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50 State Survey of the Applicability of Statutes of Repose to Indemnity and Contribution Claims in Construction Cases

I. INTRODUCTION

This panel will discuss the statute of limitations, statute of repose, discovery rule as well as contractual indemnity, common law indemnity, and contribution claims and their connection to statute of limitations and statute of repose. As you will see, these items are intertwined and attorneys and claims representatives alike need to know how to strategically use these to their client's advantage.

In an effort to curtail, control, and provide some certainty in construction defect litigation, state legislatures have enacted provisions to control the timeliness of construction defect suits through statute of limitation and statute of repose. These statutes primarily assist contractors, subcontractors, and design professionals who are sued in construction defect cases many years after they performed their work. Plaintiffs, however, should not fret as the discovery rule does provide some relief to claims that occur years after construction is complete.

II. STATUTE OF LIMITATIONS

Whether it is a pre-claim matter or actual litigation, one of the first questions that needs to be investigated is whether the statute of limitations defenses is in play. Sometimes in construction cases, the injury/damage can occur during or shortly after construction is complete. For example, a contractor fails to install windows or doors. In this situation it is obvious that something was done incorrectly. However, in the majority of complex construction cases, the defective work is not discovered until years after the contractor performed their respective work and many times years after the project was complete.

A statute of limitations has been described as a "statute prescribing limitations to the right action on certain described causes of action or criminal prosecutions; declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the accrued." Black's Law Dictionary (5th Ed. 1979); see also Federal Deposit of Insurance Corp. v. Peterson, 770 F.2d 141 (10th Cir. 1985); Gaston v. Hartzell, 89 N.M. 217 (Ct. App. 1976); Twp. Of Kearny v. Brandt, 214 N.J. 76 (2013). If litigation were permitted to be bright after a significant period of time has passed, the defendant may suffer various forms of prejudice. For instance, witnesses disappear, memories fade, important

documents are lost or destroyed, and the defendant may have a difficult time mounting an adequate defense. There is a danger that “defendants could find themselves at the mercy of unscrupulous plaintiffs, who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense.” Burns v. Board of Supervisors, 227 V. 354, 357, 315 S.E.2d 856, 859 (1984). Statute of limitation generally is applied from the date of accrual. A “cause of action accrues, for the purpose of the statutes of limitations, from the injury rather than from the wrongful act.” Zamora v. Prematic Serv. Corp., 936 F.2d 1121 (10th Circ. 1991). In Prematic it was held that the statute of limitations accrued from the time a contract was breached, not the time the contract was entered into.

In Palisades at Fort Lee Condominium Association, Inc. v. 100 Old Palisade, LLC, et al., 077249 (September 14, 2017) the New Jersey Supreme Court held a construction-defect cause of action accrues at the time that the builder’s original or subsequent owners first knew or, through exercise of reasonable diligence, should have known of the basis for the claim. From that point, the plaintiff has six years to file a claim. A subsequent owner stands in no better position than a prior owner in calculating the limitations period. If a prior owner knew or reasonably knew or reasonably should have known of a basis for a construction defect-action, the limitations period began at that point. In this case, the Supreme Court remanded the case to the trial court to determine when the accrual clock commenced for each particular defendant. Of particular note was the Supreme Court’s reference to the statutory relief plaintiff had against the developer/sponsor. Thus, even if plaintiff could not sue certain contractor/design professional defendants, they would be able to recover against the developer/sponsor.

There are, however, exceptions to the general rule. Various things can happen that will extend or “toll” a limitations period. The “discovery rule”, for example, often operates to keep the limitations clock from starting to tick. The discovery rule tolls the limitations period until the injured party knows, or with reasonable diligence should have known, of an injury giving rise to a claim/cause of action. The discovery rule recognizes it would be unfair to start the limitations period running when a party does not know and has no way of knowing of the injury giving rise to a claim until years after the limitations period has expired. In the construction industry, the unknown injury is often a latent defect. On the other hand, if the discovery rule were to toll the ticking of the limitations period until the discovery of a latent defect, a contractor would forever be potentially exposed to defect claims.

Sometimes developers own wrongful actions can lead to the nullification of the statute of limitations, but this wrongdoing must rise beyond performing negligent work. In construction defect cases, the allegation of fraud and/or willful concealment extends the statute of limitations when a defendant deceitfully conceals wrongdoing. The accrual period is generally deferred until such time as the plaintiff discovers or should have discovered the deceitful conduct or facts upon which the cause of action is based. In a civil matter, fraud and/or willful concealment must be proved by showing that the defendant's actions generally involve five separate elements: (1) a false statement of a material fact, (2) knowledge on the part of the defendant that the statement is untrue, (3) intent on the part of the defendant to deceive the alleged victim, (4) justifiable reliance by the alleged victim on the statement, and (5) injury to the alleged victim as a result.

In *Acosta v. Glenfed Development Corp.* 128 Cal.App.4th 1278 (2005) the Court of Appeals held that a developer/general contractor can be liable long after the 10 year statute of limitation period for the willful misconduct of subcontractors involved in the project. According to the complaint, the development's soil and foundations were improperly prepared, structural framing was so defective it was dangerous, and the damage to the houses continuously existed since the construction.

Additionally, Right to Repair / Opportunity to Repair statutes often have some sort of built-in tolling mechanism to automatically toll the statute either by a mandatory set of dates or by mutual consent of the parties. For example, in an effort to streamline or prevent construction defect litigation and with the aim of promoting affordable housing by reducing the cost of such litigation, the California Legislature enacted SB 800 (California Civil Code section 895 et seq.) in 2002. The so-called "Fix-It Bill," amongst other things, adds notice, repair, and mediation procedures to residential construction defect claims. It must be noted from the outset that in order for a builder to avail itself of the pre-litigation procedures provided by SB 800, it must provide notice of those procedures. The goal is to allow the builder/contractor to remedy the alleged defective construction.

In any event, after the repair has been completed under SB 800, and if no prior mediation has taken place, then the homeowner must request mediation with the builder if they wish to bring further action. The statute of limitations to bring such further action is generally extended during the repair and mediation process until 100 days after they are completed. If a homeowner ultimately sues under SB 800, then damages are limited to the reasonable value of repairing any SB 800 violation, any damages caused by the original repairs, the cost of removing and replacing any improper repairs completed by the builder, reasonable relocation and storage expense, lost business income if the residence is used as a principal place of business licensed to be operated from the residence, reasonable investigative cost, and all other costs or fees recoverable by contract or statute.

III. STATUTE OF REPOSE

While an analysis of the statute of limitations is necessary, once that is done, the next defense mechanism is whether the statute of repose can be applied to the case. Statutes of repose operate differently from statutes of limitation in two important respects. First, a statute of repose begins to run from the occurrence of a particular event. Second, unlike statutes of limitation, statutes of repose are not subject to tolling or extension. Significantly, the discovery rule does not apply to the statute of repose. As such, once a statute of repose has run on a project, a builder (and others protected by the statute) is generally in the clear with respect to latent defect claims

A statute of repose is a type of statute of limitations that place an outer limit on the time period to bring an action, but which runs from a specified date, rather than accrual or injury. *N.M. Stat Ann.* § 13-1—28 (1978), holding that no action to recover damages for any injury to property, or injury to the person, or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, shall be brought after 10 years from the date of substantial completion of such improvement, providing that the limitation shall not apply to any action based on a contract, warranty, or guarantee which contains express terms inconsistent herewith. see also Ala. Code § 6-5-221 ("All civil actions [related to construction]. . . any right of

action which accrues or would have accrued more than 13 years thereafter is barred.”); Alaska Stat. § 09.10.055 (“No action [related to construction may be brought . . . more than 6 years after substantial completion of an improvement.”); Cal. Civ. Proc. Code. § 337.15 (any action brought more than 10 years after substantial completion of development or improvement is time barred); Ind. Code. § 32-30-1-5 (“An action for construction defects may not be brought . . . unless the action is commenced within 10 years of substantial completion or 12 years after completion and submission” of plans and specifications if the action alleges design deficiency against a licensed professional.).

A. The Repose Period and the Discovery Rule

Each statute of repose contains a specific period of time after which someone may no longer file a claim. Generally, that period begins on the date of substantial completion of the construction professionals’ work on the improvement. Some courts have noticed that “substantial completion” is a term of art and is well-recognized in the construction industry. Trinity Church v. Lawson-Bell, 925 A.2d 720, 730 (App. Div. 2007). Most statutes of repose do not contain a definition of the term. Col. Rev. Stat. Ann. §13-80-104 (2001). Some do, however, and they can be instructive in determining when the timeline in construction statutes of repose will begin. N.M. Stat. Ann. § 37-1-27 (1978); Ind. Code § 32-30-1-4 (2002); Wash. Rev. Code § 4.16.310 (1986).

Generally, these statutes define “substantial completed” as the date upon which the owner of the improvement to real property can occupy and use the improvement in the manner in which it was intended. Id. Many courts use similar definitions when a statute does not contain one. Sunset Presbyterian Church v. Brockamp & Jaeger, Inc., 254 Or. App. 24, 34 (Or. Ct. App. 2012). Each jurisdiction, however, may have a definition that varies from others in critical ways that can affect when the repose period begins.

The limitations period for a construction statute of repose begins upon the construction professional’s substantial completion of the project, not the plaintiff’s date of injury. Burlington N. & Santa Fe Rwy. Co. v. Poole Chem. Co., Inc., 2004 WL 1926322 (N.D. Tex. Aug. 27, 2004), aff’d sub nom, Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355 (5th Cir. 2005) (“a repose period begins to run from when the “improvements are completed or operations commence, rather than when the cause of action accrues.”); Johnson v. City of Ft. Worth, 774 S.W.2d 653 (Tex. 1989); Rodriguez v. Niemeyer, 595 P.2d 952, 955 (Wash. Ct. App. 1979); Alsenz v. Twin Lakes Village, Inc., 843 P.2d 834, 836 (Nev. 1992); Lamprey v. Britton Const., Inc., 37 A.3d 359, 365-66 (N.H. 2012).

In general, applying the “discovery rule” or accrual analysis to a construction statute of repose would defy the policy of curtailing the open-ended liability that such statutes seek to remedy. King, 752 N.E.2d at 613. Furthermore, despite the long latency of asbestos-related diseases, courts have refused to carve out an exception to the applicability of the discovery rule in the context of construction statutes of repose. Id. As one court explained, “the purpose of the statute of repose is to impose a cap on the applicability of the discovery rule so that the outer limit terminates the possibility of liability after a definite period of time, regardless of a potential plaintiff’s lack of knowledge of his cause of action.” Id. (emphasis in original).

Courts have upheld construction statutes of repose to protect the defendants from having to defend against stale claims. Wright v. Bd. Of Educ. Of City of Chicago, 335 Ill. App. 3d 948, 955 (Ill. App. Ct. 2002); Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 6 O.3d 74, 83-84 (Wash. Ct. App. 2000). The New Jersey Supreme Court said it best when it stated,

There comes a time when (a potential defendant) ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost memories have faded, and witnesses have disappeared.'

Rosenbery v. Town of North Bergen, 61 N.J. 190 (1972) (quoting Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950)). See also Cyktor v. Aspen Manor Condo, Ass'n, 359 N.J. Super. 459, 470 (App. Div. 2003).

1. What is Substantial Completion?

In Town of Kearny v. Louis F. Brandt, AIA, 214 N.J. 76 (2013), the New Jersey Supreme Court addressed the Statute of Repose when dealing with when a building is substantially complete. The factual history in this matter involves structural failures at a facility in the Township of Kearny. The town sued Brandt, an architect, as well as soils and structural engineers. The trial court granted summary judgment in favor of the soils and structural engineers holding that the claims were filed more than ten years after their work was completed. The trial court denied Brandt's motion because their architectural services continued throughout the project. The New Jersey Supreme Court held "[f]or professionals [like Brandt] whose responsibilities for the Kearny public safety facility continued throughout its design and construction, the ten-year period . . . commences on the date of the project's substantial completion." This is distinguishable from a contractor or design professional whose project related services do not continue throughout the lifespan of the project, but are hired to perform limited services and discrete tasks.

In a recent New Jersey case, D.R. Horton (the developer) argued that because it did not perform any construction work after the final electrical inspection on April 17, 2006. Although substantial completion can be conclusively established by the issuance of a certificate of occupancy, a party may still establish "substantial completion" through other proofs. D.R. Horton argued construction of the property was completed on April 17, 2006, when the property passed its final subcode inspection; subsequently, the Township did nothing more than process paperwork.

In Etheridge v. YMCA, 391 S.W.3d 541 (Tenn. Ct. App. 2012), a subcontractor was to relocate and replace plumbing, wiring and fixtures in the men's and women's restrooms of a church. However, in apparent violation of the applicable local codes, no permits were obtained for the project and no final inspection of the work occurred. Notwithstanding the failure to obtain appropriate permits, the replaced items operated correctly when the subcontractor finished his work in November 2004.

In the middle of 2008, a child was injured when he propped himself up on a sink in the men's room and the sink detached from the wall and shattered. The child's parents filed suit against, inter alia, the contractor and subcontractor of the project. The contractors moved for summary judgment pursuant to Tennessee's 4-year statute of repose. The plaintiffs opposed the motions arguing that the contractors had failed to obtain the requisite permits/inspections for the construction project, and, therefore, that the project was not "substantially complete" so as to commence the running of the statute of repose.

In upholding the trial court's dismissal of the plaintiffs' claims against the contractors, the Tennessee appellate court held that "substantial completion" occurred when the sink could be used for its intended purpose. And this may or may not coincide with the approvals of governmental entities. "[P]assing such a final inspection is indicative of substantial completion but not necessarily determinative." *Id.* at 549 (quotations omitted).

A similar analysis occurred in Rosso v. Hallmark Homes of Minneapolis, Inc., 843 N.W.2d 798 (Minn. Ct. App. 2014). There, in the spring of 1995, the builder decorated, furnished, and began using a certain house as a model home. This continued until November 14, 1995, when it entered into a contract for sale with the plaintiffs. While the home was in "move-in condition" as to the date of the contract, for tax reasons, the builder did not obtain a certificate of occupancy for the home until one day before closing.

After the homeowners filed suit against the builder alleging construction deficiencies, the builder moved for summary judgment pursuant to Minnesota's 10-year statute of repose. The plaintiffs argued that, because the city required a certificate of occupancy as a condition to occupy the home legally, the home's construction was not substantially completed until the certificate was issued on January 19, 1996. Therefore, their claims fell within the ten-year statute of repose, which is triggered by substantial completion of the improvement.

The Minnesota court disagreed with the plaintiffs. It held that substantial completion contemplates the structure's physical condition and not the issuing of a certificate of occupancy. While a "certificate of occupancy may serve as prima facie evidence of substantial completion because a certificate of occupancy would never be issued before a structure's construction were completed, it is not a necessary condition that has to occur before substantial completion of a home is achieved..." Rosso, 843 N.W.2d at 802. As such, the plaintiffs were found to have filed their claim out of time. See also Colormatch Exteriors v. Hickey, 569 S.E.2d 495, 499 (Ga. 2002) (holding that with regard to Georgia's statute of limitations, "[w]e conclude that the issuance of a certificate of occupancy by a governmental agency is not required as a matter of law in order to establish substantial completion. A building is substantially complete where the actual construction is finished and it could be physically used, despite some delay in the issuance of a certificate of occupancy.")

IV. INDEMNIFICATION

Indemnification is the right of one party to collect from another the damages it owes to a third party. There are two distinct recognized legal bases for indemnification — contractual and equitable (also often referred to as "common law" indemnification). American Transtech, Inc. v U.S. Trust Corp., 933 F. Supp. 1193, 1202 (S.D.N.Y. 2012). A right to contractual indemnification, as its name implies, is created by contract. As is the case with any contract claim, the scope of

the obligation is strictly defined by the terms of the contract. Although indemnification clauses are generally enforceable, they are subject to certain limitations and defenses. For example, in virtually all states, an agreement that purports to indemnify for intentional conduct is void as a matter of public policy. Industrial Tile, Inc. v. Stewart, 388 So.2d 171 (1980); E.L. White, Inc. v. City of Huntington Beach, 579 P.2d 505 (1978). Similarly, agreements to indemnify a party against its own negligence are prohibited in many states and disfavored in most. Even where enforceable, a clause that purports to indemnify a party for its own fault is enforceable only where the language is explicit that it extends to the indemnitee's own failure to perform. Id. Thus, depending on the specific language of the indemnification clause and the state in which the project is located, a contractor's independent breach of its own contractual obligations may bar any claim for indemnification against its subcontractors.

V. CONTRIBUTION

"Contribution" is a claim brought by one such tortfeasor against another tortfeasor to recover some or all of the money damages the first tortfeasor owes to an injured/damaged plaintiff, as a result of a settlement or a judgment in favor of the plaintiff. For example, if a plaintiff sues a general contractor for injuries resulting from a fall on the job site, the general contractor's insurer could pursue a claim for contribution against a subcontractor who was directly responsible for causing the injury. The insurer would seek reimbursement from the subcontractor based on the latter's proportionate share of responsibility, liability, or fault assigned to the subcontractor either in the original lawsuit or in a separate lawsuit seeking the contribution. Understanding contribution law is important for subrogation practitioners because an insurer who settles on behalf of its **insured** must know whether the settlement will extinguish its subrogated right of contribution against the other tortfeasors in order to determine what should be paid in settlement.

VI. APPLICATION OF CONSTRUCTION STATUTES OF REPOSE TO CLAIMS FOR INDEMNITY AND CONTRIBUTION

Construction statutes of repose are prevalent and have become a feature to which construction lawyers have been accustomed and, to a certain extent, comfortable. Yet even for the experienced construction lawyer these statutes pose a potential trap for the unwary when they act as a bar to indemnity and contribution claims. Practitioners whose clients are defendants in timely-filed actions may not consider the impact of statutes of repose, but they should. If the client later seeks indemnity or contribution from another participant in the construction project, the construction statute of repose may bar the client's claim. Even practitioners who consider future indemnity and contribution claims may assume that such claims will be within any applicable limitation or repose period so long as they are filed immediately after the preliminary defendant has a judgment rendered against it.

A. States that Reference Contribution and Indemnity in their Respective Statutes of Repose

Of all fifty states and the District of Columbia, twenty-six states have found that the construction statute of repose does apply to contribution or indemnity claims. Four states have refused to apply the statute of repose to such claims. The remaining states have either not addressed the issue, have conflicting precedent, or only apply the statute or repose to certain indemnity or

contribution claims. The statutes are generally similar in that they provide a definite cutoff for construction defect claims. The statutes vary, however, in several important respects. For example, some statutes expressly include claims for indemnity and contribution, while other statutes expressly exclude such claims. Some statutes apply solely to tort claims, while others apply solely to contract claims. These differences can affect the indemnity claims, and are discussed in detail below.

Some states have made express compromises in their statutes of repose. For example, Minnesota's statute provides a ten-year statute of repose for construction claims, which begins to run upon substantial completion. Minn. Stat. § 541.051. The case of Weston v. McWilliams & Associates, Inc., applied § 541.051 to a construction defect case. The general contractor completed its work in July of 1993. Plaintiff homeowner commenced action in May 2003, approximately two months before the end of the statutory time period. The general contractor, however, waited an additional ten months, until March 2004 to assert contribution and indemnity claims against subcontractors and a supplier. Third-party defendants moved for summary judgment seeking to dismiss contribution and indemnity claims. The trial court dismissed these claims stating they were barred by the Statute of Repose. The Court of Appeal reversed, holding that claims for contribution and indemnity that have not otherwise accrued within ten years of completion of construction should be deemed to have accrued in the tenth year, thus triggering the extension feature referenced in the above paragraph. The Supreme Court reversed the Court of Appeals and reinstated the trial court's summary judgment decision, reasoning that the extension feature did not apply because the cause of action for contribution and/or indemnity did not accrue during the nine of tenth year after substantial completion. To the contrary, a cause of action for contribution or indemnity only accrues upon payment of final judgment. Here, no payment was made in the ninth or tenth year after substantial completion of the construction, and accordingly the extension provision was not triggered.

B. States that do not Reference Contribution and Indemnity in their Respective Statutes of Repose

For practitioners in states that remain undecided on whether the construction statute of repose applies to indemnity or contribution claims, analyzing the statute and related case law in jurisdictions where the statute expressly applies to indemnity and contribution claims is likely of little use. Instead, the real interest would lie in the states where courts have decided this issue when the statute did not expressly mention indemnity or contribution claims. This section will discuss some of these cases.

The Colorado Supreme Court recently weighed in and held that the 90-day tolling period for indemnification claims related to construction defects actions also tolls the statute of repose. Goodman v. Heritage Builders, Inc., 390 P.3d 398 (2017).

Colorado has a two-year statute of limitations and a six-year statute of repose applicable to construction defects claims. Specifically, under Colorado law, a construction defects actions must be brought within two years after the claim arises, but in no case may such an action be brought more than six years after the substantial completion of the improvement to the real property. C.R.S. § 13-80-104(1)(a).

However, Section 13-80-104(1)(b)(II), C.R.S., provides the following 90-day tolling provision for indemnification claims related to construction defects actions:

[A]ll claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person . . . [a]rise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and . . . [s]hall be brought within ninety days after the claims arise, and not thereafter.

This "tolling" provision was meant to allow general contractors and developers to defend against construction-defects claims without having to bring third-party claims against every subcontractor and supplier. Instead, they could wait until the underlying defects action resolved, and then bring their indemnification claims against the relevant subcontractors within 90 days. But there was a problem: The Colorado Court of Appeals had held multiple times that the 90-day tolling period did not toll the six-year statute of repose. *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008). Therefore, waiting until the underlying construction defects litigation was resolved could result in the indemnification claims being barred by the six-year statute of repose.

In *Goodman v. Heritage Builders, Inc.*, the Colorado Supreme Court finally overruled the holdings in *Thermo Dev.* (among other cases) and held that the 90-day tolling provision tolls both the statute of limitations and statute of repose. *Id.* at 399-400. According to the Court, "under section 13-80-104(1)(b)(II), third-party claims are timely irrespective of both the two-year statute of limitations and the six-year statute of repose so long as both the claims are brought during the construction defect litigation or within ninety days following the date of judgment or settlement." *Id.*

In *Ray & Sons Masonry Contractors, Inc. v. U.S. Fidelity & Guaranty Co.* 114 S.W.3d 189 (2003), Wal-Mart hired a general contractor, Crane, to build a store. Construction of the store was completed in 1993. When Wal-Mart failed to pay Crane the amount due under the contract, Crane sued. Wal-Mart counterclaimed, alleging defective construction. In response to the counterclaim, Crane and its surety brought a separate lawsuit against several subcontractors that had participated in the construction of the store. Crane and its surety amended the complaint in 2001 to allege a contractual indemnity claim against one of the subcontractors, Ray, asserting that Ray performed defective work on the construction of the store. The subcontract contained a broad indemnity provision requiring Ray to indemnify Crane for any damages arising out of Ray's work under the subcontract. *Id.* at 195.

Ray claimed that Crane's claim was barred by Arkansas's construction statute of repose. The statute provided as follows:

No action in contract, whether oral or written, sealed or unsealed, to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement.

Id. at 202.

The court held that the statute of repose did not bar Crane's claim. In so holding, the court characterized Crane's claim as "an action alleging...breach of (a) contractual obligation to indemnify" rather than an action seeking damages from allegedly defective construction."

A similar approach was taken by an Illinois appellate court in South Dearborn School Bldg. Corp. v. Duerstock. In Duerstock, the plaintiff was injured when he dove from a starting block into the shallow end of a school swimming pool. 612 N.E.2d 203 (Ind. Ct. App. 1993). The plaintiff sued the developer, alleging defective construction. The developer then sought indemnity from the project contractor. The contractor between the developer and the contractor provided that the contractor was obligated to indemnify the developer for any loss resulting from the acts or omissions of the contractor. The trial court granted summary judgment for the contractor, finding that the developer's claim for indemnity was barred by the statute of repose. The statute provided as follows:

No action in tort, contract or otherwise shall be commenced against any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than six years after the substantial completion of such an improvement, for the recovery of damages for:

- (a) Any deficiency in the design, planning, supervision or observation of construction or construction of such an improvement; or
- (b) Injury to real or personal property caused by any such deficiency; or
- (c) Injury to or wrongful death of a person caused by any such deficiency.

Id. at 207.

The trial court's decision was reversed on appeal. In reversing the trial court, the appellate court held (much like the court in Ray & Sons) that the plain language of the statute of repose prevented its application to contribution and indemnity claims. Indeed, the court found that the statute only applied to actions for construction defects, injuries to property, and injuries to persons. The court further found that the developer's claim for contractual indemnity did not fall within any of these three categories.

C. Should Construction Statutes of Repose be Applied to Claims for Indemnity and Contribution?

There are a significant number of states whose courts and legislature have not yet decided whether the construction statute of repose applies to claims for indemnity and contribution. As such, the question of whether construction statutes of repose should apply to claims for indemnity and contribution is more than merely academic. This article argues that by excepting claims for indemnity and contribution from the statute of repose, courts and legislatures can continue to serve the policy goals behind such statutes while ensuring that construction industry participants are not unfairly prejudiced.

First, as a legal and practical matter it seems unlikely that excepting contribution and indemnity claims from construction statutes of repose will significantly increase the durations for which construction industry participants are liable. As a legal matter, a party is normally not entitled to seek contribution or indemnity when the party itself has not been found liable. Thus, once the statute of repose has run with respect to any primary claims, the party against whom such claims would have been asserted can no longer bring claims for indemnity or contribution. In other words, even if indemnity and contribution claims are not directly subjected to the statute of repose, they will be extinguished indirectly once the period of repose period has run on the related primary claims.

For example, a contractor or construction manager may have overseen the construction of a building that, upon completion, had several hidden defects. If the contractor is sued before the period of repose has run, it may want to seek indemnity and contribution from its subcontractors. If the period of repose has run and the contractor has not been sued, however, its liability is extinguished. The subcontractor's liability would also be extinguished, since the contractor cannot seek indemnity or contribution for liability it has not incurred and will not incur.

Furthermore, a party that is sued for construction defects has an incentive to promptly bring a third-party claim for indemnity or contribution. If such claims are not brought in the original lawsuit they will likely be brought immediately upon the original lawsuit's conclusion. While this may slightly increase the window of time in which a third party may be held liable, it is far from the "limitless" and "perpetual" liability that the statute of repose is designed to prevent.

Even if claims for indemnity and contribution are not completely excepted from the statute of repose, they should be given a short extension. The approach taken by Minnesota legislature is enlightening in this regard. As previously noted, the Minnesota construction statute of repose provides two-year extensions for indemnity and contribution claims. This statute prevents parties who are directly sued from losing the contribution or indemnity claims. In doing so, it does not undermine the purpose of the statute of repose. All construction industry participants

have a ten-year window in which they can be sued under the Minnesota statute. If, during those ten years, none of the project participants are sued, the liability of all participants is extinguished. If one of the participants is sued, then the remaining parties have an additional two years during which they may be liable. This is a minor trade off to ensure that they party who is directly sued does not have to pay more than its fair share.

Contrasting with Minnesota and California is New Jersey which has the Entire Controversy Doctrine. The Entire Controversy Doctrine requires whenever possible all phases of a legal dispute to be adjudicated in one action. Prevratil v. Mohr, 145 N.J. 180, 214 (1996). “At a minimum, all parties to a suit should assert all affirmative claims and defenses arising out of the underlying controversy.” Id. The Doctrine is expressly incorporated by New Jersey Court Rule 4:30A, and its purposes are to encourage comprehensive determinations of disputes between parties and to avoid fragmentation of litigation. The Doctrine promotes party fairness and judicial economy and efficiency. In fact, when an initial Complaint or Answer is filed in the Superior Court, the attorney is required to certify that he is unaware of any other litigation or arbitration pending between the parties and that he is also unaware of any persons or entities who should be joined as parties to the litigation. Thus, the Entire Controversy Doctrine requires that a defendant “assert not only claims deriving from plaintiff’s cause of action, but also any and all cross-claims and counterclaims arising out of the underlying transaction.” Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, certif. denied, 75 N.J. 528 (1977)).