

Construction Law News

Foster Swift Commercial Litigation Group

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Upcoming Events:

DESIGN-BUILD INSTITUTE OF AMERICA'S MICHIGAN CHAPTER 2011 SPRING FORUM

WHERE: Christman Building,
Lansing, MI

WHEN: Friday, April 8, 2011

The program will focus on design-build best practices. Foster Swift attorney **David Lick** will also present on the status of design-build initiatives.

For more information and registration details, go to www.dbiaglr.org/events.

IMPLEMENTING PARTNERSHIPS FOR INFRASTRUCTURE

WHERE: Henry Center,
Lansing, MI

WHEN: May 11, 2011

The program will explore the rapid growth in the use of Public Private Partnerships, and the implications for economic development.

For more information and registration details, go to www.ncppp.org.

When Does 90 Days Mean 90 Days?

by: **Dirk H. Beckwith** & **Timothy P. Burkhard**

In a decision decided earlier this year, the Michigan Court of Appeals held that a contractor's construction lien was invalid because the contractor failed to record the lien within 90 days after the last furnishing of labor or material for the improvement. The key issue in the case was whether work performed by the contractor was "warranty work." Because "warranty work" is not considered an "improvement" under the Construction Lien Act, as interpreted by Michigan Courts, the 90-day filing period for a valid construction lien was not extended by the performance of the warranty work.

In the recent case¹, a plumbing contractor performed underground and rough plumbing work on August 31, 2005 and finish plumbing work on August 4, 2006 and/or September 29, 2006. The plumber returned to the job site on two occasions after performing this work. On December 20, 2006, the contractor repaired a leak at the kitchen sink. On May 29, 2007, it repaired a small leak in a whirlpool tub and replaced the ball and cock assembly of a toilet. The plumbing contractor eventually filed its claim of lien on August 23, 2007. In the interim, a different contractor, who had also been involved on the same project, filed to foreclose its claim of lien.

The trial court found the plumber had completed its construction work in either August or September 2006 and its claim of lien filed on August 23, 2007 was, therefore, untimely and invalid. The plumber appealed that decision, asserting the work performed on May 29, 2007 was an "improvement" under the Construction Lien Act and that its lien was therefore timely.

The Court of Appeals agreed with the trial court and affirmed the trial court's dismissal of the lien. Although noting repair work can constitute an "improvement" and is specifically included in the definition of "improvement," the Court explained there is a difference between repair work that is specifically contracted for and repair work performed to correct problems with a contractor's work. In the previous decision of *Woodman v Walter*², the Court of Appeals had held that where a contractor's performance of work was to correct deficiencies in work performed or defects in fixtures installed ("warranty work") it was not an

"improvement" under the Construction Lien Act. According to the Court, the distinguishing factor between a repair constituting an improvement and warranty work, the latter of which does not allow for the commencement of the 90-day filing period, **is whether the work in question conferred any value beyond the value furnished by completion of the original work.**

The Court found the plumbing contractor's work in December 2006 and May 2007 did not add any value beyond the value furnished in August or September 2006 - the repairs completed by the plumber merely provided what was originally contracted for: fully functional and properly functioning plumbing fixtures in a new house. That these repairs were "warranty work" was further bolstered by the plumber's description of the May 2007 work as "Warranty Service Call" and the fact that there was no evidence the plumber ever billed the general contractor for those additional services. Because the work performed was to repair minor deficiencies, it was properly classified as "warranty work" and did not extend the time period for filing a valid construction lien.

Contractors and others who perform work or provide materials on a construction project must ensure they file a lien within 90 days of the last day they perform work which adds value to the project and cannot rely on subsequent repair work to extend the time period to file a valid construction lien. The time period must be carefully monitored because the 90-day deadline is a strict requirement and is not subject to the substantial compliance provision of the Construction Lien Act. As the Court stated, "the ninety-day deadline means precisely ninety days."

If you have any questions, please contact **Dirk Beckwith** at 248.539.9918 or **Timothy Burkhard** at 248.785.4729.

¹*Stock Bldg Supply, LLC v Parsley Homes of Mazuchet Harbor, LLC*, ___ NW2d ___, 2011 WL 222143 (Jan 25, 2011).

²204 Mich App 68; 514 NW2d 190 (1994).

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Be Timely When Filing Claims for Damages Against the State

by: [Richard C. Kraus](#) & [David M. Lick](#)

Any individual or business with a potential claim for damages against the state or a state agency must pay careful attention to the deadline for filing claims or notices of intent. Your claim for damages will be dismissed if a claim or a notice of intent to sue is not filed by the deadlines under the Court of Claims Act.

Most claims for damages against the state or its departments, commissions, boards, institutions, arms or agencies must be filed in the Court of Claims in Ingham County. The Court of Claims has exclusive jurisdiction over damage claims based in contract or tort, as well as certain claims arising from statutory violations. The Act includes a mandatory notice provision, MCL 600.6431, which states that "no claim may be maintained" unless the claimant files the claim or a notice of intent to file claim with the Court of Claims' clerk within the specified period. The claim or notice must be signed under oath and include specific details about the claim and damages.

The time allowed for filing claims or notices are much shorter than the statute of limitations applicable to other cases.

- For most claims, the filing deadline is one year after the claim accrues.
- For claims relating to property damage or personal injuries, the notice period is shortened to six months.
- There are other notice periods governing certain statutory claims.

Because the time for filing notice runs from when a claim "accrues," it is important to consult with counsel to determine both the date of accrual and the notice deadline.

In a recent published decision, the Michigan Court of Appeals held that an action must be dismissed when the plaintiff does not file the statutorily required notice with the Court of Claims' clerk within the time allowed by statute. *McCahan v Brennan*, ___ Mich App ___ ; ___

NW2d ___ (February 1, 2011). Dismissal is required even if failing to file a notice with the clerk does not result in any prejudice to the state. In fact, dismissal is required even if the state has been notified in writing about the potential claim.

This is a significant change in the law. In a series of cases dating to the mid 1970's, courts held that actions could only be dismissed when a plaintiff's failure to file a timely claim or notice caused "substantial prejudice" to the defendant. An example of "substantial prejudice" would be the inability to investigate the background or facts related to the claim.

In 2007, the Supreme Court interpreted a similar notice requirement for claims based on highway defects. *Rowland v Washtenaw County Road Com'n*, 477 Mich 197; 731 NW2d 41 (2007). Rowland held that the statute's plain language imposed "a notice provision with no prejudice requirement." The Court held that dismissal was required when timely notice was not filed even if there is no prejudice as a result.

The majority in *McCahan* followed *Rowland's* reasoning. First, the court held "substantial compliance does not satisfy" the statute. The plaintiff sent a letter to the university's counsel stating that a lawsuit would be filed. The court held that the letter was not a substitute for the notice required by the statute. Second, the court held that the plaintiff's failure to file a notice of intent within the statutory deadline required dismissal even without a showing of prejudice to the defendant.

McCahan is binding precedent and will apply to all claims brought in the Court of Claims. There are many other statutes requiring notice to the state, counties and municipalities of potential claims. In light of *Rowland* and *McCahan*, it is possible that these statutory notice requirements will be strictly enforced by the courts.

If you have any questions, please contact [Richard Kraus](#) at 517.371.8104 or [David Lick](#) at 517.371.8294.

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