Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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The Source for Defense Success

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President's Note

Jamey T. Pregon, Esq.
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Summer is nearly over, but the COVID-19 pandemic is still here. OACTA is still here, too. Better late than never, we present you with our Summer Quarterly, which is brought to you by the Construction Litigation Committee. Many thanks to the Construction Litigation Committee Chair, Patrick Corrigan, for coordinating this *Quarterly*, and to authors John Farnan, Frederick Bills, Stephanie Osterholt for their articles on important and timely construction litigation topics. Double thanks to Patrick Corrigan for also contributing an article as well.

We have entered the home stretch of this unprecedented year. We have just wrapped up another Insurance Coverage Seminar, which was the second of our two yearly seminars to go virtual due to the pandemic. Thanks to Mike Neltner, the chair of the Insurance Coverage Committee, and to Michelle Burden, the chair of the Personal Injury Defense Committee, for being able to pivot to virtual seminars when it became impossible to have in person seminars due to COVID-19. Both seminars were well attended, and had talented and informative speakers. OACTA has also continued to provide webinars practically every week this year on a variety of topics.

More information about the Annual Meeting will be coming soon, as we anticipate some changes to the format and delivery, due to COVID-19. This year's Annual Meeting will have a COVID-19 theme to it, and will feature panels of judges and litigators who have tried cases since the COVID-19 pandemic, and many other timely topics. The Annual Meeting will kick off with our business meeting, and award ceremony, on the afternoon of November 12, with the seminar programming to follow, and will conclude the morning of November 13. There will be more details to come, so please mark your calendars.

COVID-19 has certainly been a test of everyone's strength and fortitude, but we all are proving that we are up to the challenge. We are all doing our best to get through all of the challenges that this year has brought. James Lane Allen famously said "Adversity does not build character, it reveals it." We undoubtedly have seen this to be true in our personal lives and our professional lives during these challenging times, and I have witnessed it with OACTA this year. Our officers, board, and committees have risen to the challenge and have been engaged and dedicated to providing services to our membership. Debbie Nunner and Laney Mollenkopf have been invaluable in keeping things moving forward, particularly with our aggressive webinar schedule. So many others in our leadership and membership have come forward to write articles, present webinars, and help out in many ways behind the scenes. This year could have been a disaster, but it has been remarkable in so many ways. I have been thankful for the opportunity and ability as OACTA President to give back to my profession, and this organization, and I will continue to do so right up until I virtually pass the gavel to Natalie Wais in November. Please continue to look for opportunities to help others in these challenging times, and thanks to everyone for your time and effort this year.

Stay safe and healthy.

Introduction

Construction Law Committee

Patrick Corrigan, Esq., Committee Chair
Staff Counsel of The Cincinnati Insurance Companies

The OACTA Construction Litigation Committee has assembled an excellent series of articles, providing a roadmap through some of the more challenging legal issues faced by construction litigators. The current national challenges related to Covid-19 and the economy will put a slight cramp in construction activity, and thus perhaps construction claims. However, the economic growth of the last decade has brought extensive new construction, in the commercial, residential and governmental settings. We can anticipate that failures and defects in materials and/or workmanship will continue to provide a wide array of challenges for the construction litigator.

John Farnan, Esq. of Weston Hurd, LLP, has provided an excellent road map for the analysis of CGL coverage and construction related claims. The analysis provides clarity for understanding the terms applicable to an insurance coverage contract, specifically as to how the courts have construed the term "occurrence" and how it applies to defective workmanship. The article highlights the exclusions, as well as the fact that some carriers have made provision for coverage for damage resulting from work and work product.

One of the more challenging areas for construction litigators has been the Statute of Repose. Frederick T. Bills, Esq. of Weston Hurd, provided an intelligent summary of *New Riegel Local School District Board of Education v. Buehrer Group Architecture & Engineering, Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851. Fred provides a detailed analysis of the meaning of the word "accrue" and gives excellent attention to Justice French's majority opinion. His analysis of Justice Kennedy's concurring and dissenting opinions illuminates the unanswered questions and potential avenues for argument. The article also addresses the express warranty exceptions in the statute, as well as the meaning and application of the terms *"defective"* and *"unsafe condition,"* as it has been pursued in cases and construed by the courts.

Stephanie Osterholt, P.E., of CED Technologies has provided an engineer's perspective on construction sequencing, product installation and the critical standards that apply to materials in construction. Her essay provides guidance to the litigator on materials to be sought in discovery as well as details on the manufacturing standards for building products, i.e. adhered stone and masonry veneers.

Finally, we have a brief book review of Salvadori's *Why Buildings Stand Up*. Salvadori's classic book will provide not only enjoyable reading, but guidance on the understanding of structures. The Construction Litigation Committee stands ready to provide guidance and shared input for its members. I encourage you to join and participate in the committee to advance our mission of sharing knowledge and resources for the defense of construction claims. If you have any interest in working up our goals for next year, please direct an email to my attention at: Patrick_corrigan @staffdefense.com

Analyzing CGL Coverage For Construction Related Claims

John G. Farnan, Esq.
Weston Hurd LLP

Many contractors, builders and developers, in the construction trades, have third party liability coverage via Commercial General Liability ("CGL") insurance policies. This article will provide a brief overview of how insurers typically examine construction defect claims and lawsuits, against insureds, that arise out of alleged deficiencies in an insured's construction work.

1. CGL Policies Are Neither Performance Bonds Nor Builder's Risk Policies

First, insured contractors often mistakenly believe that CGL policies are performance bonds. CGL policies are not performance bonds or builders' risk policies. *Nationwide Insurance Company v. Phelps*, 7th Dist. Columbiana No. 03CO23, 2004-Ohio-1200.

The typical CGL policy, insuring a contractor on a third party liability claim, does not insure the integrity of the contractor's work. Put another way, the typical CGL policy does not provide coverage for the costs to repair, replace, finish or re-do the insured's faulty work. Instead, properly understood, the CGL policy provides coverage for third party liability claims that allege, for purposes of determining whether an insurer owes a defense, or prove, for purposes of determining whether the insurer owes indemnity, that such defective work caused consequential property damage to another's property or work or bodily injury to a person.

For example, assume that a school hires a roofing contractor to put a new roof on the school gymnasium. If the roof leaks, due to faulty or poor workmanship, the school might bring a claim against the roofing contractor. The roofing contractor would likely then turn in the claim to its CGL carrier for a defense and/or indemnity. Here, speaking broadly, the CGL policy would not provide any third party liability insurance coverage for the cost of repairing or replacing the allegedly defective roof. However, if the roof leaks and causes damage to the wooden gym floor, then there would likely be coverage for the repair or replacement of the damaged gym floor – as that damage would be consequential property damage arising from the insured's poor workmanship.

2. Claims For The Cost To Repair, Replace, Complete or Re-Do The Insured Contractor's Own Defective Work Do Not State Claims For An Insurance Policy "Occurrence", A Prerequisite to Triggering The Third Party Property Damage Liability Coverage in The Typical CGL Policy

Many of the lawsuits or claims against insured contractors are for the cost to repair, replace, complete or re-do the insured's own allegedly defective work or incomplete work.

a) Claims for Defective or Negligent Work Are Not a Policy "Occurrence"

Putting bodily injury claims aside, the typical CGL policy only provides third party liability coverage for "damages because of * * *property damage to which this insurance applies", if the "* * *property damage is caused by an "occurrence" * * *." The typical CGL policy

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defines "occurrence" to mean an "accident", including continuous or repeated exposure to substantially the same general harmful conditions.

The Ohio Supreme Court has consistently held that an "accident", when used to define an insurance policy "occurrence", is expected and unintended. *Hybud Equip. Corp. v. Sphere Drake Insurance Company*, 64 Ohio St.3d 657, 666 (1992).

Under Ohio law, claims for defective construction or faulty workmanship are not claims for "property damage" caused by an insurance policy "occurrence." *See, e.g. Westfield Insurance Company v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712. Similarly, if an insured contractor hires a subcontractor, and that subcontractor performs defective or faulty work, a claim arising therefrom also fails to state an "occurrence" under a CGL policy per *Ohio N. Univ. v. Charles Constr. Servs.*, 2018-Ohio-4057.

Thus, the Ohio Supreme Court has made clear that insurance policies are not designed to cover the cost of repairing or replacing the insured contractor's own work, or that of its subcontractor, or the associated "business risks," but, rather, are intended to insure the risk of an insured causing damage to other persons or their property or other work. Accordingly, claims that the insured or its subcontractor performed faulty or defective work, that needs to be repaired, replaced, re-done or completed, do not trigger coverage in the typical CGL policy in the absence of claims of consequential damage to other persons or other property.

b) Claims For Breach Of A Construction Contract Are Not An "Occurrence".

Similarly, claims that the insured contractor's poor work amounted to a "breach of contract" do not state a claim for an insurance policy occurrence either. *Royal Plastics v. State Auto Mutual Insurance Company*, 99 Ohio App.3d 221 (8th Dist. 1994); *Auto Owners Mutual Insurance Company v. Kendrick*, 5th Dist. Ashland No.: 08-COA-028, 2009-Ohio-2169 and *Erie Insurance Exchange v. Colony Dev. Corp.*, 10th Dist. Franklin Nos. 02AP-1087, 02AP-1088, 2003-Ohio-7232.

In short, Ohio courts have generally found that CGL policies do not exist to protect insureds against "business risks", which are the "* * *normal, frequent, or predictable consequences of doing business and which business management can and should control or manage." *Reggie Constr. Ltd. v. Westfield Insurance Company*, 11th Dist. Lake No.: 2013-L-095, 2014-Ohio-3769, at ¶47.

c) Claims For Intentional or Negligent Misrepresentation Or Fraud Do Not State A Policy "Occurrence".

Property owners upset with poor construction work, or incomplete work, sometimes throw in claims for misrepresentation or fraud, claiming that the insured contractor overstated or misrepresented its competence and skill level. However, again, the Ohio Supreme Court has made clear that claims for intentional and negligent misrepresentation and fraud also fail to state claims for an insurance policy "occurrence" and, therefore do not trigger an insurance policy's liability coverage. *Cincinnati Insurance Company v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048.

See, also, Westfield Insurance Company v. D.C. Builders, 8th Dist. Cuyahoga No. 82870, 2004-Ohio-742 (The Court of Appeals ruled that claims for negligent misrepresentation were not covered because they did not arise out of an "occurrence" since "such intentional conduct cannot, under any stretch of the imagination, be considered an "accident" constituting an "occurrence" under the policy." *Id.* at ¶32).

d) Claims For Violations Of Consumer Statutes Do Not State A Policy "Occurrence".

Often times, in lawsuits against insured contractors, frustrated homeowners assert claims for alleged violations of Ohio's Consumer Sales Practices Act

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("OCSPA"),to try and obtain treble damages and attorney fees under those consumer statutes. However, due to a 2012 amendment to the OCSPA, home construction services are not even covered by the OCSPA. Instead, such claims are governed by the Home Construction Services Suppliers Act, also enacted in 2012.

However, a claim under either such consumer statute does not state a claim for bodily injury or property damage under an insurance policy. *See, i.e., Heritage Mutual Insurance Company v. Richart Ford, Inc.*, 105 Ohio App.3d 261 (10th Dist. 1995); *Chiropractic Clinic of Solon, Inc. v. National Chiropractic Mutual Insurance Company*, 8th Dist. Cuyahoga Nos. 73584, 1998 Ohio App. LEXIS 5937 (December 10, 1998); *Lakeside Terrace Home Sales, Ltd. v. Arrowood Indem. Co.*, 2006 U.S. Dist. LEXIS 114828 (N.D. Ohio, August 26, 2016) and *Auto Owners Mutual Insurance Company v. Kendrick*, 5th Dist. Ashland No. 08-COA-028, 2009-Ohio-2169. To prevail on such consumer statute claims, the claimants must prove intentional acts which neither state an insurance policy "occurrence", defined to mean an accident, and/or are excluded from coverage by CGL policy's Expected or Intended Act Exclusion.

e) New Policy Give-Backs Of The Insurer's "Occurrence" Defense.

Lately, in response to some market pressure, some insurers are starting to add back in some coverage, to CGL policies, that would otherwise be absent, via an amendatory endorsement entitled "Injury Or Damage To Or Resulting From Your Work And Injury Or Damage Resulting From Your Product." That amendatory endorsement provides coverage, for property damage, by expressly stating that it considers defective work to be a policy "occurrence" if there is damage to the insured's work that arose from work done by a subcontractor. However, such affirmative coverage would still not apply to "defective or faulty work".

In other words, there would still be no coverage, under the CGL policy, for the repair or replacement of a subcontractor's defective work. Instead, the affirmatively added coverage would be limited to the damage to the general contractor's work, and would still be subject to other exclusions.

Accordingly, in order to trigger the CGL policy's third party liability coverage for property damage, there must be allegations of consequential damage to property other than work done by the insured or its subcontractor. If there are such claims of consequential property damage, or bodily injury to another, arising from the allegedly defective work, then the policy is triggered subject to any potentially applicable exclusions.

3. If Coverage Is Triggered, Standard Exclusions May Apply To Bar Or Limit Coverage On Construction Defect Claims

Most CGL policies contain several exclusions that are often referred to as the "business risk" exclusions, one or more of which may apply to limit or to remove insurance coverage for claims for "property damage", arising out of construction defects, depending upon the facts of the particular case. Courts have explained that such "exclusions are standard, since 'replacement or repair of faulty * * *workmanship' is part of the risk of doing business, and not a liability which an insurer intends to cover." *I.G.H. II, Inc. v. Spilis*, 6th Dist. Wood No. WD-06-058, 2007-Ohio-2258 at ¶27. *See, also, LISN, Inc. v. Commercial Union Insurance Companies*, 83 Ohio App.3d 625 99th Dist. 1992).

a. The "Work In Progress" Exclusion

Most CGL policies preclude insurance coverage for claims for property damage arising from works in progress:

"5. We do not pay for property damage to that specific part of real property on which work is being performed by:

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a. You; or
b. A contractor or subcontractor working on your behalf, if the property damage arises out of such work * * *."

Courts have found that this exclusion applies only to "work in progress" meaning that it only applies when the damage occurred while the work was still being done. If the damage arose after the contractor completed the work, the exclusion does not apply. *Spears v. Smith*, 117 Ohio App.3d 262 (2nd Dist. 1996).

b. The "Faulty Work" Exclusion

The second applicable "business risk" exclusion is the "faulty work" exclusion:

"6. We do not pay for property damage to that specific part of any property that must be restored, repaired or replaced because of faulty workmanship. This exclusion does not apply to:

a. Property damage covered under the Products-Completed Work Hazard; or
b. Liability assumed under a written side track agreement.

The products-completed work hazard exception "permits coverage for tort liability for physical damage to others but not for contractual liability of insured who fails to produce work which is satisfactory to its customer." *Camp Frederick v. D&G Ents., Inc.*, 7th Dist. Columbiana Case No.: 98 CO 77, 1999 Ohio App. LEXIS 5949, at *14 (December 10, 1999), *citing Westfield Insurance Company v. Riehle*, 113 Ohio App.3d 249, 255 (6th Dist. 1996).

The Ohio Supreme Court applied this exclusion to preclude insurance coverage in *Zanco v. Michigan Mutual Insurance Company,* 11 Ohio St.3d 114 (1994). There, the insured, a general contractor, constructed a condominium complex. *Id.* at 116. The work gave rise to claims of numerous construction defects. The Ohio Supreme Court ruled that the exclusions for the named insured's work, and the named insured's product, applied to exclude insurance coverage. *Id.* at 116. *See, also, Erie Insurance Group v. Kratzer*, 9th Dist. Lorain No. 91CA005129, 1992 Ohio App. LEXIS 635 (February 12, 1992) (The Court applied the "faulty work" exclusion to preclude insurance coverage for damages that arose as a result of the need for restoration, repair or replacement of the insured's faulty workmanship).

c. The "Impaired Property" Exclusion

The "impaired property" exclusion removes insurance coverage for property damage to property that has not been physically injured or destroyed or to impaired property:

"SECTION I – COVERAGES
COVERAGE A – BODILY INJURY AND
PROPERTY DAMAGE LIABILITY

2. Exclusions

This insurance does not apply to:

***

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

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The Policy defines "impaired property" to mean:

8. "Impaired Property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill terms of a contract or agreement;

if such property can be restored to use by:

1) The repair, replacement, adjustment or removal of "your product" or "your work"; or

Your fulfilling the terms of the contract or agreement.

There is an exception to the impaired property exclusion, which applies when the damage to the property arises out of "sudden and accidental physical injury". In the absence of such a "sudden and accidental" event, the exception to the exclusion does not apply. *See, e.g., Acme Steak Company, Inc. v. Great Lakes Mechanical Company*, 2006-Ohio-2566 (7th Dist.); and *Hartzell Industries v. Federal Insurance Company*, 168 F.Supp.2d 789 (S.D. Ohio 2001).

Ohio courts have applied the "impaired property" exclusion to preclude coverage in the construction defect context: *See, e.g., Cincinnati Ins. Co. v. G.L.H., Inc.,* 6th Dist. Erie No. E-07-053, 2008-Ohio-5028 (applying the "impaired property" exclusion to preclude coverage on claims against the insured condo association asserting defective construction, breach of implied warranty, and negligence in connection with the construction of a condominium complex); *Owners Ins. Co. v. Reyes,* 6th Dist. Ottawa No. OT-99-017, 1999 Ohio App. LEXIS 4557 (Sept. 30, 1999) (applying the "impaired property" exclusion to preclude coverage for claims against an insured building contractor who allegedly performed substandard work and/or failed to complete work on the construction of the house); *Acuity v. City Concrete LLC*, 2006 U.S. Dist. LEXIS 79720 (N.D. Ohio Oct. 17, 2006) (applying the CGL policy's "impaired property" exclusion to preclude property damage coverage for damage or loss of use of a house due to the installation of a defective concrete driveway).

CONCLUSION

Based on current Ohio Supreme Court case law, and corresponding insurance policy language, insured contractors usually have no CGL insurance coverage for claims or lawsuits seeking to recover the property owner's cost to repair, replace, complete or re-do allegedly defective construction work.

In the absence of consequential damage to persons or other property, or other work, beyond the insured contractor's own work, such claims do not even trigger the typical insurance CGL insurance policy due to the absence of an "occurrence", defined to mean an "accident." Ohio law generally looks claims for the repair or replacement of the insured's own defective work as a "business risk" that is not covered by a CGL policy.

If there are claims for consequential bodily injury or property damage to others or the work of others, then coverage may be triggered subject to any applicable exclusions.

Even if there is a policy "occurrence", standard CGL exclusions, discussed above, may apply to limit or preclude coverage depending on the facts of the particular claim and the allegations arising therefrom.

Insureds in the construction business or trades should understand that their CGL policies provide some third party liability coverage but they are not performance bonds or builders risk policies. There are some endorsements and limited coverage offerings, by insurers, starting to creep into the marketplace to provide limited coverage for damages, for example, caused by an insured's subcontractor's defective work to the insured's own work or other work on the property. Insureds seeking such coverage should sit down with

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their insurance agent, prior to purchasing the coverage, to discuss the availability of such coverage and whether, when available, it is worth the additional cost.

On the other hand, insurers should be wary about "giving away" hard fought victories and coverage defenses, developed over the years, that are now supported by Ohio Supreme Court decisions and a body of Ohio Appellate Decisions.

John G. Farnan, Esq., is a Partner with Weston Hurd LLP, practicing primarily in the areas of insurance coverage, and the defense of claims arising from personal injury, premises liability, and professional liability. John received his B.A., cum laude, from Georgetown University and his J.D. from the University of Notre Dame Law School.

John is a co-founder and former President of the National Lawyers Association and is a member of the Federation of Defense and Corporate Counsel. In 2002, OACTA voted John as "Member of the Year". He is the past Chairman of OACTA's Insurance Coverage Committee and a former member of OACTA's Board of Directors. From 2016-2018, John was a fellow of the American College of Coverage and Extra-contractual Counsel.

John has lectured on insurance coverage issues throughout Ohio and in Philadelphia, New York City, New Jersey, Chicago, Denver, Pittsburgh and Virginia on various topics, including insurance coverage for construction claims, Y2K claims, "Me Too" claims, "bad faith" claims, claims against architects and engineers, business interruption claims arising from the Coronavirus, claims arising from the use of the internet and other electronic media, and on advertising injury coverage, UM/UIM coverage, tort reform, "splitting files" and legal ethics.

John has published numerous articles on insurance issues and previously served as editor of the OACTA quarterly insurance coverage newsletter. He is the current editor of Weston Hurd's Desktop Legal Primer for Ohio Claims. John is AV-rated by Martindale-Hubbell. Since 2007, Thomson Reuters has named John an Ohio Super Lawyer in Insurance Coverage and, previously, in Appellate Practice. Since 2011, John has named in Best Lawyers in America® for Commercial Litigation, Insurance Law and Personal Injury Litigation. More recently, John has been named Best Lawyers® 2020 "Lawyer of the Year" in Cleveland for Insurance Law.

Following the Construction Statute of Repose After *New Riegel*

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On July 17, 2019, the Ohio Supreme Court held that the construction statute of repose applies to contract claims, as well as tort claims, so long as the claims and damages asserted therein meet the statutory criteria of R.C. 2305.131. See *New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851 (2019). The statute states that no claim to recover damages for injury to real property that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement later than ten years from the date of substantial completion of the improvement. *See* R.C. 2305.131(A)(1).The holding in *New Riegel* is significant because the Supreme Court previously held that former iterations of the statute applied exclusively to claims sounding in tort. In effect, those rulings allowed for claims sounding in contract, or claims between parties in privity, to be filed until the statute of limitations for written contracts, R.C. 2305.06, expired. Under Ohio's delayed-damages rule and the tolling of statutes of limitation, the Supreme Court's prior interpretation resulted in prolonged periods of exposure for contractors, subcontractors, and design professionals to owners.

After *New Riegel*, contractors, subcontractors, and design professionals were assured greater certainty in their respective periods of exposure following substantial completion of a project. However, despite its facially broad holding, certain questions regarding the scope of R.C. 2305.131 linger. This article will attempt to identify and address the status of those questions.

Questions Following *New Riegel*

1. The meaning of "accrue" as used in the statute.

The first question not answered by *New Riegel* is whether R.C. 2305.131 applies to claims that accrue during the ten-year period of repose, but which are not filed until after the ten year period expires. The statute states, in pertinent part, as follows:

> (A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property ***shall accrue*** against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

R.C. 2305.131(A)(1) (emphasis added). The appellee school district in *New Riegel* argued that the use of "accrue" in the statute demonstrates that R.C. 2305.131 was never intended to apply to claims sounding in breach

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because such claims accrue at the time of project delivery to the owner, and therefore reasoned that all claims for breach would accrue within the ten-year period of repose such that the statute would never apply. See *New Riegel*, *supra*, at ¶ 35 (J. Kennedy dissenting in part, concurring in part).

It should be noted that the appellee school district's general theory of accrual in *New Riegel* is incorrect. Ohio has long adhered to the delayed-damages rule for accrual in breach of contract claims. See *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 324 (2010) ("[A] cause of action for breach of contract does not accrue until the complaining party suffers actual damages as a result of the alleged breach." citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 42 Ohio App.3d 6, 8 (9th Dist. Ct. App. 1988). "[W]hen considering when a cause of action accrues in construction cases, we have used the delayed-damages rule…the…rule considers when all elements of a cause of action have come into existence." *Oaktree Condo. Ass'n v. Hallmark Bldg. Co.*, 139 Ohio St.3d 264, 267 (2014).

Justice French and the majority in *New Riegel* specifically declined to answer the question of accrual, noting that the question was beyond the scope of either proposition of law before the Court. See *New Riegel*, *supra*, at 174. Justice Kennedy, however, provides guidance in her opinion concurring in part and dissenting in part on the question of accrual. Justice Kennedy notes that applying R.C. 2305.131 only to causes of action that accrue after the ten-year repose period would render entire sections of the statute meaningless. For example, R.C. 2305.131(A)(2) creates a discovery-rule exception to the statute, where a plaintiff is given an additional two-year period to file a claim where a defective and unsafe condition is discovered in the final two years of the ten-year repose period. However, if the statute does not apply to claims that accrue during the ten-year period, then there is no need to include a discovery rule exception and extension. Because courts must evaluate statutes to give effect to every word and clause where plausible, Justice Kennedy rejects appellee school district's accrual argument. Justice Kennedy's opinion also notes that the Supreme Court previously analyzed R.C. 2305.131 as applying to bar claims that accrue during the repose period, but which are filed after the period expires in *Oaktree Condo. Ass'n v. Hallmark Bldg. Co*, 139 Ohio St.3d 264 (2014). In *dicta*, while analyzing when an owner's cause of action against a contractor vests, the Court noted that "[b]y its plain language,…(R.C. 2305.131)…applies to civil actions commenced after the effective date of the statute regardless of when the cause of action accrued." *Id*. at 266. Accordingly, Justice Kennedy reasons that R.C. 2305.131 acts to bar any claim meeting its statutory criteria filed more than ten years after the date of substantial completion, regardless of when the claim accrues. See *New Riegel* at ¶ 37.

On remand, the Third District Court of Appeals addressed appellant's "accrue" argument. At heart, the question is whether R.C. 2305.131 is a true statute of repose; one that cuts off a plaintiff's ability to file suit after a specified period of time has passed. Relying upon *Oaktree*, the Third District found that R.C. 2305.131 bars claims filed more than 10 years after the date of substantial completion of an improvement to real property, regardless on when said claims may have accrued. *New Riegel Loc. Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g Inc.*, 2019-Ohio-5040 at ¶ 11 (3rd Dist. Ct. App. 2019). In addition to the Third District, other appellate district courts are following suit. In *Union Local Sch. Dist. v. Grae-Con Constr., Inc.*, 2019-Ohio-4877 (7th Dist. Ct. App. 2019), appellant school district raised (for the first time) on appeal whether the statutory bar of R.C. 2305.131 does not apply to claims that accrue or vest during the 10-year repose period. While the Seventh District Court of Appeals correctly found that appellant had waived its right to first raise the argument on appeal procedurally, it also cited to the dicta in *Oaktree* as evidence that R.C. 2305.131 is a true statute of repose. *Id*. at ¶ 17. The Fifth District Court of Appeals has found the same. See *Bd. of Educ. of Tuslaw Local Sch. Dist. v. CT Taylor Co.*, 2019-Ohio-1731 at ¶ 25 (5th Dist. Ct. App. 2019).

2. The express warranty exception to the statute.

The second question left unanswered by *New Riegel* is how the express warranty exception to the construction statute

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of repose should be interpreted. R.C. 2305.131 provides an exception where a person has expressly warranted or guaranteed the improvement to real property for a period longer than the ten-year period of repose. The statutory exception states as follows:

> (D) Division (A)(1) of this section does not prohibit the commencement of a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than the period described in division (A)(1) of this section and whose warranty or guarantee has not expired as of the time of the alleged bodily injury, injury to real or personal property, or wrongful death in accordance with the terms of that warranty or guarantee.

See R.C. 2305.131(D). While generally a determination as to whether such an exception applies involves a straightforward analysis of whether the injury and resulting damages claimed are covered by the express terms of a written warranty, we have seen plaintiff attorneys using…creative…methods as an attempted end-around to the *New Riegel* decision. For example, several recent cases involve plaintiff counsel asserting that a single paragraph in the 2,325 page long Ohio School Design Manual (the "OSDM") creates an express warranty by the architect and/or structural engineer guaranteeing school buildings for a period of 40 – 100 years. The OSDM is a design guideline first developed on behalf of the Ohio Schools Facilities Commission (the "OSFC") and now utilized by the Ohio Facilities Construction Commission (the "OFCC") to provide guidance and create materials and specification standards for use in the design and construction of Ohio school buildings receiving funding through the OFCC (or, previously, the OSFC).

The language plaintiff attorneys cite to appears in Chapter 8 of the OSDM in a subsection discussing structural design. It states:

> B. School building structures and exterior enclosures shall be designed and constructed of materials which will perform satisfactorily for 40 years, with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required.

Considered alone and in a vacuum, a reasonable person may perhaps be convinced that the language cited creates some obligation. However, for the purposes of understanding how to respond to such an argument, an analysis of the organization of the OSDM and the technical terms used throughout the document is necessary.

Structure and organization were a focus of the authors of the OSDM due, in part, to the manual's daunting length. The authors of the OSDM understood that consistency in use of language and terms was critical for their readers' understanding. Thus, the term "warranty" or some variation of it appears 74 times throughout the 2004 version of the manual whenever it discusses guarantees. In Chapter 8, the chapter addressing "materials and systems" and in which the language cited by plaintiff attorneys is located, the term appears only once. By comparison, the vast majority of the term's use (64 times) appears where one might suspect, in Chapter 9 dealing with specifications. The term does not appear in the language cited by plaintiff attorneys as creating an express warranty. In its entirety, the provision states:

> A. The Structural Design Professional shall be responsible for the adequacy, economy, and serviceability of all structures for which he/she is assigned design responsibility. Good engineering judgment shall be used in addition to compliance with all national, local, and applicable codes.
>
> B. School building structures and exterior enclosures shall be designed and constructed of materials which will perform satisfactorily for 40 years, with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required.
>
> C. School buildings shall provide a safe, secure shelter for students, faculty and staff, generally capable of resisting forces from wind, earthquake, airborne debris, and man-made elements.

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> D. Structural and building enclosure systems shall be selected on the basis of life cycle costs, safety, durability, constructability, availability of materials, and aesthetic considerations.[1]

By the plain language of the manual, the section only applies to the structural design of the roof and building enclosure. It has no application to specific, identified materials or minimum warranties, which are later detailed in Chapter 9 of the manual. And it should come as no surprise that this single provision fails to create warranty obligations to design professionals. Architects and engineers are not in the business of manufacturing or supplying warrantable commodities. They are not in a position to provide warranties for their services in traditional design-bid-build project delivery models because design professionals and contractors are responsible for different aspects of the construction process and are not accountable for each other's work. The contractor bids the project and constructs the building. The contractor is the last entity to touch the work and therefore is the only entity in a position to warrant it. It is one of the reasons why courts have held that warranties for performance in a workmanlike manner and fitness for intended use apply to contractors, but not to architects. See *Crowninshield / Old Town Cmty. Urban Redevelopment Corp. v. Campeon Roofing & Waterproofing*, 1996 Ohio App. LEXIS 1514 at ¶ 12 (1st Dist. Ct. App. 1996) ("[T]he architect's undertaking, however, in the absence of a special agreement, does not imply or guarantee a perfect plan or satisfactory result, but he is liable only for failure to exercise reasonable care and skill.").

As of the date of this article, this issue has been argued to but not considered by the Fifth District and summary judgment motions are pending in at least one trial court. It will be interesting to see whether courts interpret the OSDM as creating a novel warranty obligation for an industry not typically providing warranties at all.

3. The meaning of "defective and unsafe condition" as used in the statute.

The third question left unanswered in *New Riegel* is whether R.C. 2305.131 applies to claims seeking recovery of damages arising from defective conditions that are not "unsafe." The statute states, in pertinent part, as follows:

> (A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of ***a defective and unsafe condition*** of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of ***a defective and unsafe condition*** of an improvement to real property(.)

R.C. 2305.131(A)(1) (emphasis added). We have recently filed a motion for summary judgment in a case where opposing counsel has filed a motion for continuance on the grounds that he needs additional discovery to determine if the conditions identified in the complaint are unsafe. In other words, opposing counsel is framing the argument that application of R.C. 2305.131 only applies to defective ***and*** unsafe conditions.

While I have not found any case law in Ohio specifically analyzing this question, the Fifth District has issued a decision holding that the statute applies to "actions brought 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." *State ex rel Wray v. Karl R. Roher Assocs.*, 2018-Ohio-65 at ¶ 28 (5th Dist. Ct. App. 2018) (emphasis added). The *Rohrer* Court's use of the disjunctive is significant because it allows the bar of R.C. 2305.131 to apply to standard breach of contract claims where the allegations may only include defective design / workmanship claims and not necessarily allege an unsafe condition. The *Rohrer* Court reasoned that the General Assembly's Statement of Intent to protect contractors and design professionals against stale litigation would not be met if R.C. 2305.131 does not apply to claims involving defective ***or*** unsafe conditions. The Supreme Court in *New Riegel* cited favorably to the *Rohrer* decision. In addition,

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several cases have applied the bar of R.C. 2305.131 to claims where the Complaint does not appear to allege an unsafe condition. Examples include:

- *Bd. of Educ. of Tuslaw Local Sch. Dist. V. CT Taylor Co.*, 2019-Ohio-1731 (5th Dist. Ct. App. 2019), in which R.C. 2305.131 barred claims of defective workmanship allowing for condensation, moisture intrusion, heat loss, excess humidity, and premature deterioration in the roof and building envelope. *Id.* at ¶ 3.

- *Oaktree Condo. Ass'n v. Hallmark Bldg. Co.*, 2010-Ohio-6437 (11th Dist. Ct. App. 2010), in which R.C. 2305.131 barred claims of defective workmanship where the footers of a condominium development were not placed below the frost line, requiring significant remediation.

- *McClure v. Alexander*, 2008-Ohio-1313 (2nd Dist. Ct. App. 2008), in which R.C. 2305.131 barred claims of defective workmanship where a contractor's failure to properly install siding created wall rot and deterioration.

No appeal was filed in the Third District's *New Riegel* decision addressing the meaning of "accrue" nor the Seventh District's *Union Local* decision or the Fifth District's *Tuslaw* decision. However, given that the Supreme Court specifically declined to consider the meaning of "accrue" and given that trial courts are facing the questions of the warranty exception and meaning of "defective and unsafe condition" under the statute, it is reasonable to expect they will be addressed in the near future. Decisions on these remaining questions will have a significant impact on settling the *New Riegel* decision and determining the scope of R.C. 2305.131 in protecting contractors, subcontractors, and design professionals from prolonged periods of liability exposure.

Endnotes

[1] *See* 2004 Ohio School Design Manual at pg. 8210-1.

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Construction Disputes: Sequencing and Material Selection

Stephanie Osterholt
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During construction of large residential and commercial buildings, it is typical for multiple subcontractors to perform work at the construction site. Each subcontracting party has a specialty trade or duty that they have been contracted to fulfill during the project. Typically, there is a general contractor or construction manager that oversees the construction project and who the subcontractors work under. Subcontractors are often hired to install one building product (e.g. siding, roofing, gutters). The relationship between the general contractor and subcontractors is a critical factor in ensuring that the building products are installed according to plans. Oftentimes, miscommunication or lack of communication between the general contractor and subcontractors, or among subcontractors, leads to incorrect installation of building products. In litigation, water intrusion is often the result of faulty installation of building products (Figure 1). The purpose of this article is to provide general background information behind such issues on a multi-contractor construction site.

Subcontractor sequencing is one of the many important responsibilities of the general contractor. The general contractor typically creates a construction schedule to determine the order of work required to complete the job in a timely fashion. The construction schedule also assists in determining the order in which a subcontractor must complete their work before the next subcontractor can commence. There are often delays during construction. For example, weather events, product purchasing delays or shipment delays can result in subcontractors not completing their work during the time allotted by the general contractor on the construction schedule. Subcontractor overlap can occur because of delays where the secondary subcontractor starts work before the first subcontractor has finished. The overlap can lead to product installation issues. For instance, a subcontractor installing a weather resistive barrier (WRB) might overlap with a secondary subcontractor responsible for installing windows. Due to such an overlap, there may be cases where WRB is installed after the windows. There are several questions that must be considered before making a design change in the field. Did the architect intend for the WRB to be installed prior to the windows? Does the window manufacturer require that the windows be installed prior to the WRB? Oftentimes the subcontractor does not take the design or manufacturer's requirements into consideration and issues result.

During construction litigation involving product installation issues (often presenting itself in the form of water intrusion), counsel should establish a list of subcontractors involved in the construction project and each subcontractor's scope of work. Subcontractor agreements between the general contractor and subcontractor should show the specific work required by the subcontracting party. Counsel should obtain the architectural building drawings and specifications. The architectural drawings contain floor plans, section cuts (showing wall materials and how they interact with each other), and details (a magnified view of section cuts). The project specifications are a set of written documents that are organized by divisions (concrete, masonry, metals, etc.), and often include information about installation of building products not listed or defined on the architectural drawings. Experts will utilize the construction documents to determine the

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Figure 1 - Damaged sheathing resulting from improper building product installation

products and installation requirements specified by the architect. Securing construction documents is extremely helpful in defending a general contractor or subcontractor.

During the construction process, the general contractor sometimes purchases building products for a subcontractor to use on the site. The product being purchased is based on the general contractor's understanding of the architectural drawings and project specifications. If the general contractor misinterprets the architectural section, or incorrectly identifies the building product shown by the architect, the wrong product may be purchased. Typically, the construction documents are available to the subcontractors for review within the general contractor's trailer on site. Although the construction documents are available, the subcontractors sometimes perform their work without reviewing the documents. If the subcontractor has not reviewed the construction documents, when given the wrong product, they may not question the general contractor regarding its installation. The misinterpretation of architectural drawings and lack of communication between the general contractor and subcontractor can lead to faulty building product installation.

During the construction litigation process, counsel should obtain invoices that show record of the products purchased for the construction of the building. The invoices typically include the name and manufacturer of the product purchased and name of the subcontractor or general contractor who made the purchase. The expert hired on the case can use an invoice to determine who was responsible for making the purchase and whether the incorrect product was purchased. If the invoice lacks information, the expert may call the business who sold the product to inquire for further information.

Complicating matters further, installation guidelines for many widely used building products, such as adhered stone, were not established until recently. In the 2000's several manufacturers of adhered manufactured stone masonry veneer (AMSMV) joined to form the Masonry Veneer Manufacturer's Association (MVMA).[1] In 2009, the MVMA established the first set of installation guidelines for AMSMV. In these guidelines, it was established that the AMSMV should be applied over two layers of weather resistive barrier (WRB). Per the 2009 guidelines, the

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following requirements were listed for a wood stud wall with sheathing[2]:

- Minimum 2 separate layers #15 felt (ASTM D 226 No. 15, Type 1) or
- Minimum 2 separate layers Grade D paper (ICC-ES Acceptance Criteria AC 38) or
- 1 layer house wrap (ICC-ES Acceptance Criteria AC 38), and 1 layer Grade D paper (ICC-ES Acceptance Criteria AC 38), or #15 felt (ASTM D 226 No. 15, Type 1)
- Note: One layer of paper-backed lath meeting the requirements of Grade D paper may qualify for one layer of WRB.

Prior to 2009, AMSMV was typically only applied over one layer. It was not until the 2012 International Building Code (IBC) that the code stated that adhered stone be applied over two layers of WRB. Prior to 2012, the IBC did not address the requirements for WRB with adhered stone. As a result, the installation of stone and/or WRB during this time varied, resulting in confusion in claims and litigation.

Your expert will determine the applicable code for the subject building at the time of construction. Often, the architect will list the applicable codes that they used at the time of the design on the architectural general notes sheet. After determining the applicable code, the expert will be able to analyze whether the building product was installed per code and whether the architect specified the product per code on the architectural drawings.

Miscommunication between the general contractor and subcontractor, misinterpretation of the construction documents and lack of installation guidelines and code requirements all can lead to product installation issues during large construction projects. When litigation arises, counsel can support their expert and ultimately their client, by obtaining key documents generated during the construction project.

Endnotes

1 Installation Standards for Adhered Manufactured Stone Masonry Veneer (AMSMV), Ronald A. Mueller, April 7, 2015, Berman & Wright. https://bermanwright.com/installation-standards-for-adhered-manufactured-stone-masonry-veneer-amsmv/

2 MVMA Installation Guide for Adhered Concrete Masonry Veneer, 2nd Edition, Published January 19, 2009, Revised June 8, 2010. http://www.islandblockmfg.com/wp-content/themes/flare/boral/pdf/Cultured-Stone-Install-Guide-MVMA.pdf

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Book Review: "Why Buildings Stand Up?"

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I have had the pleasure and opportunity while litigating construction cases to learn about the nature of the structures involved, the various systems that are designed into buildings, the foundations upon which the structures are based, and the utility of the materials involved. It wasn't until late in my career that I discovered the book ***"Why Buildings Stand Up"*** by Mario Salvadori, published by WW Norton & Co., ISBN:0-393-30676-3, copyright 1980.

According to the author, the book was written for "*those who love beautiful buildings and wonder how they stand up."* Salvardori recounts in his Preface that he hopes to share his excitement over the beauty of structures, and the history of some of the great moments of architecture. He succeeds. The book includes chapters on architectural technology to introduce the unique structures of various, recognizable monuments such as the Eiffel Tower, the Pyramids of Egypt, The Brooklyn Bridge and the Dome of Santa Maria Del Fiore in Florence, Italy. The book is resplendent with interesting insights into the great variety of structures that a construction litigator might have to understand. The book contains excellent drawings and is written in accessible English, with comfortable explanations of the principles underlying the engineering of the various structures.

Salvadori introduces the 'lay' reader to the misapprehension that "*an understanding of structures requires a scientific mind and the acquisition of technical knowledge, usually outside the province of ordinary citizens."* (See page 25). He points out that the physical laws of structures have not changed over the centuries. As an example, he explains that "the 5,840 – feet – long Akashi-Kaikyo suspension bridge, built in Japan, works exactly as the vegetable-fiber footbridges built in central America, over 1000 years ago.

The text engages the reader in learning that the primary components in structures are related to loads, materials, beams and columns, as taught in Chapters 3, 4, and 5. Through examples such as skyscrapers, houses, bridges and form resistant structures in the later chapters, Salvadori introduces how the loads, materials, and structure work together. In cross-examining any architects or structural engineers regarding any building's failure, a basic knowledge of dead loads [***The dead load on a building is the weight of the building, it's walls, beams and columns***], as opposed to live loads [***loads that may or may not act, fully or partially, and vary with time and exact location on the structure]*** or dynamic loads [**load that moves**, **changing magnitude or direction over time]** is essential for a construction litigator. Salvadori's instruction on loading provides the univocal terminology necessary to conduct a thorough analysis. The effect of wind on a building is addressed in his discussion of 'wind loads' *[**used to refer to any*** **pressures** ***or forces that the wind exerts on a building or structure***]. Earthquake loads are another area addressed, as well as thermal loading [***the amount of cold water, hot water and steam used for air conditioning in a district heating and cooling (DHC) system***]. Each of these various factors affect the stability and strength of the structure. Salvadori introduces each topic with excellent examples, such as the Empire State Building, or the Sears Tower, and even the Hagia Sophia in Istanbul.

Salvadori introduces the reader to the principles of tension and compression, elasticity and plasticity, safety factors and the variety of materials available in the building process, including concrete, steel, wood and plastics.

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Understanding the purpose and utility of the various construction materials is made easy through the author's straight forward explanations and easy to understand definitions.

The thirty (30) page chapter on Beams and Columns introduces us to Newton's Laws and the principles of equilibrium. The book becomes more complex in its discussion of the shear strength of the materials used and how the materials buckle under various loads. Such principles are frequently at issue in construction litigation, so the text provides a road map for cross-examination on these issues. Salvadori's book illustrates the various physical principles in an easy fashion, and his examples would be communicable to any jury, or even a judge!

Salvadori's chapter entitled "Skyscrapers" contains interesting analysis and commentary i.e. "*The same compulsion that sent Mallory to his death only a few hundred feet from the top of Mt. Everest, drives men to erect taller and taller buildings. They matter not because of their absolute height, but because they overcome the height of other buildings."* The age of the book is betrayed by the author's observation that "*the race is on to build the first hi-rise with 150 floors*", but the content remains timeless. (page 108). He walks the reader through how the skyscraper is envisioned, the property that is deemed appropriate for such structure, and then each stage of construction, from the excavation and foundation through erection of the structure. His examples introduce us to shear resistance and various structural framing systems that are designed to withstand wind and earthquake loads.

His explanation of skyscrapers is followed by an enlightening chapter on the Eiffel Tower. If one has been fortunate enough to visit and hike the stairs of the Eiffel Tower, the book assists the reader in appreciating its immense importance as a symbol of the success of structural engineering. Throughout all of Europe, other than the Cathedral of Cologne, the Eiffel Tower was the tallest structure built, through the end of WWII.

An interesting biographical subtext on Alexandre Gustov Boenisckhausen-Eiffel, delves into the greatness of this rare engineering genius. Eiffel's background included the design and construction of train stations, dome observatories, churches, bridges and department stores. He specialized in structures that were made with iron, and many of those structures are found in Peru, Russia, Viet Nam and even the skeleton for the Statute of Liberty. Such interesting facts make this book a compelling read.

From a tour of bridge styles to form-resistant cathedrals, Mario Salvadori's book should be on every construction litigator's bookshelf, and I highly recommend it as a primary source of instruction for a construction litigator.

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