

Fair Housing Act Design and Construction Violations— When Does the Statute of Limitations Begin to Run?

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act (“FHA”), prohibits discrimination in the sale or rental of housing on the basis of an individual’s race, color, religion, sex or national origin. 42 U.S.C. §§ 3601-3639. In 1988, Congress amended the FHA to further prohibit discrimination against persons with disabilities. Federal law defines persons with disabilities as any person who has a “physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 3602(h). To ensure that developers, architects, engineers and other professionals construct multifamily dwellings¹ to be accessible to persons with disabilities, the FHA contains certain “design and construction” requirements. These requirements include accessible building entrances, common and public use areas, kitchens and bathrooms. 42 U.S.C. § 3604(f)(3)(C).

Failure to incorporate FHA accessible “design and construction” features in multifamily dwellings amounts to discrimination on the basis of handicap. This is a violation of federal law.

The FHA offers three methods of enforcement, each with its own statute of limitations period.²

First, a direct civil action may be brought by an “aggrieved person” in federal or state court. A private claim alleging housing discrimination under this provision must commence “no[] later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)(A).

Second, a person aggrieved by a discriminatory housing practice may file an administrative complaint with the Department of Housing and Urban Development (HUD), which may lead to an administrative hearing or, if either party elects, may be transferred to federal court and prosecuted by the Justice Department on behalf of the complainant. 42 U.S.C. §§ 3610-3612. Complaints under this provision must be filed “no later than 1 year after an alleged discriminatory housing practice has occurred or terminated.” 42 U.S.C. § 3610(a)(1)(A)(i).

Third, a civil action may be brought by the Attorney General under section 3614 of the FHA. This provision may be invoked only if the defendant has “engaged in a pattern or practice of resistance” to FHA rights or if a “group of persons has been denied any [FHA] rights...and such

¹ Covered multifamily dwellings for purposes of the FHA are buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units. 24 C.F.R. § 100.201.

² A statute of limitations is a law that bars claims after a specified period; specifically, a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). BLACK’S LAW DICTIONARY 1450-1451 (8th ed. 2004).

denial raises an issue of general public importance.” 42 U.S.C. § 3614(a). Suits by the Department of Justice under this provision are not subject to any explicit statute of limitations. Courts generally allow Section 3614 claims for injunctive relief to be raised at any time, but have imposed a three year limitations period on claims for monetary damages and a five year limitations period on claims civil penalties.

A common problem faced by builders that have been sued under one of the three enforcement provisions of the FHA is determining when the statute of limitations begins to run (i.e. the trigger). In other words, from what date does the builder start counting the one, two, three or five year statutory period. Unfortunately, the federal courts are not all in agreement. Some courts have held that the statute of limitations begins to run after the non-compliant building is completed; others say it begins to run when the last non-compliant unit in a development has been sold; still others use a theory called the “continuing violation doctrine”³ to hold that the statute of limitations begins anew every day so long as the non-compliant unit remains in existence.

The Map and Table below, current through April 13, 2009, are intended to provide NAHB members with some assistance in determining when the statute of limitations might run on a FHA violation in their geographic region. The Map illustrates the boundaries of the twelve Federal Circuit Courts and the Table provides information on how the Federal Courts have dealt with the FHA statute of limitations issue. Courts which have not addressed the issue are indicated by a blank entry.

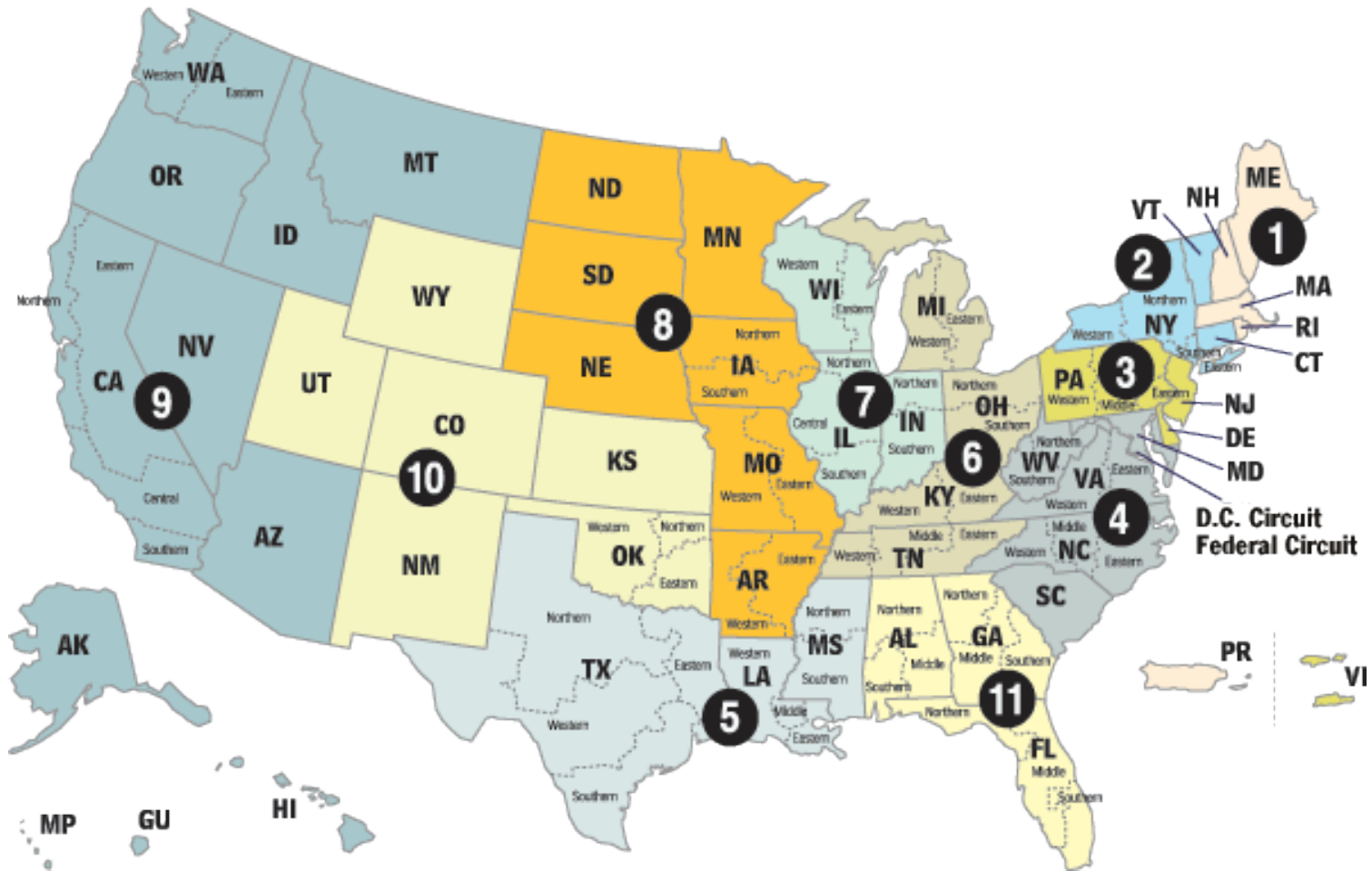
As one can see, there is no clear answer to the question, “from what date do I start counting to determine if the statute of limitations has expired on my project?” NAHB has petitioned the U.S. Supreme Court seeking clarification on this important question⁴ and continues to closely monitor FHA litigation that raises the question.

³ The continuing violation doctrine is a judge-made rule dictating that if a discriminatory act is of an ongoing nature, the statute of limitations will be extended to allow the plaintiff to recover even when a claim based on that act would otherwise be time-barred. BLACK’S LAW DICTIONARY 340 (8th ed. 2004).

⁴ NAHB assisted builder-member WKB Associates with a Petition for Certiorari to the U.S. Supreme Court. The Court denied Certiorari on January 7, 2008.

Geographic Boundaries


of the United States Courts of Appeals and United States District Courts



CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
D.C. Circuit					
1	1st Circuit Court of Appeals				
	Massachusetts				
	Maine				
	New Hampshire				
	Puerto Rico				
	Rhode Island				
2	2nd Circuit Court of Appeals				
	Connecticut				
	New York	<i>Eastern Paralyzed Veterans Ass'n v. Lazarus Burman Associates</i> , 133 F. Supp.2d 203 (2001)	YES	Remediation of non-compliant housing structure	Where plaintiffs allege an ongoing discriminatory practice, such as a housing structure not being wheelchair accessible, the ongoing wrong repeatedly triggers and retriggers the statute of limitations clock
	Vermont				


CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
3	3rd Circuit Court of Appeals				
	Delaware				
	New Jersey				
	Pennsylvania				
	Virgin Islands				
4	4th Circuit Court of Appeals				
	Maryland	<i>Baltimore Neighborhoods v. Rommel Builders Inc.</i> , 40 F.Supp.2d 700 (1999)	NO	Sale of last inaccessible unit	
		<i>Kuchmas v. Towson University</i> , 2007 WL 2694186	NO	Completion of construction	A failure to properly design and construct is a single instance of unlawful conduct, even though the ill effects may continue to be felt decades after construction is complete.
	North Carolina				
	South Carolina				
	Virginia	<i>Moeseke v. Miller</i> , 202 F.Supp.2d 492 (2002)	NO	Completion of construction	Proper focus should be on defendant's act (i.e., the design and construction of a non-compliant housing) rather than the continuing effects.
West Virginia					

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
5	5th Circuit Court of Appeals				
	Louisiana				
	Mississippi				
	Texas				
6	6th Circuit Court of Appeals	<i>Fair Housing Council v. Village of Olde St. Andrews</i> , 210 Fed.Appx.469 (6th Cir. 2006)	YES	Sale of last inaccessible unit in a development	Where plaintiff alleges developer engaged in a policy or practice throughout the entire development of constructing housing units that fail to comply with the FHA, the continuing violation doctrine applies to toll the statute of limitations period until the sale of the last unit in that development.
	Kentucky				
	Michigan				
	Ohio				
	Tennessee				
7	7th Circuit Court of Appeals				
	Illinois				
	Indiana				
	Wisconsin				

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
	8th Circuit Court of Appeals				
	Arkansas				
	Iowa				
	Minnesota				
	Missouri				
	North Dakota				
	Nebraska				
	South Dakota				

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
9	9th Circuit Court of Appeals	<i>Garcia v. Brockway</i> , 526 F.3d 456 (9th Cir. 2008)	NO	Date the last certificate of occupancy was issued	The discriminatory act is a failure to design and construct, which is not a continuing violation, but a discrete instance of discrimination that terminates at the conclusion of the design and construction phase
	Alaska				
	Arizona				
	California	<i>Fagundes v. Charter Builders</i> , 2007 WL 2113575	NO	Completion of construction or sale of last inaccessible unit	The continuing violation doctrine does not apply in the construction context
	Guam				
	Hawaii				

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
<p style="text-align: center;">9</p> <p>(continued)</p>	Idaho	<i>U.S. v. Hallmark Homes, WL 23219807 2003</i>	NO	Completion of construction	Continued existence of a non-compliant housing structure is a continuing “effect” of discriminatory conduct, not a continuing violation of the law
		<i>U.S. v. Taigen & Sons, Inc., 303 F.Supp.2d 1129 (2003)</i>	NO	Completion of construction	Continued existence of a non-compliant housing structure is a continuing “effect” of discriminatory conduct, not a continuing violation of the law
		<i>U.S. v. Pacific Northwest Electric, Inc. 2003 WL 2573548</i>	NO	Completion of construction	Mere fact that the effects of a discriminatory design and construction violation are continuing does not convert previous acts into a continuing violation
	Montana	<i>Montana Fair Housing, Inc. v. American Capital Development, Inc., 81 F.Supp.2d 1057 (1999)</i>	YES	At the earliest, the date the last alleged violation was cured (e.g., installation of wheelchair ramp)	
	Mariana Isl.				

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
<div style="text-align: center;">  <p>(continued)</p> </div>	Nevada	<i>Thompson v. Rancho Del Norte.</i> , No. CV-S-05-0156- ERC (D.NV. Filed Oct. 14, 2005)	NO	Completion of construction	Creation of a non-compliant housing structure is a discrete act of discrimination, not a practice or policy of discrimination
		<i>Silver State v. ERGS.</i> , 362 F.Supp.2d 1218 (2005)	YES	Last ‘act’ in a series of related wrongful acts	Design and construction of multiple FHA non-compliant housing developments can constitute a ‘practice of discrimination’ and thus the continuing violation doctrine can apply to extend the time to bring an action
		<i>Thompson v. Mountain Peak Associates</i> , 2006 WL 1582126	NO	Completion of construction	Existence of a non-compliant housing structure constitutes a continuing effect of past discriminatory acts, which is insufficient to constitute a continuing violation
	Oregon				

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
<p style="text-align: center;">9</p> <p>(continued)</p>	Washington	<i>Fair Housing Council of Oregon v. Cross Water Development, LLC</i> , 2009 WL 799685 (W.D.Wash)	NO	Date the last applicable certificate of occupancy was issued	Time during which a complaint is pending with HUD (administrative complaint) is not included in the computation of the two-year state of limitations applicable to the commencement of a private claim, assuming the administrative complaint was timely filed

CIRCUIT	STATE	CASE CITE	CONTINUING VIOLATION?	STATUTE OF LIMITATIONS: TRIGGER ACTION	CASE NOTES
10	10th Circuit Court of Appeals				
	Colorado				
	Kansas				
	New Mexico				
	Oklahoma				
	Wyoming				
11	11th Circuit Court of Appeals				
	Alabama				
	Georgia				
	Florida				