



# Construction Law Update

## September 2011

### How to Get Sued

By Charles F. Behler, Attorney

While being involved in the throws of litigation can certainly be exciting and interesting; most people and businesses would prefer to be spared from the cost, time and stress of defending a lawsuit. However, if you desire to experience the thrills of litigation, simply follow these easy steps to drastically increase your odds of having the opportunity to defend against a lawsuit.\*

1. Enter into a contract without:
  - a. reading it;
  - b. understanding the meaning or consequences of all of its terms;
  - c. having a lawyer review it;
  - d. having an insurer review it to make sure your obligations are insured or insurable.
2. Don't be familiar with or disregard your contractual obligations; particularly ignore the provisions regarding change orders, specifications, notices, time of performance, and liquidated damages.
3. Use traditional media and social media as the avenues through which to communicate your opinions and legal position regarding pending or potential issues or claims.
4. Make warranties and representations that are:

- a. impossible;
  - b. out of your control;
  - c. uninsurable;
  - d. outside the scope of the contract;
  - e. orally provided.
5. Don't become familiar with the laws, codes, regulations, and professional or industry rules and standards that apply to your profession or business.
  6. Assume that a legal "self-help" remedy will be cheaper, easier and eventually lead to a better outcome.
  7. Co-mingle your personal funds along with those of your business.
  8. Assume that your word will never be challenged or forgotten. Accordingly, never document, record, or confirm conversations or occurrences concerning projects or transactions.
  9. Don't copyright, trademark, patent or otherwise protect any of your intellectual property. Furthermore, ignore these protections if you want to "borrow" someone else's work.

*\*Our professional opinion, of course, is that you should NOT engage in any of these behaviors. Instead, contact your SHRR attorney to maintain the best legal position.*

10. Always trust your potential employee's assertion that he/she had no employment, non-competition, non-solicitation and/or confidentiality agreement with his/her former employer.
11. Assume that your partners, employees, independent contractors, and competition all have your best interest at heart when conducting business.
12. Don't have a succession plan for yourself or your business.
13. Rely on "one-size-fits-all" forms, documents or contracts for your individual, unique or special situation or project.
14. If a dispute arises:
  - a. don't evaluate a claim to determine if it has any factual, technical, or legal basis;

- b. delete or destroy all relevant documents, file materials, and e-mails relating to a dispute;
- c. make statements to the "other side" without knowing if they have legal significance to the dispute;
- d. don't put your insurer on notice of the dispute in accordance with the requirements of your insurance policy;
- e. don't consult your attorney.

And finally:

15. Adopt the approach that winning now is more important than protecting your future or that of your business.

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## Changes to the Statutes of Limitations Affects the Construction Industry

*In recent months, the time period in which someone can file a lawsuit has been affected by several developments in the Michigan courts and legislature. Because some of the changes to statutes of limitation affect those in the construction profession, it is important to be aware of the changes in the law.*

### **CFO & Commercial Lending Spotlight:** The Michigan Court of Appeals Shortens the Period of Limitations for Lawsuits on Open Accounts

*By Steven K. Stawski, Attorney*

Chief Financial Officers, commercial lenders, and accounting professionals should be aware of recent court ruling that shortens the period of limitations for lawsuits to enforce open accounts for sales of materials and supplies as well as goods that are purchased on credit.

The new published decision from the Michigan Court of Appeals shortens the period of limitations

to commence legal action to enforce payment on delinquent accounts.

This decision is particularly relevant during the economic downturn and should encourage businesses — particularly manufacturers, suppliers, and distributors — to act quickly before any claim to unpaid amounts is barred at law.

An open account is defined as "an unpaid or unsettled account" or "an account that is left open for ongoing debit and credit entries and that has a fluctuation balance until either party finds it convenient to settle and close, at which time there is a single liability."

The decision shortens the period to commence a collection suit from six to four years. This ruling is the first in Michigan to hold that actions upon an open account for the sale of goods are controlled by the Uniform Commercial Code instead of the general six year period of limitations for contracts.

Businesses that manufacture, sell, supply or distribute products should initiate legal action on delinquent open accounts as soon as possible to avoid the risk that any claim on the unpaid balance would be barred by the shortened four year period of limitations.

Banks and other lenders that receive assignments of accounts should also act quickly because a similar ruling determined that a deficiency action upon a retail sales installment contract "was more closely related to the sales aspect than the security aspect," which brings the account under the four year limitation period.

*For more information, contact Steve Stawski. Steve is the author of "A Practical Resource for Managing UCC-Based Litigation," published in the Federation of Defense and Corporate Counsel Quarterly. He can be reached at (616) 458-4394 or sstawski@shrr.com.*

### **Proposed House Bill 4318: Claims Against Architects, Professional Engineers, Contractors, and Surveyors**

*By Megan E. Smith, Attorney*

A bill that would shorten the statute of limitations for claims against architects, professional engineers, contractors and surveyors was passed by the Michigan Senate (SB 77) and introduced into the House (HB 4318) in February of this year. Previous issues of this newsletter discussed a similar bill, which was passed by the Senate but stagnated in the House last session.

The bill has the potential to significantly impact the construction industry in Michigan.

Under the bill, an action against an architect, professional engineer, or contractor, based on an improvement to real property, must be brought within two years (three years for a land surveyor) of the injury or damage. However, the action could not be commenced later than six years from the time of occupancy, use, or acceptance of the improvement. Or, if the injury was caused by gross negligence, the action must be brought within one year of discovering the defect, but not later than 10 years from the time of occupancy, use or acceptance. Currently, the six and 10 year limitation periods apply no matter when the damage or injury occurred.

The bill as passed in the House specifies that an action to recover damages for injuries to people or property against a state-licensed architect or professional engineer would be an action charging malpractice. However, this section was omitted from the version introduced into the Senate. The House Judiciary Committee received the bill on February 23, 2011 and the bill is currently awaiting consideration. Even if the proposed legislation passes, it would not apply to actions for breach of contract, which have a six year statute of limitations.

*For more information, contact Megan Smith. She can be reached directly at (616) 458-5454 or msmith@shrr.com.*

*Summer associate Peter Afendoulis contributed to this article.*

### **Miller-Davis v Ahrens Construction: Breach of Contract Claims**

*By Megan E. Smith, Attorney*

In *Miller-Davis v. Ahren Constructions*, the Michigan Supreme Court examined which

limitations period applied to a breach of contract claim. The case involved a general contractor who brought a breach of contract claim against a sub-contractor hired to fix a roof on a YMCA building in Battle Creek alleging that the roof did not meet specifications. The defect was not discovered until the roof was removed for repair and as a result the suit was filed more than six years from the day the YMCA accepted occupancy. The sub-contractor contended that the general contractor's claim for indemnity under the party's contract was disallowed under the six year limitations period of a statute that states that a claim cannot be brought more than six years from "occupancy of the completed improvement, use, or acceptance of the improvement." The general contractor said the statute did not apply because it was a breach of contract action and not a tort claim.

The Court agreed with the general contractor and held that the six year limitations period contained within the statute is limited to tort actions, and therefore, does not apply to breach of contract actions. Rather, breach of contract actions are governed under a different statute.

While both statutes provide for a six year limitations period, the important difference between the two statutes is when a claim accrues; in other words, when the limitations period clock starts ticking. A tort action accrues from the date of occupancy, use, or acceptance of a property and cannot be brought more than six years following that date. On the other hand, an action for breach of contract accrues on the day when all the elements necessary for the claim have occurred, namely when a breach of a contract causes damages. The accrual date distinction can be an important determination when considering potential claims or defenses.

As always, Smith Haughey Rice & Roegge will continue to monitor this issue and update you regarding developments.

*For more information, contact Megan Smith. She can be reached directly at (616) 458-5454 or [msmith@shrr.com](mailto:msmith@shrr.com).*

*Summer associate Peter Afendoulis contributed to this article.*

## SHRR Construction Law News

Steve Stawski joined the program committee for the American Subcontractors Association (ASA). He has also been invited to speak at the ASA's November meeting concerning material purchase agreements and banking-related matters.

Joe Belsito, Jon Siebers, and Steve Stawski recently presented a seminar in Grand Rapids to

small business owners about entity formation and operating agreements.

Janis Adams and Bob Stone recently presented a seminar in Grand Rapids to small business owners about general employment law issues and non-compete agreements.

## Mark Your Calendars!

### Upcoming Events

The following events for entrepreneurs, business owners, and directors are all open to the public, free, and presented by the attorneys at Smith Haughey Rice & Roegge. For more information about any of these events, or to register to attend, please contact Keri Amlotte at 616-458-1332 or [kamlotte@shrr.com](mailto:kamlotte@shrr.com).

#### **Making the Grade: Legal Know-how for Businesses**

*Traverse City Seminar*

*Wednesday, September 28 – 8:00-10:00 a.m.*

Topics include: non-exempt vs. exempt employees, I-9 compliance, and bankruptcy in the business world. For more information, or to register, visit [www.tinyurl.com/SHRR-9-28-11](http://www.tinyurl.com/SHRR-9-28-11).

#### **Bankruptcy: Protect Your Place in Line**

*Webinar*

*Friday, October 7 – 12:00-1:00 p.m.*

Topics include: defending preference claims, filing proofs of claim, contract protections, statute of limitations. For more information, or to register, visit [www.tinyurl.com/SHRR-10-7-11](http://www.tinyurl.com/SHRR-10-7-11).

#### **Contract Fundamentals for Officers, Directors, and Office Managers**

*Grand Rapids Seminar*

*Tuesday, October 11 – 8:00-9:30 a.m.*

After a review of contract law fundamentals, attendees will learn to spot key issues and minimize financial and legal risks that pertain to their business. For more information, or to register, visit [www.tinyurl.com/SHRR-10-11-11](http://www.tinyurl.com/SHRR-10-11-11).

#### **Refinancing in a New Age**

*Webinar*

*Friday, November 4 – 12:00-1:00 p.m.*

Topics include: addressing common problems for borrowers and lenders, SBA 504 refinance

program, trends and opportunities in a changing landscape. For more information, or to register, visit [www.tinyurl.com/SHRR-11-4-11](http://www.tinyurl.com/SHRR-11-4-11).

#### **Real Estate Issues for Businesses**

*Grand Rapids Seminar*

*Tuesday, November 8 – 12:00-1:00 p.m.*

Topics include: commercial leasing basics, acquisition process, purchase agreements, title work, surveys, inspections.

#### **Work-outs and the Distressed Business**

*Webinar*

*Friday, December 2 – 12:00-1:00 p.m.*

Topics include: foreclosures, the receivership remedy, litigation tactics. For more information, or to register, visit [www.tinyurl.com/SHRR-12-2-11](http://www.tinyurl.com/SHRR-12-2-11).

#### **Intellectual Property Issues for Business Owners**

*Grand Rapids Seminar*

*Tuesday, December 13 – 8:00-9:30 a.m.*

#### **Immigration Law for Businesses**

*Grand Rapids Seminar*

*Tuesday, January 10 – 8:00-9:30 a.m.*

## SHRR Construction Law Attorneys



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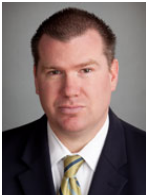
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