CONSTRUCTION

MICHIGAN SUPREME COURT CLARIFIES THE APPLICABLE LIMITATIONS PERIOD FOR BREACH OF CONTRACT ACTIONS AGAINST ENGINEERS, ARCHITECTS, AND CONTRACTORS AND FINDS THAT THE STATUTE OF REPOSE APPLICABLE TO TORT ACTIONS AGAINST ENGINEERS, ARCHITECTS, AND CONTRACTORS DOES NOT APPLY TO CONTRACT CLAIMS

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For more than 20 years, there has been a split of authority over the applicable statute of limitations for a breach of contract action arising from faulty construction work that did not result in "injury to property" or "bodily injury." One line of authority held that the statute of limitations begins to run from "the time of occupancy of the completed improvement, use, or acceptance of the improvement." MCL 600.5839(1) (the special statute of repose for claims arising from improvements to property). The competing authority held that the statute of limitations is triggered on the date the "claim first accrued," MCL 600.5807(8) (the general statute of limitation for contract actions). Although the applicable limitations period in both statutes is six years, there has been much confusion regarding when that six-year period commenced.

The Michigan Supreme Court recently clarified the matter in *Miller-Davis Co v Ahrens Construction, Inc,* ___ Mich ___ (Docket No. 139666, July 11, 2011), holding that the statute of repose contained in MCL 600.5839(1) is "limited to tort actions" alleging "injury to property" or "bodily injury or wrongful death," and that the general statute of limitations for contract actions, MCL 600.5807(8), applies to a breach of contract claim for a defect in a building improvement. The significance of this decision lies in the difference between a statute of limitations and a statute of repose and the Court's apparent unwillingness to interfere with contractually allocated risks and obligations. Engineers, architects and contractors are now at greater risk for lawsuits as a result of the decision.

A statute of limitations simply sets forth the time within which an accrued cause of action must be asserted in court. In contrast, a statute of repose is a statute of duration, and provides a date upon which the action no longer exists, whether it accrued by that date or not. Thus, for instance, a building improvement may have a latent defect which the owner does not discover for over six years after occupying the building. Construction defects often may be covered or hidden and the true nature of the problem cannot be determined without resort to invasive testing or partial destruction of the improvement. Application of MCL 600.5839(1) would bar any claim arising from such a defect if not brought within six years. Absent the statute of repose, however, the owner potentially could file a breach of warranty claim against the contractor because such claims, by statute, may be brought up to six years after the breach is discovered.

Miller-Davis involved a claim by the general contractor, plaintiff Miller-Davis Co., which was "hired to improve and construct various buildings for the YMCA Camping and Retreat Services of Battle Creek and Kalamazoo," including a natatorium (an indoor pool). Miller-Davis contracted with the defendant, Ahrens Construction, Inc., to install the natatorium's roof. A temporary certificate of occupancy was issued for the entire project on June 11, 1999, but the natatorium roof was completed and arguably used before that date, potentially as early as February 1999. There also was evidence that Miller-Davis "accepted" Ahrens' work by April 1999 by accepting a certificate of completion and paying Ahrens for the work.

Shortly after its installation, "the YMCA noted excessive condensation in the natatorium, so severe at times that it appeared to be 'raining' in the pool area." Ahrens attempted several times to correct the problem (which the architect had traced to rips in and missing sections of vapor barrier and improper installation of insulation), but was unsuccessful. Upon the architect's recommendation, Miller-Davis removed the roof and performed corrective work in the fall of 2003. It thereafter filed a lawsuit against Ahrens in May 2005 seeking damages resulting from Ahrens' performance of nonconforming and defective work on the roof. Importantly, Miller-Davis claimed that the nature of the defect did not become apparent until the roof was removed.

Following a verdict in favor of Miller-Davis in the trial court, Ahrens appealed, arguing that the suit filed by Miller-Davis was untimely under MCL 600.5839(1) because it was not filed within six years of the date that Miller-Davis had "accepted" the work, which Ahrens claimed was no later than April 1999. Interestingly, the Court of Appeals found that Miller Davis' acceptance of the work, not the owner's later acceptance of the entire project, triggered the running of the six-year statute of limitations, and thus reversed the judgment entered in favor of Miller-Davis.

The Supreme Court, however, reversed the Court of Appeals' decision, concluding that the Court of Appeals erred in applying MCL 600.5839(1) instead of the general statute of limitations for contract actions. Because there was an open question concerning when Miller-Davis' claim accrued under that provision, the case was remanded to the Court of Appeals to resolve that issue. Miller-Davis argued that its claim did not accrue until the last to occur of (a) the date of substantial completion of the entire project, (b) Ahrens' failure to act pursuant to any warranty, or (c) Ahrens' failure to perform any other duty or obligation under the contract documents. [1]

In reaching its decision, the *Miller-Davis* Court began by examining the pertinent language of MCL 600.5839(1):

> No person may maintain any action to recover damages for any injury to property . . . or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any 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, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Construing this language in light of the "overall statutory scheme involving periods of limitations for tort and contract actions," the *Miller-Davis* Court concluded that MCL 600.5839(1) was limited to tort actions involving injury to persons or property. The Court explained that MCL 600.5839 had to be read in conjunction with MCL 600.5805, which references MCL 600.5839 in subsection (14) and is entitled "Injuries to persons or property." In contrast, MCL 600.5807 "sets forth the limitations periods for suits seeking damages for breaches of contract," yet "contains no reference to MCL 600.5839." Moreover, MCL 600.5839(1) itself "uses language similar to that found throughout" the remaining subsections of MCL 600.5805, "referring to 'injury to property' and 'bodily injury.'" "That language," the Court held, "describes tort actions."

The *Miller-Davis* Court found further support for its conclusion in prior case law, such as the Sixth Circuit's decision in *Garden City Osteopathic Hospital v HBE Corporation,* 55 F3d 1126 (6th Cir. 1995), clarifying "that the nature and origin of a cause of action determine which limitations period applies," and that "MCL 600.5839(1) is not applicable to claim against an engineer or contractor if the nature and origin of the claim is the breach of a contract." To the extent that some Court of Appeals panels had applied MCL 600.5839(1) "to all actions brought against contractors on the basis of an improvement to real property, including those brought by owners for damage to the improvement itself," those decisions, the Supreme Court concluded, "erroneously expanded the scope of MCL 600.5839(1) to contract actions." The *Miller-Davis* Court summarized its holding as follows:

> We concluded that the Legislature intended [MCL 600.5839] to be limited to actions in tort. Thus, it does not apply to a claim against an engineer or contractor for a defect in an improvement when the nature and origin of the claim is the breach of a contract.

Applying this holding to Miller-Davis' claim against Ahrens, the Supreme Court observed that "[t]here was no allegation that the roof deck system caused any 'injury to property' or 'bodily injury or wrongful death.' Nor was there any allegation of a 'defective and unsafe condition." Rather, Miller-Davis claimed that "because [Ahrens] failed to build the roof to agreed-upon specifications, [Miller-Davis] was forced to expend money repairing it." This, the Supreme Court concluded, was a breach of contract claim such that the six-year period of limitations for contract actions, MCL 600.5807(8), applied.

Until the Supreme Court's decision in *Miller-Davis*, engineers, architects, and contractors could defend against defective work claims by arguing that under MCL 600.5839(1), the statute of limitations for such claims unequivocally ran from the time of occupancy, use, or acceptance of the completed improvement, irrespective of whether the claim sounded in contract or tort. Under *Miller-Davis*, it is now clear that if the "nature and origin" of the claim is the breach of a contract, then the general six-year period of limitations for contract actions applies, and that the statute of repose contained in MCL 600.5839(1) only applies in cases involving "injury to property," "bodily or wrongful death," or a "defective and unsafe condition." It appears that the Supreme Court recognized that the public policy bases justifying the imposition of a statute of repose to protect architects, engineers and contractors from stale claims and open-ended liability from third-person tort claims do not apply to actions between parties who have negotiated their own agreement. By limiting the application of MCL 600.5839(1) to tort claims, freely negotiated contract remedies against engineers, architects, and contractors can be pursued beyond the six-year statute of repose period, provided the action is timely brought once the claim accrues.

The *Garden City* case cited by the Supreme Court provides an extreme example of the type of claim made possible by the *Miller-Davis* decision. In that case, the hospital was permitted to pursue a claim against the general contractor nearly 20 years after the original work had been completed. An out of plumb basement wall was discovered during an expansion project. The defect was not detected earlier because the hospital claimed that the contractor effectively had masked the defect by applying an additional coat of plaster to the wall to make it appear straight. Had the statute of repose been applicable, the hospital's breach of contract and warranty claims would have been barred.

In light of the decision in *Miller-Davis*, architects, engineers, and contractors must exercise even greater diligence when reviewing the indemnity and warranty provisions in their contracts as the statute of repose is no longer available to limit their exposure. However, just as owners may seek to negotiate project, material, and equipment warranties that extend well beyond six years of project completion, architects, engineers, and contractors should consider using contract terms to shorten their exposure to potential defect claims.[2]

[1]A breach of contract claim generally accrues when the contract is

breached. Similarly, a claim for breach of an express warranty accrues only after notice of the claim within the warranty period and after the warrantor refuses to fulfill its warranty obligation.

[2]Section 13.7 of the AIA A201 General Conditions to the Contract for Construction is one such provision that contractually defines when the statutory period commences prior to substantial completion, between substantial and final completion, and after the issuance of a final certificate of completion. The majority of courts have held that contractual clauses that shorten statute of limitations periods are enforceable if the clause is unambiguous and susceptible of only one meaning.

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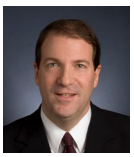

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