MARYLAND CONSTRUCTION LAW DESKBOOK
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CHAPTER 14

CONDOMINIUM AND NEW HOME WARRANTIES AND RIGHTS OF ACTION

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I. INTRODUCTION

This Chapter is intended as an analysis of the issues that confront associations and homeowners when attempting to pursue construction defect remedies, as well furnishing developers, builders, designers, engineers, contractors and suppliers with an understanding of their potential liability for single-family and multi-family construction that fails to conform to applicable industry standards.

For most individuals, the purchase of a new house or condominium unit is the largest investment that they will have ever made. Moreover, that investment is also a home and place of refuge and relaxation that they share with family and friends. Few things, therefore, have the potential to be more disturbing than the discovery of construction defect issues that diminish both the enjoyment of the home and its value. For that reason, new home purchasers in Maryland are afforded various protections in the form of statutory warranties. They also may receive specific warranties from the seller as part of their purchase agreement. Additionally, homebuyers may have other statutory and common law rights of action that arise as a result of construction deficiencies. However, none of these possible remedies provides a certain or easy path to relief. All such claims are governed by strict statutes of limitations that require considerable diligence or order to preserve the intended benefits. Pursuing claims is also an expensive and often protracted process that, in addition to the retention of capable legal counsel, also requires the involvement of building consultants who can identify defects, recommend repairs, and offer opinion evidence to support the claim. Additionally, real estate contracts often contain provisions designed to limit claims and the means by which they can be resolved.

The first consideration must be a determination of what constitutes a building defect for which the developer or builder may be responsible. Generally, the construction must be accordance with the applicable building code. Codes, however, are often somewhat generic. For example, the code may contain a requirement that buildings be watertight, but may not identify what methods are required to ensure against moisture intrusion. They may call for specific waterproofing components, such as flashing, but not define what material is acceptable for use as flashing. In some cases, "flashing" can mean a specific metal component designed for a particular application, such as at a window head or interface between dissimilar components. In other instances, a peel and stick tape material may constitute "flashing." Nevertheless, the code is a standard to which the builder is bound to comply.

In addition to the building code, builders must also construct the home in accordance with the design drawings and specifications. They are typically documents that have been prepared by a licensed architect or engineer, and submitted to the jurisdiction in which the building permit is issued. Such design documents often contain specificity as how the code requirements are to be met in terms of materials and methods of construction. However, in residential projects, design drawings are sometimes quite generic, depicting only elevations and floor plans without much detail. Still, the design documents provide another standard for compliance, and a deviation by the builder may result in a right of action on the part of the homeowner.

Builders must also comply with industry standards. These are the norms of construction methodology that are applicable in a given region. The National Association of Homebuilders, for example, publishes guidelines that provide standards for various building methods and tolerances.[1] Some standards are defined by industry trade groups, such as the Brick Industry Association, which establishes standards for masonry construction. Homebuilders are also required to comply with the installation specifications of the manufacturers of materials and products used in the construction.

Finally, the seller of the home must comply with any promises or representations contained in the purchase documents, and may also be required to construct the home in accordance with oral representations relied on by the purchaser. Failures to meet any of

[1] *Residential Construction Performance Guidelines,* NAHB BuilderBooks (2005).

these standards can constitute a building defect for which the seller/builder is responsible to correct.

II. IMPLIED WARRANTIES UNDER MARYLAND LAW

The Maryland General Assembly has established statutory standards for new home warranties. These include both warranties that are implied by operation of law, as well as a description of representations that are deemed to constitute express warranties. The implied warranties are applicable to all sales of newly constructed homes and condominiums, and were intended by the Legislature to provide new home purchasers with an opportunity to require the seller to correct conditions that fail to meet minimum construction standards.

It is of note that, while implied warranties suggest a likeness to strict liability, the Maryland Court of Special Appeals has specifically held "that breach implied warranty and strict liability in tort are two separate and distinct claims in Maryland."[2] Accordingly, it is important to remember that implied warranties have particular requirements as to their application, scope and duration, as well as with regard to the running of limitations.

A. Implied Warranties Under Title 10

Pursuant to Md. Code Ann., Real Prop. Tit. 10, certain implied warranties are applicable to the sale of every newly constructed home in Maryland.[3] These warranties are applicable to all "improvements," which are defined as "every newly constructed private dwelling unit, and fixture and structure which is made part of a newly constructed private dwelling unit at the time of its construction."[4] They are enforceable against a "vendor," defined as "any person engaged in the business of erecting or otherwise creating an improvement on realty, or to whom a completed improvement has been granted for resale in the course of his business."[5] These broadly worded implied warranties provide that the improvement is:

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[2] *Youmans v. Douron, Inc.,* 211 Md. 274, 287 (2013), *citing A.J. Decoster Co. v. Westinghouse Elec. Corp.,* 333 Md. 245, 246 (1994).
[3] Md. Code Ann., Real Prop. §10-203 (2003).
[4] *Id.* at 10-201(b).
[5] *Id.* at 10-201(e).

(1) free from faulty materials;

(2) constructed according to sound engineering standards;

(3) constructed in a workmanlike manner; and

(4) fit for habitation.[6]

It is expressly provided that these warranties "do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed."[7] There is, however, a fifth implied warranty that is not subject to the inspection exception. This is the implied warranty of fitness for a particular purpose. "If the purchaser, expressly or by implication, makes known to the vendor the particular purpose for which the improvement is required, and it appears that the purchaser relies on the vendor's skill and judgment, there is an implied warranty that the improvement is reasonably fit for the purpose."[8]

These implied warranties may only be excluded or modified with respect to completed improvements, and only by a written document, signed by the purchaser, that sets forth the warranty and shows the exact exclusions or modifications:

> Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. However, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it.[9]

Accordingly, any exclusion or modification of the implied warranties must be contained in a separately signed document that is apart from the purchase agreement itself.

The implied warranties run for "one year after delivery [of the deed] or after the taking of possession by the original purchaser, whichever occurs first," except that "where the dwelling is not complete at the time of delivery of the deed, one year from the date of completion or taking of possession by the original purchaser, whichever occurs first."[10] Additionally, "[i]n the case of structural defects," the warranties run for "2 years

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[6] *Id.* at 10-203(a).
[7] *Id.* at 10-203(b).
[8] *Id.* at 10-203(c).
[9] *Id.* at 10-203(d).
[10] *Id.* at 10-204(b)(1)-(2).

after the date of completion, delivery, or taking of possession, whichever occurs first."[11] The warranties do not expire in the event of a subsequent sale by the original purchaser.[12]

In the event of a defect that constitutes a breach of these warranties, "the court may award legal or equitable relief, or both, as justice requires."[13] An action for breach of the warranties "shall be commenced with two years after the defect was discovered or should have been discovered, or within two years after expiration of the warranty, whichever occurs first."[14] Accordingly, this creates a maximum period in which a claim must be brought of three years after taking possession, and four years in case of structural defects. However, the period may be shorter if it is demonstrated that the defect was, or should have been, discovered at a date occurring during the warranty period and prior to the end of the warranty. Indeed, if the issue should have been observed at the time of possession, the two year period for filing a claim would begin immediately, regardless of whether it involves a structural defect.

In *Starfish Condominium Ass'n v. Yorkridge Service Corp.,* the Court of Appeals held that the Title 10 warranties were applicable to newly constructed condominium units and, importantly, also to the common elements.[15] Significantly, it ruled that "one or more of the original purchasing unit owners in the condominium could directly have sued for breach of §10-203 implied warranties as to the common elements and could have sought the entire damages to the common elements."[16] This is true even where the claims of some unit owners might be time-barred. Additionally, it was held that the action could also be brought by the council of unit owners in its representative capacity of two or more unit owners with viable claims.[17]

B. Condominium Implied Warranties Under Title 11

Section 11-131 of the Maryland Condominium Act provides significant warranty protections for the purchasers for new condominium units. Section 11-131(a) establishes as a matter of statute what the Court of Appeals held in *Starfish, i.e.,* that the new home

[11] *Id.* at 10-204(b)(3).
[12] *Id.* at 10-204(c).
[13] *Id.* at 10-204(a).
[14] *Id.* at 10-204(d).
[15] 195 Md. 673 (1983).
[16] *Id.* at 707.
[17] *Id.* at

implied warranties under Section 10-203 "apply to all sales by developers" of condominiums, and that "a newly constructed private dwelling unit means a newly constructed or newly converted condominium unit and its appurtenant undivided fee simple interest in the common areas."[18] Specific warranties are applicable to certain specified components of both individual units and the common elements, and they are the obligation of the condominium's developer.

Section 11-131(c) of the Condominium Act provides "an implied warranty on an individual unit from a developer to a unit owner" that is expressly in addition to the warranties provided by Section 10-203. Indeed, the Court of Appeals has held that the Title 10 warranties and the condominium warranties under Title 11 run concurrently, and aggrieved purchasers may proceed under either or both.[19] This additional implied warranty is limited to specifically identified components, commences with the transfer of title to that particular unit, and extends for a period of one year.[20] The warranty makes the developer "responsible for correcting any defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit," and further warrants that "the heating and air conditioning systems have been installed in accordance with acceptable industry standards."[21] The stated standards are "[t]hat the heating system is warranted to maintain a 70°F temperature inside" and "[t]hat the air conditioning system is warranted to maintain a 78°F temperature inside" when the outdoor temperature and winds are "at design conditions established by the Energy Conservation Standards Act … or those established by the political subdivision" in which the condominium is located.[22] This establishes what is, essentially, a strict liability standard; *i.e.,* if the existence of a defect is proven, the developer is responsible for damages consisting of the cost of correction.

Section 11-131(d) provides for "an implied warranty on the common elements from developer to the council of unit owners," that is also expressly in addition to the

[18] Md. Code Ann., Real Prop. §11-131(a).
[19] *Milton Co. v. Council of Unit Owners of Bentley Place Condo.,* 121 Md. App. 100 (1998), *aff'd,* 354 Md. 264 (1999).
[20] Md. Code Ann., Real Prop. § 11-131(c).
[21] *Id.* at 11-131(c)(1).
[22] *Id.* at 11-131(c)(2).

implied warranties provided in Section 10-203.[23] Like the warranty on the units, this common element warranty is also applicable only to specific components, consisting of "the roof, foundation, external and supporting walls, mechanical, electrical, and plumbing systems, and other structural components."[24] The reference to "external and supporting walls" encompasses not only the wall framing members, but cladding systems as well. The inclusion of "structural components" broadens the application of the warranty to any common element component that is part of the building's structure and framing, as well as community amenities that have a structural capacity, such as paving, pools, sport courts, curbs, steps and sidewalks, and drainage areas. Arguably, the specification of these components as being subject to the common element warranty requires that such components be defined as part of the common elements in any condominium regime. Otherwise, the full scope of the Legislature's intent in providing the warranty could be negated by excluding some of these components from inclusion in the common elements. Indeed, the statute presumes that these specified components will be among the common element in every condominium.

The common element warranty provides "that the developer is responsible for correcting any defect in materials or workmanship, and that the specified common elements are within acceptable industry standards in effect when the building was constructed."[25] Like the warranty on the unit, this is a akin to a strict liability standard that applies once a defect is demonstrated. However, unlike strict liability, the specific scope and application of the warranty must be adhered to.

The common element warranty "commences with the first transfer of title to a unit owner."[26] As to any common element "not completed at the first transfer of title," the warranty commences "with the completion of that element or with its availability for use by all unit owners, whichever occurs later."[27] The warranty generally extends for a period of three years from the date of commencement. However, this provision gave rise to problems in enforcing the warranty in circumstances where a majority of the units,

[23] *Id.* at 11-131(d)(1).
[24] *Id.* at 11-131(d)(1).
[25] *Id.* at 11-131(d)(2).
[26] *Id.* at 11-131(d)(3)(i).
[27] *Id.* at 11-131(d)(3)(ii).

and, therefore, a majority of the condominium's board of directors, remain in the control of the developer for an extended period of time. As a result, during 2010 session, the General Assembly amended the statute to provide that the common element warranty run for a period of 3 years, or "2 years from the date on which the unit owners, other than the developer and its affiliates, first elect a controlling majority of the members of the board of directors for the council of unit owners, whichever occurs later."[28]

Significantly, a suit for enforcement of the common element warranty may only be brought by the council of unit owners, and is not actionable by an individual or group of individual unit owners.[29] Nevertheless, if the council of unit owners is controlled by the developer, and the time for filing a claim may expire, it is arguable that unit owners may be entitled to preserve the claim by acting on behalf of themselves and all unit owners.

Both the warranty on the units and the common element warranty are subject to a prerequisite notice requirement that is not applicable to the implied warranties under Section 10-203. In order to be enforced, the Condominium Act warranties require that notice of any defect must be given to the developer "within the warranty period."[30] Suit for enforcement must be brought within one year of the end of the warranty period.[31] Pursuant to this provision, as to the warranty on the unit, this creates a maximum period of two years from the date of possession for bringing a claim. As to the common element warranty, the maximum period is four years in the event that the three-year warranty is applicable, or, if the two-year warranty is applicable, a maximum period of two years from the date that the independent unit owner board of directors is elected.

It is important to note that the Section 10-203 implied warranties, as they apply to condominiums, and the Section 11-131 implied warranties, have separate and distinct periods of limitations. In *Antigua Condominium Ass'n. v. Melba Investors Atlantic, Inc.,* the Court of Appeals held that the Title 10 warranties applied to newly constructed condominiums independent of Title 11, and therefore, limitations for condominium

[28] *Id.* at 11-131(d)(3)(iii).
[29] *Id.* at 11-131(d)(4).
[30] *Id.* at 11-131(e).
[31] *Ibid.*

claims under Section 10-203 are governed by the two year period of limitations established in Section 10-204.[32]

The *Antigua case* also expressly held that the notice requirement of the Title 11 warranties does not apply to the Title 10 warranties as applicable to condominiums.[33] As a result, while notice within the warranty period must be provided to the developer before an action may be commenced to enforce the Title 11 warranties, the Title 10 warrantied may be enforced by condominium council of unit owners or an individual unit owner without regard to the notice requirement.

Unlike the Title 10 warranties, the Title 11 condominium warranties "may not be excluded or modified" by any action or written document.[34] This recognizes that a condominium purchaser is buying an interest in the common elements of a building, or perhaps a number of buildings, and is not have the same ability as a purchaser of an individual home to inspect the entire premises. Therefore, the condominium warranties apply regardless of any agreement to exclude them or modify the content. However, the Title 11 condominium warranties are expressly limited so as not to apply "to any defects caused through the abuse or failure to perform maintenance by a unit owner or the council of unit owners," and are also inapplicable to non-residential condominium regimes. [35]

III. HOMEOWNER ASSOCIATION WARRANTIES

Implied warranties are also provided under the Maryland Homeowners Association Act.[36] It provides that, "[i]n addition to the implied warranties on private dwelling units under" Section 10-203, "there shall be an implied warranty to the homeowners association" with respect to the "improvements to common areas."[37] These warranties on common area improvements are the same as three of the Section 10-203; *i.e.,* they provide that the improvements are (1) free of faulty materials; (2) constructed in accordance with sound engineering standards; and (3) constructed in a workmanlike

[32] 307 Md. 700 (1986).
[33] 354 Md. at 282-283.
[34] Md. Code Ann, Real Prop. §11-131(a).
[35] *Id.* at 11-131(f).
[36] Md. Code Ann., Real Prop. Tit. 11B.
[37] *Id.* at 11B-110(a)(1).

manner."[38] The warranties cover community amenities such as pools, playgrounds, sports courts, pavilions and gazebos, but also apply to structural elements such as retaining walls, curbs and sidewalks, parking lots and drainage areas. If the roads in the community are private, the warranty would extend to road paving.

The warranty to the homeowners association is from the vendor of the lots in the development "if the improvements to the common areas were constructed by the vendor, its agents, servants, employees, contractors, or subcontractors.[39] If, however, "the improvements to a specific common area were constructed on the common areas prior to its conveyance to the homeowners association, then the warranty on improvements shall be from the grantor of the common areas."[40]

The common area warranty "begins with the first transfer of title to a lot to a member of the public by the vendor of the lot."[41] As to common area improvements not completed at the time of the first transfer of title to a lot, the warranty begins "with the completion of the improvement or with its availability for use by lot owners, whichever occurs first."[42] Previously, the statute provided that the warranty extended for a period of only one year from the date of commencement. However, as with the condominium common element warranty, this provision gave rise to problems in enforcing the warranty in circumstances where a majority of the homes, and, therefore, a majority of the association's board of directors, remain in the control of the developer for an extended period of time. As a result, during 2010 session, the General Assembly amended the statute that extended the common area warranty run for a period of 2 years from the date of commencement, or "2 years from the date on which the lot owners, other than the declarant and its affiliates, first elect a controlling majority of the members of the governing body of the homeowners association, whichever occurs later."[43]

Unlike the condominium common element warranty, which may only be brought by a council of unit owners, a suit for enforcement of the common area warranty may be brought by the homeowners association or by any individual lot owner in the

[38] *Id.* at 11B-110(a)(1)(i)-(iii).
[39] *Id.* at 11B-110(a)(2)(i).
[40] *Id.* at 11B-110(a)(2)(ii).
[41] *Id.* at 11B-110(a)(3)(i).
[42] *Id.* at 11B-110(a)(3)(ii).
[43] *Id.* at 11B-110(a)(3)(iii).

community.[44] It is required that notice of a defect be given to the vendor or grantor, whichever is responsible, within the warranty period, and suit "be brought within one year of the expiration of the warranty period."[45] This provides a maximum period in which claims must be made of three years after commencement of the common area warranty.

As with the condominium warranties, the common area warranty does "not apply to defects caused through abuse or failure to perform maintenance by a lot owner or the homeowners association."[46]

IV. EXPRESS WARRANTIES UNDER MARYLAND LAW

Express warranties in the sale of new housing are governed by Md. Code Ann., Real Prop. §10-202. This section governs express warranties as to an "improvement" and enforceable against a "vendor" as those terms are defined in Section 10-201 and discussed above in connection with the implied warranties under Section 10-203. It provides for the creation of express warranties as follows:

> (1) Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.
>
> (2) Any written description of the improvement, including plans and specifications of it, which is made part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.
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> (3) Any sample or model which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms substantially to the sample or model.[47]

These broad warranties cover both oral and written representations made by authorized sales agents, and the written and photographic content of brochures and sales literature. Indeed, the statute expressly provides that "it is not necessary to use formal words, such as 'warranty' or 'guaranty,' or that there be a specific intention to make a warranty."[48] It

[44] *Id.* at 11B-110(4).
[45] *Id.* at 11B-110(b).
[46] *Id.* at 11B-110(c).
[47] Md. Code Ann., Real Prop. §10-202(a)(1)-(3).
[48] *Id.* at 10-202(b).

is the effect rather than the intent that gives rise to an actionable warranty. "However, an affirmation merely of the value of the improvement or a statement purporting to be an opinion or commendation of the improvement does not create a warranty."[49] Nevertheless, statements and representations upon which the purchaser relies that relate to or embody a promise or description as to the property constitute express warranties under Maryland law.

Once an express warranty is made, "neither words in the contract of sale, the deed, other instrument of grant, nor merger of the contract of sale into the deed or other instrument of grant is effective to exclude or modify the warranty."[50] As with implied warranties, "the warranty may be excluded or modified wholly or partially by a written instrument, [separate and apart from the contract of sale,] signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the agreement with respect to it," and such instrument may only be executed after the contract of sale has been signed.[51]

V. THE RIGHT TO CORRECT A WARRANTED DEFECT

As to all warranty claims, regardless of whether the warranties are express or implied, the contractor generally must be given an opportunity to correct the defect. Indeed, "[i]t is pellucid that a plaintiff may not assert a claim for breach of warranty against a defendant whom he has denied the opportunity to correct the defect."[52] Of course, the contractor or supplier must be "ready and willing to perform his part of the contract."[53] Indeed, a claimant my assert that the defendant, while expressing a willingness to perform, is incapable of correcting the defective condition, particularly after a failed attempt to do so.

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[49] *Ibid.*
[50] *Id.* at 10-202(c).
[51] *Ibid.*
[52] *U.K. Constr. & Mgt. LLC v. Gore,* 199 Md. App. 81, 93 (2011). *See also Murphy v. 24th Street Cadillac Corp.,* 121 Md. App. 454, 460 (1998).
[53] *Evergreen Amusement Corp. v. Milstead,* 206 Md. 610, 622 (1955).

VI. SEPARATE CLAIMS UNDER CONTRACT

Section 10-202 establishes that representations concerning the condition of property at the time it is sold constitute express warranties, and their duration and period of limitations are governed by Section 10-204. In *Potterton v. The Ryland Group*[54], the builder of a new home, in a letter, agreed to repair a list of defects, but failed to satisfactorily do so. The trial court held that owner's claim was barred by the two year period of limitations under Md. Code Ann., Real Prop. §10-204. The Court of Appeals reversed, holding that the promise to correct defects extended limitations beyond those applicable to a warranty claim:

> Here the record shows that there was a subsisting agreement under which the seller was to perform an obligation other than the payment of money. The 10 July 1975 letter consisted of both an acknowledgment that the seller had not properly performed its obligations and an express unconditional promise to perform properly….
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> Under these circumstances, the bar created by the statute of limitations was removed, and the limitations period extended.[55]

Such an acknowledgment and promise to repair extends limitations until such time as the plaintiff is on notice that the repairs have not been properly performed. In *Antiqua, supra,* the developer of the condominium expressly agreed to undertake corrections of defects upon receipt of notice within a one year period. The Court of Appeals held that a statement as to the condition of the property at the time it is sold is an express warranty, and is governed by the provisions of Sections 10-201, 10- 202 and 10-204, including its duration and the applicable period of limitations. However, a promise of future performance, such as an agreement to undertake repairs, is a contractual obligation. The Court ruled that, "even though giving notice of a defect presupposes discovery of the defect, it does not follow that limitations cannot begin to run later than the date on which notice of a defect was given."[56] Accordingly, the discovery rule applies, the cause of action accrues and limitations commences only when the owner discovers, or, in the exercise of reasonable diligence, should have discovered, the developer's failure to make repairs in accordance with the contractual promise.

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[54] 289 Md. 371 (1981).
[55] *Id.* at 378.
[56] 307 Md. at 717.

The contract action does not accrue until there is discovery that the promise of future performance has been breached, after which the applicable period of limitations for such contract actions is Maryland's general three-year statute of limitations.[57] As a result, a contract action can potentially arise, and a suit can be brought, many years after warranties have long expired without any defect having been discovered during the warranty period.

Where condominiums are concerned, it is noteworthy that Section 11-141(a) of the Condominium Act expressly provides that "[t]he provisions of this title are in addition and supplemental to all other provisions of the public general laws, the public local laws, and any local enactment in the State." As a result, common law claims in contract, as well as tort, may be brought in connection with condominium building defects in addition to or in place of warranty claims.

VII. NEGLIGENCE ACTIONS

Maryland recognizes a general cause of action for failure to exercise due care in construction.[58] This includes negligence in the design and construction of the project, negligent selection of materials, and negligent supervision of the various trades. A duty in negligence is determined as follows:

(1) A duty will be imposed, even where only economic loss is involved, where the nature of the harm gives rise to the risk of serious personal injury among a foreseeable group.

(2) A duty will be imposed where the harm results in property damage.

(3) Where the harm is purely economic loss, without the risk of personal injury, a duty will be imposed where there is contractual privity between the parties, or a sufficiently close nexus or relationship so as to be the functional equivalent of contractual privity.[59]

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[57] *Poffenberger v. Risser,* 290 Md. 631 (1981). Md. Code Ann., Cts. & Jud. Pro. §5-101.
[58] *Milton Co. v. Council of Unit Owners of Bentley Place Condominium, supra.*
[59] *See, e.g., Morris v. Osmose Wood Preserving,*340 Md. 519 (1995); *U.S. Gypsum Co. v. Mayor & City Council of Baltimore,* 336 Md. 145 (1994); *A.J. Decoster Co. v. Westinghouse Electric Corp.,* 333 Md. 245 (1994); *Village of Cross Keys, Inc. v. U.S. Gypsum Co.,* 315 Md. 741 (1989); and *Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.,* 308 Md. 18 (1986).

The period of limitations applicable to a negligence claim is Maryland's general three-year statute of limitations,[60] subject to the discovery rule.[61]

The economic loss doctrine precludes a tort claim where only economic loss is at issue unless the requisite elements are present. As noted above, foremost in the imposition of tort liability is the presence of privity of contract, or its equivalent, between the plaintiff and defendant:

> Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent.[62]

However, court have considered and identified other bases for imposing a duty in tort. In *Whiting-Turner Contracting Co.*,[63] the Court of Appeals considered whether a builder or architect may "owe a tort duty of reasonable care to a person with whom he has no contractual privity." The *Whiting Turner* decision delved deeper into the history of the economic loss rule, which drew from products liability law, to understand its parameters in a situation where privity did not exist:

> In its early development, the law relating to builders and architects generally held that their duty did not extend to those with whom they had no contractual privity. Gradually, however, exceptions to the general rule of nonliability were judicially recognized. . . .Thus, where a duty of due care had been assumed by contract or conduct, recovery by a workman not in privity with the builder was permitted. *See, e.g., Krieger v. J.E. Greiner Co., Inc.*, 282 Md. 50, 382 A.2d 1069 (1978), recognizing that supervising and consulting engineers may owe a tort duty to workmen with whom they have no privity, depending upon the terms of their contracts or their voluntary assumption of duties. . . .
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> As the list of exceptions to the rule of nonliability grew, and as the attack upon the citadel of privity progressed in the area of products liability, courts increasingly turned to a reexamination of the underpinnings and continued viability

[60] Md. Code Ann., Cts. & Jud. Pro. §5-101.
[61] *Poffenberger v. Risser, supra.*
[6262] *Chicago Title Ins. Co. v. Allfirst Bank*, 394 Md. 270, 291 (2006) (citation and internal quotation marks omitted).
[63] 308 Md. 18, 24 (1986),

> of the general rule. The authors of a recent text offer the following analysis of the results of that reappraisal:
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> * * * * * *
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> > The requirement of privity of contract has been abandoned as a basis for recovery by third parties for physical harm to themselves and tangible things against those who negligently supply, repair, or construct things so as to leave them in an unreasonably dangerous condition.
>
> The authors conclude that the rule of nonliability and its plethora of exceptions has now evolved into a general rule of liability where the result of negligence is the creation of a dangerous condition.
>
> It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. This applies not only to contractors doing original work, but also to those who make repairs, or install parts, as well as supervising architects and engineers. There may be liability for negligent design, as well as for negligent construction.[64]

Clearly, the law has evolved over time to allow, as an exception to the privity requirement, some tort liability where the parties are not in privity; the exception involves an analysis of the degree and probability of physical harm. Additionally, however, damage or harm to property has been held to be distinct from purely economic loss so as to give rise to tort liability.[65]

The determination of the existence of a tort duty also depends in part on the status of the party upon whom it is sought to be imposed. In *Brock Bridge Ltd. P'ship, Inc. v. Dev. Facilitators, Inc.*,[66] the Court of Special Appeals applied this exception to the economic loss rule to conclude that an engineer could be found personally liable under a

[64] 308 Md. at 25-28 (some citations omitted).
[65] *See, e.g., A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 252 (1994).
[66] 114 Md. App. 144, 161 (1997)

negligence theory for having misrepresented the costs of construction. This was the case even though the engineer did not sign a contract with the plaintiff in the engineer's own capacity, and therefore had no contractual privity with the plaintiff.[67] The Court of Special Appeals found that engineering, by its very nature, was of "'those occupations requiring particular skill [in which] a tort duty to act with reasonable care will be imposed on those who hold themselves out as possessing the requisite skill.'"[68] Accordingly relevant to the determination of whether a tort duty exits is "the nature of the business of the party upon whom the burden may be imposed."[69] Parties involved in the design and construction process, therefore, may be liable in tort based on having held themselves out as possessing a license or other special skill.

In a recent decision, *Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP,*[70] the Court of Special Appeals discussed the economic loss doctrine at length, and held that, as to design professionals, privity of contract is required before a tort duty will be imposed, and "the 'privity equivalent' concept of extra contractual duty does not apply" where purely economic loss is at issue, and "there is no death, personal injury, property damage, or the risk of death or serious personal injury."[71] In the context of this government contract case, the Court found that there is "a distinction between the duty owed by design professionals to construction contractors under government contracts, and the duty owed by accountants and other professionals to third parties who can establish reliance and the elements of an intimate nexus."[72]

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[67] *Id.* at 161.
[68] *Id.* at 161 *(quoting Jacques v. First Nat'l Bank,,* 307 Md. 527 (1986).
[69] *Id.* at 161.
[70] Court of Special Appeals of Maryland, January 28, 2016.
[71] *Id.* at 31.
[72] *Id.* at 30.

VIII. CLAIMS UNDER THE MARYLAND CONSUMER PROTECTION ACT

The Maryland Consumer Protection Act includes a private cause of action for damages sustained as a result of an unfair and deceptive trade practice as defined in the statute.[73] The Act is expressly applicable to "consumer realty," which refers to new sales real property purchased "primarily for personal, household, family, or agricultural purposes."[74] Accordingly, representations made in connection with the sale of new homes may be in violation of the Act where they are misleading to consumers.

One particularly germane basis for an unfair and deceptive trade practice is a representation that consumer realty has a "characteristic" or "quality" which it does not have.[75] False representations as to a property's content, specifications or workmanship, can give rise to consumer claims. Indeed, it has been held that presentation of a projects plans and specifications is a representation of a "characteristic" of the property. Deviating from those plans and specification can constitute an unfair and deceptive trade practice under the Act. In *Hartford Accident & Indemnity Co. v. Scarlett Harbor Associates L.P.,* the Court of Special Appeals held that "[s]ince conformity to plans and specifications is an attribute or descriptive aspect of a condominium, a seller's statement that the building or unit so conforms is a representation that the condominium has a particular 'characteristic'."[76]

It is of particular note that a Consumer Protection Act exposes the defendant to broader damages than other actions. In addition to damages for injury and loss, the Act provides that a prevailing plaintiff under a private cause of action pursuant to the Act may also be awarded "reasonable attorney's fees."[77]

It is important to note that, with regard to claims under the Act, the alleged misrepresentations or other form of unfair and deceptive trade practice must have occurred prior to the purchase so as to have induced the purchase on false grounds.

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[73] Md. Code Ann., Com. Law §13-408(a).
[74] *Id.* at 13-101(d).
[75] *Id.* at 13-301(2)(i).
[76] 109 Md. App. 217 (1996), *aff'd.,* 346 Md. 122 (1997).
[77] Md. Code Ann., Com. Law §13-408(b).

IX. OTHER MISREPRESENTATION CLAIMS

Sales of new homes and condominium can also expose the seller to claims of common law fraud or misrepresentation. Unlike a claim under the Consumer Protection Act, such claims are not limited to actions that would constitute an unfair and deceptive trade practice. Instead, they may arise from any alleged misrepresentation of a material fact upon which the purchaser relies to their detriment. Moreover, fraud may exist in a suppression of the truth as well as the assertion of a falsehood.[78]

The elements of negligent misrepresentation are (1) the negligent assertion of a false statement by a defendant owing a duty of care to the plaintiff; (2) the intention of the defendant that the plaintiff act or rely on the assertion; (3) knowledge of the defendant that the plaintiff probably will rely on the assertion, which, if erroneous, will cause damage to the plaintiff; (4) justifiable action by the plaintiff in reliance on the assertion; and (5) resulting damages.[79] In the context of the sale of a new home, the existence of duty is determined under the same standards applicable to negligence in general; *i.e.,* the existence of privity of contract or its equivalent, damage to property, and the existence of special duties arising from the status of skills of the party upon whom the duty is imposed.

X. FIDUCIARY DUTIES AND CONTROL OF A BOARD OF DIRECTORS

It should be noted that developers of condominiums can find themselves in a position in which they have fiduciary duties to the owners of the units. This occurs during the period of time during which the developer maintains a majority interest in, and therefore control of, the condominium's governing body, and arises because the developer owns the units until they are sold. Accordingly, the developer has a majority of the votes and control of the condominium's board of directors until more the 50% of the units are conveyed. Moreover, developers typically appoint the initial board members. During this period of developer control, fiduciary duties arise.

Maryland law recognizes that "directors of a corporation occupy a fiduciary

[78] *Impala Platinum v. Impala Sales (U.S.A.), Inc.,* 283 Md. 296 (1978).
[79] *Flaherty v. Weinberg,* 303 Md. 116, 135 (1985).

relationship to the corporation and its stockholders."[80] Such fiduciary duties impose affirmative duties on directors.[81]

Furthermore, while the Court of Appeals recognized in *Kaan v. Kaan*,[82] that there was "no universal omnibus tort for the redress of breach of fiduciary duty," it also specifically held in its decision that:

> This does not mean that there is no claim or cause of action available for breach of fiduciary duty. Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not as conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem.[83]

Thus, under Maryland law, to establish a breach of fiduciary duty, a plaintiff must demonstrate (1) the existence of a fiduciary relationship, (2) breach of the duty owed by the fiduciary to the beneficiary, and (3) harm to the beneficiary resulting from the breach.[84] And where a breach of a fiduciary relationship exists, fraud may be presumed.[85] The fiduciary relationship can give rise to obligations with regard to the accurate disclosure of material facts. If such facts are withheld or misleading facts are disclosed, causes of action may arise if damages are incurred as a result of reasonable reliance on any inaccurate information.

It should also be noted that a developer's control of a board can have the effect of extending the statute of limitations on claims. In *Hecht v. Resolution Trust Corp.*,[86] the Maryland Court of Appeals adopted the "disinterested majority" version of the adverse domination doctrine, which provides that "claims by a corporation [or association] do not

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[80] *Martin Marietta Corp. v. Bendix*, 549 F. Supp. 623, 633 (D. Md. 1982); *see also Lawson v. Baltimore Paint & Chemical, Corp.*, 347 F. Supp. 967 (D. Md. 1972); *Tonor v. Baltimore Envelope Co.*, 304 Md. 256 (1985); *Merchants Mortgage Company v. Lubow*, 275 Md. 208 (1975).
[81] *Herring v. Offutt*, 266 Md. 593, 600 (1972).
[82] 344 Md. 689 (1997),
[83] 344 Md. at 713.
[84] *Lyon v. Campbell*, 120 Md. App. 412 (1998).
[85] *Republic Realty Co. v. Phoenix Savings and Loan Ass'n.*, 250 Md. 549, 558 (1968).
[86] 333 Md. 324, 339 (1994),

accrue and/or limitations do not run against any of the culpable officers and directors until there exists a disinterested majority of nonculpable directors." This doctrine carries a presumption that "control of the association by culpable directors and officers precludes the possibility of filing suit because these individuals can hardly be expected to sue themselves or to initiate any action contrary to their own interests." [87] This presumption, however, can be rebutted by "evidence that someone other than the wrongdoing directors had knowledge of the cause of action, and both the ability and the motivation to bring suit. This burden of production is on the defendant, who has the obligation to prove the defense of limitations."[88]

[8787] *Id*. at 340 and 347 (internal quotations omitted).
[88] *Id*. at 347.