

How Long Is A Roofing Contractor Liable in the Carolinas?

Carolina Roofing & Sheet Metal Contractors Association
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Myrtle Beach, SC

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**Statute of
Limitations**
EXPIRED

WHAT IS A STATUTE OF LIMITATIONS?

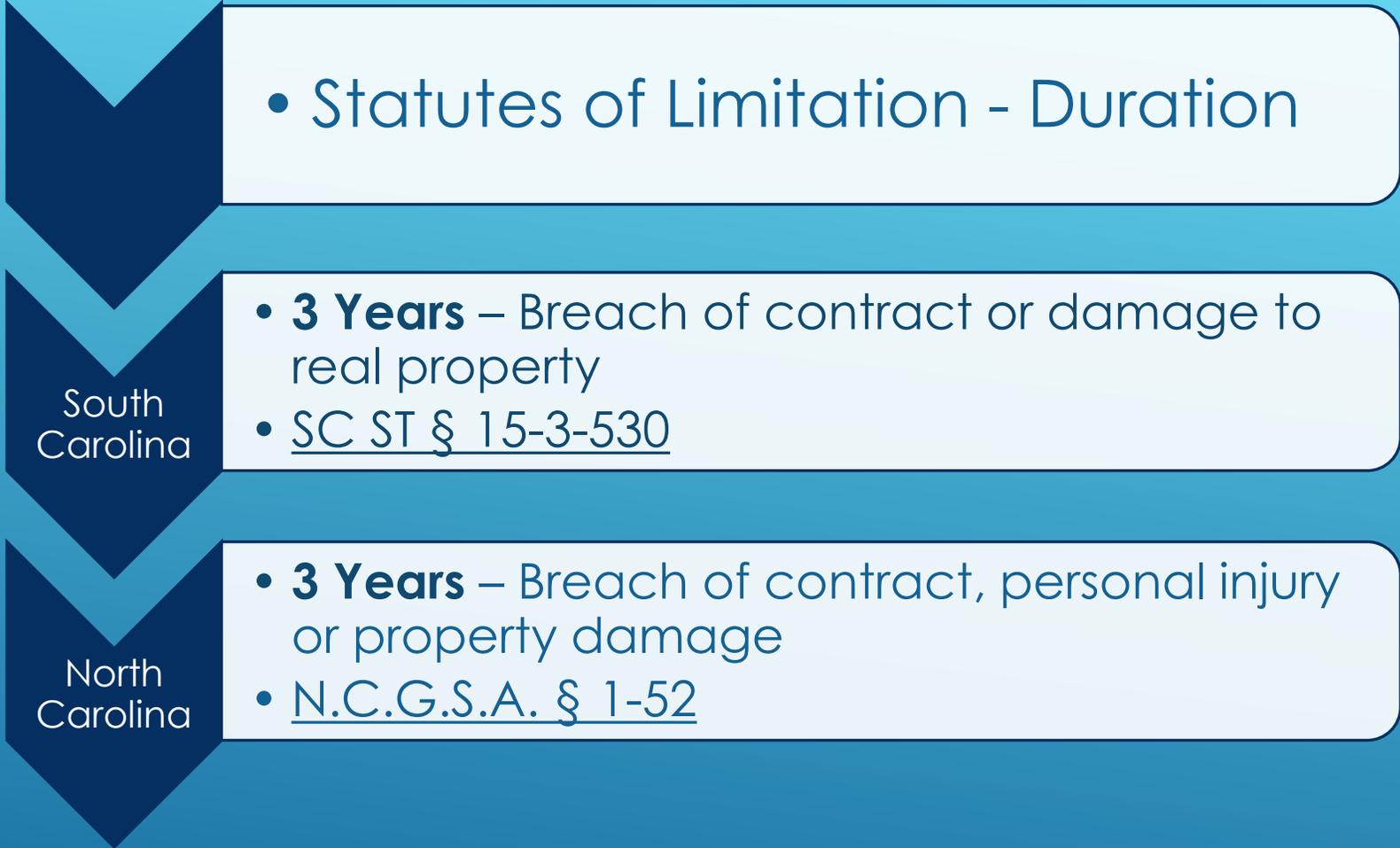
STATUTE OF LIMITATIONS

Factors Determining Statute of Limitations:

- ▶ Duration: How many years?
- ▶ Starting Point: When does the statute of limitation begin?
- ▶ When does the cause of action accrue?
 - ▶ Time when breach of contract or negligent act occurred
 - ▶ Time of completion
 - ▶ Time of injury
 - ▶ Time of discovery of claim

Statute of Limitations

- ▶ What is the legal theory of the claim?
 - ▶ Breach of Contract
 - ▶ Tort- Negligence
 - ▶ Breach of Warranty
 - ▶ Claim for Contribution or Indemnification



- Statutes of Limitation - Duration

South
Carolina

- **3 Years** – Breach of contract or damage to real property
- SC ST § 15-3-530

North
Carolina

- **3 Years** – Breach of contract, personal injury or property damage
- N.C.G.S.A. § 1-52

Unusually short in both N.C. and S.C., but...

STATUTES OF LIMITATION

- Both North Carolina and South Carolina apply the “discovery” rule
- The statute of limitations begins to run upon discovery of the claim by the claimant, not when the breach of contract or alleged negligence occurred, i.e. not at the time of construction.



- ▶ “Breach of contract accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could have discovered the breach through the exercise of reasonable diligence.”
- ▶ *Maher v. Tietext Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998)

SOUTH CAROLINA STATUTE OF LIMITATIONS

N.C. STATUTE OF LIMITATION

- ▶ 3-year period does not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant.
N.C.G.S.A. § 1-50(f)

South Carolina – Discovery Rule: Runs from the date when the cause of action reasonably ought to have been discovered

North Carolina – Discovery Rule: Runs from the date that physical damage to property becomes reasonably apparent or ought to have become apparent to the claimant

STATUTE OF LIMITATIONS– STARTING DATE

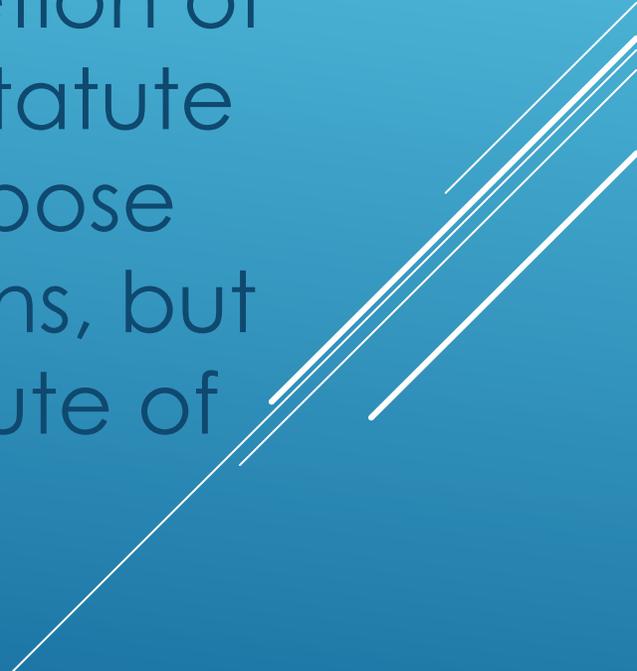
EFFECT OF THE DISCOVERY RULE

So can a contractor be sued 5, 10, 15 or 20 years after completing the job if the claimant does not discover the alleged deficiency until 4, 9, 14, or 20 years after the contractor completed the job?

- ▶ What if there are no leaks until year 7, does the claimant have 3 more years – until 10 years after installation – to file a lawsuit against the roofing contractor?

STATUTE OF LIMITATION VS STATUTE OF REPOSE

Statutes of repose establish an outside time limit generally running from the completion of construction in which the “discovery” statute of limitations operate. The statute of repose does not extend the statute of limitations, but limits the duration of a “discovery” statute of limitation.

The image features several white diagonal lines in the bottom right corner, consisting of three parallel lines of varying lengths, creating a modern, abstract graphic element.

South Carolina
S.C.S.T § 15-3-640

North Carolina
NC ST § 1-50(a)(5)(a)

8 years after substantial
completion of
improvement

6 years bid from the latter
of the specific last act or
omission of defendant
giving rise to the cause of
action or substantial
completion of the
improvement

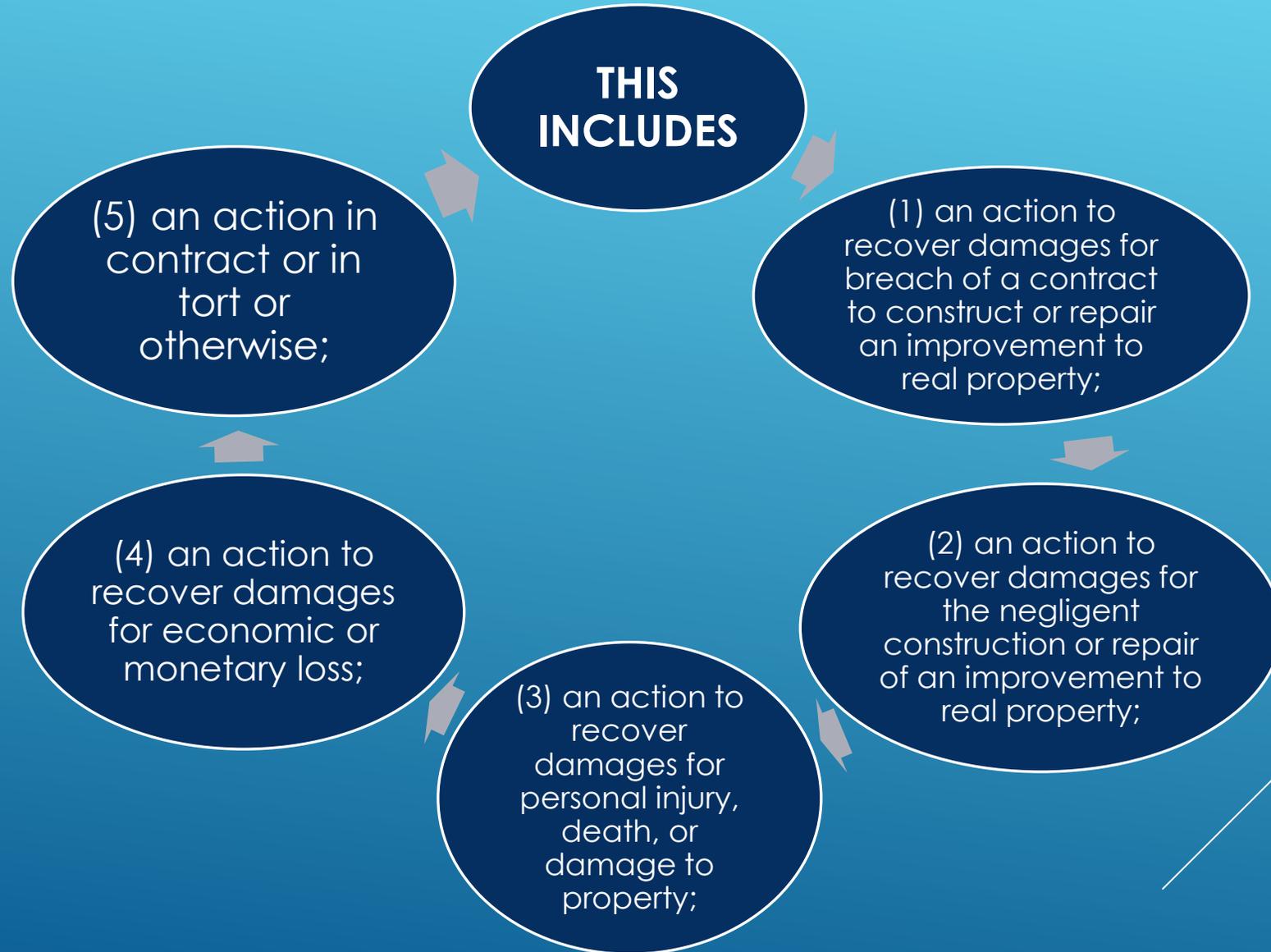
STATUTE OF REPOSE

STATUTE OF REPOSE SOUTH CAROLINA – 8 YEARS

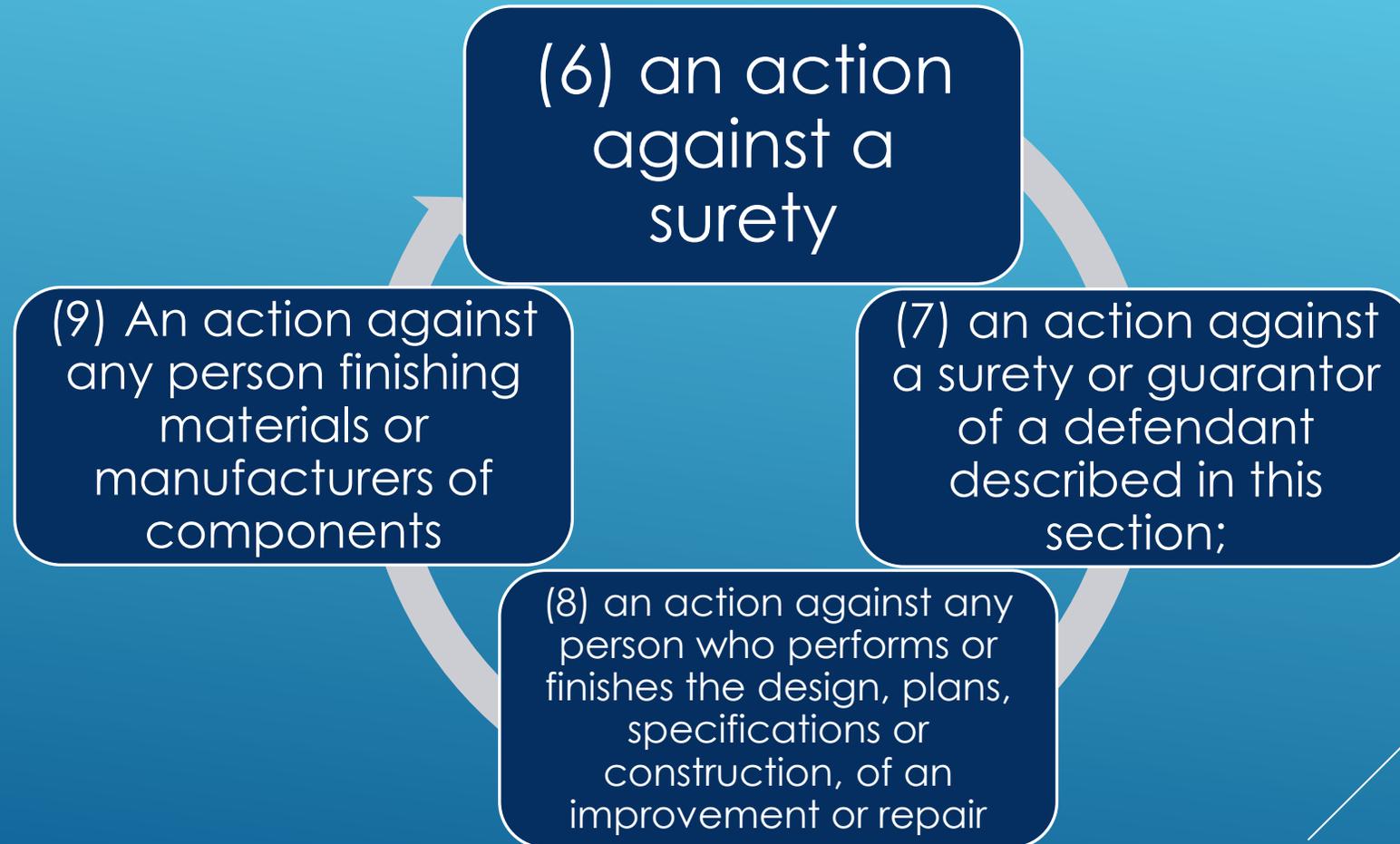
SC ST § 15-3-640

No actions to recover damages arising out of the defective or unsafe condition of an improvement to real property may be brought more than 8 years after substantial completion of the improvement

STATUTE OF REPOSE SOUTH CAROLINA – 8 YEARS



STATUTE OF REPOSE SOUTH CAROLINA 8 YEARS



Statute of Repose

North
Carolina
6 Years

N.C.G.S.A § 1-50(a)(5)

- ▶ No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the latter of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. STATUTE OF REPOSE



- ▶ Suit must be brought within 6 years from the latter of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement

Statute of Repose

North
Carolina
6 Years

N.C.G.S.A § 1-50(a)(5)

- Includes generally same claims as under S.C. statute of repose. Very inclusive.
- Applies to claims against architects and engineers
Applies to claims against material suppliers.

N.C. STATUTE OF REPOSE

Applies to an action based upon or arising out of the defective or unsafe condition of an improvement to real property. Applies to actions against:

- any person furnishing materials;
- any person who develops real property;
- any person who performs the design, plans, specifications or surveys;
- any person who performs supervision or testing or observation of construction;
- any person who performs construction of an improvement to real property;
- any person who performs repairs to an improvement to real property

N.C. STATUTE OF REPOSE

6-year statute of repose will not be a defense by any person who shall have been guilty of:

- fraud;
- willful or wonton negligence;
- wrongfully concealing fraud, or willful or wonton negligence

N.C.G.S.A. § 1-50e

- Willful or wanton negligence connotes deliberate or intentional disregard of or indifference to the rights and safety of others

SALES OF GOODS

What About Claims
Against Sellers of
Materials – distributors
and manufacturers – if
the roofing materials
prove to be defective?



SALES OF GOODS/ CLAIMS AGAINST SELLERS OF MATERIALS

Governed by Uniform Commercial Code (UCC)

SOUTH CAROLINA

SC ST § 36-2-725: 6 years

- Cause of action accrues for breach of warranty when the breach is or should have been discovered



North Carolina



- ▶ NC ST § 25-2-725: 4 years
- ▶ Cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Breach of warranty occurs when tender of delivery is made, except for a warranty that explicitly extends to future performance of the goods; then the cause of action accrues when the breach is or should have been discovered

SALES OF GOODS/CLAIMS AGAINST
SELLERS OF MATERIALS

Claims against manufacturers and suppliers if you receive defective materials or a claim is made against you for defective materials...

Be sure to have a simple, straightforward agreement with the supplier stating:

- Supplier will hold harmless and indemnify roofing contractor if supplier furnishes defective materials to roofing contractor or if a claim is made against roofing contractor alleging defective materials furnished by the seller or manufacturer of the material.

BREACH OF WARRANTY

What About Warranty Claims?

- ▶ If you provide a 2-year contractor's warranty and the owner claims you breached the warranty, can the owner sue you 4 years after you installed the roof/2 years after your 2-year warranty expired?
- ▶ What if you have provided a 10, 15, or 20-year manufacturer's warranty to the owner?



WARRANTY CLAIMS

3 year statutes of limitations in S.C. and N.C. apply to an action upon a contract, obligation or liability, express or implied.

WARRANTY CLAIMS

- ▶ Manufacturer (or contractor) gives 10, 15 or 20 year warranty.
- ▶ What is the effect of the 6 (N.C.) or 8 (S.C.) year statute of repose?

WARRANTY CLAIMS

North Carolina

- ▶ *Roemer v. Preferred Roofing, Inc.*, 190 N.C. App. 813, 660 S.E.2d 920 (2008) – N.C. Court of Appeals said that N.C. statute of repose precluded a claim for damages under an express lifetime warranty. Claimant's remedy was specific performance after statute of repose had run, not damages.

WARRANTY CLAIMS



▶ *Christie v. Hartley Construction, Inc.*, 367 N.C. 534 (2014)

Homeowner's could pursue claim based on 20-year express warranty issued by manufacturer of stucco-like exterior material despite expiration of 6-year N.C. statute of repose. Manufacturer/seller of material "bargained away" right to rely on 6-year statute of repose when stating that its produce was fully warranted for 20 years.

North Carolina

CAN PARTIES TO A CONTRACT STIPULATE TO THEIR OWN
STATUTE OF LIMITATIONS?

CAN PARTIES AGREE CONTRACTUALLY TO SHORTEN THE
STATUTE OF LIMITATIONS?

CAN PARTIES TO A CONTRACT STIPULATE TO
THEIR OWN STATUTE OF LIMITATIONS?

North Carolina: Yes

South Carolina: No

CONTRACTUAL STATUTE OF LIMITATIONS

You could for example, in North Carolina, include a provision along these lines in your contract:

Any claims against roofing contractor alleging defective or improper roof installation shall be brought no later than one (1) year after roofing contractor performed the roof installation and shall be resolved through arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

CONTRACTUAL STATUTE OF LIMITATION FOR WARRANTY CLAIM

You could for example, in North Carolina, for a claim for alleging breach of warranty include a provision along these lines in your warranty and/or contract:

Any claim against or dispute with roofing contractor alleging breach of this warranty must be filed no later than one (1) year after the alleged breach of the warranty and in all cases no later than one (1) year after the expiration date of the warranty, and shall be resolved through arbitration.

PERFORMANCE BONDS/CONTRACTUAL LIMITATIONS

North Carolina

Look for and consider including in all performance bonds that you issue a provision along these lines to reduce potential performance bond liability:

Any claim on this bond must be filed no later than one (1) year after roofing contractor performed the roof installation.

EQUITABLE TOLLING

- ▶ What if you tell the owner after leaks have occurred, that you will take care of everything – the owner has nothing to worry about?
- ▶ Do your representations or your conduct affect the running of the statute of limitations or statute of repose?

Can the running of the statute of limitations be stopped or suspended by the conduct of the parties?

EQUITABLE TOLLING

- Assurances to an injured party that defects can be corrected, coupled with attempts to correct them, is conduct that may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.
- Such assurances may provide the basis to stop or suspend the running of the statute of limitations

EQUITABLE TOLLING

SOUTH CAROLINA – EQUITABLE ESTOPPEL

- It is sufficient that the aggrieved party **reasonably relied** upon the words and conduct of the person to be estopped in allowing the limitations period to expire
- Equitable tolling if you assure the other party construction defects will be repaired, and the other party was justified in relying upon those assurances.

EQUITABLE TOLLING – SOUTH CAROLINA

Dillon County School District No. Two v. Lewis Street Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985)

- 1970 roof installed at new high school
- Leaked continuously from the time roof was installed
- November 1972 Architect referred to leaks as a “continued problem”. Architect wrote letter to School District stating: “This problem will be resolved to your satisfaction.” Many meetings, but roof continued to leak.
- Suit filed in 1981 dismissed against material manufacturers, deck subcontractor and engineer who did little to try to solve the problem. Owner was allowed to continue to pursue the claim against the general contractor, roofing contractor and architect who tried to solve the problem.

EQUITABLE TOLLING – NORTH CAROLINA

Walker Manufacturing Company v Dickerson Inc., 560 F.2d 1184 (4th Cir. 1977)

U.S. Circuit Court of Appeals reversed trial court's dismissal of lawsuit against the contractor filed more than 5 years after roof was constructed and experienced blisters and leakage. Contractor assured Owner that he would take care of deficiencies which were the Contractor's responsibility regardless of expiration of the roofing contractor's 1-year warranty. Court of Appeals applied the doctrine of equitable estoppel and said that court judge should not have ruled the claim was barred by the 3-year statute of limitations.

SOUTH CAROLINA – EQUITABLE ESTOPPEL/TOLLING

Magnolia North Property Owner's Association, Inc. v. Heritage Communities, Inc. 397 S.C. 348, 725 S.E.2d 112 (2012)

“A defendant will be estopped to assert the statute of limitation in bar of a plaintiff's claim when the delay that otherwise would give operator to the statute has been included by defendant's conduct.”

EQUITABLE TOLLING

- South Carolina – S.C. Supreme Court agrees with principle of equitable tolling
- North Carolina – statute of repose cannot be equitably tolled, but a statute of limitations can be tolled

EQUITABLE TOLLING – SOUTH CAROLINA & NORTH CAROLINA

- ▶ Be careful not to inadvertently waive statute of limitations defenses due to equitable estoppel doctrine
- ▶ Certainly ok to make repairs
- ▶ Don't tell owner: “no need to take legal action” or “we'll get this solved to your satisfaction”

NULLUM
TEMPUS
OCCURRIT
REGI

“No Time Runs Against
The King”

S.C. – Abolished

N.C. – Recognizes
for statute of
limitations

Nullum Tempus – North Carolina

- *Rowan County Board of Education v. U.S. Gypsum Co.*, 418 S.E.2d 648 (1992)
- When the state or one of its political subdivisions is pursuing a governmental purpose, the doctrine of nullum tempus protects that political body from the running of statutes of limitation and repose unless the pertinent statute expressly includes the State

Nullum Tempus – North Carolina

- Statute of Repose, N.C.G.S.A. § 1-50 (6 years)
 - 7(b) This section applies to actions brought by a private party and to actions brought by the state or a political subdivision of the state
- Statute of limitations N.C.G.S.A. § 1-52 (3 years)
 - No express provision

Claims on Payment Bonds

- North Carolina – No action on a payment bond shall be commenced after the expiration of 1 year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final payment was made with the contractor. N.C.S.T § 44A-28(6)
- 6 year statute or repose applies

Claims on Payment Bonds

- South Carolina – Action on bond must be brought within 1 year after the last day of furnishing or providing labor, materials, or rental equipment.
S.C.S.T § 11-35-3030(c) and (d)

CONCLUSION: HOW LONG WILL A ROOFING CONTRACTOR BE LIABLE IN THE CAROLINAS?

- South Carolina – 3 years from discovery of the defect, but no more than 8 years after substantial completion of improvement
- North Carolina – 3 years from discovery of the defect, but no more than 6 years after the latter of the last act or omission of the defendant giving rise to the claim or substantial completion of the improvement

BUT THE DURATION OF YOUR POTENTIAL LIABILITY CAN BE EXTENDED BY:

- Issuance of a warranty
- Equitable tolling – assurance that claim will be resolved