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ARCHITECTS & ENGINEERS NEWSLETTER

CONSTRUCTION STATUTE OF REPOSE UPDATE:
CONFLICT IN APPELLATE COURTS CREATE OPPORTUNITY FOR CLARITY ON STATUTE'S REACH

Three years ago, we discussed whether the 10-year limitation of the construction statute of repose espoused in R.C. §2305.131 applies to claims for breach of contract as well as to claims sounding in tort.[1] The statute states that no claim for damages arising from a defective and unsafe condition of an improvement to real property may accrue more than 10 years after the date of substantial completion of the improvement. It is beneficial to designers because it creates a bright line rule for when liability exposure ends. However, the statute's reach has been uncertain since its enactment in 2005.

The uncertainty stems from the language of the current version of the statute compared to courts' historical analysis of prior enactments. Versions of the construction statute of repose date back to 1961, when Ohio, along with several other states, attempted to limit the particular vulnerability of designers and contractors to protracted lawsuits due to the erosion of the privity requirement and the manner in which statutes of limitation toll in tort and contract claims. The current enactment states that it applies to any "cause of action" meeting its statutory requirements. However, the Ohio Supreme Court limited application of a prior version of the statute to claims sounding tort in part because that version of the statute used language traditionally associated with tort law and had "[n]o legislative history to help (courts) interpret the statute[.]" See *Kocisko v. Charles Shutrump & Sons Co.*, 21 Ohio St.3d 98 (1986) citing *Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co.*, 14 Ohio App.3d 281 (1st Dist. Ct. App., Apr. 18, 1984).

When the current statute was enacted, the Ohio General Assembly included a lengthy statement addressing its intent and the scope of the statute. The "Statement of Findings and Intent," describes that designers lack control over improvement and maintenance decisions of an owner subsequent to construction, lack control over the forces, uses, and intervening causes that may impact a project, and have no opportunity to be made aware of or evaluate the effect of any forces, uses, or intervening causes impacting a project. It concludes by stating that the statute promotes a "greater interest" than other general statutes of limitation, such as the statute of limitations for breach of contract claims.

It appears likely that we will soon have clarity on this issue. Two district court of appeals have recently authored conflicting opinions on whether the statute applies to claims for breach of contract, as well as claims sounding in tort.

In *New Riegel Local Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 2017-Ohio-8521 (Nov. 13, 2017), the Third District Court of Appeals held that the statute applies only to claims sounding in tort. The Court struggled with the apparent conflict between the plain language of the statute and the Ohio Supreme Court's prior ruling in *Kocisko*, stating that, the "[s]tatute specifies that NO cause of action for damages to real property, resulting from the improvement to that real property, can be brought after 10 years from the time the improvements were substantially completed. The statute does not limit it to claims for torts only." Nevertheless, the Court felt compelled to follow the ruling of *Kocisko* as binding precedent, and held that the statute's bar does not apply to claims for breach of contract.

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[1] *See* "Does Ohio's Construction Statute of Repose Apply to Breach of Contract Claims?" Spring 2015 Architects & Engineers Newsletter, Weston Hurd LLP

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The Fifth District Court of Appeals, however, recently authored an opinion agreeing with the position stated in our 2015 article; that the statute's bar applies to any claim meeting its statutory requirements, whether sounding in tort or breach of contract. In *State v. Karl R. Rohrer Assocs.*, 2018-Ohio-65 (Jan. 8, 2018), the Court found that the plain language of the current version of the statute, along with the statement of intent by the General Assembly, made clear that the 10-year limitation applied to any claims "[b]rought against design professionals for injury to person or property caused by a defective or unsafe improvement to real property, whether such action sounds in tort or contract." The Fifth District further held that the *Kocisko* decision is not binding precedent because its holding was limited to the prior version of the statute it was interpreting.

As of now, a jurisdictional appeal has been filed with the Ohio Supreme Court in the *New Riegel* litigation (Case No. 2018-0189) and is pending review. Several entities, including the Ohio Association of Civil Trial Attorneys and AIA of Ohio, have filed *amicus curiae* briefs in support of the jurisdictional appeal. While it is not mandatory that the Court accept jurisdiction of the appeal, it is likely given the conflicting opinions of the district courts. If the Supreme Court agrees with the interpretation of the statute espoused in the *Rohrer* decision, it will mark a victory for designers and have a significant impact on limiting construction litigation moving forward. ■

AIA V. OFCC – RISK MANAGEMENT

The following is a comparison of the provisions in the Owner/Architect agreements pertaining to risk reduction and risk creation and how different provisions can reduce the design professional's risk. There are provisions contained within the AIA Owner/Architect Agreement that do not exist in the Ohio Facilities Construction Commission (OFCC) agreement, and there are provisions in the OFCC agreement that create additional potential liabilities. Additionally, the OFCC documents impose obligations on architects/engineers (A/E) creating potential liability that are the subject of future articles.

RISK MANAGEMENT PROVISIONS NOT AVAILABLE IN OFCC DOCUMENTS

Assignment

§10.3 of the B101-2017 precludes either party from assigning the agreement without the written consent of the other. Exception is for an assignment to a lending institution as long as the lending institution assumes the rights and obligations of the owner. The OFCC document allows for the state to assign the contract, but precludes the architect or engineer.

Waiver of Consequential Damages

Both B101-2017 and the OFCC A/E Standard Terms and Conditions have a waiver of consequential damages. However, the waiver does not apply under §5.3.2.1 of the OFCC A/E Standard Terms and Conditions to the indemnity obligation the A/E owes to the state/owner under §7.4 discussed below.

Indemnification

The B101-2017 has no indemnification provision. §7.4 of the OFCC A/E Standard Terms and Conditions requires the A/E to indemnify, defend, and hold harmless the owner from all claims, damages, and losses as a result of bodily injury or property damage or a "violation of Applicable Law." Further, the provision requires indemnity regardless of the A/E proportionate share of liability. In other words, the A/E could only be 10 percent responsible for the bodily injury, but would be 100 percent responsible for paying the state's indemnity claim. The duty to defend arises regardless of whether the A/E believes it has any liability for the bodily injury or property damage.

Copyright

Under Article 7 of the B101-2017, the architect retains copyright and ownership of the instruments of service. Under Article 9 of the OFCC A/E Standard Terms and Conditions, ownership and copyright is transferred to the state/owner with the exception that the A/E maintains the rights to standard details and specifications but grants a license to the state to use those standard details. However, if the state/owner intends to use the instruments of service on another project, the state/owner must compensate the A/E.

Mediation

The B101-2017 requires mediation as a condition precedent to arbitration or litigation under §8.2. There is no mediation requirement in the OFCC documents.

Means and Methods

B101-2017 §3.6.1.2 makes it clear that the architect is not responsible for the contractor's means and methods. There is no such provision in the OFCC documents. This does not mean the A/E has liability for the contractor's means and methods, but it is not specifically addressed. ■

OWNER/ARCHITECT AGREEMENT CHANGES – B101-2017

This article serves as a simple and helpful reference regarding the most significant changes in the B101. While it is not intended to address all changes in the 2017 AIA Document, rather it focuses on the ones we felt were the most significant.

ARTICLE 1 – INITIAL INFORMATION

§1.1 (Project Information)

Three pages of the B101-2017 are dedicated to subsections under §1.1. These sections require the owner and architect to meet and describe the owner's program, owner's budget, milestones, procurement, and delivery method (i.e. as a competitive bid, and negotiated bid, fast track, phase construction), sustainable objectives, owner representative, owner consultant, architect representative, architect consultant. §1.1.1 (Owner's program) and §1.1.3 (Owner's budget) are rudimentary but often they are not clearly established and become the focus of litigation. In recent litigation, the owner took the position that the architect failed to comply with the owner's program and budget and therefore did not have to be paid for the CDs that had been created. The owner was also the developer and builder which is the most likely scenario for a "fluid" program and budget.

§1.2 (Reliance on Owner Provided Information)

This section retains the architect's right to rely on the owner to provide information, but significantly provides that the owner "shall" adjust the owner's budget and milestone dates based upon modifications to the original information provided. Most importantly, it provides that the architects' fees "shall" be appropriately adjusted for material changes to the initial information.

§2.5 (Insurance)

This section now requires more detail on insurance coverage requirements. Further, Section 2.57 includes a requirement that the architect name the owner as an "additional insured" on the architect's CGL and auto liability policies and that such coverage will be primary.

ARTICLE 4 – SUPPLEMENTAL AND ADDITIONAL SERVICES

Several provisions were added to enable the architect to charge for additional fees. §4.1 was revised to set forth "Supplemental Services." Supplemental services are not part of the architects' basic services and are to be paid in addition to basic services. The supplemental services are not to be provided unless they are set forth in the "Supplemental Services Table." According to the AIA, additional services are intended to be used for unforeseen changes, while supplemental services are intended for services that are foreseeable, but are not typically included in the basic services.

§4.2.1.3 (Interpretation of Codes, Laws, Regulations By Permit Authorities)

This section addresses changes to codes, laws, and regulation. The intent is to solve a problem that has vexed design professionals; building code officials regularly imposing additional design requirements or changes to previously submitted plans. Even though the design professional often disagrees with the code official's interpretation, nevertheless to get the plans approved, revisions are made. This provision enables the architect to recover fees redrafting the plans as additional services.

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§5.12 (Communications)

Communications from the owner to the contractor no longer have to flow through the architect. Instead, the owner need only include the architect in communications that affect the architect services.

§6.7 (Modification of Construction Documents to Meet Budget)

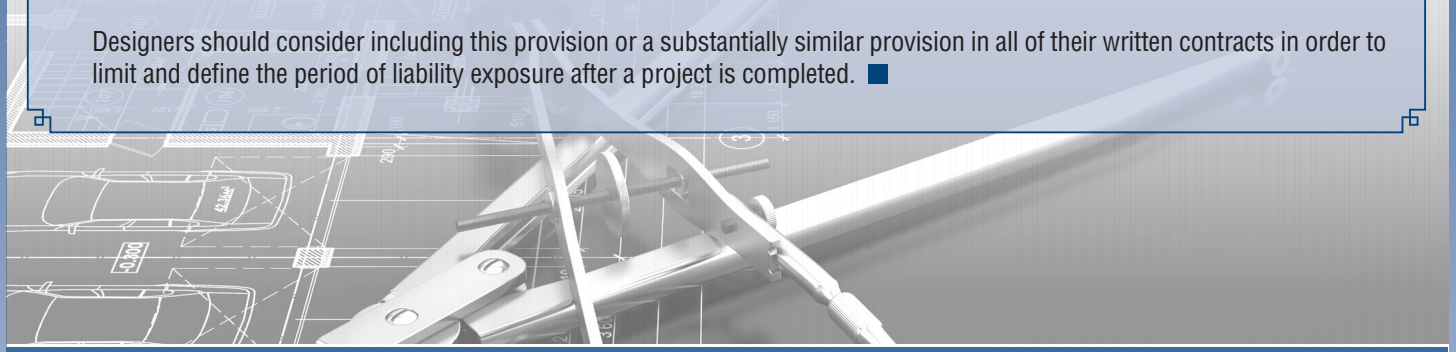
Previously, this section required the architect to perform redesign "without additional compensation" if the owner exceeded its budget and when the owner desired to revise the project scope. No longer. The architect is now entitled to payment as additional services if the proposals exceed the owner's budget due to "market conditions" not reasonably anticipated by the architect. This will lead to an interesting discussion between the owner and the architect as to what should be "reasonably anticipated." ■

CLAUSE CORNER

The status of the construction statute of repose offers an opportunity to remind designers that the best way to create a definite period of liability exposure is through contract. Section 8.1.1 of AIA Document B101–2017 contains language that creates a specific period of liability exposure between the contracting parties. It states:

> The Owner and Architect shall commence all claims and causes of action against the other and arising out of or related to this Agreement, whether in contract, tort, or otherwise, in accordance with the requirements of the binding dispute resolution method selected in this Agreement and within the period specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Architect waive all claims and causes of action not commenced in accordance with this Section 8.1.1.

Designers should consider including this provision or a substantially similar provision in all of their written contracts in order to limit and define the period of liability exposure after a project is completed. ■



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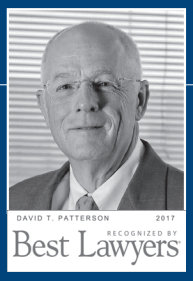

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