Fun With Indemnity

James R. Case
Kerr, Russell and Weber, PLC

MCLA 600.5805

- “(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.”

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- “(14) An action against a state licensed architect or professional engineer or licensed professional surveyor arising from professional services rendered is an action charging malpractice subject to the period of limitation contained in subsection (6).”

- “(15) The periods of limitation under this section are subject to any applicable period of repose established in section 5838a, 5838b, or 5839.”

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- “(16) The amendments to this section made by 2011 PA 162 apply to causes of action that accrue on or after January 1, 2012.

MCLA 600.5838

- “(1) Except as otherwise provided in section 5838a or 5838b, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.”

MCLA 600.5838

- “(2) Except as otherwise provided in section 5838a or 5838b, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The plaintiff has the burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim. A malpractice action that is not commenced within the time prescribed by this subsection is barred.

MCLA §600.5839
"Statute of Repose"

- (1) A person shall not maintain an action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death arising out of the defective or unsafe condition of an improvement to real property, or an action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, unless the action is commenced within either of the following periods:

Statute of Repose, cont.

(a) Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

(b) If the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer, 1 year after the defect is discovered or should have been discovered. However, an action to which this subdivision applies shall not be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Miller Davis v Ahrens (2011)

- "MCLA 600.5839 does not apply to actions for breach of contract. MCLA 600.5807(8) is the applicable statute."

MCLA 600.5807(8) – Statute of Limitations/Breach of Contract

No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

* * *

(8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

MCLA 600.5827
Accrual of Claim

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 and 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

- Breach of contract claim accrues at time of breach, no matter when damage occurs, and must be commenced within 6 years from time of accrual.

Miller Davis v Ahrens II (2014)

- "An indemnity contract creates a direct, primary liability between indemnitor and the indemnitee that is original and independent of any other obligation."

Timeline

- **Apr-1999**
  - Ahrens receives final payment under subcontract.
- **Jun-11, 1999**
  - Work substantially completed by Ahrens
- **Jun-25, 1999**
  - Certificate of Substantial Completion
- **Jan-28, 2000**
  - Miller-Davis notifies Ahrens of problem with moisture in atrium.

Timeline, cont.

- **Feb-2000**
  - Ahrens performs remedial work not contemplated by original design
- **Feb-17, 2000**
  - Ahrens receives payment for this work
- **Feb-2003**
  - Architect opens up roof; discovers deficiencies/failure of Ahrens' work to comply with original plans and specifications.

Timeline, cont.

- **Apr-2, 2003**
  - Miller-Davis notifies Ahrens of defective work
- **Jun-27, 2003**
  - Ahrens promises to provide plan to correct, but nothing is submitted
- **Jul-15, 2003**
  - Miller-Davis terminates Ahrens

Timeline, cont.

- **Aug-27, 2003**
  - Miller-Davis/Owner execute agreement for Miller-Davis to correct Ahrens' work
- **Dec-8, 2003**
  - Miller-Davis completes corrective work
- **May, 2005**
  - Miller-Davis files lawsuit against Ahrens

- “The six year limitation of MCLA 600.5807(8) begins to run when the promisor fails to perform under the contract.”
- “A specific action for indemnification against loss accrues when the indemnitee [has] sustained a loss.”
- “[T]he date of accrual for the breach of an indemnified promise does not serve as the date of accrual for an indemnity action.”

- Breach of contract claim for Ahrens' failure to perform work in accordance with plans and specifications occurred April 1999 at the latest, the date of final payment.

- Breach of indemnity agreement occurred either:
  - **Feb-26, 2003** (partial tear-off of roof), or
  - **Aug-27, 2003** (settlement agreement between Miller-Davis and Owner), or
  - **Dec-8, 2003** (date remedial work completed)
- Since lawsuit was filed in May 2005, it did not matter which of these dates applied because all were well within six-year limitations period.

MCLA 691.991

- Sec. 1.(1) In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

MCLA 691.991

- (2) When entering into a contract with a Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor for the design of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, or a contract with a contractor for the construction, alteration, repair, or maintenance of any such improvement, including moving, demolition, and excavating connected therewith, a public entity shall not require the Michigan-licensed architect, professional engineer,

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landscape architect, or professional surveyor, or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor, or the contractor and that of his or her respective subconsultants or subcontractors. A contract provision executed in violation of this section is against public policy and is void and unenforceable.

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- (3) For the purposes of this section, a contractor may be an individual, sole proprietorship, partnership, corporation, limited liability company, joint venture, construction manager, or other business arrangement.

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- (4) As used in this section, “public entity” means this state and all agencies thereof, any public body corporate within this state and all agencies thereof, and any nonincorporated public body within this state of whatever nature and all agencies thereof; including, but not limited to, cities, villages, townships, counties, school districts, intermediate school districts, authorities, and community and junior colleges

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as provided for in section 7 of article VIII of the state constitution of 1963, and their employees and agents, including, but not limited to, construction managers or other business arrangements retained by or contracting with the public entity to manage or administer the contract for the public entity. However, public entity does not include institutions of higher education as described or provided for in section 4 or 6 of article VIII of the state constitution of 1963, or their employees or agents.

MCLA 691.991

- (5) Nothing in this act affects the application of 1964 PA 170, MCL691.1401 to 691.1419.

- NOTE: This provision only applies to contracts executed after March 1, 2013.

Indemnity and "The Potential Liability Rule"

- If an indemnitee settles a claim against it after it has seasonably tendered the defense to the indemnitor and the indemnitor has refused to defend, the indemnitee need only show it was potentially liable for the claim and that the settlement was reasonable.

- Professional liability policies preclude an assumption of defense of a third party. Therefore, agreeing to defend as part of an indemnity provision in a contract is an obligation for which the design professional will not be covered. Due to “the potential liability rule” agreeing to defend by contract and then refusing to defend out of necessity can have horrendous consequences.

- Even attempting to limit the defense obligation to claims involving negligence are problematic as demonstrated by the recent unpublished Court of Appeals' holding in *Posen Construction v City of Dearborn v NTH Consultants, Ltd.*

- The City/NTH contract indemnity provision:

- The ENGINEER agrees to be responsible for any loss or damage to property or injury, damage or death to persons due to the negligent performance of the service under this Contract, and further agrees to protect and defend the OWNER against all claims or demands of every kind involving negligent performance by the ENGINEER and to hold the OWNER harmless from any loss or damage resulting from any negligent acts, errors, or omissions in the performance of the services under this Contract. Such responsibility shall not be construed as a liability for damage caused by or resulting from the negligence of the owner, its agents other than the ENGINEER, or its employees.

- At this time lawsuit was filed, there were 19 “Claims” pending between Posen and the City, many involving DSC’s, claims that NTH and/or the City had refused to allow deviations from contractually mandated means, methods or construction sequences, or that the City had obstructed the work or failed to pay for extra work.

- Posen couched its claims against the City in terms of DSC's, defective plans and specifications, breach of warranty that work could be completed per plans and specifications, breach of contract, and unjust enrichment.

- The City tendered the defense of every single claim to NTH, and demanded NTH agree to indemnify and hold it harmless for each and every claim ostensibly on the basis this was required by the indemnity clause.

- NTH attempted to negotiate a reasonable tender, but the City refused to discuss anything but full defense and agreement to indemnify.

- At mediation, the City settled for $3.2 million which involved release of $2.3 million of LD's being withheld after contract time was extended to a date subsequent to settlement, and paying an additional $900,000 for a claim which the City was exclusively responsible for and out of DSC contingency.

- By this time, claims had changed, with some of the initial claims having been resolved by C.O. and new claims added, including claims for delay/additional time resulting from City requested extra work.

- Court held (as we understand it):
  - (1) NTH is only liable for costs incurred in defending claims that should have been assumed by NTH, i.e. claims involving NTH negligence.
  - (2) However, no need for expert testimony
  - (3) City need only show it was “potentially liable” for claims involving NTH negligence.
  - (4) Again, no need to establish by expert testimony what these claims involved.

- Court failed to recognize:
  - (1) NTH was in untenable situation due to City's overreaching tender of defense
  - (2) The Court must look to facts underlying claims (no facts were presented by the City) to determine if the facts trigger the indemnity provision

- (3) The Court ignored the fact that the obligation to defend was not coextensive with the obligation to indemnify. By applying "the potential liability rule," the Court ignored the fact that the indemnity obligations in the clause required a showing of causation (indemnity obligation was triggered by "loss or damage resulting from any negligent acts, errors or omissions."
- (4) How could the City have been damaged when by contract with Posen it could not withhold LD's after it extended contract time.

Indemnity

- For and in consideration of the first one hundred ($100.00) dollars to be paid to the Design Professional, Design Professional shall provide the following:

Continued …

- For design related matters, in addition to any liability or obligation of the Design Professional to the Contractor that may exist under any other provision of this Agreement or by law or otherwise, Design Professional shall defend, indemnify and hold harmless the Contractor, the Owner and anyone else to whom the Contractor owes indemnity, their respective officers, agents and employees from any and all loss, claim injury damage,

cost, expense, or liability (including reasonable attorney fees incurred in both tendering the matter to Design Professional as well as in defending and or responding to the matter) to the extent caused by, arising out of, or resulting from any alleged negligent act, error or omission in the performance of the Design Professional's design services, excepting only loss, claims, injuries, damages, costs, expenses or liabilities to the extent cause by the negligence of a party indemnified hereunder.

- For all other matters, Design Professional agrees to indemnify, defend and hold harmless the Contractor and the Owner and their agents and employees, and any other person or entity to whom Contractor owes indemnity from and against any claim, injury, damage, cost, expense or liability (including actual attorneys' fees incurred in both defending the claim and tendering the claim to Design Professional), whether arising before or after completion of the Design Professional Work caused by, arising out of, resulting from or occurring in

connection with the performance of Work, violation of one or more applicable federal or state laws, *or any activity associated with the Work,* by the Design Professional, *its Sub-consultants* or *their* agents or employees, or from any activity of the Design Professional, *its Sub-Consultants,* or *their* agents or employees at the Site whether or not caused in part by the active or passive negligence or other fault of a party indemnified except only to the extent caused by the sole negligence of a party indemnified hereunder. In the case of claims

against the Contractor, the Owner, or their agents and employees or any other person or entity to whom Contractor owes indemnity by any employee of the Design Professional, anyone directly or indirectly employed by it or anyone for whose acts it may be liable, the indemnification obligation under this Article shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Design Professional under workers' compensation acts, disability benefit acts or other employee benefit acts.

- If any part of the indemnity provision set forth in this Article is adjudged to be contrary to law, the remaining parts of the provision shall, in all other respects, be and remain legally effective and binding. These indemnity provisions shall not be construed to eliminate or in any way reduce any other indemnification or rights which the Owner or Contractor has by law or through the Contract Documents.

Indemnity – revised provision

- For and in consideration of the first one hundred ($100.00) dollars to be paid to the Design Professional, Design Professional shall provide the following:

- The Design Professional agrees, to the fullest extent permitted by law, to indemnify and hold the Client harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by the Design Professional's negligent acts, errors or omissions in the performance of professional services under this Agreement and those of his or her sub-consultants or anyone for whom the Design Professional is legally liable. The Design Professional is not obligated to indemnify the Client in any manner whatsoever for the Client's own negligence.

Continued …

- If any part of the indemnity provision set forth in this Article is adjudged to be contrary to law, the remaining parts of the provision shall, in all other respects, be and remain legally effective and binding. These indemnity provisions shall not be construed to eliminate or in any way reduce any other indemnification or rights which the Owner or Contractor has by law.