CARDOZO
Benjamin N. Cardozo School of Law

Cardozo Law Review

Vol. 12
Iss. 6

Article 25

Statutes of Repose and the Construction Industry: A Proposal for New York

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NOTES

STATUTES OF REPOSE AND THE CONSTRUCTION INDUSTRY: A PROPOSAL FOR NEW YORK

INTRODUCTION

Architects[1] and builders[2] may be liable for damages caused by serious personal injury at a structure with whose construction they had a connection. While the American legal system allows an action to be filed against any individual or business entity, the particular nature of the work of architects and builders exposes them to a particularly broad range and lengthy period of potential liability.

The defects which give rise to the injuries for which damage claims are filed generally cannot be discovered or rectified by architects and builders during their long period of liability because they have no control over their work after the construction project is completed.[3] Some architects have dealt with the cost of insuring against this open-ended and uncontrollable liability by carrying no insurance coverage.[4] This can leave a successful plaintiff who has won a judgment against an architect with little or no assets from which to collect that judgment.[5]

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[1] An architect is generally an individual who has received a postgraduate degree from an accredited school of architecture, who has served a stipulated period of internship under the supervision of an established architect, and who has passed a series of examinations designed to test the applicant's professional skill and judgment. An architect is licensed by a state to practice only in that particular state. *See, e.g.*, N.Y. EDUCATION LAW §§ 7301-7307 (McKinney 1985). So-called "national certification" does not confirm any broader rights to practice, but rather establishes a uniform record of competency, thereby making it easier for a state to evaluate the record of an applicant who is already licensed to practice in another state. National certification is administered by the National Council of Architectural Registration Boards, 1735 New York Avenue, N.W., Washington, D.C. 20006.

Reference to architects in this Note not only includes architects, per se, but also engineers, surveyors, and other professionals who are responsible for the design or planning of a construction project. Every state allows each of these professionals to practice as an individual or in partnership with other professionals as a firm. Some states also permit professional practice within a corporate form of organization. Thus, an architect may be "he" or "she," and may also be "it."

[2] The term builder, as used in this Note, encompasses builders, contractors, subcontractors, construction managers, and others who actually build construction projects, whether as individuals, corporations, or other entities. It does not include suppliers of materials, equipment, or component parts.

[3] *See infra* notes 146 and 152 and accompanying text.

[4] *See infra* note 79 and accompanying text.

[5] *See infra* note 80 and accompanying text.

Statutes of repose[6] provide a finite limitation on the requirement for insurance by ending exposure to liability after a period of time. Adaptation of such statutes should encourage the purchase of coverage, as the costs would no longer be open-ended or uncontrollable. Where the end of the limitation period of the statute of repose is set at a point that will allow all but a small percentage of all injured parties to bring suit, a reasonable balance is achieved between the need for an opportunity to redress an injury and the need for a realistic end to liability that will allow adequate insurance coverage during the period of liability.[7]

The broad base of possible legal theories under which suits may be brought against an architect or builder includes tort negligence,[8] strict liability,[9] contract,[10] express or implied warranty,[11] or, in the case of an architect, professional malpractice.[12]

The relationship of these theories to the particular sorts of work in which architects and builders engage can be seen by examining the course of development and construction of a building project. First, an owner contractually retains an architect.[13] Later, the owner hires a builder to construct what the architect designed, also within the framework of a contract. Under those agreements contractual liability exists, but such liability is limited to parties in contractual privity, or persons who are considered to be third-party beneficiaries of the agreements.[14]

The larger universe of potential claimants against architects and builders, however, are independent third parties—users, visitors, or those merely passing by—who are injured in or about a building. Although such people may benefit from the contracts which helped to

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6 *See infra* note 29 and accompanying text.

7 *See infra* note 173 and accompanying text.

8 *See, e.g.*, Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 146 A.D.2d 190, 539 N.Y.S.2d 814 (3d Dep't 1989), discussed *infra* note 47.

9 *See, e.g.*, Bednarski v. Hideout Homes & Realty, 711 F. Supp. 823 (M.D. Pa. 1989), discussed *infra* note 47.

10 *See, e.g.*, Shreve v. Biggerstaff, 777 S.W.2d 616 (Ky. Ct. App. 1989), discussed *infra* note 47.

11 *See, e.g.*, Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977), discussed *infra* note 55.

12 *See, e.g.*, Sosnow v. Paul, 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975), discussed *infra* note 53.

13 For most construction projects the owner hires the architect directly. For a "turn-key" project, however, the owner hires the builder to provide a completed project with stipulated performance specifications for a stated price. For such projects, the builder will be the one to hire the architect. This alters the ties of contract liability, but the architect's responsibilities for the quality of the work produced remain unchanged.

14 *See* E. FARNSWORTH, CONTRACTS 712-13, 716 (1982).

produce the building, they cannot claim any rights under them.[15] They can, however, bring suit under two other legal theories. First, an injured third party can sue the architect for professional malpractice,[16] and second, he can sue both the architect and the builder for ordinary tort negligence.[17] Although damages recoverable under contract liability are generally limited to the aggrieved party's original expectation of benefit from the contract—an amount which generally is foreseeable, even if large[18]—tort recoveries for negligence or professional malpractice can encompass out-of-pocket expenses, recompense for pain and suffering, future loss of earnings, and punitive damages.[19] Thus, tort recovery can amount to significant and unpredictably open-ended sums.

When an accident occurs and someone is injured, anyone with even a tangential connection to the perceived source of the harm is fair game for a summons and complaint. This is true regardless of how far removed in time the defendant is from that source, even if that time is measured in decades.[20]

Encouraged by media reports of jury awards that may appear to be out of proportion to the injuries suffered,[21] plaintiffs may be lured

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[15] *Id.* at 710 ("The performance of a contract usually benefits persons other than the parties who made it, but they cannot ordinarily enforce it.").

[16] Malpractice is defined as:

> Professional misconduct or unreasonable lack of skill. . . . Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them.

BLACK'S LAW DICTIONARY 959 (6th ed. 1990) [hereinafter BLACK'S].

[17] Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. . . . Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances.

Id. at 1032.

[18] E. FARNSWORTH, *supra* note 14, at 812.

[19] W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 6, 9 (5th ed. 1984) [hereinafter PROSSER & KEETON]; J. HENDERSON, JR. & R. PEARSON, THE TORTS PROCESS 201, 211, 239, 286-90 (3d ed. 1988).

[20] *See, e.g.*, Anderson v. M. W. Kellogg Co., 766 P.2d 637 (Colo. 1988) (damage claim against designer/builder for worker's loss of an arm at a plant built 20 years prior to the accident); Smith v. Fluor Corp., 514 So. 2d 1227 (Miss. 1987) (personal injury damage claim against builder of oil refinery completed 25 years before suit was filed).

[21] An inebriate, whose lawyer referred to his intoxication as a "disability," fell onto the train tracks at a New York City subway station and lost an arm when he was struck by an oncoming train that could not stop in time. Ignoring the man's responsibility for his own behavior, the jury awarded him $9 million. Merino v. New York City Transit Auth., Index

into thinking that they too can strike it rich, notwithstanding the potential sanctions against attorneys attendant on claims which are not well grounded in fact and warranted by a good faith interpretation of existing law.[22]

It is common knowledge that an architect designs buildings and a builder constructs them. Thus, these people are most likely to be sued following an injury at a project they designed and built. The problem of time lag between the completion of that project and the institution of the lawsuit against them can work a severe hardship.[23]

The normal business procedures of those who design and build structures makes the mounting of a defense against a lawsuit espe-

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no. 18730/89 (Sup. Ct. Bronx County 1990); N.Y. Times, Sept. 23, 1990, § 1, at 20, col. 4. *See also*, N.Y. Times, Oct. 16, 1990, at A28, col. 3 (letter to the editor from the plaintiff's lawyer justifying the award by asking, "Would you rather have your left arm or $9 million?"). In an earlier case, a worker injured at a construction site won a $40 million jury verdict in his suit against the general contractor and others. Toussaint v. Rockrose Constr. Co., Index no. 13825/86 (Sup. Ct. New York County 1987) (reported in N.Y.S. JURY VERDICT REV. & ANALYSIS, Feb. 1988, at 1).

22 FED. R. CIV. P. 11. The sanctions under the federal rule are aimed primarily at lawyers, but they can be assessed against clients as well. *Id. See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2). Unlike the federal rule, there is no provision for a restraint or sanction against a client in the Model Rules or the Model Code.

23 The subject of lawsuits filed so long after completion of the work in question that their validity is highly suspect has been the subject of satiric reportage. For a special April Fools issue of a professional newsletter normally published by McGraw-Hill Book Company, its editor, this author, independently noted the fictitious case of *Metropolitan Authority of Pisa v. Piscial'acqua*, reporting,

> In the celebrated "Leaning Tower of Pisa" case, which has spanned centuries and survived countless ravenous lawyers, the Court of Appeals of Tuscany has held that the region's statute of limitations will not foreclose suit against the architect who was commissioned to design and construct the provincial edifice.
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> Architect Purtroppo Piscial'acqua was commissioned to provide architectural services for the Metropolitan Authority of Pisa in connection with the construction of a bell tower next to the city's great cathedral. Pursuant to provisions in the contract, the architect was obligated to have all necessary site tests conducted and completed to his satisfaction and to supervise construction to completion.
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> Construction began on the campanile in 1170, but before three of the eight stories were erected, a public outcry from nearby pedestrians put a temporary halt to progress. Supplementary studies disclosed that the sandy soil might have an effect on the building's physical properties. Nonetheless, and despite repeated claims on the part of the media that the white marble structure was beginning to sink, city officials concluded that nothing seemed amiss, and gave Piscial'acqua permission to continue.
>
> Eventually construction was completed and the architect died, leaving a substantial estate to his Tuscan relatives. In 1759, the Italian government noticed that the tower, whose top was by that time more than 14 feet to the side of the base, was not resting perpendicularly to the ground. Studies were again conducted which convinced city officials that something had gone wrong, despite repeated protestations from the press that the tower had in fact been "falling" for more than 500 years. Federal support resulted in the placement of millions of tons of cement

cially difficult after the passage of only a few years. Buildings are usually unique structures whose design and construction are documented with unique drawings, specifications, and project records. This voluminous paperwork, which accumulates rapidly in an active design or construction practice, is commonly treated with a low level of care. In the normal course of business affairs, papers are thrown out or lost, and after a few years, the documents needed for a suitable defense are no longer available.[24] In addition, because of a high level of turnover in the construction industry,[25] the people with knowledge about any particular project leave for other jobs, and can no longer be located to serve as defense witnesses.

In recognition that stale claims are less likely to be fruitful, and that the passage of time should bring some measure of certainty about past events, time-measured statutory restrictions of some sort have

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below and around the base of the 179-foot building to stabilize it, at an estimated cost of 731 billion lire.

In 1763, the City filed suit against Piscial'acqua or, in his absence, every known descendant, claiming negligence in the design and construction of the building. Lawyers for the defendants argued that the region's statute of limitations required that actions for damages to property be brought within five years.

The trial court, however, refused to dismiss and the Court of Appeals of Tuscany affirmed, ruling that the date of the injury, not the date the negligence occurred, controls when the period of limitations begins to run. In the opinion of the court, the Tower was injured sometime in 1758, when it began to fall, not in and around 1170, when the original acts of negligence on the architect's part probably occurred. Even though there was some evidence that the building had been falling before 1758, said the court, nothing authoritative on that issue could be mustered by the defendants; hence, the City's conclusion that it began to fall a few months before discovery must be accepted.

The court rejected as "merely conjectural" the defense lawyers' contention that the falling was only the "symptom" of acts of negligence which terminated centuries before, saying, "We are prepared to relieve the cause, but not the symptom." As a result of the court's decision, trial against Piscial'acqua and his descendants is likely at some point in the near future. Lawyers for the defendants were not prepared to disclose what their next legal gambit would be.

5 LEGAL BRIEFS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS Issue 7A, at 3 (1979) (on file at Cardozo Law Review).

24 These problems are common to many malpractice actions. Hospitals and medical practitioners such as doctors, dentists, podiatrists, and chiropractors also produce voluminous records, which are likely to be needed to defend a future lawsuit, but the frequency of lawsuits against the medical profession has led to greater care being taken to preserve those records. The bulk of records which need to be retained, however, is not as great for the medical profession as for the construction industry, because medical records are, by their nature, less voluminous than construction drawings, specifications, and related material, and because medical records generally need not be kept longer than the relevant statute of repose, N.Y. CIV. PRAC. L. & R. § 214.6 (McKinney 1990), whereas constructions records ought to be kept forever, because of the lack of a comparable statute of repose.

25 Because the construction of new buildings is not a continuously critical industry, as is the production of food or gasoline, it is especially sensitive to general economic downturns. Workers are laid off whenever workflow slows, not to be rehired until production picks up.

been placed on legal claims in all states.[26] Essentially, these restrictions take two forms.

A statute of *limitations* places a time limit on bringing a law suit once the cause of action exists.[27] The time period is measured either from the creation of the injury or its discovery.[28] A statute of *repose* also places a limit on the time available for filing a suit, but the measuring point is fixed by the terms of the statute and does not relate to the injury suffered.[29] Under a statute of repose, an injured party has no cause of action once the statutory period is passed, even if the period ends before the injury occurs.[30]

Limitations to extended liability already exist in the health care industry.[31] Similarly, liability of architects and builders should not be open-ended. Exposure to suit should be relieved after a suitable period of time by statutory protection.

Statutes of repose have been widely enacted to protect parties connected with construction projects from liability.[32] This Note ex-

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[26] *See, e.g.*, N.Y. CIV. PRAC. L. & R. §§ 211-217 (McKinney 1990).

[27] The pattern of statutes of limitation is to establish different periods for different causes of action. Thus, the statute of limitations may include periods for negligence, breach of contract, breach of warranty, malpractice, bodily injury, property damage, fraud, deceit, misrepresentation, and other categories, two or more of which might arguably be applicable to a case of the malpractice of architects. . . . The classification of the act determines the period of limitations.

J. ACRET, ARCHITECTS & ENGINEERS § 11.02, at 238 (2d ed. 1984).

[28] A statute of limitations is triggered by the accrual of a cause of action. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 203(a) (McKinney 1990). The traditional view places the accrual of the action at the time of the wrongdoing by the architect or the builder. South Burlington School Dist. v. Goodrich, 135 Vt. 601, 604, 382 A.2d 220, 222 (1977) ("[T]he cause of action accrues when the act upon which the legal action is based took place and not when the damage became known."). The "discovery rule," by contrast, places the accrual of a cause of action at the point when the plaintiff discovers the injury he has suffered, or should have discovered it by the exercise of reasonable diligence. PROSSER & KEETON, *supra* note 19, § 30, at 166.

[29] "Rather than *limiting* the time within which a plaintiff may sue to *enforce* a cause of action, statutes of repose, after a lapse of years, *prevent* the cause of action from ever arising." J. ACRET, CONSTRUCTION LITIGATION HANDBOOK § 22.04, at 407 (1986) (emphasis in original).

[30] "The unique and distinctive feature of statutes of repose is that they dissolve all grounds of liability . . . solely by lapse of time." *Id.* at 408.

[31] Professional providers of medical services in New York are protected from suits thirty months after completion of the medical treatment of which complaint is made, N.Y. CIV. PRAC. L. & R. § 214-a (McKinney 1990) (applicable actions for medical, dental, or podiatric malpractice), unless the source of the problem is a foreign object which was left inside the plaintiff's body by the medical practitioner. In cases in which the malpractice suit is based on discovery of a foreign object in the body, a potential plaintiff has one year from the date of discovery to sue. *Id.* The difficulties of defending against a claim that a specific ill or injury was caused long ago by the medical practitioner are reflected by the New York medical malpractice statute of repose, which keeps the liability of a doctor, dentist, or podiatrist from being eternally open-ended.

[32] *See* Appendix.

amines the lack of a protective statute of repose in New York and it compares this anomaly to the statutes of repose enacted by other states. Part I outlines the historical background of liability for construction injuries, tracing theories of liability from ancient Babylon to the present day. Part II sets forth the nature and scope of the problem, including questions of insurance coverage, financial consequences, and the phenomenon of "going bare," that is, practicing without liability insurance. Part III provides an overview of other states' methods for addressing the problem of potentially open-ended liability, and it discusses the constitutional issues raised by statutes of repose. Part IV argues that architects and builders should be protected at the end of seven years, with the period extended to eight years for injuries which occur during the seventh year. Part V comprises a specific proposal for a statute of repose for New York. Following a summary and conclusion, an appendix presents a comparative description of current statutes of repose that affect the construction industry in all states, and charts the judicial decisions ruling on the constitutionality of each of those statutes.

I. HISTORICAL BACKGROUND

Architects and builders in ancient Babylon were subject to an extreme form of strict liability which could impose a death sentence with no proof of negligence.[33]

The law as it evolved in England by the nineteenth century was rather more civilized; penalties were not so draconian, and proof of causation was required.[34] Builders and designers were protected further by the requirement for privity of contract, and third-party negligence suits were not allowed.[35]

England's tradition of limitation on liability developed in the United States in the form of the doctrine of caveat emptor (let the buyer beware)[36] and continued with the requirement of contractual

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33 According to the Code of Hammu-rabi, 2285-2242 B.C.E., if a building collapsed, the builder (or architect) had to pay the cost of rebuilding it; if the accident killed the son of the owner (or occupant), the builder's son was killed; and if it killed the owner, the builder himself was put to death. HAMMU-RABI, THE BABYLONIAN LAWS §§ 229-32 at 83 (G. Driver & J. Miles trans. rev. ed. 1968). This concept is called *lex talionis*, or the law of retaliation, which, under Mosaic law, was expressed by the formula, "an eye for an eye; a tooth for a tooth." BLACK'S, *supra* note 16, at 913.

34 PROSSER & KEETON, *supra* note 19, at § 41.

35 Winterbottom v. Wright, 10 Meeson & Welsby 109, 152 Eng. Rep. 402 (1842) (no personal injury liability for a defective coach in the absence of privity).

36 Seixas v. Woods, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804) (seller not liable for hidden defect of wood, despite contrary representation when sold).

privity for negligence suits.[37] However, the privity standard began to fall through a series of judicial decisions in the nineteenth and early twentieth centuries[38] and was further limited in 1916 with Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*[39] This sequence of case law was confined to general business dealings, primarily in the form of evolving products liability law. It was not until 1957, however, that the privity requirement in cases involving architects first began to crumble.[40]

If normal injury-based statutes of limitation are applied to these decisions, liability of architects and builders becomes virtually open-ended. For example, in a state which has a three-year statute of limi-

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[37] *See, e.g.*, Loop v. Litchfield, 42 N.Y. 351 (1870) (no liability for wrongful death from defective balance wheel in absence of privity); Burkett v. Studebaker, 126 Tenn. 467, 150 S.W. 421 (1912) (no liability for personal injury from defective automobile wheel in absence of privity).

[38] *See* Thomas v. Winchester, 6 N.Y. 397 (1852) (personal injury liability without privity for sale of dangerous poison); Devlin v. Smith 89 N.Y. 470 (1882) (wrongful death liability without privity for a negligently defective scaffold); Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1914) (personal injury liability without privity for defective pre-packaged bottled beverage). The fall of the concept of privity in negligence actions was addressed extensively in Prosser, *The Assault Upon the Citadel* (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960), and Prosser, *The Fall of the Citadel* (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966), long recognized as the definitive authority on the subject.

[39] 217 N.Y. 382, 111 N.E. 1050 (1916) (personal injury liability for negligence without privity where a defect makes an item imminently dangerous).

[40] Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957) (designers and builders can be held liable for injuries to remote users for latent defects or dangers not generally known). The court in *Inman* exonerated the architect charged by the third-party user of the property, because the "defect"—the absence of a porch railing—was not latent, but was clearly visible. The *Inman* holding was overruled by Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976) (manufacturer of printing press held liable for patent defects and dangers as well as latent ones), as stated in Roberts v. MacFarland Constr. Cos., 102 A.D.2d 981, 477 N.Y.S.2d 786 (3d Dep't 1976) (in personal injury action, proving existence of latent defect or concealed danger not needed in order to hold builder liable for slip-and-fall accident on warehouse floor).

Actually, cracks in the privity requirement were first observed in 1949, when builders' liability to third parties for defective structures was noted. Adams v. White Constr. Co., 299 N.Y. 641, 641, 87 N.E.2d 52, 52 (1949) (a cause against the builder is created even if the injured party is not in privity with the builder); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 34-35, 68 A.2d 517, 533 (1949) (liability to third parties for injuries from chattels with hidden defects is equally applicable to injuries from structures that are improvements to real property).

In 1956, a federal court expressly rejected the doctrine that a contractor was relieved of liability for injuries to third parties once a construction project was completed and accepted by the owner of the building. Hanna v. Fletcher, 231 F.2d 469, 472 (D.C. Cir. 1956) (claim for personal injury damages against contractor who repaired an iron railing improperly resulting in injuries when the railing gave way), *cert. denied*, 351 U.S. 989 (1956). The circuit court in *Hanna* saw no difference between the foreseeability to the automobile manufacturer in *MacPherson* of third party users of its product who might be injured if its work were negligently done, and the foreseeability to the contractor that third party users of the steps might be injured if the railing repairs were negligently done. *Id.* at 474.

tations for negligence suits, a person injured in 1991 as a result of some defect which may have been present in a building since it was completed in 1944 would have until 1994 to file suit—half a century after the architect had completed the project.[41]

II. THE PROBLEM

Within a statute of limitations that measures the limitations period from the completion of a contract, injuries that are evident prior to the completion of a project or shortly thereafter would be readily compensable within the statutory time frame and would not pose a problem.[42] Such "concurrent" or "shortly thereafter" defects can include an ice-skating rink's being nonfunctional, even though it was designed to provide artificially frozen water for recreation,[43] or a building's steel frame's collapsing while under construction.[44]

Many years after a project is completed, however, a roof may leak,[45] or a user of a building may slip and fall due to a defect in the building's design, construction, or maintenance.[46] Even though a project might have been completed many years earlier and in accord with the customary practices of the time,[47] an accident can occur in which

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41 If that state had a 10-year statute of repose, the architect would have been subject to suit only until 1954, 10 years after the building was completed. A person injured after that point would have no cause of action against the architect, although he would be able to sue the owner of the building if the statute of repose did not specifically protect that class of persons.

42 Whenever an injury occurs *prior* to the measuring point for the start of the statutory limitation period, the statute is not yet applicable because it has not yet begun to run. When the injury occurs *after* the measuring point is passed, the statutory clock is running, but for injuries evident only a short time later, the typical limitations period for contract actions provides sufficient time to file suit. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 213.2 (McKinney 1990) (action upon a contractual obligation to be commenced within six years).

43 City of New York v. Kalisch-Jarcho, Inc., 161 A.D.2d 252, 554 N.Y.S.2d 900 (1st Dep't 1990) (city entitled to sue subcontractor for defective ice-making system in recreational ice rink ultimately completed by Donald Trump).

44 Williams Enters. v. Strait Mfg. & Welding, 728 F. Supp. 129 (D.D.C. 1990) (prime contractor awarded damages against subcontractor when structural steel collapse led to 83-day delay in construction schedule).

45 Watson, Watson, Rutland/Architects, Inc. v. Montgomery County Bd. of Educ., 559 So. 2d 168 (Ala. 1990) (architect charged with violation of duty to inspect construction of school whose roof leaked).

46 Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dep't 1979) (tenant in apartment house who slipped and fell in building's laundry room brought personal injury suit for damages against architect and building owner).

47 Under a negligence theory, the architect or builder would be liable if the defect in the work were known at the time the project was designed and built. *See, e.g.*, Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 146 A.D.2d 190, 539 N.Y.S.2d 814 (3d Dep't 1989) (builder owner claimed against architect and roofer for leaky roof), *appeal denied*, 75 N.Y.2d 702, 551 N.E.2d 107, 551 N.Y.S.2d 906 (1989). However, negligence liability could also attach if the builder should have known about the defect. *See, e.g.*, Shreve v. Biggerstaff, 777 S.W.2d 616 (Ky. App. 1989) (homeowners claimed against builder of defective chimney for breach of

the builder may be held liable for the *misuse* of the work if that irregular operation is held to have been foreseeable.[48]

The particular situation in New York arises out of its three relevant statutes of limitations and its lack of a statute of repose.[49] New York bars actions to recover tort damages for injuries to property or persons three years after the injury occurs.[50] Also within that three-year limitations period are actions to recover damages for professional malpractice, other than actions for medical, dental, or podiatric malpractice.[51] A six-year statute of limitations has been provided for actions grounded in a contractual obligation or liability.[52]

Prior to 1976, an action in New York against an architect for *malpractice* in the provision of architectural services was barred *three years* after the completion of construction by application of section 214.6 of the State's Civil Practice Law and Rules.[53] In 1976, the

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oral contract). Finally, under certain circumstances, strict liability would place responsibility onto the architect or builder regardless of whether the defect could have been known, or even whether it was capable of being known. *See, e.g.*, Bednarski v. Hideout Homes & Realty, 711 F. Supp. 823 (M.D. Pa. 1989) (homeowner claimed against builder and electrical contractor for damages from fire that destroyed his house).

[48] *See, e.g.*, McCoy v. Otis Elevator Co., 546 So. 2d 229 (La. App. 1989). In *McCoy*, the elevator company, Otis Elevator Company, serving as a subcontractor (and thus a "builder" as that term is used in this Note), was held liable to an injured worker, McCoy, whose foot was crushed in 1982 while he was operating a freight elevator during a building renovation in which power for the elevator light had been turned off. The elevator had been installed without a door in 1923. The court affirmed a $5000 award to McCoy, holding that the jury could have concluded that a doorless elevator was unreasonably dangerous in normal use, and that McCoy's use of the car without functioning lights was a foreseeable use or misuse. *Id.* at 231. A strong dissent observed, however, that the unreasonably dangerous per se theory presented by McCoy prevented Otis from presenting evidence of the "state of the art" for freight elevator design in 1923. *Id.* at 235 (Hightower, J., dissenting). The dissent also noted that Otis had had no connection with the elevator since 1962, when its maintenance contract for the elevator was not renewed. *Id.* at 233. The case was treated as a product liability suit rather than one against a subcontractor who participated in the construction of a portion of a building.

[49] *See infra* notes 50-52.

[50] N.Y. CIV. PRAC. L. & R. §§ 214.4, 214.5 (McKinney 1990).

> The following actions must be commenced within three years:
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> . . . .
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> 4. an action to recover damages for an injury to property . . . ;
> 5. an action to recover damages for a personal injury . . . ;

Id.

[51] *Id.* § 214.6 (covering malpractice, other than medical, dental, or podiatric malpractice, which is encompassed within section 214-a).

[52] *Id.* § 213.2.

> The following actions must be commenced within six years:
>
> . . . .
>
> 2. an action upon a contractual obligation of liability, express or implied, except [a sales contract];

Id.

[53] *See, e.g.*, Sosnow v. Paul, 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975). Although the claim in *Sosnow* was

power of this protective period was weakened when the New York Court of Appeals determined that the claims in the dispute could be brought under either a "contract" or a "tort" theory and thus were subject to arbitration if brought within the six-year contract limitations period.[54]

The following year, the protection of the three-year limitations statute for malpractice fell completely, so far as damage actions for injury to property or pecuniary interests were concerned, leaving only the six-year contract statute to govern.[55] A clear distinction was made, however, between causes of actions for personal injuries and those for property or economic damages, with the personal injury malpractice cases remaining within the three-year statute.[56] A happenstance of practice thereby placed architects at a distinct disadvantage amongst other professionals. Architects, engineers, and others who provide similar services to the construction industry generally do so via written contracts, whereas doctors, dentists, and other medical practitioners do not. Thus, the court could readily graft a six-year contract statute of limitations onto a malpractice claim which might

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brought for professional malpractice and for breach of contract, the court noted the applicability of the three-year statute of limitations rather than the six-year one "to both causes of action, since defendants' alleged malpractice is truly the basis for the cause of action sounding in breach of contract." *Id.* at 979, 352 N.Y.S.2d at 503.

[54] *See In re* Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 672, 345 N.E.2d 565, 566, 382 N.Y.S.2d 22, 23 (1976) (claim by building owner that architect's lack of reasonable care and skill was the cause of leakage in the building). The court in *Paver*, in commenting upon the contract/tort distinctions underlying the six-year/three-year statute of limitations dichotomy, stated:

> The discussion would not be complete without observing, as one should again and again, that the distinctions between contracts and torts are not contained in the natural order but are the products of the faltering legal grammar that men apply to the facts of life in order to make them tractable to verbalized rules. The distinctions, however, are not to be confused with pronouncements from Mt. Sinai. Karl Llewellyn, in a characteristic footnote, pointed the issue: "One recalls also from the Legal Apocrypha: 'And the Lord said: Let there be contracts and let there be torts. And it was so. And He divided contracts from torts. And darkness, etc.' . . . ."

Id. at 678, 345 N.E.2d at 570, 382 N.Y.S.2d at 27.

[55] *See* Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977). After open concrete access ramps at a parking deck over a Sears Roebuck store cracked, the company sued its architect, Enco Associates, for (1) malpractice in the preparation of the plans and specifications, (2) breach of implied warranty of fitness for the plans, and (3) breach of contract. The court in *Sears* rejected the implied warranty and strict liability claims, but characterized the other two causes of action as coming within the ambit of the six-year limitations statute by observing that the liability of the architect "had its genesis in the contractual relationship of the parties," and that, had there not been a contract, "no services would have been performed and thus there would have been no claims." *Id.* at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 771.

[56] *Id.* at 396-97, 372 N.E.2d at 558, 401 N.Y.S.2d at 770.

otherwise have been subject to the three-year tort statute of limitations.[57]

A personal injury action by a third party not in contractual privity with the architect, however, or one brought by a contracting party under a tort negligence theory, would not be considered to be barred until three years after the injury for which recompense is sought.[58] In setting this measuring point a New York appellate court held that "malpractice essentially is a special form of negligent conduct."[59] The court maintained that malpractice was a tort which carried a three-year statute of limitations *measured from the time of injury*, a decision affirmed by the New York Court of Appeals.[60]

The appellate court in this case did, however, recognize the concept of a statute of repose which would provide a fixed time bar to claims by placing the accrual of a cause of action at the completion of construction, rather than the moment of actual injury. It determined, however, that this would be appropriate only if "reasons of compelling public policy" could be found.[61]

Seeking such a finding, the architect in the case argued that it had had no involvement with the project and had had nothing to do with its maintenance and repair since the time it submitted a certifi-

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[57] *Id.* at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 771.

[58] *See, e.g.*, Cubito v. Kreisberg, 69 A.D.2d 738, 740, 419 N.Y.S.2d 578, 579 (2d Dep't 1979) (action against architect by apartment house tenant who slipped on laundry room floor where water had collected was held to have accrued on the date of the injury and not the date the building was completed), *aff'd*, 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980).

[59] *Id.* at 742, 419 N.Y.S.2d at 580. While the court acknowledged that "the statute formally treats malpractice actions differently from other actions based on negligence," it nonetheless decided that there was "no material difference" between malpractice and ordinary negligence actions sufficient to justify treating them differently. Thus, the court, in effect, "repealed" the malpractice statute by encompassing it completely within the negligence one. *Id.*

[60] *Id.* 51 N.Y.2d at 900, 415 N.E.2d at 979, 434 N.Y.S.2d at 991. In affirming, the Court of Appeals adopted the reasoning stated in the lower court opinion, and declined to issue any commentary of its own. Nonetheless, in an *earlier* case, the same Court of Appeals saw malpractice as a contractual action whose statute of limitations is six years from the date of completion of the project. Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977). By saying "[i]t should make no difference then how the asserted liability is classified or described," *id.* at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 771, the court in *Sears* completely negated the will of the legislature as evidenced by its enactment of different statutory limitations periods for contract and malpractice actions.

[61] *Cubito*, 69 A.D.2d at 744, 419 N.Y.S.2d at 582. The court in *Cubito* distinguished cases in which the limitations period for malpractice actions against architects was measured from the completion of construction, by transforming those tort claims into ones based on a contract theory. The court then continued its sleight-of-hand trick and transformed the subject malpractice claim into a simple negligence action, thereby fixing the start of the limitations period at the time when the plaintiff was injured, rather than the time when the architect's work on the project ceased by virtue of the completion of its construction.

cate of final inspection,[62] more than four years prior to the time the plaintiff filed her claim.[63] The architect asserted that the trial court had erroneously relied on two earlier cases, *MacPherson v. Buick Motor Co.*[64] and *Inman v. Binghamton Hous. Auth.*[65] The architect distinguished those cases, noting that in neither instance was liability predicated on the rendition of professional services, and that public policy soundly differentiates between a manufacturer of a defective product and a purveyor of professional services, such as an architect.[66] In response, the court noted the hardship that architects suffered as a result of the existing judicial interpretation of the state's statutes of limitation,[67] but it raised an institutional competence argument by saying that any change ought to come from the legislature.[68]

Thus, New York has a time-limitation structure for architects and builders that has several categories:

1. Contract actions brought by parties in privity: six years, measured from completion of construction.
2. Malpractice claims *masquerading as contract actions* and brought by contracting parties for property or pecuniary damages: six years, measured from completion of construction.
3. Malpractice claims *masquerading as contract actions* and brought by contracting parties for personal injuries: three years, measured from completion of construction.
4. Actual malpractice or negligence actions brought by either contracting or noncontracting parties for personal injuries: three years, *measured from the injury.*

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62 An architect's contractual duties may include regular inspections of the contractor's work as a prerequisite to approval of applications for progress payments, and the issuance of a certificate of final inspection when the entire project is complete and the final payment to the contractor can be made.

63 *Cubito*, 69 A.D.2d at 741, 419 N.Y.S.2d at 580.

64 *See infra* note 39.

65 *See infra* note 40.

66 *Cubito*, 69 A.D.2d at 741, 419 N.Y.S.2d at 580.

67 *Id.* at 744, 419 N.Y.S.2d at 582. Flying in the face of all logic and reason, the court determined that "the liability of an architect must now be treated under the same tests currently applied toward an industrial manufacturer." *Id.* at 745, 419 N.Y.S.2d at 583.

68 *Id.* at 746, 419 N.Y.S.2d at 583. The court in *Cubito* suggested that any change that would grant to architects the relief from open-ended liability inherent in a statute of repose should be

> accomplished by the Legislature, just as the Legislature has acted on behalf of the medical profession [referring to N.Y. CIV. PRAC. L. & R. § 214-a (McKinney 1990)]. . . . The Statute of Limitations has been changed from time to time in New York in response to current needs and expectations in society and has been peculiarly a subject of legislative solicitude.

A. *The Insurance Dilemma*

Traditionally, the response to laments of unending liability has been that insurance can cover those risks. Insurance premiums are often thought of as but one more line item in the overhead calculation of a contractor. Insurance becomes just one more element of a project for which the owner pays, and on which the builder may even take a profit should he have a cost-plus contract. For the design professional, however, the situation is not so simplistic. Two types of liability insurance have been devised to cover professional malpractice: claims-made insurance and occurrence insurance.[69]

Coverage under a claims-made policy is bought only for claims made while premiums are continually paid. Although the annual premiums for this sort of insurance are initially lower than for occurrence insurance, there is a long tail of payments which follow after the construction project has been completed. If an architect wishes to maintain coverage, premiums must continue to be paid, even after his active practice is over and he has permanently retired. Claims-made insurance generally encompasses claims for negligent acts, errors, and omissions resulting from the performance of those professional services stipulated in the policy, and it excludes coverage for express warranties or guarantees, and for cost overruns.[70]

Liability insurance issued on an occurrence basis provides permanent coverage for claims grounded in occurrences or acts which took place while premiums were being paid. The cost of this sort of insurance is higher than that of claims-made policies, because the premium income must be invested by the insurer to provide sufficient financial resources to cover claims which may be made many years into the future.

Professional liability insurance is available today only on a

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[69] Professional liability insurance is often called errors-and-omissions insurance. It provides a specialized and limited form of coverage to a particular professional group covering liability for negligence, omissions, mistakes, and errors inherent in the practice of the profession. 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4504.01, at 310 (Berdal ed. 1979). Coverage for errors and omissions is effective under an "occurrence" insurance policy if the negligent act or omission occurred during the policy period, regardless of the date of discovery of that act or omission. A variant is a "discovery" policy where the coverage is effective if the negligent or omitted act was discovered and brought to the attention of the insurer during the policy period no matter when the act or omission occurred. 13A COUCH ON INSURANCE 2D § 48:167, at 171 n.18 (rev. ed. 1982). The "claims made" form of insurance, which offers coverage only for claims made while the policy is in effect, was challenged as being against public policy, but was upheld as a valid form of insurance. J. APPLEMAN, *supra*, § 4504.01, at 88.

[70] Herlihy, *Design for Success; Liability of Design Professionals; Inside the Specialty Market*, BEST'S REVIEW, PROPERTY CASUALTY INS. EDITION, Feb. 1990, at 44.

claims-made basis,[71] and occurrence insurance is no longer available to the construction industry.[72]

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[71] *Id.*

[72] A special problem area involves asbestos. It has been well over a decade since asbestos was disapproved for use in construction projects as sprayed-on fireproofing. *The Growing Need for Asbestos Substitutes*, BUS. WK., Dec. 3, 1979, at 98D. The Environmental Protection Agency has prohibited the spraying of asbestos on the walls or ceilings of buildings since 1978. *Id.* Nevertheless, thousands of buildings exist that were completed prior to 1978 and which contain asbestos in one form or another. "Estimates by the [New York City] Department of Buildings [in 1980] were that about 150 million square feet of space was built with sprayed-on asbestos from 1951 to 1973, three-quarters of it is in Manhattan." Oser, *Asbestos Removal; As Demand Grows, an Industry Blossoms*, N.Y. Times, Mar. 22, 1987, § 8, at 9, col. 2. There have been many cases in which architects and builders have been sued for alleged asbestos-related injuries from installations of the material made when its cancer-causing properties were unknown. *See, e.g.*, Barnett v. City of Yonkers, 731 F. Supp. 594 (S.D.N.Y. 1990). After Richard Barnett died in 1986 from mesothelioma, a lung cancer, his mother brought a lawsuit against Eli Rabineau, the architect who had designed a school in 1956 which Barnett had attended from 1967 to 1970. Diane Barnett asserted that the sprayeded-on asbestos fireproofing Rabineau had specified for the school was the cause of her son's death. The mother claimed the architect was liable for her son's death because he should have known not to specify asbestos as fireproofing within the school building. The federal court for the Southern District of New York threw out the suit, holding that Rabineau could not be expected to have known in 1956 about the deleterious effects of asbestos, particularly since the New York State Education Department had approved sprayed-on asbestos for schools until 1979. Despite the exoneration, Rabineau had to pay to defend against the claim. This case illustrates one sort of potential liability for architects—a project that used asbestos when its dangers were not known. Pre-existing asbestos installations also pose liability questions.

Local laws now generally require asbestos abatement as a condition of permit approval for any renovation project. *See, e.g.*, N.Y. CITY ADMIN. CODE § 27-198.1 (Local Law 76 of 1985). Local Law 76, effective on April 1, 1987, is a response to a realization that asbestos in existing buildings can pose a hazard when disturbed during renovation or demolition work. Local Law 76 requires that no building permit for such work be issued until all asbestos within the building is removed according to stipulated procedures and an appropriate certificate of compliance issued. *Id.* § 7. All workers removing asbestos must complete an approved course, take a two-hour examination, and be certified. *New York City Asbestos Regulations Not Pre-empted by Federal Standards*, 57 U.S.L.W. 1039 (Sept. 13, 1988).

Local Law 76 is considered to be one of the most stringent local asbestos-removal regulations in the country. Lebow, *Owners Face More Heat on Asbestos Standards*, Crain's N.Y. Bus., Feb. 1, 1988, at 14. Local Law 76 was followed in 1986 by the federal Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. 94-469 (1986) (codified as amended at 15 U.S.C. §§ 2641-2655 (1988)). AHERA mandates inspections of school buildings and preparation of plans for encapsulation or removal of asbestos which is friable, or easily crumbled. Hooper, *The Asbestos Mess*, N.Y. Times, Nov. 25, 1990, § 6 (Magazine), at 38, 40, col. 4. Asbestos abatement has been projected to grow to a $10- to $12-billion industry which will call for qualified design professionals to test for asbestos, determine its condition, and design removal programs. Herlihy, *supra* note 70, at 45. If an architect is negligent in specifying or overseeing the removal of existing asbestos from a building, he will be subject to this second class of liability claims.

Although insurance coverage for asbestos-related claims was totally unavailable to architects and engineers for many years, alterations were made in 1990 to the general liability policies issued by two insurers, DPIC Companies, Inc., Monteray, California, and Victor O. Schinnerer & Company, Inc., Chevy Chase, Maryland, which together control seventy-five percent of the professional liability insurance market for architects and engineers. Post, *Design*

B. *Financial Consequences*

Today, lawsuits are being filed against a significantly larger percentage of practicing architects and other professional designers than in earlier decades.[73]

A logical corollary to this "crisis" has been the increased cost of obtaining liability insurance to cover these claims.[74] In an effort to hold down this cost, design professionals often carry relatively high per-claim deductibles.[75] Even with such deductibles, architect and engineer firms, on average, pay between three and five percent of their annual billings for professional liability insurance,[76] although some firms engaged in some of the higher hazard disciplines, such as industrial engineering, asbestos consulting, and structural engineering, may average as much as seven to ten percent of annual billings.[77]

C. *Going Bare*

The high cost of insurance has been cited as the reason why twenty-five percent of all firms surveyed by the American Consulting Engineers Council carry no professional liability coverage.[78] Ninety-

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Coverage Improved, ENG'G NEWS REC., Aug. 9, 1990, at 14. These policies were expanded to cover at least some of the possible claims that might arise from asbestos inspection and abatement work. *Id.* However, as illnesses attributable to asbestos exposure take many years to develop, current insurance coverage may not be adequate for claims which might arise decades into the future.

The problem of open-ended liability applies not only for asbestos claims, but also for claims of illnesses caused by materials now commonly used which may later be shown to have an adverse effect on humans (the "asbestos" of the future). Product liability, and particularly toxic tort liability, can be found when a defendant "should have known" of the danger, even when, paradoxically, the danger could not have been known at the time. *See supra* notes 47-48 and accompanying text.

[73] According to surveys made by a leading insurer, Victor O. Schinnerer & Co., Inc., Two Wisconsin Circle, Chevy Chase, Md. 20815, there were fewer than 13 claims per 100 architecture firms filed annually in the United States in the early 1960s. By the mid-1980s, the figure had jumped to 42 claims per 100 firms. In 1987, it settled back to 30 (still, more than a 100% increase over the level of the 1960s), perhaps in response to a generally lower level of construction nationwide. Lurie, *Architects Drawing More Lawsuits for Malpractice*, L.A. Times, Nov. 5, 1989, at K1, col. 2.

[74] One firm of architects in Maryland reported that its deductible had jumped 10-fold (from $25,000 to $250,000 per claim) while its premium almost doubled (from $132,000 to $250,000 per year). In addition, its coverage was reduced from $5 million to $2 million. Wells, *Architects' Insurance Soars, Number of Projects Dip*, Washington Bus. J., June 4, 1990, § 1, at 27.

[75] *Id.*

[76] For doctors, the figure ranges from 2.5% (psychiatrists and ophthalmologists) to 9.9% (neurosurgeons) of annual billings, with a median figure for all doctors of 4.2%. Holoweiko, *Practice Expenses Take the Leap of the Decade*, MED. ECON., Nov. 12, 1990, at 82, 102.

[77] Wells, *supra* note 74, at 27.

[78] *Id.*

three percent of all architectural firms nationwide have fewer than five employees and, of these, an astounding sixty percent "go bare" by not carrying any coverage.[79]

Going bare is a paradoxical approach to protecting against liability, because practical realities dictate that lawsuits be mounted only against those with an ability to pay a judgment. Thus, an architect who is not, in general, in a high-paying profession, is an unattractive target for a suit if it is known that he has no insurance. Although the architect would be personally liable for any adverse judgment despite the absence of insurance, the financial resources of individual architects are generally not especially high.[80] It is ironic that being "insured" against a judgment is accomplished by *not* being insured.

D. *Ancillary Liability*

An added problem for architects is ancillary exposure to liability through the work of other professionals and consultants to whom the architect has subcontracted portions of his work. Often, the architect for a project will hire an engineer, a landscape architect, a site planner, and other special consultants for complex or technically specialized areas of the work. The fees of these subcontractors are usually passed on as a reimbursable expense to the owner of the project.[81] If problems arise, however, it is often the architects who are sued, since the consultants' insurance coverage may have even more inadequate limits or may be nonexistent, and, in fact, the consultants' names may not even be known.[82] Of course, if the architect's insurance coverage is also meager or nonexistent, the injured party must look elsewhere for the recovery of damages, with the owner being a likely target.

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79 Lurie, *supra* note 73, at K1, col. 2.

80 This author has observed that far more architects than any architectural school or professional organization would care to acknowledge have been unable to amass significant capital assets or positive net worth. Nonetheless, means exist to make oneself "judgment proof," such as maintaining personal assets in the names of friends or relatives, or simply spending ones income on intangible pleasures rather than on tangible property. The infamous lawyer Roy Cohn, onetime advisor to Senator Joseph McCarthy, flouted the libel laws with abandon and ignored legal challenges to his actions, as any judgment which might be obtained against him would be uncollectible because he held title to nothing of value.

81 Just as a building owner hires a contractor to construct the building, who, in turn, hires subcontractors to perform particular pieces of the work, such as structural steelwork, electrical or mechanical installations, roofing, and landscaping and sitework, *see supra* notes 13-14 and accompanying text, so may the owner hire an architect to take responsibility for the design of the project. That professional person or firm may subcontract out those disciplines whose practitioners are not retained in-house. The architect generally passes on to the owner the costs of these consulting subcontractors as reimbursable out-of-pocket expenses, but liability for the work they produce remains with the architect, who contractually assumed responsibility for all design work on the project.

82 *See* Herlihy, *supra* note 70, at 46.

Thus, owners may in turn attempt to gain indemnification from the architect under his contractual duties, but such efforts will, for all practical purposes, be thwarted if the architect is not insured.

III. How States Address the Issue

The vast majority of states have enacted statutes of repose giving freedom from liability to architects, builders, and others after some period following the completion of a construction project.[83] When tested in state courts by equal protection, due process, or open courts challenges, some of these statutes have failed to survive state or federal constitutional attack.[84] Of those found constitutionally infirm, some were re-enacted and subsequently found to be constitutional[85] and others were re-enacted but still could not pass constitutional muster.[86] Even after allowing for these challenges, however, the majority of states have upheld the validity of their statutes of repose for the construction industry.[87]

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[83] Only Iowa, Kansas, New York, and Vermont have never enacted a statute of repose. *See* Appendix.

[84] *See, e.g.*, Horton v. Goldminer's Daughter, 785 P.2d 1087 (Utah 1989) (statute violated state constitution's open-courts clause); Turner Constr. Co. v. Scales, 752 P.2d 467 (Alaska 1988) (violation of equal protection clause of state constitution); Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983) (violation of due process clauses of state and federal constitutions).

[85] In 1979, the Supreme Court of Florida ruled in Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (1979), that the state's 12-year statute of repose protecting architects, engineers, and contractors, FLA. STAT. ANN. § 95.11(3)(c) (West 1982), violated the state constitution's guarantee of access to the courts. *Overland, supra*, at 575. The problem, according to the court, was that the state legislature had not expressed any perceived public necessity for abolishing the previously held cause of action for injuries occurring more than 12 years after the completion of the improvements in question. *Id.* at 574. A vigorous dissent noted the problems inherent in requiring architects, engineers, and contractors to defend a suit many years after the work was completed. *Id.* at 576-77 (Alderman, J., dissenting). Responding specifically to the decision in *Overland*, the Florida legislature in 1980 reenacted the statute of repose in essentially the same format, but with a 15-year repose point instead of a 12-year one. However, the legislature added a lengthy preamble to the enactment which provided the "perceived public necessity" for the protection being afforded to architects, engineers, and contractors. This reenacted statute was found to pass constitutional muster in American Liberty Ins. Co. v. West & Conyers, Architects & Eng'rs, 491 So. 2d 573 (Fla. Dist. Ct. App. 1986), in which the court quoted the pertinent portions of the preamble. *Id.* at 574-75. In writing this introductory justification for the statutory revision, the drafters relied heavily on the language of the dissent in *Overland*.

[86] *See, e.g.*, Shibuya v. Architects Haw. Ltd., 65 Haw. 26, 647 P.2d 276 (1982) (revised statute still left equipment supplier unprotected while barring actions against architect and builder, thus violating state constitutional due process rights).

[87] The statutes of repose of 33 states and the District of Columbia have been held constitutional, those of five states have been invalidated, and those of eight states have not been tested in their current versions. *See* Appendix.

A. *The Equal Protection Challenge*

When challenges to statutes of repose involving architects and builders are brought under a claim of equal protection violation, courts scrutinize those statutes using a rational review standard.[88] Because of the broad range of rationality and the wide range of what may reasonably be considered rational, this has resulted in inconsistent approaches at the state level.[89]

Typically, a statute of repose will protect "any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction,"[90] or "any person lawfully performing or furnishing the design, planning, supervision or observation of construction,"[91] or, more specifically, "architects or engineers duly licensed or registered."[92] In any of the above examples, architects and engineers, at a minimum, are clearly covered. There is variety, however. For example, the California statute of repose would, by its terms, also cover a land surveyor or a site planner,[93] while Penn-

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88 Equal protection is guaranteed under the federal constitution, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."), and under state constitutions, *e.g.* N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

In evaluating equal protection claims of constitutional violation, the rational basis theory is the basic test used by courts, except in cases where a fundamental right, such as freedom of speech, is threatened, or a suspect group, such as a racial minority, is involved, in which event a strict scrutiny basis of analysis is employed. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2, 16-12, 16-13 (2d ed. 1988).

89 For example, a relatively strict rational basis standard was used in the past. *See, e.g.*, F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (a classification being subjected to equal protection review must be reasonable and must have a fair and substantial relation to the legislation in question). Subsequently, however, a more relaxed rational basis standard was adopted. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961) (even if a law results in some inequality, its classification of people will not be set aside unless there is no state of facts that can reasonably be conceived to justify it).

90 CAL. CIV. PROC. CODE § 337.1(a) (West 1982) (providing a four-year statute of repose for a "[p]atent deficiency in real property improvement, design, survey, construction, etc." measured from "the substantial completion of such improvement"). Substantial completion is a term of art. It "generally means that the building or project has reached a point where it is ready for the use for which it was intended and that whatever work remains to be done is minor." Note, *Architectural Malpractice: Toward an Equitable Rule for Determining when the Statute of Limitations Begins to Run*, 16 FORDHAM URB. L.J. 509, 522 (1988) (authored by Jeffrey R. Cruz).

91 PA. STAT. ANN. tit. 42, § 5536 (Purdon 1981) (providing a 12-year statute of repose measured from the "completion of construction").

92 ME. REV. STAT. ANN. tit. 14, § 752-A (1980 & Supp. 1990) (statute of repose for malpractice or professional negligence effective 10 years after the "substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved").

93 *See supra* note 90 and accompanying text.

sylvania has chosen to provide separate statutes of repose with differing terms for surveyors[94] and landscape architects.[95] Most statutes of repose also incorporate protection for builders by covering a "person having constructed, altered or repaired any improvement upon real property,"[96] or a "person performing or furnishing the . . . construction of . . . an improvement [to real property]."[97]

The equal protection challenges to these statutes have asserted that material suppliers, equipment manufacturers, or owners, tenants, or others in possession or control of the premises, are classes of people similarly situated to architects and builders.[98] Thus, under an equal protection analysis, treating these two classes of individuals differently under statutes of repose without justification arguably violates the Constitution.[99]

Courts have come down strongly on both sides of this issue. Nevada's statute of repose does not protect material suppliers[100] but this exclusion was held to have a "rational basis" because of the existence of a "well developed body of products liability law."[101] The Ohio

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94 PA. CONS. STAT. ANN. § 5537 (Purdon 1981) (providing a bar to actions against a licensed land surveyor for "any deficiency, defect, omission, error or miscalculation" not brought within 21 years after the services were performed).

95 *Id.* at § 5538 (providing a bar to actions against a licensed landscape architect for "any deficiency, defect, omission, error or miscalculation" not brought within 12 years after the services were performed). This statute is internally inconsistent, as it provides the performance of the professional services as a measuring point, but also notes that the action accrues upon "substantial completion of the project." The conflict arises because the professional's services may be completed before the project itself is finished, if he has not been retained to observe the construction work and to certify its completion.

96 WASH. REV. CODE ANN. § 4.16.300 (1988) (providing protection against claims accruing more than six years after "substantial completion of construction").

97 TENN. CODE ANN. § 28-3-202 (1980) (providing a four-year statute of repose measured from "substantial completion" of the real property improvement).

98 *See, e.g.*, Reich v. Jesco, Inc., 526 So. 2d 550 (Miss. 1988) (property damage action by owners of collapsed chicken house against architect and builder). The court in *Reich* rejected the claim of one of the plaintiffs, an insurance company, that the relevant statute of repose was "unconstitutional because it exempts architects and contractors but excludes similarly situated persons such as owners and suppliers," which was claimed to "contravene the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *Id.* at 553, 554.

99 The only apparent basis for the [Kentucky Statute of Repose] . . . is that a special class, builders, architects and engineers involved in construction, faced with a growing exposure to litigation, lobbied for a statute limiting their liability. There is no social or economic basis presented to justify a special class, only their own self-interest. Other groups similarly situated do not share in their legislative windfall. Their subjective reasons will not withstand public policy analysis.

Tabler v. Wallace, 704 S.W.2d 179, 187 (Ky. 1985).

100 NEV. REV. STAT. § 11.204 (1987) (exempting material suppliers from protection of the statute of repose).

101 Wise v. Bechtel Corp., 104 Nev. 750, 753, 766 P.2d 1317, 1319 (1988). In a damage claim for personal injuries sustained when a steam pipe failed, the Supreme Court of Nevada

Supreme Court has also determined that the restriction of a statute of repose to certain classes within the construction industry does not thereby render it in violation of constitutional guaranties of equal protection.[102] In rejecting the claim, the court noted that the United States Supreme Court had refused certiorari or dismissed appeals from at least two state court decisions which had upheld similar architect-builder statutes of repose on the ground that no substantial federal question was presented.[103] The court concluded that the Supreme Court's refusal to hear a case for lack of a substantial federal question is a decision on the merits[104] and that this "is at least some authority that these statutes do not violate the federal Constitution."[105]

The Supreme Court of Alaska considered the question and determined that the state's six-year statute of repose[106] did violate the equal protection clause of the Alaska Constitution[107] but not the federal Constitution.[108] The court determined that the purpose of the statute was to encourage construction and avoid stale claims, which it held to

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upheld a revised statute of repose, noting that its prior holding that the statute was unconstitutional because it protected architects and builders but not owners and suppliers was no longer valid because the statute as revised now protected owners. *Id.* The court noted that the existence of products liability law created a justification for distinguishing between architects and builders of improvements to real property, as opposed to manufacturers and material suppliers. *Id.*

102 Sedar v. Knowlton Constr. Co., 49 Ohio St. 3d 193, 205, 551 N.E.2d 938, 947 (1990) (damage claim by a college student for injuries sustained in 1985 when his hand went through a glass door in a dormitory completed in 1966). The court in *Sedar* noted that the statute of repose, OHIO REV. CODE ANN. § 2305.131 (Anderson 1981), protects architects and builders but specifically excludes protection for owners and tenants and impliedly excludes material suppliers. In holding that this bore a "real and substantial relation to the . . . general welfare of the public," *Sedar*, *supra*, at 199, 551 N.E.2d at 944, the court observed that owners and tenants have continuing control of a building and are responsible for its repair and maintenance, while architects and builders lose control once they finish construction, leaving the possibility for "neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair," and that the owner or tenant may "use the premises for a purpose for which it was not designed, or make defective alterations which may appear to be a part of the original construction." *Id.* at 204, 551 N.E.2d at 948 (citation omitted). The court noted further in support of the exclusion of material suppliers, that they "typically supply and produce components in large quantities, make standard goods and develop standard processes [and can] thus maintain high quality control standards in the controlled environment of the factory." *Id.* (citation omitted).

103 Tabler v. Wallace, 704 S.W.2d 179 (Ky. 1985), *cert. denied*, 479 U.S. 822 (1986); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

104 *Sedar*, 49 Ohio St. 3d at 203, 551 N.E.2d at 947.

105 *Id.* (citing Mandel v. Bradley, 432 U.S. 173, 179-80 (1977) (Brennan, J., concurring)).

106 ALASKA STAT. § 09.10.055 (1990).

107 ALASKA CONST. art. 1, §§ 1, 7.

108 Turner Constr. Co. v. Scales, 752 P.2d 467 (Alaska 1988) (damage claim for property loss from a fire allegedly caused by negligent construction and installation of a fireplace in an apartment building).

be a legitimate government purpose.[109] The court then went on to find that protecting designers and contractors, while leaving owners unprotected, would result in the owner being completely liable for any damages regardless of being only partially at fault.[110] According to the court, the common-law rule of joint and several liability among joint tortfeasors would mean that an owner liable for only fifty percent of a plaintiff's injuries would be held liable for 100% of the plaintiff's damages because he would have no ability to seek contribution from the joint tortfeasor.[111] Moreover the court argued that design defects may be catastrophic, and experimental designs may shift unknown risks to owners, thereby discouraging them from financing construction projects.[112] Accordingly, the court held that "the statutory means are not substantially or rationally related to the [legislative] ends," and thus the statute was constitutionally infirm.[113]

B. *The Due Process Challenge*

It is not uncommon for a state's construction statute of repose to be challenged on the ground that blocking an individual's right to bring a lawsuit violates federal and state constitutional guarantees of due process of law.[114]

Courts generally have used two lines of reasoning to defeat such challenges. Most courts apply a "rational basis" test, upholding a statute of repose under due process if it is rationally related to a permissible legislative objective.[115] To date, no statute has been invalidated solely on the basis of a due process challenge using the "rational basis" test.[116]

The second line of reasoning applies a "vested right" test, holding that while vested rights[117] are protected by due process, rights that

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109 *Id.* at 471.

110 *Id.*

111 *Id.*

112 *Id.* at 472.

113 *Id.*

114 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; *see also* N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

115 *See, e.g.*, Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982) (personal injury suit against architect brought by college student cut by plate glass door installed more than eight years prior to the accident where the statutory repose period was six years). The court in *Klein* maintained that "[a] court must sustain economic legislation if it has a permissible legislative objective and if the legislation bears a rational relation to that objective." *Id.* at 707, 437 N.E.2d at 519.

116 *See* Appendix.

117 In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of

have not yet become vested may be abrogated by the legislature.[118] As an interest in bringing an action does not vest prior to the accrual of that action,[119] a statute of repose does not prevent a plaintiff from bringing a cause of action but instead bars a cause of action from ever arising after the expiration of the statutory period. Thus, not being able to file a lawsuit once the statute of repose has run does not deny a would-be plaintiff due process of law, because there was no right to be denied. Attempts to challenge this vested-right analysis before the Supreme Court have failed.[120]

A more difficult situation occurs when the lawsuit is not initiated until after the statute of repose has run, but the cause of action accrues—and thus the right to bring a lawsuit vests—*prior* to the expiration of the statutory repose period. Such a situation existed following a fatal highway accident in New Mexico, which occurred nine years and nine months after the completion of the highway, and the statutory repose period was ten years.[121] The state's statute of repose had already been upheld as constitutional,[122] but the statute had never been tested against an action which had accrued before the statute

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> any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.

BLACK'S, *supra* note 16, at 1564.

118 "The legislature is free to create rights and is equally free to abrogate rights which have not yet vested." State Farm Fire & Casualty Co. v. All Elec., Inc., 99 Nev. 222, 230-31, 660 P.2d 995, 1001 (1983) (Springer, J., dissenting) (consolidated cases of insurance companies against contractors and engineering firm).

119 " '[A] person has no property, no vested interest, in any rule of the common law.' " Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (citation omitted). As one court stated:

> [A] right, to be within the protection of the Constitution, must be a vested right or something more than a mere expectancy based upon an anticipated continuance of an existing law. (Citation omitted). Neither the Constitution of the United States nor of this State forbids the abolition of common law rights of action in order to attain a permissible legislative object.

Sowders v. M.W. Kellogg Co., 663 S.W.2d 644, 648 (Tex 1983). *But see* Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419, 427 (S.D. 1984) (plaintiffs had a vested right in a common-law negligence action which could not be abrogated by the legislature under an "open courts" constitutional challenge of a statute of repose).

120 Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981), *appeal dismissed*, 459 U.S. 802 (1982) (wrongful death action following a fatal elevator accident 49 years after completion of the improvement where the statutory period of repose was 10 years); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) (wrongful death action following a fatal elevator accident 10 years after the completion of the improvement where the statutory period of repose was four years).

121 Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

122 Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977) (action by minor child for personal injuries suffered at an airport more than 10

had fully run. The New Mexico Supreme Court held that the three months that remained between the highway accident and the expiration of the statutory repose period was an unreasonably short period of time for bringing an action, and thus was a denial of due process.[123] Citing with approval the existence of savings clauses in the statutes of repose of some states which provide a grace period extending the limitations period for actions brought close to its expiration,[124] the court went on to hold that three years from the time of injury was the appropriate time period within which plaintiffs whose claim had vested had to file their suit.[125] Many states solve this sticky point in the due process analysis by providing such a savings clause.[126]

C. *Special Problems*

Particular clauses of some state constitutions present special problems for statutes of repose. These are the so-called "open courts" clauses,[127] which stipulate that state courts be accessible to all, and the single-subject clauses,[128] which require that every state statute shall cover only one subject, which must be clearly stated in the title of the statute.

An open-courts clause generally does not bar a statute of repose, as vested rights in open courts do not exist until a cause of action accrues.[129] However, South Dakota has rejected this analysis, holding that a complete abrogation of access to courts for a cause of action, even if it has not yet arisen, is in opposition to the entire concept of

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years after the completion of the construction was held barred by 10-year statute of repose which was not tolled by reason of child's minority).

123 *Terry*, 98 N.M. at 120, 645 P.2d at 1376.

124 *Id.* at 122, 645 P.2d at 1378.

125 *Id.* at 123, 645 P.2d at 1379. The court affirmed the *Howell* holding that a statute of repose posed no due process violation where the claim did not accrue until after the statute had run. *Id.* at 121, 645 P.2d at 1377. Alabama's statute of repose was found to be unconstitutional on the same ground as New Mexico's—lack of a grace period for the accrual of "last minute" causes of action. Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 728-29 (Ala. 1983).

126 *See* Appendix.

127 *See, e.g.*, N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.").

128 *See, e.g.*, NEV. CONST. art. IV, § 17 ("Each law enacted by the Legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title.").

129 *See, e.g.*, Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982). Twenty-one years after an architect designed windows for a high-rise hotel in Denver, a guest went through the glass of one of them and was killed by her 15-story fall. The statute of repose protecting the architect was held to bar the claim of the guest's husband. *Id.* at 827.

open courts.[130] The Alabama Supreme Court has also held that its repose statute violated the state constitution's open courts provision,[131] arguing that both manufacturers of products and constructors of buildings should remain liable during the entire useful life of what they produce.[132]

Florida's constitution, which also includes an "open courts" provision[133] has been interpreted as barring the state legislature from enacting any law to abolish the right of access to the courts without providing an alternative, unless an overpowering public necessity can be shown.[134] This constitutional provision, which originally was interpreted as barring the state's statute of repose protecting architects, engineers, and contractors where no public necessity for the statute was found in the bill's legislative history,[135] was no longer a bar when the legislature reenacted the statute to provide such a justification of public necessity.[136]

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130 Daugaard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984). " 'Death cannot occur without there first being conception, nor dusk come without daylight. Neither can a cause of action expire before it accrues.' " *Id.* at 425 (citation omitted).

131 Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 728 (Ala. 1983) (action for damages arising from a personal injury accident involving an electric arc furnace).

132 The court in *Jackson* evaluated the state's revised statute of repose protecting architects and builders, ALA. CODE § 6-5-218 (1977), and held that it was constitutionally defective when measured against the open courts clause of the state constitution, ALA. CONST. art. I, § 13. *Jackson*, 435 So. 2d at 728. The court compared the instant case against an earlier products liability case, Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982), in which it had held the products liability statute of repose to be in violation of ALA. CONST. art. I, § 13. Declaring that it was inherently unfair to limit the rights of injured parties regardless of the useful life of the product, the court stated: "A manufacturer should be required to produce a product that can be safely used during the period of its intended use, not for some arbitrary period of time that is applied to all products," and extended its rationale to buildings, holding that the comparatively longer useful life of a building simply exacerbated the situation. *Jackson*, 435 So. 2d at 728 (citation omitted). The court dismissed the problem of the potentially long period of time between the completion of the construction work and the bringing of a suit, noting that an injured plaintiff would have to prove causation and negate intervening negligence. *Id.* The court also minimized the problem of "stale evidence" by noting that litigants on both sides would face equal hardships in this regard. *Id.*

133 "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.

134 *See, e.g.*, Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). The plaintiff in *Kluger* challenged the constitutionality of a statute which barred tort actions for automobile property damage where the injured party carried her own insurance and the damage was not in excess of $550. The court held that the statute impermissibly prevented access to the courts for the redress of an injury because no alternative had been provided and no public necessity for such an abolition was shown. *Id.*

135 *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979) (suit to recover damages for personal injuries suffered more than 12 years after completion of the construction of the building at which the accident took place, where the limitation period was 12 years).

136 *See* American Liberty Ins. Co. v. West & Conyers, Architects & Eng'rs, 491 So. 2d 573 (Fla. Dist. Ct. App. 1986) (subrogation action by insurance company against architects and

A separate problem is presented in those states whose constitutions have provisions restricting laws to one subject with a clearly descriptive title.[137] A challenge to Alabama's statute of repose using that state's one-subject/clear-title constitutional provision achieved its purpose.[138] However, an attempt to strike down a Nevada statute of repose as unconstitutional under such a provision failed.[139]

In light of challenges to statutes of repose in other states, such a statute for New York would have to be carefully crafted to avoid potential constitutional infirmities.

V. JUSTIFYING AND DEVELOPING A STATUTORY SOLUTION

A judicial policy has been suggested that a time should come when one's actions of the past ought to be done and over.[140] The

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engineers to recover money paid to settle fire claim over damage in building architects and engineers designed which was completed more than 20 years prior to the fire).

137 *See, e.g.*, NEV. CONST. art. IV, § 17, discussed *supra* note 128.

138 Bagby Elevator & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974) (damage action for personal injuries sustained by a young child who was injured in an elevator accident). The Alabama constitution requires that "[e]ach law shall contain but one subject, which shall be clearly expressed in its title." ALA. CONST. § 45. Alabama's repose statute provided a four-year repose period for contract or tort actions relating to a construction project, a six-month savings clause for latent causes of action, and a seven-year ultimate statute of repose on all actions. 1969 Ala. Acts. 1418 (codified as amended at ALA. CODE § 6-5-218 (1977)). The court in *Bagby* held that the title of the Act, "To regulate further the time within which actions . . . must be commenced," *id.*, did not describe the seven-year statute of repose, as the title delineated a "traditional statute of limitations," while the body of the Act portrayed something very different—an elimination of a substantive right. *Bagby* at 195, 291 So. 2d at 309. Further, the court held that the Act contained two distinct subjects—a statute of limitations and a grant of immunity. Under both rationales, the seven-year statute of repose was constitutionally defective and invalid. *Id.* at 198, 291 So. 2d at 312. The remainder of the Act—its four-year statute of repose and six-month savings clause—was declared void for vagueness in a separate case the following year. Plant v. R. L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975). The dissents in both cases protested strongly against the "hypercritical exactness" of the majority, and suggested that the ostensible difference between a grant of immunity and a statute of limitations was nonexistent, as any period of limitation grants immunity after the expiration of the period, regardless of how the starting point is measured. *Bagby* at 200, 208, 291 So. 2d at 314, 322; *Plant* at 162, 313 So. 2d at 524.

139 *See*, Wise v. Bechtel Corp., 104 Nev. 750, 766 P.2d 1317 (1988) (unsuccessful challenge to a statute of repose because the title mentioned both statutes of repose and statutes of limitations). The court in *Wise* held that the one-subject requirement

> must be liberally construed, lest meritorious legislation be declared void by reason of inartificiality in the title. The main test of the application of the clause to a particular statute is whether the title is of such a character as to mislead the public and the members of the legislature as to the subjects embraced in the act.

Id. at 754, 766 P.2d at 1319 (citation omitted).

140 If these surveyors could be held liable to such an unforeseeable and remote purchaser 24 years after the survey, they might, with equal reason, be held liable to any and all purchasers to the end of time. We think no duty so broad and no liability so limitless should be imposed.

Howell v. Betts, 211 Tenn. 134, 138, 362 S.W.2d 924, 926 (1962) (action by owners against a

United States Supreme Court has observed that there is

> pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose.[141]

Another reason set forth by the Supreme Court for barring stale claims is to avoid forcing a person to defend after "evidence has been lost, memories have faded, and witnesses have disappeared."[142] This concept of avoiding stale claims is a recurring one.[143]

The problem of being unable to defend after the passage of years is a practical and real one, and it has led to dubious, frivolous, or even fraudulent claims where the likelihood of an effective defense has been reduced by time.[144] Although this problem exists to some extent for all defendants, it is especially acute in the construction industry.[145]

There is further inequity in expecting architects or builders of a construction project to bear liability many years after their involvement with the work has ceased. These people

> have no control over the real estate improvement once it is completed and turned over to the owner. The owner or tenant may permit unsafe conditions to develop, or use the premises for a purpose for which it was not designed, or make defective alterations which may appear to be a part of the original construction.[146]

For an injured party, an old building, which may appear less safe than a new one, might incite speculation that it is in fact not safe, and

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land surveyor for a faulty survey). The owners had bought the property in 1958 and sought to recover from the surveyor, who prepared a survey in 1934 for a former owner. They alleged damages arising from errors in the description of the property, where the actual dimensions of the property were less than those shown on the survey.

141 United States v. Kubrick, 444 U.S. 111, 117 (1979) (citation omitted).

142 American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974).

143 *See, e.g.*, Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982). " 'There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.' ' " *Id.* at 709, 437 N.E.2d at 520 (citations omitted).

144 *See supra* note 22 and accompanying text.

145 *See* Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App. 1977).

> While both those covered and those not covered by the statute [of repose] may be exposed to claims years after the construction project was completed, there is a difference in the problems of defending such claims. . . . Due to the lapse of time, those persons covered by the statute may find it impossible to assert a reasonable defense.

Id. at 694, 568 P.2d at 220. *See also supra* note 24 and accompanying text.

146 *Howell*, 90 N.M. at 694, 568 P.2d at 220.

thus encourage an unwarranted lawsuit.[147]

Architects, unprotected by a statute of repose, have often found themselves without the ability to mount an effective defense.[148] Especially egregious situations were described in hearings before a committee of the United States House of Representatives:[149]

The report of the committee related that

> [A]n architectural firm designed an auditorium which was built in 1928. In 1965, a visitor to the auditorium fell on the stairway and was injured. Her allegation in a suit for damages against the owner was that her injury was due to the improper location of a handrail. The owner of the building, in turn, filed suit against the architect for alleged negligence in designing the stairway and handrail. Thus, 38 years after the completion of the construction the architectural firm is now defending itself against a $50,000 lawsuit[150]. . .
>
> . . . .
>
> In another instance an engineering firm designed a grain elevator which was built in 1934. The elevator was destroyed in an explosion in 1957. In 1959, the owner sued the engineer for $250,000 alleging that the explosion was due to errors in the design of the ventilation system.[151]

The House Report went on to conclude:

> Architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes which may, years afterward, be determined unsafe or defective and ap-

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147 "Comparatively, modern architecture, engineering, and construction, with the new techniques, technology, and methods, may give the appearance of defective or unsafe conditions to older structures." H.R. REP. No. 370, accompanying H.R. 4181, 91st Cong., 1st Sess. 2 (1969) [hereinafter House Report]. The report, prepared by the Committee on the District of Columbia, offered justification for a proposed statute of repose for the District, which was not enacted into law. A later bill became the District's statute of repose for the construction industry, D.C. CODE § 12-310 (1989), which was upheld in *Sandoe v. Lefta Assoc.*, 559 A.2d 732 (D.C. 1988). *See* Appendix.

148 The purpose of the law is to provide a reasonable time and opportunity for a person who has suffered injury or damages to bring an action. To permit the bringing of such actions without any limitations as to time places the defendant in an unreasonable position if not imposing the impossibility of asserting a reasonable defense. House Report, *supra* note 147, at 2.

149 *Id.*

150 "[N]one of the architects involved in the design of the auditorium is alive today but the architectural firm is being sued. The plans, specifications, and contracts may have been lost or destroyed. Old building codes, essential to the defense cannot be found." *Id.*

151 "[T]he plaintiff in effect alleged that the engineer should have created in 1934 a ventilation system based on 1959 standards and technology." *Id.*

pear to be part of the original improvement.[152]

Hence, Congress itself, in considering a statute of repose for the District of Columbia, has demonstrated its understanding of the problem faced by architects and builders.

A. *What Should Be Covered*

Construction projects, which are "custom" designed by architects and engineers and "custom" erected by builders as "improvements" to real property,[153] are the primary source of the lawsuits under discussion and must be covered by a statute of repose. Obviously, determining what constitutes an improvement is a threshold matter. An improvement is generally considered to be something permanent, but as technology has changed, so too have the attitudes towards structures which are readily relocated. As one court noted, "prebuilt buildings, mobile or otherwise, are a part of our changing society. The law must be responsive to the best interests of those whom it is designed to serve."[154]

Because an "improvement" covers so many possible alterations or additions to property, a strict definitional approach would likely be overly long and seemingly repetitious, or would risk omitting coverage to some unusual situation or one not contemplated at the time the definition was drafted. To avoid this, most statutes have not defined what constitutes an improvement to real property,[155] leaving it instead for the courts to interpret under what may be called a "common sense" approach.[156]

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152 *Id.*

153 A dictionary definition of "improvement" is,

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc.

BLACK'S, *supra* note 16, at 757.

154 John Wagner Assocs. v. Hercules, Inc., 797 P.2d 1123, 1129 (Utah Ct. App. 1990) (relocatable modular building held to constitute "realty" and thus to be subject to the state lien law and to a payment bond claim).

155 An exception is the definition of improvement provided for purposes of a mechanic's lien law: "[A]ny building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for its permanent benefit." N.D. CENT. CODE. § 35-27-01(3) (1987).

156 The Supreme Court of Wisconsin determined that a fire sprinkler system was an improvement to real property "on the basis of the common usage of language." Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 386, 225 N.W.2d 454, 456 (1975). The ruling in *Kallas* and its common-sense approach were cited with approval and emulated by the Supreme Court of Minnesota in determining that a furnace, which had been held by the trial court to be little

Such an approach gives courts flexibility to serve justice without having to contort statutory language. Thus, a bridge was held to be an improvement covered by Rhode Island's ten-year statute of repose,[157] as was a refrigeration system in Tennessee,[158] while an industrial crane was determined to be merely a piece of "production machinery" in New Jersey, and not an improvement to real property.[159] Although most improvements to real property that are the subject of lawsuits involving statutes of repose are traditional buildings or other structures whose status is unquestioned, these examples show that a "common-sense" definitional approach is needed to permit "fact sensitive verdicts," which are more likely to be just.

B. *Who Should Be Protected*

A statute of repose giving special protection after a fixed period of time is not justifiable for all members of the "construction team." Who therefore should be protected? The many people involved in a construction project fall into several broad, but distinct, categories, with extended control over the project, or the lack of it, being an important characteristic distinguishing the groups. Those who take part in the design of the improvement are designated in this Note by the generic term architects.[160] This category would include the architect and the engineer, who prepare the construction drawings and specifications from which the project is built, as well as other professional consultants, who might be involved in design activities, such as surveyors, planners, and landscape architects. These people complete their work, which is specifically prepared for the particular project, and then have no further connection with the project or control over it. They should be covered by a statute of repose, as their lack of connection or control over completed projects prevents them from discovering potential problems and correcting them.

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more than a portable space heater temporarily attached to ducts and cables, was, in fact, an improvement to real property, and thus within the ambit of the state's statute of repose for such constructions. Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977). Georgia has taken an essentially common-sensical approach, but has reduced it to a three-part test in which a determination of whether an improvement to real property has occurred is made by evaluating "(1) the permanence of the improvement; (2) any added value to the reality; and (3) the owner's intent." Note, *The Effect of Georgia's Architectural Statutes of Limitations on Real and Personal Property Claims for Negligent Construction*, 7 GA. ST. U.L. REV. 137, 154 (1990) (authored by Robert Jandrlich).

157 Walsh v. Gowing, 494 A.2d 543 (R.I. 1985).

158 Harmon v. Angus R. Jessup Assocs., 619 S.W.2d 522 (Tenn. 1981).

159 McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 169, 521 A.2d 851, 856 (1987) (personal injury action by a welder against the manufacturer of an overhead crane installed at an iron foundry on permanent elevated steel rails).

160 *See supra* note 1.

Contractors, subcontractors, and construction managers, collectively called builders in this Note,[161] are directly responsible for the actual construction of the project. Their work, too, is specifically produced for a unique project and also have no control over the project after that work is done. They should be covered by a statute of repose for the same reason as architects—their inability to discover and correct problems which are not evident until well after the project has been completed.

C. *Who Should Not Be Protected*

Material and equipment suppliers do their work off-site in the controlled environment of a factory or plant, for installation on the project by others. There is opportunity for them to test and perfect what they supply, which usually constitutes a fungible commodity.[162] They are generally covered by product liability statutes and should not be covered by a statute of repose because there is no reason to extend such protection to them.

Local building inspectors and authorities are usually protected against liability for negligence when working within the scope of their official duties[163] and thus need not be covered by a statute of repose.

The final category includes the owner, or the user, tenant, or occupant—those who have continuing control over the use and maintenance of the improvement. These are the persons who, after the improvement is completed, are in the best position to be aware of developing defects and to remove the source of the problem.[164] The

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161 *See supra* note 2.

162 "A materialman typically supplies components in large quantities and can standardize the items he produces. Standardized processes allow the materialman to maintain high quality control standards in the controlled environment of the factory. . . . Unlike the materialman, the designer or builder can pretest his work only in a limited fashion." Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1372 (6th Cir. 1984) (subrogation action by insurer against builder and engineer for damages sustained when school gymnasium collapsed). *See also* Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 637 n.80 (1985) (authored by Josephine Herring Hicks).

163 *See, e.g.*, Peele v. Dobbs, 196 Ga. App. 684, 396 S.E.2d 600 (1990) (claim by homeowners against building inspector for fire damage allegedly caused by defectively constructed chimney which had been improperly inspected).

> Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as a result of an erroneous decision; provided the acts complained of are done within the scope of the officer's authority, and *without wilfulness, malice, or corruption*."

Id. at 684, 396 S.E.2d at 601 (emphasis in original) (citation omitted).

164 "[The] owner or person in possession of a building can maintain adequate safety conditions and is in control at the time of any incidents giving rise to litigation, whereas the archi-

owner also controls later changes to the improvement and would be responsible for seeing that the work is not misused. There is no justification for current owners or others in control of an improvement to be covered by a statute of repose, as this would discourage their attentiveness to potential sources of danger on their property.

D. *When the Clock Should Start Ticking for Each of Those Protected*

A problem with a statute of repose that begins to run when a building is "finished" is determining when that point occurs. For a simple storage shed designed and built by the same person, the problem would seem also to be simple—it's finished when it's ready to receive what is to be stored in it. But what of the shed designer whose plans were completed in mid-winter (and his bill paid then), if the builder did not begin construction until the following summer? And what if the owner took the shed in its raw state and didn't get around to painting it until two years later?

Moving from the relative simplicity of a storage shed to the vast complexity of a large construction project, the difficulty in fixing a measuring point for liability becomes obvious. Does it entail reference to chronological time? to degree of involvement? to percentage of completion of the work? Just as the extent of the involvement of the designer of the storage shed, its builder, and the owner has a bearing on the responsibility of each for the finished shed, so too the responsibilities of the members of a larger construction team must have an impact on their liability for a completed project of greater complexity.

Using a single starting point of the limitation period for everyone involved in the construction of an improvement to real property would be administratively the simplest for determining the cut-off time for when liability would cease on any particular project. Such a scheme would, however, sacrifice fairness for convenience. A more equitably justifiable theory would begin the running of the statutory time clock at the point most appropriate for each particular member of the construction team.

The basic measuring point for a conventional construction project that is designed and built without undue delay should be the point of "substantial completion" of the project.[165] Although this is a term

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tect has no control over the conditions of the building after construction has been completed." *Note supra* note 162 at 638 n.83 (citing Yarboro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982)).

[165] For a definition of "substantial completion," *see supra* note 90.

of art which has wide currency within the construction industry, courts may have difficulty determining when it has occurred. In some states, the point of substantial completion is defined in their statutes of repose.[166] This is beneficial, as it resolves a point of possible dispute.

Several other identifiable points are also appropriate for use. They document the reality of substantial completion and thus define the point with accuracy. Thus, the measuring point should be the *earlier* of the project's substantial completion, certification of completion by the architect, final payment to the contractor, certificate of occupancy issued by the public authority having jurisdiction, or actual or constructive occupancy by the owner or user.

Using any of these points is not only appropriate for one who is involved with the full scope of the project,[167] but also for those involved in only a portion of the work. The use of such a measuring point for a *portion* of a project accommodates a large project that is erected or completed in phases.

For one whose work on the project ceases before the project has been completed, whether because of contractual limitations on the scope of involvement, or because of termination, fairness dictates that the cessation of that person's (or entity's) involvement should be the measuring point. It is at that point that the party's control over his work ceases. Thus, for an architect who prepares contract working drawings and specifications, but who is not retained to provide construction services such as jobsite observation and certification of the contractor's progress billings, the measuring point should be the completion of the design documentation required by his contract, which is when his control over the project ends. A surveyor's limitation period would begin after the survey was complete, and a subcontractor's starting point for measuring liability would be the completion of his work on the project. Some states recognize this concept and begin the measuring period for design professionals and others who perform services to the benefit of a construction project at the moment when their services have been completed.[168] An extension of this logical

166 For example, Arizona's statute says that substantial completion is the earliest of several possible events, namely, the first time the project is used by its owner or occupant, the first time it is available for use after having been completed according to the contract, including changes agreed to, or at the final inspection by the authority that issued the building permit. ARIZ. REV. STAT. ANN. § 12-552 (1990).

167 This would include an architect who renders a full scope of services, or a general contractor responsible for the entire project.

168 The New Jersey statute of repose, for example, limits the time when an action may be brought against the designer of an improvement to property to 10 years after the performance or furnishing of the design services. N.J. STAT. ANN. § 2A:14-1.1 (West 1987). This was

approach covers a project that is composed of several discrete elements that are built over an extended period of time. In such an instance, the measuring period for liability would begin to run for each element upon its completion and would not await the completion of the entire development, which might never happen.[169] If a project is abandoned, the measuring point for the beginning of the statutory period should be the point when the abandonment occurs, or when work on the project ceases.

E. *When Liability Should End*

Existing statutes of repose provide an end to liability for architects and builders after a period which varies state to state from four years[170] to fifteen years[171] after substantial completion of a construction project. The choice of these widely varying periods seems completely arbitrary, especially since so many states have fixed a ten-year statutory limit.[172]

In selecting a suitable period of limitation, a rational balance must be struck between the desire of architects and builders to be free from obligations at some reasonable point in time, and the equally important need for those harmed by defective design or construction work to have legal recourse to damages. The point at which liability will cease should be just past the period of occurrence of the significant majority of accidents which give rise to claims.[173] That will al-

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confirmed by the New Jersey appellate division, which held that an architect who performs only design work and does not supervise construction is free from liability 10 years after he completes his design, not 10 years after the end of construction. Hopkins v. Fox & Lazo Realtors, 242 N.J. Super. 320, 329, 576 A.2d 921, 925-926 (1990).

169 *See, e.g.*, Schwetz v. Minnerly, 220 Cal. App. 3d 296, 269 Cal. Rptr. 417 (1990) (ten-year statute of repose held to begin for each individual house in a residential subdivision at the completion of that house, not at the completion of the entire subdivision).

170 Tennessee, TENN. CODE ANN. § 28-3-202 (1980).

171 Florida, FLA. STAT. ANN. § 95.11(3)(c) (West 1982).

172 *See, e.g.*, District of Columbia, Hawaii, Illinois, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, West Virginia, Wyoming. *See* Appendix.

173 In an effort to determine that point, a study of insurance claims involving design professionals was prepared for The American Institute of Architects. J. WALLER & L. WHITAKER, A STUDY OF INSURANCE CLAIMS INVOLVING DESIGN PROFESSIONALS TO ASSESS THE EFFECT OF A STATUTE OF LIMITATIONS (n.d.) (prepared by Lachelli, Waller & Assoc., 600 Maryland Ave., S.W., Washington D.C., and published by the New York State Association of Architects, 235 Lark Street, Albany, N.Y. 12210 (the state organization of the American Institute of Architects)) (available at Cardozo Law Review). The data used for the study were 320 claims filed in 1981, 1982, and 1983 covering projects located in New York and designed by professionals insured by one of the two major professional liability insurers, Victor O. Schinnerer & Co, Inc., Two Wisconsin Circle, Chevy Chase, Md. 20815. The study showed that 62% of the claims were brought against the designers by persons involved with the projects, e.g., owner, general contractor, subcontractor, surety company, construction worker, while the

low most potential plaintiffs to bring suit, but will also provide ultimate rest and repose to those responsible for the design and construction of buildings.

V. A MODEL STATUTE FOR NEW YORK

This proposed statute of repose for New York attempts to correct the limitations and faults that have derailed those of other states. To avoid the constitutional impediments of equal protection and due process discussed above,[174] the proposed statute sets forth its justification through the findings of the legislature, and explains why a distinction is made between the several classes of potential defendants to actions over design or construction defects.

The proposed statute addresses the problem of the "last minute" injury[175] by providing a one-year savings clause to extend the seven-year claims period.

This statute seeks to achieve a reasonable framework within which architects and builders can practice their craft in a financially realistic way. By setting a seven-year point of repose for liability, extended by one year for "last-minute" injuries, the liability risk will be given sensible boundaries. Thus, it will be more likely that appropriate insurance coverage will be carried, and injured parties recompensed.

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remaining 38% were brought by independent third parties. J. WALLER & L. WHITAKER, *supra*, at 9. Of the total number of claims, 85% were brought within seven years of substantial completion, 87% within eight years, and 91% within nine years. *Id.* at 7.

Setting the limit of the period of liability for architects and builders at seven years would preserve the right of recourse to the courts for 85% of injured parties. This would appear to strike a reasonable balance between competing rights and desires of plaintiffs and defendant designers and contractors. As the statutory period is extended, the yearly increase in the number of potential plaintiffs benefitted diminishes. However, the exposure to potential defendants remains unabated for the longer time period. Thus, the burden on the defendants increases over time relative to the benefit to plaintiffs. An appropriate balance is struck when the *rate* of increase in the percentage of total possible plaintiffs covered has been significantly reduced.

However, this limitation would work a hardship on someone injured a very short time prior to the expiration of the seven-year period. Indeed, one injured during the last few weeks, or even the last few months, of the seventh year, would be very hard pressed to file a suit within the deadline.

To accommodate such potential claimants, and to avoid a possible due process trap, a savings period of one year from the date of actual injury should be grafted onto the seven-year statutory period for those injured during the seventh year. This would then yield an outside limit of eight years, which would encompass 87% of claims, thus maintaining the reasonable balance of the inherently competing interests of potential plaintiffs and defendants that had been accomplished at the end of seven years, when 85% of all potential claims had had the opportunity to be brought.

[174] *See supra* notes 88-116 and accompanying text.

[175] *See supra* notes 121-126 and accompanying text.

The specific language of the statute is an amalgamation of the phraseology of the statutes of many states. It is augmented with additional material needed to provide the requisite reasoning to demonstrate its "rational relationship" to the problems it seeks to resolve.

Section 1 sets forth the legislative findings and purpose of the statute.

Section 2 is the text of the statute and includes definitions of certain words in it.

Section 3 removes from actions under this statute applicability of the section of the Civil Practice Laws & Rules which would otherwise toll the statute for a person disabled by infancy or insanity.

Section 4 similarly removes the tolling provision for actions accruing during time of war.

AN ACT to amend the Civil Practice Law & Rules, in relation to limitations of time to commence actions for injuries to persons or property or for wrongful death or for contribution or indemnification arising out of alleged deficiencies in improvements to real property or in professional services relating to improvements to real property.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Statement of findings and purpose.

The legislature finds:

(a) that the open-ended and continuing liability imposed upon members of the design professions and upon construction contractors and builders because of alleged deficiencies relating to improvements to real property has resulted in an unfair burden on such professionals and builders and a general increase in the costs of both public and private improvements to real property;

(b) that the cost of maintaining adequate insurance coverage for such risks has reached such a level that a significant number of professionals and builders have elected to forgo insurance coverage, to the detriment of injured parties seeking damages;

(c) that even the best designed and constructed improvement is dependent upon proper use and maintenance to preserve its integrity and safety and it is thus of importance to the public safety and welfare to insure that an owner use, maintain, and repair that which is the property of the owner;

(d) that owners, tenants, and users are in control of those improvements whereas architects and builders are not in control of the

way in which those improvements are used or maintained after their completion;

(e) that design professionals and builders are not in a position to pre-test the improvements to real property which they design and construct, whereas suppliers or materials and equipment are in a position to institute manufacturing quality control practices and to pre-test what they supply.

The legislature therefore finds:

(a) that it is necessary and desirable to establish time limits after which design professionals and builders are free from exposure to actions relating to the improvements to real property they design and build;

(b) that it is neither necessary nor desirable to set time limitations for others who may be involved with such improvements;

(c) that the time limitations set forth herein will preserve the liability of professionals and others during a period in which the significant majority of injuries occur and defects are revealed, and therefore will establish an appropriate limitation on liability while affording adequate protection to the public.

Section 2. Article two of chapter eight of the Civil Practice Law & Rules is amended to add a new section 212-a to read as follows:

§ 212-a. Actions to be commenced within seven years.

(a) Notwithstanding any other statute or local ordinance, no action or arbitration, whether in contract, tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or observation of construction, or construction of an improvement to real property, or for any injury to property, real or personal, or for personal injury or wrongful death, arising out of or relating to the defective or unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or wrongful death, shall be brought against any person performing or furnishing the design, planning, surveying, supervision or observation of construction, or construction of such improvement to real property, after seven years, measured from the earliest of:

(1) the substantial completion or termination of the performance or furnishing of such services;

(2) the issuance of a certificate of completion by the architect or engineer for the improvement;

(3) the issuance of a certificate of occupancy by the local authority having jurisdiction over the improvement;

(4) the actual or constructive occupancy of the improvement by its owner, tenant, or user;

(5) the substantial completion of the improvement; or

(6) the abandonment or cessation of work on the improvement.

(b) The limitation set forth in subsection (a) shall not govern in actions against any person supplying materials or equipment for incorporation into or for use in connection with the improvement to real property unless such person installs or otherwise incorporates or uses such material or equipment at the site of the improvement, nor shall the limitation apply to any person in actual or constructive possession and control as owner, tenant, user, or otherwise, of the improvement at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

(c) Notwithstanding the time limitation of subsection (a), if the injury occurs during the seventh year after the measuring point under this section, an action may be brought within one year after the date on which the injury occurred or the defect was discovered or by the exercise of reasonable diligence should have been discovered, but in no event may an action be brought more than eight years after the measuring point under this section.

(d) Nothing in this section shall operate to extend the period prescribed by the laws of this state for bringing any action. If a shorter period of limitation is prescribed for a specific action, the shorter period shall govern.

(e) Definitions.

(1) The term "person" shall mean an individual, firm, partnership, company, corporation, association, joint venture, business trust, or other entity.

(2) The substantial completion of the improvement is the point at which the improvement can be used for its intended purpose in accordance with its construction drawings and specifications as defined or identified in the contract, including any modifications to that contract that have been agreed to by the parties.

Section 3. Section 208 of article two of chapter eight of the Civil Practice Law & Rules is amended to add the following at the end thereof:

This section shall not apply to any action to which section 212-a applies.

Section 4. Section 209 of article two of chapter eight of the Civil Practice Law & Rules is amended to add the following subsection:

(d) This section shall not apply to any action to which section 212-a applies.

Section 5. Nothing in this act shall operate to terminate any action filed or served prior to the effective date of this act.

Section 6. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.

CONCLUSION

This Note has examined the exposure of architects and builders to liability for claims relating to defects and deficiencies in improvements to real property. It has evaluated the relative positions of those who are involved in the construction process, and has assessed how states have treated those individuals. Through an analysis of statutory language, case law, and claims data, this Note has argued that liability of architects and builders for claims should have a finite limit through the use of statutes of repose, and that New York should enact such a statute. If the proposed statute of repose becomes law in New York, the design professions and the construction industry will have an important measure of liability containment, to the benefit of both the industry and the public, while still affording adequate and appropriate recourse for those seeking recompense for injuries they may have suffered or damages they may have sustained.

Andrew Alpern, AIA

APPENDIX: *Statutes of Repose*

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Ala.	ALA. CODE § 6-5-218 (1977).	7 years	none	7 years	substantial completion	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, observe, build; but not owner or one in possession or control.	NO (open courts provision of state constitution, plus lack of savings clause). *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725 (Ala. 1983).
Alaska	ALASKA STAT. § 09.10.055 (1990).	6 years	2 years	8 years	substantial completion	all actions for damages for injury to property or persons, or wrongful death.	design, plan, supervise, observe, build; but not owner or one in possession or control.	NO (equal protection under state constitution because owners and suppliers not covered). *Turner Constr. Co. v. Scales*, 752 P.2d 467 (1988).
Ariz.	ARIZ. REV. STAT. ANN. § 12-552 (1990).	8 years	1 year	9 years	substantial completion: earliest of: • first used • available for use after completed per contract with agreed changes • final inspection by building permit issuer.	contract, including implied warranties, for injury to property only; but does not operate to shorten the period of an express warranty.	architect, engineer, surveyor, builder, developer, one who develops and sells.	UNTESTED (added by 1989 ARIZ. SESS. LAWS, ch. 240, § 1.).
Ark.	ARK. STAT. ANN. § 16-56-112 (1987).	5 years (property damage); 4 years (personal injury or wrongful death).	1 year (personal injury or wrongful death).	5 years	substantial completion. (Special: 3 year blanket limitation for architect after furnishing plans if they are not used.)	contract: injury to property or persons, or wrongful death. tort: injury to persons or wrongful death.	design, plan, survey, prepare map, supervise, observe, build.	YES. *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).
Cal.	CAL. CIV. PROC. CODE § 337.1 (West 1982).	4 years	1 year	5 years	substantial completion	all actions for damages for injury to property or persons for patent defects; but not for owner-occupied single-unit residence.	design, survey, plan, supervise, observe, build; but not one in possession or control.	YES. *Wagner v. State*, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Cal.	CAL. CIV. PROC. CODE § 337.15 (West 1982).	10 years	none	10 years	substantial completion, or, if earlier, • final inspection by public agency • recording of valid notice of completion • use or occupation • one year after work terminates or ceases; and measured by each profession or trade rendering services.	all actions for damages for injury to property for latent defects.	design, survey, plan, supervise, build; but not one in possession or control.	YES. *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982).
Colo.	COLO. REV. STAT. § 13-80-104 (1987).	6 years	2 years	8 years	substantial completion	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	architect, engineer, inspector, contractor, builder, builder-vendor; but not owner or one in possession or control.	YES. *Criswell v. M.J. Brock & Sons, Inc.*, 681 P.2d 495 (Colo. 1984); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822 (Colo. 1982).
Conn.	CONN. GEN. STAT. ANN. § 52-584a (West Supp. 1990).	7 years	1 year	8 years	substantial completion: earliest of either • first used • available for use after completed per contract with agreed changes.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	architect, professional engineer; but not owner or one in possession or control.	YES. *Zapata v. Burns*, 207 Conn. 496, 542 A.2d 700 (1988).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Del.	DEL. CODE ANN. tit. 10, § 8127 (1975).	6 years	none for property damage; 2 years for personal injury if contract limitation period is less than 2 years from starting point.	6 years for property damage; 8 years for personal injury as indicated.	substantial completion or earliest of: • substantial completion (or completion of portion or phase) if such date was in the contract • date stipulated in the contract for start of limitations period • date of final payment to the one being sued for the phase of the work in question • acceptance by owner or occupant.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution (but contract actions are covered only for the owner's contract with the prime contractor).	design, plan, supervise, observe, build; but not owner or one in possession or control.	YES. *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413 (Del. 1984).
D.C.	D.C. CODE § 12-310 (1989).	10 years	none	10 years	substantial completion: earliest of either: • first used • available for use after completed per contract with agreed changes.	any action except contract, for damages for injury to property or persons, wrongful death; or indemnification or contribution for personal injury or wrongful death.	[anyone] where action results from defective or unsafe condition of improvement to real property; but not owner or one in possession or control, nor supplier; but OK for manufacturer of component part of improvement per *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116 (D.C. 1985).	YES. *Sandoe v. Lefta Assoc.*, 559 A.2d 732 (D.C. 1989).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Fla.	FLA. STAT. ANN. § 95.11(3)(c) (West 1982).	4 years for patent defects; 15 years for latent defects.	none	15 years	latest of: • actual possession by owner • issuance of certificate of occupancy • abandonment if not completed • completion and termination of contract of professional engineer, registered architect, or licensed contractor.	an action founded on the design, planning, or construction of an improvement to real property.	design, plan, construct.	YES. *American Liberty Ins. Co. v. West & Conyers, Architects & Eng'rs*, 491 So. 2d 573 (Fla. Dist. Ct. App. 1986) (The preamble to the revised statute stipulated the "public necessity" for the statute, the lack of which was the reason for the declaration it was unconstitutional under *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979).).
Ga.	GA. CODE ANN. §§ 9-3-51, -52 (1982).	8 years	2 years for tort actions	10 years	substantial completion	all actions for damages for injury to property or persons, or wrongful death.	design, plan, survey, prepare plat, specify, supervise, observe, build; but not owner or one in possession or control.	YES. *Nelms v. Georgian Manor Condominium Ass'n*, 253 Ga. 410, 321 S.E.2d 330 (1984).
Haw.	HAWAII REV. STAT. § 657-8 (1985).	10 years	none	10 years	substantial completion or abandonment of improvement.	all actions for damages for injury to property.	design, plan, supervise, observe, build; also material manufacturer and supplier, surety.	UNTESTED. Earlier version held to violate equal protection clause of state constitution. *Shibuya v. Architects Haw. Ltd.*, 65 Haw. 26, 647 P.2d 276 (1982).
Idaho	IDAHO CODE §§ 5-216, -219, -241 (1990).	2 years for malpractice; 6 years for tort; 5 years for written contract	none for malpractice; 2 years for tort; none for contract	2 years for malpractice; 8 years for tort; 5 years for written contract	for malpractice: the act complained of; for tort or contract: final completion of construction.	actions relating to improvements to real property, malpractice, or personal injury or death.	design, plan, supervise, build; but not owner or one in possession or control.	YES. *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Ill.	ILL. ANN. STAT. ch. 110, ¶ 13-214 (Smith-Hurd Supp. 1990).	10 years	4 years	14 years, except tolled until disability removed for minor, retarded, mentally ill, or imprisoned on criminal charge.	the act or omission complained of.	all actions for an act or omission involving an improvement to real property.	design, plan, supervise, observe, build.	YES. *Continental Ins. Co. v. Walsh Constr. Co. of Ill.*, 171 Ill. App. 3d 135, 524 N.E.2d 1131 (1988).
Ind.	IND. CODE ANN. §§ 34-4-20-1, -2, -3, -4 (Burns 1986).	10 years	2 years	earlier of: 12 years; or 14 years from submission of plans and specifications to owner if action is for design deficiency.	earlier of: • first beneficial use of the improvement or any portion of it • sufficiently completed per contract (with modifications) to allow for intended use.	all actions for damages for injury to property, persons, or wrongful death.	design, plan, supervise, observe, build; but not owner or one in possession or control.	YES. *Beecher v. White*, 447 N.E.2d 622 (Ind. Ct. App. 1983).
Iowa	no statute of repose							
Kan.	no statute of repose							
Ky.	KY. REV. STAT. ANN. § 413.135 (Michie/Bobbs-Merrill Supp. 1990).	7 years	1 year	8 years	substantial completion, defined as the date when the owner first uses or occupies the project.	all actions for damages for injury to property or persons, or wrongful death arising from the design, planning, supervision or construction.	any person	UNTESTED in re-enacted form (effective July 13, 1990). Earlier law held to violate equal protection clause of state constitution. *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1985), *cert. denied*, 479 U.S. 822 (1986).
La.	LA. REV. STAT. ANN. § 9.2772 (West 1965 & Supp. 1990).	10 years	1 year	11 years	earliest of: • acceptance by owner recorded at mortgage office • occupancy by owner • completion of design or planning services by one who does not also inspect the work.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan survey, supervise observe, build; but not owner or one in possession or control.	YES. *Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Parish*, 366 So. 2d 1381 (La. 1978) (equal protection); *Bordlee v. Neyrey Park, Inc.*, 394 So. 2d 822 (La. Ct. App. 1981) (due process).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Me.	ME. REV. STAT. ANN. tit. 14, § 752-A (1980 & Supp. 1990).	10 years	none	10 years	substantial completion of construction contract, or substantial completion of the services provided if construction contract not involved.	all actions for malpractice or professional negligence.	architects or engineers licensed or registered under state law, Title 32.	YES. *Bangor Water Dist. v. Malcolm Pirnie Eng'rs*, 534 A.2d 1326 (Me. 1988) (not addressing the question of constitutionality, but applying the statute as written).
Md.	MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1989 & Supp. 1990).	10 years	3 years	13 years	date the entire improvement becomes available for its intended use.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	architect, professional engineer, contractor.	YES. *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 499 A.2d 178 (1985).
Mass.	MASS. GEN. LAWS ANN. ch. 260, § 2B (West Supp. 1990).	6 years	none	6 years	earlier of: • opening of improvement to use • substantial completion and taking possession for occupancy by owner.	all actions for damages arising out of deficiency or neglect involving an improvement to real property.	design, plan, administer, build.	YES. *Dighton v. Federal Pac. Elec. Co.*, 399 Mass. 687, 506 N.E.2d 509, *cert. denied*, 484 U.S. 953 (1987).
Mich.	MICH. COMP. LAWS ANN. § 600.5839 (West 1987).	6 years	none	6 years; 10 years if gross negligence.	occupancy, use, or acceptance of the improvement.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	contractor, or state licensed architect or professional engineer.	YES. *Fennell v. John J. Nesbitt, Inc.*, 154 Mich. App. 644, 398 N.W.2d 481 (1986) (accepting and applying the statute).
Minn.	MINN. STAT. ANN. § 541.051 (West 1988 & Supp. 1991).	10 years	2 years	12 years	substantial completion, defined as the date when the owner can occupy or use the improvement for its intended purpose.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, observe, build; also material supplier or owner (but not owner where cause of action is negligence in maintaining or operating the improvement); but not manufacturer or supplier of equipment.	UNTESTED. *But see Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988) (holding 15-year period of earlier statute constitutional; current statute shortens repose period and adds actions for injury to property).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Miss.	MISS. CODE ANN. § 15-1-41 (Supp. 1989).	6 years	none	6 years	earlier of: • written acceptance of the improvement • actual occupancy or use.	all actions for damages for injury to property or persons, indemnity, or contribution; but not for wrongful death.	design, plan, supervise, observe, build; but not owner or one in possession or control.	YES. *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988).
Mo.	MO. ANN. STAT. § 516.097 (Supp. 1991).	10 years	none	10 years	completion of improvement.	all tort actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, build; but not owner or one in possession.	UNTESTED.
Mont.	MONT. CODE ANN. § 27-2-208 (1989).	10 years	1 year	11 years	earlier of: • completion certificate is executed • owner can utilize improvement for intended purpose.	all actions for damages, other than those based on a written contract.	design, plan, survey, supervise, observe, build; but not owner or one in possession and control.	YES. *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 551 P.2d 647 (1976).
Neb.	NEB. REV. STAT. §§ 25-222, -223 (1989).	10 years	none	10 years	the act giving rise to the cause of action.	any action for professional negligence or breach of warranty on improvements to real property.	design, plan, supervise, observe, build.	YES. *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987).
Nev.	NEV. REV. STAT. §§ 11.203-.205 (1987).	10 years for "known or should-have-known" defects; 8 years for latent defects; 6 years for patent defects.	2 years	12 years for "known or should-have-known" defects; 10 years for latent defects; 8 years for patent defects.	substantial completion	all actions for damages for injury to property or persons, or wrongful death.	design, plan, supervise, observe, build; also owner or occupier.	YES. *Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988) (earlier statute had been held unconstitutional on equal protection grounds for not including owners and suppliers, but exclusion of suppliers in current statute has rational basis because of existence of products liability law).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
N.H.	N.H. REV. STAT. ANN. § 508:4-b (1983) (re-enacted, 1990 N.H. A.L.S. LEXIS 164, effective June 26, 1990).	8 years	none	8 years	substantial completion, defined as the date when the improvement can be used for its intended purpose.	all actions for damages for injury to property or persons, wrongful death, or economic loss.	design, plan, engineer, survey, supervise, inspect, observe, build; also supplier of labor or materials; but not owner or one in possession or control.	UNTESTED. Earlier statute had been held to violate state and federal equal protection rights. *Henderson Clay Prods. v. Edgar Wood & Assoc.*, 122 N.H. 800, 451 A.2d 174 (1982).
N.J.	N.J. STAT. ANN. § 2A:14-1.1 (West 1987).	10 years	none	10 years	performance or furnishing of services or construction.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, build; but not owner or one in possession and control.	YES. *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972).
N.M.	N.M. STAT. ANN. § 37-1-27 (Supp. 1990).	10 years	none	10 years	latest of: • date when owner can use improvement for its intended purpose • actual occupancy • substantial completion as established by the contractor.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, inspect, administer, build.	YES. *Terry v. New Mexico State Highway Comm'n*, 98 N.M. 119, 645 P.2d 1375 (1982) (abrogation effect on post ten-year claims not unconstitutional); *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct. App. 1977) (due process and equal protection rights not violated).
N.Y.	no statute of repose							
N.C.	N.C. GEN. STAT. § 1-50(5) (1990).	6 years	none	6 years	later of: • substantial completion, defined as the date when the owner can use the improvement for its intended purpose • last act or omission complained of.	all actions for damages for injury to property or persons, death, economic loss, indemnity, or contribution.	design, plan, specify, survey, supervise, test, observe, repair, build; also developer, supplier, surety; but not owner or one in possession or control.	YES. *Square D Co. v. C.J. Kern Contractors, Inc.*, 314 N.C. 423, 334 S.E.2d 63 (1985).
N.D.	N.D. CENT. CODE § 28-01-44 (Supp. 1989).	10 years	2 years	12 years	substantial completion	all actions for damages for injury to property or persons, or wrongful death.	design, plan, supervise, observe, build; but not owner or one in possession or control.	YES. *Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Ohio	OHIO REV. CODE ANN. § 2305.131 [§ 2305.13.1] (Anderson 1981).	10 years	none	10 years	performance or furnishing of services or construction.	all actions for damages for injury to property of persons, wrongful death, indemnity, or contribution (tort actions only, not contract, per *Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co.*, 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984)).	design, plan, supervise, build; but not owner or one in possession or control.	YES. *Sedar v. Knowlton Constr. Co.*, 49 Ohio St. 3d 193, 551 N.E.2d 938 (1990).
Okla.	OKLA. STAT. ANN. tit. 12, § 109 (West 1988).	10 years	none	10 years	substantial completion	tort actions for damages for injury to property or persons, or wrongful death.	design, plan, supervise, observe, build; also owner, lessee, or one in possession.	YES. *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915 (Okla. 1989).
Or.	OR. REV. STAT. § 12.135 (1988).	10 years	none	10 years	substantial completion, defined as acceptance of the improvement as usable for its intended purpose.	all actions for damages from construction, alteration, or repair of an improvement to real property.	design, plan, survey, supervise, inspect, build; but not owner or one in possession or control.	YES. *Hansen v. Treasure Valley Community College*, 75 Or. App. 324, 705 P.2d 764 (1985); *Davis v. Whiting Corp.*, 66 Or. App. 541, 674 P.2d 1194 (1984).
Pa.	PA. CONS. STAT. ANN. § 5536 (Purdon 1981).	12 years	2 years	14 years	completion of construction.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, observe, build; but not owner or one in possession or control.	YES. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978).
R.I.	R.I. GEN. LAWS § 9-1-29 (1985).	10 years	none	10 years	substantial completion	all tort actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	architect, professional engineer, contractor, subcontractor, material supplier.	YES. *Leeper v. Hillier Group, Architects & Planners, P.A.*, 543 A.2d 258 (R.I. 1988); *Walsh v. Gowing*, 494 A.2d 543 (R.I. 1985).
S.C.	S.C. CODE ANN. § 15-3-640 (Law. Co-op. Supp. 1989).	13 years	none	13 years	substantial completion	all actions for damages for injury to property or persons, wrongful death, economic loss, indemnity, or contribution.	design, plan, specify, supervise, observe, test, build; also owner or manufacturer of component part, material supplier, developer, owner.	UNTESTED (re-enacted 1986). Earlier statute held unconstitutional. *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
S.D.	S.D. CODIFIED LAWS ANN. §§ 15-2-9, -10, -11 (1984), *repealed by* 1990 S.D. LAWS 1985, ch. 156, § 10 (Supp. 1990).	6 years	1 year	7 years	substantial completion, defined as the date when the owner can use the improvement for its intended purpose.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, supervise, observe, inspect, build; but not owner or one in possession or control.	NO (violates open courts provision of state constitution). *Daugaard v. Baltic Coop. Bldg. Supply Assoc.*, 349 N.W.2d 419 (S.D. 1984).
Tenn.	TENN. CODE ANN. §§ 28-3-201, -202, -203 (1980).	4 years	1 year	5 years	substantial completion, defined as the date when the owner can use the improvement for its intended purpose.	all actions for damages for injury to property or persons, or wrongful death.	design, plan, supervise, observe, build.	YES. *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128 (6th Cir. 1986); *Harmon v. Angus R. Jessup Assoc.*, 619 S.W.2d 522 (Tenn. 1981).
Tex.	TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, -009 (Vernon 1989) (formerly art. 5536a (1969)).	10 years	2 years	10 years	substantial completion	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	registered or licensed architect or engineer, or one who constructs or repairs an improvement to real property; but not one in actual possession or control.	YES. *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918 (Tex. Ct. App. 1985).
Utah	UTAH CODE ANN. § 78-12-25.5 (Supp. 1990).	7 years	none	7 years	completion of construction, defined as issuance of certificate of substantial completion, or use of improvement by owner.	all actions for damages for injury to property or persons, or wrongful death.	design, plan, survey, supervise, build; but not owner or one in possession and control.	NO (violates open courts provision of state constitution). *Horton v. Goldminer's Daughter*, 785 P.2d 1087 (Utah 1989).
Vt.	no statute of repose							
Va.	VA. CODE ANN. § 8.01.250 (1984).	5 years	none	5 years	performance or furnishing of services of construction.	all actions to recover for injury to property or persons, wrongful death, indemnity, or contribution (tort actions only, not contract, per *Fidelity & Deposit v. Bristol Steel & Iron Works*, 722 F.2d 1160 (4th Cir. 1983).	design, plan, survey, supervise, build; but not supplier of machinery or equipment, nor owner or one in possession and control.	YES. *Smith v. Allen-Bradley Co.*, 371 F.Supp. 698 (W.D. Va. 1974).

State	Statute	Claims period	Savings clause	Point of repose	Starting point	Actions covered	Persons covered	Constitutionality
Wash.	WASH. REV. CODE ANN. §§ 4.16.300-320 (1988).	6 years	none	6 years	termination of services performed, or substantial completion of construction, defined as date when improvement may be used for its intended purpose.	all actions arising from an improvement to real property.	design, plan, survey, supervise, observe, build; but not manufacturer nor owner nor one in possession and control.	YES. *Pfeifer v. City of Bellingham*, 112 Wash. 2d. 562, 772 P.2d 1018 (1989) (considering constitutional claims and resolving case on basis of statutory construction).
W. Va.	W. VA. CODE § 55-2-6a (Supp. 1990).	10 years	none	10 years	occupancy or acceptance by owner.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plans, survey, supervise, observe, build.	YES. *City of Bluefield ex rel. Sanitary Bd. of Bluefield v. Autotrol Corp.*, 723 F. Supp. 362 (S.D.W. Va. 1989) (restricting the statute to tort actions); *Basham v. General Shale*, 377 S.E.2d 830 (W. Va. 1988) (not addressing the question of constitutionality, but applying the statute).
Wis.	WIS. STAT. ANN. § 893.89 (West 1983).	6 years	6 months	6 years and 6 months	substantial completion	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, survey, plan, supervise, build; also material supplier.	NO (lack of protection for owners, occupants, and tenants violates equal protection rights without rational basis). *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 435 N.W.2d 244 (1989).
Wyo.	WYO. STAT. §§ 1-3-110, -111, -112 (1990).	10 years	1 year	11 years	substantial completion, defined as date when owner can utilize the improvement for its intended purpose.	all actions for damages for injury to property or persons, wrongful death, indemnity, or contribution.	design, plan, survey, supervise, observe, manage, build; but not owner or one in possession or control.	UNTESTED (re-enacted 1981). Earlier statute held unconstitutional. *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980).