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BILL ANALYSIS

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Senate Bill 882 (as reported without amendment) *(as passed by the Senate)*
Sponsor: Senator Alan Sanborn
Committee: Judiciary

Date Completed: 10-28-09

RATIONALE

A 2006 decision of the Michigan Supreme Court has raised concerns about the length of time a person has to bring a lawsuit against an architect, professional engineer, or contractor. In *Ostroth* v *Warren Regency, GP, LLC*, the Court addressed the interaction of Sections 5805 and 5839 of the Revised Judicature Act which, respectively, impose a statute of limitations and a statute of repose (also called a period of limitations and a period of repose). (A statute of limitations limits the period of time an action may be brought after an injury or damage occurs or is discovered. A statute of repose sets a fixed time following an event, other than the injury or damage, after which a person cannot be held liable for injury or damage. When the period of repose expires, an action may not be brought even if the injury or damage has not yet occurred.) Traditionally, lawsuits against architects and engineers have been subject to the two-year statute of limitations on malpractice actions under Section 5805, and suits against contractors have been subject to the section's three-year statute of limitations on general negligence actions. As amended in 1988, however, Section 5805 specifies that the period of limitations for an action against an architect, professional engineer, or contractor, based on an improvement to real property, is as provided in Section 5839. Under that section, as a rule, a person may not bring an action arising out of the defective and unsafe condition of an improvement to real property, against an architect, professional engineer, or contractor later than six years after the time of occupancy or acceptance of the completed improvement.

In *Ostroth*, the Supreme Court held that Section 5839 functions as *both* a statute of limitations and a statute of repose. As a result, injured parties have six years after the completion of an improvement to real property to bring an action against an architect, professional engineer, or contractor, regardless of whether the two- or three-year period of limitations under Section 5805 otherwise would have barred the action. Some people believe that this case contradicts the public policy against preventing stale claims and is creating confusion and instability in the legal environment for the design and construction industry. It has been suggested, therefore, that the *Ostroth* decision should be reversed in statute.

CONTENT

The bill would amend Section 5839 of the Revised Judicature Act to provide that an action against a State-licensed architect, professional engineer, contractor, or licensed surveyor would be subject to the applicable period of limitations as provided in Chapter 58 (Limitation of Actions), but Section 5839 also would apply to an action against a State-licensed architect, professional engineer, contractor, or licensed surveyor as an additional limitation.

(Under Section 5839, a person may not maintain an action to recover damages for injury to real or personal property, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, 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, later than either of the following: 1) six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement; or 2) one year after the defect is discovered or should have been discovered, if the defect constitutes the proximate cause of the injury or damage and is the result of gross negligence, but not more than 10 years after the time of occupancy. Also, a person may not maintain an action to recover damages based on error or negligence of a State-licensed land surveyor in the preparation of a survey or report more than six years after its delivery.)

MCL 500.5839

BACKGROUND

Section 5839 of the Revised Judicature Act (RJA) originally was enacted in 1967 to limit the liability exposure of architects and engineers. Michigan courts had held that architects, like health professionals, were subject to the statute of limitations that governs malpractice actions; by extension, this also applied to engineers. Until the mid-20th century, a person had to be "in privity" with an architect or engineer in order to bring a claim against him or her (meaning, essentially, that the parties had to have a contractual relationship). This doctrine began to wane as a defense in suits by injured third parties, which expanded the scope of liability of architects and engineers. As a result, Public Act 203 of 1967 added Section 5839 to the RJA to establish a six-year period of repose for these actions. Subsequently, Public Act 188 of 1985 extended this to contractors.

The courts then dealt with the question of whether Section 5839 applied to *all* claims arising out of the defective and unsafe condition of an improvement to real property, or only to third-party claims. Separate panels of the Michigan Court of Appeals held that the section did not apply to the owner of the property, but also found that lawsuits by owners were subject to the six-year statute of limitations on contract actions. These opinions distinguished between damage suffered by third parties arising out of an improvement to real property and damage to the improvement itself. In response to these decisions, Public Act 115 of 1988 amended Section 5805, adding the language under which the period of limitations for an action against an architect, engineer, or contractor based on an improvement to real property is as provided in Section 5839. In a 1992 opinion, the Michigan Court of Appeals held that the intent behind this amendment was to apply the limitation in Section 5839 "…to all actions brought against contractors on the basis of an improvement to real property, including those by owners for damage to the improvement itself" (*Michigan Millers Mutual Insurance Co.* v *West Detroit Building Co., Inc.*, 196 Mich App 367).

The interaction between Sections 5805 and 5839 was first addressed by a Michigan Court of Appeals opinion in January 1994: *Witherspoon* v *Guilford* (203 Mich App 240). This case involved an action that was brought after the three-year period of limitations for negligence claims in Section 5805 had run, but within the six-year period set forth in Section 5839. Reading the statute as a whole, the Court stated, "[W]e do not understand those provisions to expand the general three-year period of viability for injury claims under…[Section 5805] to a six-year period insofar as the claims are protected by § 5839." According to the Court, the Legislature did not indicate an intention "to breathe additional life into claims that otherwise would have expired" under Section 5805. In other words, the periods of limitations in Section 5805 continued to bar actions that were not brought within those time frames, even if the six-year period under Section 5839 had not expired. The Michigan Supreme Court denied leave to appeal.

In July 1994, a separate panel of the Court of Appeals reached the opposite conclusion in *Ostroth* v *Warren Regency* (263 Mich App 1). This action against an architectural firm was brought after the two-year period of limitations in Section 5805 had run, but within six years after the real estate project had been completed. The Court stated that *Witherspoon* was "wrongly decided" and held, "[T]he special six-year statute of limitations in § 5839(1) applies to all negligence actions against architects, contractors, and engineers. Because plaintiff's complaint was filed within six years after the time of occupancy of the completed improvement, use, or acceptance

of the improvement, her cause of action against defendant is still viable."

The Michigan Supreme Court affirmed this decision in 2006 (474 Mich 36). The Court stated that there is no ambiguity in the language of the statute and that the six-year period in Section 5839 "operates as both a statute of limitations and a statute of repose". The Court also pointed out that the periods of limitations in Section 5805 for malpractice and general negligence actions still apply to any claim that does not involve a State-licensed architect, professional engineer, land surveyor, or contractor, and that is not based on an improvement to real property.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Statutes of limitations are designed to prevent stale claims and to relieve potential defendants of the protracted fear of litigation. The Michigan Supreme Court's decision in *Ostroth* v *Warren Regency* defeats these purposes. By essentially eliminating the two- and three-year periods of limitations on actions against architects, professional engineers, and contractors, and making them subject only to the six-year period of repose, the Court has doubled and tripled the time people will have, in some cases, to bring an action arising out of an improvement to real property. (For example, if an injury and the completion of a project both occurred on December 31, 2009, the two- or three-year statute of limitations would bar an action after the 31st of 2011 or 2012, but six-year the period gives the injured party until December 31, 2015, to bring a suit.) In addition to contradicting Michigan's strong public policy of preventing stale claims, this ruling creates confusion and instability in the legal environment for the construction and design industry, because it fails to address the question of when the statute of limitations begins to run on claims for incomplete projects.

By extending the period of exposure to liability, the *Ostroth* decision will require architects, engineers, and contractors to spend more of their resources protecting themselves. This makes Michigan less business-friendly, especially in comparison to other states. Michigan's six-year statute of limitations is now the longest in the country. According to the American Council of Engineering Companies, the statute of limitations is five years in only one state, four years in five states, and two or three years in 30 states.

Since the Supreme Court found that the statutory language is unambiguous, it is necessary to amend the statute to restore the two-year period of limitations on malpractice actions against architects and engineers, and the three-year period of limitations on negligence claims against contractors. The bill would make it clear that the six-year period of repose in Section 5839 would be *in addition* to the periods of limitations in Section 5805.

Opposing Argument

Architects, engineers, and contractors design and build the homes, schools, workplaces, and public facilities that Michigan residents occupy, and a six-year period of limitations on actions against these professionals is appropriate. As the Michigan Supreme Court stated in 1980 (before Section 5839 was extended to contractors), "The Legislature could reasonably have concluded that allowing suits against architects and engineers to be maintained within six years from the time of occupancy, use, or acceptance of an improvement would allow sufficient time for most meritorious claims to accrue and would permit suit against those guilty of the most serious lapses in their professional endeavors" (*O'Brien* v *Hazelet & Erdal*, 410 Mich 1).

Ostroth v *Warren Regency* was not wrongly decided and should not be reversed. The Michigan Court of Appeals held as early as 1978 that Section 5839 is both a statute of limitations and a statute of repose, and the Michigan Supreme Court adopted that interpretation in 1980. Most recently, the Supreme Court unanimously agreed with it in *Ostroth*. In light of this line of cases, it is the decision in *Witherspoon* that is a deviation.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have an indeterminate impact on the State and local units of government. The extent to which the bill could preclude an action brought by the State or a local unit of government in the future is not determinable.

Fiscal Analyst: Bill Bowerman

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