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How to Benefit from a Shorter Statute of Limitations

When Billability Drops

By Leslie Kusek, Marketing Consultant

I've been involved in the A/E industry long enough to understand the deity of the billable hour, and the repercussions of the lack thereof. However, I also understand the importance of hanging on to excellent people, and

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AIA Michigan Kicking Off New Benefit

By Debra Gervase, PCIA Executive VP Group Benefits 810.224.5278 or dgervase@pciaonline.com

AIA Michigan members now have access to an exclusive health insurance program with medical, prescription drug coverage, dental and life insurance in one convenient plan that

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Insurance Help for Your Employees

By Tony Preston, PCIA VP Personal Lines 810.224.5267 or tpreston@pciaonline.com

PCIA is offering lunch and learns for employees to help them avoid making risky decisions in their auto and home coverage. Call us to arrange!

(See Page 6 for insurance tips...)

By: Stephen P. Ormond, Esq.
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For design professionals there are legal advantages to doing business in Michigan. One of them is that if a claim for professional negligence is made, Michigan law allows the professional to demand that the court allocate negligence among all responsible parties, whether or not the others have been sued. MCL 600.6304. This eases some of the nightmarish risk of defending against a meritless claim by guaranteeing that the design professional cannot be held responsible for others' negligence without prior agreement. Most states do not have this rule.

One area in which Michigan lags behind some other states, however, is in its statutes of limitations applicable to design professionals. The current rules rely upon hairsplitting distinctions which, without any apparent logic, can subject design professionals to vastly different results. **Since a statute of limitations defense can provide the fastest way to get a case dismissed, this article suggests some ways a design professional might get the best treatment.**

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PROFESSIONAL CONCEPTS
INSURANCE AGENCY

Statute of Limitations

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In a lawsuit, the first line of defense is whether the plaintiff has brought suit in time, that is, whether he complied with his legal obligation to bring suit within the time

period prescribed by the applicable statute of limitations. If not, the court will be obliged to dismiss the case

unless there is an established exception. If the plaintiff has failed to file his case timely, it may be possible to get it dismissed early in the court process, without having to defend the case on its merits.

In a lawsuit, the first line of defense is whether the plaintiff has brought suit in time.

Michigan's statutes of limitations cover design professionals in two basic ways. One set of statutes, MCL 600.5838(2) and 600.5805(6), taken together, require a lawsuit against "a member of a state licensed profession" to be filed within **two years** from the professional's discontinuance of work on the project, or within **six months** of discovery of the problem, whichever is later (the "General Rule"). Unfortunately, the General Rule is subject to an exception found in another statute applicable specifically to "state licensed architect[s] or professional engineer[s]." MCL 600.5839(1) allows at least **six years** to bring certain lawsuits (the "Exception"). The difficulty of defending against a six year old problem is immense and many cases are settled simply because of those difficulties. Yet, there may be ways to improve the chances that the shorter limitation period of the General Rule will apply. Design professionals and their counsel should evaluate each claim with an eye toward the distinctions.

The Exception applies to the following classes of cases only:

- "[D]amages for any *injury to property*, real or personal, or for *bodily injury* or *wrongful death*,"
- "[A]rising out of the *defective and unsafe condition* of an *improvement to real property*,"
- "[A]gainst any state licensed architect or professional engineer *performing or furnishing the design or supervision* of construction of the improvement..."

The italicized terms may present opportunities for a design professional to avoid the Exception's longer limitations period. For example, what constitutes "injury to

Opportunities exist to avoid longer limitations.

property," "wrongful death" or "bodily injury" has been litigated in Michigan over the years and the case at hand may not fit. Similarly, is the plaintiff alleging both a "defective" and an "unsafe" condition of the particular "improvement"? Is the "improvement" to real property or to personal property? Is it an "improvement" at all? Finally, did the design professional either "perform" supervision of construction or furnish the designs? If any of the above ele-

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ments are not met, then the Exception should not apply and the shorter two year General Rule may allow for dismissal.



A court may be willing to invest more time than usual in these arguments if the court knows that a stale claim can be removed from its docket.

two years after the project was completed and lacks sufficient allegations to either extend the General Rule or prove the Exception, a motion to dismiss under the General Rule is good strategy. In order to enhance their arguments, design professionals should also put language in their contracts to help define away some of the Exception's key elements to give a court something direct and persuasive upon which to rely in ruling on a dismissal motion. Some of them are obvious. For example, if the professional is not expected to provide plans, then the contractual documents should exclude that possibility. If the professional is not supervising construction, then language saying that should be included. We

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Importantly, a court may be willing to invest more time than usual in these arguments at an early stage if the court knows that a stale claim can be removed from its docket. Judges are rightfully leery of trying cases involving old claims, which by their nature have documentary gaps, missing key witnesses and flawed memories. If a plaintiff's complaint has been filed more than

New AIA MI Benefit

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fits varying budgets. This program offers several benefits:

- Flexible plan choices, including traditional PPO and consumer-directed plans.
- Cost-saving, consumer-directed options, such as health savings accounts (HSAs) help achieve lower premiums and empower employee choice.
- Pharmacy benefits through Wellpoint include over 61,000 network pharmacies nationwide, copay options, mail order and specialty drug services.
- The buying power of a larger group with other AIAMI member employers statewide, which may help lower overall costs.

The AIAMI Health Plan is underwritten by Trustmark Life Insurance Company. Trustmark has nearly 100 years of experience in the insurance industry, and more than 50 years as a leader serving associations. For more info, go to www.trustmarkaffinitymarkets.com.

PCIA is ready to assist you with evaluating your options and taking advantage of this exclusive plan. Please contact *Debra Gervase*, at 810.224.5278 or dgervase@pciaonline.com.

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suggest some contract language in the highlight box below that a design professional might use, oriented toward avoiding the Exception's six year limitation period.

Contract vs. Negligence in Michigan's Statutes of Limitations

If a design professional is successful in getting a court to apply the General Rule's two year limitation period, then a plaintiff may try to evade dismissal by adding a breach of contract claim. Under Michigan law, a breach of contract claim is timely if filed within six years. MCL 600.5807. If a plaintiff is confident that the Exception's six years will apply, then he will have no need to get creative this way. Still, plaintiffs attempt this, particularly if the shorter period of the General Rule may result in a dismissal. They argue that since they had a contract for the design professional's work, a failure to perform that work adequately is a breach of the contract, in addition to negligence.

Michigan's courts have ruled that a breach of contract claim against a design professional is governed by the General Rule's two year limitation rather than the six year breach of contract limitation if the crux of the dispute is the design professional's alleged failure to perform in accordance with customarily accepted good professional practices. Reasoning that a plaintiff should not be able to do an end run around the deliberately more stringent limitation period for professionals, the courts have upheld dismissal of time barred claims under the General Rule even when coupled with contract claims. There are exceptions, of course, for contract claims that arise

from contracts not related to professional services. For example, if a design professional fails to pay the office rent or the photocopying charges, he or she may still be sued in contract and the longer limitation period will apply.

Suggested Contract Language to Avoid Stale Claims

The following contractual language may help a design professional avoid Michigan's longer statutes of limitations under the Exception and attempted contract theories:

Client agrees that any claim under this Agreement shall be brought within the time period set forth in MCL 600.5838(2) and MCL 600.5805(6), governing claims against state licensed professionals for failure to perform in accordance with the applicable standard of care. Client agrees that Consultant's work under this Agreement is not performed pursuant to a special agreement under Michigan law.

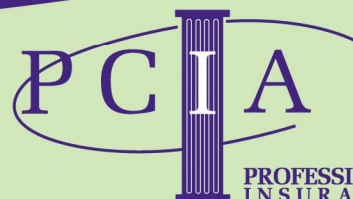
Client agrees that supervision of any construction of improvements to real property shall be the sole responsibility of contractor(s) and not that of Consultant.

[Optional, use if accurate] This Agreement does not call for Consultant to furnish designs for any improvements to real property.

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How Does This Work in Real Life?

Our firm recently defended a design professional in circumstances where these issues came into focus. In 2002, our client provided professional services in Michigan for a solid waste facility. In 2006, a problem surfaced and the solid waste facility assigned its rights to the contractor for the 2002 project, who then sued our client in Texas state court in early 2007. We removed the case to federal court and won a dismissal of the Texas case due to the fact that jurisdiction was improper. The plaintiff then sued our client in Arizona state court. We again removed the case to federal court and won another dismissal due to improper jurisdiction. We hoped that the dispute would die after four courts in two states.

Unfortunately, the plaintiff re-filed the lawsuit in federal court in Michigan in late 2007. Careful evaluation of the statute of limitations revealed that under the General Rule, the lawsuit was too late. The plaintiff's forum shopping in Texas and Arizona had resulted in so much passage of time that the clock had run out. On the other hand, if the Exception applied or if a breach of contract theory was given any life, the lawsuit was timely. Our task, then, was to evaluate the case carefully against the Exception's elements and convince the court that our client's professional services fell within the General Rule and outside the Exception. Second, we had to show that the contract claims were derivative of the professional negligence claims and subject to the General Rule. Our resulting motion to dismiss was granted on both points and the case was dismissed, the court writing a lengthy opinion holding that the General Rule applied, the Exception did not and the contract theories did not extend the limitation period.

This experience shows the importance of taking advantage of all of the procedural defenses that are available in good faith, from contesting jurisdiction to relying upon the statute of limitations. Looking forward, it also shows the importance of making sure that contract documents exclude the possibility of longer limitation periods, as much as possible.

The above material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.

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harnessing their productivity when project work lulls. If we use "slow time" wisely, we can get some things done that have been lingering for years!

- **Technology:** software continually improves and new options become available. Get your folks up to speed! This will improve overall efficiency now and later.
- **Cross train:** Cross training takes time. Now may be when it makes sense to teach your best and brightest new technical areas.
- **Get your house in order.** It seems we are always too busy to update marketing materials, procedures or manuals. Now may be the time.
- **What's next?** When we're busy, we don't have time to look up and out. If we have the chance to pause, let's focus on the horizon—what's off in the distance that we can use this time to position for?

Certainly we have short term needs that we need to meet. But tomorrow will come, and we can use today to make tomorrow better—for our firms and our employees.

Leslie Kusek can be reached at Leslie@LMKconsulting.com



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Tips you can use: Is your jewelry properly insured?

Many people overlook the need to properly insure their expensive jewelry, believing that it is automatically covered by their homeowners policy.



While homeowners policies do cover jewelry, this insurance usually is subject to a much lower limit than the overall contents coverage. This reduced limit is called a "sublimit," and a typical sublimit is \$1,500 for loss by theft of jewelry, watches, and precious and semiprecious stones.

If your jewelry is worth more than the sublimit in your homeowners policy, you should consider purchasing specific insurance to cover it. The following is a good process to follow.

- Arrange an appointment with us to review your jewelry coverage. Bring as much information about your jewelry portfolio as possible, including any appraisals.
- If your high-valued jewelry has not been appraised within the last 3 years, consider obtaining an appraisal from a reputable jeweler.
- Make sure the appraisal has a description of the diamond's four C's -- (a) carat, (b) cut, (c) clarity, and (d) color. Remember that the better the appraisal, the fewer problems you will encounter with the insurer if you ever have to make a claim.
- Purchase inland marine coverage that can be added via an endorsement onto your homeowners policy. This endorsement (also available as a separate policy) provides much broader coverage than the limited protection found on the unendorsed homeowners policy.

- Consider keeping any valuable jewelry you rarely wear in a safety deposit box at your bank.
- Review your jewelry protection with us at least every 2 years or whenever you sell or purchase high-value jewelry.

For more information, or to discuss your valuables, contact:

Tony Preston, PCIA VP Personal Lines
810.224.5267 or tpreston@pciaonline.com

risk·al·i·ty

(risk-al-i-tee) *n.* real level of personal risk exposure

Think you're covered...maybe not! Our team will perform PCIA's exclusive Personal Protection Review™ to help you to identify insurance coverage gaps and save money. We then work with major insurance carriers to find the most competitive rates available.

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