



KNOW YOUR RIGHTS AND DUTIES UNDER COPYRIGHT LAW

The U.S. Copyright Act protects “architectural works,” such as the design of a building as embodied in architectural plans and drawings, and extends to the overall form, arrangement and composition of spaces and elements in the design. The copyright protection starts when the plans are created and includes the right to:

- © reproduce copies of the work;
- © prepare new works based on the original work;
- © publicly distribute copies of the work; and
- © publicly display the work

Copyright law affects the activities of architects, builders, developers and owners for even the smallest projects. Because protection exists even without a copyright notice or registration with the U.S. Copyright Office, it is risky to assume that you can modify or use drawings in any manner that you wish even if they were purchased. The recent \$5.2 million jury award against Signature Homes to the architectural firm of Kipp Flores for use of designs to build 300 homes illustrates such risks. Copying the design of a building even when plans are not reviewed or copied may also be a violation of copyright law depending on the circumstances.

Common copyright questions asked of our firm’s intellectual property attorneys include: when can plans be copied or modified, can ideas be protected, who can use the plans if the architect is terminated from the project, can the plans be used or modified for other projects, can a design be copied by visual inspection even if the plans are never reviewed or copied, and what constitutes unlawful copying of plans. Contact a competent intellectual property attorney to minimize your risk of copyright violation or to protect your rights if you are the plans’ author.



CONTRACT PROVISIONS MAY LIMIT TIME TO BRING CLAIMS

Including provisions in construction contracts that require early notice of possible claims and that limit the time period for bringing claims is a growing trend among owners and contractors. These provisions place

a significant burden on the claimant and require potential claimants to be vigilant with respect to potential claims and deadlines. Are these provisions enforceable in Michigan? The Michigan Court of Appeals recently addressed one aspect of this question about enforcing an agreed time limit for bringing claims for extras in a contract between an owner and contractor.

In *Walter Toebe Construction v MDOT*, the contractor sued the owner in order to recover compensation for alleged extras. The contract required, in essence, that the contractor bring its claim no later than 120 days after completing the involved work or no later than 60 days after the contract is completed, whichever occurred first. The contractor did not comply with the notice provisions. Instead letters were sent to the owner regarding construction delays and the intention to file a claim for additional costs. The court held that the contractor’s letters were insufficient notice under the contract. The court reasoned that even if the letters placed the owner on actual notice, the claim was invalid because the contractor did not strictly comply with the contractual notice requirements. Although the case is unpublished, it provides a warning to claimants.

Notice clauses can be highly beneficial to owners, general contractors and others engaging third parties to perform work, and have a legitimate purpose in preventing stale claims made long after the other parties are in a position to protect themselves. Persons required to provide notice of a claim should ensure that their supervisory personnel are aware of these deadlines, and that proper notice is provided and documented whenever they become aware of a possible claim. Failure to do so may provide a complete defense to the claim.



TRUST FUND ACT REQUIRES PAYMENT

The Michigan Builders Trust Fund Act prohibits any building contractor or subcontractor from retaining or using construction payments from a particular project until all laborers, subcontractors and materialmen that worked on the project have been paid. The Act applies to all private construction projects in Michigan and provides for civil and criminal penalties.

Michigan courts have interpreted the Act to impose liability on individual contractors and subcontractors, as well as the principal of a sole proprietorship that acted as a contractor. Recently, a corporate officer was convicted of violating the Act when her company failed to pay several subcontractors on a project. Although the company was the general contractor and signed all the subcontracts, liability under the Act is based on the misappropriation of funds. Therefore, the officer herself was liable because she personally caused the corporation to violate the Act by withdrawing funds from the corporate account for personal use before paying the subcontractors.

To avoid violating the Act, clearly segregate project funds from other uses and make sure that all subcontractors, laborers and materialmen are timely paid.



BEWARE: DIFFERENT STATES → DIFFERENT LAWS

Many construction companies located in Michigan do business in Ohio and other states. It is essential to know that the laws of each state vary (in some cases greatly) and that your rights may be greatly reduced or increased by the laws of the state where the project is located. For example, if you do business in Ohio, there are at least three laws you need to know about:

Prompt Pay Law: Ohio has a prompt pay law that entitles contractors, subcontractors and materialmen to the payment of 18% annual interest on amounts not paid within certain time periods subject to proper retainage and disputed work. In addition, if a lawsuit is filed to obtain payment, attorney's fees may be awarded to the prevailing party.

Lien Law: While it shares similarities with Michigan law, Ohio lien law is different in key aspects, for example: (a) The Notice of Commencement required to be filed by Owners prior to commencement of work requires more information than Michigan's form; (b) the Notice of Furnishing must be filed within 21 days of the first date of work; (c) the "Affidavit of Lien" must be filed with the county recorder within 75 days of the last date of work (60 days for certain residential properties); and (d) a procedure exists that enables a person with an interest in the improved real estate to expedite the commencement of the lien foreclosure lawsuit, *i.e.* within 60 days of service of the notice.

Contract Limits: Unlike Michigan, documents included (for example, contracts and in some cases even specifications) on a construction project are prohibited from containing provisions that:

- Waive rights under a surety bond;
- Waive any pending or asserted claim on the basis of final payment when the person against whom the claim is being asserted receives prior notice of the claim;
- Preclude liability for delay based on the owner's act or failure to act (or the contractor's or owner's failure when contained in a subcontract);
- Make a construction contract subject to the laws of a state other than Ohio;
- Preclude or limit lien or other specified rights by means of a pay-when-paid clause.

The above information is highly condensed and Ohio law should be reviewed when doing business in Ohio.

Members of the Construction Law Practice Group

Detroit Office

100 Renaissance Center, 34th Floor
Detroit, Michigan 48243

F. Thomas Lewand	(313) 393-7573	tlewand@bodmanlongley.com
Nicholas P. Scavone	(313) 393-7580	nscavone@bodmanlongley.com
Joseph J. Shannon	(313) 393-7549	jshannon@bodmanlongley.com
Charles S. Hegarty	(313) 393-7539	chegarty@bodmanlongley.com

Oakland County Office

201 West Big Beaver, Suite 500
Troy, Michigan 48084

Michael B. Lewiston	(248) 743-6001	mlewiston@bodmanlongley.com
Gary D. Reeves	(248) 743-6072	greeves@bodmanlongley.com
Thomas Van Dusen	(248) 743-6076	tvandusen@bodmanlongley.com

Ann Arbor Office

110 Miller, Suite 300
Ann Arbor, Michigan 48104

Harvey W. Berman	(734) 930-2493	hberman@bodmanlongley.com
Sandra L. Sorini	(734) 930-2495	ssorini@bodmanlongley.com
Jerold Lax	(734) 930-2491	jlax@bodmanlongley.com
Scott E. Munzel	(734) 930-2492	smunzel@bodmanlongley.com
Matthew T. Jane	(734) 930-6898	mjjane@bodmanlongley.com

Northern Michigan Office

229 Court St., P.O. Box 405
Cheboygan, Michigan 49721

Sandra L. Jasinski	(231) 627-8012	sjasinski@bodmanlongley.com
Michael A. Stack	(231) 627-8003	mstack@bodmanlongley.com

www.bodmanlongley.com

We are distributing this **BODMAN FIELD NOTES** to our clients and friends. This newsletter is intended to provide a concise overview of legal issues and subjects that may affect businesses in construction and related industries. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

© 2004 Bodman, Longley & Dahling LLP. This document may be reproduced by the recipient so long as the content is not altered and copyright ownership is acknowledged.