

# No Repose for Building Product Manufacturers

by Mark D. Shifton

Defending a building product manufacturer in a products liability or complex construction defect action inevitably presents an interesting situation. Whether such an action takes the form of a small, direct action involving a single homeowner, or a large development consisting of a dozen separate buildings housing thousands of residents, claims of products liability alleged within the context of a construction defect action often involve their own unique theories of liability, defenses, and strategies. A significant issue that occasionally arises in construction defect actions is when the passage of time implicates the statute of repose—potentially barring the claim in its entirety, and providing the defendant with a complete defense to the action.

While New Jersey's statute of repose may provide design professionals and contractors with a complete defense against claims of their alleged negligence or breach of contract, manufacturers of building products used by those entities during the course of construction enjoy no such protection. This quirk in New Jersey law not only puts manufacturers of building products at a distinct strategic disadvantage, it ignores the public policy reasoning behind the purpose of the statute of repose, and ultimately operates to shift the exposure to a party that—from a technical perspective—is often least at fault for the alleged damages.

At the outset, it is important to understand the difference between a statute of limitations and statute of repose; while they are both creatures of the Legislature, they serve very different purposes, and operate completely independently. A statute of limitations defines the time period within which an action must be commenced. For example, an action seeking damages for tortious injury to real property must be commenced within six years from the date the claim accrues.<sup>1</sup> Generally, the limitations period begins running on the date the claim accrues—whether by the occurrence of an injury, the discovery of that injury, or some other mechanism—and once the claim accrues, the limitations period runs until it expires. In those cases where

a plaintiff did not have actual knowledge of the injury within the limitations period, and could not reasonably discover the injury within that period, equitable principles may toll the running of the limitations period.<sup>2</sup> Accordingly, within any statute of limitations analysis, the date the claim accrued is of paramount importance.

The date the claim accrued, however, is irrelevant to a statute of repose analysis. Rather than defining the period within which an action must be filed to be considered timely, a statute of repose effectively defines when a claim 'dies'—statutes of repose essentially serve to 'cut off' liability past a certain point, and are almost never subject to equitable tolling. Once the period of repose has run (regardless of when, or even *if*, a plaintiff has knowledge of its injury), all potential claims are extinguished—from a metaphysical/legal perspective, it is like the claim simply never existed.<sup>3</sup>

Construction law attorneys are well aware of New Jersey's statute of repose, at N.J.S.A. 2A:14-1.1, which provides that:

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.

Simply put, New Jersey's statute of repose bars any action against a party for property damages or personal

injuries caused by the design or construction of an improvement to real property, which is commenced more than 10 years after the services provided by that party. New Jersey's statute of repose has been applied to bar claims against several different types of defendants routinely named in construction defect actions, such as developers, contractors, and design professionals. The legislative intent behind New Jersey's statute of repose is, as the Appellate Division has noted, to "provide a measure of repose and prevent 'liability for life' against contractors and architects."<sup>4</sup>

For those parties significantly involved in an entire construction project, such as the general contractors, or an architect of record responsible for contract administration, courts will generally use the date of 'substantial completion' of the construction project as the trigger for the 10-year period provided by the statute of repose.<sup>5</sup> For a subcontractor that may have only worked on a portion of the overall project, however, the 10-year statute of repose clock begins running upon the completion of that party's work on the project.<sup>6</sup> A construction project that is completed in phases may have separate trigger dates for the running of the statute of repose clock—the 10-year statute of repose period as to each phase may begin to run when that phase is completed.

Nearly all states have statutes of repose similar to N.J.S.A. 2A:14-1.1 (and 10 years is a relatively common time period for most states). In addition to protecting contractors and design professionals, a significant number of other state statutes of repose also apply to product manufacturers, precluding product liability or breach of implied warranty actions against the manufacturers of building components whose products are incorporated into construction projects, placing those manufacturers on equal footing with design professionals, developers, and contractors. New Jersey's statute of repose, however, provides no such protection to building product manufacturers, as by its very terms, N.J.S.A. 2A:14-1.1 applies only to defendants "performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property."

Further clarifying that N.J.S.A. 2A:14-1.1 provides no protections to the manufacturers of building products, in 2015, the New Jersey Supreme Court held the statute of repose inapplicable to claims of product defect—even claims relating to products used during the construction of real property (which itself would be subject to the statute of repose).<sup>7</sup> This decision, in taking the statute of

repose out of play as to building product manufacturers, unfairly places the manufacturer on an unequal footing relative to other defendants. Unless the building product manufacturer was itself involved in the installation of its product, the manufacturer is not considered one whose 'professional services' fall under the ambit of the statute of repose; rather, claims against such entities (presumably brought under the New Jersey Products Liability Act, at N.J.S.A. 2A:58C-1 *et seq.*), may only rely on the six-year statute of limitations provided by N.J.S.A. 2A:14-1 (two years if the claim is for personal injuries). Stated differently, while the statute of repose may bar all claims of property damage and personal injury caused by the deficient design or construction of an improvement to real property, the manufacturer of a building component installed during the course of construction—an entity that may have never visited the site during construction, nor had the opportunity to observe its product being installed—may be called to account for deficiencies in its product more than 10 years after it was installed, while those responsible for the project's design and actual construction enjoy complete immunity by virtue of the statute of repose.

In contrast to New Jersey, many other states extend the protections of their statutes of repose to building product manufacturers whose products are ultimately incorporated into improvements to real property. This disparity places building products manufacturers at a distinct disadvantage—both when compared to their counterparts in other states as well as against other named defendants in the same case.

To illustrate this disadvantage, consider a hypothetical construction defect action where a property owner alleges damages caused by water leaking through the roof of its building. The property owner commences an action alleging the roofing system was improperly designed by the architect (and the architect's design consultants), improperly installed by the roofing subcontractor (and under insufficient supervision by the general contractor). After testing reveals premature degradation in the roofing system (which in and of itself creates a 'the chicken or the egg' scenario, as degradation of components of the roofing system could be a cause of the water infiltration, or could itself be caused by it), the property owner asserts claims against the manufacturer of the roofing system (or component of the system), alleging the roofing products were defectively manufactured (or designed). Under the right set of facts,

if the property owner's complaint is filed more than 10 years after the date of substantial completion, the statute of repose would bar the property owner's claims against the architect and its consultants, the general contractor, and the roofing subcontractor (regardless of whether any of those claims sounded in negligence or breach of contract). The property owner's claims against the product manufacturer, however, (subject to the statute of limitations) might survive, as the manufacturer would enjoy no benefit from the statute of repose. This creates a paradoxical result—even though all claims relating to the design or construction of the building are barred in their entirety by the statute of repose, the product manufacturer (a party which is almost always farther removed from the project than the design professionals and contractors), enjoys no such protection from liability, and the property owner is free to pursue its claims against the product manufacturer.

Furthermore, denying building product manufacturers the benefits of the statute of repose ignores significant case law advancing the idea that building products are not discrete 'components' that can be separated from the structure itself—they are integral parts of a unified whole. The District of New Jersey, in granting a brick manufacturer's motion to dismiss, and holding that a property owner could not maintain an action against the manufacturer under the New Jersey Products Liability Act, has stated:

The question thus becomes what "product" the plaintiffs purchased for the purposes of resolving the instant motion. The plaintiffs purchased a completed apartment complex. They did not purchase a load of bricks from the defendant...the court must look not to the product manufactured by the defendant, but to the product purchased by the plaintiff.<sup>8</sup>

Ultimately, in any construction defect action, a property owner is alleging claims of property damage due to the deficient design and/or construction of an improvement to real property. Creating such improve-

ments necessarily involves decisions made by design professionals (in selecting certain components and determining how they are to be installed), as well as the work of those contractors who are putting the decisions of design professionals' into practice during the course of construction. New Jersey's statute of repose provides absolute protection to those design professionals and contractors from any claims relating to their work. The legislative intent behind New Jersey's statute of repose is to protect defendants from 'limitless' liability; over time, memories fade, documents are discarded, and witnesses move on with their lives. As the inexorable passage of time causes a claim to go 'stale,' forcing a party to defend against such a claim is unfair. By extending the protections of the statute of repose to design professionals and contractors, yet not to the manufacturers of building products used by those design professionals and contractors, New Jersey law creates an artificial legal distinction where—from a practical perspective—none is warranted. As Justice Roberto Rivera-Soto has noted, however, legal decision-making often fails to comport with practical reality:

The notion that an exterior finish that can only be removed by extensive demolition work is not "integrated" into the structure to which it is attached is so fanciful, so nonsensical, that it beggars the imagination. It is a conclusion that can germinate only in the minds of lawyers and can find root only in the rarified environment of this Court's decisions; it cannot, however, long survive in the atmosphere of the real world. EIFS is in many relevant respects no different than roofing shingles. Yet, applying the majority's reasoning, the roof of a home is not integrated into that home.<sup>9</sup> ■

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## Endnotes

1. N.J.S.A. 2A:14-1.
2. See *Lopez v. Sawyer*, 62 N.J. 267 (1973).
3. See *Cumberland County Bd. of Chosen Freeholders v. Vitetta Grp.*, 431 N.J. Super. 596 (App. Div. 2013), *cert. denied* 216 N.J. 430 (2013) (noting that a claim barred by the statute of repose “forms no basis for recovery,” and that “[t]he injured party literally has no cause of action”).
4. *Hein v. GM Const. Co.*, 330 N.J. Super. 282, 286 (App. Div. 2000).
5. See *Town of Kearny v. Brandt*, 214 N.J. 76 (2013).
6. *Daidone v. Buterick Bulkheading*, 191 N.J. 557 (2007).
7. See *State v. Perini*, 221 N.J. 412 (2015).
8. *Easling v. Glen-Gery Corp.*, 804 F. Supp. 585, 590 (D.N.J. 1992).
9. *Dean v. Barrett Homes, Inc.*, 204 N.J. 286, 308-09 (2010) (J. Rivera-Soto, dissenting).