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## REAL ESTATE LAW

### The Clock Is Ticking — Or Is It?

Appellate Division attempts to clarify the trigger date for N.J.'s Statute of Repose

By Peter J. Torricollo and  
Damian V. Santomauro

New Jersey's Statute of Repose provides that no action for deficient design or construction of an "improvement to real property" may be brought "more than 10 years after the performance or furnishing of such services and construction." N.J.S.A. § 2A:14-1.1(a). Although the language of the statute appears to be relatively straightforward, the statute has, over the years, spawned numerous disputes and opinions regarding when the trigger date for the 10-year period commences. In *State v. Perini*, 2012 N.J. Super. LEXIS 43 (App. Div. Mar. 30, 2012), a recent opinion approved for publication, the Appellate Division addressed this precise issue and attempted to harmonize the various factors that can implicate the trigger date in multiparty and multiphase projects.

*Perini* involved a dispute regarding the construction of the South Woods State Prison for the State of New Jersey in the mid-1990s. The project was divided into three phases that had separate completion deadlines. The first phase involved, among other things, the construction of a hot-water heating system,

*Torricollo and Santomauro are directors with the business and commercial litigation department of Gibbons in Newark.*

although the heating system was used for buildings that would be constructed in all three phases. A temporary certificate of occupancy was issued in May 1997 reflecting that the building housing the boilers for the heating system was substantially complete, and the State took control of and was operating the system in June 1997. Certificates of occupancy for the last phase of the project were issued on May 1, 1998. Within two years, the hot-water system began to fail.

On April 28, 2008, the State filed a lawsuit against the parties involved in the design and construction of the prison, alleging that there was a complete failure of the prison's hot-water heating system as a result of, among other things, design deficiencies and construction defects. The defendants moved for summary judgment, arguing that the State's claims were barred by the Statute of Repose because the prison was occupied and the hot-water system was in use before April 27, 1998. In opposition, the State asserted that the 10-year period did not begin to run until at least May 1, 1998, when it issued certificates of substantial completion for the final phase of the construction project. The trial court granted the motion, finding that the hot-water system was substantially completed before April 27, 1998, and as a result the State's claims were barred.

On appeal, the Appellate Division

sifted through prior decisions and enunciated the following three principles "pertinent to applying the Statute of Repose": (1) the trigger date is the date of substantial completion rather than the date on which "every last task of the contractor" on the project is completed, see *Russo Farms v. Vineland Board of Education*, 144 N.J. 84, 117 (1996); (2) the Statute of Repose begins to run against subcontractors from the date that they substantially completed their work on the project, even if the improvement as a whole is not completed, see *Daidone v. Buterick Bulkheading*, 191 N.J. 557, 566 (2007); and (3) the Statute of Repose begins to run against any single contractor or subcontractor from completion of that party's entire work on the improvement as opposed to completion of discrete tasks, see *Welch v. Engineers*, 202 N.J. Super. 387, 397 (App. Div. 1985).

Against the backdrop of these principles, the court considered what the appropriate trigger was for the State's claims against the defendants. The State argued that the Statute of Repose only begins to run upon substantial completion of an entire project. Conversely, the defendants asserted that the State's claims were barred because the substantial completion of any component of a contractor's work was the appropriate trigger date.

In rejecting both positions, the

court ruled that the analysis turned on the meaning of the phrase “improvement to real property” in N.J.S.A. § 2A:14-1.1(a). First, the court disagreed with the State’s bright-line position and ruled that there can be multiple triggers on a phased construction project, stating: “[M]ultiple phases of a construction project that are clearly identified and documented can trigger separate periods of repose, even for the general contractor and other contractors that continue to work on the entire project.” Second, while the court agreed that the hot-water system was a “component” of the construction project, it ruled that a component of a project is not a separate “improvement to real property” within the meaning of the Statute of Repose unless there is a “clear designation in the documentary record, with dates of substantial completion, occupancy, and use,” indicating that the parties intended (and had a mutual understanding) that the component constituted a separate improvement.

Because there was no evidence that the parties intended to treat the hot-water system as a separate improvement that could be substantially completed before completion of all of the buildings to which it was connected, the court held that the completion of that component of the prison did not constitute a separate trigger for the Statute of Repose. Thus, because the defendants had continuing duties on the project through the last phase, the court ruled that the Statute of Repose began to run no earlier than May 1, 1998, when that phase was substantially completed. As the State’s complaint was filed within 10 years of that date, the court reversed the trial court’s decision and held that the State’s action was timely.

The position taken by the State in the *Perini* case would probably have provided the most clarity and certainty to parties to a construction project, and would be the simplest for courts to apply in determining the trigger date for the Statute of Repose. Indeed, a single trigger date based upon substantial completion of the entire construction project would enable all parties to the project, as well as courts addressing the applicability of the Statute

of Repose, to clearly ascertain the date when an action is foreclosed.

This approach, however, is arguably at odds with the language of the Statute of Repose, which appears to contemplate potentially distinct periods of repose for each “person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property.” Additionally, in *Daidone*, the New Jersey Supreme Court conclusively rejected a single-trigger approach, holding that when a party on a construction project has no further functions to perform on the project, the Statute of Repose commences on the date on which that party completed his or her portion of the work, as opposed to upon substantial completion of the entire project. Thus, unless and until *Daidone* is revisited or the legislature amends N.J.S.A. § 2A:14-1.1(a), the Statute of Repose allows for the potential of multiple trigger dates on a construction project for the different parties to the project.

Considering the framework established by *Daidone*, the *Perini* decision establishes a reasonable — and relatively straightforward — approach to addressing the application of the Statute of Repose in multiphase construction projects involving multiple parties. First, there can be separate triggers for subcontractors and designers, which are determined by when each such party’s work on the project is completed. Second, there can be multiple triggers for the same party in a multiphase project, which are determined by when each phase of the project is substantially complete. Third, although a component of a project does not in and of itself constitute a separate phase with a distinct period of repose, a component of the project can have a separate period of repose if there is clear documentary evidence, including dates of substantial completion, occupancy and use, indicating that the parties intended to treat that component as a separate phase of the project for purposes of the Statute of Repose.

While the *Perini* decision provides helpful guidance, it does little to simplify Statute of Repose jurisprudence in

the context of multiphase and multiparty construction projects. On June 8, the Supreme Court granted leave to appeal in the *Perini* case to address the following issue: “When does the ten-year statute of repose, N.J.S.A. § 2A:14-1.1, begin to run with respect to the alleged deficient design and construction of a hot water system built as part of the multi-phased construction of a prison facility?” Thus, it is possible that the Supreme Court will further clarify issues relating to the trigger date for the Statute of Repose on these types of construction projects.

Until such time, however, it is likely that issues relating to the commencement of the repose period will continue to be extensively litigated where the Statute of Repose is raised as a defense. Because the *Perini* decision establishes a mechanism by which completion of a component of a project could potentially trigger a separate period of repose, disputes will almost certainly arise as to the parties’ intent and understanding at the time of contracting, with respect to whether a specific component of the work was appropriately designated as a discrete phase of the project to constitute a separate “improvement to real property” within the meaning of the Statute of Repose.

From a practical perspective, because of the potential for multiple triggers owners must, at a minimum, diligently track the dates of completion for each party’s work on a project as well as the dates on which each clearly defined phase of a project is completed. In addition, because disputes could later arise regarding whether a “component” of the project had a separate period of repose, prudent owners should ensure that their record-keeping appropriately documents when various components of the project are completed. Finally, to the extent feasible, all parties to a construction contract should endeavor to carefully and clearly define in the contract any phases of construction with specifically defined dates of substantial completion, occupancy and use. Establishing such terms clearly in the contract could enable parties to avoid subsequent disputes regarding whether there are separate periods of repose and the date on which they commenced. ■