STATE OF MARYLAND
DLLR
DEPARTMENT OF LABOR, LICENSING AND REGULATION

DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
MARYLAND HOME IMPROVEMENT COMMISSION
500 N. Calvert Street, Room 306
Baltimore, MD 21202-3651

The Maryland Home Improvement Commission	*	**BEFORE THE MARYLAND HOME IMPROVEMENT COMMISSION**
v. Theodore Ryder, Jr. t/a Aero Residential Contractors Inc. (Contractor) and the Claim of Terry Schafer (Claimant)	*	**MHIC No.: 13 (90) 1333**

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FINAL ORDER

WHEREFORE, this 26th day of October 2015 , Panel B of the Maryland Home Improvement Commission ORDERS that:

1. **The Findings of Fact set forth in the Proposed Order dated August 14, 2015 are AFFIRMED.**
2. **The Conclusions of Law set forth in the Proposed Order dated August 14, 2015 are AFFIRMED.**
3. **The Proposed Order dated August 14, 2015 is AFFIRMED.**
4. **This Final Order shall become effective thirty (30) days from this date.**
5. **During the thirty (30) day period, any party may file an appeal of this decision to Circuit Court.**

Joseph Tunney
Joseph Tunney, Chairperson
PANEL B

MARYLAND HOME IMPROVEMENT COMMISSION

IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF TERRY L. SCHAFER,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: DLR-HIC-02-15-01694**
OMISSIONS OF	*	**MHIC No.: 13 (90) 1333**
THEODORE C. RYDER, JR., T/A	*	
AERO RESIDENTIAL	*	
CONTRACTORS, INC.,[1]	*	
RESPONDENT	*	

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On August 23, 2013, Terry L. Schafer (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement

[1] Just *who* is the Respondent is a pivotal issue in this case. The Claimant entered into a contract with "Aero Roofing" (or Aero Roofing Co., Inc.) in February 2006, when Theodore C. Ryder, Sr. was the Licensee for that concern. Mr. Ryder died in an airplane crash in 2007. Consequently, the question presented here is whether Theodore C. Ryder, Jr., the Licensee for Aero Residential Contractors, Inc. — or one of several other "Aero" entities — is the successor to Aero Roofing Co., Inc. and, if so, whether that successor entity is potentially liable for any of Aero Roofing Co., Inc.'s acts or omissions.

of $3,273.00 in alleged actual losses suffered as a result of a home improvement contract with Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc. (Respondent).

I held a hearing on April 28, 2015 at the Office of Administrative Hearings (OAH) in Hunt Valley, Maryland. Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015). The Claimant represented herself. Robert M. Stahl, Attorney-at-Law, represented the putative Respondent, who was present. Jessica Kaufman, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02, and 28.02.01.

ISSUES

1. Is Theodore C. Ryder, Jr., t/a Aero Residential Contractors, Inc., responsible for the acts and omissions of Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc.?

2. If Theodore C. Ryder, Jr., t/a Aero Residential Contractors, Inc., is responsible for the acts and omissions of Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc., did the Claimant sustain an actual loss as a result of any acts or omissions committed by Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc.?

3. If the Claimant did sustain an actual loss, is her claim barred by section 8-405(g) of the Business Regulation Article, because it was not filed timely?

4. If the Claimant did sustain an actual loss not barred by section 8-405(g) of the Business Regulation Article, what is the amount of that loss?

SUMMARY OF THE EVIDENCE

Exhibits

The Claimant submitted one exhibit with multiple subparts. The Respondent did not offer any exhibits. The Fund offered seven exhibits; I considered the seventh exhibit, a timeline of events, more akin to legal argument than evidence. (I have attached a complete Exhibit List as an appendix to this decision.)

Testimony

The Claimant testified on her own behalf. Neither the Respondent nor the Fund offered any additional witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Facts Concerning the Contract and the Work Performed

1. On February 6, 2006, the Claimant entered into a contract with Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc., to install a new rubber flat roof and perform other work related to the installation of that roof at her Rosedale, Maryland home. The contract stated that "Aero Roofing Co., Inc." would begin work on February 9, 2006 and would complete it by February 22, 2006. (Test. Cl.; Cl. Ex. 1 at 4.)

2. The address of Aero Roofing Co., Inc. in 2006 was 2014 Orems Road, Baltimore, MD 21220. (Fund Ex. 5.)

3. The contract contained a ten-year warranty on the roofing work.[2] (Test. Cl.)

4. The original agreed-upon contract price was $1,700.00. (Cl. Ex. 1 at 4.)

[2] When she photocopied the contract to include in Claimant's Exhibit No. 1, the Claimant obscured about one-third of its text because she pasted a photocopy of her Visa credit card receipt for her down payment over it. The text of the warranty was probably underneath the photocopy of that credit card receipt. It is not visible in the exhibit. Nevertheless, all parties acknowledged this ten-year warranty, so I am finding its existence as a fact.

5. The Respondent began work in mid-February 2006 and completed the contract on March 7, 2006. (Test. Cl.; Cl. Ex. 1 at 4.)

6. On February 16, 2006, the Claimant made a $500.00 down payment to Aero Roofing Co., Inc. using her Visa credit card and, on March 10, 2006, paid the $1,200.00 balance to Aero Roofing Co., Inc. also using her Visa credit card. (Cl. Ex. 1 at 4-5.)

7. In 2006, the roof began to leak. The Claimant notified Aero Roofing Co., Inc., and that entity sent a worker to repair the leak. (Test. Cl.)

8. Despite the repair efforts by Aero Roofing Co., Inc., the roof continued to leak in 2006 and 2007. (Test. Cl.; Cl. Ex. 1 at 6.)

9. On March 26, 2007, Theodore C. Ryder, Sr. died in an airplane crash. (Test. Cl.; Fund Ex. 5.)

10. Throughout the next six years, the Claimant called the same telephone number that had been that of Aero Roofing Co., Inc. to complain about the continuing leaks. With one or two exceptions, the same receptionist, Gloria, answered the telephone, using the words, "Aero Roofing," when the Claimant called. (Test. Cl.)

11. At least ten times,[3] a worker from the office that the Claimant had called responded to the Claimant's home to make roof repairs. Those repairs were all unsuccessful. (Cl. Ex. 1 at 7-13.)

12. On October 12, 2012, the Claimant obtained a $3,180.00 estimate from America's Quality First Home Improvement to repair the damage to the Claimant's roof, as well as interior damage caused by the chronic roof leakage. (Test. Cl.; Cl. Ex. 1 at 25.)

[3] The Claimant testified that someone made repairs to her roof "ten or fifteen times" from the time that Aero Roofing Co., Inc. completed the contract until August 23, 2013, when she filed her claim with the Fund.

13. On August 23, 2013, the Claimant filed her Claim with the Fund for reimbursement of $3,273.00 in alleged actual losses suffered as a result of a home improvement contract with the Respondent. (Fund Ex. 3.)

Facts Concerning the Various "Aero" Entities

14. On July 21, 2006, Robert M. Stahl, Esquire, incorporated Aero Home Services, Inc. Theodore C. Ryder, Jr. was named the sole Director of Aero Home Services, Inc., with Mr. Stahl designated as Resident Agent. (Fund Ex. 4.)

15. In 2007, Theodore C. Ryder, Jr. held an MHIC license for Aero Home Services, Inc., located at 2112 Schaffers Rd., Baltimore, MD 21221. (Fund Ex. 4.)

16. On June 21, 2007, the MHIC license for "Aero Roofing Co.," MHIC License No. 01-20335, 2014 Orems Rd., Baltimore, MD 21220, was transferred to James F. Ryder, Jr. (Fund Ex. 6.)

17. James F. Ryder, Jr. currently holds the MHIC contractor's license for Amazing Home Contractors, MHIC License No. 01-93684, which has offices at 2103 Orems Rd., Baltimore, MD 21220. (Fund Ex. 6.)

18. On September 23, 2009, Aero Home Services, Inc. moved to 2103 Orems Road, Baltimore, MD 21220. (Fund Ex. 4.)

19. On April 19, 2010, the MHIC contractor's license for Aero Home Services, Inc., 2103 Orems Rd., Baltimore, MD 21220 was transferred to James F. Ryder, Jr. (Fund Ex. 6.)

20. On May 26, 2010, Theodore C. Ryder, Jr. incorporated Aero Roofing & Home Services, Inc. Its offices were located at 2014 Orems Road, Baltimore, MD 21220. (Cl. Ex. 1 at 16; Fund Ex. 4.)

21. On May 26, 2010, Aero Roofing & Home Services, Inc. filed a Trade Name Application with the Maryland Department of Assessments and Taxation to use the trade name

"Aero Roofing Company, Inc." The Maryland Department of Assessments and Taxation accepted that application. (Cl. Ex. 1 at 19.)

22. On October 1, 2012, "Aero Roofing & Home Services, Inc." forfeited its corporate charter for failure to file a personal property tax return for 2011. (Fund Ex. 4.)

23. On March 29, 2013, Theodore C. Ryder, Jr. incorporated Aero Residential Contractors, Inc. Aero Residential Contractors, Inc. maintains its offices at 723 Shore Drive, Joppatowne, MD 21085. (Fund Ex. 4.)

24. On October 1, 2013, "Aero Home Services, Inc." forfeited its corporate charter for failure to file a personal property tax return for 2012. (Fund Ex. 4.)

DISCUSSION

I. Introduction.

An owner may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor." Md. Code Ann., Bus. Reg. § 8-405(a) (2015); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has not proven eligibility for compensation.

Before I address the merits of the Claimant's claim, I must first determine whether the Claimant made her claim against the proper respondent. I conclude that she did.

II. Who or what entity is the Respondent?

On February 6, 2006, the Claimant entered into a contract with Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc., to install a new rubber flat roof at her Rosedale, Maryland home. The

contract price was $1,700.00. On March 26, 2007, Theodore C. Ryder, Sr. died in an airplane crash. After that, what happened to "Aero Roofing Co., Inc." becomes the stuff of mystery.

After the senior Ryder's death in 2007, Theodore C. Ryder, Jr. and his uncle, James F. Ryder, Jr., operated various home improvement contracting firms with the name "Aero" in their titles. Even before the senior Ryder's death, on July 21, 2006, Robert M. Stahl, Esquire, who represented the named Respondent at the hearing in this case, incorporated Aero Home Services, Inc., with Theodore C. Ryder, Jr. named as sole director and Mr. Stahl named as the corporation's resident agent. The Respondent held the MHIC license for this entity. In April 2010, however, the MHIC contractor's license for Aero Home Services, Inc. was transferred to James F. Ryder, Jr. A month later, the Respondent, Theodore C. Ryder, Jr., incorporated Aero Roofing & Home Services, Inc. On the same day that the Respondent incorporated Aero Roofing & Home Services, Inc., Aero Roofing & Home Services, Inc. filed a Trade Name Application with the Maryland Department of Assessments and Taxation to use the trade name "Aero Roofing Company, Inc." The Maryland Department of Assessments and Taxation accepted that application. On October 1, 2012, Aero Roofing & Home Services, Inc. forfeited its corporate charter for failure to file a personal property tax return for 2011. On October 1, 2013, James F. Ryder, Jr.'s entity, Aero Home Services, Inc., forfeited its corporate charter for failure to file a personal property tax return for 2012. Then, on March 29, 2013, Theodore C. Ryder, Jr. incorporated Aero Residential Contractors, Inc.

The named Respondent argues that the Claimant improperly filed her claim against Aero Residential Contractors, Inc., because that corporate entity is not the same as Aero Roofing Co., Inc. The named Respondent maintains that he was still in high school at the time that the Claimant entered into her contract with his father's concern, Aero Roofing Co., Inc. The other

various Aero enterprises have no relationship to the company operated by Theodore C. Ryder, Sr.

The Claimant maintains that it should not make any difference to her as a consumer which corporate entity did the work. She contends that although she entered into a contract with the senior Ryder and his company, Theodore C. Ryder, Jr.'s company, whatever its name, sent workers to her home at least ten times, and probably closer to fifteen times, to repair her roof, which she contends leaked from the moment Aero Roofing Co., Inc. installed it in February 2006. The Claimant testified that throughout the time she was complaining about her leaking roof, she always called the same telephone number, and, with only limited exceptions, the same receptionist, Gloria, answered the telephone with the greeting, "Aero Roofing." For this reason, the Claimant insists that Theodore C. Ryder, Jr., t/a Aero Residential Services, Inc., should be the responsible party and deemed "Respondent" in this case.

The Fund makes arguments that parallel those of the Claimant. In the Fund's view, Theodore C. Ryder, Jr.'s entity, whatever the Respondent calls it, is a continuation of the firm started by his father. Based on the records of the MHIC, the Fund asserts that the senior Ryder never filed a corporate license for Aero Roofing Co., Inc. and, from the MHIC's perspective, traded as a sole proprietorship. The telephone number remained the same. Even the receptionist remained the same. The Respondent's firm, for a time, operated out of the same offices as his father's company. Consequently, the Fund contends that Theodore C. Ryder, Jr., t/a Aero Residential Services, Inc., should be the responsible Respondent here.

I agree with the Claimant and the Fund. Despite all of the incorporations, corporate charter expirations, and name changes, there is obvious continuity between the contracting firm operated by the senior Ryder and the one operated by the Respondent. The name "Aero" appears in every company operated by the Ryders, except James F. Ryder, Jr.'s current firm, Amazing

Home Contractors, with which the Claimant had no contractual relationship. The same receptionist has been answering the same telephone number since the date of the original contract. Most importantly, employees of the concern operated by Theodore C. Ryder, Jr. have always responded to the Claimant's telephone calls when she has complained about leaks that have occurred in the roof installed by the senior Ryder's Aero Roofing Co., Inc. I conclude that Theodore C. Ryder, Jr., t/a Aero Residential Services, Inc., is the successor to Theodore C. Ryder, Sr.'s company, Aero Roofing Co., Inc.

III. Merits of the Claimant's Claim and Statute of Limitations.

The Respondent was a licensed home improvement contractor at the time he entered into the contract with the Claimant. All successor entities, including the current successor entity, were licensed as well.

There are no *prima facie* statutory impediments barring the Claimant from recovering compensation from the Fund (being related to the Respondent, recovering damages from the Respondent in a court proceeding,[4] owning more than three houses, etc.). Md. Code Ann., Bus. Reg. § 8-405(f)(1) and (2) (2015).

The salient facts are undisputed. On February 6, 2006, the Claimant entered into a $1,700.00 contract to have a new rubber flat roof installed at her Rosedale, Maryland home. The Claimant paid the Respondent the full contract price. The Respondent began installing the new roof in mid-February 2006 and completed work on it in early March of that year. Immediately, the roof began leaking. Over the next seven years, the Claimant called the Respondent (or the entities to which he became a successor) at least ten times to have repairs done to the roof to stop the leaks. Each repair stopped the leakage temporarily; none provided a permanent solution. On

[4] On May 20, 2013, the Claimant obtained a $3,180.00 judgment against Aero Roofing & Home Services, Inc. in the District Court of Maryland for Baltimore County but has not been able to collect on that judgment.

October 12, 2012, the Claimant, who had finally lost confidence in the Respondent to repair her roof, obtained a $3,180.00 estimate from America's Quality First Home Improvement to repair the damage to the Claimant's roof, as well as interior damage caused by the chronic roof leakage. Nevertheless, section 8-405(e)(5) of the Business Regulation Article limits a claimant's recovery from the Fund to what he or she paid to the original contractor. Therefore, any recoverable loss that the Claimant might have sustained is limited to the $1,700.00 that the Claimant originally paid the Respondent for installing her roof. (The America's Quality First Home Improvement estimate also includes repair costs for interior damage, which are clearly consequential and, therefore, not recoverable. Md. Code Ann., Bus. Reg. § 8-405(e)(3) (2015); COMAR 09.08.03.03B(1)(a).)

The Respondent actually concedes that the roof installation was poorly done. Nevertheless, he maintains that because the Claimant's claim should have been directed against Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc., he has no responsibility for this claim, an argument that I have rejected.

The Claimant's evidence, circumstantial yet convincing, combined with the Respondent's concession that the roof installation was inadequate, would suggest that the Claimant has made a *prima facie* case for recovering reimbursement from the Fund based on the Respondent's acts or omissions. Yet, a significant obstacle stands in the way of her recovering compensation from the Fund. Section 8-405(g) of the Business Regulation Article states, "A claim shall be brought against the Fund within 3 years after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Bus. Reg. § 8-405(g). The Claimant clearly discovered the leakage in 2006, yet did not file her claim until *seven years* later.

The Fund, however, argues that because the Respondent included a ten-year warranty as part of the contract terms and the Respondent undertook repairs under that warranty, the rule

contained in *Antigua Condominium Ass'n v. Melba Investors Atlantic, Inc.*, 307 Md. 700 (1986), tolls the limitations period of section 8-405(g). I disagree for the reasons that follow.

The Fund was established under the Maryland Home Improvement Law (Act), a regulatory statute that was enacted for the protection of the public. *See, e.g., Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 628 (1997). The Act is remedial and "facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries." *Landsman v. Md. Home Improvement Comm'n*, 154 Md. App. 241, 251 – 52 (2003) (citation omitted). Remedial statutes are to be "liberally construed" in order to effect the legislature's purpose. *Brzowski*, 114 Md. App. at 633. A court may defer to an agency's construction of a statute when the agency is responsible for administering it, but the "administrative agency may not disregard the terms of the statute when that statute is clear and unambiguous." *Id.* at 634.

The MHIC administers the Fund. Section 8-405(g) is an integral part of the statute that the MHIC administers and, at first blush, appears to be a statute of limitations. Statutes of limitations provide "adequate time for a diligent plaintiff to bring suit" but also "ensure fairness to defendants by encouraging prompt filing of claims." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 338 (1994). The Court of Appeals, citing *Booth Glass Co. v. Huntingfield Corp.*, 304 Md. 615, 623 (1985), emphasized as follows: "We have long maintained a rule of strict construction concerning the tolling of the statute of limitations. Absent legislative creation of an exception to the statute of limitations, we will not allow any 'implied and equitable exception to be engrafted upon it.'" *Hecht*, 333 Md. at 333. Equitable tolling is granted sparingly, "typically for reasons of fraudulent concealment or minority." *Anderson v. United States*, 427 Md. 99, 118 (2012).

Section 8-405(g) is the equivalent of a judicial statute of limitations, such as that contained in section 5-101 of the Courts and Judicial Proceedings Article. Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2013). In *Maryland Securities Commissioner v. U.S. Securities Corp.*, 122

Md. App. 574 (1998), the Court of Special Appeals held that section 5-107's statute of limitations did not apply to *administrative actions* for monetary fines or penalties. *Id.* at 588 – 89. The court stated that the statute applied "only to judicial proceedings as opposed to administrative hearings." *Id.* at 589. The court explained its holding based upon the "spirit, reasoning, and holding" of its majority opinion in an earlier case and stated as follows:

> [T]he impetus of our reasoning was two-fold: (1) an administrative hearing was not a "prosecution" or "suit" within the meaning of [section 5-107 of the Courts and Judicial Proceedings Article], and (2) the underlying purpose of protecting the public from unscrupulous practices by [professionals licensed by an agency] preempted the defense of limitations.

Id. at 591. While *Maryland Securities Commissioner* did not directly stand for the proposition that a limitations period in an administrative scheme could not be interpreted as a statute of limitations—and might even be interpreted as a more expansive claim processing rule—it did assert that a specific statute of limitations in a judicial proceeding should not be imported to an administrative scheme.

Because *Maryland Securities Commissioner* asserted, but did not necessarily hold, that a judicial statute of limitations should not or could not be imported to an administrative scheme, I must still discuss whether *Booth Glass*'s restrictive rule concerning the tolling of a statute of limitations or *Antigua*'s more expansive interpretation applies or, in the alternative, whether *neither* case actually applies to Fund claims. Both *Booth Glass* and *Antigua* address specific causes of action in the civil courts and calculate the limitations timeframe based upon the statute of limitations in the Courts and Judicial Proceedings Article. The question presented in *Booth Glass* was whether the three-year statute of limitations in the Courts and Judicial Proceedings Article was tolled by the "continuous course of treatment rule" in a cause of action for *negligence* against the contractor. *Booth Glass*, 304 Md. at 619. The Court of Appeals in *Booth Glass*, citing section 5-101 of the Court and Judicial Proceedings Article, stated that "an action

must be filed *within three years of the date that it 'accrues.'"* *Id.* (emphasis added). The Court explained that because the suit against the contractor was based upon "the negligent installation of the glasswork and not upon negligence in the repair process," the *discovery* rule, rather than the continuous course of treatment rule, governed when the cause of action *accrued* in the case. *Id.* at 621 – 22.

Antigua did not change the discovery rule in a negligence action against a contractor but instead narrowly analyzed the "accrual" point in a breach of a contractual covenant to repair. In *Antigua*, the court termed a specific provision in a condominium developer's contract with the buyers as a "Repair Clause." *Antigua*, 307 Md. at 708. The Court stated that the Repair Clause was not "simply a warranty of the condition of a unit or of the common elements as of the time of closing with a [condominium] Unit Owner." *Id.* at 715. The Court held that an action for breach of the Repair Clause was within the three-year limitation period in the Courts and Judicial Proceedings Article, but that the limitation did not "accrue" at the time a defect was discovered. The Court stated that the breach of the covenant to repair did not "occur at closing or necessarily when notice is given" because there must be a period of time in which the party who made the promise to repair could "investigate the problem and prepare to perform the actual work." *Id.* at 715, 717; *see also Hilliard & Bartko Joint Venture v. Fedco Sys., Inc.*, 309 Md. 147, 163 (1987). Instead, the limitation period begins to run when the breach is discovered during this investigatory and preparatory period. *Antigua*, 307 Md. at 717. A recent opinion in the Court of Appeals of Kansas summarized that the "statute of limitations period runs from the breach of the Repair or Replace Warranty" rather than from when the defect was discovered. *Hewitt v. Kirk's Remodeling & Custom Homes, Inc.*, 310 P.3d 436, 446 (Kan. Ct. App. 2013).

While *Antigua*'s limitation analysis applies only to the discovery period in a narrow cause of action for breach of the contracting party's contract to repair, it "divid[es] the contract

clauses into two groups." *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 245 (1996). The Court of Special Appeals explained that "*Antigua* suggests that a promise by a developer in a sales contract to do an act in the future is a contractual obligation, but a statement in the contract that assures the quality, description, or performance of the property constitutes an express warranty." *Id.* at 246. As such, a promise to repair is governed by the statute of limitations in the Courts and Judicial Proceedings Article, whereas the breach of an express warranty is governed by the special statute of limitations in the Real Property Article. *Id.* While the claim against the Fund does not concern real property, *Antigua* and *Hartford* support the distinction between an express warranty and a promise to repair.

Claims for compensation from the Fund are not pure negligence, breach of express warranty, or breach of contract to repair claims. Negligence and breach of contract to repair claims are governed by the general statute of limitations in the Courts and Judicial Proceedings Article, which addresses a broad range of civil causes of action that may be brought within three years from the date such actions accrue. Breach of express warranty claims, as discussed in *Hartford*, are governed by a special statute of limitations outside the Courts and Judicial Proceedings Article. *Antigua* narrowly analyzed the "accrual" point in a breach of a contractual covenant to repair and held that the limitation period begins to run when the breach is discovered during the investigatory and preparatory period. While there might be flexibility in the Fund's limitation period, neither *Booth* nor *Antigua* controls the limitations analysis.

Although Maryland's appellate courts have not directly addressed the nature of the filing deadlines in an administrative scheme, its opinions suggest that a filing deadline stipulated in a statute, such as section 8-405(g) of the Business Regulation Article, would generally be construed as a condition precedent to the right of action. *See, e.g., Higginbotham v. Pub. Serv.*

Comm'n, 412 Md. 112, 138 (2009) (Harrell, J., concurring and dissenting) ("[W]here a statute containing a limitation period creates both the right and the remedy, the limitation period constitutes a condition precedent to maintaining suit, not merely a statute of limitations subject to waiver if not raised by the defendant as an affirmative defense."). A condition precedent operates like a jurisdictional bar and is non-waivable and non-tollable and can be raised at any time. *See, e.g.*, *Kearney v. Berger*, 416 Md. 628, 658-59 (2010) ("[A] condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied." (citations omitted)). A statute of limitations, on the other hand, is subject to waiver by failure of a respondent to raise the defense in a proper manner, but it is not subject to discretionary extension. *S.B. v. Anne Arundel Cnty. Dep't of Soc. Servs.*, 195 Md. App. 287, 307-08 (2010). Equitable exceptions such as tolling and estoppel may also be available under a statute of limitations, but these exceptions are narrow. *See, e.g.*, *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 537-38 (D. Md. 2014).

The Court of Appeals' opinion in *State v. Sharafeldin*, 382 Md. 129 (2004), is a key opinion on the distinction between a statute of limitations and a condition precedent. The Court of Appeals addressed whether a statutory timeframe for breach of contract claims against the State "constitute[d] a condition to the waiver of sovereign immunity and thus to the right of action itself against the State or [was], instead, merely a statute of limitations." *Id.* at 132. The statutory provision provided that "[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year . . . ." *Id.* (emphasis added). The Court held that the filing deadline was not a statute of limitations but a condition to the action itself and that "the waiver of the State's immunity vanishes at the end of the one-year period." *Id.* at 148. In so holding, the Court reviewed the statute's construction for its legislative intent. The Court stated:

> [I]n attempting to divine legislative intent, we look first to the words of the statute, but if the true legislative intent cannot readily be determined from the

> statutory language alone, we look to other *indicia* of the intent, including the title to the bill, the structure of the statute, the inter-relationship of its various provisions, its legislative history, its general purpose, and the relative rationality and legal effect of various competing constructions.

Id. at 138 (internal quotation marks omitted and emphasis added).

The Court was concerned about construing the deadline as a "mere statute of limitations, waivable at will by State agencies or their respective attorneys," as "limitations is an affirmative defense that can be waived and that *is* waived unless raised in the defendant's answer." *Id.* at 140-41. The Court highlighted the use of the term "barred" in the applicable statute and stated that "traditional statutes of limitations . . . normally state only that an action 'shall be filed within' the allowable period." *Id.* at 140. The Court explained that when "a limitation period is stipulated in a statute *creating a cause of action* it is not to be considered as an ordinary statute of limitations, but is to be considered as a limitation upon the right as well as the remedy" and held that the time limitation in the statute was a condition to the waiver of immunity and was not subject to waiver or tolling. *Id.* at 147-48 (internal quotation marks omitted and emphasis added).

It is true that the plain language of the Fund's limitation period is more aligned with the general statute of limitations in the Court and Judicial Proceedings Article rather than the condition precedent in *Sharafeldin*. In *Sharafeldin*, the applicable limitations provision provided that "[a] claim under this subtitle is *barred unless* the claimant files suit within 1 year." *Id.* at 132 (emphasis added). The Fund's limitation provision states that "[a] *claim shall be brought against the Fund within 3 years* after the claimant discovered or, by use of ordinary diligence, should have discovered the loss or damage." Md. Code Ann., Bus. Reg. § 8-405(g) (2015) (emphasis added). Section 5-101 of the Court and Judicial Proceedings Article states that "[a] civil action at law shall be filed *within three years from the date it accrues* unless another provision of the Code provides a different period of time within which an action shall be commenced." Md. Code Ann., Cts. & Jud. Proc. § 5-101 (2013) (emphasis added). The statutory language in section 8-405(g)

thus resembles that of the general statute of limitations in section 5-101. Moreover, although the limitations period is stipulated in the statute, the Act "facilitate[s] remedies already existing for the enforcement of rights and the redress of injuries" rather than creates a new cause of action. *Landsman*, 154 Md. App. at 251-52; *see also State ex rel. Stasciewicz v. Parks*, 148 Md. 477 (1925) ("In most jurisdictions the courts have held that all the provisions of these statutes [that create a new cause of action], including that fixing the time within which the action must be brought, are essential to the maintenance of the suit."). The plain language of the statute and its legislative history indicate that the limitations period is a more flexible statute of limitations.[5] Nevertheless, the Court of Special Appeal's stance in *Brzowski* that the Act is not punitive[6] reins in the Fund's expansive interpretation that an express warranty, which here is ten years, tolls the limitations period. *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 630-35 (1997).

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[5] Even if section 8-405(g) were interpreted as a condition precedent, this action would still be barred for the same reasons as those relied on in the limitations analysis.

[6] In this regard, *Brzowski*, which analyzed the Act's legislative history, states the following in pertinent part:

> Section 8–409 of the Act serves as a check on the Commission's ability to use the Fund as a club to punish contractors who are on the losing end of arbitration awards or judicial decisions. To this end, the section specifies the requirements that must be met before the Commission may order payment of a claim against the Fund:
>
> **§ 8–409. Payments from Fund.**
>
> (a) *In general.*—The Commission may order payment of a claim against the Fund only if:
>
> (1) the decision or order of the Commission is final in accordance with Title 10, Subtitle 2 of the State Government Article and all rights of appeal are exhausted; or
>
> (2) the claimant provides the Commission with a certified copy of a final judgment of a court of competent jurisdiction or a final award in arbitration, with all rights of appeal exhausted, in which the court or arbitrator:
>
> (i) expressly has found on the merits that the claimant is entitled to recover under § 8-405(a) of this subtitle; . . .

114 Md. App. at 630 (footnote omitted).

Additionally, not only the legislative history, but also the practices of the MHIC since the creation of the Fund in the mid-1980s suggest that hearings involving claims against the Fund were not meant to be a substitute for the judicial process. Warranty issues are purely contractual and, as such, should be resolved in court. Furthermore, applying the principles of *Antigua* to section 8-405(g) of the Business Regulation Article could lead to absurd results. For example, the installation by roofers of shingles warrantied for twenty-five years is commonplace today. By applying *Antigua* to section 8-405(g), a homeowner who had his roof installed in 2015 could conceivably (and legitimately) file a claim to seek compensation from the Fund for the roofer's acts and omissions as late as 2040, if the roofer endeavored to repair twenty-five year shingles during the latter part of the warranty period and failed. Section 8-405(g) exists to avoid such absurdities.

The Claimant did not file her claim within three years of discovering defects in the Respondent's workmanship, as required by section 8-405(g) of the Business Regulation Article. Consequently, I recommend that her claim be denied and dismissed as untimely filed.

PROPOSED CONCLUSIONS OF LAW

1. Theodore C. Ryder, Jr., t/a Aero Residential Contractors, Inc., is responsible for the acts and omissions of Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc. Md. Code Ann., Bus. Reg. § 8-405(a) (2015); COMAR 09.08.03.03B(2).

2. The Claimant sustained an actual loss as a result of the acts or omissions committed by Theodore C. Ryder, Sr., t/a Aero Roofing Co., Inc. Md. Code Ann., Bus. Reg. § 8-401 (2015).

3. The Claimant's actual loss is not compensable by the Fund as a result of the Respondent's acts and omissions, because the Claimant did not file her claim within three years after she discovered or, by use of ordinary diligence, should have discovered, the loss or damage. Md. Code Ann., Bus. Reg. § 8-405(g) (2015).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund deny the Claimant's claim; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

July 17, 2015
Date Decision Issued

Thomas G. Welshko
Administrative Law Judge

TGW/dlm
#155830

IN THE MATTER OF THE CLAIM	*	**BEFORE THOMAS G. WELSHKO,**
OF TERRY L. SCHAFER,	*	**AN ADMINISTRATIVE LAW JUDGE**
CLAIMANT	*	**OF THE MARYLAND OFFICE**
AGAINST THE MARYLAND HOME	*	**OF ADMINISTRATIVE HEARINGS**
IMPROVEMENT GUARANTY FUND	*	
FOR THE ALLEGED ACTS OR	*	**OAH No.: DLR-HIC-02-15-01694**
OMISSIONS OF	*	**MHIC No.: 13 (90) 1333**
THEODORE C. RYDER, JR., T/A	*	
AERO RESIDENTIAL	*	
CONTRACTORS, INC.,	*	
RESPONDENT	*	

* * * * * * * * * * * * *

FILE EXHIBIT LIST

Claimant's Exhibits:

1. Series of exhibits consisting of the following:

Document	Page(s)
June 12, 2013 Complaint Form	1
Index of Supporting Documentation	2
May 20, 2013 Court Judgment against the Respondent	3
February 6, 2006 contract and Credit Card Slips	4-5
Undated "Particulars of this Case" Summary	6-7
September 19, 2012 letter to the Respondent	8
Duplicate of September 19, 2012 letter	9
September 20, 2012 Certified Mail Return-Receipt	10

Respondent's Exhibits:

The Respondent did not offer any exhibits.

Fund's Exhibits:

1. March 19, 2015 Hearing Notice

2. January 9, 2015 Hearing Order

3. September 5, 2013 letter from the MHIC to the Respondent, informing him of the Claimant's Claim, with the Claimant's August 23, 2013 Claim attached

4. Series of licensing/incorporation documents related to Theodore Charles Ryder, Jr. and Aero Residential Contractors, Inc.

5. Series of licensing/incorporation documents relating to Theodore Charles Ryder, Sr. and Aero Roofing Co.

6. Series of licensing/incorporation documents related to James Ryder and Amazing Home Contractors

7. 1986 – 2013 Timeline for "Aero Roofing Co., Inc."

PROPOSED ORDER

WHEREFORE, this 14th day of August, 2015, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Andrew Snyder

Andrew Snyder
Panel B

MARYLAND HOME IMPROVEMENT COMMISSION