BOMA Metro Detroit

GOVERNMENT AFFAIRS COMMITTEE

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Building Owners & Managers Association of Metro Detroit

LEGISLATIVE MEMORANDUM

RE: Senate Bill 77

SUMMARY

Senate Bill 77 would amend MCL 600.5805 and 600.5839 to shorten the limitation period for claims involving improvements to property from 6 years to two (2) years for claims against design professionals and three (3) years for claims against contractors. SB 77 could substantially affect the rights of building owners and occupants in offices, schools, hospitals and government buildings among other structures. Design and construction defects may not materialize or become known until more than two or three years have passed following completion of construction. Inadequate performance by a designer or contractor may remain undiscovered for several years until a failure or some other event triggers an investigation.[1] The six month "discovery" rule may not be adequate time to complete a thorough investigation of cause. Shortening the limitations periods could be detrimental to building owners and operators who are charged with maintaining and improving existing facilities, leaving them with no recourse for defects discovered after the shorter period of limitations has passed. SB 77 does not provide any benefit to the economy, will not generate any jobs, and will unnecessarily reduce the remedies available to building owners and occupants for injuries suffered as a result of defective designs or construction.

ANALYSIS

MCL 600.5839 was enacted in 1967 providing what is both a period of limitations and repose.

> (1) No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe

[1] As a recent example, the Interstate 35 West bridge that collapsed in Minneapolis, Minnesota, in 2007 was designed and constructed in 1967. *In re: Individual 35W Bridge Litigation*, Master File Docket No. 27-CV-09-7519, Hennepin County, Minnesota, Fourth Judicial District.

> condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Unlike a typical statute of limitations which begins to run when the claim accrues or the damage becomes known, 600.5839 begins when the improvement is used, occupied or accepted. The damage may not be suffered or known for an extended period of time, even though the date after which no claims may be brought is actually known. In *Ostroth v Warren Regency*, 474 Mich 36; 709 NW2d 589 (2006), the Michigan Supreme Court unanimously ruled that the Legislature in enacting 600.5839 intended the statute to be one of both limitations and repose for the six-year period and to apply to all claims against architects, engineers and contractors for injury or property damage resulting from defective design or construction. Some prior cases in the Michigan Court of Appeals had found that the two-year period for professional negligence or malpractice in MCL 600.5805(6) was also included in the period of repose[2] even though MCL 600.5805(14) expressly states:

> The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839.[3]

When reviewed by the Michigan Supreme Court thirty years ago, the Legislative intent was abundantly clear, and it remains so today.

> By enacting a statute which grants architects and engineers[4] complete repose after six years rather than abrogating the described causes of action *in toto*, the Legislature struck what it perceived to be a balance between eliminating altogether the tort liability of these professions

[2] *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994).

[3] This language that specifically referenced actions against a state licensed architect, professional engineer, land surveyor, or contractor was added by Public Act 115 of 1988.

[4] Contractors were added by subsequent amendment in 1986 by Public Act 188 of 1985.

> and placing no restriction other than general statutes of limitations upon the ability of injured plaintiffs to bring tort actions against architects and engineers. The Legislature could reasonably have concluded that allowing suits against architects and engineers to be maintained within six years from the time of occupancy, use, or acceptance of an improvement would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors. *O'Brien v Hazelet & Erdal*, 410 Mich 1, 16; 299 NW2d 336 (1980).

In essence, SB 77 would effectively overrule the Supreme Court's unanimous decision in *Ostroth*, by specifying that the statute of limitations for design professionals and contractors would no longer be governed by MCL 600.5839, but instead by MCL 600.5805 and the accrual events of MCL 600.5838[5] while the six-year period of repose in Section 5839 would be an "additional limitation." If passed it could have a deleterious effect on building owners and occupants where design or construction defects do not become known until more than three years after completion of construction, leaving owners potentially with no avenue for recourse.

The facts of the *Ostroth* decision are particularly instructive. The architect designed renovated office space in April 1998. The plaintiff was employed in the building from April through August of 1998. In November 2000, the plaintiff amended her original complaint to sue the architect and the building owner for personal injuries resulting from exposure to various environmental hazards such as mold, bacteria and formaldehyde during the period of the renovations. The Circuit Court dismissed the plaintiff's claim against the architect because more than two years had elapsed from the accrual of plaintiff's claim. The Court of Appeals and the Supreme Court reversed the Circuit Court and allowed the action to proceed because the six year period of limitations under MCL 600.5839 from use, occupancy or acceptance had not yet expired.

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[5] MCL.600.5838 describes the trigger for the commencement of the two-year period of limitation.

(1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession <u>accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim</u>.

(2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or <u>within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later</u>. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. <u>A malpractice action which is not commenced within the time prescribed by this subsection is barred.</u>

The merits of any plaintiff's claim aside, design and construction claims can take a significant amount of time to be manifested and the investigation necessary can require several changes in seasons. The proposed changes to the period of limitations could actually result in more litigation if property owners and occupants are concerned that the short time period is expiring on a potential defect in design or construction.

Additionally, Michigan's current periods of limitation and repose on these actions are not contrary to other state's treatment of these periods. Statutes of limitation on actions against design professionals and contractors vary across the country, and their application largely depends upon the specific cause of action asserted, such as whether the defect is latent or patent. However, statutes of repose on actions against design professionals and contractors are substantially similar among the states. The current six-year period of repose in Michigan is consistent with the periods of repose in the majority of states. At least forty (40) other states currently have a period of repose of at least six (6) years or more for actions against design professionals and contractors, demonstrating a nation-wide recognition of the importance of allowing adequate time for such claims to be discovered and pursued.

For property owners in contractual privity with designers and constructors, there is the possibility of a breach of contract claim for defective designs or construction, which has a six-year period of limitations under MCL 600.5807(8). However, breach of contract claims are typically not covered by professional or general liability insurance policies, and the specific terms of any contract may not necessarily set forth or incorporate the applicable standards of care, and the six-year statute of repose also applies to an owner's action for damage to the improvement itself. *Michigan Millers Mutual Insurance Co.* v *West Detroit Building Co., Inc.*, 196 Mich App 367, 378 (1992). Thus, a property owner in Michigan already must accept the risk that defects in design and construction may become known more than six years after use, occupancy or acceptance of the improvement. In exchange for that period of repose, the designer and contractor should remain responsible for their respective work for that like period. Insurance policies that are commercially available will provide the protection to the designers and the contractors from claims that may be asserted.

If you have any questions or would like additional information about BOMA, or our opposition to SB 882, please do not hesitate to call us at (248) 848-3714 or email at jlanglois@bomadet.org.

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