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Defenses and Indemnification Issues in Construction Defect Litigation

I. Explanation of Jurisdictions Which Will Be Discussed

A. "The Northeast"

Although the underlying facts of most construction defect claims are similar, an adjuster's and an attorney's approach to handling them must embrace the intricacies of the jurisdiction in which the claim has been filed. As such, adjusters and attorneys who handle claims across the Northeast United States (including Connecticut, Delaware, New Hampshire, New Jersey, New York, Maine, Maryland, Massachusetts, Pennsylvania, Rhode Island, and Vermont) ("the Northeast Jurisdictions") must have a working knowledge of the general concepts underlying insurance coverage and jurisdiction-specific modifications of the same concepts.

II. Preliminary Questions for Construction Defect Claims

A detailed review of the steps required to analyze a construction defect claim is beyond the scope of this presentation. Nevertheless, adjusters and attorneys should remember that every construction defect claim analysis begins with three questions: (1) Has coverage been triggered pursuant to the claimant's insurance policy?; (2) Does the claimant's insurance carrier have a duty to defend the claimant?; and (3) Does the claimant's insurance carrier have a duty to indemnify or defend or is the claimant owed defense or indemnity?

A. Determining Whether Coverage Has Been Triggered

Generally, coverage afforded by an insurance policy is triggered by an "occurrence". Although the policy in question invariably defines "occurrence", considering this definition in isolation is rarely sufficient to determine whether the insured is entitled to coverage. Instead, an adjuster or attorney must also consider the meaning of the terms referenced in the policy-provided definition and any exclusions to coverage incorporated into the policy. See, e.g., Narragansett Elec. Co. v. Am. Home Assurance Co., 921 F. Supp. 2d 166, 181-85 (S.D.N.Y. 2013).

The United States District Court for the Southern District of New York conducted such an analysis in Narragansett Electric. Id. In that case, the insured, a public utility, filed an action for damages and declaratory relief against its insurance company, which refused to provide it with

coverage in an environmental lawsuit premised upon pollution which had allegedly leaked from the insured's facility into the surrounding water table and soil Id. at 181. The Court began its analysis by examining the policy's definition of occurrence, which was "an accident, including continuous or repeated exposure to conditions, which result[ed] in bodily injury or property damage neither expected nor intended [by] the Insured." Id. at 171. After observing that the relevant lawsuit did not allege any damage to an individual, the Court examined the policy's definition of property damage: "physical injury to or destruction of tangible property which occur[ed] during the policy period. . . ." Id. at 181. Lastly, the court scrutinized the policy's pollution exclusion, which explained that the policy "[did not cover] property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land . . . or any water course . . . [unless] such discharge, dispersal, release or escape is sudden and accidental." Id. at 181-84. Only then did the court consider whether the insurance policy contained a duty to defend or a duty to indemnify the insured public utility company. Id.

B. The Duty to Defend Versus the Duty to Indemnify

In all of the Northeast jurisdictions, an insurer's duty to defend its insureds in litigation is independent from and broader than its duty to indemnify its insureds. See, e.g., New London Cty. Mut. Ins. Co. v. Sielski, 123 A.3d 925, 929 (Conn. App. Ct. 2015) (providing Connecticut law); Occhifinto v. Olivo Constr. Co.. LLC, 221 N.J. 443, 452-53 (2015) (providing New Jersey law); Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc., 920 N.Y.S.2d 763, 767-68, 945 N.E.2d 1013, 1017-18 (2011) (providing New York law); Metro. Prop. & Cas. Ins. Co. v. Morrison, 951 N.E.2d 662, 667 (Mass. 2011) (providing Massachusetts law). The duty to defend arises from the allegations in the pertinent complaint. Simply stated, if there is a possibility that the claims underlying the complaint fall within the insured's coverage, then the insurer has a duty to defend its insured during the litigation. See Morrison, 951 N.E.2d at 667. Conversely, "the duty to indemnify [is dependent upon] the facts established at trial and the theory under which judgment is actually entered in the case." New London Cty., 123 A.3d at 929.

III. Burden-Shifting Contract Language

A construction contract has a minimum of two parties—an upstream party, such as an owner or general contractor, and a downstream party, such as a subcontractor. Normally, the upstream party has more bargaining power than the downstream party. Consequently, contractual provisions which attempt to manage risk in construction contracts almost always shift the burden associated with liability to a downstream party. This is traditionally completed through two separate burden-shifting devices, indemnification clauses and additional insured clauses.

A. Indemnification Clauses

Indemnification clauses can provide a sliding scale of protection for the upstream party. Indemnification clauses provide the least protection to an upstream party when the clause limits the downstream party's liability to damage resulting solely from the downstream party's own negligence. Indemnification clauses provide the most protection to an upstream party when the clause extends the downstream party's liability to damage resulting solely from the upstream party's negligence (this is sometimes referred to as a broad-form self-indemnification clause). Although no Northeast Jurisdiction takes issue with the former type of indemnification clause,

many jurisdictions have passed ant-indemnity legislation which voids the latter type of indemnification clause.

1. Jurisdictions Which Allow Broad-Form Self-Indemnification

Only two of the Northeast Jurisdictions enforce broad-form self-indemnification provisions—Maine and Vermont. In both jurisdictions, such self-indemnification provisions are enforceable provided the pertinent language is clear and unequivocally spells out the intent to grant such indemnification. Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983); Hart v. Amour, 776 A.2d 420, 424 (Vt. 2001).

However, Vermont precedent may provide indemnitors (subcontractors) with an avenue to challenge such provisions post-injury. See Dalury v. S-K-I, Ltd., 670 A.2d 795, 798 (Vt. 1995). In Dalury, which is not a construction defect case, the highest Vermont appellate court refused to enforce an exculpatory agreement which the defendant ski resort required all consumers to sign before using its facilities. Id. The challenged agreement released the ski resort from any and all liability for personal injury and property damage resulting from its own negligence, thereby shifting the burden of such injury and damage to the consumer. Id. at 796. The Vermont Supreme Court found that the ski resort and consumers had grossly disproportionate bargaining power and that enforcing the agreement would undermine public policy. Id. at 798-99; see also Hamelin v. Simpson Paper (Vermont) Co., 702 A.2d 86, 89 (Vt. 1997).

2. Jurisdictions Which Sometimes Allow for Broad-Form Self-Indemnification

Eight of the Northeast Jurisdictions generally enforce broad-form self-indemnification clauses, but not ones that are incorporated into construction contracts. Conn. Gen. Stat. § 52-572k (Connecticut); Del.Code Ann. tit. 6, § 2704 (Delaware); Md. Code Ann., Cts. & Jud. Proc. § 5-401 (Maryland); Mass. Ann. Laws ch. 149, § 29C (Massachusetts); N.H. Rev. Stat. Ann. § 338-A:2 (New Hampshire); N.J.S.A. § 2A:40A-1 (New Jersey); Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 658 N.Y.S.2d 903, 907, 680 N.E.2d 1200, 1204 (1997) (New York); Cosentino v. A.F. Lusi Constr. Co., 485 A.2d 105, 107 (R.I. 1984)(Rhode Island).

Pennsylvania, the only Northeast Jurisdiction not referenced above, does not explicitly prohibit the use of broad-form self-indemnification clauses in all construction contracts, but does prohibit their use in at least two situations. The first situation is statutorily enumerated and is immediately applicable to certain construction contracts: "Every . . . contract or agreement made and entered into by owners, contractors, subcontractors or suppliers whereby an architect, engineer, surveyor or his agents, servants or employees shall be indemnified or held harmless for damages . . . arising out of . . . the preparation or approval . . . of maps, drawings, opinions, reports, surveys, change orders, designs or specifications . . . shall be void as against public policy and wholly unenforceable." 68 Pa. Stat. Ann. § 491. This concern for public policy carries through to the second situation in which Pennsylvania courts refuse to enforce exculpatory or self-indemnification clauses—"[a]ny attempt by a negligent party to exculpate himself for a violation of a statute intended for the protection of human life is invalid." Warren City Lines, Inc. v. United Ref. Co., 287 A.2d 149, 151 (Pa. Super. Ct. 1971).

B. Additional Insured Status

Another mechanism used to transfer risk from the upstream party to the downstream party is a clause which requires the downstream party to name the upstream party as an additional insured on its insurance policy. Many construction contracts further require that the downstream party name the third parties associated with the upstream party, such as the property owner, as additional insured. This status is coveted as an additional insured generally enjoys the same benefits from an insurance policy as the policy's named insured.

Since the promise of additional insured status is not the same as a promise of indemnity, upstream parties operating in states which prohibit broad-form self-indemnification may attempt to circumvent anti-indemnity statutes by insisting that downstream parties name them as additional insureds on the downstream party's insurance policy. Although this maneuvering is statutorily acceptable in some Northeast Jurisdictions, certain judiciaries refuse to enforce such requirements. Compare Chrysler Corp. v. Merrell & Garaguso, Inc., 796 A.2d 648, 649 (Del. 2002) (allowing additional insured requirements in a construction contract); with Shannon v. B.L. Eng. Generating Station, No. 10-04524 (RBK/KMW), 2013 U.S. Dist. LEXIS 168715, at *58-59 (D.N.J. Nov. 27, 2013) (prohibiting additional insured requirements in a construction contract).

For example, Delaware's anti-indemnity statute provides that an upstream party may not be indemnified for its own negligence in a construction contract, but clarifies that nothing in said statute "shall be construed to void or render unenforceable policies of insurance issued by duly authorized insurance companies and insuring against losses or damages from any causes whatsoever." Del.Code Ann. tit. 6, § 2704. As such, the Delaware judiciary has ruled that additional insured coverage will be extended when the additional insured was actually added to a policy and the insurer accepted the quoted insurance premium. Chrysler, 96 A.2d at 649.

The same cannot be said for the New Jersey judiciary. New Jersey's anti-indemnity statute also prohibits broad-form self-indemnification while providing that the prohibition "shall not affect the validity of any insurance contract . . . or agreement issued by an authorized insurer." N.J.S.A. 2A:40A-1. Yet, as illustrated below, the judiciary has refused to enforce additional insured requirements in construction contracts:

> [W]here the New Jersey anti-indemnity statute prohibits an owner from seeking indemnification from a contractor for its own negligence absent clear and unequivocal language, it cannot achieve a different result by requiring the contractor to procure insurance for the same indemnity obligation. This would frustrate the public policy underlying the anti-indemnity statute. The aim of the statute is evidently to ensure that an indemnified party continues to have an interest in avoiding accidents. To allow indemnification by insurance would be to accomplish indirectly what is directly prohibited.

B.L. Eng. Generating Station, No. 10-04524 at *58-59.

IV. Fundamental Defenses to Claims and Complaints (Which Require Little Discovery)

Certain defenses to a complaint may be raised almost immediately. These defenses may act as a bar to a claimant's lawsuit entirely or effectively eliminate certain aspects of his or her case. The following subsections provide explanations of three of these defenses and jurisdiction-specific details for the same.

A. Statutes of Limitation

The date that a plaintiff filed suit and the date that a plaintiff suffered his or her injury or reasonably should have known that he or she suffered an injury are important factors to consider when assessing the strength of his or her claim. Apart from determining whether the plaintiff's injuries/damages occurred during the coverage period associated with a particular insurance policy, these dates are used to determine whether the plaintiff's claim is time-barred.

A statute of limitations controls the time period during which a plaintiff may file his or her lawsuit. For example, in Connecticut, the statute of limitations for personal injury actions is two years. Conn. Gen. Stat. § 52-584. This means that if someone slips on a flight of stairs and breaks his or her wrist on December 1, 2019, then he or she would have until December 1, 2021 (two years after his or her injury) to file suit against the owner of the stairway. However, the statutes of limitations for various legal actions within a jurisdiction are not uniform and can vary greatly. For instance, Connecticut's statute of limitations for contract-related actions is six years—four more years than the statute of limitations for personal injury claims. Compare. Conn. Gen. Stat. § 52-584 (providing the statute of limitations for personal injuries); with Conn. Gen. Stat. § 52-576 (providing statute of limitations for disputes arising from written contracts). Moreover, statutes of limitations can usually be extended (tolled) to promote equitable principles, thereby protecting potentially innocent plaintiffs from shouldering unnecessary burdens. For example, minor plaintiffs who are injured or wronged by a tortfeasor are usually given additional time to file lawsuits after they become legal adults. The following subsections provide the statutes of limitation which apply to construction defect claims in each of the Northeast Jurisdictions.

1. Jurisdictions with a Statute of Limitations of More Than Six Years

Two of the Northeast Jurisdictions afford plaintiffs more than six years to file construction defect-related claims. Rhode Island provides plaintiffs with the most time to file such lawsuits—ten years after the evidence of property damage associated with the faulty construction is sufficiently significant to alert the plaintiff of the possible defect. See Boghossian v. Ferland Corp., 600 A.2d 288, 290 (R.I. 1991) (discussing the proper application of 9 R.I. Gen. Laws § 1-13 to construction defect claims); see also 9 R.I. Gen. Laws § 1-29 (providing that no action may be brought against an architect, professional engineer, or contractor for any injury related to improvements to real property more than ten years after substantial completion of the improvement project).

Connecticut provides plaintiffs with seven years to file professional negligence actions against architects, professional engineers, and land surveyors when said action relates to "any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of, or land surveying in connection with, an improvement to real

property . . . for injury to property . . . arising out of any such deficiency . . . ." Conn. Gen. Stat. § 52-584a. Otherwise, Connecticut plaintiffs have six years to file breach of contract actions, three years to file breach of oral contract actions, and two years to file negligence actions when said negligence results in property damage. Conn. Gen. Stat. §§ 52-576, 52-581, 52-584.

2. Jurisdictions with a Six-Year Statute of Limitations

Five of the Northeast jurisdictions mandate that plaintiffs file their construction defect-related claims within six years. Three of these jurisdictions, including New Jersey, New York, and Vermont, provide such mandates without distinguishing between the different types of claims which plaintiffs may bring. See N.J.S.A. § 2A:14-1, N.Y. C.P.L.R. 2 Law § 213, Vt. Stat. Ann. tit. 12, § 511. The remaining jurisdictions, Maine and Massachusetts, provide staggered statutes of limitations for the different claims which plaintiffs may bring.

In Maine, plaintiffs have six years to file any civil action premised upon a breach of contract or unintentional tort, but only have four years to file professional negligence actions against architects or engineers. Me. Rev. Stat. tit. 14, § 752 (breach of contract and unintentional torts), Me. Rev. Stat. tit. 14, § 752 (professional negligence).

In Massachusetts, plaintiffs have six years to file breach of contract claims, three years to file claims "arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property," and three years to file breach of warranty claims. Mass. Ann. Laws ch. 260, § 2, Mass. Ann. Laws ch. 260, § 2B, ALM GL ch. 106, § 2-318. The highest court in Massachusetts has held that statutes of limitations relating to construction may be shortened by contract provided the resulting statute of limitations "[is] just and reasonable and not contrary to public policy." Creative Playthings Franchising Corp. v. Reiser, 978 N.E.2d 765, 767 (Mass. 2012).

3. Jurisdictions with a Four-Year Statute of Limitations

Pennsylvania provides plaintiffs with four years to file construction defect-related claims when such claims are premised upon latent defects and corresponding breach of contract allegations. Gustine Uniontown Assocs. v. Anthony Crane Rental, Inc., 842 A.2d 334, 340 (Pa. 2004) (applying 42 Pa. Cons. Stat. Ann. § 5525 to construction defect cases). Otherwise, Pennsylvania plaintiffs have two years to assert that any party negligently caused property damage. 42 Pa. Cons. Stat. Ann. § 5524.

4. Jurisdictions with a Statute of Limitations of Less Than Four Years

The remaining Northeast jurisdictions provide plaintiffs with less than four years to file suit. Both Delaware and New Hampshire afford plaintiffs three years to file construction defect-related claims. N.H. Rev. Stat. Ann. § 508:4, Del.Code Ann. tit. 10, § 8106. Maryland also provides plaintiffs with a three-year statute of limitations, but only as to civil lawsuits generally (including most breach of contract claims). Md. Code Ann., Cts. & Jud. Proc. § 5-101. The Maryland legislature further restricted the time provided to file breach of warranty claims to two years when the alleged breach involves structural defects to a dwelling. Md. Code Ann., Real Prop. § 10-204.

5. The Discovery Rule

The time restrictions associated with the above do not always begin to run against an injured party at the time an injury occurs. Some Northeast Jurisdictions have adopted the discovery rule, which tolls a statute of limitations until the injured party knew or should have known that he or she suffered an injury. See Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 179-80 (2012) (recognizing the discovery rule). Still other Northeast Jurisdictions have only extended the discovery rule to certain causes of action. S. Burlington Sch. Dist. v. Goodrich, 382 A.2d 220, 225 (Vt. 1977) (refusing to adopt a general discovery rule).

For example, in Goodrich, the Vermont Supreme Court refused to apply the discovery rule to construction defect litigation. Id. at 221. The plaintiff-appellant in Goodrich, a school district, argued that the trial court improperly dismissed its construction defect claims against the defendants who designed and built one of its schools, which suffered from a leaky roof. Id. The Vermont Supreme Court disagreed with the school district and affirmed the trial court's decision, finding that school had been built in 1961 and that the plaintiff-appellant filed suit 1972—approximately five years after the expiration of Vermont's six-year statute of limitations. Id. at 224. The Vermont Supreme Court further explained that the legislature had intentionally created two statutory exceptions to the statute of limitations, including an exception for injuries caused by ionizing radiation and an exception for bodily injuries, which meant that the legislature had considered and rejected the adoption of a general discovery rule. Id. at 222 n.2.

However, one of the Vermont Supreme Court Justices authored a dissenting opinion. Id. at 224-25. This opinion, which is reproduced in part below, illustrates the policies underlying a general discovery rule and its application to construction defect claims:

> In the case at bar, the nature of the defect or injury is inherently unknown and latent in nature. Much of the defendants' work was done out of plaintiff's view. Moreover, the plaintiff is not an expert and should not be expected to recognize the expert defendants' negligence or the breach of their contractual duties. Nor should the plaintiff be expected to hire an expert to do the same. To say that a cause of action accrues to a person or legal entity when the person or entity may maintain an action thereon and, at the same time, that it accrues before the person or entity has or can reasonably be expected to have knowledge of any wrong inflicted is patently inconsistent and unrealistic. One cannot maintain an action before one knows there is one. To say to one who has been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law.

Id. at 225 (citations omitted). Even if a jurisdiction has adopted the discovery rule, it does not usually impact the second time-based limitation to lawsuits, the statute of repose. Big League Entm't, Inc. v. Brox Indus., 821 A.2d 1054, 1057-58 (N.H. 2003).

B. Statutes of Repose

Unlike a statute of limitations, which attempts to protect otherwise innocent consumers from incurring expenses, a statute of repose shields defendants from inevitable and perpetual liability. It does this by preventing claimants from filing suit against potential defendants more than a specified time after the discovery of harm or the act which resulted in harm. The overwhelming majority of the Northeast Jurisdictions have enacted statutes of repose which provide defendants with varying amounts of protection from construction defect-related claims. The following subsections provide an overview of these statutes and more detailed explanations for the jurisdictions which have no formal statutes of repose.

1. Jurisdictions with Statutes of Repose

The jurisdictions that have adopted statutes of repose may generally be divided into two categories: jurisdictions which provide a single statute of repose for all construction-defect related claims and jurisdictions which provide multiple statutes of repose for different types of construction-defect claims.

The five jurisdictions which do not differentiate between types of claim include the following: Delaware, which has enacted a six-year statute of repose for any injury arising out of construction of/on non-residential real property, Del.Code Ann. tit. 10, § 8127; Vermont, which has also enacted a six-year statute of repose for construction-related claims, Vt. Stat. Ann. tit. 12, § 511; New Hampshire, which has enacted an eight-year statute of repose for damages arising out of "any deficiency in the creation of an improvement to real property", N.H. Rev. Stat. Ann. § 508:4-b; New Jersey, which has enacted a ten-year statue of repose related to claims involving the construction or improvement of real property, N.J.S.A. § 2A:14-1.1; and Pennsylvania, which has enacted a twelve-year statute of repose for any civil action related to a construction defect (though this may be extended to fourteen years if the damages are discovered between the tenth and twelfth post-construction year). 42 Pa.C.S.A. § 5536.

The remaining three jurisdictions utilize multiple codified statutes of repose which differentiate between claim types, including: Maine, which has enacted a ten-year statute of repose for claims against "design professionals", including architects and engineers, and a six-year statute of limitations for all other civil claims, Me. Rev. Stat. tit. 14, § 752-752-A; Rhode Island, which has enacted separate ten-year statutes of limitation for general civil actions and for civil actions against any contractor, subcontractor, architect, or engineer relating to improvements to real property based in tort, 9 R.I. Gen. Laws § 1-29, Boghossian v. Ferland Corp., 600 A.2d 288, 290 (R.I. 1991) (discussing 9 R.I. Gen. Laws § 1-13); and Maryland, which has enacted a twenty-year statute of repose for actions accruing for injuries to real property, and an exception to said statute of repose which provides that actions against architects, professionals, and contractors must be filed within ten years. Md. Code Ann., Cts. & Jud. Proc. § 5-108(b), Md. Code Ann., Cts. & Jud. Proc. § 5-108(a),

2. Jurisdictions without Statutorily Enumerated Statutes of Repose

Three of the Northeast Jurisdictions do not have legislation which specifically references the phrase "statute of repose"—Massachusetts, Connecticut, and New York.

The phrase "statute of repose" is not included in a single piece of Massachusetts legislation. Yet, the Massachusetts judiciary has found that statutes of repose exist within the jurisdiction. As the highest Massachusetts appellate court has explained, "[the time limitations set forth by Massachusetts legislation], [are] not [ ] statute[s] of limitations but [are] statute[s] of repose." Tindol v. Bos. Hous. Auth., 487 N.E.2d 488, 490 (Mass. 1986). As such, plaintiffs in Massachusetts have six years to file breach of contract claims and six years to file claims grounded in tort "arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property." Mass. Ann. Laws ch. 260, § 2, Mass. Ann. Laws ch. 260, § 2B. Massachusetts precedent further specifically allows for the shortening of the six-year statute of repose for construction defect claims sounding in tort law to a single year. Albrecht v. Clifford, 767 N.E.2d 42, 50-51 (Mass. 2002).

The highest Connecticut appellate court has explained that "'repose' exists only in one statute." Barrett v. Montesano, 849 A.2d 839, 845-46 (Conn. 2004). As such, unless the Connecticut legislature has specified otherwise, Connecticut's statutes of limitation also serve as statutes of repose. Id. This means that plaintiffs may not file suit against: architects, professional engineers, or land surveyors more than seven years after the pertinent real property improvement has been substantially completed; any party for breach of contract more than six years after the alleged breach; any party for breach of oral contract more than three years after the alleged breach; and any party for negligence more than three years after the plaintiff is or should have known he or she was injured or experienced property damage. Conn. Gen. Stat. §§ 52-584a, 52-576, 52-581, and 52-584.

Similarly, although New York legislation does not specifically include the phrase "statute of repose", N.Y. C.P.L.R. § 202 permits the application of another state's statute of repose to actions filed within New York. Pursuant to this provision, which is commonly referred to as "New York's borrowing statute", when a cause of action accrues outside New York and the plaintiff is a nonresident, the statute of limitations or statute of repose of the jurisdiction where the claim arose, if shorter than New York's, is borrowed to measure the lawsuit's timeliness. Norex Petroleum Ltd. v. Blavatnik, 992 N.Y.S.2d 503, 505, 16 N.E.3d 561, 563 (2014); see also Barnett v. Johnson, 839 F. Supp. 236, 243 (S.D.N.Y. 1993) (dismissing a claim filed by a non-New York resident against New York architects which related to alleged construction defect in Texas because, pursuant to the borrowing statute, Texas' statute of repose for construction defect claims had run).

New York legislation currently provides an additional protection for New York-licensed professionals who practice architecture, engineering, land surveying or landscape architecture. N.Y. C.P.L.R. § 214-d provides that any party attempting to file suit against a design professional for an injury to person or property more than ten years after he or she rendered his or her services must provide the targeted professional with written notice of his or her intentions at least ninety days before filing their complaint, crossclaim, or third-party complaint. N.Y. C.P.L.R. § 214-d(1). After receiving this notice, the design professional may file a motion to dismiss the complaint, crossclaim, or counterclaim, which courts must grant "unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance . . . of such licensed [professional] was negligent and that such performance . . . was a proximate cause of personal injury, wrongful death or property damage complained of by the [party] or is supported by a substantial argument for an extension, modification or reversal of existing law."

N.Y. C.P.L.R. § 3211-d. However, this may change. Senate Bill 5158, which was introduced on April 11, 2019, would substantially alter N.Y. C.P.L.R. § 214. The proposed alternations would: eliminate the protections provided to design professionals from claims brought by a party in contractual or professional privity with said professionals; eliminate the option to file the aforementioned motion to dismiss; and replace the ninety-day notice requirement with a blanket ban on filing lawsuits against these professionals more than ten years after the completion of the property improvement (unless the injury or damage occurs in the tenth year, in which case the injured party would be given an additional year to file suit).

C. The Economic Loss Doctrine

The economic loss doctrine generally "[d]efines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort, particularly in strict liability and negligence cases." Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 244 (3d Cir. 2010). In short, the economic loss doctrine bars plaintiffs from asserting claims based in tort theories of liability (such as negligence) when they have only suffered economic losses (such as the cost to repair an alleged construction defect).

Some of the Northeast Jurisdictions have adopted or utilize the economic loss doctrine without modification. See Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, 659 A.2d 267, 271 (Me. 1995) (Maine); Stop & Shop Cos. v. Fisher, 444 N.E.2d 368, 371-72 (Mass. 1983) (Massachusetts); Walsh v. Cluba, 117 A.3d 798, 809-10 (Vt. 2015) (Vermont); Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 627-29 (1997) (New Jersey); Elec. Waste Recycling Grp., Ltd. v. Andela Tool & Mach., Inc., 968 N.Y.S.2d 765, 767 (App. Div. 2013) (New York).

Other Northeast Jurisdictions have adopted the doctrine and subsequently created exceptions to it. For example, Maryland has adopted the doctrine, but allows for tort liability when the product which has injured or damaged the aggrieved party "presents a substantial, clear and unreasonable risk" to consumers. Lloyd v. GMC, 916 A.2d 257, 265-66 (Md. 2007); see also Del.Code Ann. tit. 6, § 3652 (abolishing the Delaware economic loss doctrine as it related to residential construction defect claims); Plourde Sand & Gravel Co. v. JGI E., Inc., 917 A.2d 1250, 1254 (N.H. 2007) (explaining that the economic loss doctrine does not apply in New Hampshire when a judicially recognized special relationship exists between the plaintiff and defendant); Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1276 (R.I. 2007) (emphasizing that the economic loss doctrine does not apply to consumer transactions in Rhode Island); Dittman v. UPMC, 196 A.3d 1036, 1038 (Pa. 2018) ("[U]nder Pennsylvania's economic loss doctrine, recovery for purely pecuniary damages is permissible under a negligence theory provided that the plaintiff can establish the defendant's breach of a legal duty . . . is independent of any duty assumed pursuant to contract . . . ."); Ulbrich v. Groth, 78 A.3d 76, 102 (Conn. 2013) (asserting that, in Connecticut, the economic loss doctrine does not bar claims arising from a breach of contract claim when the plaintiff has alleged that the breach was accompanied by intentional, reckless, unethical, or unscrupulous conduct).

Please note that this document was prepared by attorneys at Reilly, McDevitt & Henrich, P.C., which has offices in New Jersey, Pennsylvania, and Delaware. This document is meant to serve as a primer for insurance professionals and is not a complete/comprehensive authority on the laws of the Northeast Jurisdictions. Any individuals relying on this document should direct all questions he or she may have to his or her attorney.