

# PEOPLE WHO LIVE IN GLASS HOUSES SHOULD NOT BUILD IN VERMONT: THE NEED FOR A STATUTE OF LIMITATIONS FOR ARCHITECTS

## INTRODUCTION

The extent of liability for architects<sup>1</sup> or builders in claims of defective design and construction is an uncertain area of Vermont law. The case law directing architects and lawyers regarding the statute of limitations, in particular, is a maze of tenuous rules, which holds little value for predicting the outcome of future claims in court.

Vermont is one of only seven states which does not have a special statute of limitations for architects and builders.<sup>2</sup> In Vermont, the nature of the injury sustained determines which statute of limitations will apply in the event of a design or structural defect.<sup>3</sup> Personal injury claims, for example, are governed by the statute of limitations for injuries to the person, under which claims must be brought within three years after discovering the injury.<sup>4</sup> Actions

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1. An architect is defined in Vt. STAT. ANN. tit. 26, § 121 (1975) as follows:  
The term "architect" or "registered architect" as used herein shall mean a person who holds himself out as able to perform, or does perform, while representing himself as an architect, any professional service such as consultation, investigation, evaluation, planning, designing (including esthetic and structural design), or responsible supervision of construction in connection with any buildings, structures or projects, or the equipment or utilities thereof wherein the safeguarding of life, health or property is concerned or involved.

*See also* Rogers v. Kelley, 128 Vt. 146, 147, 259 A.2d 748, 785 (1969). This note may apply equally to claims against other design professionals and the construction industry. Most state statutes of limitations limit claims against the class of persons furnishing improvements to real property. *See, e.g.*, DEL. CODE ANN. tit. 10, § 8127 (1974); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1983). *See infra* note 100 and accompanying text. This broad classification could include engineers, contractors, land surveyors, planners, and materialmen, as well as architects.

2. Alabama, Arizona, Iowa, Kansas, New York, Vermont, and West Virginia have no limitation of actions statutes for the construction industry. The Alabama special statute was invalidated in *Plant v. Reid, Inc.*, 294 Ala. 155, 313 So. 2d 518 (1975) and has not been reenacted. New York has no special statute of limitations for architects, but maintains a general malpractice statute which governs negligence by professionals. N.Y. CIV. PRAC. LAW § 214.6 (McKinney Supp. 1983). *See generally* Knapp & Lee, *Applications of Statutes of Limitations Concerning Design and Construction*, 23 St. Louis U.L.J. 351, 352 & nn.2-3 (1979).

3. *See* Kinney v. Goodyear Tire & Rubber Co., 134 Vt. 571, 574, 367 A.2d 677, 679 (1976).

4. The text of this statute reads in part as follows:  
Actions for the following causes shall be commenced within three years after

based on sealed and delivered contracts are limited to eight years after the cause of action has accrued.<sup>5</sup> All other claims must be brought pursuant to the statute of limitations for civil actions,<sup>6</sup> which limits claims to six years after the cause of action has accrued.

Until recently, the point at which a cause of action accrued in architectural claims was an open question in Vermont. In 1976, however, the Vermont Supreme Court was asked to resolve that question in *Union School District No. 20 v. Lench*.<sup>7</sup> In a carefully worded opinion, which was limited closely to its facts,<sup>8</sup> the court ruled that the cause of action did not accrue upon discovery of the cause of the architectural defect.<sup>9</sup> A subsequent decision broadened the scope of *Lench*,<sup>10</sup> and *Lench* has been read as representing the rejection of the discovery rule in construction claims in Vermont.<sup>11</sup> The apparent effect of *Lench*, albeit inconsonant with its limited holding, is to limit the liability of architects in Vermont to six years upon completion of the structure under the statute of limitations for civil actions.

The rule of *Lench*, as it has been construed, is disturbing for several reasons. First, a finite limitation on architectural liability may not be as desirable as it was claimed to be when the special statutes of limitations gained popular acclaim in the 1960's.<sup>12</sup> In an

the cause of action accrues, and not after:

.....  
 (4) Except as otherwise provided in this chapter, injuries to the person suffered by the act or default of another person, provided that the cause of action shall be deemed to accrue as of the date of the discovery of injury;  
 .....

VT. STAT. ANN. tit. 12, § 512 (1973 & Cum. Supp. 1983).

5. The statute reads as follows:

"Actions on specialties shall be brought within eight years after the cause of action accrues, and not after." VT. STAT. ANN. tit. 12, § 507 (1973). See also, *Alexander v. Morrissey, Inc.*, 137 Vt. 20, 399 A.2d 503 (1979).

6. The text of this statute reads as follows:

"A civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter." VT. STAT. ANN. tit. 12, § 511 (1973).

7. 134 Vt. 424, 365 A.2d 508 (1976).

8. *Id.* at 427-28, 365 A.2d at 511.

9. *Id.* at 426-27, 365 A.2d at 511.

10. *South Burlington School Dist. v. Goodrich*, 135 Vt. 601, 605, 382 A.2d 220, 222 (1977); *Anderson v. McKee*, 136 Vt. 623, 383 A.2d 273 (1978) (mem.).

11. *South Burlington*, 135 Vt. at 605, 382 A.2d at 222.

12. See Collins, *Limitations of Actions Statutes for Architects and Builders—An Ex-*

age of mass-produced housing, limiting construction and design liability may strip the consumer of his only means to regain losses by suing the party responsible for negligent construction.<sup>13</sup> Second, if limitations on liability are to be imposed, such limits should be set by the legislature, and not by the court. The legislature is structured to hear and weigh the interests of all parties concerned, and is the appropriate forum through which a rule should be promulgated based on a balance of those interests. Indeed, the court in *Lench* encouraged legislative action regarding a statute of limitations for architects,<sup>14</sup> but the legislature has not responded thus far. Finally, the rule of *Lench* appears only to limit architectural claims brought pursuant to the six year statute of limitations for civil actions. The *Lench* court was silent as to whether an architect could remain subject to potentially infinite liability in the case of personal injury.<sup>15</sup>

A special statute of limitations need not favor the architect at the expense of third parties and project owners. A middle ground can be reached which balances the rights of owners and third party claimants with those of the architect. The purpose of this note is to urge the Vermont Legislature to consider the need for a special statute of limitations for the design and construction industries. In support of this position, the following areas will be addressed: 1) the expansion nationwide of architectural liability in recent decades; 2) the role of the architect in the construction process; 3) the purposes and consequences of the special statutes of limitations; 4) constitutional challenges to the special statutes of limitations; and 5) the status of the law in Vermont. Finally, a special statute of limitations will be proposed for Vermont which takes into account the interests of both architects and parties injured by defective construction.

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*amination of Constitutionality*, 29 FED'N INS. COUNS. Q., 41, 45 (1978); Comment, *A Defense Catalogue for the Design Professional*, 45 UMKC L. REV. 75, 93 (1976) [hereinafter cited as Comment, *A Defense Catalogue*]; see generally Comment, *Up Against the Wall Master Builder: The Architect's Legal Status*, 23 ST. LOUIS U.L.J. 384 (1979) [hereinafter cited as Comment, *Up Against the Wall*].

13. The owner of a defective structure would be barred from suing the architect or contractor under the typical statute of limitations for architects. An injured third party might have a cause of action against the owner, but only if the owner's act or omission caused the injury.

14. *Lench*, 134 Vt. at 427, 365 A.2d at 510-11.

15. See VT. STAT. ANN. tit. 12, § 512 (1973 & Cum. Supp. 1983).

## I. THE EXPANSION OF ARCHITECTURAL LIABILITY

In recent decades, a significant expansion of the liability of architects for injuries caused by defective design and construction has occurred on a national scale.<sup>16</sup> This trend appears to be caused by the combined circumstance of increased construction starts<sup>17</sup> and the rejection of privity of contract as an essential element in claims brought for defective design.<sup>18</sup>

The growth of the housing industry in the United States following World War II exemplifies the overall pattern of increased construction starts. In 1945, the number of housing starts was calculated to be 326,000; one year later the number had increased to 1,023,000.<sup>19</sup> Since 1946, the number of residential housing starts has risen as high as 2,379,000, and has never fallen below the 1,000,000 mark.<sup>20</sup> The growth of the construction industry in general during the post-war era is one factor influencing the increase in claims brought against architects.<sup>21</sup>

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16. *Rosenberg v. Town of N. Bergen*, 61 N.J. 190, 194, 293 A.2d 662, 664 (1972); Note, *Architectural Malpractice: A Contract Based Approach*, 92 HARV. L. REV. 1075, 1075-76 (1979) [hereinafter cited as Note, *Architectural Malpractice*]; Note, *Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. PRAC. & PROC. 287, 287 (1977) [hereinafter cited as Note, *Malpractice*]. See Brockanic & Robusto, *Products Liability in New Homes Sales*, 19 CARROLL BUS. BULL. 4 (1981). This article traces the expansion of liability for new homes sales.

17. See Comment, *Architectural Liability for Construction Site Accidents*, 30 U. KAN. L. REV. 429 (1982). The author suggests that the volume of construction nationwide has resulted in "an exponential increase" in the chances for "negligent construction practices." *Id.* at 429.

18. Collins, *supra* note 12, at 41-45; Sisson & Kelley, *Statutes of Limitations for the Design and Building Professions*, 49 INS. COUNS. J. 243, 243 (1982); see, e.g., *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956), cert. denied sub nom. *Gicher Iron Works, Inc. v. Hanna*, 351 U.S. 989 (1956); *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3d Cir. 1948), cert. denied, 334 U.S. 846 (1948); *Hunter v. Quality Homes*, 45 Del. 100, 68 A.2d 620 (1949); *King v. Mason*, 95 So. 2d 705 (La. Ct. App. 1957), *aff'd*, 99 So. 2d 117 (La. 1958); *Russell v. Whitcomb, Inc.*, 100 N.H. 171, 121 A.2d 781 (1956); *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 143, N.E.2d 895, 164 N.Y.S.2d 699 (1957); *Krisovich v. John Booth, Inc.*, 181 Pa. Super. 5, 121 A.2d 890 (1956).

19. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES COLONIAL TIMES TO 1970*, 639 (1975).

20. *Id.*

21. See J. FELD, *CONSTRUCTION FAILURE* (1968). Feld notes that: "Where construction booms, the sudden large increase in volume of work outruns the availability of trained personnel to exercise the necessary control, and failures become more common." *Id.* at 12. See also Comment, *The Expanding Scope of Liability in the Home Construction Enterprise*, 5 LAND AND WATER L. REV. 637 (1970). The article acknowledges that large scale post-war housing production caused the abolition of caveat emptor and the adoption of implied warranties of fitness in housing construction. *Id.*

At common law, liability for defective design was predicated on a showing of both negligence and the existence of contractual privity, establishing a duty between the architect and project owner.<sup>22</sup> Judge Cardozo's landmark opinion in *McPherson v. Buick Motor Co.*<sup>23</sup> foreshadowed the elimination of privity of contract in architectural claims. In *McPherson*, the court ruled that a third party could recover against a manufacturer for negligence in the inspection of a faulty wheel, even though the plaintiff had not contracted with the manufacturer.<sup>24</sup>

It was not until World War II that courts abolished privity of contract in claims of defective design and construction.<sup>25</sup> In 1957, the reasoning used in *McPherson* was applied against an architect in *Inman v. Binghamton Housing Authority*.<sup>26</sup> The *Inman* court suggested that there was no difference between a chattel and a structure built on land.<sup>27</sup> The court concluded that a third party claim against an architect would stand in cases of "latent defect or concealed dangers."<sup>28</sup>

The elimination of contractual privity stripped the architect of his once-established insulation from third party claims. Exposure to this new source of liability resulted in a steady increase in the number of suits brought against architects.<sup>29</sup> Architects responded to their expanded liability in two ways. First, within the private law sphere of contractual relations, architects modified their role as overseers of the construction process.<sup>30</sup> Second, in the area of

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22. *Ford v. Sturgis*, 14 F.2d 253, 254 (D.C. Cir. 1926). See *supra* note 18. See generally Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME LAW. 306 (1977). See also *Berlin Dev. Corp. v. Vermont Structural Steel Corp.*, 127 Vt. 367, 371, 250 A.2d 189, 192 (1968).

23. 217 N.Y. 382, 111 N.E. 1050 (1916).

24. *Id.* at 394-95, 111 N.E. at 1054-55.

25. See *supra* notes 18, 22 and accompanying text.

26. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *Inman* is not the first case which abolished privity of contract in claims for defective design or construction. For example, *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3d Cir. 1948), cert. denied, 334 U.S. 846 (1948), was decided nine years before *Inman*. Yet *Inman* remains the case cited most often in this regard. See Note, *Liability of Architects*, *supra* note 22, at 308 n.12.

27. *Inman*, 3 N.Y.2d at 144, 143 N.E.2d at 898, 164 N.Y.S.2d at 703.

28. *Id.* at 145, 143 N.E.2d at 899, 164 N.Y.S.2d at 704.

29. In 1976, 29.6% of insured architects had been sued. N.Y. Times Feb. 12, 1978 § 1 at 1, col. 1. The figure had risen to 36% by 1978, and to 45% by 1980. N.Y. Times Aug. 5, 1982 § III at 3, col. 3. See also Collins, *supra* note 12, at 43 n.16.

30. Kornblut & Sullivan, *The Liability of Architects and Engineers to Third Parties for Economic Loss*, in CONSTRUCTION LITIGATION 245-48 (K. Cushman ed. 1981). See Comment, *supra* note 17, at 430-34. The comment also discusses the development of common law and contractual duties assigned to architects by courts. *Id.*

public law, architects mounted a legislative lobbying effort aimed at enacting special statutes of limitations which would terminate liability after a specified number of years following construction.<sup>31</sup>

## II. THE ROLE OF THE ARCHITECT DURING CONSTRUCTION

The rights and duties of architects during design and construction are set forth by contract.<sup>32</sup> In 1917, the American Institute of Architects (AIA) published its first standard form contract as a suggested format to govern contractual relations between the architect and owner.<sup>33</sup> This document, combined with the standard form agreement between the owner and contractor,<sup>34</sup> and the general conditions for construction,<sup>35</sup> controls the affairs of the architect, owner, and contractor during construction.

No one model represents accurately the contractual relationships between the owner, architect, and contractor.<sup>36</sup> Increasingly, the nature of the relationship depends on a variety of factors,<sup>37</sup> including: whether payment is a stipulated figure or the cost of the project added to a fee;<sup>38</sup> whether the agreement includes guarantees;<sup>39</sup> whether the federal government is the project owner;<sup>40</sup> the

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31. Comment, *Defective Design—Wisconsin's Limitation of Actions Statute for Architects, Contractors and Others Involved in Design and Improvement to Real Property*, 63 MARQ. L. REV. 87, 87 (1979).

32. J. Sweet, *Owner-Architect-Contractor: Another Eternal Triangle*, 47 CALIF. L. REV. 645, 646 (1959). The standard of care required by an architect, however, may be determined by the common law as well as by contractual provisions. See *South Burlington School Dist. v. Calcagni-Frazier-Zajchowski Architects, Inc.*, 138 Vt. 33, 41, 410 A.2d 1359, 1362-63 (1980); Comment, *A Defense Catalogue*, *supra* note 12, at 78-79.

33. See AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (13th ed. 1977) [hereinafter cited as AIA OWNER-ARCHITECT AGREEMENT]; Note, *Architectural Malpractice*, *supra* note 16, at 1077 n.11.

34. AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A101, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR (11th ed. 1977) [hereinafter cited as AIA OWNER-CONTRACTOR AGREEMENT]. The Owner-Contractor Agreement was first issued by the AIA in 1915. See *id.*

35. AMERICAN INSTITUTE OF ARCHITECTS, DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION (13th ed. 1976) [hereinafter cited as AIA GENERAL CONDITIONS]. The General Conditions were first issued by the AIA in 1911. See *id.*

36. Comment, *Design-Build Contracts in Virginia*, 14 U. RICH. L. REV. 791, 792 (1980); Note, *Architectural Malpractice*, *supra* note 16, at 1076.

37. Davidson, *The Liability of Architects*, 13 TRIAL, June 1977, at 20. The author notes that the AIA publishes a variety of forms tailored to these variables in construction.

38. *Id.*

39. *Id.*

40. *Id.*

size of the project;<sup>41</sup> and the economic power of the owner.<sup>42</sup> Many different contractual models are used in construction,<sup>43</sup> but the evolution of the traditional model suffices to show the efforts made by architects to limit professional liability by modifying their private contractual relations.

#### A. Contractual Relations under the Traditional Model

Until the last ten years, traditional construction agreements had governed the relationship among three distinct parties to construction: the project owner, the architect, and the general contractor.<sup>44</sup> Under the so-called traditional model<sup>45</sup> the architect typically assumed three roles during the construction process:<sup>46</sup> 1) the preparation of plans and specifications;<sup>47</sup> 2) the control or supervision of the construction segment of the project;<sup>48</sup> and 3) the arbitration of disputes between the owner and contractor.<sup>49</sup> The general contractor has been responsible for construction in accordance with the architect's plans.<sup>50</sup>

During the initial phase of drafting and submitting plans, the architect has been considered to be an independent contractor vis-a-vis the owner.<sup>51</sup> During construction, the architect oversaw the

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41. *Id.*

42. Note, *Architectural Malpractice*, *supra* note 16, at 1080. The wealth of large owners allows them to impose contract terms which favor the owner over the architect. *Id.*

43. *Id.* at 1079. For example, architects have formed large firms which allow professional specialization. This model differs from the traditional role of the architect as "master builder" overseeing the entire construction process. *Id.* For a concise summary of the traditional structure of the construction process, see Meyers, *The New Contractual Arrangements*, in CONSTRUCTION CONTRACTS 1983 13-18 (1983).

44. Meyers, *supra* note 43, at 13.

45. The term "traditional model" has been used by a number of sources. See, e.g., Meyers, *supra* note 43; Note, *Architectural Malpractice*, *supra* note 16.

46. Under any contractual model, architects need not contract for their services in each of the three phases of construction. For example, an architect could contract for his services in designing plans, and assume no responsibilities during construction. See Carey, *Assessing Liability of Architects and Engineers for Construction Supervision*, 1979 *Ins. L.J.* 147, 150. For a Vermont case in which an architect performed only design work see *Koerber v. Middlesex College*, 128 Vt. 258, 258 A.2d 572 (1969).

47. Little, *The Architect's Immunity as Arbiter*, 23 *St. Louis U.L.J.* 339, 339 (1979).

48. *Id.* See also Carey, *supra* note 46, at 150.

49. Little, *supra* note 47, at 339.

50. The role of the architect as an arbitrator will not be discussed because the architect is entitled to judicial immunity for decisions made in arbitration. Little, *supra* note 47, at 339-40.

51. *Id.* at 339. In the Vermont case of *Templeton Construction Corp. v. Kelly*, 130 Vt. 420, 296 A.2d 242 (1972), a designer was held to be an independent contractor. The court

performance of the contractors and subcontractors; accordingly, his role shifted from that of independent contractor to agent of the owner.<sup>52</sup> Traditional duties of the architect during construction have included interpretation of contract documents, resolution of disputes between the owner and contractor, and issuance of certificates of payment and completion.<sup>53</sup>

### B. *Modification of the Role of the Architect in Supervising Construction*

Traditionally, the architect maintained control over the construction process by supervising the work of contractors and subcontractors.<sup>54</sup> One variation on the supervisory role of the architect appeared in the 1951 standard owner-architect contract form, which stated, "[t]he Architect will endeavor by general supervision to guard the Owner against defects and deficiencies in the work of the contractors, but he does not guarantee the performance of their contracts."<sup>55</sup> Under past forms, architects had a duty to make construction site visits, supervise the quality of the contractor's work, and to force a stop to construction if the work was improper.<sup>56</sup>

The duty to supervise under these older contract forms was advantageous to architects in that it gave them control over the implementation of their plans. On the other hand, control over construction also meant greater responsibility for construction fail-

stated that drafting plans for the alteration of a septic system was not sufficient to trigger an agency relationship because the home owner had no knowledge of the change called for in the plans and thus could not have ratified or accepted the acts as his own. *Id.* at 425-26, 296 A.2d at 245-46.

52. See Little, *supra* note 47, at 339.

53. J. SWEET, *LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS* 699 (2d ed. 1977).

54. Davidson, *supra* note 37, at 20. The author notes:

Once towering over the chain of command, demanding authority to control the work of virtually all who breathed life into their designs, architects now have withered into the shadows (or so they allow it to seem), leaving to owners the task of overseeing builders and recasting themselves primarily as advisors.

*Id.*

55. AIA OWNER-ARCHITECT AGREEMENT, *supra* note 33, art. 7 (6th ed. 1951). For a discussion of this provision see W. PARKER & F. ADAMS, *THE AIA STANDARD CONTRACT FORMS AND THE LAW* 15 (1954).

56. AIA GENERAL CONDITIONS, *supra* note 35, arts. 38, 39 (6th ed. 1951); AIA OWNER-ARCHITECT AGREEMENT, *supra* note 33, arts. 38, 39 (6th ed. 1951).

ures.<sup>57</sup> The doctrine of privity of contract, however, offset the vast potential for liability, and architects remained insulated from third party suits until privity of contract was abolished.<sup>58</sup>

With the rejection of privity of contract as an essential element of claims for defective design and construction, the duty to supervise became a double-edged sword. While benefiting from control of construction, the architect became increasingly susceptible to suits by third parties,<sup>59</sup> sureties,<sup>60</sup> contractors,<sup>61</sup> and workers injured in construction site accidents.<sup>62</sup> The increased probability of liability forced architects to cut back on their supervisory role during construction.

The duties of the architect were curtailed sharply in the 1976-77 editions of the AIA contract forms. The general conditions now call for the architect to visit the construction site only for the purpose of familiarizing himself with the progress and quality of work.<sup>63</sup> The duties of the architect were limited to: rejecting non-conforming work, requiring special inspections, refusing to certify payment, or revoking certification.<sup>64</sup>

Thus, architects have attempted to limit their liability through the private law of contracts. Efforts aimed at limiting liability in

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57. For example, architects had a right to stop construction if the contractor failed to follow his plans. Note, *Architectural Malpractice*, *supra* note 16, at 1077. The architect could also be held responsible for the negligence of the contractor. See Comment, *Up Against the Wall*, *supra* note 12, at 402-03.

58. See *supra* notes 22-29 and accompanying text.

59. See *id.*; Comment, *supra* note 36, at 793.

60. Comment, *supra* note 36, at 793. See, e.g., *Hall v. Union Indem. Co.*, 61 F.2d 85 (8th Cir. 1932).

61. Comment, *supra* note 36, at 794. See, e.g., *Lundren v. Freeman*, 307 F.2d 104 (9th Cir. 1962).

62. Comment, *supra* note 36, at 793. See, e.g., *Erhart v. Hummonds*, 232 Ark. 133, 334 S.W.2d 869 (1960). See generally Comment, *supra* note 17.

63. AIA GENERAL CONDITIONS, *supra* note 35, at § 2.23. That section now reads as follows:

The Architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine if the Work is proceeding in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of his on-site inspections as an architect, he will keep the owner informed of the progress of his work.

64. AIA GENERAL CONDITIONS, *supra* note 35, at § 2.24 commentary. See also Davidson, *supra* note 37, at 21. The author suggests that the authority retained in the 1976-77 AIA standard contract forms may afford architects the same level of control held prior to the changes in contractual language.

the public law sector have focused on lobbying state legislatures to enact special statutes of limitations for architects and other design professionals.<sup>65</sup>

### III. THE SPECIAL STATUTES OF LIMITATIONS

A limitation of actions statute restricts the period of time within which the right to sue, which is otherwise unlimited, may be asserted.<sup>66</sup> Limitations were originally placed on claims by common law,<sup>67</sup> and later by statute, to resolve the problems endemic to stale claims,<sup>68</sup> including: lost or destroyed evidence,<sup>69</sup> faded memories,<sup>70</sup> and witnesses who could not be located.<sup>71</sup> Barring claims after the expiration of a statute of limitations ensures fairness to the defendant<sup>72</sup> and increases the efficiency of the judicial system<sup>73</sup> by securing prompt resolution of claims.<sup>74</sup>

#### A. General Statutes of Limitations

A general statute of limitations usually applies to nonspecialized areas of the law.<sup>75</sup> It precludes suits after a legislatively imposed number of years following the accrual of a cause of action.<sup>76</sup> As a rule, the statute bars only certain remedies but not the under-

65. See Comment, *supra* note 31, at 87.

66. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868).

67. See J. ANGELL, *LIMITATIONS OF ACTIONS AT LAW* 3 (1854). The origin of time-barring access to judicial relief is based on the Roman and civil law concept of "prescription," which means to limit. *Id.* Prescription was often implemented in the area of property law, incorporating such principles as adverse possession, incorporeal rights, easements, and servitudes. *Id.* at 5. Before statutes of limitations were enacted, plea limitations were another means of time-barring claims. 51 AM. JUR. 2D *Limitations of Actions* § 1 (1970).

68. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

69. *Weber v. Board of Harbor Comm'r*, 85 U.S. (18 Wall.) 57, 70 (1873).

70. *Id.*

71. *Id.*

72. *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, —, 647 P.2d 276, 286 (1982); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter cited as *Developments*].

73. *Developments*, *supra* note 72, at 1185.

74. *Riddlesbarger*, 74 U.S. (7 Wall.) at 390.

75. See, e.g., VT. STAT. ANN. tit. 12, § 511 (1973) (civil actions); NEB. REV. STAT. § 25-212 (1979) (actions not specified).

76. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 300 (1866); McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 418 (1981); see generally Ghiardi, *Computing Time in Tort Statutes of Limitations*, 64 MARQ. L. REV. 575 (1981).

lying substantive right to a cause of action.<sup>77</sup> Thus, in some cases the substantive right may form the basis of another remedy, which has not been barred by the statute of limitations.<sup>78</sup>

### B. *The Discovery and Completion Rules*

When claims are brought against an architect pursuant to a general statute of limitations,<sup>79</sup> some question may arise as to whether the cause of action accrues upon discovery of the architectural defect or upon completion of construction.<sup>80</sup> Determining the point at which a cause of action accrues is of great importance, as the decision may have the drastic effect of barring access to judicial relief entirely.<sup>81</sup>

Under the discovery rule, the cause of action accrues upon discovery of the defect or injury.<sup>82</sup> A claim need only be brought within the permissible number of years following the injury. The discovery rule has been criticized for indefinitely subjecting architects to liability for design and construction claims.<sup>83</sup> Claims may

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77. *Developments, supra* note 72, at 1187. It has also been suggested that courts are split as to whether the running of the statute extinguishes only the remedy, or both the remedy and the underlying right. 51 AM. JUR. 2D *Limitations of Actions* § 22 (1970).

78. *Developments, supra* note 72, at 1187.

79. In very few states would an action be commenced against an architect under a general statute of limitations since 43 states have specialized statutes of limitations pertaining to architects. *See infra* note 104.

80. The term "completion" is an example of one point at which a cause of action may be deemed to accrue in a statute of limitations. *See, e.g.,* MONT. CODE ANN. § 27-2-208 (1981). "Substantial completion" and "acceptance" are additional examples of points at which a statute may begin to run. *See, e.g.,* S.D. COMP. LAWS ANN. § 15-2-9 (Supp. 1983); LA. REV. STAT. ANN. § 9:2772 (West 1965 & Supp. 1983). The range of accrual dates imposed by legislatures in special statutes appears in the appendix. For a discussion of the discovery and completion rules in claims against architects see Annot., 90 A.L.R.3d 507, 509 (1979). *See also* Knapp & Lee, *supra* note 2, at 359-63; Comment, *supra* note 31, at 88-94.

81. Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CALIF. L. REV. 106, 106 (1980).

82. *See* Sears, Roebuck & Co. v. Cleveland Trust Co., 355 F.2d 705, 708 (6th Cir. 1966).

83. The discovery rule has also been attacked for causing an increase in insurance premiums for architects, and for resulting in policy exclusions and restrictive clauses in insurance policies currently in use. *See* Neeson, *The Current Status of Professional Architects and Engineers Liability Insurance*, 45 INS. COUNS. J. 39, 43-44 (1978). Indeed, since 1969, payments by insurance companies for building casualty claims have risen from \$35 million to \$600 million per year. *Washington Post*, Sept. 26, 1981, § E at 1, col. e. The CNA Insurance Company, a major insurer of architectural claims paid such a substantial amount of money in claims that its insurance premiums rose 557% in cost. *Id.* The increase in insurance rates, however, may be more fairly attributed to the general expansion of architectural liability than the imposition of the discovery rule. A valid criticism of the discovery rule is that insurance must be maintained for longer periods of time.

be brought long after the professional relationship between the owner and architect has terminated, and long after the architect has relinquished control over maintenance of the structure.<sup>84</sup> Potentially infinite liability leaves open the possibility of suit where construction failure is due to the intervening cause of negligent maintenance rather than to architectural malpractice.

The inequities inherent in the discovery rule are exemplified by the factual scenario in *Yarbro v. Hilton Hotel Corp.*<sup>85</sup> In *Yarbro*, Dr. John Yarbro instituted suit against the Hilton Hotel Corporation and I. M. Pei, the architect of the Denver Hilton Hotel, for the wrongful death of his wife and for negligent design. Mrs. Yarbro allegedly tripped on a radiator located at the base of a hotel window, fell through the window, and dropped fifteen stories to her death.<sup>86</sup> The action had commenced nineteen years following completion of the hotel, during which time the architect had no contact with the structure.<sup>87</sup> Although *Yarbro* involved a constitutional challenge to the Colorado special statute of limitations, the facts of the case illustrate the dangers of the discovery rule. Indeed, the court noted that after a nineteen year delay, the problems of proof in defending a negligence suit become very difficult,<sup>88</sup> and that at some point the architect should be relieved of responsibility for injuries resulting from building defects.<sup>89</sup>

Although the discovery rule prolongs architectural liability, the completion rule is similarly unjust to the owner or injured party who may be denied his day in court. The completion rule<sup>90</sup> imposes a finite period of time after construction within which an aggrieved party may bring an action.<sup>91</sup> Under the completion rule, the cause of action usually begins to run upon the date of completion, and thus the right to bring an action may expire before the defect causing injury is discovered.<sup>92</sup>

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84. See Comment, *A Defense Catalogue*, *supra* note 12, at 91-92; Comment, *supra* note 31, at 89-91.

85. \_\_\_ Colo. \_\_\_, 655 P.2d 822 (1982).

86. *Id.* at \_\_\_, 655 P.2d at 824.

87. *Id.*

88. *Id.* at \_\_\_, 655 P.2d at 826, n.5. For a description of *Yarbro*, see Ellison, *Statutory Termination of Perpetual Liability for Design and Construction Negligence*, 2 CONSTRUCTION LAW. 1 (1981) and Ellison, *Constitutionality of Colorado Statute of Limitations Upheld—A Sequel*, 4 CONSTRUCTION LAW. 5 (1983).

89. *Yarbro*, \_\_\_ Colo. at \_\_\_, 655 P.2d at 826.

90. See *supra* note 80.

91. See Comment, *supra* note 31, at 89-90.

92. Sisson & Kelly, *Statutes of Limitations for the Design and Building Profes-*

The completion rule can be most unfair in the event of a latent defect<sup>93</sup> or defect giving rise to personal injury. In *Harmon v. Angus R. Jessup Assoc., Inc.*,<sup>94</sup> for instance, liquid ammonia from a refrigeration system leaked from a storage tank into the water drainage system which led to the office at which the appellant was employed.<sup>95</sup> The leaking ammonia burned the appellant severely and killed her husband. Construction of the refrigeration system was complete in 1966 and an addition was built in 1973.<sup>96</sup> Since the accident occurred in 1978, after the termination of liability pursuant to the four year Tennessee statute of limitations for architects,<sup>97</sup> the claim for judicial relief was barred.<sup>98</sup>

sions—*Will They Survive Constitutional Attack?*, 49 *INS. COUNS. J.* 243, 244 (1982).

93. The California statute of limitations protecting persons performing design and construction of improvements to real property defines a latent defect as "a deficiency which is not apparent by reasonable inspection." CAL. CIV. PROC. CODE § 337.152(b) (West 1982). The statute also defines a patent defect as "a deficiency which is apparent by reasonable inspection." CAL. CIV. PROC. CODE § 337.1(e) (West 1982).

94. 619 S.W.2d 522 (Tenn. 1981).

95. *Id.* at 523.

96. *Id.*

97. TENN. CODE ANN. § 28-3-202 (1980). The Tennessee special statute precludes suits brought after four years following substantial completion of construction. It is the shortest state special statute, excluding, of course, those states with a two year actionable period which accrues upon discovery. See Appendix. Appellant properly argued that the actionable period was unreasonably short. *Harmon*, 619 S.W.2d at 525. The court disagreed, ruling that the legislature could have concluded that most construction defects would become apparent within four years of construction. Yet, at least 15.7% of all claims are not brought until after four years following completion.

#### STUDY OF DISTRIBUTION OF CLAIMS BY LENGTH OF TIME

Number of years after completion of project before claim is brought	Number of Claims	Percentage of Claims	Cumulation Percentage of Claims
1	215	37.7	37.7
2	106	18.6	56.3
3	96	16.8	73.1
4	64	11.2	84.3
5	31	5.4	89.7
6	18	3.3	93.0
7	28	4.9	97.9
8	5	.8	98.7
9	3	.5	99.2
10	2	.4	99.6
11	0	—	—
12	0	—	—
13	1	.2	99.8
14	1	.2	100.0
15	0	—	—
	570	100.0	

### C. *The Special Statutes of Limitations for the Design and Construction Industries*

A special statute of limitations displaces the general statute of limitations for particular types of claims,<sup>99</sup> often setting accrual points and time limitations different from those prescribed by the general statute.<sup>100</sup> A special statute of limitations which accrues upon completion of construction is a "statute of repose," since it can potentially bar suits before the cause of action arises,<sup>101</sup> and thus prevent the right of action from ever coming into existence.<sup>102</sup>

As a result of a tremendous lobbying effort asserted by architects,<sup>103</sup> forty-three states and the District of Columbia have enacted various special statutes of limitations for the design professions.<sup>104</sup> The statutes typically bar any action against a party

*Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Committee of the District of Columbia, 90th Cong., 1st Sess. 28 (1967).*

98. *Harmon*, 619 S.W.2d at 523.

99. *Watts v. Putnam County*, 525 S.W.2d 488, 492 (Tenn. 1975); *Developments, supra* note 72, at 1179.

100. See generally *McGovern, supra* note 76, at 416-20.

101. *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, —, 647 P.2d 276, 285 (1982); *McGovern, supra* note 76, at 418-19; Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361, 378 (1969).

102. Comment, *supra* note 101, at 372.

103. Comment, *supra* note 31, at 87.

104. ALASKA STAT. § 09.10.055 (1983); ARK. STAT. ANN. § 37-237 (Supp. 1983); CAL. CIV. PROC. CODE §§ 337.1, 337.15 (West 1982); COLO. REV. STAT. § 13-80-127 (Supp. 1982); CONN. GEN. STAT. ANN. § 52-584a (West Supp. 1983); DEL. CODE ANN. tit. 10, § 8127 (1974); D.C. CODE § 12-310 (1981); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. § 3-1006 (Supp. 1982); HAWAII REV. STAT. § 657-8 (Supp. 1982); IDAHO CODE § 5-241 (1978); ILL. ANN. STAT. ch. 110, § 13-214 (Smith-Hurd Supp. 1983); IND. CODE ANN. § 34-4-20-2 (Burns 1973 & Supp. 1983); KY. REV. STAT. ANN. § 413.135 (Baldwin 1981); LA. REV. STAT. ANN. § 9.2772 (West 1965 & Supp. 1983); MAINE REV. STAT. ANN. tit. 14, § 752-A (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1980 & Supp. 1983); MASS. ANN. LAWS ch. 260, § 2B (Michie/Law Co-op 1980); MICH. STAT. ANN. § 27A.5639 (Callaghan 1977); MINN. STAT. ANN. § 541.051 (West Supp. 1983); MISS. CODE ANN. § 15-1-41 (Supp. 1982); MO. ANN. STAT. § 516.097 (Vernon Supp. 1983); MONT. CODE ANN. § 27-2-208 (1983); NEB. REV. STAT. § 25-223 (1979); NEV. REV. STAT. § 11.202-.05(1979); N.H. REV. STAT. ANN. § 508:4-b (1983); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1983); N.M. STAT. ANN. § 37-1-27 (1978); N.C. GEN. STAT. § 1-50(5) (Supp. 1981); N.D. CENT. CODE § 28-01-44 (1974); OHIO REV. CODE § 2305.131 (Baldwin 1975); OKLA. STAT. ANN. tit. 12, § 109 (West Supp. 1982); OR. REV. STAT. § 12.135 (Supp. 1981); PA. STAT. ANN. tit. 42, § 5536 (Purdon 1981); R.I. GEN. LAWS § 9-1-29 (Supp. 1983); S.C. CODE ANN. § 15-3-640 (Law. Co-op. 1976); S.D. COMPILED LAWS ANN. § 15-2-9 (Supp. 1983); TENN. CODE ANN. § 28-3-202 (1980); TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1982); UTAH CODE ANN. § 78-12-25.5 (Replacement 1977); VA. CODE § 8.01.250 (1977); WASH. REV. CODE ANN. § 4.16.300 (Supp. 1983); WIS. STAT. ANN. § 893.89 (West 1983); WYO. STAT. § 1-3-111 (1983).

furnishing improvements to real property,<sup>105</sup> and may expressly exclude the project owner or party in possession from the statute's protection.<sup>106</sup> The period of time within which suits must be brought ranges from two years upon discovery of the defect to twenty years upon completion or substantial completion of construction.<sup>107</sup>

To a large extent, the special statutes eliminated judicial discussion regarding when a cause of action accrues in architectural claims. The decision to impose either the discovery or completion rules was made by the legislature rather than by the courts. A majority of state legislatures have codified the substantial completion rule, rather than the discovery rule, in their architectural statutes of limitations.<sup>108</sup>

The special statutes of limitations appear to relieve the contemporary hardships of architects<sup>109</sup> rather than those of the consumer of architectural services.<sup>110</sup> The statutes arbitrarily cut off an architect's liability after a number of years—one allowing only four years<sup>111</sup>—after a particular cut-off date based on the completion of construction.<sup>112</sup> Most statutes take no account of latent defects in construction, which may go undetected until years after the statutory termination of liability. In these ways, the special statutes of limitations reflect their origin in architectural lobbying groups, rather than as legislation protecting the general public interest.

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105. See, e.g., GA. CODE ANN. § 3-1006 (Supp. 1982); MINN. STAT. ANN. § 541.051 (West Supp. 1983); S.C. CODE ANN. § 15-3-640 (Law. Co-op. 1976). In contrast, some states list the specific parties which are protected by the statute. See, e.g., MAINE REV. STAT. ANN. tit. 14, § 752-A (1964) (protecting only licensed or registered architects and engineers); R.I. GEN. LAWS § 9-1-29 (Supp. 1982) (listing architects, professional engineers, contractors, and materialmen).

106. See, e.g., DEL. CODE ANN. tit. 10, § 8127(d) (1974); N.D. CENT. CODE § 28-01-44(3) (1974); TEX. REV. CIV. STAT. ANN. art. 5536a(2) (Supp. 1982).

107. See, e.g., COLO. REV. STAT. § 13-80-127 (Supp. 1982) (actionable for two years accruing upon discovery); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1980 & Supp. 1983) (outside limitation of twenty years). For a comparison of the various state actionable periods see Appendix.

108. See, e.g., ALASKA STAT. § 09.10.055 (1983). See also Appendix.

109. See *supra* notes 83-89 and accompanying text.

110. See *supra* notes 90-98.

111. TENN. CODE ANN. § 28-3-202 (1980).

112. See, e.g., ARK. STAT. ANN. § 37-237 (Supp. 1983) (five year actionable period accruing upon substantial completion); MO. ANN. STAT. § 516.097 (Vernon Supp. 1983) (ten year actionable period accruing upon completion); N.C. GEN. STAT. § 1-50(5) (Supp. 1981) (six year actionable period accruing upon act or omission giving rise to suit or substantial completion).

Yet a special statute of limitations could be designed to afford protection for an injured party as well as to provide termination of liability for the architect. A hybrid or mixed statute of limitations provides protection to both the architect and the injured party. In a mixed statute, the cause of action accrues upon discovery of the defect, but remains subject to statutory termination in relation to a completion date, after which no claims can be brought.<sup>113</sup> Moreover, some states have chosen one statutory termination date for patent and another for latent defects.<sup>114</sup> These states allow a longer period within which to bring claims for latent defects.<sup>115</sup>

#### IV. CONSTITUTIONAL CHALLENGES TO THE SPECIAL STATUTES OF LIMITATIONS

##### Challenges to the constitutionality<sup>116</sup> of the special statutes of

113. See, e.g., COLO. REV. STAT. ANN. § 13-80-127 (Supp. 1982); ILL. ANN. STAT. ch. 110, § 13-214 (Supp. 1983).

114. See *supra* note 93.

115. See, e.g., CAL. CIV. PROC. CODE § 337.1, .15 (West 1983); FLA. STAT. ANN. § 95.11(3)(c) (West 1982).

##### 116. *Held Unconstitutional*

A. 1967-1975: *Plant v. R. L. Reid, Inc.*, 294 Ala. 155, 313 So. 2d 518 (1975) (void for vagueness); *Bagby Elevator and Elec. Co. v. McBride*, 292 Ala. 191, 291 So. 2d 306 (1970) (two subjects in one title under Alabama Constitution); *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568 (1973) (equal protection under Hawaii Constitution); *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (equal protection under Illinois Constitution); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973) (due process under Kentucky Constitution); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (equal protection under Wisconsin Constitution).

B. 1975-Present: *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980) (equal protection under Colorado and United States Constitutions); *Overland Const. Corp. v. Sirmons*, 369 So. 2d 572 (Fla. 1979) (due process under Florida Constitution); *Perez v. Universal Eng'g Corp.*, 413 So. 2d 75 (Fla. App. 1982) (due process under Florida Constitution); *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, 647 P.2d 276 (1982) (equal protection under Hawaii Constitution); *Muzar v. Metro Town Houses, Inc.*, 82 Mich. App. 368, 266 N.W.2d 850 (1978) (equal protection apparently under Michigan Constitution); *Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977) (equal protection apparently under Minnesota Constitution); *State Farm Fire & Casualty Co. v. All Electric, Inc.*, \_\_\_ Nev. \_\_\_, 66 P.2d 955 (1983) (equal protection under Nevada and United States Constitutions); *Henderson Clay Prod., Inc. v. Edgar Wood & Assoc., Inc.*, 122 N.H. 790, 451 A.2d 174 (1982) (equal protection under New Hampshire and United States Constitutions); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977) (equal protection under United States Constitution); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980) (equal protection and due process, under Wyoming Constitution).

##### *Held Constitutional*

A. 1967-1975: *Smith v. Allen-Bradley Co.*, 371 F. Supp. 698 (W.D. Va. 1974) (due process under West Virginia and United States Constitutions); *Carter v. Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971) (due process, equal protection under Arkansas and United States Constitutions); *Rosenberg v. Town of N. Ber-*

gen, 61 N.J. 190, 293 A.2d 662 (1972) (equal protection and due process under New Jersey and United States Constitutions); *Josephs v. Burns*, 260 Or. 493, 491 P.2d 203 (1971) (due process under Oregon Constitution); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 234 Pa. Super. 441, 341 A.2d 184 (1974), *aff'd*, 476 Pa. 270, 382 A.2d 715 (1978) (equal protection, due process, and limitation of damage award for workmen's compensation under Pennsylvania Constitution); *Good v. Christensen*, 527 P.2d 223 (Utah 1974) (no reasoning); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1972) (equal protection under Washington and United States Constitutions).

B. 1975-Present: *Adair v. Koppers Co.*, 541 F. Supp. 1120 (N.D. Ohio 1982) (due process under Ohio and United States Constitutions, equal protection under United States Constitution); *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981) (equal protection under Colorado and United States Constitutions, equality of justice under Colorado Constitution); *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557 (D. Md. 1980) (equal protection and due process under United States Constitution); *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982) (equal protection under California and United States Constitutions, due process apparently under California Constitution); *Salinero v. Pon*, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1980) (equal protection and due process apparently under California Constitution); *Liptak v. Diane Apartments, Inc.*, 109 Cal. App. 3d, 167 Cal. Rptr. 440 (1980) (due process as applied); *Wagner v. State*, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) (equal protection apparently under California and United States Constitutions); *Regents of the Univ. of Cal. v. Hartford Accident & Idem. Co.*, 59 Cal. App. 3d 675, 131 Cal. Rptr. 112 (1976) (equal protection under California and United States Constitutions); *Yarbro v. Hilton Hotels Corp.*, ——— Colo. ———, 655 P.2d 822 (1982) (equal protection and due process under Colorado and United States Constitutions); *Northbrook Excess and Surplus Ins. Co. v. J.G. Wilson Corp.*, 250 Ga. 691, 300 S.E.2d 507 (1983) (affirming *Mullis*); *Mullis v. Southern Co. Serv., Inc.*, 250 Ga. 90, 296 S.E.2d 579 (1982) (two subjects in one title under Georgia Constitution, equal protection under Georgia and United States Constitutions); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982) (due process under Idaho Constitution, equal protection under Idaho and United States Constitutions); *Beecher v. White*, 447 N.E.2d 622 (Ind. App. 1983) (equal protection and due process under Indiana and United States Constitutions); *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1982) (due process under Kentucky Constitution); *Burmester v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381 (La. 1978) (equal protection and due process under Louisiana and United States Constitutions); *Bordlee v. Neyrey Park, Inc.*, 394 So. 2d 822 (La. App. 1981) (due process apparently under Louisiana and United States Constitutions); *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982) (equal protection and due process under Massachusetts and United States Constitutions); *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980) (equal protection and due process apparently under Michigan and United States Constitutions); *Bouser v. City of Lincoln Park*, 83 Mich. App. 167, 268 N.W.2d 322 (1978) (constitutional application); *Oole v. Oosting*, 82 Mich. App. 291, 266 N.W.2d 795 (1978) (due process apparently under Michigan Constitution); *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982) (due process under Minnesota and United States Constitutions, equal protection apparently under Minnesota Constitution); *Anderson v. Fred Wagner and Roy Anderson, Jr., Inc.*, 402 So. 2d 320 (Miss. 1981) (equal protection and due process under Mississippi Constitution); *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 551 P.2d 647 (1976) (two subjects in one title under Montana Constitution, equal protection and due process under Montana and United States Constitutions); *Terry v. New Mexico State Highway Comm'n*, 98 N.M. 119, 645 P.2d 1375 (1982) (equal protection and due process apparently under New Mexico and United States Constitutions); *Mora-San Miguel Elec. Coop., Inc. v. Hicks & Ragland Consulting & Eng'g Co.*, 93 N.M. 175, 598 P.2d 218 (1979) (impairment of contract, equal protection, due process, and two subjects in one title under New Mexico and United States Constitutions); *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (1977) (two subjects in one title, equal protec-

limitations emerged in 1967.<sup>117</sup> In the few years following, courts were divided almost evenly between those which upheld and those which struck down their state statutes.<sup>118</sup> More recently the trend is clearly in favor of upholding the special statutes of limitations.<sup>119</sup>

This evolving line of judicial decisions may well reflect the transition that occurred between the Warren and Burger Courts.<sup>120</sup> The initial willingness of some courts to invalidate their state statutes corresponds with the judicial activism exhibited by the Warren Court. The more recent trend in favor of upholding the statutes conforms with the restrictive stance of the Burger Court regarding many constitutional challenges.

The split between the various state court decisions may also be attributed to more tangible factors. For example, certain state constitutions contain provisions which form the bases for statutory invalidation in a particular jurisdiction.<sup>121</sup> Some courts may also be more sympathetic to the plight of the injured party than that of the architect.<sup>122</sup> In addition, the severity of a limitation of actions statute, in terms of the length of time within which a claim may be brought, may affect the ruling of a court.

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tion, and due process apparently under New Mexico Constitution); *Lamb v. Wedgewood S. Corp.*, 55 N.C. App. 868, 286 S.E.2d 876 (1982), *aff'd in part, rev'd in part*, 308 N.C. 419, 302 S.E.2d 868 (1983) (equal protection under North Carolina and United States Constitutions, due process under North Carolina Constitution); *McMacken v. State*, 320 N.W.2d 131 (S.D. 1982) (two subjects in one title under South Dakota Constitution, equal protection and due process under South Dakota and United States Constitutions); *Harmon v. Angus R. Jessup Assoc., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (two subjects in one title and due process under Tennessee Constitution, equal protection under Tennessee and United States Constitutions); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Civ. App. 1981) (equal protection and due process under Texas Constitution); *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App. 1977) (equal protection and due process apparently under Texas Constitution); *United States Fire Ins. Co. v. E. D. Wesley Co.*, 100 Wis. 2d 59, 301 N.W.2d 271 (1980), *modified*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982) (due process under Wisconsin and United States Constitutions). See *infra* note 126.

117. The first case to address the constitutionality of a statute of limitations for architects was *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

118. See *supra* note 116.

119. *Id.*

120. Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981). The Warren Court pursued a policy of judicial activism based upon economic liberalism, libertarianism, and egalitarianism. *Id.* at 891. Conversely, the Burger Court restricted constitutional claims in a number of areas. *Id.* at 935.

121. See, e.g., *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

122. See, e.g., *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

Constitutional challenges have been brought against the special statutes under three theories: 1) equal protection;<sup>123</sup> 2) due process or the right of a legislature to abolish a cause of action before the injury occurs;<sup>124</sup> and 3) one subject with clear title.<sup>125</sup>

### A. Equal Protection

The Illinois Supreme Court was first in adopting the equal protection argument<sup>126</sup> in *Skinner v. Anderson*.<sup>127</sup> In *Skinner*, the defendant challenged section 29 of the Illinois Statute of Limitations Act, which immunized architects and contractors from claims brought four years following performance of services by the architect or contractor.<sup>128</sup> The court reasoned that the statute violated the equal protection clause of the Illinois Constitution because it granted special or exclusive immunity to architects and engineers, while the project owner could still be held liable in a third party claim.<sup>129</sup> The court concluded that the classification of architects and engineers was not reasonably related to the legislative purpose of protecting the parties involved in construction.<sup>130</sup> By way of example, the court noted that manufacturers of building materials were excluded from the classification.<sup>131</sup> The statute was thus held to violate section 22 of article IV of the Illinois Constitution.<sup>132</sup>

The Supreme Court of Hawaii invalidated the state special statute of limitations on equal protection grounds in *Fujioka v. Kam*.<sup>133</sup> The *Fujioka* court followed the reasoning set forth in *Skinner*.<sup>134</sup> It ruled that the classification of architects, engineers,

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123. See, e.g., *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977).

124. See, e.g., *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973).

125. See, e.g., *Bagby Elevator and Elec. Co., Inc. v. McBride*, 292 Ala. 191, 291 So. 2d 306 (1974).

126. Some states also have constitutional provisions prohibiting special legislation granting a special privilege or immunity. See, e.g., Wyo. CONST. art. III, § 27; see also *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 828 (Wyo. 1980). Because of the similarity between the reasoning employed for special legislation and equal protection claims, only the equal protection argument will be discussed.

127. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

128. *Id.* at 456, 231 N.E.2d at 589.

129. *Id.* at 460, 231 N.E.2d at 591.

130. *Id.* at 461, 231 N.E.2d at 591.

131. *Id.* at 460, 231 N.E.2d at 591.

132. *Id.* at 461, 231 N.E.2d at 591.

133. 55 Hawaii 7, 514 P.2d 568 (1973).

134. *Id.* at 12-13, 514 P.2d at 572.

and contractors was arbitrary and not reasonably related to the purpose of the legislation.<sup>135</sup> In strong language, the court opined:

Stated another way, the cause of injuries is the same, the plaintiff is the same and the injuries are the same—but under the statute the plaintiff may not recover from the engineer and the contractor even though the negligence of the engineer and the contractor may have been the sole proximate cause of the injuries suffered by the plaintiff. However, the plaintiff may recover from the owners . . . . We are unable to see any rational basis for treating the engineer and contractor differently from the owners under the same circumstances.<sup>136</sup>

The court held that the statute exemplified invidious discrimination and that it violated the equal protection guarantee.<sup>137</sup>

A second generation of cases has emerged recently in which state courts have reviewed their respective legislature's second attempt at drafting or curing their special statute of limitations. One such case is *Shibuya v. Architects Hawaii Ltd.*,<sup>138</sup> which addressed amendments to the Hawaii special statute after *Fujioka*. In *Shibuya*, the Hawaii Supreme Court struck down its state statute of limitations after the legislature had amended the statute several times.<sup>139</sup> Following criticism of the confused legislative purpose of the statute in its various forms, the court noted that the statute still "operate[ed] to cloak punitive tortfeasors with partial immunity on the basis of membership in a particular industry or an alliance . . . ." <sup>140</sup> For a second time, the court found that the statute

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135. *Id.* at 12, 514 P.2d at 572.

136. *Id.* at 12, 514 P.2d at 571.

137. *Id.* at 13, 514 P.2d at 570-72.

138. 65 Hawaii 26, 647 P.2d 276 (1982).

139. *Id.* at —, 647 P.2d at 278. The Hawaii State Legislature enacted the original statute in 1967. See HAWAII REV. STAT. § 657-8 (1976). The statute limited liability to ten years after performing or furnishing of architectural services. After the Hawaii Supreme Court's decision in *Fujioka v. Kam*, 55 Hawaii 7, 514 P.2d 568 (1973), the legislature amended the statute by shortening the ten year actionable period to six years accruing upon completion of the improvement to real property. At the same time, the legislature amended the statute to cure the equal protection defect by including the owner under the statute's protective umbrella. In 1979, the protective reach of the statute was extended to manufacturers, materialmen, and persons constructing or making repairs to real property. A savings clause was also added in 1979, in which the actionable period for defects causing injury or death occurring in the fifty or sixth year was extended. In 1980, the legislature amended the statute again by expanding its coverage to claims involving the owner, surety, or other person having an interest in the real property or improvements. *Shibuya*, 65 Hawaii at —, 647 P.2d at 279-82.

140. *Id.* at —, 647 P.2d at 286.

violated equal protection guarantees.<sup>141</sup>

While courts in at least eleven states have declared their statutes of limitations unconstitutional on equal protection grounds,<sup>142</sup> at least thirty courts have rejected the equal protection argument.<sup>143</sup> For example, the New Jersey special statute withstood an equal protection claim in *Rosenberg v. Town of North Bergen*.<sup>144</sup> In *Rosenberg*, the plaintiff fell on a street crevasse which had been repaved in 1935,<sup>145</sup> and sued the Town of North Bergen for damages. Addressing the equal protection argument, the court reasoned that the classification of persons designing, planning, supervising, or constructing an improvement to real property was not arbitrary because of the recent expansion of liability imposed upon the class.<sup>146</sup> The classification, therefore, bore a reasonable relationship to the purpose the court believed was served by the legislation.<sup>147</sup>

The analysis of the Pennsylvania Supreme Court in *Freezer Storage, Inc. v. Armstrong Cork Co.*<sup>148</sup> is often cited for its persuasive rejection of the equal protection argument.<sup>149</sup> In *Freezer Storage*, the Armstrong Cork Company designed and installed insulation for the ceiling of plaintiff's low temperature warehouse. The ceiling later collapsed. In embracing the constitutionality of the statute, the court reasoned adeptly that a rational basis existed for the legislative protection of architects and builders as a class.

It is manifestly rational to adjust time periods for liability for acts performed according to the substantive scope of the liability involved. The scope of liability of the class of builders differs significantly from that of the class of owners. First, the class of persons to whom builders may be liable is larger than the class to which owners may be liable . . . . Second, a builder may be liable for construction defects under various legal theories—contract, warranty, negligence and perhaps strict liability in tort. . . . Third, landowners can ordinarily

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141. *Id.* at —, 647 P.2d at 288.

142. *See supra* note 116.

143. *Id.*

144. 61 N.J. 190, 293 A.2d 662 (1972).

145. *Id.* at 193, 293 A.2d at 663.

146. *Id.* at 194-95, 293 A.2d at 667.

147. *Id.* at 198, 293 A.2d at 668. The court did not disclose the purpose actually set forth by the New Jersey State Legislature.

148. 476 Pa. 270, 382 A.2d 715 (1978).

149. *See, e.g.,* *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 182-83, 183 Cal. Rptr. 881, 887 (1982); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 830 (Wyo. 1980).

avoid liability by taking adequate care of their lands and structures and by regulating the number and type of persons entering the land and regulating the conditions of entry. The builder has no such control . . . Landowner's liability is also controlled by a myriad of common law rules limiting liability to such classes as "undiscovered trespassers," "mere licensees" and so forth. Builder's insurance and owner's insurance structures and pricing are also different. For any of these reasons the Legislature might rationally conclude that builders should remain liable for their mistakes only 12 years after they complete construction. . . .<sup>150</sup>

The Minnesota Supreme Court reviewed for a second time its statute of limitations five years after it ruled that the statute was unconstitutional. In the second generation case of *Calder v. City of Crystal*,<sup>151</sup> the court acknowledged the legislative attempt to cure the statute after it was held to violate equal protection in *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*<sup>152</sup> The *Calder* court found that the statute now protected individuals such as owners and materialmen who were unconstitutionally excluded from the statute's protection prior to *Pacific Indemnity*.<sup>153</sup> By amending the statute, the court concluded that the legislature had "close[d] the door to objection to the statute on equal protection grounds."<sup>154</sup>

### 1) Standing—A Related Issue

Some of the recent cases addressing equal protection claims have raised the separate but related issue of standing.<sup>155</sup> Although the standing issue may not be directly germane to the formulation of a special statute of limitations, it is an important issue for liti-

150. 476 Pa. at 276, 383 A.2d at 718.

151. 318 N.W.2d 838 (Minn. 1982).

152. 260 N.W.2d 548 (Minn. 1977). A similar situation took place in *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981). *Cudahy* is also a second generation case, in which the court upheld the Colorado special statute of limitations on equal protection grounds by finding that the distinction between construction professionals and materialmen was not arbitrary. *Id.* at 1217. Just one year earlier, the statute was struck down for violating equal protection guarantees in *McClanahan v. American Gilsonite Co.*, 494 F. Supp. 1334 (1980).

153. 318 N.W.2d at 843.

154. *Id.*

155. See, e.g., *Salinero v. Pon*, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1980); *Shibuya v. Architects Hawaii Ltd.*, 65 Hawaii 26, 647 P.2d 276 (1982); *Klien v. Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982). See also *Lague Inc. v. State*, 136 Vt. 413, 416, 392 A.2d 942, 944 (1978).

gators and one which is often forgotten at trial.

Defeat of a special statute of limitations on equal protection grounds is usually premised upon the unequal treatment of, for example, the owner or materialman as compared with the architect regarding the length of time within which suit may be brought.<sup>156</sup> Injured third parties, however, have argued the discriminatory effect of the special statutes upon the owner or materialman in suits against architects.<sup>157</sup> In such an instance, the plaintiff would be asserting the rights of another party and potential defendant, and thus is not an aggrieved party sufficient to establish standing to sue.

*Adair v. Koppers Co., Inc.*<sup>158</sup> exemplifies the reasoning used by courts to conclude that an injured third party lacks standing to assert an equal protection claim. In *Adair*, the plaintiff sued for damages for an injury sustained while operating a coal handling conveyor which had been designed by the defendant.<sup>159</sup> After the Koppers Company raised the statute of limitations defense in a motion for summary judgment, the plaintiff contended that the statute was unconstitutional on equal protection grounds. The court first set forth the general rule that "[a] litigant generally has no standing to assert the constitutional claims of third persons . . . ."<sup>160</sup> Noting that departures from the general rule existed, the court was vague in holding that the plaintiff could not assert the rights of other potential defendants because the "policies and philosophies"<sup>161</sup> underlying the exceptions were absent in that case.<sup>162</sup>

A contrary conclusion was reached in *McClanahan v. Ameri-*

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156. See *supra* notes 126-54 and accompanying text.

157. See, e.g., *Yarbro v. Hilton Hotels Corp.*, \_\_\_ Colo. \_\_\_, 655 P.2d 822 (1982); *Rosenberg v. Town of N. Bergen*, 61 N.J. 190, 293 A.2d 662 (1972); *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978).

158. 541 F. Supp. 1120 (N.D. Ohio 1982).

159. *Id.* at 1121.

160. *Id.* at 1129.

161. *Id.* at 1130. The court's reasoning was unclear as to what, specifically, those "policies and philosophies" involved. From the court's citation of authority, it is possible to discern that some general social benefit must be gained from an exception to the standing rule. The following cases were cited by the *Adair* court as illustrative of those "policies and philosophies" necessary to grant standing: *Barrows v. Jackson*, 346 U.S. 249 (1953) (racial discrimination); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (physician granted standing to assert patients' rights to avoid conviction); *NAACP v. Alabama*, 377 U.S. 288 (1958) (association rights); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (white tenant allowed to bring suit for exclusion of black from apartment complex). *Id.*

162. 541 F. Supp. at 1130.

can *Gilsonite Co.*,<sup>163</sup> in which the court ruled that plaintiff had standing to contest the statute of limitations.<sup>164</sup> *McClanahan* involved an action brought for the death and personal injuries of persons injured in an oil refinery accident. Construction of the refinery was substantially completed in 1957,<sup>165</sup> and the complaint was filed in 1978,<sup>166</sup> long after the statutory limit of ten years had expired.<sup>167</sup> The court approached the issue of standing by noting that the general rule did not allow a party to vindicate the constitutional rights of another party.<sup>168</sup> An exception to the general rule, however, arises if both the enjoyment of the third party's right is bound inextricably to the litigant's activity and the relationship between the litigant and the third party is such that the litigant is an effective proponent for the third party.<sup>169</sup> The court ruled that the plaintiffs were proper parties to assert the equal protection argument because there was adequate assurance that the enjoyment of the third party's rights would be affected by the outcome of the claim<sup>170</sup> and because the result sought by the litigants would be identical to those excluded from the statute's protection.<sup>171</sup>

## 2) Equal Protection Guarantees Under the Vermont Constitution

Judicial review of the equal protection clause of the Vermont Constitution<sup>172</sup> reflects the Supreme Court's analysis of the equal protection clause of the United States Constitution.<sup>173</sup> Under Ver-

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163. 494 F. Supp. 1334 (D. Colo. 1980).

164. *Id.* at 1344.

165. *Id.* at 1342.

166. *Id.* at 1337.

167. *Id.* at 1342.

168. *Id.* The court cited *Singleton v. Wulff*, 428 U.S. 112 (1976), as authority for both the general rule and exceptions for standing.

169. 494 F. Supp. at 1343.

170. *Id.*

171. *Id.*

172. VT. CONST. ch. I, art. 7 provides:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community; and that the community hath an indubitable, inalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conclusive to the public weal.

173. *State v. Auclair*, 110 Vt. 147, 161, 4 A.2d 107, 113 (1939); see also Note, *The Standard of Review in Equal Protection and Due Process Challenges to Vermont Blue Laws*, 6 Vt. L. Rev. 173, 187-88 (1981).

mont constitutional analysis, legislative classification is arbitrary if no rational basis serving a legitimate public policy objective can be articulated in defense of the classification.<sup>174</sup> Absent discrimination against a suspect class,<sup>175</sup> the regulation of areas of general economic and social welfare is upheld if the classification has some "reasonable basis."<sup>176</sup> A special limitation of actions statute for architects, therefore, should be upheld under the Vermont Constitution as long as the legislature could have articulated a rational basis for its enactment.

The Vermont Supreme Court, however, struck down legislation which was aimed at the general economic welfare in *State v. Shop and Save Supermarkets*.<sup>177</sup> The *Shop and Save* court ruled that there was no permissible state purpose for Sunday closing legislation, which classified stores according to their gross revenue.<sup>178</sup> In considering what valid legislative objective could be promoted by the legislation, the court stated: "[E]conomic discrimination based solely on consanguinity is impermissible . . . . Similarly, the promotion of locally owned businesses is a suggested justification. Such protectionism, also, is not a permissible state objective."<sup>179</sup>

The reasoning in *Shop and Save* was supplemented by the Vermont Supreme Court in *State v. Ludlow Supermarkets, Inc.*<sup>180</sup> The court noted that the reenacted Sunday closing laws were based upon the unconstitutional purpose of protecting small businesses,<sup>181</sup> which would be permissible only if a case of necessity based on an overriding public interest could be established.<sup>182</sup> Thus, some authority exists in Vermont on which to challenge legislation which promotes an economic class based on equal protection grounds.

It is possible that the Sunday closing laws cases are anomalies in the line of Vermont equal protection cases since economic protectionist purposes are normally permissible.<sup>183</sup> If, however, the

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174. *State v. Carpenter*, 138 Vt. 140, 143, 412 A.2d 285, 287 (1980).

175. *State v. Stewart*, 140 Vt. 389, 402, 438 A.2d 671, 677 (1981).

176. *In re Barcomb*, 132 Vt. 225, 233, 315 A.2d 476, 481 (1974).

177. 138 Vt. 332, 415 A.2d 235 (1980).

178. *Id.* at 338, 415 A.2d at 238.

179. *Id.* (citations omitted).

180. 141 Vt. 261, 448 A.2d 791 (1982).

181. *Id.* at 266-67, 448 A.2d at 794-95.

182. *Id.* at 268, 448 A.2d at 795.

183. See, e.g., *Anchor Hocking Glass Corp. v. Barber*, 118 Vt. 206, 105 A.2d 271 (1954) (law prohibiting sale of beer in nonreturnable glass containers upheld); *State v. Auclair*, 110

language of the Vermont Supreme Court in *Ludlow Supermarkets and Shop and Save* is to be read literally, an equal protection argument could be directed against a special statute of limitations for architects in Vermont, should one be enacted. Thus, a statute of limitations for architects should be structured so as to avoid economic discrimination and the promotion of one faction of the construction industry over others, or over the owner of the project.<sup>184</sup>

### B. Abolition of a Common Law Right of Action

A second constitutional argument is that the legislature, by enacting a special statute of limitations, has abolished a common law right of action in violation of due process rights. This claim arises when a limitation of actions statute acts as a statute of repose,<sup>185</sup> barring a cause of action before the injury actually occurred.

The Kentucky Supreme Court addressed this argument squarely in *Saylor v. Hall*.<sup>186</sup> In *Saylor*, defendant Hall had constructed a home which was rented thereafter to plaintiffs, the Saylor family.<sup>187</sup> Four months after the Saylor family had moved into the house, a stone fireplace and mantel collapsed on the Saylor's two children, killing one and injuring the other severely.<sup>188</sup> Plaintiffs asserted that the special statute of limitations, which otherwise would bar the action, violated the due process clause of the United States Constitution and sections 14, 54, and 241 of the Kentucky Constitution.<sup>189</sup> The court found that provisions of the Kentucky Constitution which had been interpreted to prohibit legislative abolition of a cause of action for personal injury or death governed its decision.<sup>190</sup> Thus the statute destroyed "a common law right of action for negligence that proximately cause[d] injury or death, which existed at the [time] the statutes were enacted."<sup>191</sup> The

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Vt. 147, 4 A.2d 107 (1939) (act establishing board to set milk prices upheld).

184. See generally *Pabat v. Commissioner of Taxes*, 136 Vt. 126, 388 A.2d 1181 (1978). The specific statutory language which should discourage such promotion is discussed *infra* text accompanying note 290.

185. See *supra* text accompanying note 101.

186. 497 S.W.2d 218 (Ky. 1973).

187. *Id.* at 220.

188. *Id.*

189. *Id.* at 221.

190. *Id.* at 222.

191. *Id.* at 224.

*Saylor* court held that the statutory scheme could not be applied constitutionally to bar plaintiffs' claims in that case.<sup>192</sup>

The scope of *Saylor* appears to have been limited by *Carney v. Moody*,<sup>193</sup> recently reviewed by the Kentucky Supreme Court. The court reasoned that a cause of action must first exist before its abolition becomes unconstitutional under the Kentucky Constitution. The *Carney* court disagreed with the reasoning in *Saylor*, arguing that the remedy asserted against the builders must have existed at the time the constitutional provisions were adopted, rather than at the time the statutes were enacted.<sup>194</sup> Due to the requirement of privity of contract at that time, however, no cause of action would have existed for an injured third party.<sup>195</sup>

Thus, the court ruled that sections 14 and 54 of the Kentucky Constitution would not apply.<sup>196</sup> The court stated:

Our construction of these constitutional provisions is and should be that which leaves to the policy-making arm of government the broadest discretion consistent with their language. That the statutes limiting the period of a builder's exposure to liability for faulty construction may occasionally leave injured parties without a remedy, or without a solvent defendant, cannot justify the courts in taking corrective measures that more appropriately fall within the prerogative of the legislature.<sup>197</sup>

The Florida Supreme Court established the rule in *Overland Construction Co. v. Sirmons*<sup>198</sup> that a special statute of limitations is applied unconstitutionally if it abolishes a common law right of action under article V, section 3(b)(3) of the Florida Constitution.<sup>199</sup> Yet, most state courts have held that the legislature may abolish a cause of action, just as it may create one, so long as it

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192. *Id.* at 225.

193. 646 S.W.2d 40 (Ky. 1982). *Carney* involved a challenge under sections 14 and 54 of the Kentucky Constitution, but did not include a challenge under section 241 as did *Saylor*. Thus, *Saylor* may still be good law for wrongful death actions.

194. 646 S.W.2d at 41. See also *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 227-28 (6th Cir. 1982).

195. 646 S.W.2d at 41; see *supra* text accompanying notes 22-31.

196. 646 S.W.2d at 41.

197. *Id.*

198. 369 So. 2d 572 (Fla. 1979).

199. *Id.* at 574. In *Ellison v. Northwest Eng'g Co.*, 521 F. Supp. 199, 201 (S.D. Fla. 1981), the court entitled this rule the "*Overland Constitution doctrine.*"

does not abolish a vested right.<sup>200</sup> The courts which invalidated their special statutes for abolishing a common law right of action tend to have specific provisions in their constitutions limiting this type of legislation.<sup>201</sup>

### 1) Abolishing a Common Law Right of Action: Vermont Constitutional Provisions

The Vermont Constitution has its own unique provision which by its language guarantees a right to judicial remedy.<sup>202</sup> The language of chapter 1, article 4 is similar to the sections of the Kentucky Constitution which invalidated the limitation of actions statute in *Saylor v. Hall*.<sup>203</sup> It is possible that a special statute of limitations for architects in Vermont could be held unconstitutional by depriving an injured party of his day in court. Predicting the result of such a challenge depends upon judicial construction of this section as applied to statutes of repose.

No Vermont case has determined whether barring a cause of action before it accrues will violate chapter I, article 4 of the Vermont Constitution. In *Granai v. Witters*,<sup>204</sup> however, a statute was challenged because it barred judicial action against a member or official of the General Assembly during the legislative session. The court noted, "Chapter I, Article 4th of the Vermont Constitution provides that a remedy at law is secured by all . . . . There are no

200. See *supra* note 116.

201. See, e.g., *Overland Constr. Corp. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975). The court in *Kallas* held that the existing Wisconsin special statute of limitations violated equal protection guarantees. In the process of its reasoning, the court suggested that the statute would unconstitutionally bar a right to sue before the cause of action arose, in contravention of article I, section 9 of the Wisconsin Constitution, had it not been invalid on equal protection grounds. *Id.* at 393, 225 N.W.2d at 457.

202. Vt. CONST. ch. I, art. 4th provides that:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely and without being obliged to purchase it; completely and without denial; promptly and without delay; conformably to the laws.

203. Ky. CONST. § 14 provides that:

All courts shall be open and every person for an injury done him in his lands, goods, person or reputation, have remedy by due course of law, and right and justice administered without sale, denial or delay.

See *supra* notes 185-201 and accompanying text.

204. 123 Vt. 468, 194 A.2d 391 (1963).

peculiar rules or exemptions for a particular occupation."<sup>205</sup> While this language was clearly dictum,<sup>206</sup> *Granai* may stand as authority for the proposition that a special statute of limitations for architects in Vermont would be unconstitutional for barring a cause of action against a particular occupation before the cause of action has accrued.

### C. *Two Subjects Expressed in the Title of the Statute*

Some state constitutions also contain provisions which preclude a statute drafted with two subjects expressed in the title of the statute.<sup>207</sup> This prohibition has formed the basis for invalidation of the special statutes of limitations for architects in some states. The Vermont Constitution contains no express prohibition of two subjects expressed in the title of a statute; nor has the Vermont Supreme Court addressed the issue. A brief discussion may, however, prove useful in understanding the constitutional arguments asserted against the special statutes of limitations.

In *Bagby Elevator and Electric Co. v. McBride*,<sup>208</sup> for example, the Alabama Supreme Court held that its state constitution required each law to contain only one subject clearly expressed in the statute's title "to fairly apprise the people of subjects considered and to inform . . . the legislature so that they may not perform their duty deceived or ignorant of what they are doing."<sup>209</sup> The Alabama special statute of limitations violated that prohibition by both acting as a statute of limitations and abolishing rights of action against architects and builders.<sup>210</sup> The statute embodied, in effect, two subjects under its title of a statute of limitations for architects.<sup>211</sup>

This conclusion was, however, rejected by the New Mexico Supreme Court in *Howell v. Burk*.<sup>212</sup> The *Howell* court suggested that the test was "whether the title fairly gives reasonable notice of the

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205. *Id.* at 470-71, 194 A.2d at 393.

206. The Court held that an act which prohibited suits against members of the legislature during session infringes on the judicial process constitutionally guaranteed to litigants. 123 Vt. at 471, 194 A.2d at 393.

207. See generally *Sisson & Kelly, supra* note 92, at 245.

208. 292 Ala. 191, 291 So. 2d 306 (1974).

209. *Id.* at 195, 291 So. 2d at 309.

210. *Id.* at 198, 291 So. 2d at 312.

211. *Id.*

212. 90 N.M. 688, 568 P.2d 214 (1977).

subject matter of the statute.<sup>213</sup> In upholding the statute, the court reasoned that reference to limitation of actions in the title of section 23-1-26 connected both logically and naturally with the no-action provision of the statute.<sup>214</sup>

## V. THE VERMONT EXPERIENCE

Construction in Vermont has followed the expansive trends in construction nationwide. Little construction took place in the state during the years preceding World War II.<sup>215</sup> During the decade of the 1970's, construction starts in Vermont increased<sup>216</sup> and the percentage of increase in housing units surpassed the national average.<sup>217</sup> Nineteen eighty-two, a year of national recession, saw a large number of sales of newly-built condominiums in and around ski resorts.<sup>218</sup>

The point at which a cause of action accrued in claims of defective design and construction was unsettled law prior to 1976.<sup>219</sup> Architects believed they could be liable indefinitely for defective design pursuant to the discovery rule,<sup>220</sup> and thus malpractice insurance policies were maintained well into the retirement of many architects.<sup>221</sup> Consequently, a legislative lobbying effort was launched in the mid-1970's to draft a special statute of limitations which would, *inter alia*, limit liability for design professionals to

213. *Id.* at 692, 568 P.2d at 218.

214. *Id.*

215. In 1937, total construction starts in Vermont urban areas stood at 466. By 1938, that figure grew to 540. U.S. DEP'T OF LABOR, BUREAU OF STATISTICS, BUILDING CONSTRUCTION 1921 TO 38, BULLETIN No. 668 54-55 (1940).

216. Residential construction projects throughout Vermont amounted to 3,215 in 1972. THE VERMONT ECONOMIC ALMANAC 180 (G. Bright ed. 1980). By 1979, that number had increased to 3,473. *Id.*

217. *Percent Increase in Housing Units*

	United States	Vermont
1950	24%	15.9%
1960	27%	12.5%
1970	17%	21%
1980	29.5%	35%

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS REPORTS—GENERAL HOUSING CHARACTERISTICS 6 (1980) (figures may be approximate).

218. New York Times, Nov. 21, 1982, § 8 at 1, col. 2.

219. In 1976, Union School District No. 20 v. Lench, 134 Vt. 424, 365 A.2d 508 (1976) was decided. See *infra* notes 242-48 and accompanying text.

220. See *supra* notes 82-89 and accompanying text.

221. Interview with Marilyn Alexander, Counsel for Legislative Lobbying Effort, in Burlington, Vt. (Sept. 3, 1982). See also *supra* note 83.

six years after performance or furnishing of services and construction.<sup>222</sup> The proposed statute was withdrawn without a legislative vote on its merits<sup>223</sup> after *Union School District No. 20 v. Lench*<sup>224</sup> was decided.

The Vermont Supreme Court held in *Lench* that a cause of action does not accrue upon discovery of the cause of the defect, but at some prior point in the construction process.<sup>225</sup> A fundamental premise for the court's decision in *Lench*, and in subsequent cases, was that the legislature should properly address the issue.<sup>226</sup> Ironically, subsequent cases construed *Lench* as limiting an architect's liability to six years following completion of construction.<sup>227</sup> Such an interpretation bears marked similarity to the six year statute of limitations submitted to the legislature by the architects.

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222. The text of the proposed statute reads as follows:

*Sec. 522 Actions Resulting from Construction*

(a) No action to recover damages for injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of any deficiency in the survey or plat, planning, design, specifications, supervision, or observation of construction and repair of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, may be brought against any person performing or furnishing the survey or plat, planning, design, specifications, supervision or observation of construction or construction and repair of such improvement to real property more than two (2) years after discovery thereof, nor in any event more than six (6) years after the performance or furnishing of such services and construction.

(b) Notwithstanding the provisions of Section 1 of this act, in the case of such injury to property or the person or such an injury causing wrongful death, which injury occurred during the fourth year after the performance of such services, an action in tort to recover damages for such an injury or wrongful death may be brought within one (1) year after the date on which such injury occurred (irrespective of the date of death), but in no event may such action be brought more than seven (7) years after the performance of such services.

(c) The limitation prescribed by this act will not be asserted by way of defense by any person in actual possession or control as owner, tenant or otherwise of the improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

A statute of limitations limiting liability to four years following completion was also drafted. (On file with the *Vermont Law Review*.)

223. See *supra* note 221.

224. 134 Vt. 424, 365 A.2d 508 (1976).

225. 134 Vt. at 425, 365 A.2d at 510.

226. *Id.* at 427, 365 A.2d at 510-11.

227. See *infra* notes 248-58 and accompanying text.

Architects, engineers, and the construction industry welcomed *Lench*, which became the first in the line of Vermont cases which sharply limited architectural liability. Yet, the status of architectural liability in Vermont is misleading, as the law is unfavorable to the architect as well as to the consumer of architectural services. Should a latent defect in construction or design be discovered after the six year limitations period, an owner will have no available judicial relief. An injured third party would have a cause of action against only the owner, who may not have caused the injury.<sup>228</sup> If such a legislatively imposed policy would violate constitutional guarantees,<sup>229</sup> it is possible that the completion rule<sup>230</sup> applied judicially would have a similar unconstitutional effect.

Moreover, *Lench* and its progeny do not absolve the architect of liability for all design and construction defects. In 1975, the Vermont Legislature amended the limitation of actions statute for injuries to the person, imposing a three year limitation to accrue upon discovery of the injury.<sup>231</sup> Therefore, architects will remain subject to potentially infinite liability for personal injuries sustained from any project on which they have worked.

#### A. *When the Cause of Action Accrues in Vermont*

*Lench* was the first Vermont case which dealt with the statute of limitations question in a claim against an architect. In deciding *Lench* the Vermont Supreme Court relied on *Murray v. Allen*,<sup>232</sup> a medical malpractice decision, as precedent.

In *Murray*, the defendant surgeon operated on the plaintiff's abdomen, but failed to remove gauze sponges before closing the incision.<sup>233</sup> After the operation, the plaintiff complained of severe pain in her side, but the doctor assured her that she was recovering properly.<sup>234</sup> The sponge passed in her stool some five years later. In a suit for medical malpractice, defendant claimed the statute of

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228. See Knapp & Lee, *supra* note 2, at 355.

229. See *supra* notes 116-214 and accompanying text. See also *Lycoming Fire Ins. Co. v. Batchelder & Sons*, 62 Vt. 148, 19 A. 982 (1890). The court stated that a cause of action begins to run when a plaintiff can first maintain an action for recovery, apparently adopting the discovery rule. *Id.* at 152, 19 A. at 983.

230. See *supra* notes 90-98 and accompanying text.

231. See VT. STAT. ANN. tit. 12, § 512 (Cum. Supp. 1983).

232. 103 Vt. 373, 154 A. 678 (1931).

233. *Id.* at 374, 154 A. at 678.

234. *Id.*

limitations barred the action.<sup>235</sup> Plaintiff argued that the right of action did not accrue until she discovered that the sponge had not been removed.<sup>236</sup> The court, however, rejected her argument, and held that "the right of action accrued when the negligent act upon which the action is based took place, and not when the consequential damage became known."<sup>237</sup>

*Murray* served as the basis for the *Lench* decision, even though the legislature modified *Murray* for certain medical malpractice claims before the court decided *Lench*.<sup>238</sup> In *Lench*, design work performed on a school building was completed in January of 1966.<sup>239</sup> The roof of the school began to leak almost immediately upon occupancy in September, 1966. Although plaintiff attempted to correct the fault, by the fall of 1971 a wall had bulged and cracked.<sup>240</sup> Professional advice was then sought, and in January, 1972, plaintiff first became aware that "the roof was latently defective due to negligent design."<sup>241</sup> The school district instituted suit on December 8, 1972, and defendants pleaded the statute of limitations for civil actions.

Following the argument advanced in *Murray*, plaintiff asserted that the cause of action accrued in January, 1972—the date on which the roof was discovered to be latently defective. Defendants claimed that the statute began to run when they rendered final services in January, 1966, or alternatively, that the cause of action accrued in September, 1966, when plaintiffs had notice of the defect.<sup>242</sup>

*Lench* has been cited for rejecting the discovery rule in architectural claims in Vermont.<sup>243</sup> Yet, the scope of the opinion was limited closely to the facts submitted. The court actually ruled that the statute of limitations *did not* begin to run when plaintiff discovered the *cause* of the defect, which was in January of 1972. The only date that could have been actionable pursuant to the six year limitations period was in January of 1972, the point at which

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235. *Id.*

236. *Id.* at 376, 154 A. at 679.

237. *Id.*

238. *Lench*, 134 Vt. at 426, 365 A.2d at 510. See also VT. STAT. ANN. tit. 12, §§ 512, 518 (Cum. Supp. 1983).

239. 134 Vt. at 425, 365 A.2d at 509.

240. *Id.*

241. *Id.*

242. *Id.* at 427, 365 A.2d at 510.

243. Annot., 90 A.L.R.3d 507, 518-20 (1977).

the precise cause of injury was discovered, and the court reasoned that even where the discovery rule is applied, discovery of the reason for the injury is not the point of accrual.<sup>244</sup> The court then affirmed the lower court in dismissing the claim.<sup>245</sup>

The significance of *Lench*, however, is what the Vermont Supreme Court declined to decide. It did not rule that a cause of action accrues upon completion of architectural services. Nor did the court hold that a cause of action will not accrue upon discovery of the defect (as opposed to discovering the cause of the defect).<sup>246</sup> Rather, the court opined that determining a point of accrual was properly a task for the legislature:

[L]egislative enactment may well, in light of the history in other jurisdictions, resolve the precise point before judicial determination is required. Legislative attention to balance of underlying equities and the policy of repose inherent in statutes of limitations would be indeed appropriate, and would involve many considerations not briefed or analyzed by parties, as here, interested in only affirming or reversing a particular judgment.<sup>247</sup>

The reasoning in *Lench* portrays a cautious stance by the Vermont Supreme Court. Such caution is understandable, if unwarranted, in that *Lench* was the first decision rendered on the issue of the application of the six year statute of limitations to a claim for architectural malpractice.

*Lench* was, however, relied upon as controlling authority for the next in the line of cases involving the statute of limitations defense, even though *Lench* did not determine the specific point at which a cause of action accrues. In *South Burlington School District v. Goodrich*,<sup>248</sup> construction of a high school was substantially completed in December of 1961.<sup>249</sup> The roof began to leak shortly thereafter, particularly around the sky dome lighting and through an expansion joint in the lobby. In 1962 or 1963, the architect certified that construction was in accordance with his plans and speci-

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244. *Lench*, 134 Vt. at 426-27, 365 A.2d at 510-11 (citing *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 193 Neb. 848, 230 N.W.2d 87 (1975)).

245. 134 Vt. at 425, 365 A.2d at 510.

246. *Id.* at 427, 365 A.2d at 509.

247. *Id.*

248. 135 Vt. 601, 382 A.2d 220 (1977).

249. *Id.* at 603, 382 A.2d at 221.

fications.<sup>250</sup> In March of 1966, leaks were discovered in the roof over the entire gymnasium area. Subsequent inspection revealed that the leaks were caused by a series of long splits in the built-up roofing.<sup>251</sup>

In February 1972, plaintiffs instituted suit, and defendants raised the statute of limitations defense pursuant to *Lench*. The court ruled in favor of defendants, basing its decision on *Murray, Lench* and legislative inaction.<sup>252</sup> While the court never stated so expressly, it implied that the cause of action accrued at the point of completion—a giant step beyond *Lench*:

For the statute of limitations not to bar the action, it would be necessary for any cause of action to have accrued within six years prior to that date, i.e. after February 28, 1966. It is clear from the record that the construction project was completed, that the building was occupied and that construction was certified to be in accordance with the plans and specifications by 1962 or 1963. Thus, as a matter of law, an action for defective construction based upon either negligence or the construction contract would be barred.<sup>253</sup>

The court in *South Burlington* failed to establish firmly whether completion, occupation, or certification of a building by the architect is the point at which the statute begins to run. Yet, its language was sufficient for later cases to hold that the cause of action accrues upon completion of the project.<sup>254</sup>

Justice Billings authored a notable dissenting opinion in *South Burlington*. He criticized the majority for hiding behind legislative inaction in not adopting the discovery rule.<sup>255</sup> Billings argued:

In the case at bar, the nature of the defect or injury is inherently unknown and latent in nature . . . . [T]he plaintiff is not an expert and should not be expected to recognize the

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250. *Id.*

251. *Id.*

252. *Id.* at 605, 382 A.2d at 222. See *Capron v. Romeyn*, 137 Vt. 553, 409 A.2d 565 (1979), in which the court refused to impose the discovery rule in a malpractice suit even though the legislature had enacted a discovery rule, but had not applied it retroactively. See also *Stewart v. Darrow*, 141 Vt. 248, 448 A.2d 788 (1982), which upheld the *Capron* decision.

253. *South Burlington*, 135 Vt. at 605, 382 A.2d at 222-23.

254. See, e.g., *Anderson v. McKee*, 136 Vt. 623, 383 A.2d 273 (1978). See also *Alexander v. Gerald E. Morrissey, Inc.*, 137 Vt. 20, 24, 399 A.2d 503, 505 (1979).

255. 135 Vt. at 608, 382 A.2d at 224 (Billings, J., dissenting).

expert defendants' negligence of the breach of their contractual duties . . . . To say that a cause of action accrues to a person or legal entity when the person or entity may maintain an action thereon and, at the same time, that it accrues before the person or entity has or can reasonably be expected to have knowledge of any wrong inflicted is patently inconsistent and unrealistic. One cannot maintain an action before one knows there is one.<sup>256</sup>

Justice Billings was joined in dissent by Justice Hill in *Anderson v. McKee*,<sup>257</sup> a memorandum decision. In *Anderson*, the Vermont Supreme Court affirmed the order of the trial court, ruling that a suit for negligent architectural design was barred by the statute of limitations and controlled by *South Burlington*.<sup>258</sup>

After *Anderson*, the law was established, albeit on shaky grounds, that a cause of action for negligent design or construction accrues upon completion of construction. Ironically, the Vermont Supreme Court has acknowledged the potential for injustice,<sup>259</sup> and has urged legislative consideration of the issue. Yet, in the face of legislative inaction, the court has refused to overrule *Murray* and institute the discovery rule.

#### B. *Fraudulent Concealment—Protection for Claims of Latent Defect?*

Some reprieve for plaintiffs has been allowed for construction defects which have been concealed fraudulently. When a court renders a finding of fraudulent concealment, the statute of limitations is tolled until discovery of the defect.<sup>260</sup> Fraudulent concealment, however, is not synonymous with a latent defect. *Scienter* is a requirement for the fraudulent concealment rule,<sup>261</sup> and defects may

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256. *Id.* at 609, 382 A.2d at 225 (Billings, J., dissenting).

257. 136 Vt. 623, 383 A.2d 273 (1978).

258. *Id.*

259. See *supra* text accompanying note 253.

260. VT. STAT. ANN. tit. 12, § 555 (1973). The concealment of facts by one who has a duty to disclose will be deemed a fraud sufficient to toll the statute of limitations. *Watta v. Mulliken's Estate*, 95 Vt. 335, 339, 115 A. 150, 152 (1921); *Troy v. American Fidelity Co.*, 120 Vt. 410, 143 A.2d 469 (1958). But the fraudulent concealment must have been procured "with a design to prevent the discovery of the facts which gave rise to the action." *Murray v. Allen*, 103 Vt. 373, 378, 154 A. 678, 680 (1931).

261. *Merrill v. Reville*, 135 Vt. 517, 520, 380 A.2d 96, 98 (1977); *Murray v. Allen*, 103 Vt. 373, 378, 154 A. 678, 680 (1931).

exist which are termed "latent,"<sup>262</sup> but of which the architect is unaware. Thus, fraudulent concealment is a narrow pocket of re-prieve, and the litigation of latent defects may still be barred if defects are discovered beyond the actionable period.

In *Standard Packaging Corp. v. Julian Goodrich Architects, Inc.*,<sup>263</sup> the defendant filed third party complaints against two sub-contractors. The third party complaint against one subcontractor alleged:

[T]hat [the subcontractor] breached its contract 'and with gross and willful negligence deliberately and intentionally' bent a portion of the structural steel support for the roof to accommodate the installation of the sprinkler system . . . that as a result the structural strength of the support system was severely damaged with a portion of the roof collapsing on January 15, 1969. Only then . . . were the damaged supports discovered.<sup>264</sup>

The complaint against the second subcontractor asserted that structural steel columns used to support the roof of the building were installed out of line.<sup>265</sup> In both third party complaints, the defendant alleged that the subcontractors " 'actively concealed' the defective work which was not apparent to [the architect]."<sup>266</sup> The trial court ruled that the defendants' claims were barred by the six year statute of limitations.<sup>267</sup> On appeal, the Vermont Supreme Court reversed the trial court's dismissal, finding that the third party pleading was sufficient to raise the issue of fraudulent concealment.<sup>268</sup> The court granted the architect a hearing on the matter.<sup>269</sup>

The fraudulent concealment exception for architectural claims set forth in *Standard Packaging* was applied under somewhat broader factual circumstances in *Alexander v. Gerald E. Morrissey, Inc.*<sup>270</sup> In *Alexander* the defendant contractor's use of insulation with a thermal resistance less than that specified in the architectural plans gave rise to a claim for breach of contract against the

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262. See *supra* note 93.

263. 136 Vt. 376, 392 A.2d 402 (1978).

264. *Id.* at 377-78, 392 A.2d at 404.

265. *Id.* at 378, 392 A.2d at 404.

266. *Id.*

267. *Id.*

268. *Id.* at 381, 392 A.2d at 406.

269. *Id.*

270. 137 Vt. 20, 399 A.2d 503 (1979).

architect and contractor.<sup>271</sup> The Vermont Supreme Court reversed the lower court's finding of fact that the architect had no knowledge of the nonconforming insulation.<sup>272</sup> The court ruled that the finding of the lower court that the architect approved the insulation was inconsistent with the finding of a lack of knowledge of its use.<sup>273</sup> Knowledge of the nonconforming insulation, combined with a representation that the building was constructed according to plans, amounted to fraudulent concealment sufficient to toll the statute of limitations until the discovery of the defect.<sup>274</sup>

*Alexander* was decided under broader factual grounds than was *Standard Packaging* because the architect in *Alexander* did not "with gross and willful negligence deliberately and intentionally"<sup>275</sup> install the insulation. In fact, the trial court in *Alexander* was persuaded that the architect had no knowledge of the installation of inferior insulation.<sup>276</sup> Since, pursuant to contract, an architect may have the duty to certify that a building was constructed according to plans,<sup>277</sup> the fraudulent concealment exception in Vermont may only require knowledge of nonconforming work by a contractor, rather than a specific intent to defraud. The question remains unanswered whether an architect's pro forma supervisory role in construction,<sup>278</sup> combined with certification of the building,<sup>279</sup> will impute knowledge sufficient to expose architects to liability for latent defects under the *Alexander* test.

## VI. A SPECIAL STATUTE OF LIMITATIONS FOR VERMONT

The web of judicially created rules regarding the duration of architectural liability in Vermont favors neither architects nor owners and third parties injured by defective construction. The law derogates the interests of architects because it was established by the court on dubious legal grounds. At least two Vermont Supreme Court justices may dissent in a future challenge to the completion rule as it stands.<sup>280</sup> Should a case arise with an unconscion-

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271. *Id.* at 21, 399 A.2d at 504.

272. *Id.* at 25, 399 A.2d at 506.

273. *Id.*

274. *Id.*

275. *Standard Packaging*, 136 Vt. at 377, 392 A.2d at 404.

276. *Alexander*, 137 Vt. at 25, 399 A.2d at 506.

277. See *supra* text accompanying note 53.

278. See *supra* note 54 and accompanying text.

279. See *supra* note 53 and accompanying text.

280. Justices Hill and Billings both dissented in the cases establishing the completion

able set of facts, the court could very well impose the discovery rule. The fraudulent concealment rule might also be extended to allow all latent defects to toll the statute of limitations until discovery of the defect. A change in the existing law is all the more probable due to the recent retirement of the Chief Justice.<sup>281</sup> In short, a special statute of limitations for architects would provide for more assurance of stability than a judicially created rule of liability.<sup>282</sup>

The completion rule in Vermont also disfavors the rights of parties injured by defective design or construction. If a defect is latent, and discovery takes place beyond the statutory period, a party is denied his right to recover from the party at fault. Moreover, it may be unfair for a legislature to abolish a common law right of action, but it is more unjust for a court to do so. The legislature provides a far better forum to balance the interests of all parties concerned,<sup>283</sup> and it furnishes a means of providing notice of the law. Indeed, the Vermont Supreme Court has urged legislative review of the current rule.<sup>284</sup>

In the final analysis, the Vermont State Legislature should enact a special statute of limitations for the design and construction professions. Recent developments in the case law of other jurisdictions demonstrate problems with the special statutes, particularly with regard to their constitutionality. Yet, enacting a special statute for Vermont may still provide the most equitable means of balancing the interests of all parties affected by architectural defects.

The following proposed statute is based on the special statutes of limitations in Colorado,<sup>285</sup> Florida,<sup>286</sup> Illinois,<sup>287</sup> and

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rule. See *supra* notes 255-57 and accompanying text. See also *Capron v. Romeyn*, 137 Vt. 553, 556, 409 A.2d 565, 567 (1979) (Billings and Hill, J.J., concurring in part, dissenting in part). Justice Underwood has also registered dissent regarding the failure of the Vermont Supreme Court to overrule *Murray v. Allen*. See *Stewart v. Darrow*, 141 Vt. 248, 253, 448 A.2d 788, 790 (1982) (Underwood, J., dissenting).

281. Chief Justice Albert J. Barney retired from his term in the Vermont Supreme Court on January 1, 1983. The former Chief Justice authored the opinion in *South Burlington School Dist. v. Goodrich*, 135 Vt. 601, 382 A.2d 220 (1977), which upheld *Lench*.

282. Of course, a statute might be susceptible to constitutional attack, and thus unstable. The statute proposed, however, attempts to cure any constitutional deficiencies a special statute might have. See *infra* text accompanying notes 289-90.

283. See *supra* note 247.

284. See *supra* note 235 and accompanying text.

285. COLO. REV. STAT. § 13-80-127 (Supp. 1982).

286. FLA. STAT. ANN. § 95.11(3)(c) (West 1982).

287. ILL. ANN. STAT. ch. 110, § 13-214 (Smith-Hurd 1983).

**Minnesota.<sup>288</sup>**

**Limitations applicable to actions arising from deficiencies in design, construction, or improvements to real property.**

1) All actions against any person for an act or omission of such person in the design, planning, supervision, observation, or management of construction shall be brought after twelve years following the act or omission complained of.

2) (a) All actions against any person for an act or omission of such person in the design, planning, supervision, observation, or management of construction shall be commenced within two years after the claim for relief arises.

(b) A claim for relief arises under this section at the time the injured party discovers or in the exercise of reasonable diligence should have discovered the act or omission.

3) In the event that a person discovers an act or omission after ten years but prior to the expiration of twelve years, that person shall have no less than two years to bring an action as provided for in section 2(a).

4) Sections 1 and 2 shall not prohibit any action against a defendant, who has expressly warranted or promised the improvement to real property, from being brought within the warranted period if that period is longer than the statutory actionable period.

5) Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation and inspection of the real property improvement against the owner or other person in possession.

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288. MINN. STAT. ANN. § 541.051 (West Supp. 1983).

The mixed discovery-completion rule<sup>289</sup> appears to be the most equitable means of striking the balance between the rights of injured parties and those of the architect. The longer the period of time within which architectural claims remain actionable, the greater the protection that is afforded to owners and injured parties. Accordingly, the sooner the injured party is forced to bring suit after the injury, the greater is the protection afforded to architects.

Sections one and two impose a variation of the mixed discovery-completion rule. Section one creates a twelve year outside limitation on actions commencing, not upon completion of the structure or services, but upon the act or omission which formed the basis of the cause of action. Thus, the actionable period as prescribed by statute is a function of the defending party's actual involvement in the construction process.

Section two provides that suits must be brought within two years of discovery of the act or omission which gave rise to the cause of action. This provision shortens liability for architects in the event that a plaintiff is neglecting to institute suit promptly.

A statutory grace period, or savings clause, is set forth by section three. The grace period allows claims to be brought beyond the twelve year limit if the plaintiff discovers the defect during the last two years of the actionable period. An injured party will, therefore, never have less than two years to bring an action, and the longest possible period of liability for the architect would be fourteen years.

Section four excludes an action from the statute's limitation provisions if the architect has warranted the quality of his work expressly. The public policy underlying this section is clear. If an architect warrants his works for a specific length of time, he should not be released from that obligation simply because the statute of limitations has expired.

To withstand an equal protection challenge, the statute protects "any person" involved in the construction process. All parties—including owners, tenants, and manufacturers of building products—would fall within the ambit of the proposed statute. Section five, however, excludes the owner or tenant from the statute's protection if the cause of action is related to negligence in the

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289. See *supra* note 106 and accompanying text.

maintenance of the structure.

It is curious that more special statutes have not been enacted with a provision excluding the owner from the statute's protection if the cause of action is due to substandard maintenance of the structure. By far, the majority of states which have invalidated their special statutes on equal protection grounds have done so because the owner was not a protected party by the statute.<sup>290</sup> Many courts have, however, noted the distinction between owners and architects in terms of their control over the structure. The proposed statute resolves some of the conflict between architects and owners based on their ability to maintain a building.

### CONCLUSION

Until 1976, when *Union School District No. 20 v. Lench*<sup>291</sup> was decided, no law existed in Vermont regarding the statute of limitations defense in architectural and construction claims. *Lench* and its progeny have propagated a vague judicially created completion rule, which never specified precisely when a cause of action accrues in actions for design or construction defects. Moreover, *Lench* was based on an archaic medical malpractice decision, *Murray v. Allen*,<sup>292</sup> which at least three members of the Vermont Supreme Court have criticized.

It is time that the Vermont Legislature act to remedy the failure of the Vermont Supreme Court to discard *stare decisis*, by enacting a special statute of limitations for architects. In drafting the statute, the legislature should note that most state special statutes of limitations tend to favor architects, reflecting the fact that architects form the sole interest group lobbying for enactment. These statutes merely curtail architectural liability and terminate the rights of owners or third parties from judicial relief. The statute proposed by this note is structured to protect the legitimate interests of owners and injured third parties, while balancing those interests against the contemporary commercial demands of architects.

Charlotte E. Thomas

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290. See *supra* note 116.

291. 134 Vt. 424, 365 A.2d 508 (1976).

292. 103 Vt. 373, 154 A. 678 (1931).

## APPENDIX

State	Actions Barred	Length of Actionable Period	Savings Clause	Point of Accrual	Provision for Personal Injury	Parties Protected by the Statute	Final Statutory Termination of Liability
Alaska	all actions for damages	6 years	2 years for personal injury only	substantial completion	provision for 2 year savings clause	any person* except owner or party in control	8 years
Arkansas	contract	5 years		substantial completion		any person	5 years
California	all actions for damages	4 years for patent defect 10 years for latent defect	1 year for tort claim for patent deficiency	substantial completion		any person except owner or party in control	10 years
Colorado	all actions	2 years with 10 year limit	2 years	discovery, (2 years); substantial completion, (10 years)		Architects, contractors, builders, builder vendor, engineers, and inspectors. Expressly excludes owner and party in control.	12 years
Connecticut	all actions	7 years	1 year	substantial completion		Architects and professional engineers. Expressly excludes owner and party in control.	8 years

Delaware	all actions for damages, contribution and indemnity	6 years		completion, according to contract, receipt of payment in full, substantial completion of particular improvement, acceptance, or discovery for personal injury, whichever is earliest	cause of action accrues when injuries were sustained	any person except owner or party in control	6 years
District of Columbia	all actions except contract	10 years		substantial completion		any person except owner of party in control	10 years
Florida	all actions	4 years		possession, issuance of certificate of occupancy, abandonment of construction, completion or termination of contract. If latent, upon discovery.		any person	15 years
Georgia	all actions for damages	8 years	2 years	substantial completion		any person	10 years

Hawaii	all actions for damages, indemnity or contribution	2 years	2 years for personal injury	completion (6 year limit)	2 year savings clause	any person or his surety	8 years
Idaho	tort, contract	5 years for contract, limit for tort depends on nature of claim		for torts 6 years upon final completion; for contracts upon final completion		any person except owner or party in control	
Illinois	all actions	2 years with 12 year limit	2 years	discovery		any person	14 years
Indiana	all actions to recover damages	10 years		substantial completion		any person	10 years
Kentucky	all actions to recover damages	5 years	1 year			any person except owner or party in control	6 years
Louisiana	all actions to recover damages or on contract	10 years	1 year	registry in mortgage office of acceptance, occupation		any person except owner or party in control	11 years
Maine	actions for malpractice or professional negligence	4 years, 10 year limit		discovery, (4 years), substantial completion, (10 years)		licensed or registered architects and engineers	10 years

Maryland	all actions for damages, contribution or indemnity	3 years, 10 year limit		discovery	architects and professional engineers; all other parties limited to 20 years; owners and parties in possession excluded	20 years
Massachusetts						
Michigan	all actions for damages, contribution or indemnity	6 years		occupation, use or acceptance	licensed architect, profession engineer, or land surveyor; owner and party in possession excluded	6 years
Minnesota	all actions for damages, contribution or indemnity; excludes actions for fraud and statutory warranties	2 years 15 year limit	2 years	discovery, (2 years); substantial completion, (15 years)	any person	17 years
Mississippi	all actions for damages, contribution or indemnity; excludes actions for wrongful death	10 years		written acceptance or occupancy	any person except owner or party in control	10 years

Missouri	all actions for damages, contribution or indemnity	10 years		completion		any person except owner or possessor	10 years
Montana	all actions for damages except contract	10 years	1 year	completion		any person except owner or party in control	11 years
Nebraska	breach of warranty actions	4 years; 2 years if latent defect		act or omission constituting breach; if latent, upon discovery		any person	10 years
Nevada	all actions	6 years if patent defect; 8 years if latent defect; 10 years if known defect	2 years	substantial completion		any person	12 years
New Hampshire	all actions for damages	6 years		performance of services and construction		any person except owner or party in possession	6 years
New Jersey	all actions for damages, contribution or indemnity	10 years		performance or furnishing of services		any person except owner or party in control	10 years
New Mexico	all actions for damages, contribution or indemnity	10 years		substantial completion		any person	10 years

North Carolina	actions for damages, contribution or indemnity	6 years		act or omission giving rise to suit or substantial completion		any person except owner or person in possession	6 years
North Dakota	actions for damages	10 years	2 years for tort claim	substantial completion		any person except owner or party in control	12 years
Ohio							
Oklahoma	actions for damages	10 years		substantial completion		any person	10 years
Oregon							
Pennsylvania	all actions for damages	12 years	2 years	completion		any person except owner or party in possession	14 years
Rhode Island	tort actions for damages, contribution or indemnity	10 years		substantial completion		architects and professional engineers, contractors, subcontractors and materialmen	10 years
South Carolina	all actions for damages	10 years		substantial completion		any person	10 years
Tennessee	all actions for damages	4 years		substantial completion		any person	4 years
Texas	all actions for damages, contribution or indemnity	10 years	2 years	substantial completion		any person except owner or party in possession	12 years
Utah	all actions for damages	7 years		completion		any person except owner or party in control	7 years

Virginia	all actions for damages, contribution, or indemnity	5 years		performance of services		any person except owner, party in possession, manufacturer or supplier	5 years
Washington	all actions	6 years		substantial completion or termination of services		any person except owner or person in possession	6 years
Wisconsin	all actions for damages, contribution or indemnity	6 years	6 months	substantial completion		any person	6 1/2 years
Wyoming	all actions	10 years	1 year	substantial completion		any person	11 years

