

CONTRACTORS & DESIGN PROFESSIONALS LEGISLATIVE UPDATE: WHAT'S BREWING AT THE CAPITOL?

November 2006

PENDING BILL GOVERNING REGISTRATION OF INTERIOR DESIGN PROFESSIONALS

By Cara L. Nieboer

The Michigan House of Representatives has recently passed three bills providing for the registration of interior design professionals in the State of Michigan. The bills are presently under consideration by the Senate Committee on Economic Development, Small Business and Regulatory Reform. This article provides a brief overview of the proposed legislation currently pending in the Senate.

House Bill 4311 defines “interior designer” as a person performing interior design services. “Interior design services” means services in connection with the design of interior spaces, including the preparation of design documents, relative to finishes, systems furniture, furnishings, fixtures, equipment, lighting, outlets and switching, and non-load-bearing interior partitions that do not *materially affect* the building mechanical, structural, electrical, or fire safety systems. “Materially affect” would mean either or both of the following: (1) activity that has a substantial and negative impact on the health, safety, and welfare of the occupants of the interior space after installation of finishes, etc; and (2) activity that is incompatible with the applicable building or fire codes to such a degree that more than a minor modification of the design documents is needed to correct the incompatibility.

When it was originally introduced, the bill provided for *licensure* of interior designers. However, the bill was modified in the House to provide for *registration* rather than licensure. Registration protects the title of “interior designer” and only allows those who are registered to hold themselves out as interior designers. Licensure, in addition to protecting the title of an occupation, makes it unlawful for an individual to engage in a licensed occupation without a license. Accordingly, because this is a registration system rather than a licensure system, an individual who is

not registered may still provide interior design services so long as they do not use the terms “registered interior designer”, “interior designer”, or another term or title connoting registration. Nevertheless, the bill would not prohibit an individual certified or otherwise qualified by a private organization from using a term or title copyrighted by the certifying organization so long as the term does not connote registration in Michigan.

The bill also establishes a Board of Interior Design within the Department of Labor and Economic Growth and provides a three-year registration with continuing education requirements for renewal.

House Bill 4262 amends the Single State Construction Code Act by providing that, when required by law, the construction documents for new construction, alteration, repair, expansion, addition, or modification for buildings or structures would have to be prepared by or under the supervision of a registered design professional licensed under Article 20 of the Occupational Code (which provides for the licensure of architects, professional engineers, and land surveyors). The bill also specifies that interior design documents could be prepared by an interior designer. Documents signed by an interior designer would have to bear the person’s seal.

This legislation permits individuals who are not registered to offer interior design services; however, they must be careful not to represent themselves with a title indicating registration. While the terms “interior designer” and “registered interior designer” are clearly off limits, the bill is vague on what other titles may violate the act.

Also, the legislation contemplates the issuance of a permit to an interior designer for interior design activities. Since interior design services do not appear

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to fall within those types of activities typically regulated by municipalities, it is not clear what the legislature contemplates in providing for the issuance of permits based on interior design documents.

The SHRR Construction Industry Team will continue to monitor this legislation and keep you apprised of any new developments.

CUTTING OFF CLAIMS AGAINST ARCHITECTS, ENGINEERS, AND CONTRACTORS PART II: THE LIMITED EXCEPTION TO THE STATUTE OF REPOSE

By Steven K. Stawski

Can an architect, engineer or contractor be sued up to ten years after a project is completed? The answer is “yes,” if a plaintiff can meet the three-part requirement of the limited exception to the Statute of Repose.

As presented in the May 2006 companion article¹, most claims against architects, engineers, and contractors are extinguished six years after occupancy, use, or acceptance of the improvement. But the Statute of Repose leaves open the possibility that, pending certain requirements, a claim may be filed within 10 years.

In enacting the Statute of Repose, the Michigan legislature left open the possibility of claims between six and 10 years for latent or otherwise hidden defects that are caused by the gross negligence of an architect, engineer or contractor. The claim must meet three requirements to qualify for the limited exception.

First, the claims must be filed within one year after the defect was discovered or should have been discovered. Michigan has adopted the possible cause of action discovery rule: the discovery period starts once a plaintiff has knowledge of the existence of a defect and its possible cause. If the evidence shows that a plaintiff knew or should have known of a defect more than one year before a claim was filed, then the claim will be barred.

Second, the defect must be the result of gross negligence on behalf of the architect, engineer, or contractor. Gross negligence is a heightened standard and requires conduct “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” Claims of defective workmanship or

negligent performance of contract do not rise to a gross negligence standard.

Third, the defect must constitute **the** proximate cause of the damages. In other words, the defect must be the one most immediate, efficient, and direct cause preceding the injury or damage. In a typical negligence or defect claim, the defect need only be **a** proximate cause of the damages.

Although there is no published authority in Michigan addressing the limited exception to the Statute of Repose, Smith Haughey has obtained the most comprehensive unpublished decision to date in favor of a contractor client.² In *Jungslager*, the Court of Appeals found that plaintiffs were aware of a possible cause almost immediately after occupancy, when numerous attempts at repair were first made. The court also found that allegations of improper installation of an Exterior Finish and Insulation System, flashing, and window sills do not rise to the level of gross negligence.

While most claims against architects, engineers, and contractors will be barred after six years, the risk of litigation risk exists for up to 10 years if plaintiffs can satisfy the three requirements to qualify the limited exception to the Statute of Repose.

Representative Phil LaJoy (R-Canton Twp.) is currently drafting legislation which would make professional claims against an architect subject to a two-year statute of limitation. It is anticipated that Rep. LaJoy will introduce this bill in the fall.

¹ See “Cutting off Claims Against Architects, Engineers and Contractors” in SHRR’s May 2006 *Construction Law Update*.

² See *Jungslager v Lampe*, unpublished Opinion of the Court of Appeals, issued February 14, 2006 (Dkt. No. 264441).

LEGISLATIVE BRIEFS

House Bill Increases Penalties For Unauthorized Practice of Architecture

In May, Representative Chris Ward (R-Brighton) introduced House Bill 5874, which proposed increased penalties for the unauthorized practice of professions regulated by Article 20 of the Occupational Code – including architecture. The bill would allow a person directly affected to maintain injunctive relief to restrain or prevent violations of the bill. HB 5874 passed the House and was referred to the Senate Committee on Economic Development, Small Business and Regulatory Reform.

Certificate of Merit May Be Required Before Filing Suit A “Licensed Professional”

House Bill 5948, sponsored by Representative John Pastor (R-Livonia), would require a plaintiff to obtain a certificate of merit from a person licensed in the same occupation or profession before filing suit

against a “licensed professional”. The certificate must include a description of the actions that should have been taken or omitted, and the manner in which the breach of the applicable standard of practice was the proximate cause of alleged injury to the plaintiff. In sum, the certificate must state that based on a review of records it appears that the plaintiff’s claim has merit. This bill is currently with the House Judiciary Committee.

Proposed Expansion of Practice of Landscape Architecture

Senate Bill 1303 was introduced by Senator Wayne Kuipers (R-Holland) in June. This bill would expand the practice of landscape architecture to include grading and storm water management, and has been referred to the Senate Committee on economic Development, Small Business and Regulatory Reform.

FAILING TO NOTIFY OWNER IN WRITING OF UNFORESEEN SITE CONDITIONS IS NOT AN ABSOLUTE DEFENSE

By Benjamin H. Hammond

Typical AIA contracts include a provision whereby a contractor must immediately stop work and notify the owner or its representative in writing if they encounter an unforeseen site condition. For a variety of reasons, this written notification may not happen. An on-site supervisor may be told of the situation and adjustments may be made in the field so that the work can progress. Written notification may not come for weeks, if at all. All seems to be well until the bill is submitted for the change in work based on encountering the unforeseen site conditions. The owner may decline to pay the extra amount requested because it was not notified in writing as required in the contract.

In a recent decision by the Supreme Court of Michigan, this very issue was raised. In *Triangle Excavating Co. v Covert Township*, the excavation company (Triangle) encountered unmarked telephone lines and fiber optic cables and was forced to move the excavation to the other side of the street. The owner’s project engineer who was supervising Triangle’s work was notified verbally of the condition, but not in writing as required by the

contract. Nevertheless, the court did not dismiss the action in favor of the owner because the site inspector (1) knew about the unforeseen condition and (2) was aware of Triangle’s intent to request additional compensation. The case was sent back to the trial court to determine whether or not the facts of that case constituted a waiver of the written notification requirement.

This new case law should put owners on notice of a potential weakness in an otherwise strong contractual defense. Reliance solely on the language of the contract may not be enough to avoid liability where the owner’s representative was aware of the change and the intent to request additional compensation. Likewise, contractors should be aware that they may have a viable claim in situations where they encountered an unforeseen site condition but failed to notify the owner in writing about the condition. Depending on the facts of the particular case, that contractor may be able to successfully argue that the owner waived the writing requirement and recover additional compensation for the extra work required by the unforeseen condition.

**SMITH HAUGHEY RICE & ROEGGE'S
CONSTRUCTION LAW INDUSTRY TEAM**



Aileen M. Leipprandt,
Chair
616.458.5298
aleipprandt@shrr.com



Charles F. Behler
616.458.6245
cbehler@shrr.com



Thomas M. Weibel
616.458.6244
tweibel@shrr.com



Michael J. Roberts
616.458.1212
mroberts@shrr.com



Craig R. Noland
616.458.9466
cnoland@shrr.com



T. J. Ackert
616.458.3638
tackert@shrr.com



Jeffrey R. Wonacott
231.486.4509
jwonacott@shrr.com



Robert W. Parker
231.929.4878
rparker@shrr.com



Rachel Brochert Roe
231.486.4503
rroe@shrr.com



Benjamin H. Hammond
616.458.4256
bhammond@shrr.com



Cara L. Nieboer
616.458.0437
cnieboer@shrr.com



Steven K. Stawski
616.458.4394
sstawski@shrr.com



Shawn C. Worden
231.486.4505
sworden@shrr.com



Scott D. Harvey
231.486.4545
sharvey@shrr.com



Jason Thompson
231.486.4543
jthompson@shrr.com