ALERTS AND UPDATES

When Is Defective Construction Work Sufficiently "Unsafe" for N.J. Statute of Repose's Protection of Defendants?

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New Jersey's statute of repose[1] (the "Statute") precludes claims arising from the "defective *and* unsafe" condition of an improvement to real property that are asserted more than 10 years after construction of the improvement. Although the Statute may be mistakenly thought to apply to all construction defect claims, the courts occasionally provide a reminder that a particular construction defect also has to be "unsafe."

The New Jersey Supreme Court in *E.A. Williams, Inc. v. Russo Dev. Corp.*[2] rejected the attempt of a professional surveyor to raise the Statute as a defense in a claim brought by a building owner who alleged that the surveyor's error resulted in the building's being constructed too close to a property line. The Statute does not cover that type of defect, the state supreme court held, because the defect caused by the surveyor's negligence did not result in a safety hazard—but rather a mere economic injury.

In considering the Statute's applicability in *Port Imperial Condominium Association, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc.*,[3] the New Jersey Superior Court, Appellate Division, again addressed the issue of whether design and construction defects created an unsafe condition—as opposed to merely necessitating expensive and inconvenient repairs.

Case Background

The development at issue in *Port Imperial* was constructed atop unsuitable soil, adjacent to the Hudson River. Because of the soil conditions, the developer's design team implemented a "ground improvement plan," which included soil compaction and the installation of wick drains to allow for water removal from the soil. Installation of the wick drains was completed in February 1998. After discovering foundation cracks and other defects during the transition process, the condominium association filed suit against the developer on April 22, 2008. The developer filed an answer and third-party claims against several of its subcontractors, although not those subcontractors who implemented the ground improvement plan.

During discovery, in November 2009 and December 2009, the association's geotechnical expert produced reports in which the expert opined that improper design and implementation of the ground improvement plan was causing settling of the soil under certain parts of the development, resulting in foundation cracks and other damage to the buildings. Thereafter, the association amended its complaint to name the subcontractors who implemented the ground improvement plan, and the developer sought to assert claims against these same subcontractors in a companion action brought by the condominium's master association, which arose from similar alleged deficiencies in common areas controlled by the master association. The trial court granted the subcontractors' motions for summary judgment—upon the grounds that the Statute barred the claims—because these subcontractors had completed the work at issue more than 10 years before the association and developer sought to assert claims against them.

Appellate Division Decision

On appeal, the association and developer contended that, although the repairs would be costly, no "unsafe condition" existed; thus, the trial court should not have applied the Statute. The Appellate Division rejected this argument and allowed application of the Statute to protect the subcontractors, based upon the presence of sufficient evidence in the record to support the trial court's finding that the subcontractors' defective work rendered the building unsafe. In particular, the Appellate Division noted the association's own allegations in the amended complaint and the conclusion of the association's expert that the improper installation of the wick drain system would cause the continuation of significant and unpredictable settling of the soils, which was remediable only by demolishing the existing buildings and installing new foundation piles.

In concluding the improvements were unsafe, the Appellate Division emphasized the evidence and allegations of the inability of the sinking units to fulfill their intended function of residential occupation, absent corrective action. Significantly, the Appellate Division held that it did not matter that the subcontractors had not offered proof of an unsafe condition, because sufficient evidence appeared in the record—*i.e.*, the evidence produced by the association—that the subcontractors had caused functional impairment of the building and a hazardous condition.

Analysis

The *Port Imperial* decision appears to serve as a reminder that the Statute, because it requires that defects are "unsafe" in order to qualify the responsible defendant for protection, provides a lesser measure of repose than statutes of repose adopted in other states. The decision again underscores that the courts interpret the statute broadly, and “unsafe” conditions are those that imperil *either* persons or property coming into contact with the improvement.

Port Imperial also reaffirms that defects will be deemed "unsafe," for purposes of the Statute's application, even if the safety risk is a future risk rather than a present one. Although litigating this issue can present a potentially uncomfortable role reversal among litigants—with the building owner compelled to maintain that the defects present no safety concerns and the contractor responsible for the defects contending that his work is not only defective but also unsafe—the Appellate Division allowed the subcontractors to use the association's own allegations and expert evidence to support the argument in favor of an unsafe condition.

On this point, however, the decision appears to raise the question of whether a building owner seeking to raise stale defect claims might under appropriate circumstances be better served by downplaying potential safety risks posed by construction defects in order to potentially avoid dismissal under the Statute.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact Robert A. Prentice, Michael W. O'Hara, any member of the Construction Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. Statute of Repose, N.J.S.A. 2A:14-1.1.
2. *E.A. Williams, Inc. v. Russo Dev. Corp.*, 82 N.J. 160 (1980).

3. *Port Imperial Condominium Association, Inc. v. K. Hovnanian Port Imperial Urban Renewal, Inc.*, 2011 N.J. Super. LEXIS 73 (App. Div. May 2, 2011) (approved for publication).