A Primer on Liability for Plumbing Professionals

Part 3: Defenses, Limitations on Damages, and Mechanic's Liens

By Steven Nudelman

The first two parts of this primer (*PS&D* March/April 2005 and July/August 2005) focused on certain affirmative legal claims that a plumbing professional could bring in the course of doing business. In this final article of the series, we turn our attention to a number of defenses that a plumbing professional could employ if he is named as a defendant in a lawsuit. I'll conclude the discussion with a few words about mechanic's liens.

It is important to remember that the purpose of this series is to provide you with a general, broad-based understanding of certain legal concepts. These articles are not designed to be an exhaustive treatise on the law or to take the place of a qualified attorney. If you find yourself facing any issues remotely similar to those discussed, I urge you to seek an attorney's advice immediately.

For purposes of our discussion, we revisit the hypothetical example of Paul Plumber. You may recall that HAH Housebuilders Unlimited, a general contractor, retained Paul as a subcontractor to supply and install six Flusher-oo 6500 china toilets for the $1.5 million custom-built home of Mary Moviestar. According to Paul's work order/invoice, which was signed by the president of HAH, HAH was required to pay Paul $9,600 ($1,600 per toilet) net 30 days after the completing work. Two months after he installed the toilets, one of them exploded as an unsuspecting guest of Mary attempted to flush it. The guest sustained physical injuries and sued Paul, HAH, and Mary for damages, asserting claims for breach of warranty and negligence. HAH filed a cross-claim against Paul for breach of contract, negligence, and fraud. Paul filed a cross-claim against HAH because HAH never paid Paul $1,600 for the toilet in question.

Now that the stage has been set regarding the lawsuits and claimants, what defenses may the defendants assert to limit the quantum of damages (or, as we say in the business, the exposure) they face? In this article I will cover four separate, relatively common defenses that vary in scope from jurisdiction to jurisdiction. In other words, these are general legal concepts. The specifics of each concept may differ depending on the law of the state that applies to your lawsuit.

STATUTE OF LIMITATIONS

The first defense is the statute of limitations. In short, a statute of limitations requires a prospective claimant to bring suit within a certain time or forever be barred from doing so. As the New Jersey Supreme Court noted, the statute of limitations "stimulates activity, punishes negligence and promotes repose by giving security and stability to human affairs." The primary purpose of a statute of limitations is to eliminate stale claims and to compel the exercise of a right of action so that an opposing party has a fair opportunity to defend himself in a lawsuit.

When analyzing a statute of limitations, you generally look at three components: the time or length of the statute, the accrual point (or when the statute begins to run), and any potential tolls (which serve to lengthen the time).

Statutes of limitations and their applications vary greatly from state to state. For example, one state may have a six-year statute of limitations for breach of contract actions, with the date of the breach as the accrual point. Applying this statute to our hypothetical example, suppose that Paul installed the defective toilet on Nov. 1, 2005, and HAH waited until Dec. 1, 2012, to file its cross-claims against Paul. He would be able to assert the defense of the statute of limitations successfully to bar HAH from asserting its cross-claim for breach of contract. If the fraud statute of limitations was three years in our example, then Paul also would be able to assert a statute of limitations defense to bar that claim.

In this example, assume that no tolls of the limitations periods existed. Tolls effectively stop the running of the statute of limitations clock and could result from a variety of factors such as insanity, bankruptcy, and minority (i.e., the age of a party). The important thing to remember is that statutes of limitations may be tolled depending on the factual circumstances and the law of the jurisdiction, and the effect of a toll is to extend the limitations period during which one could commence a lawsuit timely.

STATUTE OF REPOSE

Unlike statutes of limitations, statutes of repose are not subject to being extended or tolled. For example, the 10-year statute of repose in New Jersey, N.J.S.A. 2A:14-1.1, states:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, 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 on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

The statute of repose is like a floor. Its purpose is to limit the liability of contractors, builders, planners, and designers. Before states enacted such statutes, it was possible to sue architects and contractors for injuries long after a project was completed. As the New Jersey Supreme Court phrased it, the statute is intended "to cut back on the potential of this group to be subject to liability for life."

Applying the statute of repose of New Jersey to our hypothetical example, if the guest sued HAH and Paul more than 10 years after their work was completed on the home, then HAH and Paul could assert the statute of repose as a defense to such a claim. The more likely scenario in which the statute of repose would apply is if one of the non-exploding toilets breaks more than 10 years after HAH and Paul completed their work on the home. Assuming no express warranties apply, Mary and/or the injured guest would not be able to successfully assert a claim against HAH and Paul relating to this broken toilet due to the statute of repose.

Again, unlike statutes of limitations, no tolls apply to the statute of repose. In New Jersey, the statute is 10 years—no more, no less. Also, if you examine the wording of the statute, you will note that there are limits to the types of defendants who may assert the statute of repose, at least in New Jersey. For example, if Paul were solely a materials supplier, it is unlikely that he would be able to

assert the statute of repose because construction or design activity is required.

EXCUSED PERFORMANCE AND MITIGATION OF DAMAGES

Statutes of limitation and repose vary widely based on the enacted legislation (or statutes) of each state. I now will turn to two legal concepts that are general defenses not predicated on a particular state's statutes. In other words, these concepts stem from the common law.

The first legal concept is excused performance. Simply stated, if a party to a bilateral contract, or a contract in which each party promises a performance, commits a material breach, then the other party is excused from performing. For example, if I promise to pay you $500 on Tuesday if you promise to drive me to the airport on Wednesday, and I fail to pay you on Tuesday, then guess what? You do not have to drive me to the airport on Wednesday. If I were to sue you for breach of contract on Thursday (not having anything better to do since I missed my flight), then you would be able to assert the defense of excused performance.

Applying this defense to our hypothetical example, HAH could try to assert an excused performance defense against Paul's cross-claim for the $1,600 by arguing that Paul failed to supply and install the toilet as promised. Therefore, HAH does not have to pay Paul the $1,600. The excused performance defense may not be completely successful in this case because it does not account for the two months of toilet use nor could it be safely assumed that Paul's labor (even if proven to be partly at fault) and toilet itself are worth nothing.

Similar to excused performance, the mitigation of damages defense is as straightforward as it sounds. A claimant who has suffered an injury is under a legal duty to take reasonable steps to mitigate his damages. The burden of proving facts in mitigation of damages generally rests upon the defendant. In our hypothetical example, assume that Mary failed to clean up after the toilet exploded and that she left the bathroom flooded for two months. Assume further that mold developed as a result of Mary's failure to mop up her bathroom promptly. Could Mary seek damages from Paul and HAH relating to this mold? In all likelihood the defendants would be able to assert the defense that Mary failed to mitigate her damages by not cleaning her bathroom promptly after the incident.

MECHANIC'S LIENS

Before wrapping up this three-part series on plumbing professionals' liability, I would be remiss if I did not address the topic of mechanic's liens. Unlike the other topics in this article, a mechanic's lien is not a defense—it is typically part of an affirmative claim. The law governing mechanic's liens is statutory; similar to statutes of repose and limitations, it varies widely from state to state. Rather than discuss the specifics of the mechanic's lien law in one jurisdiction, it would be more helpful to discuss a number of concepts that you should examine before you file a mechanic's lien in your state.

Generally a mechanic's lien on a private (nongovernmental) project is an encumbrance filed against real property by a contractor or materials provider to secure payment for his goods or services. The lien typically is filed with the county clerk's office of the county in which the real property is located, and it is served on the owner and contractor.

Again, the specifics for these procedures vary and are set forth in state statutes. Universally, however, owners do not like mechanic's liens. A lien shows up on a title search as a mar on title. Liens often interfere with financing and the transfer of property. In short, a mechanic's lien could serve as a valuable weapon for a plumbing professional who has not been paid. However, be forewarned: State statutes for mechanic's liens often are construed strictly, and some of them impose harsh penalties for parties who wrongfully (and/or frivolously) file liens without basis. In other words, check with an attorney in your jurisdiction before charging into your county clerk's office with a lien in hand.

When considering filing a mechanic's lien you should examine the following issues:

- Does your state require any notice or filing prior to the performance of the work? This often is called a lien pre-filing requirement.
- What is the time frame for filing a lien? You may have a time limit after you perform the work or supply the materials.
- What is the deadline for filing suit to initiate a lien foreclosure action? You may be required to commence a lawsuit if your lien remains unpaid.
- Does your state impose mandatory notice requirements? Must the lien be served on the property owner, tenant, and/or contractor? When? What about the filing requirements?
- Does your state impose special requirements or limitations on lower-tier subcontractors or suppliers? In certain states only claimants who perform work directly for the owner (general contractors, construction managers, architects, engineers, etc.) and the next two subcontracting tiers (subcontractors and sub-subcontractors) could file a lien. You need to check with your state for such limitations.
- When is a contractor or supplier deemed to have last performed work or furnished materials so as to trigger the start of the lien-filing period?
- Does your state provide a procedure for bonding or otherwise removing the claim of lien?
- What costs or damages typically are not allowed in a lien claim? Most states require a written contract as a prerequisite for a lien claim. Statutes set forth the particular types of work, services, materials, and equipment that could be the subject of a mechanic's lien claim.

CONCLUSION

As I frequently have stated throughout this three-part series, any one of the issues discussed could be the topic for an entirely separate article. Some of these topics are taught in law school as semester-long courses. It is important to keep that in mind because the purpose of these articles is to provide you with an overview—not a comprehensive legal education so you can play lawyer and impress your friends (or sue your enemies). I cannot emphasize enough that you must get a lawyer if you have a legal problem. Be proactive, not reactive. Do not try to do it yourself (any more than you, as a plumbing professional, would advise an inexperienced layperson to install a dry pipe sprinkler system by himself). You often will find that great success results from working closely with your attorney on the legal issues facing you in business. You also will find that people who do this are, in general, more successful than people who wait to retain an attorney until after they're in trouble. **PSD**

SUGGESTED READING

Martinez v. Cooper Hosp.-Univ. Med. Ctr. 163 N.J. 45, 747 A.2d 266 (N.J. 2000) (statute of limitations).

Ramirez v. Amsted Indus., Inc., 86 N.J. 332, 431 A.2d 811 (N.J. 1981) (statute of repose).

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