



**Testimony on behalf of
Building Owners and Managers Association of Metro Detroit
House Judiciary Committee**

June 16, 2011

Good morning distinguished committee members. I am John Sier of Kitch Attorneys and Counselors testifying on behalf of Building Owners & Managers Association of Metro Detroit as co-chair of the Government Affairs Committee. I appreciate the opportunity to address you regarding this important issue.

The Building Owners and Managers Association was founded in 1908 and is comprised of nearly 400 member companies representing over 250 million square feet of office space in Southeast Michigan. BOMA members represent every aspect of the industry from building owners, building managers, real estate brokers, and all the suppliers to real estate including landscapers, roofers, janitorial services, utilities, professional services firms, construction contractors and designers. We are primarily comprised of business owners who have made the choice to invest in Michigan and create jobs.

BOMA urges your opposition to Senate Bill 77, which would shorten the limitation period for design claims involving improvements to property from 6 years to 2 years and the limitations period for construction defect claims from 6 years to 3 years.

Currently, the 6 year period of MCL 600.5839 begins when the improvement is used, occupied, or accepted. SB 77 would start the shorter clock running when the work is performed or the services completed, which are more difficult dates to establish.

We believe that SB77, as introduced, would substantially and negatively affect the rights of building owners and occupants in offices, schools and hospitals, among other structures, and the ability to recover damages resulting from a design or construction defect on real property. This is particularly problematic as the cause for damage to a building stemming from inadequate performance by a designer or contractor may remain latent and undiscovered for several years. Some issues with heating, ventilation and air conditioning systems may only become known through multiple seasonal changes; similarly, water entry and intrusion through the building's exterior may only occur under certain periodic conditions; additionally, structural issues with foundations may take years to become known, and even longer to investigate the cause of the problem. Just two short examples:

1. Part of a Michigan hospital's roof was completed in 2008 and plaster beetles appeared shortly after, but just as quickly disappeared. The beetles reappeared periodically over subsequent years. The destructive testing investigation, which took several months, revealed the cause to be trapped moisture in the roofing materials over the operating room as a result of defective construction and design specifications. Repairs are being made in 2011, outside of SB 77's proposed 2 year design statute of limitations and possibly even the 3 year limitation period for construction defects.
2. At a public institution's student center, the cast stone veneer and building envelope system began to show signs of water damage several years after renovations were complete, well beyond SB 77's provided 2 or 3 years. Following a months-long investigation, the university discovered substandard workmanship by the contractor, non-industry standard construction

detailing by the architect as well as a material failure by the supplier. The public institution would have been precluded from pursuing any remedy under SB77.

As a result, building owners – including properties paid for by public financing and the State of Michigan - will bear more risk of design and construction defects discovered more than 2-3 years after completion - especially those defects requiring a significant investigation to determine the cause.

Further, there is a misperception that Michigan is more generous in its Statutes of Repose and Limitation for bringing an action based upon design and construction defects. This is far from the truth when the actual accrual events are compared among the Statute of Limitations and the periods are considered in context. Unlike a typical statute of limitations which begins to run when an injury occurs or the damage becomes known, the period in Michigan begins to run when the improvement is used, occupied or accepted. The table I have provided clearly demonstrates the critical nature of the accrual date and its control of the time frame to bring suit.

Several other states have periods of limitation of 4 years or more from the date that the injury or defect is discovered. For example, Illinois allows an action to be brought within 4 years of when it is discovered even despite the Statute of Repose at 10 years from the completion of the project; as a result, a claim discovered in the 10th year following the completion of the improvement can be brought up to 14 years after completion, which is longer than the current period of repose in Michigan even for gross negligence! The current six-year period of limitations and repose in Michigan is consistent with the periods of repose in the majority of states. At least forty (40) other states currently have a period of repose of at least six (6) years or more for actions against design professionals and contractors, demonstrating a nation-wide recognition of the importance of allowing adequate time for such claims to be discovered and pursued. Some states, such as New York, have no period of repose at all, and many states, similar to Illinois, allow the period of limitations to extend beyond the period of repose.

Effectively, this bill would require a public or private owner who may be investigating the cause of a building issue to initiate litigation before the conclusions are known - to wait could result in the expiration of the time period in which to bring the suit and prevent the owner from obtaining any relief at all.

SB 77 does not provide any benefit to the economy, will not generate any jobs, and erodes the remedies and protections available to private and public building owners. Additional burdens are not consistent with Michigan's strategic plan to be a competitive market that encourages development and investment. We urge you to consider the impact this bill will have on private and public entities and deny its passage.

Again, thank you for this opportunity and we look forward to answering any questions you may have regarding this issue.

For more information on BOMA, its members or issue positions please contact:

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State-by-State Survey of Statutes of Repose & Limitation for Design Professionals and Contractors

Definitions for Terms Used in Table Below

Acceptance: Buyer's words or actions that signify the improvement was completed satisfactory or that Buyer will accept it despite known nonconformities. Black's Law Dictionary (9th ed. 2009).

Accrue: The time when a legally enforceable claim or right comes into existence. Black's Law Dictionary (9th ed. 2009).

Discovery: The time at which an injury is discovered or should have reasonably been discovered. 63B Am. Jur. 2d Products Liability § 1461.

Gross Negligence ("GN"): The statutes do not always provide a specific definition, and the concept of gross negligence can change according to the context. However, one definition in Michigan describes gross negligence as, "Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 268-269; 668 NW2d 166 (2003).

Improvement: An addition or enhancement to real property that increases its value or utility. Black's Law Dictionary (9th ed. 2009).

Injury: A wrong or injustice; a violation of another's legal right for which the law provides a remedy. Black's Law Dictionary (9th ed. 2009).

Occupied: When Buyer takes possession or control of improvement. www.merriam-webster.com/dictionary/occupied

Performance: The successful completion of a contractual duty. Black's Law Dictionary (9th ed. 2009).

Statute of Limitations ("SOL"): A time limit for bringing a claim based on the date when the claim accrued; bars claims brought too late after the cause of action accrued. Black's Law Dictionary (9th ed. 2009).

Statute of Repose ("SOR"): A time restriction that bars any suit that is brought after a specified time; it is **not** related to the accrual of any cause of action; the SOR period begins when a specific event occurs **regardless of whether a cause of action has accrued or any injury has resulted.** Black's Law Dictionary (9th ed. 2009).

Substantial Completion of Improvements ("SCI"): The date when construction is sufficiently completed so that the owner can occupy or use the improvement for its intended purchase. Susan C. Randall, *Due Process Challenges to Statutes of Repose*, 40 Sw. LJ 997, 1020 (1986).

Tort: A civil wrong other than breach of contract, for which the damaged party can obtain a remedy in the form of damages. Black's Law Dictionary (9th ed. 2009).

Information for each state will follow the format below:

Table of SOR and SOL

State	SOR (years)	SOR Accrual Date	SOL (years)	SOL Accrual Date	Longest Possible Time to Bring Suit (years)	State Code Section

Table of SOR and SOL

State	SOR (years)	SOR Accrual Date	SOL (years)	SOL Accrual Date	Longest Possible Time to Bring Suit (years)	State Code Section
Alabama	13	SCI	2	INJURY OR DISCOVERY	15	6-5-221, 6-5-225
Alaska	10	SCI or Occupancy	1	DISCOVERY	11	09.10.055 & .054
Arizona	8	SCI	1	INJURY OR DISCOVERY	9	12-552
Arkansas	5 Contract, 4 Tort	SCI	3	INJURY OR DISCOVERY	5	16-56-112
California	10	SCI			10	337.15 & .1
Colorado	6	SCI	2	DISCOVERY	8	13-80-104
Connecticut	7	SCI	1	INJURY	8	52-584a
Delaware	6		2	INJURY		8127
Florida	10	Later of Owner Poss. or Comp. of Contract	4	DISCOVERY	14	95.11
Georgia	8	SCI	2	INJURY	10	18874
Hawaii	10	SCI	2	INJURY	12	657-8
Idaho	6	Comp. of Improvement	Contract=4, Personal Injury=2, Property Damage=3	Contract accrues from Final Comp. of Improvement, Tort accrues 6 yrs after Final Comp. of Improv.	4, 8, 9	5-241, 5-216, 5-219(4), 5-218(3)
Illinois	10	Time of Act or Omission	4	DISCOVERY	14	735 ILCS 5/13-214
Indiana	10 (12 for design defects)	Comp. of Improvement	2	DISCOVERY	12 OR 14	32-30-1-5
Iowa	15	Time of Act or Omission			15	614.1
Kansas	10	Time of Act or Omission	2	DISCOVERY	12	60-513
Kentucky	10	First of occupation or settlement date	1	DISCOVERY	11	198B.130
Louisiana	5	Comp. of design work or owner occupation	1	INJURY	6	9:2772
Maine	10	SCI	4	DISCOVERY	14	572-A
Maryland	10	Available for Intended Use	3	INJURY	13	5-108
Massachusetts	6	SCI	3	INJURY	9	260 sec. 2B
Metro						
Washington	10	SCI	3	Discovery	13	12-310
Michigan	6 or 10*	Occupancy or Acceptance, *for Gross Negligence	6 or 1*	Occupancy, *from Discovery if Gross Negligence	6 (10 for Gross Negligence)	600.5839
Michigan Proposed	6 or 10*	Occupancy or Acceptance, *for Gross Negligence	2 for design prof., 3 for contractors	When service professional stops providing service	6 (10 for Gross Negligence)	Senate Bill 77

Table of SOR and SOL Cont.

State	SOR (years)	SOR Accrual Date	SOL (years)	SOL Accrual Date	Longest Possible Time to Bring Suit (years)	State Code Section
Minnesota	12	SCI	2	DISCOVERY	12	541.051
Mississippi	6	Occupancy or Written Accept. of Comp. of Improv. or Issuance of Occup. Permit	3	DISCOVERY	6	15-1-41
Missouri	10	Comp. of Improvement	5	Damaged is Sustained DISCOVERY (if in 10th yr, 1 additional yr is added)	10	516.097
Montana	10	Act or Omission	3	Act, or if past the 4 yr SOL, 2 yrs from Discovery	12	27-2-208
Nebraska	10	Act or Omission	4	DISCOVERY	10	25-223
Nevada	8	SCI	2	DISCOVERY	10	11,203, 204
New Hampshire	8	SCI	3	DISCOVERY	8	508:4-b
New Jersey	10	Act or Omission	2	Not defined	12	2A-14-1.1
New Mexico	10	SCI	4	DISCOVERY	10	37-1-27
New York	10	SCI	3	DISCOVERY	INDEFINITE	231, 214, 214-d
North Carolina	6	Later of last act/omission or SCI	3	DISCOVERY	9	1-50, 1-52
North Dakota	10	SCI	2	INJURY OR DISCOVERY	12	28-01-44
Ohio	10	SCI	2	DISCOVERY	12	2305.131
Oklahoma	10	SCI	2	DISCOVERY	12	12 OKI St Sect 109
Oregon	10	SCI	2	DISCOVERY	10	12.135
Pennsylvania	12	Comp. of Improvement	2	DISCOVERY	14	5536
Rhode Island	10	SCI	3	DISCOVERY	13	sect 9-1-29
South Carolina	8	SCI	3	INJURY	8	sect 15-3-640, 15-3-530
South Dakota	10	SCI	1	INJURY	11	15-2A-1, 15-2A-5
Tennessee	4	SCI	2	INJURY	4	28-3-202
Texas	10	SCI	2	INJURY	12	16.008
Utah	9 (6 for contract or warranty)	SCI	2	DISCOVERY	11 or 8	78B-2-225
Vermont	6	Completion, Owner Occupancy, or Acceptance			6	511
Virginia	5	Performance	2	DISCOVERY	7	8.01-250
Washington	6	Later of SCI or termination of services	3	DISCOVERY	9	4.16.310
West Virginia	10	First of Accepted or Occupied	2	INJURY	10	55-22-6a
Wisconsin	10	SCI	3	DISCOVERY	13	893.89
Wyoming	10	SCI	4	DISCOVERY	14	1-3-111