

## UNITED STATES DISTRICT COURT IN OHIO TACKLES QUESTION OF PERSONAL LIABILITY FOR DESIGN PROFESSIONALS

**By: Frederick T. Bills**

Last year at this time, Weston Hurd LLP brought attention to the trend of plaintiff attorneys filing claims personally against individual design professionals for professional negligence in standard breach of contract construction cases.<sup>1</sup> The practice is based on the theory that professional negligence is a viable tort claim independent from an underlying breach of contract claim an owner may allege against a design firm with which it contracted. At the time, we opined that tort claims against individual design professionals is improper where the action is predicated on conduct arising out of a purported breach of contract and that the economic loss doctrine bars such actions where the owner is not in privity of contract with the individual design professional against whom it filed suit.

In February 2015, the United States District Court for the Northern District of Ohio issued a favorable decision for design professionals in which it agreed with our opinion that the economic loss doctrine bars such actions. The case involves a design-build firm that filed suit against an engineering firm for claims sounding in both breach of contract and professional negligence, and against an individual design professional for professional negligence. The plaintiff sought damages related to remediation costs for the contracted project; in other words, the plaintiff sought recovery for purely economic damages. The design professional included in the suit provided structural engineering work on the project as an employee of the design firm.

The decision is titled *Babcock & Wilcox Power Generation Group v. R.T. Patterson Co.*, Case No. 5:13-cv-2071, 2015 U.S. Dist. LEXIS 17552 (N.D. Ohio Feb. 12, 2015). Our brief on behalf of the design professional asserted that Ohio's economic loss doctrine prevents the recovery of purely economic losses in a negligence action where recovery of such damages is not based upon a tort duty independent of contractually-created duties. At its core, the doctrine stands for the principle that a plaintiff who has suffered only economic loss due to another's negligence is not injured in a legally cognizable manner. The court agreed, noting that "[i]n the absence of privity of contract no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications." The court noted that the design professional merely completed work as an employee of the engineering firm on the project and that he held no contract with the owner. As such, the court dismissed the professional negligence claim against the individual design professional.

The decision should be welcome news to design professionals. It reaffirms Ohio's tradition as a strong economic loss doctrine state, and, most importantly, limits the liability exposure of individual design professionals. The decision directly opposes the practice of plaintiff attorneys filing tort claims against individual design professionals in cases involving contractually-created duties with a design firm, and should be relied upon as a basis for a motion to dismiss such claims when they arise. ■

<sup>1</sup>"Can an Owner Hold Individual Designers Personally Liable?" [Spring-Summer 2014 Architects & Engineers Newsletter](#).

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# FILE RETENTION

By: David T. Patterson

How long should a design firm keep its files is a question that is commonly asked. In order to respond, both contract claims and tort claims have to be considered. Contract claims are claims typically brought by the entity with whom the design firm has its contract, normally the owner. Tort claims are claims brought by a third-party, generally for personal injury or property damage. Each needs to be considered in order to answer the question as to how long files should be maintained.

## CONTRACT CLAIM

Claims brought pursuant to the contract are governed by what the contract states as far as the time period in which an action can be filed. Under the AIA document B101-2007 Owner/Architect Agreement Section 8.1.1 allows claims to be brought no more than 10 years after the day of substantial completion of the work. Therefore, assuming that the B101-2007 document has been used, it would be reasonable to purge files within a reasonable period of time after the 10 year period has lapsed. Therefore, 11 or 12 years after substantial completion would be a reasonable period. If your contract has a shorter provision than the 10 years indicated in Section 8.1.1 then one to two years after that shorter time period would be reasonable.

However, if the AIA document B101-2007 was not used and there is no provision in the Owner/Architect Agreement setting forth a limitation period to bring an action, it becomes more complicated. The contract Statute of Limitations in Ohio is eight years from the date of accrual of the cause of action. Accrual happens when both breach and damages happen. Therefore, if the breach happens during design and damages occur almost immediately after completion of construction then the owner would have eight years to bring its cause of action from the time the breach and damages occurred. However, if the damages do not occur until five or even 10 years after the design defect, then the owner would have eight years from the time the damages are sustained to bring its cause of action. As can be seen, there is no set answer to how long to keep a file when there is no contract language establishing the date in which a claim has to be brought. The Statute of Repose could address this issue if interpreted to apply to a contract claim. (*See Statute of Repose article*).

## TORT CLAIM

Claims for personal injury and property damage by a third-party can be brought no later than 10 years after substantial completion of the project. The exception being that if a claim accrues within the last two years of the 10 year period, the plaintiff would have an additional two years from the date of injury to bring its suit. Therefore, a reasonable period of time after the longest period available of 12 years would be 13 to 14 years to retain files.

## CONCLUSION

In conclusion, if a design firm has a contract provision that limits the time in which an action can be brought by an owner, the longer possible period in which an action could be brought would be in tort and therefore, it would make sense to purge files 13 to 14 years after substantial completion. If there is no contract provision which would limit the time that an owner can bring a cause of action, there is no safe period in which to purge files since in theory damages from design defect could occur many years after substantial completion. ■

# DOES OHIO'S CONSTRUCTION STATUTE OF REPOSE APPLY TO BREACH OF CONTRACT CLAIMS?

By: Frederick T. Bills

Two years ago, we discussed the impact of the 10 year limitation of the construction statute of repose in O.R.C. §2305.131 as reducing liability exposure of designers by limiting the time period to file actions.<sup>1</sup> The construction statute of repose 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 as to when the "clock" barring claims begins to run. However, Ohio law is unclear as to whether the statute applies to both breach of contract claims and tort claims, or if its application is exclusive to tort claims.

<sup>1</sup> "Statute of Repose" [Spring 2013 Architects & Engineers Newsletter](#).

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The uncertainty stems from Ohio courts’ history of analysis of the statute. 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 litigation due to the erosion of the privity requirement and the manner in which statutes of limitation toll in tort and contract claims. The statute attempts to establish a bright line rule for when liability exposure ends. The statute has taken several forms over time because of constitutional challenges. The current version of the statute replaced and modified a prior version of the statute that was held unconstitutional in 1994. The prior version of the statute was limited in application to tort claims by the Ohio Supreme Court. In *Kocisko v. Charles Shutrump & Sons Co.* (1986), 21 Ohio St.3d 98, the Court adopted the holding in *Elizabeth Gamble Deaconess Home Ass’n v. Turner Constr. Co.*, 14 Ohio App.3d 281 (1st Dist. App. Ct., Apr. 18, 1984), which limited application of the statute to tort claims in part because the statute had “[n]o legislative history to help (courts) interpret the statute[.]”

The current version of the statute, enacted in 2005, includes an extensive statement by the Ohio legislature regarding its intent and scope of application. In its “Statement of Findings and Intent,” the legislature 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. As such, the purpose of the 10 year limitation is to create a clear timeline of liability exposure for designers. The legislature concludes by stating that the section promotes a “greater interest” than other general statutes of limitation.

In one of our current cases, we have argued that the current construction statute of repose should apply to both claims for breach of contract and tort claims. While there is no case law specifically on point, our review of the legislative history of the statute and the positions taken by other states lead us to believe that the statute should act so as to bar all claims, regardless of whether they sound in breach of contract or in tort, 10 years after the date of substantial completion of a project. First, the “Statement of Findings and Intent” expresses the purpose for the statute to create a clear deadline for liability exposure to designers and contractors and appears to be a direct response to the Ohio Supreme Court’s decision in the *Kocisko* case. Second, our review of other states’ version of the statute reveals that 48 states, the District of Columbia, and the Territory of Guam have all enacted some form of the construction statute of repose. Not including Ohio, an overwhelming majority of 34 apply the statute to claims for breach of contract. Meanwhile, only 12 restrict application of the statute to claims sounding in tort and the positions of just three are undecided. Among the states that apply their version of the construction statute of repose to claims for breach of contract, several are worded substantially similar to O.R.C. §2305.131. Unsurprisingly, most states agree with the proposition that the construction statute of repose was designed to apply to breach of contract claims because the protection it affords would be “[f]ragile, indeed, if it depended on how a plaintiff chooses to frame and plead its cause of action.”<sup>2</sup>

Ultimately, Ohio courts must decide this issue. If it is determined that the statute applies to breach of contract claims as well as tort claims, it would be a significant victory for designers and contractors. We currently have three separate cases in which the statute of repose would act so as to bar the contract claims of an owner because the cause of action was brought more than 10 years after the date of substantial completion of a project. We have fully briefed the matter in litigation pending in the Belmont County Court of Common Pleas, and its decision will be our first indication of whether courts agree with our analysis. ■

<sup>2</sup> *Hagerstown Elderly Assocs. L.P. v. Hagerstown Elderly Bldg. Assocs. L.P.*, 368 Md. 351, 362 – 363 (Md. App., March 12, 2002).

## THE CLAUSE CORNER

By: Frederick T. Bills

As is clear in the articles of this newsletter, designers are particularly vulnerable to protracted periods of civil liability exposure because of the uncertain manner in which the statute of limitations for breach of contract claims accrue (“when breach and damages occur”) and the uncertainty of whether Ohio’s construction statute of repose applies to breach of contract claims. AIA Document B101 – 2007 Standard Form of Agreement Between Owner and Architect at Section 8.1.1 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, whether in contract, tort, or otherwise, against the other arising out of or related to this Agreement in accordance with the requirements of the method of binding dispute resolution selected in this Agreement 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 its written contracts in order to limit and define the period of liability exposure a designer faces after a project is completed. ■

# THRESHOLD APPROACH TO STANDARD OF CARE

**By: David T. Patterson**

Ohio Jury Instruction provides the following as to an architect/engineer's standard of care:

"The existence of an Architect (Engineer)-Client relationship places on the Architect (Engineer) the duty to act with the degree of skill, knowledge, care, and diligence normally applied by members of that profession under like or similar circumstances. This is known as a standard of care. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you will find that he/she was negligent."

I have reviewed numerous other "tailored" jury instructions pertaining to the architect or engineer's standard of care. Some make reference to perfection as not being the standard. Others refer to unsatisfactory results alone as not necessarily being evidence of lack of skill or proper care. Still others include language that a bad result does not necessarily suggest a violation of the standard of care. Regardless of other qualifying language, the core of the instruction focuses on providing "... knowledge, skill, and judgment ordinarily possessed and exercised in a similar situation."

Section 2.2 of the AIA B101-2007 provides the following:

"Architect shall perform its services consistent with professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."

The above language mirrors the Ohio Jury Instruction as well as other jury instructions that I have reviewed. Clearly perfection is not the standard. No architects in any area or under any circumstance practice at a level of perfection. So what is an acceptable level of non-perfection? The "Threshold Approach" is an attempt to quantify the amount of imperfection resulting from design errors and omissions. Since perfection is not the standard, it seems to make sense that a violation of the standard of care only occurs when a reasonable threshold of errors has been crossed. If the damages being claimed relate to correcting defects in the project, in other words, increase cost to the owner as a result of design errors, then the Threshold Approach makes a great deal of sense in determining whether the standard of care has been violated. It probably does not make sense in a personal injury case since the concerns of the injured party are not whether or not the owner incurred increased cost. In a personal injury case, the focus is on issues related to safety as opposed to additional construction cost.

There are no cases which I can report that have addressed the Threshold Approach. Therefore, there is no precedent that could be relied upon to show that the courts have adopted this approach in analyzing the standard of care. Although there are no cases addressing the Threshold Approach, studies have been completed in order to justify benchmarks to measure the quality of the design. One such study was conducted in 1994 by the National Research Council and focused on projects developed by the federal government. The study concluded that construction changes due to architectural and engineering errors and omissions should not increase the cost of construction by more than five percent. An earlier study by the Construction Industry Institute showed that the correction of design errors and omissions should not increase the cost of construction by more than two to three percent. Sweet, in his treatise on construction industry contracts, also referred to the Threshold Approach and discusses language created in the owner/architect agreement creating a "three percent safe zone." The language Sweet suggests is the following:

"Accordingly, the Owner and Architect/Engineer agree to fix the sum within which the Owner shall not look to the Architect/Engineer for either responsibility or compensation for costs which might be attributable to errors, omissions, conflicts, or ambiguities in the design. For purposes of this project, that limit shall be fixed at 3 percent of the Construction Cost. Cost incurred by the Owner in excess of this amount shall be compensable by the Architect/Engineer, but only to the extent caused by a negligent act, error, or omission in the performance of services under this Agreement."

In conclusion, the Threshold Approach for design errors and omissions which impact construction cost is a valid, reasonable, and appropriate method to determine the designer's standard of care. Consideration should be given to making the threshold part of the contract language in the owner/architect agreement. ■



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