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## Practical Construction Law & Risk Issues

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### Statute of Repose

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#### Statute of Repose Limits an Indemnity Claim

*Michael S. Zicherman Partner & Frank A. Hess, Sr. Counsel of Peckar & Abramson P.C.*[Beware of GC Proposing a Design Solution](#)

Patch Remedy Available When the Statute of Repose Limits Indemnity Claim Against a Sub

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When a general contractor (GC) or construction manager (CM) is sued due to its subcontractor's defective work or a subconsultant's professional negligence, the general contractor or construction manager will naturally protect itself by asserting claims for indemnity and contribution against the sub. However, all claims against the sub could be barred due to the expiration of the statutes of limitations or repose, measured from the last date the sub performed work on the project. In many cases, the last day of the sub's performance is likely to be much earlier than the substantial completion date of the entire project, the date by which claims against the general contractor or construction manager are measured. This potentially leaves the general contractor or construction manager liable for the sub's performance deficiencies with no recourse against the sub.

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Fortunately, the June 2013 New Jersey Supreme Court decision, in *Town of Kearny v. Brandt*, 214 N.J. 76 (2013), has partially mitigated the harshness of this outcome. In *Kearny*, the Court fashioned a remedy that would allow the GC or CM to at least obtain apportionment of damages for any fault attributable to the sub, while at the same time affording the sub the benefit of the expiry of the statutory limitations period. A summary of the facts illustrates the issue.

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Following structural failures in a public safety facility, the Town of Kearny sued its architect, Brandt-Kuybida Architects (Brandt), and soils engineer, Solis Engineering Services, Inc. (SESI), and the architect's structural steel consultant, Harrison-Hamnett, P.C. (Harrison-Hamnett), for breach of contract and professional negligence. Kearny had directly retained SESI to conduct a soils investigation; SESI completed and reported on the results in July 1990 and had no further involvement with the facility. Brandt retained Harrison-Hamnett to serve as the structural engineer with responsibility to design the facility's foundations, piles, roof structure and wall reinforcement. Harrison-Hamnett completed its work on October 30, 1995. The completion of the entire project and Brandt's work were not completed until some time later, the exact completion date being disputed.

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On November 24, 1995, Brandt and Kearny signed a "Certificate of Substantial Completion" (Certificate). However, neither an issue date nor a date of completion was inserted in the appropriate part of the Certificate. On April 9, 1996, Kearny's

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construction official issued the first Temporary Certificate of Occupancy, limited to the police section of the building and subject to completion of punch list items. On May 23, 1996, the construction official issued the second Temporary Certificate of Occupancy, permitting the Kearny Fire Department to use its section of the building.

According to the reported decision:

Structural defects in the facility surfaced shortly after the Police Department took occupancy. The building settled differentially, causing gaps between the ceiling and a wall, as well as leaks, buckled tiles and cracks in the walls. The Police Department reported leaks in various parts of the building and doors that could not close because they did not fit in their frames. Although the Town continued to use the facility, there were further complaints about structural flaws in the building. In 2003, the Town's Construction Official received an emergency call that the ceiling in the police dispatch area of the building was about to collapse. By 2007, ceilings in the facility had fallen, pipes had separated and pulled, and glass had broken, all of which were attributed to uneven settlement. The Town never issued a final certificate of occupancy. The Town's construction official ordered all occupants to evacuate the building on February 8, 2007. The building has been vacant and unused since that date.

Kearny filed suit against the design professionals on April 7, 2006; the design professionals in turn filed crossclaims against each other seeking contribution and indemnification. Thereafter, all defendants filed motions to dismiss the claims asserting that New Jersey's ten-year statute of repose and ten-year statute of limitations applicable to public entities barred Kearny's claims. The trial court denied Brandt's motion, concluding that the ten-year period for purposes of the statute of repose began for Brandt on the date of substantial completion of the project, ruling that the critical date was April 9, 1996 when the first Temporary Certificate of Occupancy was issued. This meant that the ten-year period for filing suit against Brandt expired on April 9, 2006, two days after the Town sued. The trial court, however, granted the motions filed by SESI and Harrison–Hamnett, ruling that the ten-year period commenced for these parties on the date that their involvement in the project ended, July 31, 1990 for SESI and October 30, 1995 for Harrison–Hamnett.

With Brandt the only defendant left in the case, the trial court then precluded Brandt from asserting its right to seek apportionment of fault from the dismissed parties, SESI and Harrison–Hamnett. The trial court held that by virtue of the dismissal of the Town's claims against them, those defendants were no longer in the case and Brandt was not entitled to an apportionment of fault against them.

At trial, Brandt was found solely liable to Kearny in the amount of \$800,000. Brandt appealed both the finding of the date of substantial completion, claiming that it should date back to the Certificate, as well as the denial of apportionment against the dismissed parties. The appellate court, while upholding the trial court's ruling that substantial completion did not occur until the first Temporary Certificate of Occupancy was issued, remanded the case for a new trial to allow Brandt to seek allocation of fault against SESI and Harrison–Hamnett, ruling that the judgment against Brandt should be reduced based on the fault that would have been attributed to these parties had Kearny timely sued them. Both Brandt and Kearny appealed to the Supreme Court, Brandt seeking to overturn the trial court's finding of when substantial completion occurred and Kearny appealing the ruling allowing Brandt to reduce its judgment by apportionment against the dismissed parties.

The Supreme Court affirmed the trial court's ruling that since the Certificate was never fully completed and issued and because work needed to be performed before the building could even be partially occupied, substantial completion did not occur until the first temporary certificate of occupancy was issued on April 9, 1996. In dealing with this issue, the Court stated that the law distinguishes between contractors who are hired to perform limited services (such as subcontractors and subconsultants), and contractors with supervisory responsibilities that span the entire project (such as general contractors and construction managers). In determining the date upon which the ten-year period begins to run for purposes of the statute of repose for the former category, it is at the conclusion of the contractor's specific task; for the latter category, it begins to run at the time of occupancy.

Turning to the apportionment issue, the Court affirmed the appellate court's decision, ruling that allocation of fault to the dismissed defendants—who will, in any event, pay no damages—does not subvert the statute of repose's purpose to give construction

defendants “the right not to have to defend ancient claims or obligations.” Further, the Court stated that the goals of the comparative fault statutory scheme are advanced if the jury assesses the SESI and Harrison–Hamnett defendants’ potential fault, noting that within the time constraints imposed by the statute of repose, the Town had the opportunity to assert a cause of action against SESI and Harrison–Hamnett period. The Court ruled that the jury’s assessment of SESI and Harrison–Hamnett’s fault promotes fair allocation of responsibility and avoids creating an incentive for a plaintiff to strategically target only one of a range of culpable defendants.

**Editors’ Note:**

***The Supreme Court’s decision is a literal application of the statute of repose. The statute does not distinguish between claims made by owners or by contractors, and it applies as much to claims for indemnification and contribution as it does to direct claims for damages. Though a contractor may no longer be liable in damages for the defective work of its subcontractor, the contractor still is not made whole by the Court’s decision. The contractor, through no fault of its own, still has lost its ability to obtain indemnification from its subcontractor for attorney’s fees and other costs of litigation, and to the extent that the contractor has insurance coverage, it may be subject to increased premiums. The only way to rectify such a result is either by amending the statute of repose, or possibly by way of a provision in the subcontract, which states that for purposes of the subcontractor’s indemnity obligations, the subcontractor’s work shall not be deemed to be substantially complete until a certificate of occupancy is issued for the entire project or until the contractor’s work is substantially completed. Such a provision may be effective to extend the statute of repose for the subcontractor to make it commensurate with that of the general contractor.***

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