

## LEGAL PIPELINE

# The Statute of Repose and Product Manufacturers

The application depends on state law and the nature of the product.



BY STEVEN NUDELMAN

After discussing claims in past articles, this month we take a look at defenses, specifically the defense known as the "statute of repose." In particular, we examine how the statute of repose applies to product manufacturers in construction claims — think pipe, for example.

Before we narrow our focus, it is important to have a basic understanding of the statute of repose. It is a critical defense in construction claims and, as the name signifies, is based on a statute that varies from state to state. Indeed, not every jurisdiction has a statute of repose for construction claims and those that do have important differences in terms and time periods.

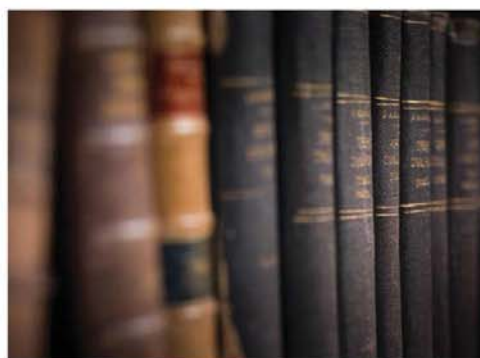
The statute of repose is often confused with another, more common statutory defense, the statute of limitations. Both statutes provide a defense to claims based on time. After that, they bear little resemblance to each other.

## Repose vs. limitations

A statute of limitations is a defense limiting the remedy available from an existing cause of action. *Goad v. Calotex Corp.*, 831 F.2d 508, 511 (4th Cir.1987), cert. denied, 487 U.S. 1218 (1988). For example, in New Jersey, the statute of limitations for a claim sounding in negligence is six years. Thus, an owner's negligence claim against the subcontractor who installed the leaky pipe must be asserted within six years after the damage occurred.

Ordinarily, a statute of limitations accrues, or begins to run, at the time of the alleged injury. However, the New Jersey Supreme Court developed an equitable rule, known as the "discovery rule," that may adjust when the statute begins to run. Under the discovery rule, "the accrual of a cause of action is delayed 'until the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered, that he may have a basis for an actionable claim.'" See *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 42-43 (App. Div.) (citation omitted), cert. denied, 161 N.J. 334

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(1999). Understandably, this is a very fact-sensitive inquiry.

The above analysis has nothing to do with the statute of repose. In addition to having a timely action under the appropriate statute of limitations (for the particular claim asserted), a claimant must also satisfy the statute of repose. In New Jersey, the statute of repose period is 10 years:

"N.J.S.A. 2A:14-1.1(a). No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction.

"This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought."

"The basic feature of a statute of repose is the fixed beginning and end to the time period a party has to file a complaint." *R.A.C. v. P.J.S. Jr.*, 192 N.J. 81, 96 (2007). "Unlike a conventional statute of limitations, the statute of repose does not bar a remedy but rather prevents the cause of action from ever arising." *Port Imperial Condo.*

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*Ass'n Inc. v. K. Hovnanian Port Imperial Urban Renewal Inc.*, 419 N.J. Super. 459, 469 (App. Div. 2011).

Thus, there are no delays, tolls or pauses with the statute of repose. The 10-year period runs from a fixed date and provides a hard, fast time limit. After the statute of repose runs, the defendant is insulated from liability. This allows a subcontractor, for example, to know that 10 years after it performs its subcontract work, it can no longer be sued in connection with that work. This rigid application of the statute of repose stands in stark contrast to the statute of limitations and the flexibility afforded by New Jersey's discovery rule, for example.

### Product manufacturers under N.J. statute

While it is clear a subcontractor may avail itself of the statute of repose, what about a product manufacturer? In *Dziewicki v. Bakula*, 180 N.J. 528, 532-33 (2004), the New Jersey Supreme Court held that the statute of repose does not cover a manufacturer.

The first sentence of the statute (quoted above) refers to "design, planning, surveying, supervision or construction." See N.J.S.A. 2A:14-1.1(a). The court in *Dziewicki* held that designing a "standardized" product installed at a construction project is not enough to be covered by the statute of repose. *Dziewicki*, 180 N.J. at 532-33. Other jurisdictions agree with this analysis. See, e.g., *Corbally v. W.R. Grace & Co.*, 993 F.2d 492 (5th Cir. 1993) (manufacturer of component part not covered by Texas statute of repose); *Windley v. Potts Welding & Boiler Repair Co.*, 888 F. Supp. 610 (D. Del. 1995) (supplier of raw materials not covered by Delaware statute of repose).

However, what if the product is customized or custom-manufactured for a specific construction project? New Jersey's Appellate Division looked at this precise issue in *Cherilus v. Federal Express*, 435 N.J. Super. 172 (App. Div. 2014).

After Joseph Cherilus was injured on a cargo lift while working at a Federal Express facility, he and his wife sued the company responsible for maintaining the lift, LFS. LFS, in turn, asserted a products liability claim against the manufacturer of the lift. The trial court dismissed the claims against the lift manufacturer on the grounds that they were barred by the 10-year statute of repose.

LFS appealed, arguing that the statute of repose was inapplicable to the lift manufacturer. The Appellate Division disagreed and affirmed the decision of the trial court.

In terms of timing, the lift manufacturer designed the "torklift" at issue in the case in the mid-1990s and the contraption was installed in the FedEx facility at Newark Airport in 1995. Cherilus' complaint against LFS was filed more than 12 years later, in February 2008, and the claims

were asserted against the lift manufacturer in 2009 and 2011. In sum, if the statute of repose applied, then any claims asserted against the lift manufacturer would be time-barred.

LFS argued that the torklift is not subject to the statute of repose because it was manufactured off-site and the lift manufacturer had no role in the construction of the FedEx warehouse. The Appellate Division did not see this as the critical inquiry; rather, it focused on the Supreme Court's holding in *Dziewicki*:

"[T]he torklift was not a standard building material or a 'stock or shelf' fabricated item. It was specifically designed and fabricated by [the lift manufacturer] for the Federal Express facility. ... Considering the cases that have addressed the scope and reach of the statute of repose, we conclude that the statute applies to bar a claim after 10 years if a defendant can show three things: (1) that the injury was caused by an 'improvement to real property,' ... (2) that the defendant 'designed, planned ... supervised or constructed the improvement,' ... and (3) that the improvement was not a standardized building product ... but was specially designed and fabricated to be an improvement to the real property. We hold that the designer/manufacturer need not also install such a product in order to invoke the statute of repose." *Cherilus*, 435 N.J. Super. at 185-86 (citations omitted).

The court found that the torklift was installed as an integral part of the FedEx facility and was thus an "improvement to real property." The lift manufacturer designed and constructed the improvement and the improvement was not standardized. It was customized specifically for FedEx. *Cherilus*, 435 N.J. Super. at 186. Since the torklift satisfied the three-part test announced by the Appellate Division, the statute of repose applied and the claims against the lift manufacturer were found to be out of time (i.e., exceeding the 10 years allowed by New Jersey's statute of repose).

### Takeaways

Although the Cherilus three-part statute of repose analysis applies specifically to New Jersey, it offers some good, general takeaways by way of key questions that must be answered. First, does the state where the project is located have a statute of repose for construction claims? If so, what are its requirements and how long does the statute run? Second, how does the state in question treat product manufacturers? Is the product standardized or custom-built? Did the manufacturer have a role in the design and/or construction? Finally, does the product constitute an improvement to real property?

These questions must be explored and answered fully with the help of an attorney specializing in construction claims. If you are a product manufacturer, it is critical for you to know whether the statute of repose applies to you (and your product) at a specific construction project. If it does and a claim against you is untimely, then the statute may help you get the claim summarily dismissed. As the court in *Port Imperial* noted, failure to comply with an applicable statute of repose prevents the claim from ever arising against you in the first instance. ●

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