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**HIDDEN DANGER: DISCOVERY OF LATENT  
DEFECTS IN OCCUPIED BUILDINGS:  
RESOLVING DEFECTS DISCOVERED AFTER COMPLETION  
A PUBLIC OWNER'S PERSPECTIVE**

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## **Introduction**

During the last 30 years, Miami-Dade County, Florida has responded aggressively to a general growth boom in South Florida. The County has built a variety of infrastructure projects. A number of those projects manifested defects after completion of the project. I will discuss how we responded to those unhappy discoveries, and what we learned from these events. This experience may be instructive to any owner of large commercial properties.

### **A. Examples of Latent Defects**

#### **1. Cultural Center smoke evacuation systems.**

During the final testing of the smoke evacuation systems by the Fire Marshall during project close out prior to obtaining a Certificate of Occupancy, the three buildings in the Cultural Center complex failed the cold smoke evacuation tests mandated by the Building Code. The buildings, an art museum, history museum and main library, all were built with an innovative engineered smoke evacuation design, which was premised on managing hot smoke, not the cold smoke bombs required by the test protocol. The system may have worked beautifully in an actual fire, but we never got a chance to find out. After some lengthy discussions with the architectural firm that was the designer of record and its mechanical HVAC consultant, the buildings were redesigned to a more conventional system, and completely rebuilt from the inside out. The repair effort took over a year, and was paid for entirely by the E&O coverage of the two design firms. The County assumed the cost of reassigning the staff to other facilities while repairs were underway.

## **2. Library roof failure.**

Shortly after the library was occupied and operational, the roof began manifesting cracking all over the entire roof right through the roof deck. The anticipated cost to redesign and re-roof the library was several times the amount of E&O coverage. Although there was no real dispute that the cause of the failure was design related, the carrier denied coverage because of a prior release. Two years previous to the discovery of this pervasive cracking, a small discrete section of the roof had collapsed onto the library floor as a result of an unrelated design omission of roof supports. The carrier had paid at that time to redesign and restore that specific roof section. Initially, it denied coverage of the second roof failure because of the release issued after the first collapse. After suit was filed, the matter was settled for the policy limits.

## **3. Spalling and detaching facing stone on Administration office tower.**

After the building was occupied, chunks of facing stone started falling from the high corners of the 30 story building onto the public plaza below. Initial investigations indicated that the contractor had not installed control joints in some of the specified locations. The contractor denied that the lack of control joints was the cause of the cracking. The County engaged the services of an independent structural engineering firm to evaluate the situation and to make recommendations. The firm performed some destructive testing and monitored the building's status over a several season cycle with strain gauges and thermometers installed at various points on the building. Ultimately the firm reported that the failure to install the control joints as specified was contributing to the cracking and spalling of the facing stones, but that the original design was flawed

as well. The firm recommended detaching and reattaching several designated rows of stones to introduce new control joints to the facing wall. The County sued the designers and the contractor for the remediation costs established by bidding out the repair work recommended. The insurance carriers for the designers and for the contractor battled until the trial was underway, each trying to place on the other a larger share of responsibility, and to claim that the recommended “fix” was too costly. Ultimately the case settled during trial, with the carriers agreeing to share the repair costs equally. The building remained fully operational during the remediation, although fencing was erected to prevent public access to the surrounding plaza.

#### **4. Standing seam metal roof leaks.**

The standing seam metal roof on a library admitted water intrusion through the seams and at the flashings on the valleys where the roofline changed elevations. Leaking was pervasive, and was interfering with the operation of the electronic book check-out equipment. Whole areas of the library had to be closed to the public and the books and shelves draped in plastic sheets. Mockups and destructive testing indicated that the manufacturer’s seam and flashing detail were inadequate to prevent torrential rains or wind-driven rain from penetrating. The County removed the entire roof system and replaced it with a metal roofing system from a competing manufacturer that offered more robust physical barriers within the seam itself to combat water intrusion. The cost was shared by the County, the contractor (who passed the cost to its roofing subcontractor), and the designer furnished a remedial specification.

**5. Parking garage failed beams.**

Sometime before substantial completion of a 7 story parking garage, over a hundred post-tensioned structural beams began cracking. The cracking did not stabilize or abate. Destructive testing indicated that in many instances the steel chords installed in the beam forms were not located or attached as specified by the design, causing the weight bearing capacity of those beams to be impaired. The contractor, the designer and the owner each engaged a structural consultant. After a battle of the experts, a compromise repair protocol was agreed upon and implemented by the contractor under the supervision of the owner's consultant and the designer. By agreement, only the most seriously cracked beams were repaired, and the County agreed to monitor the extent of the cracking by performing periodic "crack surveys" on the remaining beams. Ten years later, only two additional beams needed extraordinary repair.

**6. Airport terminal building exterior stucco failure.**

At this recently completed terminal building significant portions of the exterior stucco are spalling off; the estimate to remove and replace the defective stucco exceeds \$9 million. Destructive testing indicates that the stucco has failed to adhere to the underlying structure because of substandard construction methods, including inadequate wall preparation, missing adhesive and excessive water in the stucco mix. The Owner's ability to recover the cost to replace the stucco is impaired because of prior mutual releases issued at the close-out of construction activities.

**7. Performing Arts Center pipe obstruction.**

One year after this facility was occupied the main waste line backed-up, flooding the rehearsal hall. Investigation revealed that the waste pipe was installed with a smaller

diameter pipe jammed inside that restricted flow capacity. At the time, contract close out was still ongoing, and contractor was back-charged for cost to repair and resulting damages.

**8. Airport terminal building duct condensation.**

Shortly after the building began to be used for passenger service, the exposed air conditioning ducts began dripping condensed water onto the immigration processing area, soaking officials and passengers arriving into this country. Initial investigation revealed that in certain locations, the contractor had not installed the internal duct insulation specified. The owner allowed the contractor to install external insulation as an emergency measure, while a permanent solution was negotiated.

**9. Airport terminal baggage handling system.**

This is a system that worked too well. After substantial completion, when the system was put into full operational status, it became apparent that the state-of-the-art baggage handling software was unexpectedly identifying a huge percentage of screened bags as needing supplemental scrutiny. This precautionary effect caused most of the bags to be diverted for intense investigation by TSA. The number of bags per minute being processed dropped dramatically, and airplane loading activities were slowed to the point of gridlock. This matter is still under discussion among the owner, the designer, the construction manager, and the contractor.

**B. A Checklist: Steps to take when faced with a defective building component**

**1. Protect Public Safety and the safety of your employees.**

To a public owner, managing a facility whose primary purpose is public access, the highest priority is always public safety. When confronted with potential defective construction elements, immediate steps need to be taken to protect people and property. Appropriate intervention needs to be implemented to prevent injury to the public or the facility's employees, and to prevent further damage to the facility itself. Once the owner is on notice of the hidden defect, it owes a duty to those using the facility to provide a safe environment, and is obligated to mitigate its losses. See eg, *Jablonski v. Fulton Corners, Inc.*<sup>1</sup>(injured worker brought action against property owner for creating dangerous condition on worksite); An owner becomes liable if it had actual or constructive notice of the dangerous condition , but failed to reasonably correct the defect to prevent the danger. “To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it.... [C]onstructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection’) *Ciriale v. Sharrotts Woods*, 9 A.D.3d 473, 475, 781 N.Y.S.2d 47”, *Lal v. Ching Po Ng*,<sup>2</sup>

A determination needs to be made as to whether the situation created by the defect is so dangerous that the ongoing operations need to be curtailed or stopped and which appropriate short term and permanent protective measures need to be implemented. The building managers need to assess whether the spalling stone may fall on a pedestrian, or whether the wet electrical equipment may short out and injure an employee or facility patron. Do you close the facility, or limit access to a defined area? Would the installation of temporary shoring be prudent?

## **2. Define the problem.**

In order to evaluate the urgency of the defective condition, some initial analysis will allow prudent management decisions to be made. Both public and commercial owners need to know several parameters of the defective condition. Initially it is critical to determine whether the cracking, leaking, or other defect that has made itself visible is merely symptomatic of an even greater problem, and whether the apparent defects are cosmetic or structural. If the problem is cosmetic, you have time to evaluate and select your options; if the defect suggests an imminent structural failure, you will likely need to take action on limited information.

## **3. Evaluate latency.**

Acceptance of a completed improvement to real property with knowledge of the existing defect most likely will bar recovery altogether. See *Slavin v. Kay*.<sup>3</sup> An assessment needs to be made as to whether the defective condition is latent or patent. The determination as to whether an alleged defect is patent or latent has been held to be a question of fact for the trier of fact to determine. *Plaza v. Fisher Development, Inc.*<sup>4</sup> The question to be answered by the trier of fact is not when the defective condition became manifest, but rather when a person with no specialized skill or equipment should have reasonably recognized or appreciated the severity of the situation. The test for patency is not whether the existence of the object itself was obvious, but whether the defective nature of the object was obvious with the exercise of reasonable care. See *Kala Investments, Inc. v. Sklar*<sup>5</sup> (a defect is latent either when it is “not apparent by use of one’s ordinary senses from a casual observation.... or hidden from the knowledge as well as from the sight”), and *Alexander v. Suncoast Builders, Inc.*<sup>6</sup> (“Latent defects are

generally considered to be hidden or concealed defects which are not discoverable by reasonable and customary inspection, and of which the owner has no knowledge. *Lakes of the Meadow Village Homes Condominium...v. Arvida/JMB Partners, L.P.*, 714 So. 2d 1120, 1122 (Fla. 3d DCA 1998”).

**4. Get your arms around the problem with qualified advice.**

Don't hesitate to obtain professional expert help in appropriate disciplines to get advice as to how best to remedy the situation. I recommend that you ask both your contractor and your designer for references. Skill and experience can be very personal attributes. It would be helpful to know the identity of an expert whose opinion your designer or your contractor respects and trusts. References should also be sought from your own professional networks. Specialty trade associations (like glass products and metal roofing manufacturers) also offer newsletters, websites, and professional development seminars, all of which can become fertile ground for locating knowledgeable individuals with pertinent expertise.

**5. Check statutory constraints on enforcement or recovery.**

Each state will have its own statute of limitations for latent defects. Additionally some jurisdictions require that a claimant seeking recovery for construction defects furnish notice of the defect or provide an opportunity to cure the defect as a condition precedent to filing a lawsuit. Case law and statutory references offered in this paper are limited to California, Florida and New York.

**a. Statutes of limitations and of repose.**

The time periods authorized by statutes to commence suits to recover for defects in the design or construction of improvements to real property may differ

depending upon whether the defect is determined to be patent or latent. The “purpose of a statute of repose is to cut off the right of action after a specified time measured, from the delivery of a product or the completion of work, regardless of the time of the accrual of the cause of action or the notice of the invasion of a legal right.” *Firestone Tire & Rubber Co. v. Acosta*.<sup>7</sup> Statutes of repose will limit the time available to seek recovery, whether or not the injured party has notice of the injury.

i. **Florida.** Fla. Stat. Sec. 95.11 (3)(c) provides for a statute of limitations of four years from the completion of the project for patent defects, but a longer period to commence a lawsuit for latent defects in order to allow for delayed discovery. The period for seeking redress for latent defects, while still four years, does not begin to run until the defect should have been discovered with reasonable diligence.<sup>8</sup> However, the statute of repose provides that a suit for latent defects must be filed within ten years from the completion of the work or from its occupancy, whichever is **latest**.<sup>9</sup> See *Allan and Conrad, Inc. v. University of Central Florida*.<sup>10</sup>

ii. **California.** California Code of Civil Procedure provides a 10 year statute of limitations for breach of contract for latent defects (except see section 337.15(f), which excludes “actions based on willful misconduct or fraudulent concealment”),<sup>11</sup> and a one year statute of limitations period for patent defects.<sup>12</sup> Both periods run from “substantial completion of the improvement, not

from discovery of the defect.” *Fireman’s Fund Insurance Co. v. Sparks Construction, Inc.*<sup>13</sup> The ten year period commences “upon substantial completion of the improvement, but not later than the date” of final inspection, recordation of a valid notice of completion, occupancy, or one year after termination , whichever is **earliest**.<sup>14</sup>

iii. **New York.** New York has a 6 year statute of limitations for breach of contract actions.<sup>15</sup> New York has no particular statute of limitations addressing latency; an appropriate cause of action could be for fraudulent concealment, rather than breach of contract. “A cause of action predicated on defective construction accrues on the date of completion of the “actual physical work” (*Cabrini Med. Ctr. v. Desina*,<sup>16</sup> even if the claimed defect is latent (*Yeshiva Univ. v. Fidelity & Deposit Co. Md.*<sup>17</sup>), and ... action against the construction contractor was barred by the six-year breach-of-contract statute of limitations....While a cause of action alleging fraudulent construction may be within the greater of six years from accrual of the cause of action or two years from the time the fraud was or could with reasonable diligence have been discovered (CPLR 213[8]; *Cappelli v. Berkshire Life Ins. Co.*, 276 A.D.2d 458, 713 N.Y.S.2d 756 [2000] )...” *Rite Aid of New York, Inc. v. R.A. Real Estate, Inc., etc.*,<sup>18</sup>; see also *Gorsky v. Triou’s Custom Homes, Inc.*,<sup>19</sup> (six year statute of limitations for breach of contract applied to defective roof shingles, not shorter limitation for breach of implied warranty in new home).

**b. Conditions precedent.**

Prior to seeking legal redress for defective work, the claimant may be required to provide notice to the party from whom it seeks recovery, and may also be required to provide an opportunity to cure the defect before litigation can be initiated.

Since 2003, Florida required notice and an opportunity to cure before filing suit to recover for defects in connection with new residential construction.<sup>20</sup> Chapter 558 was amended two years ago to apply to all construction projects – not just residential construction. Thus, at the present time, both notice and an opportunity to cure must be offered by a claimant prior to filing suit. Mailing of the notice will toll the statute of limitations until the cure opportunity has been accepted or rejected.<sup>21</sup>

In California, performance of repairs by the non-performing party will also toll the statute of limitations, under the doctrine of equitable tolling. See *Jackson Plaza Homeowners Association, v. W.Wong Construction*.<sup>22</sup>

**6. Confirm contractual remedies and constraints.**

The contract between the owner and the contractor and the contract between the owner and the designer both are likely to allocate responsibility and set out procedural requirements for asserting claims. It will be very helpful to locate specific contract language that addresses: (a) duties and obligations that may give rise to an action for breach of contract, (b) indemnity provisions of the contract; (c) conditions precedent to enforcement of remedies, which may include notice, demand, or an opportunity to cure, and all associated designated timeframes, (d) potential waiver issues, (e) prior releases, and (f) exculpatory limitations ( “Absent a statute or public policy to the contrary, such

provisions of a contract limiting a party's liability are enforceable. *Sommer v. Federal Signal Corp*, 79 N.Y.2d 540 (1992).” *Carney v. Coull Building Inspections, Inc.*,<sup>23</sup> Slip Copy 2007 WL 2119740 (N.Y. City Civ. Ct.) 2007).

Prior releases may be found in a variety of locations, including change orders, field authorizations and contract amendments approved during design or construction phases of the project.

In some jurisdictions, it is also possible that in either the construction or the design contract, the parties have agreed to a shorter statute of limitations or a shorter commencement date of the statute of limitations than would otherwise be available under state law, and that these contractual provisions will be enforceable. *Harbor Court Assocs. v. Leo A. Daly Co.*<sup>24</sup>

#### **7. Confirm potential insurance and bond coverage.**

Insurance claims will have different, often shorter, notice provisions and limitations periods than will the direct claims against contractor or designer.<sup>25</sup> The claim against an insurer or a surety is a claim under contract, not a claim for improvement to real property. See *Clark Construction Group, Inc. v. Wentworth Plastering of Boca Raton, Inc*<sup>26</sup>. There are several potential sources of insurance and bond coverage. For each source of potential coverage, you will need to verify the coverage period, and identify relevant notice requirements and claims filing restrictions found within the policy documents. See eg, *Nationwide Mutual Insurance Company v. Bates*<sup>27</sup> (renter successfully sued CGL carrier due to damages sustained in home due to decaying debris buried under the home, despite coverage exclusion for damage caused by settling.) Keep the calendar in mind; don't let deadlines pass.

a. **comprehensive general liability policy**

The owner or the contractor may have purchased comprehensive general liability coverage for the project, or the owner may be an additional named insured under the contractor's policy. See *Standard Fire Insurance Co. v. The Spectrum Community Association*,<sup>28</sup> (held that insurer holding policy during construction period had duty to provide defense to condominium developer in suit by condominium association for latent defects, and that association had cause of action against developer.)

b. **professional liability policy**

The designer may have purchased a professional liability policy for this project, or may have held a policy or several policies, covering all its projects during the time of the design and construction of the project. If the defect is due to a failure of the designer to meet the appropriate standard of care for a project of comparable complexity in the jurisdiction of your project, you may be able to make a claim against this policy. As a general rule these policies deduct the insurer's costs of investigation and defense from the available policy proceeds, so the longer the dispute lingers, the less recovery is available to you.

c. **performance bond**

The contractor may have purchased a performance bond to cover its completion obligations on the project. The coverage of the bond will vary depending upon its terms. The bond may cover warranty defaults during the first

year after completion, and if specified, it may cover latent defects beyond that time period.

**8. Have designer and contractor comment on condition.**

Not only is it helpful to seek the input of the designer and contractor about the nature of the defective condition and suggestions on how to remedy the situation, but in some jurisdictions, notice is a condition precedent to filing suit.

**9. Monitor conditions over time if necessary.**

Install appropriate monitoring devices, for example, strain gauges, or humidity measurement devices, or conduct manual surveys to measure crack growth.

**10. Mitigate collateral damage.**

Depending upon the condition, it may be necessary to provide temporary bracing or shoring, to dry out an area that has experienced excessive moisture, or to temporarily restrict access to an area no longer safe for public use.

**11. Furnish independent report to contractor and designer for comment**

This is a matter of tactical dispute. In the event of litigation or arbitration, the reports of independent consultants or experts will be disclosed in any event. If your objective is to get the problem resolved with a minimum of fuss, disclosure is the recommended path.

**12. Negotiate**

Good faith settlement negotiations alone will not generally toll statutes of limitations. See *Lantzy v. Centex Homes*<sup>29</sup> (“section 337.15’s 10-year statute of limitations for latent construction defects is not subject to a general rule of equitable tolling while promises or attempts to repair are pending,” 31 Cal.4<sup>th</sup> at p.367, 2

Cal.Rptr3d 655, 73 P.3d 517); *Inco Development Corp v. Superior Court*<sup>30</sup> (sec. 337.15 not subject to statutory tolling nor extended by period of automatic stay under federal bankruptcy law).

A formal written tolling agreement will toll applicable statute of limitations in some jurisdictions. See *Standard Fire Insurance Co. v. The Spectrum Community Association*,<sup>31</sup>; *El Escorial Owners' Ass'n. v. DLC Plastering, Inc.*<sup>32</sup> Fla. Stat. c. 558 provides for tolling of the statute of limitations to allow for repairs to be made.

### **13. Mediate.**

Mediation can be an effective tool for conflict resolution. It is the cheapest and most efficient vehicle available if unassisted negotiations stall. A mediated settlement will assist in preserving the relationship, always a plus if repairs are part of the resolution. Mediation will be required as a condition prerequisite to suit or to litigation only if the contract so provides. However, even when the contract is silent as to mediation, you may find it to be the best alternative to a more adversarial process in arbitration or litigation. Even an unsuccessful mediation may assist in narrowing the issues in dispute and clarifying areas of agreement among the parties.

### **14. Litigate/Arbitrate**

Arbitration only available if contract so provides, and if no statutory prohibitions prevent arbitration. See Cal. Code Sec. 1298.7; *Pardee Construction Company v. Superior Court o San Diego County*<sup>33</sup> (purchase contract that provided for judicial reference instead of jury trial for construction defects was found to be unconscionable). Arbitration is a creature of contract. In the absence of a written agreement providing for arbitration, it is unlikely that the dispute would be subject to arbitration. Arbitration

offers the advantages of being under the control of the contracting parties. Because the parties can agree on any individual or panel to arbitrate their dispute, the matter can be presented to knowledgeable and experienced professionals for expeditious resolution.

The causes of action which may be available to a claimant include the following:

a. Breach of contract. The parties in privity with the owner owe a duty to perform the work as contemplated by the contract. The owner is entitled to be made whole for any breach.

b. Fraudulent Concealment – “A party asserting a claim for fraudulent concealment must establish all of the elements of fraud and must further prove the existence of an affirmative duty to disclose [citations omitted]. ...[A]n affirmative duty to disclose arises where one party’s knowledge of the fact renders the transaction inherently unfair unless those facts are disclosed....New York adheres to the doctrine of *caveat emptor* and imposes no duty on the seller ...to disclose any information concerning the premises...unless there is some conduct on the part of the seller ... which constitutes active concealment.....*Caveat emptor* does not, however apply if the purchaser could not have discovered the condition upon due inquiry or inspection.[citations omitted].” *Hamlet on Olde Oyster bay Home Owners Ass’n, Inc. v. Holiday Organization, Inc.* <sup>34</sup>.

“Fraudulent inducement claim is not barred by economic loss rule.” *Swope v. DiMarco*<sup>35</sup>,

c. Negligence: See *Siegel et al. v. Anderson Homes, Inc.*<sup>36</sup> (subsequent owners of home containing latent defects may maintain cause of action in tort against builder, so long as previous owners suffered no damage from latent defects).

However, the Economic Loss Rule may limit the availability of claims sounding in tort. “A breach of contract claim does not give rise to a separate cause of action in tort

unless the Defendant breach a legal duty that is separate and apart from the Defendant's contractual obligations.” *Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v. Holiday Organization, Inc.* <sup>37</sup>; *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,<sup>38</sup> (where action for breach of contract lies, economic loss rule bars recovery in tort, except for torts independent of breach of contract) ; *Jimenez v. Superior Court of San Diego County*,<sup>39</sup> (“the economic loss rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to ‘other property’, that is, property *other than the product itself*. The law of contractual warranty governs damages to the product itself.”, *Id.*, at 483)

d. Breach of building code. Failure to meet the minimum requirements of the local building code may be a cause of action, or may be the standard of care to which the contractor and designer are held. See c. 553 Fla. Stat.; *A.R. Moyer, Inc. v. Graham*.<sup>40</sup>

e. Products liability. Where a breach of contract action will not lie, recovery may be had in an action for products liability. See *Fireman's Fund Insurance Co. v. Sparks Construction, Inc.*,<sup>41</sup> (cause of action accrued three years from discovery of defect)

### **C. Lessons Learned Going Forward**

Careful drafting of contract language will lessen, but not eliminate ambiguity and disputes concerning each party's responsibility for remedying defective work. The public owner should insist that the designer's contract clearly provide for the designer to have responsibility to redesign a defective building component at no cost to the owner. In establishing the designer's insurance obligations, consider all available options, including

project insurance, and have experienced risk management advice as to an adequate amount of professional liability insurance, considering the size and the complexity of the project. The language of the performance bond should be deliberately negotiated as well so as to preserve as much coverage as possible. Contract provisions should not limit the statutory periods of limitations or repose.

Releases issued during the construction phase should be drafted as narrowly as possible, and tailored to the exact specifics of the situation at hand, so as not to preclude remedies for future latent defects that may be discovered. This is also true of the any final release issued to the contractor at project completion; such a release should specifically preserve project warranty obligations.

The public or commercial owner should maintain a competent oversight program during design and construction. Unless the owner has employed qualified in-house talent to perform this function, the assistance of an agency construction manager should be considered. Post-acceptance, the Owner's maintenance staff should maintain a formal monitoring and inspection program. Standardized documents assist staff to perform these functions and to observe benchmark dates, like the expiration of warranty periods and insurance coverage periods. For example, a walk through 11 months after substantial completion to make sure that warranty coverage is not squandered should be standard. A system should be implemented to maximize the owner's ability to achieve its anticipated result – a functioning building with all systems operational.

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<sup>1</sup> *Jablonski v. Fulton Corners, Inc.*, 193 Misc.2d 135, 748 N.Y.S.2d 634, 2002

<sup>2</sup> *Lal v. Ching Po Ng*, 33 A.D.3d 668, 823 N.Y.S.2d 429, 2006

<sup>3</sup> *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959) (A contractor cannot be held liable for injuries sustained by third parties when the injuries occur after the contractor completed its work, the owner of the property accepted the contractor's work, and the defects causing the injury were patent.)

<sup>4</sup> *Plaza v. Fisher Development, Inc.*, 971 So. 2d 918, (Fla. 3d DCA 2007)

<sup>5</sup> *Kala Investments, Inc. v. Sklar*, 538 So. 2d 909 (Fla. 3d DCA 1989) (“not apparent by use of one's ordinary senses from a casual observation.... or hidden from the knowledge as well as from the sight”)

<sup>6</sup> *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056 (Fla. 3d DCA 2003)

<sup>7</sup> *Firestone Tire & Rubber Co. v. Acosta*, 612 So. 2d 1361, 1363 (Fla. 1992)

<sup>8</sup> See. Fla Stat. sec. 95.11.

<sup>9</sup> Fla. Stat. Sec. 95.11(3)

<sup>10</sup> *Allan and Conrad, Inc. v. University of Central Florida*, 961 So. 2d, 1083 (Fla. 5<sup>th</sup> DCA 2007)

<sup>11</sup> Cal. Code of Civil Procedure, Sec. 337.15

<sup>12</sup> Cal. Code of Civil Procedure, Secs. 337.1 and 337.15

<sup>13</sup> *Fireman's Fund Insurance Co. v. Sparks Construction, Inc.*, 114 Cal. App. 4<sup>th</sup> 1135, 8 Cal. Rptr3d 446 (2004)

<sup>14</sup> Cal. Code of Civil Procedure, Sec. 337.15

<sup>15</sup> New York Civil Practice Law and Rules, Sec. 213

<sup>16</sup> *Cabrini Med. Ctr. v. Edina*, 64 N.Y. 2d 1059, 1061, 489 N.Y.S.2d 872, 479 N.E.2d 217 [1985]

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- <sup>17</sup> *Yeshiva Univ. v. Fidelity & Deposit Co. Md.*, 116 A.D.2d 49, 500 N.Y.S.2d 241 [1986], *lv.denied* 68 N.Y.2D 603, 506 N.Y.S.2d 1025, 497 N.E.2d 705 [1986]
- <sup>18</sup> *Rite Aid of New York, Inc. v. R.A. Real Estate, Inc., etc.*, 40 A.D.3d 474, 837 N.Y.S.2d 48, 2007
- <sup>19</sup> *Gorsky v. Triou's Custom Homes, Inc.*, 194 Misc. 2d 736, 755 N.Y.S.2d 197, 2002
- <sup>20</sup> Fla. Stat. Ch.. 558
- <sup>21</sup> Fla. Stat. s. 558.004
- <sup>22</sup> *Jackson Plaza Homeowners Association, v. W.Wong Construction*, 98 Cal. App. 4<sup>th</sup> 1088. 121 Cal. Rptr2d 221, 2002
- <sup>23</sup> *Carney v. Coull Building Inspections, Inc.*,<sup>23</sup> Slip Copy 2007 WL 2119740 (N.Y. City Civ. Ct.) 2007
- <sup>24</sup> *Harbor Court Assocs, v. Leo A. Daly, Co.*, 179 F.3d 147 (4th Cir 1999); *Matter of Oriskany Cent. Sch. Dist.*, 206 A.D. 2d 896 (NY App. Div. 1995); *S.R. Seagrove Development, LLC, v. Destin Architectural Group, Inc.*, Case No. 06-000063CA ( 1<sup>st</sup> Judicial Circuit 2007)
- <sup>25</sup> Sec. 95.11(2)(b) Fla. Stat. provides a five year statute of limitations for actions founded on written contracts, except for surety bonds, which are governed by Sec. 255.05 Fla. Stat. for bonds on public projects, and Sec. 713.23 Fla. Stat., with regard to surety bonds on private projects.
- <sup>26</sup> *Clark Construction Group, Inc. v. Wentworth Plastering of Boca Raton, Inc.*, 840 So. 2d 357 (Fla. 4<sup>th</sup> DCA 2003)
- <sup>27</sup> *Nationwide Mutual Insurance Company v. Bates*, 840 So. 2d 349 (Fla. 1<sup>st</sup> DCA 2003)
- <sup>28</sup> *Standard Fire Insurance Co. v. The Spectrum Community Association*, 141 Cal. App. 4<sup>th</sup> 1117, 46 Cal. Rptr.3d 804, 2006
- <sup>29</sup> *Lantzy v. Centex Homes* (2003) 31 Cal.4<sup>th</sup> 363, 2 Cal. Rptr.3d 655, 73 P.3d 517
- <sup>30</sup> *Inco Development Corp v. Superior Court*,<sup>30</sup> 131 Cal. App.4<sup>th</sup> 1014, 31 Cal. Rptr.3d 872 2005
- <sup>31</sup> *Standard Fire Insurance Co. v. The Spectrum Community Association*, 141 Cal. App. 4<sup>th</sup> 1117, 46 Cal. Rptr.3d 804, 2006
- <sup>32</sup> *El Escorial Owners' Ass'n. v. DLC Plastering, Inc.*, 154 Cal. App. 4<sup>th</sup> 1337 (2007)

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<sup>33</sup> *Pardee Construction Company v. Superior Court o San Diego County*, 100 Cal. App. 4<sup>th</sup> 1081, 123 Cal. Rptr.2d 288 (2002)

<sup>34</sup> *Hamlet on Olde Oyster bay Home Owners Ass'n, Inc. v. Holiday Organization, Inc.*, 12 Misc.3d 1182, 824 N.Y.S.2d 763, 2006

<sup>35</sup> *Swope v. DiMarco*, 886 So. 2d 270, 271 (Fla. 4<sup>th</sup> DCA 2004)

<sup>36</sup> *Siegel et al. v. Anderson Homes, Inc.*, 118 Ca. App. 4<sup>th</sup> 994, 13 Cal. Rptr.3d 462 (2004)

<sup>37</sup> *Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v. Holiday Organization, Inc.* 12 Misc.3d 1182, 824 N.Y.S.2d 763, 2006

<sup>38</sup> *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1239 (Fla. 1996)

<sup>39</sup> *Jimenez v. Superior Court of San Diego County*, 29 Cal. 4<sup>th</sup> 473, 58 P.3d 450 (2003)

<sup>40</sup> *A.R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973)

<sup>41</sup> *Fireman's Fund Insurance Co. v. Sparks Construction, Inc.*, 114 Cal. App. 4<sup>th</sup> 1135, 8 Cal. Rptr3d 446 (2004)