all of the homeowners' claims, stating that the statute of limitations had expired prior to the commencement of the lawsuit. The court noted:

> There is no dispute that the [homeowners] discovered substantial leakage in the spring of 1994. But a builder may be estopped [prevented] from asserting the bar of statute of limitations if his conduct satisfies the elements of equitable estoppel:
>
> (1) There must be conduct—acts, language or silence—amounting to a representation or concealment of material facts.

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(2) These facts must be known to the party estopped.

(3) The truth concerning these facts must be unknown to the other party claiming the benefit of estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.

(4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party or under such circumstances that it is both natural and probable that it will be so acted upon it.

(5) The conduct must be relied upon by the other party and thus relying, he must be led to act upon it.

(6) He must in fact act upon it in such a manner as to change his position for the worst.

The court of appeals found that when all of these elements are satisfied, or when reasonable minds could disagree as to whether all of the six elements are satisfied, the homeowners are entitled to at least present their case to a jury rather than have their case dismissed in its entirety. The court went on to note:

> When a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired, the party may be estopped from asserting a statute of limitations defense if the injured party reasonably and detrimentally relied on the assurance or representations (*citing Hydra Mack v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990)).

The *Rhee* case gives hope to some homeowners who have waited more than two years from first discovering a problem to commence suit. However, the court did note that in the event only one reasonable inference can be made as to whether the builder engaged in acts causing estoppel, the homeowner will not then receive the benefit, their case will be dismissed, and they will not be able to recover. The court noted, however, when reasonable people could differ as to whether the six elements of estoppel are present, the homeowner (luckily for them) will be allowed to present their case to a jury.

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Oreck v. Harvey Homes, Inc.**, 602 N.W.2d 424 (Minn. Ct. App. 2000)**. The homeowners in this matter contracted with the builder for the construction of a stucco home in 1994. Under the contract the builder was specifically not defined as a general contractor on the project. The homeowners worked directly with the stucco provider during the construction of the home. Construction was completed in 1995. The builder communicated a number of the homeowners' complaints to subcontractors despite its position that it was not the general contractor.

After the homeowners moved into the property they experienced leaking from rain, leaking from ice dams and issues related to defective stucco and windows. The builder requested the stucco subcontractor perform stucco repairs. The stucco contractor completed repairs in 1995. The builder sent one of its own employees to add caulking to the home but this effort did not stop the leaking problems. In 1996, the builder sent a window manufacturer to the home to inspect the windows. This window manufacturer concluded that there was no problem with the manufacture or installation of the windows.

The homeowners commenced a lawsuit in November 1997 – just days after the two-year anniversary of the discovery of the defects in the home. Both the builder and the stucco manufacturer ultimately made a motion to the court asking the court to dismiss the homeowners' case in its entirety based on the two-year statute of limitations.

The court also considered the issue of whether the statute of limitations clock was stopped because of the builder's responses to complaints prior to the lapse of the two-year statute of limitations. The court used the term "equitable tolling" for its analysis of this issue, although some courts use the term "estoppel" to analyze this question. The court noted:

> Estoppel depends on the facts of each case and ordinarily presents a question for the jury.

(Citing Brenner v. Nordby, 306 N.W.2d 126 (Minn. Ct. App. 1981).) These holding benefits homeowners, as the court stated that the issue of whether the statute of limitations was tolled (stopped) is a question for a jury to decide. When a question is for a jury to decide, the builder may not simply move to have a case dismissed immediately upon commencement of the action. The court noted that "the primary issue in this case is whether [the builder] made assurances to

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the [homeowners] that they would repair the leakage in the windows, roof and sockets." The court also noted that specific correspondence from the builder attempted to blame the water leakage on other contractors. This was a factor in deciding whether the builder made assurances that it would correct the problems, and ultimately revolved around the question as to whether the homeowners could maintain a claim more than two years after the discovery of the first water. Ultimately, the court found while the homeowners claimed that the builder had made assurances of repair, the facts indicated that the clock was not stopped, the statute of limitations had expired, and the homeowners received nothing.

***Mutual Service Life Insurance Company v. Galaxy Builders, Inc.*, 435 N.W.2d 136 (Minn. Ct. App. 1989)**. A building owner brought an action alleging defects in the construction against a general contractor who constructed the building, the floors of which were required to be 4 inches to 6 inches thick. Approximately one year after the building was constructed, it was discovered that the floors actually ranged from 2-1/4 inches to 5 inches thick, causing the floors to fail.

The property owner commenced a lawsuit more than two years after discovering the actual insufficient thickness of the floor. The court found that even if the hidden nature of the defect constituted "fraud" pursuant to Minn. Stat. § 541.051, once the defect was discovered, the statute of limitations was no longer "tolled." As such, although the court allowed the building owners to continue their case on the basis of estoppel (assurances that the building would be fixed by the builder), it found that fraud stops the clock only until the fraud is discovered.

As these cases illustrate, legal claims involving construction defects resulting in water intrusion, mold or other damage are subject to strict time limitations and often-complex legal interpretations. It is important for homeowners to understand their rights and take action in a timely manner. Moreover, as each case is different, homeowners faced with this issue should consult an attorney with specific experience in this area of law.

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HELLMUTH & JOHNSON, PLLC is one of Minnesota's fastest growing law firms. Our construction defect/water infiltration practice focuses on the representation of individual homeowners, homeowner associations and other property owners with their claims against builders, subcontractors and building product manufacturers. At Hellmuth & Johnson we pride ourselves on our responsiveness to our clients and our attention to detail. Each of our clients benefits from our experience in the areas of construction and real estate law.

Construction defects, water infiltration, mold and stucco defects are increasingly common issues with homeowners throughout the State of Minnesota and involve legal issues requiring the assistance of an attorney. Each step of the process of a claim or a lawsuit related to home construction is complex and Hellmuth & Johnson, PLLC strives to make the process seamless and reduce the stress for our clients. Hellmuth & Johnson, PLLC also strives to keep the public informed on these issues by regularly conducting seminars and publishing newsletters on related topics. Contact Hellmuth & Johnson, PLLC with any questions related to construction defects, water infiltration or stucco defects that you may be facing.

We meet the objectives of our clients by exceeding their expectations.

Hellmuth & Johnson, PLLC
8050 West 78th Street
Edina, MN 55439
(952) 941-4005
www.hjlawfirm.com
www.mnwaterintrusion.com

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