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PRODUCTS LIABILITY

The Door Is Open Once Again to Product Manufacturers Who Seek the Benefits of the Statute of Repose

BY ALAN R. LEVY

An unpublished Appellate Division decision which went almost entirely unnoticed by the legal community last summer may have a significant impact in the realms of both construction law and products liability law involving products used in commercial and residential real estate construction projects. In *Miles v. Deluxe Bldg. Systems, Inc.*, 2009 WL 2224258 (App. Div. 2009), a plaintiff suffered personal injuries when the second story of his modular home collapsed, whereby he sued both the manufacturer and contractor. Because the home was constructed 18 years before the incident, the case fell within the purview of New Jersey's Statute of Repose; N.J.S.A. 2A:14-1.1 ("SOR"). In a surprising decision which appears to depart from an earlier Supreme Court decision, the *Miles* court held that a product manufacturer can benefit from the immunity provided by the SOR.

New Jersey's Statute of Repose holds that that no cause of action for injury or property damage may be stated

Levy is a partner in the New York office of Buckley & Curtis and handles defense matters ranging from products liability, motor vehicle liability and general civil liability.

arising from the "deficiency in the design, planning, surveying, supervision or construction of an improvement to real property ... more than 10 years after the performance or furnishing of such services and construction." *Daidone v. Butterick Bulkheading*, 191 N.J. 557 (2007). Hence, contractors, architects, designers, engineers and surveyors are immune from suits arising from negligence in the design or construction of an improvement to real property 10 years after the completion of construction. *Newark Beth Israel v. Gruzen*, 124 N.J. 357, 362 (1991). In other words, a contractor is completely immune from liability once 10 years has passed from the completion of construction, no matter how negligent or irresponsible they were.

While the SOR is similar to a Statute of Limitations (See N.J.S.A. 2A:14-2, et seq.), in reality, the SOR is not a Statute of Limitations at all. In fact, very often the SOR imposes a much stricter deadline. While a Statute of Limitations runs from the date an injury occurred, an SOR begins running from a much earlier date; the completion of a construction project, which is typically related to an act of a defendant. Simply put, a lawsuit may be barred even before the injury occurs. "Injury occurring more than ten years after the performance of the negligent act simply forms no basis

for recovery. The injured party literally has no cause of action." *E.A. Williams, Inc. v. Russo Development Corp.*, 82 N.J. 160, 167 (1980).

While some states have SOR's which explicitly provide immunity to product manufacturers once a certain period of time has passed since the product was manufactured, New Jersey provides no specific statutory protection to product manufacturers. Nevertheless, since the SOR was first enacted by the legislature in 1967, many product manufacturer defendants have attempted to invoke the SOR, arguing that the "design ... of an improvement to real property" is immune from liability 10 years following the completion of a construction project.

Those efforts met with mixed results. See *Brown v. Jersey Central Power and Light Co.*, 163 N.J. Super. 179 (App. Div. 1978) (where the court held that product manufacturers did not fall within the protection of the SOR, but granted summary judgment on other grounds); *Wayne Twp. Bd. of Ed. v. Strand Century, Inc.*, 172 N.J. Super. 296 (App. Div. 1980) (where the court held a product manufacturer could benefit from the SOR if they "participated to any extent in the design and planning stages" of the project but were not entitled to the SOR if they "merely sold a stock or shelf item out of its regular inventory.").

Then, six years ago, the New Jersey Supreme Court appeared to summarily close the door on product manufacturers. See *Dziewiecki v. Bakula*, 180 N.J. 528 (2004). In *Dziewiecki*, a swimming pool manufacturer attempted to invoke the SOR by claiming that its design of the swimming pool was “an improvement to real property.” The Supreme Court rejected this argument holding that the SOR did not provide immunity to the product manufacturer and affirmed that the SOR was not intended to provide protection to manufacturers of products which were merely a “stock or shelf item out of its regular inventory.” Even if a product manufacturer wore “two hats” as both the fabricator of the product and a designer of the real estate project, *Dziewiecki* held that the two hats were mutually exclusive:

We reject that approach and hold that when a person in effect wears “two hats” (undertakes activities covered by the SOR and comes under the product liability statute), and the cause of the injury is attributable to both, the responsibility should be allocated between the two. The defendant could wear either hat, but not both hats. In other words, even if a defendant both manufactured the product and installed it, he could only benefit from the SOR insofar as his liability for negligent installation. However, he would still be exposed to liability arising from an allegation of product liability.

This “two hat” argument creates a rather bizarre paradox for product manufacturers. A contractor who was clearly negligent in the installation of the product

is nevertheless immune from any and all liability once 10 years has passed from the completion of the construction project. Meanwhile, the manufacturer of the subject product, who had no involvement with its installation, would have potential liability lasting for all eternity. To make matters more bizarre, in order for a manufacturer defendant to assert immunity, it would need to argue that it had substantial involvement in the negligent installation and design of its own product. Nevertheless, *Dziewiecki* appeared to conclusively shut the door on product manufacturers being able to benefit from the SOR.

The *Miles* decision appears to open the door again for product manufacturers who seek the benefits of the SOR. As stated earlier, the case arose when a plaintiff was injured as a result of a second-story deck collapsing from his modular home, causing significant personal injuries. Because the home had been constructed 18 years before the incident, manufacturer of the home, Deluxe, moved for summary judgment on the grounds of the SOR. While it was conceded that Deluxe was in the business of manufacturing prefabricated modular homes, and manufactured the home in question, there was an unresolved issue of fact as to whether or not Deluxe manufactured the deck which had collapsed. Amazingly, the court held that this issue of fact was immaterial:

We recognize that it is uncertain whether Deluxe fabricated the deck or whether Antonini or some other third party did. But that uncertainty does not affect the propriety of dismissing the claims against Deluxe. If Deluxe did not have anything to do with the creation of the deck, then it is not legally responsible for its

structural integrity. Alternatively, if Deluxe did design and/or specially fabricate the deck, its endeavors in that regard are clearly protected by the Statute of Repose.

The *Miles* decision is a stark departure from *Dziewiecki*, specifically insofar as the appellate court expands the SOR back into the realm of the Products Liability Act. It is reminiscent of prior Supreme Court decisions where the SOR was interpreted in a broad and remedial manner to bring in as many defendants as possible. See *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 198 (1972) (The statute must be applied with a “broad sweep ... to all whom this condition may adhere whether they be planners and builders of structures, roads, playing fields, or aught else that by broad definition can be deemed ‘an improvement to real property.’”); *E.A. Williams, Inc. v. Russo Development Corp.*, 82 N.J. 160, 169 (1980) (“the statute was intended to terminate the liability of all persons who might be responsible for the existence of “defective and unsafe” conditions through their negligent design, plan, or construction of an improvement to real property.”) It is unclear as to whether there was an application for certification to the Supreme Court in *Miles*, so there is no way to determine how the Supreme Court would have decided this matter if certification were granted.

Nevertheless, the impact of *Miles* is clear: manufacturers of products used in real property improvements continue to have a sympathetic ear in the judiciary in asserting that the SOR can be used as a basis for seeking summary judgment when the cause of action arises more than 10 years after the completion of a construction project. ■