



**Testimony on behalf of
Building Owners and Managers Association of Metro Detroit
House Judiciary Committee**

June 16, 2011

Good morning distinguished committee members. I am John Sier of Kitch Attorneys and Counselors testifying on behalf of Building Owners & Managers Association of Metro Detroit as co-chair of the Government Affairs Committee. I appreciate the opportunity to address you regarding this important issue.

The Building Owners and Managers Association was founded in 1908 and is comprised of nearly 400 member companies representing over 250 million square feet of office space in Southeast Michigan. BOMA members represent every aspect of the industry from building owners, building managers, real estate brokers, and all the suppliers to real estate including landscapers, roofers, janitorial services, utilities, professional services firms, construction contractors and designers. We are primarily comprised of business owners who have made the choice to invest in Michigan and create jobs.

BOMA urges your opposition to Senate Bill 77, which would shorten the limitation period for design claims involving improvements to property from 6 years to 2 years and the limitations period for construction defect claims from 6 years to 3 years.

Currently, the 6 year period of MCL 600.5839 begins when the improvement is used, occupied, or accepted. SB 77 would start the shorter clock running when the work is performed or the services completed, which are more difficult dates to establish.

We believe that SB77, as introduced, would substantially and negatively affect the rights of building owners and occupants in offices, schools and hospitals, among other structures, and the ability to recover damages resulting from a design or construction defect on real property. This is particularly problematic as the cause for damage to a building stemming from inadequate performance by a designer or contractor may remain latent and undiscovered for several years. Some issues with heating, ventilation and air conditioning systems may only become known through multiple seasonal changes; similarly, water entry and intrusion through the building's exterior may only occur under certain periodic conditions; additionally, structural issues with foundations may take years to become known, and even longer to investigate the cause of the problem. Just two short examples:

1. Part of a Michigan hospital's roof was completed in 2008 and plaster beetles appeared shortly after, but just as quickly disappeared. The beetles reappeared periodically over subsequent years. The destructive testing investigation, which took several months, revealed the cause to be trapped moisture in the roofing materials over the operating room as a result of defective construction and design specifications. Repairs are being made in 2011, outside of SB 77's proposed 2 year design statute of limitations and possibly even the 3 year limitation period for construction defects.
2. At a public institution's student center, the cast stone veneer and building envelope system began to show signs of water damage several years after renovations were complete, well beyond SB 77's provided 2 or 3 years. Following a months-long investigation, the university discovered substandard workmanship by the contractor, non-industry standard construction

detailing by the architect as well as a material failure by the supplier. The public institution would have been precluded from pursuing any remedy under SB77.

As a result, building owners – including properties paid for by public financing and the State of Michigan - will bear more risk of design and construction defects discovered more than 2-3 years after completion - especially those defects requiring a significant investigation to determine the cause.

Further, there is a misperception that Michigan is more generous in its Statutes of Repose and Limitation for bringing an action based upon design and construction defects. This is far from the truth when the actual accrual events are compared among the Statute of Limitations and the periods are considered in context. Unlike a typical statute of limitations which begins to run when an injury occurs or the damage becomes known, the period in Michigan begins to run when the improvement is used, occupied or accepted. The table I have provided clearly demonstrates the critical nature of the accrual date and its control of the time frame to bring suit.

Several other states have periods of limitation of 4 years or more from the date that the injury or defect is discovered. For example, Illinois allows an action to be brought within 4 years of when it is discovered even despite the Statute of Repose at 10 years from the completion of the project; as a result, a claim discovered in the 10th year following the completion of the improvement can be brought up to 14 years after completion, which is longer than the current period of repose in Michigan even for gross negligence! The current six-year period of limitations and 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. Some states, such as New York, have no period of repose at all, and many states, similar to Illinois, allow the period of limitations to extend beyond the period of repose.

Effectively, this bill would require a public or private owner who may be investigating the cause of a building issue to initiate litigation before the conclusions are known - to wait could result in the expiration of the time period in which to bring the suit and prevent the owner from obtaining any relief at all.

SB 77 does not provide any benefit to the economy, will not generate any jobs, and erodes the remedies and protections available to private and public building owners. Additional burdens are not consistent with Michigan's strategic plan to be a competitive market that encourages development and investment. We urge you to consider the impact this bill will have on private and public entities and deny its passage.

Again, thank you for this opportunity and we look forward to answering any questions you may have regarding this issue.

For more information on BOMA, its members or issue positions please contact:

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