

HOW CONTRACTORS MAY LOSE PROTECTION FROM LIMITLESS LIABILITY

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For many years, New Hampshire contractors have benefited from a law which bars lawsuits "arising out of any deficiency in the creation of an improvement to real property, including without limitation the ... construction ... of that improvement," more than eight years after the substantial completion of the improvement. Known as the "statute of repose," this law has operated to prevent claims against contractors, design professionals and others based on alleged design or construction defects in projects substantially completed more than eight years earlier.

Before New Hampshire's statute of repose was enacted, New Hampshire law permitted claims for design or construction defects to be asserted within three years from the date when such defects were discovered, regardless of how long ago the project had been completed. This exposed architects, engineers and contractors to liability of virtually infinite duration for such defects. In 1990, the New Hampshire legislature responded to the industry's concerns about this limitless liability by enacting the current version of RSA 8:4-b. Since that time, contractors and others have enjoyed protection from such liability beginning eight years after substantial completion, regardless of whether an alleged defect has been discovered.

A recent court decision,¹ however, has highlighted a way in which contractors may, either intentionally or inadvertently, give up the protection afforded by the statute of repose. In September of 2008, the Grafton County Superior Court ruled that a contractor could, by contract with a project owner, effectively surrender the protection of the statute of repose by agreeing to indemnify the owner against claims of third parties alleging defective construction.

Where the contractor has agreed to indemnify the owner in this fashion, the Court concluded that the owner's indemnity claim arises not from a "deficiency in the creation of an improvement to real property" but from a contractual obligation voluntarily undertaken by the contractor. Accordingly, the Court ruled that the statute of repose did not operate to bar a claim for indemnification, made by the original owner/developer against the contractor, with respect to a suit against the owner alleging defects in the design and construction of a project completed well over eight years earlier. This meant that the contractor was compelled, due solely to its contract with the owner, to defend a lawsuit that otherwise would have been barred by the statute of repose.

¹ 85 South Main Street Condominium Association v. Brookstone Builders, Inc., docket no. 06-C-210.

The Grafton County Superior Court's interpretation of the statute of repose may be still open to argument in other cases, but it was well reasoned and supported by court decisions in other states. It is not unlikely, therefore, that this decision will be followed by other New Hampshire courts and adopted by the New Hampshire Supreme Court when the issue finally reaches our highest court.

The lesson of this case for contractors and design professionals is apparent:

Parties contracting with an owner for the design or construction of a project should be wary of contract provisions that require them to indemnify the owner, with respect to claims of design or construction defects asserted against the owner, regardless of how long after completion of the project the claim is asserted.²

In negotiating and drafting contract terms, contractors and design professionals would be well advised to limit, to the extent possible, their indemnity obligations to eight years, so that they expire at the same time that other claims become barred by the eight-year statute of repose. Owners, of course, will resist this limitation, but armed with the rationale behind the statute of repose, contract negotiators should have some success in convincing them that unlimited exposure to liability is not only unreasonable and unfair, but inconsistent with New Hampshire law.

The bottom line is that, if you, as parties to construction contracts, are agreeing to indemnify owners against claims of third parties regardless of when such claims are made, you are giving up a large portion of the legal protection that New Hampshire's statute of repose was intended to provide.

² *The same lesson applies to subcontractors and suppliers negotiating indemnity provisions with general contractors and construction managers.*

