Court of Appeals

STATE OF NEW YORK

TOWN OF OYSTER BAY,

Plaintiff-Appellant,

-against-

LIZZA INDUSTRIES, INC.,

Defendant-Respondent.

TOWN OF OYSTER BAY,

Plaintiff-Appellant,

-against-

(Caption continued on inside cover)

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE*

MARY MASSARON ROSS (NY BAR # 4075594)
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J.D. POSILLICO, INC. AND LIZZA INDUSTRIES, INC.,

Defendants-Respondents.

TOWN OF OYSTER BAY,

Plaintiff-Appellant,

-against-

HENDRICKSON BROS., INC.,

Defendant-Respondent.

VILLAGE OF BABYLON,

Plaintiff-Appellant,

-against-

HENDRICKSON BROS., INC.,

Defendant-Respondent.

VILLAGE OF LINDENHURST,

Plaintiff-Appellant,

-against-

HENDRICKSON BROS., INC.,

Defendant-Respondent.

VILLAGE OF LINDENHURST,

Plaintiff-Appellant,

-against-

LIZZA INDUSTRIES, INC.,

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TOWN OF OYSTER BAY,

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-against-

J.D. POSILLICO, INC. ,

Defendant-Respondent.

TOWN OF OYSTER BAY,

Plaintiff-Appellant,

-against-

S. ZARA AND SONS CONTRACTING CORPORATION,

Defendant-Respondent.

TOWN OF OYSTER BAY,

Plaintiff-Appellant,

-against-

MARVEC ALLSTATE, INC.,

Defendant-Respondent.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affirmation of MARY MASSARON ROSS, affirmed on the 24th day of September, 2013, and upon all papers, pleadings and proceedings heretofore and herein, the undersigned will move the New York State Court of Appeals at the Courthouse located at 20 Eagle Street, Albany, New York 12207-1095, on Tuesday the 15th day of October at 2:00 p.m. of that day, or as soon thereafter as counsel can be heard for an Order granting DRI – The Voice of the Defense Bar leave to file an amicus curiae brief in the above-captioned appeal in support of Defendant-Respondents.

Annexed to the instant motion is the proposed brief.

DRI – THE VOICE OF THE DEFENSE BAR

By: _____

MARY MASSARON ROSS
(NY BAR # 4075594)
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Dated: September 24, 2013

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AFFIRMATION IN SUPPORT OF DRI – THE VOICE OF THE DEFENSE BAR'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Mary Massaron Ross, an attorney duly admitted to practice law before the Courts of this State, affirms the following under penalties of perjury:

1. I am the President of DRI – The Voice of the Defense Bar (DRI) and I am a shareholder of the law firm of Plunkett Cooney in Bloomfield Hills, Michigan. I have been admitted to the practice of law in New York since 2002, and will receive service in this matter by care of Goldberg Segalla, 8 Southwoods Boulevard, Suite 300, Albany, NY 12211-2364. I submit this affirmation in support of the motion by DRI for leave to submit an annexed *amicus curiae* brief in the above-captioned appeal.

2. DRI is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. Committed to enhancing the skills, effectiveness, and professionalism of defense lawyers around the globe, DRI seeks to address issues germane to defense lawyers and the civil justice system. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI draws on the practical expertise of its members and participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

3. DRI's Construction Law Committee includes over 1,100 members who devote their practice to defending builders, contractors, and other persons and entities in the construction industry. DRI's Insurance Law Committee includes approximately 2,500 members who devote their practice to the defense of insureds and insurance companies. DRI's Governmental Liability Committee includes over 500 members who spend a substantial amount of their time defending governments and their employees, and insurance industry representatives involved in underwriting and adjusting public entity claims. Each of these committees holds annual meetings and instructional seminars, and publishes newsletters throughout the year addressing civil litigation in these areas of law, including the defense of construction liability actions.

4. This is an action attempting to impose ongoing, perpetual liability for property damage to public roadways arising out of allegedly defective sewer line construction which was completed over 30 years ago. DRI's interest in this case stems from its concern about the potential for this Court to depart from well-established legal principles preventing the litigation of stale claims and securing the availability of affordable insurance coverage for important public works projects. Since DRI's Construction Law, Insurance Law, and Governmental Liability group members are involved in construction litigation and insurance practice throughout the country, DRI is well-positioned to assist the Court by offering insight into the impact of the decision at issue here.

5. This Court has previously granted permission to DRI to file *amicus curiae* briefs in *Kirschner v KPMG LLP* (15 NY2d 446 [2010]) and *Hamilton v Beretta U.S.A. Corp.* (96 NY2d 222 [2001]).

6. WHEREFORE, it is respectfully requested that this Court enter an Order granting DRI – The Voice of the Defense Bar leave to submit its brief in the annexed form, and for such other and further relief as this Court deems just and proper.

Dated: Bloomfield Hills, Michigan
September 24, 2013

Mary Massaron Ross

CORPORATE DISCLOSURE STATEMENT

DRI – The Voice of the Defense Bar is a not-for-profit corporation which has no parent companies, subsidiaries, or affiliates.

Dated: Bloomfield Hills, Michigan
September 24, 2013

Mary Massaron Ross

Court of Appeals

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***AMICUS CURIAE* BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR**

PRELIMINARY STATEMENT OF INTEREST

DRI – The Voice of the Defense Bar (DRI) is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. Committed to enhancing the skills, effectiveness, and professionalism of defense lawyers around the globe, DRI seeks to address issues germane to defense lawyers and the civil justice system. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI draws on the practical expertise of its members and participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's Construction Law Committee includes over 1,100 members who devote their practice to defending builders, contractors, and other persons and entities in the construction industry. DRI's Insurance Law Committee includes approximately 2,500 members who devote their practice to the defense of insureds and insurance companies. DRI's Governmental Liability Committee includes over 500 members who spend a substantial amount of their time defending governments and their employees, and insurance industry representatives involved in underwriting and adjusting public entity claims. Each of these committees holds annual meetings and instructional seminars, and publishes newsletters throughout the year addressing civil litigation in these areas of law, including the defense of

construction liability actions. Collectively, the members of these committees are involved in construction litigation and insurance practice throughout the country, including in New York.

This is an action attempting to impose ongoing, perpetual liability for property damage to public roadways arising out of allegedly defective sewer line construction which was completed over 30 years ago. DRI's interest in this case stems from its concern about the potential for this Court to depart from well-established legal principles preventing the litigation of stale claims and securing the availability of affordable insurance coverage for important public works projects. The decisions of the Second Department should be affirmed, and this Court should decline to recognize a cause of action for continuing public nuisance in the construction context.

QUESTION PRESENTED

Did the Appellate Division, Second Department correctly dismiss Plaintiffs' property damage claims because they arose out of construction that was substantially completed more than six years before the claims were filed?

This question should be answered in the affirmative.

ARGUMENT

The Appellate Division, Second Department Correctly Dismissed Plaintiffs' Property Damage Claims Because They Arose Out Of Construction That Was Substantially Completed More Than Six Years Before The Claims Were Filed

A. Statutes of limitation make construction risks predictable and prevent the litigation of stale claims.

Statutes of limitations play a vital and time-honored role in this nation's legal and business landscapes. The United States Supreme Court has articulated the fundamental importance of enforcing civil statutes of limitations as a matter of public policy:

> They represent a public policy about the privilege to litigate ... and their underlying rationale is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory... Such statutes are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected, ... they promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared ... and they are primarily designed to assure fairness to defendants. Courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.... [S]uch statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

United States v Marion, 404 US 307, 323 n 14 (1971) (internal citations omitted). Strict adherence to such periods of limitations "is the best guarantee of evenhanded administration of the law" (*Mohasco Corp. v Silver,* 447 US 807, 826 [1980]).

This Court has characterized statutes of limitations as a "peculiarly legislative prerogative" weighing an individual's interest in his tardy but meritorious claim against society's interest in repose from stale litigation (*Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212, 219 [1963]). Rather than relying on the courts to make equitable determinations on a case-by-case basis, the Legislature has decided that "occasional hardship is outweighed by the advantage of barring stale claims" (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 404 [1993] [barring untimely breach of contract claim for recovery of commission where statute of limitations expired before commission was due and breach was discovered]). In rejecting fact-based accrual dates for accounting malpractice actions, which would impose ongoing liability, this Court noted that "[t]he policies underlying a Statute of Limitations—fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory—demand a precise accrual date that can be uniformly applied, not one subject to debate or negotiation" (*Ackerman v Price Waterhouse*, 84 NY2d 535, 542 [1994]). The "objective, reliable, predictable, and relatively definitive rules" governing the time in which a claim may be brought promote the free flow

of commercial and financial intercourse, which is particularly critical in the State of New York (*Ely-Cruikshank*, 81 NY2d at 403; *see Ehrlich-Bober Co. v University of Houston*, 49 NY2d 574, 581 [1980] [noting "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world"]).

Legal commentators, legislators and courts have noted the importance of statutes of limitations and repose[1] to the construction industry and to the adjudication of claims arising from defective construction. Construction standards and technology can change significantly over the span of decades, such that juries deciding whether a contractor was negligent in work performed over thirty years ago "might have a difficult time evaluating the actions of the [contractor] in the context of the technology available at that past date and would be likely to impose standards based on present-day technology" (Michael J. Vardaro & Jennifer E. Waggoner*, Statutes of Repose—The Design Professional's Defense to Perpetual Liability*, 10 St. John's J Legal Comment 697, 704 [1995]). Three public policy arguments voiced by legislators in favor of limitations periods for construction professionals are: the unfairness of liability throughout a professional's lifetime,

[1] While the terms are sometimes used interchangeably, a statute of repose is the proper term for a limitations period which runs from the occurrence of a defined event, after which even a claim arising out of that event which has not yet accrued cannot be brought. A statute of limitation is a time period running from the accrual of a claim, but is superseded by a statute of repose when the claim accrues beyond the repose period (*see generally* 2 Madden & Owen on Products Liability § 16.1 [3d ed]).

which fosters instability in the construction industry; the long life spans of buildings and other public works projects, which are susceptible to deterioration caused by negligent maintenance rather than negligent construction; and the difficulty in producing reliable evidence of construction that took place decades earlier (*id.* at 712-713). Problems with procuring reliable human and documentary evidence to prosecute and defend construction defect suits grow significantly worse with the passage of time:

> The normal business procedures of those who design and build structures makes the mounting of a defense against a lawsuit especially difficult after the passage of only a few years. Buildings are usually unique structures whose design and construction are documented with unique drawings, specifications, and project records. This voluminous paperwork, which accumulates rapidly in an active design or construction practice, is commonly treated with a low level of care. In the normal course of business affairs, papers are thrown out or lost, and after a few years, the documents needed for a suitable defense are no longer available. In addition, because of a high level of turnover in the construction industry, the people with knowledge about any particular project leave for other jobs, and can no longer be located to serve as defense witnesses.

Andrew Alpern, *Statutes of Repose and the Construction Industry: A Proposal for New York*, 12 Cardozo L Rev 1975, 1978-1979 [1991] [footnotes omitted]. A committee of the U.S. House of Representatives looking at legislation for the District of Columbia concluded that dangerous and unsafe conditions developing over a period of years are outside of a contractor's control, where he cannot prevent an owner from neglecting to maintain an improvement or altering or using

the improvement for purposes for which it was not designed (*id*. at 2002-2003). Moreover, the passage of time increases the likelihood that improper maintenance, rather than faulty design or construction, is the proximate cause of property damage (Hearing 7 on H.R. 6527, H.R. 6678 and H.R. 11544 before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 24, 29 [1967]). The Massachusetts Supreme Court held that timing for claims involving construction must strike "a reasonable balance between the public's right to a remedy and the need to place an outer limit on the tort liability of those involved in construction" (*Klein v Catalano*, 386 Mass 701, 712, 437 NE2d 514, 521 [1982]).

This Court has recognized that a clearly defined limitations period for actions against professionals helps to control insurance premiums and provides certainty regarding the length of potential exposure to liability from a given project (*see Chase Scientific Research, Inc. v NIA Grp., Inc.*, 96 NY2d 20, 27 [2001]). There is considerable interplay between limitations periods and insurance premiums because the commercial insurance industry examines and insures particular risks using state limitations periods (*id.*; *see generally* 2 Madden & Owen on Products Liability § 16:1 [3d ed]). For example, in a state with a ten-year limitations period for construction defect claims running from the date of substantial completion, any claims or potential claims older than ten years would

not factor into the risk assessment and premium calculation for a particular contractor because the contractor (and therefore the insurer) would no longer be subject to civil liability by a third party for that project. Limitations periods make insurance premiums more affordable by negating the insured's liability for events past a definite time period, making the risk cheaper and more predictable for the insurer (*see Orlak v Loyola University Health System*, 228 Ill2d 1, 17, 885 NE2d 999, 1009 [2007] [stating purpose of Illinois' medical malpractice statute of repose was to reduce cost of malpractice insurance by eliminating "long tail" liability, making it easier for malpractice insurance companies to predict future liabilities]).

B. Actions arising out of construction defects in New York have traditionally accrued upon substantial completion of the project.

The Legislature has determined that the statutes of limitations for actions alleging injury to property arising out of negligence and breach of contract are three and six years, respectively (CPLR 214 [4], 213 [2]). In *City School Dist. of City of Newburgh v Hugh Stubbins & Associates, Inc.* (85 NY2d 535, 538 [1995]), this Court held that those statutes of limitations are to be applied in cases against contractors using an accrual date of "completion of performance." This Court confirmed that "no matter how a claim is characterized in the complaint—negligence, malpractice, breach of contract—an owner's claim arising out of defective construction accrues on date of completion, since all liability has its genesis in the contractual relationship of the parties" (*id.* at 400-401; *see Sears,*

Roebuck & Co. v Enco Assoc., 43 NY2d 389, 394 [1977]; *State v Lundin*, 60 NY2d 987, 988 [1983] [rejecting efforts to plead around completed construction date of accrual]). This overarching "date of completion" accrual framework is applicable even to third-party property damage claimants who were not parties to the contract, where the third party was an intended beneficiary of the contract (*Newburgh* at 400-401). Federal courts applying New York law and New York's lower courts, including the Second Department, have subsequently applied this date of accrual rule to first party and third party claims without difficulty (*see* 75 NY Jur 2d Limitations and Laches § 81; 2B Carmody-Wait 2d § 13:251; *Royal Ins. Co. of America v RU-VAL Elec. Corp.*, 918 F Supp 647, 656-657 [ED NY 1996] [noting accrual and statute of limitations rules "have been strongly reaffirmed" by this Court]; *Commerce & Industry Ins. Co. v Vulcraft, Inc.*, 1998 WL 823055, *3 [SD NY Nov. 20, 1998, No. 97-cv-2578] [citing *Newburgh* as establishing "date of completion" accrual rule applies even absent contractual privity, "provided that the plaintiff is sufficiently involved in the contractual relationship"]).

The "substantial completion" accrual rule for property damage cases arising out of allegedly defective construction establishes a time period for potential claims with certainty and predictability. Courts are not burdened with case-by-case, fact-based applications of the statute of limitations for successive incidents arising out of the same negligent construction; rather, the courthouse door is

opened on the date the work is completed and closed three or six years thereafter. This promotes both construction and the full enjoyment and use of real property by "removing the peril of remote and distant liability which would tend to deter persons from entering into the construction business" (*Ernest W. Hahn, Inc. v Superior Court*, 108 Cal App 3d 567, 570 [Cal App 2 Dist 1980]).

The Legislature has determined that the societal and judicial benefits of limitations periods in claims involving professionals, such as architects and contractors, outweigh the potential harm to individual litigants whose causes of action may be foreclosed in these circumstances (*see Cubito v Kriesberg*, 69 AD2d 738, 742 [2d Dep't 1979] [noting exceptions to the "date of injury" accrual rule in negligence actions where the cause of action arises out of a professional relationship]). Allowing Plaintiffs to "plead around" the statute of limitations by characterizing their claims as sounding in continuing public nuisance or asserting that they were somehow not the intended beneficiary of the construction contract threatens to disrupt the Legislature's policy choice (*see Town of Islip v H.T. Schneider Associates*, 73 AD3d 1029, 1030 [2d Dep't 2010], *lv denied* 16 NY3d 705 [2011] [rejecting cities' attempts to recharacterize property damage claims as nuisance or continuing public nuisance claims to avoid statutes of limitation]).

New York is among the majority of states recognizing a "completion" date for limitations purposes for claims arising from construction projects, regardless of

when the actual property damage occurred.[2] The wisdom and fairness of these limitations periods in the construction defect context is borne out by a study of insurance claims involving contractors and design professionals, which showed that 85% of the claims filed against contractors and designers from 1981-1983 arising out of projects located in New York were brought within seven years of substantial completion of the project, 87% within eight years, and 91% within nine years (Alpern at 2008 n 173). An earlier study presented to the U.S. House of Representatives found that 84.3% of all claims against architects and builders were brought within four years of completing construction (Hearing 7, *supra*, at 5, 11).

Plaintiffs, who filed their actions over 30 years after the sewer line construction was completed, ask this Court to do away with a fair and workable statute of limitations to save their unusually tardy claims. The reality of construction defect litigation in New York does not justify imposing perpetual

[2] Ariz Rev Stat Ann § 12-552; Ark Stat Ann § 16-56-112; Cal Code Civ Proc §§ 337.1 and 337.15; Conn Gen Stat Ann § 52-584; 10 Del Code Ann § 8127; DC Code § 12-310; Fla Stat Ann § 95.11 (3) (c); Ga Code Ann §§ 9-3-51, 52; Idaho Code § 5-241; La Rev Stat Ann § 9.2772; 14 Me Rev Stat Ann § 752-A; Md Cts & Jud Proc Code Ann § 5-108; Mass Gen Laws Ann ch. 260, § 2B; Mich Comp Laws Ann § 600.5839 (1); Minn Stat Ann § 541.051 (1) (a); Miss Code Ann § 15-1-41; Mo Ann Stat § 516.097; Mont Code Ann § 27-2-208; Neb Rev Stat § 25-223; Nev Rev Stat Ann §§ 11.203-.205; NH Rev Stat § 508:4-b; NJ Stat Ann 2A:14-1.1a; NC Gen Stat § 1-50 (a) (5); ND Cent Code § 28-01-44; 12 Okla Stat Ann § 109; Or Rev Stat § 12.135; 42 Pa Cons Stat Ann § 5536; RI Gen Laws § 9-1-29; SC Code Ann § 15-3-640; Tenn Code Ann § 28-3-201; Tex Civ Prac & Rem Code Ann § 16.009; Va Code Ann § 8.01.250; Wash Rev Code Ann § 4.16.310; Wis Stat Ann § 893.89; Wyo Stat §§ 1-3-110, -111, -112.

liability upon contractors for property damage arising from projects completed decades earlier.

C. Plaintiffs' theory of continuing public nuisance contravenes the statute of limitations and threatens the viability of New York's construction industry.

In an attempt to succeed where other municipalities have failed to survive dismissal based on the statute of limitations, Plaintiffs recast their claims as sounding in "continuing public nuisance," arguing that a new cause of action arises each day the defective roadbed continues to exist. The unavailability of this claim under New York law for the allegedly negligent excavation and backfilling of the subject roadbed, which had finite beginning and ending dates, is amply briefed in the Defendants-Respondents' submissions to this Court. *Amicus curiae* DRI will focus its argument on the potentially grave consequences for the construction and insurance industries in New York should this Court alter longstanding principles of New York law to determine that Plaintiffs have stated a claim for continuing public nuisance which is not subject to the limitations period running from substantial completion of the project.

This Court's precedents in *Newburgh*, *Sears*, and *Lundin* applying the statute of limitations to construction defect cases based on the date of substantial completion should control the Court's analysis of the instant case under the principles of stare decisis. Like statutes of limitations, "[a]dherence to precedent

promotes stability, predictability, and respect for judicial authority" (*Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US 768, 783 [1992]). This Court has justified adherence to precedent based on the requirement "that those who engage in transactions based on the prevailing law be able to rely on its stability" (*People v Hobson*, 39 NY2d 479, 489 [1976]). Reliance interests are thus doubly strong in cases involving statutory limitations periods which have been settled and relied upon according to judicial precedent, and which have formed the basis for commercial transactions. The Second Department recognized the settled nature of New York law with respect to limitations periods for claims arising out of construction defects, and reached consistent results in each of the eleven cases before this Court on appeal. As noted above, state and federal courts have applied this Court's precedent to first- and third-party property damages claims with predictable results.

Here, commercial insurers and the contractors whom they insure have economic reliance interests in a limitations period for property damage claims based on the date of substantial completion, which has been recognized since 1975 in New York (*see Sosnow v Paul*, 36 NY2d 780, 782 [1975]). To the extent Plaintiffs' proposed cause of action for continuing public nuisance seeks to change the state of the law, this would severely disrupt reliance interests in previously-issued commercial insurance policies. Going forward, the insurance industry and

insureds would no longer be able to rely on a stable and predictable limitations period running from the date of substantial completion. This Court should not disrupt long-settled contractual and economic expectations of contractors and insurance companies, nor should it reexamine its own precedent absent the "humbling assumption, often true, that no particular court as it is then constituted possesses a wisdom surpassing that of its predecessors" (*Hobson*, 39 NY2d at 488). Plaintiffs have failed to show the requisite "compelling circumstances" allowing this Court to abandon stare decisis and do away with the limitations period applied in *Newburgh*, *Sears*, and *Lundin* to construction defect claims (*id*. at 487-491).

The continuing public nuisance action in the construction defect context would subject contractors and other design professionals to open-ended, perpetual liability for damages caused by a single negligent act committed decades earlier. Insurance underwriters, unable to rely on a defined liability period when evaluating the risk posed by insuring a certain contractor for a certain policy period, will be forced to raise premiums considerably to account for this undefined risk (*see Stine v Continental Cas. Co.*, 419 Mich 89, 99, 349 NW2d 127, 131 [1984] [noting that where actuarial factors are highly speculative, premium rate schedules are accordingly set high enough to accommodate the most costly scenario]). For policies which have already been purchased, the risk assumed would change

suddenly from defined to open-ended, thus disrupting the balance struck between the premium paid and the risk insured (*see Shotmeyer v N.J. Realty Title Ins. Co.*, 195 NJ 72, 83, 948 A2d 600, 606 [2008)] ["[B]ecause insurance premiums and coverage provisions are based on predictable levels of risk, … insurers need to rely on certain consistent conditions in order to calculate premium rates reliably"]). The same is true for contractors who have purchased "completed operations" coverage for their completed projects for a finite number of years based on the statute of limitations (*see* Sandy M. Kaplan et al., *OCIPS, CCIPS, and Project Policies*, 29 SUM Construction Lawyer 11, 14 [2009]). These contractors would be left uninsured for claims made beyond the statutory period, even though they intended for their policies to cover all of the potential liability arising out of a certain project. In the face of rising premiums and diminished liability coverage, other contractors may follow the lead of architects and choose to underinsure themselves or "go bare" without any insurance, eliminating financial recovery for plaintiffs with meritorious and timely claims (*see* Alpern at 1990-1991). These adverse consequences can be largely avoided by upholding the security and predictability created by existing limitations periods.

Recent history shows that judicial creation of open-ended liability for the construction industry could jeopardize the availability of insurance coverage for New York contractors. The "insurance crisis" of the mid-1980s was marked by

drastic increases in insurance premiums for certain products and services, including ski operations, obstetrics, and vaccines, while coverage for day care centers, intrauterine devices, and other products and services suddenly disappeared because insurers withdrew that coverage from the market (George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L J 1521 [1987]). Legal commentator George L. Priest attributed this sudden collapse of coverage to the unforeseen expansion of tort liability in these areas, both in the number of potential litigants and the length of potential liability. Specifically, Priest noted that "[m]any of the industries most severely affected by the insurance crisis are those subject to tails of liability extending over long periods of time, thus incorporating an extraordinarily wide range of potential outcomes" (*id*. at 1583). This "wide range of potential outcomes" forces insurers to charge higher premiums to account for higher risk; when the premiums become too high, low-risk insureds drop their coverage and the remaining pool of high-risk insureds becomes too small to reliably insure (*id*. at 1566-1567). Priest cited the asbestos industry as a prime example of this effect, observing that since courts had dramatically expanded manufacturer liability for asbestos exposure spanning decades, asbestos insurance coverage was virtually unavailable, and some insurers went bankrupt (*id*. at 1575, 1583). Another example is the widespread adoption of the "absolute pollution exclusion" to end commercial insurance coverage for pollution claims, in response

to court decisions broadly expanding coverage for pollution claims based on alleged ambiguities in the preexisting "sudden or accidental" pollution coverage exclusion (58 Am Jur Proof of Facts 3d 213, § 6).

Here, a departure from the majority approach to limitations periods for construction claims could make construction insurance risk in New York so unpredictable that insurers will stop writing these policies in New York in order to stabilize their risk pool (Priest at 1575). Imposing long-term liability for public works projects may cause some contractors to stop providing these services, in order to reduce the variance of risks in the non-public services they continue to provide (*id*. at 1567). While a cause of action for continuing public nuisance might improve the financial status of a few tardy plaintiffs, the ensuing unavailability of coverage for public works projects would devastate contractors, municipalities, and the citizens of New York.

Continuing public nuisance claims would place further financial strain on contractors who do obtain insurance by forcing them to carry insurance collateral for a longer period of time. Certain construction CGL policies are known as "loss sensitive" programs, meaning that the insured reimburses the insurer for losses as they are paid out, up to a certain amount (known as a deductible) (International Risk Management Institute, Inc. (IRMI), Glossary of Insurance and Risk Management Terms, www.irmi.com/online/ insurance-glossary/terms/l/loss-

sensitive-plans.aspx [accessed September 16, 2013]). To ensure that the contractor will be able to meet its maximum deductible obligation during the policy term, many insurers require contractors to secure their policies with collateral in the amount of the maximum deductible obligation (Kaplan at 20). This collateral obligation remains in effect through the end of the policy term and typically for a few years after, until the insurer has reasonably determined the amount of losses to be paid under that policy, such that existing claims are closed and pending claims are reliably secured by a sufficient reserve (Richard Resnick, *Wrap-Ups and the Issue of Collateral (Part 2)*, IRMI, www.irmi.com/expert/articles/2007/ resnick06.aspx [accessed September 16, 2013]). But if the contractor remains liable in perpetuity for claims arising from a particular construction project, it would never be prudent for the insurer to return the collateral to the insured because the insured would be liable for deductible payments well into the future. Under Plaintiffs' proposed cause of action, contractors could see substantial portions of their assets tied up for decades as collateral for insurance policies purchased to cover projects completed years earlier.

At a time when construction costs in New York are among the highest in the nation, the state and its construction industry cannot afford the increased costs which would result from recognizing a cause of action for continuing public nuisance in the construction defect context (Rider Levett Bucknall, *Quarterly*

Construction Cost Report 6, 8 [Second Quarter 2013], http://rlb.com/rlb.com/pdf/research/RLB_USA_Report_Second_Quarter_2013.pdf [accessed September 16, 2013]). As ably briefed by fellow *amicus curiae* Associated General Contractors of New York State, LLC, the construction industry employs hundreds of thousands of New York residents. Higher costs in the form of increased premiums and extended collateral obligations would lead to job loss and loss of contractor companies. These ramifications would be felt by New York's private companies, public entities, and taxpayers, because the loss of contractors would make the bidding process less competitive and more expensive, and the increased costs of doing business as a contractor would be passed on through bids. New York, and the City of New York in particular, cannot afford to suffer a downturn in the workers and financial resources necessary to build and repair its infrastructure and buildings.

Plaintiffs argue for creation of a new cause of action for continuing public nuisance, suggesting it would benefit them in tough economic times. But if adopted, this new cause of action would seriously impair Plaintiffs and other municipalities from securing public works projects from qualified contractors in the future. Perpetual liability for property damage from construction defects would cause insurance costs for contractors to skyrocket, and those costs would either be passed on to the municipalities or would drive many contractors out of business.

New York's current three- and six-year statutes of limitations provide predictability for construction risks, and fairly allow timely causes of action to be litigated using the best evidence available. By allowing for continual accrual dates for causes of action stretching decades beyond a project's completion, this Court risks "turning its back[] on certainty and predictability, and proceeding along an indistinct trail with random and uncertain markings" (*Ackerman*, 84 NY2d at 543 [internal citation omitted]). This Court should reject a cause of action which contravenes the legislatively established statutes of limitations and could potentially cripple New York's construction industry.

CONCLUSION

Amicus curiae DRI—The Voice of the Defense Bar respectfully requests this Court affirm the orders of the Second Department appealed from in their entirety.

Respectfully submitted,

DRI – THE VOICE OF THE DEFENSE BAR

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