

# LEGAL ALERT

September 2004

## CONSTRUCTION LAW UPDATE

### NEW RULING ON THE STATUTE OF LIMITATION FOR ARCHITECTS, ENGINEERS, AND CONTRACTORS

By: Michael J. Roberts, Attorney

Recently, the Michigan Court of Appeals, in the case of *Ostroth v Warren Regency, GP, LLC*, and *Edward Schulak, Hobbs, & Black, Inc.*, held that the six year Michigan statute of repose, contained in MCL 600.5839, regarding claims against licensed architects, professional engineers or contractors arising out of defective conditions resulting from a construction project is also the controlling statute of limitations.

A statute of repose designates a time period after the occurrence of a certain event within which a suit may be filed. The statute of repose at issue limits lawsuits resulting from defective conditions of a construction project to those filed, with certain exceptions, within six years of the date of substantial completion or occupancy, whichever occurs first. Lawsuits for injuries or damages occurring after that time are not allowed.

A statute of limitations in negligence actions, on the other hand, limits the amount of time during which a lawsuit must be filed to a period after damages or injuries are sustained, no matter how much time has passed since the occurrence of the negligence that caused the injury or damage.

In *Ostroth*, the plaintiff claimed that she had suffered personal injury as a result of being exposed to fungus, mold, and bacteria as the result of an inadequately designed HVAC and plumbing system. This occurred in a building owned by Warren

Regency, GP, which was renovated pursuant to the design of the Schulak Architectural firm.

In reaching its Opinion, the Court of Appeals had to determine which statute of limitation applied: The two-year statute of limitation for malpractice claims, applied by the Trial Court; the three year statute of limitation for ordinary negligence claims, applied by an earlier 1994 Court of Appeals Decision; or the six year statute of repose for claims against architects, engineers and contractors.

The Trial Court applied the two-year malpractice statute of limitation. Accordingly, even though suit was filed within six years from the date of completion of the project, the Trial Court dismissed the plaintiff's claims since it was filed more than two years from the date of last service by the defendants to the owner.

In *Ostroth*, the Court of Appeals overruled the Trial Court, elected not to follow the 1994 Decision of the Court of Appeals applying the three year negligent statute of limitation and ruled that Section 600.5839 was both a statute of limitation and a statute of repose and the only statute of limitation applicable to actions against architects, engineers and contractors. Therefore, since the plaintiff's Complaint was filed within six years of the date of occupancy or completion of the project the Court of Appeals reinstated the plaintiff's claim.

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Unfortunately, language used by the Court of Appeals in *Ostroth* in reaching its Opinion may have broadened the impact of its Decision beyond the facts of its case. The Court did not specifically limit the application of 5839 to the damages set forth in the statute, (those “arising out of a defective and unsafe condition of an improvement to real property”) but rather, stated in its Opinion that “Section 5839(1) applies to all negligent actions against architects, contractors and engineers.”

Whether other courts will use this language to

broaden the application of 600.5839(1) to suits which do not arise from a defective condition is yet to be seen.

A Motion for Leave to Appeal the *Ostroth* Decision to the Michigan Supreme Court was filed on August 19, 2004. We will monitor the case and keep you advised of its outcome.

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## **EMPLOYEE LEASING COMPANIES: WHAT ARE THEY AND ARE THEY RIGHT FOR YOU?**

By: Patricia T. Foster, CPA, MST, Manager of State and Local Taxation at Beene Garter LLP

**I**s your Michigan Single Business Tax (SBT) liability at least \$25,000 per year? Is your SBT compensation addback at least \$1.1 million per year? Is your Michigan unemployment experience rate at least 2.7%?

If you answered yes to these questions, then an Employee Leasing Company (ELC) may be the right fit for you.

An ELC is a separate legal entity owned by a trusted non-related business associate. Your current employees become employees of the new ELC, which then leases them back to you. Your employees retain the same benefits as they had before the change; the only noticeable difference to them should be the name of the employer on their paycheck. You still retain direction and control of the employees, along with the ability to hire and fire in collaboration with the ELC.

This is a legal tax savings technique that is fully disclosed to all governmental units at

implementation. It is not a tax shelter. The state of Michigan is aware of the use of Employee Leasing Companies and has issued guidance regarding their implementation and tax consequences.

Although ELCs are fairly simple to manage once they are up and running, it is extremely important to structure them carefully so that they accomplish your objectives with minimum risk. Numerous steps must be followed to properly structure an ELC. It is important to work with both a CPA firm and a law firm experienced in the implementation of ELCs.

The best time to implement an ELC is on January 1 regardless of your company's year-end. Planning should begin well before then in order to have time to properly complete the setup process.

*For an analysis of potential savings, please contact Patricia T. Foster at Beene Garter LLP, at 616-235-5200 or [pfoster@beenegarter.com](mailto:pfoster@beenegarter.com).*

## COPYING DOESN'T PAY

By: Aileen M. Leipprandt, Attorney

In August, the Federal District Court for the Eastern District of Michigan affirmed that the unauthorized use of architectural plans for residential homes may create substantial liability by the unauthorized user.

In that case, *VanBrouck & Associates, Inc. v Darik Inc.*, the architect, Mr. VanBrouck, created architectural plans for a single-family home for the Rena family. VanBrouck charged the Renas \$15,000 for these plans. During the construction of the home, the Rena plans were shared with Erb Lumber. Erb Lumber later provided, free of charge, a copy of the Rena plans to another builder, Darik. Darik then tried unsuccessfully to purchase the plans from VanBrouck, however, VanBrouck refused to sell the plans, as they were customized plans created for one exclusive house. Thereafter, without permission, Darik used the Rena plans to build a house.

VanBrouck discovered the unauthorized use and sued Darik. Darik admitted the wrongdoing but disputed the amount of damages it owed to VanBrouck. After

reviewing extensive evidence, the court concluded that VanBrouck was entitled to recover \$24,952, the actual fair market value of the plans Darik used. The fact that VanBrouck had charged a discounted price of \$15,000 to the Renas for the plans was not relevant. Furthermore, VanBrouck was entitled to recover "infringer profits" of \$156,548. Since VanBrouck prevailed at trial, he was also entitled to recover the costs of litigation, but not attorney fees.

Copyright protection arises as a matter of law once the drawings are prepared and also attaches to the structure that is built from the plans. If the plans were registered before the infringement, the architect could elect to seek statutory damages of up to \$150,000 rather than having to prove actual losses.

The moral of the story: copying doesn't pay.

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## THE LONG ARM OF THE LAW STRIKES WAYNE COUNTY REGISTER OF DEEDS

In *Central Ceiling & Partition, Inc. v. Department of Commerce*, the Michigan Supreme Court affirmed the judgment of the Court of Appeals and concluded that the liens presented to the Wayne County Register of Deeds were timely recorded.

In addition, though, the court found that it appeared that the substantial questions about the validity of the liens in this case may have resulted from the failure of the Wayne County Register of Deeds to perform their statutory obligation to record lien documents. The Court then ordered that the Wayne

County Register of Deeds show cause in writing by July 30, 2004, as to why the Register of Deeds should not be required to pay the costs incurred by the other parties in the prosecution and defense of the action.

Further, the Court ordered that the Wayne County Register of Deeds must send the Clerk of the Michigan Supreme Court quarterly written reports on its progress toward bringing its recording system into compliance with the requirements of MCL 565.24 and 565.25.

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