

Legislative Analysis



SOL REVISION FOR ACTIONS AGAINST ARCHITECTS, ENGINEERS & CONTRACTORS

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Senate Bill 77 as passed by the Senate

Sponsor: Sen. Tonya Schuitmaker

House Committee: Judiciary

Senate Committee: Judiciary

First Analysis (6-29-11)

BRIEF SUMMARY: The bill would amend the Revised Judicature Act to make actions against an architect, engineer, or surveyor subject to the two-year period of limitation for an action charging malpractice, and would make the period of limitation subject to the applicable period of repose established in Section 5839 of the act.

FISCAL IMPACT: Senate Bill 77 would have an indeterminate fiscal impact on state and local government, including the judicial branch. The judicial branch (local courts) may realize a positive fiscal impact by having certain causes of action precluded under the provisions of the bill. However, the number of causes of action that would be precluded by the provisions of the bill is indeterminate.

THE APPARENT PROBLEM:

For decades, and despite several attempts by the Legislature to clarify the issue, courts have differed in their interpretations of statutory time limitations for bringing a civil action against an architect, professional engineer, land surveyor, or construction contractor. (For a detailed discussion of the judicial and legislative history of the statute of limitations for bringing an action against any of these professionals, see the Senate Fiscal Agency analysis of Senate Bill 77, as passed by the Senate, dated 3-1-11.)

In brief, the problem the bill seeks to address concerns the interplay between two sections of the Revised Judicature Act involving architects, professional engineers, professional land surveyors, or contractors. Since a 2006 state Supreme Court decision, the two sections have been interpreted as allowing an injured party to have up to six years from the time an improvement to real property was completed during which to file a civil action (under one of the sections), rather than the two years following the injury allowed for a charge of malpractice or the three years allowed for general negligence claims as provided in the other section (*Ostroth v Warren Regency, GP, LLC*, 474 Mich 36).

The bill would reverse the *Ostroth* decision.

THE CONTENT OF THE BILL:

Senate Bill 77 would revise Sections 5805 and 5839 of the Revised Judicature Act (MCL 600.5805 and 600.5839). These revisions would take effect May 1, 2011, and would apply to causes of action that accrue on or after the bill's effective date.

Section 5805 of the RJA currently establishes the statutory time limitations for a malpractice action as two years, and the period for all other actions to recover damages for the death of or injury to a person as three years. Section 5805 also specifies that 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, is as provided in Section 5839.

Under the bill, Section 5805 would be revised to instead specify that an action to recover damages for injuries to persons or property against a state licensed architect or professional engineer or a licensed professional surveyor would be considered an action charging malpractice subject to the period of limitation contained in subsection (6) – which sets the period of limitations as two years for an action charging malpractice. The bill would also specify that the periods of limitation under Section 5805 would be subject to the applicable period of repose established in Section 5839.

Currently, Section 5839 allows an action against a licensed architect, licensed professional engineer, or contractor to recover damages for injuries (to a person or property) arising out of the defective and unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, to be filed up to six years after the time of occupancy of the completed improvement, or one year after the defect was discovered or should have been discovered if the defect constituted proximate cause of the injury. An action cannot be maintained more than 10 years after the time of occupancy of the completed improvement.

Section 5839 would be revised to prohibit an action to recover damages for injuries or death arising out of the defective or unsafe condition of an improvement to real property as described above, unless the action was begun within either of the following periods:

- Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.
- If the defect constituted the proximate cause of the injury or damage and was the result of gross negligence on the part of the contractor or licensed architect or professional engineer, one year after the defect was discovered or should have been discovered. The bill would retain the current provision that specifies an action could not be maintained under this provision more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

The bill would also retain the current provision that limits a person from maintaining an action to recover damages based on error or negligence of a licensed land surveyor in the preparation of a survey or report more than six years after the delivery of the survey or the report to the person for whom it was made or the person's agent.

"Contractor" would be defined as an individual, corporation, partnership, or other business entity that makes an improvement to real property. Several references to a "land surveyor" would be changed to "licensed professional surveyor".

HOUSE COMMITTEE ACTION:

The committee reported the Senate-passed version without amendment.

BACKGROUND INFORMATION:

Similar bills have been before the Legislature during the two previous sessions. At the close of the 2007-08 legislative session, Senate Bill 865 was passed by the Senate and reported from the House Judiciary Committee. The bill failed to see House Floor action. Last session, Senate Bill 882 was passed by the Senate, reported from the House Judiciary Committee, but also died on the floor.

ARGUMENTS:

For:

Supporters of the bill maintain that for at least 100 years, the statute of limitations was two years in which to bring a claim against an architect or professional engineer for malpractice and was three years in which to bring a negligence claim against a contractor – a period in line with most other states. Under the *Ostroth* decision, this time period was lengthened to six years. The purpose of statutes of limitations is to protect businesses and professionals from stale claims. After a while, evidence that could be used in a defense can be lost. Thus, a shorter period of limitations restricts actions to being filed while memories are fresh and evidence likely to be still in existence.

At a time when the state is attempting to help the construction and design industry grow, this lengthening of the time period for filing lawsuits makes Michigan less friendly to attracting new businesses or retaining existing ones. In addition, it negatively impacts capital projects as infrastructure project costs can increase due to the longer exposure to stale claims.

Against:

Opponents say that the bill 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." (Written testimony provided by BOMA Metro Detroit) This is because many defects need time to surface. For instance, some problems may only surface during times of high humidity (summer) or during cold months (a problem with heating systems). By the time a problem begins to surface, the season can change, the problem can resolve, and building occupants or owners may not become aware that a serious problem exists until the situation reoccurs in a subsequent summer or winter. Once it is obvious that a problem exists, it can take time to investigate the source of the problem and relate it to a design or construction flaw. Thus, a six-year period beginning when a project is completed or the building is occupied in which to file claims is appropriate.

If *Ostroth* is reversed, more claims are likely to be filed by parties trying to beat the shorter period of limitations even before they know if the problem or injury was caused by a defect or flaw related to the design or construction team. If this happens, litigation costs to plaintiffs and defendants are likely to increase and court dockets could be further burdened. And, what would happen if a defendant filed a motion to dismiss before a plaintiff could finish the investigation? Investigations into problems associated with construction projects take time, money, and effort to complete – for example, sometimes whole walls or ceilings need to be removed before the source can be discovered. Would some cases having merit be thrown out simply because an investigation to prove the link between the design or construction team and the damage or injury was incomplete?

Moreover, if claims involving public buildings, such as schools, hospitals, and colleges, can't go forward simply because of inadequate time in which to pinpoint the source of a problem or injury, taxpayers would bear the costs of repairs and remediation. Instead, the interpretation of the statute in the *Ostroth* decision, which was unanimously agreed to by the justices, should stand unchanged.

POSITIONS:

A representative of the American Council of Engineering Companies (ACEC) testified in support of the bill. (6-23-11)

A representative of AIA Michigan and Michigan Society of Professional Surveyors testified in support of the bill. (6-23-11)

Michigan Society of Professional Engineers indicated support for the bill. (6-23-11)

Studio Intrigue Architects indicated support for the bill. (6-23-11)

The Michigan Association of Home Builders indicated support for the bill. (6-16-11)

The Michigan Infrastructure & Transportation Association indicated support for the bill. (6-16-11)

Parsons Brinkerhoff Michigan Inc. indicated support for the bill. (6-16-11)

TMP Architecture, Inc. indicated support for the bill. (6-16-11)

AGC Michigan (a chapter of the Associated General Contractors of America) indicated support for the bill. (6-16-11)

A representative of the Building Owners & Managers Association of Metro Detroit testified in opposition to the bill. (6-23-11)

MidMichigan Health indicated opposition to the bill. (6-23-11)

Michigan State University indicated opposition to the bill. (6-16-11)

Wayne State University indicated opposition to the bill. (6-16-11)

Oakland University indicated opposition to the bill. (6-16-11)

Michigan Health & Hospital Association indicated opposition to the bill. (6-16-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.