



News Release

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New York State Court of Appeals Decision in Alignment with DRI Amicus Brief in Statute of Limitations Case

Chicago – (December 18, 2013)— In a decision today, the New York State Court of Appeals ruled in alignment with a brief by DRI - The Voice of the Defense Bar. The case, *Town of Oyster Bay v. Lizza Industries, J.D. Posillico, et al.*, revolved around the central issue of the effective application of the statute of limitations involving defective sewage line installation in a number of communities on Long Island.

“I was pleased that the New York Court of Appeals rejected a continuing tort theory that would have undermined the time limits established in the statute of limitations,” said DRI amicus author Mary Massaron Ross. “The decision helps to assure that claims are brought in a timely manner, which is important to economic viability of the construction industry and the insurance industry.”

The case has its genesis in an extensive suburban works project undertaken in Nassau and Suffolk counties on Long Island. From the mid-1970s to the late 1980s, Nassau and Suffolk counties entered into nearly 200 separate prime sewer contracts on Long Island that called for the installation of hundreds of miles of main line sewer pipe and over 150,000 individual property connections in southeastern Nassau and southwestern Suffolk.

The complaint in this action contained a single cause of action against S. Zara and Sons Contracting Corporation, sounding in continuing public nuisance. The complaint claimed \$100 million in damages allegedly sustained to roadways as a result of sewer construction work performed by Zara between 1973 and 1986.

In response to the commencement of the action, defense counsel moved to dismiss on statute of limitations grounds. The trial court granted the motion and the Appellate Division, Second Department

affirmed stating that although the town's claim is denominated as a cause of action sounding in continuing public nuisance, the cause of action is actually based upon allegations of injury to property subject to a three-year statute of limitations to recover damages for injury to property that accrues upon substantial completion of the work, irrespective of when the damage is actually discovered. The Appellate Division also ruled that "alternatively, viewing the complaint as an attempt by [plaintiff] to re-characterize, under a theory of nuisance, its rights as an alleged third-party beneficiary to the sewer construction contract, . . . the action is barred by the six-year statute of limitations for a cause of action alleging breach of contract."

The towns and villages argued that the rule cited by the Appellate Division does not apply to them because they were not the parties who contracted for the work. Instead, the plaintiffs characterized themselves as third parties who have suffered damages to their property, separate from the sewer lines, as a result of improper work by the contractors. Under such circumstances, the plaintiffs asserted that the cause of action accrues upon discovery of the defect caused by the contractor's improper work.

The DRI brief maintained that an insurer who insures a risk for a defined policy period should not be required to pay liability costs arising from injuries that happen outside that period. Without a contained policy period, insurers face a lack of certainty as to the insured risk. To compensate for the increased risk of never-ending claims based on continuing public nuisance, insurance premiums for contractors would require an exorbitant increase, thereby crippling the construction industry.

In its decision, the court rejected plaintiffs' argument that the cause of action accrues upon discovery of the defect but stated instead that plaintiffs were subject to the statute of limitations that runs three years from the completion of work.

The full text of the brief can be found [here](#).

Mary Massaron Ross is available for expert comment through the DRI Communications Office

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