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The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment

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THE DISTRICT OF COLUMBIA'S ARCHITECTS' AND BUILDERS' STATUTE OF REPOSE: ITS APPLICATION AND NEED FOR AMENDMENT

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In 1972 Congress amended title 12 of the District of Columbia Code to provide a statutory time limitation governing actions for injury or death caused by defective or unsafe improvements to real property. Broadly speaking, the amendment, now set forth in section 12-310 of the District of Columbia Code, bars any action seeking damages for personal injury, injury to real or personal property, or wrongful death caused by a defective or unsafe improvement to real property if the injury or death forming the basis of the action does not occur within ten years of substantial completion of the improvement.[1] Section 12-310 also bars claims for contribution and indem-

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1. D.C. CODE ANN. § 12-310 (1981 & Supp. 1985). Section 12-310 of the Code provides:

(a)(1) Except as provided in subsection (b), any action—

(A) to recover damages for—

(i) personal injury,

(ii) injury to real or personal property, or

(iii) wrongful death, resulting from the defective or unsafe condition of an improvement to real property, and

(B) for contribution or indemnity which is brought as a result of such injury or death, shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed, or in the case where death is the basis of such action, either such death or the injury resulting in such death occurs within such ten-year period.

(2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when—

(A) it is first used, or

(B) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

(b) The limitation of actions prescribed in subsection (a) shall not apply to—

nity if the injury or death does not occur within this same ten-year period.[2]

According to the legislative proponents of section 12-310, the purpose of the statute is "[t]o provide a limitation on the period of time during which an action may be brought to recover damages, contribution, or indemnity against architects, designers, engineers, or contractors on the ground of a defective or unsafe condition of an improvement to real property."[3] With the enactment of section 12-310, the District of Columbia joined over forty other jurisdictions that specifically prescribe a limitation period for actions relating to defective or unsafe improvements to real property.[4]

Although section 12-310 may operate as the functional equivalent of a statute of limitations in certain circumstances, the section is more properly characterized as a statute of repose. A typical tort statute of limitations, for

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(1) any action based on a contract, express or implied, or

(2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property.

D.C. CODE ANN. §§ 12-310(a)(1) to -310(b)(2) (1981 & Supp. 1985).

2. *Id.* § 12-310(a)(1)(B).

3. 118 CONG. REC. 36,939 (1972).

4. *Id.* Forty-five states have enacted statutes analogous to § 12-310: ALA. CODE § 6-5-218 (1975); ALASKA STAT. § 09.10.055 (1983); ARK. STAT. ANN. §§ 37-237 to 27-244 (Supp. 1983); CAL. CIV. PROC. CODE §§ 337.1, 337.15 (1972 & West Supp. 1984); COLO. REV. STAT. § 13-80-127 (Supp. 1981); CONN. GEN. STAT. ANN. § 52-584(a) (West Supp. 1984); DEL. CODE ANN. tit. 10, § 8127 (1974); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. §§ 9-3-50 to 9-3-53 (1982); HAWAII REV. STAT. § 657-8 (Supp. 1982); IDAHO CODE § 5-241 (1979); ILL. ANN. STAT. ch. 110, § 13-214 (Smith-Hurd Supp. 1984); IND. CODE ANN. § 34-4-20-2 (Burns Supp. 1984); KY. REV. STAT. ANN. § 413.135 (Baldwin 1979); LA. REV. STAT. ANN. § 9:2772 (West Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 752-A (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1984); MASS. ANN. LAWS ch. 260 § 2B (Michie/Law. Co-op. 1985); MICH. COMP. LAWS ANN. § 600.5839 (West Supp. 1984) (Mich. Stat. Ann. § 27A.5839 (Callaghan 1977)); MINN. STAT. ANN. § 541.051 (West Supp. 1984); MISS. CODE ANN. § 15-1-41 (Supp. 1983); MO. ANN. STAT. § 516.097 (Vernon Supp. 1984); MONT. CODE ANN. § 27-2-208 (1983); NEB. REV. STAT. § 25-223 (1979); NEV. REV. STAT. § 11.205 (1983); N.H. REV. STAT. ANN. § 508:4-b (1983); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1984); N.M. STAT. ANN. § 37-1-27 (1978); N.C. GEN. STAT. § 1-50(5) (1983); N.D. CENT. CODE § 28-01-44 (1974); OHIO REV. CODE ANN. § 2305.131 (Page 1981); OKLA. STAT. ANN. tit. 12, §§ 109-110 (West Supp. 1983-1984); OR. REV. STAT. § 12.135 (1981); 42 PA. CONS. STAT. ANN. § 5536 (Purdon 1981); R.I. GEN. LAWS § 9-1-29 (Supp. 1982); S.C. CODE ANN. §§ 15-2-630 to 15-2-670 (Law. Co-op. 1976); S.D. COMP. LAWS ANN. §§ 15-2-9 to 15-2-11 (1967 & Supp. 1983); TENN. CODE ANN. §§ 28-3-201 to 28-3-203 (1980); TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1984); UTAH CODE ANN. § 78-12-25.5 (1977); VA. CODE § 8.01-250 (1984); WASH. REV. CODE ANN. §§ 4.16.300 to 4.16.320 (Supp. 1984-1985); W. VA. CODE § 55-2-6a (Supp. 1983); WIS. STAT. ANN. § 893.89 (West 1983); WYO. STAT. § 1-3-111 (Supp. 1984).

New York has a statute of limitations for professional liability claims generally. *See* N.Y. CIV. PRAC. LAW § 214.6 (McKinney 1972). The remaining jurisdictions—Arizona, Iowa, Kansas, and Vermont—have not enacted special legislation dealing with claims arising from improvements to real property.

example, establishes a time limit, usually commencing upon the date of injury, within which the plaintiff may bring suit. A statute of repose, on the other hand, is qualitatively different from a statute of limitations. A statute of repose extinguishes a party's substantive right after a specified time period irrespective of the time of the party's injury. The time limit established by a statute of repose may expire—and accordingly bar any cause of action governed by the statute—prior to the time of the party's injury. Consequently, even though the ultimate effect of a statute of limitations or repose may be the same in terms of precluding an action, a statute of repose may bar an action even before a party has suffered damage that otherwise might be compensable.[5]

Section 12-310 has received scant attention since its enactment. Indeed, there exists no reported District of Columbia decision applying the statute or interpreting its parameters.[6] The language of section 12-310, however, raises

5. For a discussion of the differences between a statute of limitations and statute of repose, see, e.g., Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 462 A.2d 416, 419 (Del. Super. Ct. 1983); Sowders v. M.W. Kellogg, Co., 663 S.W.2d 644, 647 (Tex. Civ. App. 1983); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514, 516 (1982); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662, 666 (1972). *See also* Annot., 93 A.L.R.3d 1242, § 2 (1979); RESTATEMENT (SECOND) OF TORTS § 899 comment g (1979).

Throughout this article, the time period established by § 12-310 is sometimes referred to as one of "limitations." This characterization is accurate insofar as § 12-310 requires enumerated actions to be commenced within a certain time period. Nevertheless, § 12-310 should not be confused with a normal statute of limitations. Unlike the usual statute of limitations, § 12-310 may bar a cause of action even before the occurrence of an injury or death that otherwise would be actionable.

6. Immediately prior to publication of this article, the District of Columbia Court of Appeals decided the case of J.H. Westerman Co. v. Fireman's Fund Ins. Co., No. 84-501, slip op. (D.C. Oct. 4, 1985). In that case, the court specifically held that a manufacturer of component parts of a heating system may raise the defense provided by § 12-310. The only other reported case interpreting § 12-310 is from the United States District Court for the District of Maryland. *See* President and Directors of Georgetown College v. Madden, 505 F. Supp. 557 (D. Md.), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981). *See also* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1201 n.14 (D.C. 1984) (court declines to address what impact, if any, § 12-310 has on a suit alleging tort and contract claims against the builder of a home addition). Architects' and builders' statutes of repose such as § 12-310, have engendered a fairly substantial amount of commentary. *See, e.g.*, Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 FED'N INS. COUNS. Q. 41 (1978); Knapp & Lee, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 ST. LOUIS U.L.J. 351 (1979); McGovern, *The Variety, Policy, and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981); Rogers, *The Constitutionality of Alabama's Statute of Limitations for Construction Litigation: The Legislature Tries Again*, 11 CUM. L. REV. 1 (1980); Sisson & Kelley, *Statutes of Limitations for the Design and Building Professions—Will They Survive Constitutional Attack*, 49 INS. COUNS. J. 243 (1982); Statkus, *Limitations of Actions—Statute of Limitations for Architects and Builders As Special Legislation, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980)*, 16 LAND & WATER L. REV. 313 (1981); Comment, *Limitation of Action Statutes for Architects and Builders—Blueprint for Non-Action*, 18 CATH. U.L. REV. 361 (1969) [hereinafter cited as Comment,

difficult questions concerning the scope of the statute's provisions. The statute fails to define "an improvement to real property" and, more significantly, does not identify those persons who may raise the defense created by the statute. This latter omission carries important consequences. Although the legislative history accompanying section 12-310 evidences an intent to insulate architects and other members of the construction industry from liability after a specified time period, the statutory language does not state that these parties are the exclusive parties within the ambit of the statute. Because of this omission, other persons not directly involved in the construction process, such as manufacturers and suppliers of products incorporated into the realty, can marshal a creditable argument that they may assert the limitation period contained in section 12-310, even though this result was not specifically contemplated by Congress. Thus, for example, section 12-310 may operate to deprive a person of a cause of action against a manufacturer or supplier of a defective product that forms part of the realty. In this event, the party may be relegated to the remedies, if any, he or she may possess against the owner of the realty.[7]

This article addresses the issues raised, but largely unanswered, by the language of section 12-310 and the legislative history accompanying the statute's enactment. Part I of this article provides an overview of the statute and examines the one reported decision from the United States District Court for Maryland in which a court has found occasion to examine the statute's parameters.

Part II of this article discusses an essential prerequisite to the application of section 12-310. By its terms, section 12-310 bars certain actions arising from an "improvement to real property," a phrase undefined in the statute. Courts from other jurisdictions have developed two principal tests to determine whether an object constitutes an improvement to real property subject

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Limitation of Action]; Comment, *Recent Statutory Development Concerning the Limitations of Actions Against Architects Engineers and Builders*, 60 KY. L.J. 462 (1972); Comment, *Defective Design—Wisconsin's Limitation of Action Statute for Architects, Contractors and Others Involved in Design and Improvements to Real Property*, 63 MARQ. L. REV. 87 (1979) [hereinafter cited as Comment, *Defective Design*]; Comment, *A Defense Catalog for the Design Professional*, 45 UMKC L. REV. 75 (1976) [hereinafter cited as *A Defense Catalog*]; Note, *Actions Arising Out of Improvements to Real Property: Special Statutes of Limitations*, 57 N.D.L. REV. 43 (1979) [hereinafter cited as *Improvements to Real Property*]; Note, *Legislation: Oklahoma's Statute Limiting Actions Against Designers and Builders of Improvements to Real Property*, 27 OKLA. L. REV. 723 (1974).

7. D.C. CODE ANN. § 12-310(b)(2) (1981 & Supp. 1985) specifically exempts from the statute's operation actions against "[t]he person who, at the time of the defective or unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property."

to the respective state's statute. These tests are discussed in Part II of this article.

Following a discussion of the improvements that may be subject to section 12-310, Parts III through V examine the persons who properly may invoke the time limitation set forth in the statute, as well as the effect of the statute on a plaintiff's cause of action and on a defendant's right to contribution or indemnity. A thesis of this article is that persons other than architects and construction professionals, the principal classes of protected persons envisioned by Congress, may raise the defense provided by section 12-310 as the statute is presently drafted.

Although the preclusive effect of section 12-310 may extend to situations not specifically contemplated by Congress, several reasons argue in favor of limiting the statute's applicability to claims against architects and other persons directly involved in the construction process. Part VI of this article discusses these reasons and proposes certain amendments to the present statutory language.

Finally, section 12-310 poses substantial constitutional questions. The statute in its present form, or as amended to specifically limit its applicability, distinguishes among potential classes of defendants, relieving some from liability while allowing actions to proceed against others. Further, section 12-310 may operate to extinguish a person's right of recovery before the person has suffered a loss that otherwise might be compensable, or at a time that deprives the person of a reasonable period of time within which to bring suit. The classification scheme inherent to section 12-310, and the potentially draconian effects of its application, open the statute to constitutional attack. These constitutional concerns are examined in the last Part of this article.

I. Overview of Section 12-310

Traditionally, the liability of architects and other members of the construction industry has been narrowly circumscribed. Early American courts, following English precedent, required privity of contract before imposing liability on an architect. Absent a contractual relationship between the architect and the person seeking relief, there existed no remedy for the actions of the architect.[8]

8. Winterbottom v. Wright, 10 M & W 109, 152 Eng. Rep. 402 (1842), is often cited as the progenitor of cases requiring privity of contract before liability can attach. *See* F. Harper & F. James, The Law of Torts § 18.5 (1956 & Supp. 1968); *see also* Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926). *Ford* subsequently was overruled in Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956).

The liability of architects and builders under American and English common law was a

The liability of builders to third parties was similarly limited by the so-called "completed and accepted" doctrine. This doctrine, closely related to the architects' privity defense,[9] extinguished a builder's liability to third parties once the builder completed the structure and the owner accepted it.[10]

The erosion of the privity defense initiated in the products liability arena by *MacPherson v. Buick Motor Co.*[11] slowly infiltrated to actions against architects and builders. In *Hanna v. Fletcher*[12] the United States Court of Appeals for the District of Columbia Circuit, expressly relying on *MacPherson*,[13] abandoned the privity requirement in an action against a building contractor. Courts in other jurisdictions likewise have eliminated the privity and completed-and-accepted defenses in actions against architects, builders, and others involved in the construction process.[14]

Rejection of these traditional defenses exposed members of the construction industry to potential liability of indefinite duration. Actions could be brought against the architect and builder many years after construction of the project was completed and accepted, at a time when exculpatory evidence essential to the defense no longer was available. The passage of time also made it increasingly likely that damages allegedly attributable to defective design or construction were, in fact, caused by the owner's negligent maintenance of the premises.[15]

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departure from the liability of these parties under civil law. The Romans, following a tradition dating from the Babylonian civilization, imposed strict liability upon these parties. *See* W. PROSSER & P. KEETON, THE LAW OF TORTS, § 104 (4th ed. 1971); Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711 (1959); Brown, *Building Contractors' Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1976); Collins, *supra* note 6, at 41-42; Sisson & Kelly, *supra* note 6, at 243; Comment, *A Defense Catalog*, *supra* note 6, at 75; Note, *Improvements to Real Property*, *supra* note 6, at 43; Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO ST. L.J. 217 (1984) [hereinafter cited as *The Crumbling Tower of Architectural Immunity*]. *See also* J. ACRET, ARCHITECTS AND ENGINEERS, § 9.02 (2d ed. 1984); Annot. 97, A.L.R.3d 455 (1980); Annot. 59, A.L.R.3d 869 (1974).

9. *See generally* J. ACRET, *supra* note 8, at § 9.06. *See also* Hanna v. Fletcher, 231 F.2d 469, 472 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956).

10. *See generally* J. ACRET, *supra* note 8, at § 9.06; *see also* authorities cited *supra* note 8.

11. 217 N.Y. 382, 111 N.E. 1050 (1916). In *MacPherson*, the New York Court of Appeals abrogated the privity defense and allowed the ultimate user of an automobile to maintain a negligence action against the automobile manufacturer.

12. 231 F.2d 469, *cert. denied*, 351 U.S. 989 (1956).

13. *Id.* at 473.

14. *See, e.g.*, McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974); Totten v. Gruzen, 52 N.J. 202, 245 A.2d 1 (1968); Inman v. Binghamton Housing Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *See also* RESTATEMENT (SECOND) OF TORTS § 385 (1965) (contractor liable for physical harm resulting from dangerous condition of the structure under same rules as those applying to manufacturer of chattel). *See generally* J. ACRET, *supra* note 8, at §§ 9.04, 9.06.

15. *See, e.g.*, S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972).

It is against this backdrop that various state legislatures enacted architects' and builders' statutes of repose to establish an outer time limit beyond which architects, builders, and other members of the construction industry could not be held liable for design and construction defects. These statutes differ in various respects, including the time within which actions must be commenced,[16] the persons protected,[17] the types of actions barred,[18] and the grace period allowed for causes of action accruing near the expiration of the

16. *See, e.g.*, ALA. CODE § 6-5-218 (1975) (seven years); ALASKA STAT. § 09.10.055 (1983) (six years); ARK. STAT. ANN. § 37-237 (Supp. 1983) (five years); GA. CODE ANN. §§ 3-1007 (1982) (eight years); ILL. ANN. STAT. ch. 110, § 13-214 (Smith-Hurd Supp. 1984) (twelve years); IND. CODE ANN. § 34-4-20-2 (Burns Supp. 1984) (ten years); KY. REV. STAT. ANN. § 413.135 (Baldwin 1979) (five years); MINN. STAT. ANN. § 541.051 (West Supp. 1984) (fifteen years); TENN. CODE ANN. §§ 28-3-201 to 28-3-203 (1980) (four years).

17. Unlike § 12-310, the majority of analogous statutes in other jurisdictions provide that no action may be brought against a specified group of defendants, usually those engaged in the design and construction of improvements. The Alaska architects' and builders' statute of repose offers a typical illustration: "No action . . . may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement." ALASKA STAT. § 09.10.055 (1983). Other states have outlined the class of protected persons in a similar manner. *See, e.g.*, ARK. STAT. ANN. § 37-237 (Supp. 1983); CONN. GEN. STAT. ANN. § 52-584(a) (West Supp. 1984); DEL. CODE ANN. tit. 10, § 8127 (1974); KY. REV. STAT. ANN. § 413.135 (Baldwin 1979).

Some states go further and delineate those persons who may raise the defense provided by the statute. Colorado takes this approach:

> All actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than ten years after the substantial completion of the improvement to the real property . . . .

COLO. REV. STAT. § 13-80-127(1)(a) (Supp. 1981). *See also* CONN. GEN. STAT. ANN. § 52-584(a) (West Supp. 1984) (applies to actions against architects and professional engineers); ME. REV. STAT. ANN. tit. 14, § 752-A (1964) (applies to actions against architects and engineers duly licensed or registered); MD. CTS. & JUD. PROC. CODE ANN. § 5-108(b) (1984) (applies to actions against architect, professional engineer or contractor).

Most statutes do not address whether manufacturers and other persons in the product's distributive chain may avail themselves of the protection afforded by the statute. Of the few statutes that do specify whether manufacturers are among the statutory beneficiaries, the treatment of the manufacturer is divided. *Compare* HAWAII REV. STAT § 657-8 (1984 Supp.) (manufacturers of products included within the designated class of beneficiaries); MINN. STAT. ANN. § 541.051 (West Supp. 1984) (same); R.I. GEN. LAWS § 9-1-29 (Supp. 1982) (same); WYO. STAT. § 1-3-111 (Supp. 1984) (same) *with* VA. CODE § 8.01-250 (1984) (manufacturers and suppliers excluded). Most statutes also exempt actions against owners of the realty from the statute's operation. *But see* HAWAII REV. STAT. § 657-8 (Supp. 1982); MINN. STAT. ANN. § 541.051 (West Supp. 1984).

18. *See, e.g.*, ALASKA STAT. § 09.10.055 (1983) (no action in contract, tort, or otherwise may be brought after statutory time period); CONN. GEN. STAT. ANN. § 52-584(a) (West Supp. 1984) (same); MASS. ANN. LAWS ch. 260 § 2B (West Supp. 1985) (applies only to tort claims); NEB. REV. STAT. § 25-223 (1979) (applies only to warranty claims).

time limit established by the statute.[19]

Section 12-310 applies to actions for personal injury, injury to real or personal property, and wrongful death resulting from a defective or unsafe condition of an improvement to real property. The statute bars all such actions unless the injury or death occurs within ten years from the date the improvement was "substantially completed."[20] Substantial completion is deemed to occur when the improvement to real property is first used or when it is first available for use upon completion according to the contract or agreement covering the improvement, whichever occurs first.[21] The statute also precludes any action for contribution or indemnity that is brought as a result of any injury or death not occurring within this ten-year period.[22]

Section 12-310 is inapplicable in two specified situations. First, actions based on an express or implied contract are exempt from the statute's operation.[23] Second, section 12-310 is inapplicable in any action against the owner or person in actual possession of the real property at the time the

19. For example, the Montana statute provides that no action may be commenced more than ten years after completion of the improvement. Nonetheless, the statute provides an additional year to bring suit for an injury occurring during the tenth year: "Notwithstanding the provisions of subsection (1), an action for such damages for an injury which occurred during the 10th year after such completion may be commenced within 1 year after the occurrence of such injury." MONT. REV. CODES ANN. § 27-2-208(2) (1983). Most architects' and builders' statutes of repose contain similar grace provisions. *See, e.g.*, ALASKA STAT. § 09.10.055(b) (1983) (two years); ARK. STAT. ANN. § 37-239 (Supp. 1983) (one year); COLO. REV. STAT. § 13-80-127 (Supp. 1981) (two years); CONN. GEN. STAT. ANN. § 52-584(a)(b) (West Supp. 1984) (one year); KY. STAT. ANN. § 413.135(2) (Baldwin 1979) (one year); MINN. STAT. ANN. § 541.051 (West Supp. 1984) (two years); MONT. REV. CODES ANN. § 27-2-208 (1983) (one year); N.D. CENT. CODE § 28-01-44(2) (1974) (two years). The District of Columbia statute contains no such grace period. *See* D.C. CODE ANN. § 12-310 (1981 & Supp. 1985). The absence of such a provision may expose the statute to constitutional attack. *See infra* text accompanying notes 202-07.

20. D.C. CODE ANN. § 12-310(a)(1)(B) (1981 & Supp. 1985).

21. *Id.*

22. *Id.*

23. D.C. CODE ANN. § 12-310(b)(1) (1981 & Supp. 1985). Several analogous statutes from other jurisdictions do not have a "contract" exception, but bar all causes of action both in tort and contract. *See, e.g.*, CONN. STAT. ANN. § 52-584(a) (West Supp. 1984). Thus, for example, pursuant to the contract exemption contained in the District of Columbia statute, an owner's claim against the builder premised upon the builder's breach of contract is not subject to the 10 year bar. *See, e.g.*, Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984) (Ohio statute only applies to tort claims; owner's claim against architect and builder for breach of contract not within statute); Duncan v. Schuster-Graham, 194 Colo. 441, 578 P.2d 637 (1978) (Colorado statute did not apply to owner's contract claim against builder of house). *But see* Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984) (interpreting Ohio law) (distinguishing *Duncan*, Ohio statute bars suits seeking any type of damages). The continuing precedential validity of *Hartford Fire* is subject to question in view of the Ohio appellate court's decision in *Elizabeth Gamble*.

improvement caused the injury or death.[24]

One troublesome question surrounding section 12-310 is the relationship between the ten-year period set forth in the statute and the normal statute of limitations governing a plaintiff's cause of action. Most analogous statutes of repose enacted in other jurisdictions provide that a cause of action must be "brought" or "commenced" within a specified period of time after completion of the improvement if the action is to be deemed timely.[25] The usual statute of limitations governing a cause of action operates within this outer time limit, but does not extend the time to file suit beyond the period set forth in the statute of repose. Thus, for example, in a jurisdiction having a three-year tort statute of limitations as well as an architects' and builders' statute of repose requiring all actions to be commenced within ten years after completion of the improvement, a person injured in the sixth year after completion is subject to the normal statute of limitations and has three years to file suit. On the other hand, a person injured on the 364th day of the ninth year following completion of the improvement has only one day within which to commence an action.[26]

Unlike statutes in other jurisdictions, section 12-310 does not specifically provide that actions within the statute's scope actually must be commenced within the ten-year period set forth in the statute. Nor does section 12-310 set forth its relationship with the various District of Columbia statutes of limitation. Rather, the focal point of section 12-310 is the relationship between the date of injury or death and substantial completion of the improvement. The statute provides that certain specified actions are barred unless the injury or death forming the basis of the action occurs within ten years of substantial completion of the improvement. The statute does not state, however, that all actions must be commenced within this ten-year period if the injury or death occurs within this time frame.

Although the language of section 12-310 leaves in doubt whether a party

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24. D.C. CODE ANN. § 12-310(b)(2) (1981 & Supp. 1985).

25. *See, e.g.*, ARK. STAT. ANN. §§ 37-237 (Supp. 1983); COLO. REV. STAT. § 13-80-127 (Supp. 1981); CONN. GEN. STAT. ANN. § 52-584(a) (West Supp. 1984); IND. CODE ANN. § 34-4-20-2 (Burns Supp. 1984); ME. REV. STAT. ANN. tit. 14, § 752-A (1964); MO. ANN. STAT. § 516.097 (Vernon Supp. 1984); MONT. REV. CODES ANN. § 27-2-208 (1983). Many statutes also provide that the time period established by the statute does not extend the specific statute of limitations applicable to the claim. *See, e.g.*, ALASKA STAT. § 09.10.055(c) (1983); CONN. GEN. STAT. ANN. § 52-584a(d) (West Supp. 1984); GA. CODE ANN. § 9-3-53 (1982); KY. REV. STAT. ANN. § 413.135(3) (Baldwin 1979). The Idaho statute is typical in this regard: "Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action." *See* IDAHO CODE § 5-241 (1979).

26. Several jurisdictions have ameliorated this harsh result by providing a "grace period" during which a person may bring an action for injury or death occurring near the expiration of the time period established by the statute of repose. *See supra* note 19 and accompanying text.

actually must commence an action within the ten-year period established by the statute, the legislative history of the statute answers this question in the affirmative. The Senate Report specifically states that an action within the purview of the statute must be commenced within ten years of substantial completion of the improvement: "Thus, actions for damages, contribution or indemnity against design professionals must be brought within 10 years from the date the improvement to real property was substantially completed. Actions not commenced within the 10 year period are completely barred from being brought."[27]

The effect of section 12-310 is to completely extinguish a party's cause of action ten years after substantial completion of the improvement. The normal statute of limitations operates within this ten-year period, but does not allow a person to bring suit beyond the time limit established by section 12-310.[28]

The one reported decision discussing the application of section 12-310, *President and Directors of Georgetown College v. Madden*,[29] examines several issues raised by the statute, including the relationship of section 12-310 to the statutes of limitation normally governing a plaintiff's cause of action. In *President and Directors*, the plaintiff instituted a diversity action against the architects, structural engineers, general contractors, masonry subcontractors, and surety involved in the construction of a Georgetown University dormitory. The dormitory first was used in 1964, and plaintiff filed the lawsuit in 1977. Plaintiff alleged, *inter alia*, that the architects negligently planned and supervised the construction of the building. In addition, plaintiff asserted sundry tort and contract claims against the various defendants.

Several of the defendants, including the architects, engineers, and general contractor, moved for summary judgment on the basis that plaintiff's action was barred by section 12-310. The court held section 12-310 precluded plaintiff's tort claims.[30] Further, while plaintiff's contract claims against

27. S. REP. NO. 1274, 92d Cong., 2d Sess. 1 (1972). *See also* 118 CONG. REC. 36,939 (1972).

28. Several courts have interpreted their respective state's statutes of repose in this manner. *See, e.g.*, Grissom v. North Am. Aviation, Inc., 326 F. Supp. 465 (M.D. Fla. 1971) (interpreting Florida law); Federal Reserve Bank v. Wright, 392 F. Supp. 1126 (E.D. Va. 1975) (interpreting Virginia law); O'Connor v. Altus, 67 N.J. 106, 335 A.2d 545 (1975); Smith v. American Radiator & Standard Sanitary Corp., 38 N.C. App. 457, 248 S.E.2d 462, *cert. denied*, 296 N.C. 586, 254 S.E.2d 33 (1978), *rev'd on other grounds*, Love v. Moore, 205 N.C. 575, 291 S.E.2d 141 (1982); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); Comptroller of Va. *ex rel.* Virginia Military Inst. v. King, 217 Va. 751, 232 S.E.2d 895 (1977). *See also* Note, *Improvements to Real Property*, *supra* note 6, at 55.

29. 505 F. Supp 575, *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981).

30. *Id.* at 575.

the general contractor were within the exception of section 12-310(b)(1), they nonetheless were time-barred by application of the normal District of Columbia statute of limitations pertaining to these claims.[31]

In reaching its conclusions, the court in *President and Directors* addresses several difficult issues. In an effort to avoid the preclusive effect of section 12-310, plaintiff attempted to invoke the "discovery rule" by characterizing its action as based on "professional malpractice."[32] Since the injury was not discovered until September 1976, plaintiff argued, the running of the limitations period was tolled until this time.[33] The court rejected this argument, noting that plaintiff's interpretation would render the statute a nullity.[34]

Although the court properly refused application of the discovery rule to toll the operation of section 12-310, the court's analysis of the relationship between section 12-310 and District of Columbia statutes of limitations is less satisfactory. Relying on the legislative history accompanying a 1967 version of the statute,[35] as well as the analogous Maryland statute of re-

31. *Id.* at 581.

32. *Id.* at 575.

33. *Id.*

34. The answer, however, is that if the mere incorporation of a defect constitutes an injury for which plaintiff need not claim within the time limits of section 12-310, even though the resulting damage is not discovered until many years after the ten-year period in section 12-310 has run, then the whole purpose of section 12-310 and similar statutes—to provide builders and design professionals with a finite period of risk for any one project—would be vitiated.

President & Directors, 505 F. Supp. at 575-76. *See also* Hudesman v. Meriwether Leachman Assocs., 35 Wash. App. 318, 666 P.2d 937 (1983) (Washington statute of repose for architects and builders restricts application of discovery rule); Hooper Water Improvement Dist. v. Reeve, 642 P.2d 745 (Utah 1982) (discovery rule inapplicable).

35. *President & Directors*, 505 F. Supp. at 572-73. In 1967, Congress considered a bill, H.R. 6527, nearly identical to § 12-310 with the exception that this earlier bill established a 5-year rather than a 10-year period in which the injury or death must occur if an action was to be considered timely. H.R. 6527, 90th Cong., 1st Sess., 113 CONG. REC. 28,157 (1967). This proposed legislation passed the House of Representatives, but did not receive Senate approval. *See* 113 CONG. REC. 28,157 (1967). An identical bill, H.R. 4181, was reintroduced in the House of Representatives during the 91st Congress. H.R. 4181, 91st Cong., 1st Sess., 115 CONG. REC. 19,332 (1969). *See also* H.R. REP. NO. 370, 91st Cong., 1st Sess. 1 (1969). Again, the bill passed the House, but not the Senate. *See* 115 CONG. REC. 19,333 (1969).

The legislative history of H.R. 6527, cited by the court in *President and Directors*, suggested that the bill would have no effect on the normal statute of limitations governing a plaintiff's cause of action:

> The effect of this amendment is that if a cause of action accrues at any time up to and including the last day of the 5 year period from the date the improvement was substantially completed [10 years in the later version § 12-310], an action in damages for injury to real or personal property could be filed within 3 years (D.C. Code, sec. 12-301(3)); in the case of personal injury an action could be filed within 3 years (D.C. Code, sec. 12-301(8)); and in the case of wrongful death, an action could be filed within 1 year (D.C. Code, sec. 16-2702).

pose,[36] the court observed that section 12-310 does not abrogate the normal statute of limitations governing a plaintiff's cause of action.[37] Rather, if an injury or death occurs within the ten-year period set forth in section 12-310, an action must be commenced within the normal limitation period relating to plaintiff's claim. A person injured in the ninth year following substantial completion of the improvement, for example, would have three additional years to institute an action under the normal District of Columbia statute of limitations, even though the effect of this interpretation is to extend the ten-year period contained in section 12-310.[38]

The court's holding concerning the interaction of section 12-310 and the District of Columbia statutes of limitations is correct insofar as it concerns claims arising at a time when the normal statute of limitations governing the claim does not operate to extend the time to file suit beyond the period established by section 12-310. For example, a person whose tort action accrues during the fifth year following substantial completion has three years to file an action.[39] Where the court errs, however, is in concluding that the normal statute of limitations may allow a party to file suit outside the ten-year period specified in section 12-310. This result is contrary to the legislative history accompanying section 12-310. Regardless of what the proponents of the 1967 version of the statute intended, the drafters of the 1972 statute clearly contemplated that an action within the ambit of section 12-310 be commenced within the ten-year period specified in the statute.[40] The isolated comments of a proponent of an earlier version of section 12-310 do not support the conclusion that the District of Columbia statute of limitations may extend the time period embodied in section 12-310.[41] Nor does the

113 CONG. REC. 28,158 (1967). Thus, according to the interpretation of the drafters of the 1967 version of § 12-310, the claim of a person who suffered an injury on the last day of the ninth anniversary following substantial completion of the improvement, would be governed by the normal statute of limitations. In effect, this person could file suit after the 10 year period set forth in § 12-310 expired.

36. MD. CTS. & JUD. PROC. CODE ANN. 5-108 (1984).

37. *President & Directors*, 505 F. Supp. at 572-73. "Under Maryland or District of Columbia law, if a cause of action arises on the 364th day of the ninth year, the injured party still has the normal three year limitations period in which to file suit." *Id.* at 575.

38. *Id.*

39. The District of Columbia has a three-year statute of limitations for personal injury. *See* D.C. CODE ANN. § 12-301(3) (1981 & Supp. 1985). A one-year statute of limitations applies to wrongful death actions. *See* D.C. CODE ANN. § 16-2702 (1981 & Supp. 1985).

40. *See supra* note 27 and accompanying text.

41. The court in *President & Directors* relies on the fact that the 1967 legislative history was cited to during the passage of § 12-310. *President & Directors*, 505 F. Supp. at 472 n.26. Yet it seems unlikely this bare reference can override the legislative history of the 1972 statute which unambiguously indicates that all actions must be brought within 10 years of substantial completion if they are to be deemed timely. *See supra* note 27 and accompanying text.

analogous Maryland statute lend support to the court's conclusion.[42] The interpretation of section 12-310 most consistent with the legislative history and purpose of the statute requires that all actions subject to the statute must be instituted within ten years of substantial completion of the improvement.[43]

II. WHAT CONSTITUTES AN IMPROVEMENT TO REAL PROPERTY

A necessary prerequisite to the application of section 12-310 is a determination that a party's damages are attributable to an "improvement to real property." This phrase is not defined in the statute;[44] rather, construction of this operative language is left for judicial interpretation.[45]

Interpreting similar statutory language, courts from other jurisdictions

42. The Maryland statute provides that a cause of action against an architect and professional engineer does not "accrue" if the injury or death forming the basis of the action occurs more than 10 years after the improvement first becomes available for its intended use. *See* MD. CTS. & JUD. PROC. CODE ANN. § 5-108(b) (1984). In 1979, the Maryland statute was amended to include a provision requiring an action to be filed within three years after accrual. *See* MD. CTS. & JUD. PROC. CODE ANN. § 5-108(c) (1984). Thus, so long as the cause of action accrues within the 10-year time period established by the Maryland statute, an action may be filed within three years thereafter even though this may allow an action to be filed after the expiration of the 10-year accrual period. This is in stark contrast to the Senate Report accompanying § 12-310, which specifically states that the statute requires all actions within its ambit, must be commenced within 10 years of substantial completion of the improvement. *See supra* note 27 and accompanying text. Even prior to the 1979 amendment, the legislative history of the Maryland statute strongly suggested that the normal statute of limitations applied to actions subject to the architects' and builders' statute of repose. *See President & Directors*, 505 F. Supp. at 571.

43. Recently, the District of Columbia Court of Appeals held the discovery rule applicable to a tort and contract action alleging the deficient design and construction of an addition to a house. *See* Ehrenhaft v. Malcolm Prue, Inc., 483 A.2d 1192 (D.C. 1984). The facts of *Ehrenhaft*, however, did not implicate § 12-310; only five years had elapsed between the completion of the addition and commencement of the suit. *Id.* at 1194-95. Moreover, the court specifically declined to address "[w]hat impact, if any, D.C. CODE § 12-310 (1981 & Supp. 1985) may have upon a suit alleging claims in both tort and contract." *Id.* at 1201 n.14.

44. The District of Columbia statute is not alone in this regard. Only one state has statutorily defined "improvement" to real property for purposes of its architects' and builders' statute of repose. *See* DEL. CODE ANN. tit. 10, § 8127 (1974).

45. Structural improvements to the realty, such as a building, are obviously within the ambit of the statute, as demonstrated by both the legislative history of § 12-310, *see, e.g.*, S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972), and the statutory language. Section 12-310(a)(2)(b) defines one of the two circumstances constituting substantial completion as the time when the improvement is "[c]ompleted in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement," clearly contemplating the completion of structural improvements to the realty. But improvements subject to the statute are not limited to buildings or structural improvements. In discussing the various beneficiaries of the statute, the legislative history speaks of "architects who design buildings *or* improvements to real property, [and] engineers *who design and install equipment* . . ." S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972) (emphasis added). Thus,

have adopted two somewhat overlapping tests to determine whether a particular object qualifies as an improvement. A small minority of courts have relied upon common law fixture analysis.[46] Pursuant to this approach, an object that qualifies as a fixture also is deemed to be an improvement to real property subject to the architects' and builders' statute of repose.

The overwhelming majority of courts, however, have eschewed a rigid fixture analysis and have applied a "common sense" or "common usage" test.[47] The relevant inquiry in this test centers upon whether the object is an "improvement" pursuant to the common usage or literal meaning of that term. Courts often cite dictionary definitions of "improvement" to support their determinations of whether the object in issue qualifies as such.[48]

Improvements within the meaning of statutes of repose such as section 12-310 have not been limited to buildings constructed on real property, but include items that make the real property more useful or valuable, or form an integral part of the overall structure. Thus, a sprinkler system,[49] swimming pool,[50] furnace,[51] refrigeration system,[52] street pavement,[53] electrical

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improvements within the parameters of § 12-310 are not limited to buildings or even structural improvements, but include other items such as "equipment" located on the realty.

46. *See* Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350 (E.D. Va. 1971), *aff'd per curiam*, Civil No. 71-1952 (4th Cir. Mar. 8, 1972) (unpublished).

47. *See, e.g.*, Adair v. Koppers Co., 541 F. Supp. 1120 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984); Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212 (D. Colo. 1981); McClanahan v. American Gilsonite Co. 494 F. Supp. 1334 (D. Colo. 1980); Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579 (1982); Allentown Plaza Assocs. v. Suburban Propane Gas Corp., 43 Md. App. 337, 405 A.2d 326 (1979); Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 461 N.E.2d 808 (1984) (not expressly adopting test but employing dictionary definition of "improvement"); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'g Co., 93 N.M. 175, 598 P.2d 218 (1979); Jones v. Ohio Bldg. Co., 4 Ohio Misc. 2d 10, 447 N.E.2d 776 (1982); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

48. A typical definition of an "improvement" is cited in Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975). There, the court held that an interior sprinkler system in a building was an "improvement to real property" pursuant to the Wisconsin statute precluding actions against architects, engineers, and designers. In reaching this conclusion, the court referred to the definition appearing in WEBSTER'S INTERNATIONAL DICTIONARY (3d ed.): "[A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." 66 Wis. 2d at 386, 225 N.W.2d at 456-57. Decisions from other courts have cited *Kallas* with approval and have employed the same or similar definitions of "improvement." *See, e.g.*, Adair v. Kroppers Co., 741 F.2d 111 (6th Cir. 1984); McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980); Allentown Plaza Assocs. v. Suburban Propane Gas Corp., 43 Md. App. 337, 405 A.2d 326 (1979); Jones v. Ohio Bldg. Co., 4 Ohio Misc. 2d 10, 447 N.E.2d 776 (1982).

49. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

50. Nevada Lakeshore Co. v. Diamond Elec., Inc., 89 Nev. 293, 511 P.2d 113 (1973).

51. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977).

transfer switch cabinet,[54] coal handling conveyor system,[55] oil refinery equipment,[56] and an underground pipe[57] have been held to be improvements to real property.[58]

Although the benchmark of the common sense approach is the literal

52. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972) (en banc). *See* Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212 (D. Colo. 1981).

53. Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

54. Brown v. Jersey Cent. Power & Light Co., 163 N.J. Super. 179, 394 A.2d 397 (1978), *cert. denied*, 79 N.J. 489, 401 A.2d 244 (1979).

55. Adair v. Koppers Co., 541 F. Supp. 1120 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984).

56. McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980)

57. Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983).

58. Other objects have been found to constitute improvements subject to architects' and builders' statutes of repose. *See, e.g.*, Cournoyer v. Mass. Bay Transp. Auth., 744 F.2d 208 (1st Cir. 1984) (prefabricated steel building); *In re* Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) (electrical wiring); Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740 (D.R.I. 1983) (electrical transmission line); KSLA-TV, Inc., Radio Corp. of America, 591 F. Supp. 891 (W.D. La. 1980), *aff'd in pertinent part*, 693 F.2d 544 (5th Cir. 1982) (television transmission tower); Kozikowski v. Delaware River Port Auth., 397 F. Supp. 1115 (D.N.J. 1975) (bridge); Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350 (E.D. Va. 1971), *aff'd per curiam*, Civil No. 71-1952 (4th Cir. Mar. 8, 1972) (unpublished) (machine affixed to concrete foundation); Stanske v. Wazee Elec. Co., 690 P.2d 1291 (1982) (indicator light that was part of the electrical system); Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579 (1982) (electrical system); Milligan v. Tibbetts Eng'g Corp., 391 Mass. 364, 461 N.E.2d 808 (1984) (road); O'Brien v. Hazelet & Erdal Consulting Eng'g, 410 Mich. 1, 299 N.W.2d 336 (1980) (highway); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981) (glass door); Wayne Township Bd. of Educ. v. Strand Century, Inc., 172 N.J. Super. 296, 411 A.2d 1161 (1980) (dimmer panel); Commonwealth Land Title Ins. Co. v. Topping, 167 N.J. Super. 392, 400 A.2d 1208, *cert. denied*, 81 N.J. 285, 405 A.2d 830 (1979) (land surveys); Richards v. Union Bldg. & Constr. Corp., 130 N.J. Super. 127, 325 A.2d 831 (1974) (road); Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982) (road); Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'g Co., 93 N.M. 175, 598 P.2d 218 (1979) (power line); Jones v. Ohio Bldg. Co., 4 Ohio Misc. 2d 10, 447 N.E.2d 776 (1982) (elevator); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978) (freezer insulation material); Mitchell v. United Elevator Co., 290 Pa. Super. 476, 434 A.2d 1243 (1981) (elevator); Keeler v. Commonwealth, 56 Pa. Commw. 236, 424 A.2d 614 (1981) (highway guardrails, lights, signs, and directional signals); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex Civ. App. 1981) (*writ ref'd n.r.e*), *appeal dismissed*, 459 U.S. 802, *reh'g denied*, 459 U.S. 1059 (1982) (elevator); Highsmith v. J.C. Penney & Co., 39 Wash. App. 57, 691 P.2d 976 (1984) (escalator); Washington Natural Gas Co. v. Tyee Constr. Co., 26 Wash. App. 235, 611 P.2d 1378 (1980) (power lines); Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 545 P.2d 1207 (1976) (ski lift).

Other objects have been held not to constitute improvements. *See, e.g.*, Patraka v. Armco Steel Co., 495 F. Supp. 1013 (MD. Pa. 1980) (subbase of highway); Ciancio v. Serafini, 40 Colo. App. 168, 574 P.2d 876 (1977) (survey); Atlanta Gas Light Co. v. City of Atlanta, 160 Ga. App. 396, 287 S.E.2d 229 (1981) (underground gas line); Turner v. Marable-Pirkle, Inc., 238 Ga. 517, 233 S.E.2d 773, *appeal dismissed*, 434 U.S. 808 (1977) (electric utility pole); Allentown Plaza Assocs. v. Suburban Propane Gas Corp., 43 Md. App. 337, 405 A.2d 326 (1979) (gas meters and coupling device); Raffel v. Perley, 14 Mass. App. 252, 437 N.E.2d 1082

meaning of the term "improvement," vestiges of common law fixture analysis also may influence the court's analysis. Courts ostensibly applying the common sense approach nonetheless have cited traditional fixture considerations, such as the degree of annexation and physical size of the object, to buttress their conclusions.[59] Yet considerations relevant to the law of fixtures rightfully have been cited as merely probative, and not dispositive, of whether a particular object constitutes an improvement.[60]

A test based upon the vagaries of the law of fixtures has dubious value and unnecessarily requires a court to engage in almost metaphysical inquiries concerning the degree of annexation and intent of the annexor. Freed from the constraints imposed by the law of fixtures, the common sense approach provides a flexible analytical framework that can accommodate the facts of a particular situation. The flexibility offered by the common sense test, however, is also the test's principal weakness because added flexibility inevitably leads to decreased predictive value. It is possible, and perhaps probable, that different courts considering similar fact patterns and using the common sense test may reach opposite conclusions concerning whether a particular object is an improvement to real property.[61] Nevertheless, this lack of predictive value is equally apparent to common law fixture analysis and provides little basis to wed courts to complex and confusing fixture considerations. Writing on a clean slate as they are, District of Columbia courts should adopt the common sense test in distinguishing an "improvement to real property" under section 12-310.[62]

(1982) (survey); E.A. Williams, Inc. v. Russo Dev., 82 N.J. 160, 411 A.2d 697 (1980) (survey); Ilich v. John E. Smith Sons Co., 145 N.J. Super. 415, 367 A.2d 1216 (1976) (machine wiring).

59. *See, e.g.*, McClanahan v. American Gilsonite Co., 494 F. Supp. 1334, 1341 (D. Colo. 1980); Allentown Plaza Assocs. v. Suburban Propane Gas Corp., 43 Md. App. at 345-47, 405 A.2d at 331-32; Brown v. Jersey Central Power & Light Co., 163 N.J. Super. 179, 192, 394 A.2d 397, 403 (1978), *cert. denied*, 79 N.J. 489, 401 A.2d 244 (1979).

60. *See, e.g.*, Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212, 1215 (D. Colo. 1981) ("case law regarding fixtures may be relevant by analogy"). *Accord* Adair v. Koppers Co., 541 F. Supp. 1120, 1125 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984). *See also* Jones v. Ohio Bldg. Co., 4 Ohio Misc. 2d 10, 447 N.E.2d 776 (1982) (all fixtures improvements but all improvements not necessarily fixtures); Keeler v. Commonwealth, 56 Pa. Commw. 236, 424 A.2d 614, 616 (1981) (same); Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 545 P.2d 1207 (1976) (not all "improvements" are necessarily fixtures; "improvement" has broader meaning than "fixtures").

61. *Compare* Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740 (D.R.I. 1983) (electrical transmission line an improvement) *with* Allentown Plaza Assocs. v. Suburban Propane Gas Corp., 43 Md. App. 337, 405 A.2d 326 (1979) (gas meters and coupling device not an improvement).

62. At least one other commentator also suggests that courts adopt a common-sense interpretation of "improvement to real property" because of the flexibility that approach affords. *See* Note, *Improvements to Real Property*, *supra* note 6, at 47.

III. POTENTIAL DEFENDANTS WITHIN THE PARAMETERS OF SECTION 12-310

The absence of a definition of "improvement to real property" is not the only omission of section 12-310 in its present form. Unlike similar statutes in other jurisdictions,[63] section 12-310 fails to specify the class of defendants who may assert the ten-year limitations period contained in the statute. On its face, section 12-310 precludes "any action" if the other prerequisites of the section are satisfied. Pursuant to a literal interpretation of section 12-310, manufacturers, suppliers and other potential defendants may argue persuasively that they fall within the ambit of the statute. Consequently, these potential defendants may raise the statute as a defense if they are sued in connection with defective or unsafe improvements to real property.

In describing the need for section 12-310, Congress emphasized the goal of protecting architects, engineers, contractors, and other members of the construction industry from potential claims made many years after an improvement was completed.[64] However, while the legislative history accompanying section 12-310 evidences an intention to protect these design professionals from the threat of indefinite liability, the language of section 12-310 contains no such limitation. Rather, the section is drafted in a manner that precludes any action after a specified time period; the class protected by the statute is nowhere expressed.[65]

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63. *See supra* note 17 and accompanying text.

64. Architects who design buildings or improvements to real property, engineers who design and install equipment, or contractors who build the improvements under rigid inspection and conformity with building codes, may find themselves named as defendants in such damage suits 20 years after the improvement was completed and occupied.

Moreover, architects, engineers, and contractors have no control over an owner whose neglect in maintaining an improvement may cause dangerous or unsafe conditions to develop over a period of years. They cannot prevent an owner from using an improvement for purposes for which it was not designed. Nor can they prevent the owner of a building from making alterations or changes that years later, may be determined unsafe or defective and appear to be a part of the original improvement. It cannot be doubted that to allow actions without regard to a reasonable time limitation imposes a difficult evidentiary burden on design professionals and their progenies. This proposed legislation strikes the balance between the rights of injured parties to seek recovery on the one hand, and the substantial interests of the design professionals to have work finality on the other.

S. REP. NO. 1274, 92 Cong., 2d Sess. 2 (1972).

65. The specific statutory language of § 12-310 precludes "any action" if the other requirements of the statute are satisfied. The statute expressly excludes from its operation only two classes of potential defendants—the owner of the realty and person in actual possession of the realty when the injury or death occurred. *See* D.C. CODE ANN. § 12-310(b)(2) (1981 & Supp. 1985). It cannot be argued that this language is in any manner ambiguous; the statute contains a blanket prohibition of "any action" against any defendant except those persons

Several courts have discussed the class of persons protected by statutes of

specifically identified in § 12-310(b)(2). *Cf.* Kalmbach, Inc. v. Insurance Co., 529 F.2d 552, 556 (9th Cir. 1976) (word "any" had comprehensive meaning of "all or every"). Thus, a court has no occasion to look to the legislative history to discern an intent not reflected in the plain language of the statute. *See, e.g.*, Dow Chemical Co. v. United States Enviromental Protection Agency, 635 F.2d 559, 561 (6th Cir. 1980) ("It is . . . a cardinal rule of statutory interpretation that courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments."). *See also* United States v. Young, 376 A.2d 809, 813 (D.C. 1977); United States v. Stokes, 365 A.2d 615, 618 (D.C. 1976). Of course, even if the legislative history is consulted, this history does not specifically state the statute is for the sole benefit of architects, engineers, and other classes specifically mentioned. The Senate Report indicates that "[d]esign professionals include, inter alia, architects, engineers, contractors, and builders." S. REP. NO. 1274, 92d Cong., 2d Sess. 1 (1972). *See also Hearings Before the Subcomm. on Business, Commerce, and Judiciary of the Comm. on the District of Columbia, United States Senate*, 92d Cong., 2d Sess. 7 (1972) (statement of Ted D. Kuemmerling, Office of the Corporation Counsel, District of Columbia) ("The effect of S. 1524 is to insulate from liability such persons as engineers, architects, designers, contractors, builders, and others . . . ."). The use of the phrase "inter alia" evinces an intent not to provide an exclusive list of protected parties, but to merely provide examples of included parties. *Cf.* Puerto Rico Maritime Shipping Auth. v. ICC, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) (word "including" is illustrative, not exclusive). In addition, merely because these classes are identified in the legislative history does not support an inference that actions against these persons are the only ones precluded by the statute. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 591 (1981) (one stated purpose of statute cannot be read negatively as sole purpose); Albernaz v. United States, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction which may arise."); United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973) ("[t]he plainer the language [of the statute], the more convincing contrary legislative history must be."). It is not a court's function to reject a claim because it believes the legislature meant something different than the statutory language specifies. *See, e.g.*, Sedima S.P.R.L. v. Imrex Co., 53 U.S.L.W. 5034, 5038 n.13 (U.S. June 25, 1985) ("Congress' 'inklings' [of statute's application] are best determined by the statutory language it chooses . . . . Congressional silence [in legislative history], no matter how 'clanging,' cannot override the words of the statute."); Harrison v. PPG Industries, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); Doski v. Goldseker Co., 539 F.2d 1326, 1332 (4th Cir. 1976) (citing United States v. Deluxe Cleaners & Laundry, Inc., 511 F.2d 926, 929 (4th Cir. 1975) (court may not construe a statute on the "[m]ere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated."). *See also* United States v. Young, 376 A.2d 809, 813 (D.C. 1977).

Finally, the express exclusion of owners and persons in possession of the realty in § 12-310(b)(2) supports the inference that all other persons are not excepted and may raise the time bar set forth in the statute. *See generally* 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1973) ("The enumeration of exclusions from the operation of the statute indicates that it should apply to all cases not specifically excluded."). Although this doctrine of *expressio unius est exclusio alterius* is subject to some limitations, it nonetheless remains one of the general rules of statutory construction. *Id. See also* Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); Sanker v. United States, 374 A.2d 304, 309 (D.C. 1977) ("Although the maxim *expressio unius est exclusio alterius* is a rule of construction which is to be applied with caution, it still is entitled to some weight.").

repose analogous to section 12-310. These courts have grappled with the difficult issue of whether persons not directly involved in the construction process, such as manufacturers of equipment incorporated into the realty, are afforded protection by these statutes of repose. The decisions rendered on this issue are divided. A majority of courts have narrowly construed the class of protected persons and have denied protection to manufacturers and other persons whose goods or services are only incidental to construction. Other courts, often guided by a more literal reading of the applicable statute, have allowed these more remote participants in the construction process to raise the statute as a defense.

In *Brown v. Jersey Central Power & Light Co.*,[66] one of a series of New Jersey decisions outlining the beneficiaries of that state's architects' and builders' statute of repose,[67] an action was brought against several defendants, including a defense contractor who allegedly participated in the design and construction of a missile facility where the plaintiff was burned severely. Plaintiff claimed that his injury was attributable to the improper design and location of a free-standing, metal, electrical transfer switch assembly cabinet that housed various electrical components.

The court answered the initial question of whether the cabinet was an improvement to real property in the affirmative. The cabinet was eight feet high, ten feet long, three to four feet deep, and was anchor-bolted to the floor.[68] In addition to its physical size, the cabinet formed an integral part of the electrical system designed to provide all the power needs of the missile base where the cabinet was located.[69]

Turning its attention to the class of persons covered by the New Jersey statute, the court concluded that the defense contractor was within the protected class. Furthermore, the court generally outlined those parties who may raise the defense provided by the statute as follows:

> The legislative intent in adopting [the New Jersey statute] . . . quite obviously was not to limit the exposure of manufacturers and purveyors of products which are used in the factory, shop or home,

66. 163 N.J. Super. 179, 394 A.2d 397 (1978), *cert. denied*, 79 N.J. 489, 401 A.2d 244 (1979).

67. An earlier New Jersey decision, Rosenberg v. North Bergen, 61 N.J. 190, 293 A.2d 662 (1972), held that the class of beneficiaries of that state's statute might extend beyond architects and engineers, but did not specify the parties who could raise the limitations period provided by the statute. 293 A.2d at 668. Prior to *Brown*, the courts of Montana and New Mexico also refused to interpret their respective state statutes to include manufacturers. *See* Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

68. 394 A.2d at 403.

69. *Id.* at 405.

> or those who service these products. As best we can perceive, the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate and those systems, ordinarily mechanical systems, such as heating, electrical, plumbing and air conditioning, which are integrally a normal part of that kind of improvement, and which are required for the structure to actually function as intended.[70]

The precise meaning of *Brown* is unclear. The court expressly states that manufacturers of products used in the "factory, shop, or home" are not the intended beneficiaries of the statute. Nevertheless, the court found that a different result is required for those who "design" various systems necessary to the normal function of structural improvements. Unfortunately, the court did not indicate whether the manufacturers of these integral systems are "designers" subject to coverage under the statute.[71]

The dichotomy first suggested in *Brown* is reiterated in subsequent New Jersey decisions. In *Wayne Township Board of Education v. Strand Century, Inc.*,[72] the plaintiff brought suit against the owner of a subsidiary company that allegedly participated in the design and manufacture of a defective dimmer panel used in a school auditorium. The court observed that those engaged in the design and manufacture of stock or shelf items incorporated into the structure were not the intended beneficiaries of the New Jersey statute. Those engaged in the design of integral components, however, were within the statute's parameters:

> If, however, [defendant] merely sold a stock or shelf item out of its regular inventory or fabricated a product as designed and specified by the electrical engineer or the electrical contractor for this project it was not within the repose of [the New Jersey statute]. We are satisfied that the Legislature did not intend [the New Jersey statute] to extend repose to the designers and manufacturers of all products or suppliers of materials which ultimately found their way into improvements to real estate. Implication in the design and planning stage of the improvement to realty itself or of [sic] integral component thereof, not mere design of a fungible product

70. *Id.*

71. Part of the confusion inherent in *Brown* stems from the litigants' failure to clearly describe the precise role of the defense contractor seeking to invoke the statute. *Id.* at 402. The defense contractor's alleged negligence was apparently two-fold. First, the contractor was charged with "[t]he installation of the improperly placed ventilating window in the exterior wall" of the building that contained the electrical transfer switch assembly. *Id.* at 401. Second, the contractor also allegedly participated in the "design, planning, supervision, or construction of the components . . . ." *Id.* at 403.

72. 172 N.J. Super. 296, 411 A.2d 1161 (1980).

> or fabrication of a product from specifications which product is later incorporated in the building, is required.[73]

While drawing a distinction between those who manufacture fungible products and those who manufacture integral components of a structure, *Wayne Township*, like *Brown*, does not specify whether the manufacturers of these integral components are necessarily persons engaged in the "design" of an improvement to real property within the New Jersey statute. In fact, the court suggests to the contrary when it observes that "[p]roduct design alone is not enough to trigger the applicability"[74] of the statute.

More recently, another New Jersey court has relied upon *Brown* and *Wayne Township* in denying relief to a manufacturer under that state's statute of repose. In *Cinnaminson Township Board of Education v. U.S. Gypsum Co.*,[75] the manufacturer of acoustical plaster containing asbestos argued that plaintiff's cause of action was time-barred because the suit was brought more than ten years after construction of the schools where the acoustical tile was installed. The court rejected this argument because the defendant played no role "in the design, planning, supervision or construction of the plaintiff's schools" or in "the actual installation of the acoustical plaster."[76] Further, the tile was found to be mere "stock material" that only "incidentally found its way into plaintiff's schools."[77] Accordingly, under *Brown* and *Wayne Township*, the statute of repose was held inapplicable.

New Jersey is not the only state that has narrowly interpreted a manufacturer's ability to invoke the limitation period embodied in architects' and builders' statutes of repose. In *Condit v. Lewis Refrigeration Co.*,[78] the Washington Supreme Court considered whether a defendant, who "designed, manufactured and installed"[79] a freezer system that caused plaintiff's personal injury, could raise the Washington statute of repose. The defendant claimed that plaintiff's cause of action was time-barred because the injury occurred after the time limit established by the statute. Relying on *Brown* and on the specific language of the Washington statute, the court held the defendant-manufacturer could not assert the time limitation contained in the statute as a defense. To rule otherwise, the court observed, would allow the manufacturer to circumvent products liability law:

> Furthermore, if these individuals were protected, they could easily

73. 411 A.2d at 1164 (footnote omitted).
74. *Id.*
75. 552 F. Supp. 855 (D.N.J. 1982).
76. *Id.* at 863.
77. *Id.*
78. 101 Wash. 2d 106, 676 P.2d 466 (1984) (en banc).
79. 676 P.2d at 467.

> avoid product liability law, if they desired, by simply bolting, welding the equipment or fastening it in some other manner to the building. Mechanical fastening may attach a machine to the building, but they do not convert production equipment into realty or integrate machines into the building structure, for they are not necessary for the building to function as a building.[80]

Similarly, in *Sevilla v. Stearns-Roger, Inc.*,[81] the plaintiff was injured while repairing a large "pan" that his employer used to refine sugar. The defendants, who designed and manufactured the pan allegedly causing plaintiff's injury, argued that California's statute of repose barred plaintiff's claim. The court concluded that the defendants were not within the class of beneficiaries protected by the California statute. Like the Washington court in *Condit*, the court was troubled by the implications of allowing manufacturers to invoke this statute of repose:

> Defendants assert this limitation should be invoked to cut off [plaintiff's] action because their 'pan' was ultimately installed in a sugar refinery. By this simple fact, defendants claim, a 'product' was transformed to an 'improvement of real property.' The effect of such a transformation would severely limit the development of products liability law and bestow this statutory protection on manufacturers of allegedly defective products.[82]

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80. *Id.* at 468-69.

81. 101 Cal. App. 3d 608, 161 Cal. Rptr. 700 (1980).

82. *Id.* at 611, 161 Cal. Rptr. at 702. Other courts also have refused to extend protection under their respective state statutes to manufacturers and suppliers. *See* Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507 (1983) (though Georgia statute did not apply to "mere" manufacturer, manufacturer who participated in the design of doors installed in building was within statute); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976) (manufacturer of whirlpool machine installed in university field house not within statute of repose); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, 223, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977) (to the extent defendant was sued as manufacturer of glass incorporated in building, statute of repose inapplicable; to the extent same defendant was sued as designer or installer of glass, defendant was within the statute of repose); Swanson Furniture Co. v. Advance Transformer Co., 105 Wis. 2d 321, 313 N.W.2d 840, 844 (1982) (Washington statute "clearly does not apply to every manufacturer of any product which ultimately may be used as an improvement to some real property"). *See also* Cornoyer v. Mass. Bay Transp. Auth., 744 F.2d 208 (1st Cir. 1984) (defendant who supplied and designed a prefabricated building could assert the statute because plaintiff sued on a theory of defective design); Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740 (D.R.I. 1983) (interpreting Massachusetts law) (same); Baker v. Walker & Walker, Inc., 133 Cal. App. 3d 746, 184 Cal. Rptr. 245 (1982) (manufacturer of goods installed in building cannot raise time bar); King's Dep't Stores v. Poley-Abrams Corp., 386 Mass. 1008, 437 N.E.2d 237 (1982) (materialmen not within statute);. *Cf.* Becker v. Hamada, Inc., 455 A.2d 353 (Del. 1982) (supplier not within language of Delaware statute). In construing the constitutionality of architects' and builders' statutes of repose, other courts have assumed manufacturers and suppliers are not among the beneficiaries of these statutes. *See, e.g.*, President & Directors of Georgetown v. Madden, 505 F. Supp. 557 (D. Md. 1980), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir.

Although allowing manufacturers to raise the defense provided by architects' and builders' statutes of repose indeed may limit their exposure under products liability concepts, the reasoning adopted by courts in denying protection to manufacturers and in narrowly interpreting the protected class is questionable. If the electrical transfer switch assembly and other similar objects before the courts legitimately are characterized as improvements to real property, the conclusion that the manufacturer is the "designer" of these improvements seems inescapable. Indeed, in *Condit*, the court itself acknowledged that the defendant "designed" the freezer system,[83] thus further eroding the persuasiveness of the court's reasoning. If the freezer is an improvement to real property, and the defendant designed the freezer, the inquiry concerning the statute's applicability should be concluded.

The analysis adopted by these courts is unsatisfactory for other reasons as well. Under the two-tier approach suggested by some courts, a distinction is drawn between those who design fungible or stock items, which incidentally are incorporated into the realty, and those systems that are required for the structure to function as intended.[84] In addition, even if the product is a stock item, these courts imply that a manufacturer nonetheless may avoid liability if it played a role in the actual installation of the product.[85]

From a products liability standpoint, differentiating items that perform an integral function, such as the electrical transfer switch assembly in *Brown*, from fungible products, such as the acoustical plaster in *Cinnaminson Township*, is of questionable value. Integral components, as the plaintiff in *Brown* unfortunately learned, are no less likely to have dangerous propensities than ceiling tile that subsequently is determined to contain a potentially carcinogenic substance.[86] In each such case, moreover, the manufacturer is best

1981) (interpreting District of Columbia law); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

83. 101 Wash. 2d at 107, 676 P.2d at 467.

84. *See, e.g.*, Wayne Township Bd. of Educ. v. Strand Century, Inc., 172 N.J. Super. 296, 411 A.2d 1161 (1980); Brown v. Jersey Central Power Co., 163 N.J. Super. 179, 394 A.2d 397 (1978), *cert. denied*, 79 N.J. 489, 401 A.2d 244 (1979).

85. *See, e.g.*, Cinnaminson Township Bd. of Educ. v. U.S. Gypsum Co., 552 F. Supp. 855, 863 (D.N.J. 1982).

86. To determine the issue of whether the product serves an integral function, the proper test to be applied is whether the product is an "improvement" to realty. The determination does not turn on whether a certain class is protected under the applicable statute. *See In re* Beverly Hills Fire Litigation, 695 F.2d 207, 225 n.39 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). One court has defined an "improvement" to be "a permanent and necesary part of the building." Merne v. American Radiator Co., 150 Ky. 151, 150 S.W. 24, 25 (1912).

able to distribute the risk of a defective product to the populace as a whole.[87]

The principal problem preventing clear analysis in this area is the failure of various legislatures to anticipate application of statutes of repose such as section 12-310 to situations not involving architects and other persons directly involved in constructing structural improvements to realty. The legislative history accompanying section 12-310, for example, demonstrates an intention to protect architects, engineers, and certain other construction professionals. Nowhere in the legislative history, however, is there an explicit recognition that the statute may be invoked by parties such as manufacturers and suppliers of equipment incorporated into the realty.[88]

Nevertheless, the legislature's failure to anticipate a particular application of a statute provides no basis to deviate from the plain meaning of the statutory language. Courts that create an exception where none exists in the statutory language usurp a legislative function and, in effect, impose their own view of legislative intent even though the statute as enacted fails to reflect this supposed intent.[89] For example, drawing a distinction among various product manufacturers on the basis of whether their product is a stock item or serves an integral purpose, or whether the manufacturer assisted in the installation of the product, represents a wholly artificial solution to a problem whose cause is much more fundamental. If the statute is to be limited to certain classes of defendants, the proper course is to amend the statute to specifically identify the persons within the statute's ambit.

Although several courts have narrowly limited the class of persons protected by statutes of repose similar to section 12-310, other courts have not been so constrained. In *Wiggins v. Proctor & Schwartz*,[90] the plaintiff brought an action against the manufacturer of a machine used in producing

87. Indeed, the dominant theme of tort law for the last several decades has been to place liability on those best able to insure against loss and distribute this loss efficiently to the consuming public. But where a statute such as § 12-310 is at issue, and the provisions of the statute are unambigious, then the court cannot properly abrogate its judicial function and interpret the statute to further some unexpressed intention of the legislature, even though such an interpretation may be consistent with some broader social goals.

88. *But see* S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972), where Congress stated that "[e]ngineers who design and install equipment" were among the beneficiaries of § 12-310. A manufacturer whose engineers designed equipment that qualified as an improvement to real property arguably would be included in this category of beneficiaries.

89. *See supra* note 65 and accompanying text. *See also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947):

> A Judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.

90. 330 F. Supp. 350 (E.D. Va. 1971), *aff'd per curiam*, Civil No. 71-1952 (4th Cir. Mar. 8, 1972) (unpublished).

a jute. Plaintiff alleged that his personal injury was attributable to the "negligent and unsafe manufacture and unsafe and negligent design[91] of the machine. The defendant asserted as a defense the Virginia statute of repose, which precluded personal injury actions filed more than five years after the completion of improvements to real property.[92]

The court agreed with defendant's contention that plaintiff's claims were untimely. First, the court concluded that the machine was an "improvement to real property" within the parameters of the Virginia statute. The machine weighed approximately 4,500 pounds, and was affixed to a concrete foundation by means of heavy hold-down bolts.[93] The court held that the machine constituted a common law fixture and, consequently, qualified as an improvement to real property.[94]

Second, the court considered whether the Virginia statute should extend to manufacturers. The court observed it was "[p]robably true that architects and engineers prompted the passage"[95] of the Virginia statute, but saw no reason why the statute should not also extend to manufacturers:

> The statute should be given a reasonably liberal interpretation. If it is to operate for the benefit of the contractor who erected the building, it should also operate in like manner for the benefit of any manufacturer who constructs an integral part of said building. Persons who construct a factory may be called upon, as a part of the contract, to provide many items which are included as permanent fixtures in the original building. The same logic exists when a permanent fixture is added as an improvement. While there may be a material distinction between a manufacturer and a contractor for tax purposes, a manufacturer of a given product is assuredly one who designs, plans, supervises and constructs the improvement

91. *Id.* at 351.

92. The Virginia statute in effect at the time *Wiggins* was decided provided in pertinent part:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction. This limitation shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

VA. CODE § 8-24.2 (1964 ed.).

93. 330 F. Supp. at 351.

94. *Id.* at 352-53.

95. *Id.* at 353.

which is considered as such the moment it is affixed to the realty.[96]

The court's decision in *Wiggins* prompted an immediate legislative response amending the Virginia statute to specifically exclude actions against manufacturers and suppliers.[97] In view of the statutory language in effect at the time, however, the *Wiggins* decision not only is defensible, but is also the only result that could be reached consistent with the statute.[98]

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96. *Id.* In *Loyal Order of Moose, Lodge 1785 v. Cavaness*, the majority, like the *Wiggins* court, observed the class of protected persons under the Oklahoma statute extended beyond architects and engineers: "The statute probably was intended to limit the liability of the narrow class consisting of architects and engineers, etc. In its enacted form, it must be read to be much broader and include materialmen, manufacturers or anyone involved in providing material or service in the construction." 593 P.2d 143, 147 (Okla. 1977). *See also* Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977). In *Pacific Indemnity*, the majority of the Minnesota Supreme Court held that the Minnesota statute prohibiting actions against "[a]ny person performing or furthering the design, planning, or supervision" of improvements to real property denied equal protection and was hence unconstitutional. *Id.* at 555. The dissent argued that the majority's assumption that certain classes of persons, such as material suppliers, were not within the statute was unsupported:

> But whether or not he takes part in the 'design' of the improvement, when the issue is before us a persuasive argument can be made that a materialman *does* come within the definition of 'any person performing . . . construction,' and consequently he is *not* excluded from the favored class in a manner which renders that classification impermissible. Certainly one who furnishes structural supplies, plumbing, or heating or electrical equipment, fashioned for specific use in erecting a building, is a person 'performing' an integral part of the construction process. It would be difficult for us to hold otherwise.

Id. at 559-60 (Otis, J., dissenting) (citations omitted, emphasis in original). *Cf.* Adair v. Koppers Co., 741 F.2d 111, 116 (6th Cir. 1984) (product liability action not excluded from operation of the statute; defendant who "designed, manufactured, installed, and sold" a coal handling system is within statute of repose); KSLA-TV Inc. v. Radio Corp. of America, 501 F. Supp. 891, 898 (W.D. La. 1980), *aff'd in pertinent part*, 693 F.2d 544 (5th Cir. 1982) (contractor who was materialman and manufacturer of television transmission tower is within ambit of statute).

97. The General Assembly of Virginia viewed *Wiggins* as an erroneous interpretation of § 8-24.2 and adopted an emergency measure effective March 13, 1973, excluding manufacturers and suppliers from the Virginia statute of repose. *See* Hupman v. Cook, 640 F.2d 497, 498 (4th Cir. 1981). According to certain members of the General Assembly, the Virginia statute " 'was never intended to cover or apply to manufacturers of any equipment machinery or articles whether or not they become an improvement to real property.' " Smith v. Allen-Bradley Co., 371 F. Supp. 698, 701 n.4 (W.D. Va. 1974) (citing Report of the House Delegates Committee for Court of Justice, Feb. 5, 1973). The Virginia statute currently in effect specifically excludes manufacturers and suppliers: "This limitation shall not apply to the manufacturer or supplier of any equipment or machinery or any other articles which are installed in or become a part of any real property either as an improvement or otherwise." VA. CODE § 8.01-250 (1984).

98. As the Fourth Circuit in Hupman v. Cook, 640 F.2d 497 (4th Cir. 1981) observed in connection with *Wiggins:* "The General Assembly used language plainly compelling the result in *Wiggins,* despite any unexpressed intention to the contrary. 'If Parliament does not mean what it says it must say so.' " *Id.* at 504 (citing A. HERBERT, THE UNCOMMON LAW 313 (7th ed. 1950)).

Both the Virginia statute under consideration in *Wiggins* and section 12-310 fail to specifically delineate the class of persons who may assert the time bar specified by the statute. Indeed, the language of section 12-310 is even broader than the former Virginia statute.[99] If the legislative intent were to limit the applicability of the statute to certain persons, this intent was not manifested in the Virginia statute of repose. Nor is such an intent apparent in the current statutory language of section 12-310.

Besides *Wiggins*, the U.S. Court of Appeals for the Sixth Circuit also approved an expansive reading of an architects' and builders' statute of repose in *In re Beverly Hills Fire Litigation*.[100] There, plaintiffs brought suit against a manufacturer of aluminum electrical wire, claiming the wire had caused a fire in a restaurant. Defendants argued that plaintiffs' cause of action was precluded by operation of the Kentucky statute of repose, which barred actions after the expiration of five years following substantial completion of an improvement to real property. The district court concluded the defendants were not within the class of beneficiaries protected by the statute. The Sixth Circuit disagreed, noting that in view of its unambiguous language, the statute should be interpreted to include materialmen such as the defendant:

> We are not nearly so confident as the trial court that the statute ought to be narrowly construed. The statute requires that '[n]o action to recover damages . . . arising out of any deficiency in the design . . . of any improvement to real property . . . shall be brought against *any person* performing or furnishing the design . . . .' Whether or not we may agree with the results, we cannot alter the language of the statute, which by its terms covers all persons furnishing such designs. 'If that language is plain and unambiguous its meaning should be upheld as so expressed, uninfluenced by any unwise or unusual result that might follow the upholding of the plainly expressed writing or statutes . . . .'[101]

The court also observed that passage of legislation such as the Kentucky statute of repose was premised upon the peculiar position of architects and other persons involved in the construction process. With the abolishment of privity of contract as a defense, these persons confronted potential liability

99. The Virginia statute provided that no action "[s]hall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction." VA. CODE § 8-24.2 (1964 ed.). Most other states similarly limit the applicability of their architects' and builders' statutes of repose. *See supra* note 17 and accompanying text. Section 12-310, however, fails to designate in any manner the persons who may assert the defense provided by the statute.

100. 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

101. *Id.* at 224 (citing Reynolds Metal Co. v. Glass, 302 Ky. 622, 195 S.W.2d 280, 283 (1946) (footnote and citation omitted; emphasis in original).

for actions which may have occurred many years earlier. However, those designing parts that were intended to become part of the realty faced a similar threat of indefinite liability. Absent exclusionary language pertaining to materialmen, it could "safely be assumed"[102] that these persons were protected by the Kentucky statute.[103]

Elevator manufacturers also have successfully raised statutes of repose as a defense to product-related injuries. In *Mitchell v. United Elevator Co.*,[104] plaintiff fell while entering an elevator and brought suit against various defendants, including Westinghouse who "built and installed"[105] the elevator. The court, citing a legal dictionary's definition of the term "improvement,"[106] concluded that the elevator system qualified as such. Thus, Westinghouse properly could raise the Pennsylvania statute of repose pertaining to improvements to real property to avoid liability.

Similarly, in *Ellerbe v. Otis Elevator Co.*,[107] a wrongful death and survival action was brought based upon an allegedly defective design of an elevator that had been designed, manufactured, and sold by the defendant. The court observed that "[a]n elevator in a multi-story building obviously constitutes an improvement on real property,"[108] and that the manufacturer was "[a] person performing or furnishing construction of the elevator even though it did not install it in the building."[109]

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102. *Id.* at 225.

103. *In re Beverly Hills Fire Litigation* provides a poignant example of the judicary's struggle to interpret the parameters of architects' and builders' statutes of repose. After the Sixth Circuit remanded the case because of juror misconduct, the district court certified to the Supreme Court of Kentucky the question of whether the Kentucky statue was constitutional as applied to the facts of the case. The Supreme Court of Kentucky, over the dissent of two justices, held that product manufacturers were not within the class of beneficiaries of the statute. *In re* Beverly Hills Fire Litigation, 676 S.W.2d 922 (Ky. 1984).

104. 290 Pa. Super 476, 434 A.2d 1243 (1981).

105. *Id.* at 485, 434 A.2d at 1248.

106. *Id.* at 488, 434 A.2d at 1249.

107. 618 S.W.2d 870 (Tex. Civ. App. 1981) (*writ ref'd n.r.e.*), *appeal dismissed*, 459 U.S. 802 (1982).

108. *Id.* at 872.

109. *Id.* The court's decision in *Ellerbe* is somewhat confusing. On the one hand, the court concludes that the manufacturer of the elevator may assert the Texas statute of repose. At the same time, however, the court states that materialmen "[m]ay be excluded" from the statute. 618 S.W.2d at 873. "Materialman" under Texas law has been defined "[a]s a person *who does not engage in the business of building or contracting* to build homes for others, but who *manufactures* . . . materials which enter into buildings . . . ." Reddix v. Eaton Corp., 662 S.W.2d 720, 724 (Tex. Civ. App. 1983, *writ ref'd n.r.e.*) (emphasis in original). In *Reddix*, the court held that manufacturers of component parts of an elevator are not within the Texas statute. *Ellerbe* can be construed as consistent with decisions denying relief to "mere" manufacturers, but allowing the manufacturer to raise the statute of repose if it participated in the "design" of the product. *See, e.g.*, Northbrook Excess & Ins. Co. v. J.G. Wilson Co., 250 Ga. 691, 300 S.E.2d 507 (1983) (manufacturer who participated in design of doors installed in a

Section 12-310 as currently drafted contains no limitation on the class of persons who may properly invoke the ten-year limitations period. By its terms, section 12-310 bars "any action" if the other requirements of the statute are satisfied. The legislative history, although identifying certain beneficiaries of the statute, does not undertake to provide an exclusive list of protected classes. The only class of potential defendants that is expressly excluded from the statute is the owners of the realty.[110] Without legislative guidance in the form of explicit statutory language, a plain reading of section 12-310 allows persons other than those mentioned in the legislative history to raise the umbrella of protection afforded by the statute. This interpretation is not necessarily desirable. Indeed, as discussed below, several reasons suggest that the legislature should amend section 12-310 to narrow its applicability. This task, however, is a decidedly legislative function, not a judicial one.

IV. The Effect of Section 12-310 on a Plaintiff's Cause of Action

Although section 12-310 in its present form may be interpreted to allow manufacturers and other persons not directly involved in the construction process to assert the limitations period set forth in the statute, such an interpretation may deprive litigants of an effective remedy for injury or death caused by defective or unsafe products located on the realty. This result, although not expressly contemplated by Congress,[111] proceeds from the failure of the statute's drafters to specifically delineate the scope of the statute's application.

To envision the potential effect of section 12-310, consider a situation in

building within the statute); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977) (to the extent glass manufacturer sued as designer or installer of glass, manufacturer may raise statute of repose).

In Jones v. Ohio Bldg. Co., 4 Ohio Misc. 2d 10, 447 N.E.2d 776 (1982), the court, relying on *Mitchell* and *Ellerbe*, held that an elevator company that "designed, constructed, installed, and serviced" an elevator fell within the class of beneficiaries of the Ohio architects' and builders' statute of repose. *Id.* at 778. *See also* Cournoyer v. Mass. Transp. Auth., 744 F.2d 208 (1st Cir. 1984) (supplier of prefabricated building that was sued in its capacity as a designer could assert the statute of repose); Jasinski v. Showboat Operating Co., 459 F. Supp. 309 (D.C. Nev. 1978), *rev'd on other grounds*, 644 F.2d 1277 (9th Cir. 1981) (Nevada statute applied to supplier and seller of shower doors installed in hotel). *Cf.* Mullis v. Southern Co. Servs., 250 Ga. 90, 92 n.2, 296 S.E.2d 579, 582 n.2 (1982) (favored class under Georgia statute may be larger than architects, engineers, and contractors).

110. That Congress specifically excepted claims against one class of defendants and not other classes provides additional support for the argument that all classes of potential defendants not excepted from the statute may assert the statute's protection. *See supra* note 65 and accompanying text.

111. *But see supra* note 88 and accompanying text.

which a tenant in an apartment building is injured by a defective product serving the building.[112] Typically, the tenant in this example sues the apartment building owner, who specifically is exempted from the operation of section 12-310, as well as the product manufacturer on the theories of negligence, strict liability in tort,[113] and breach of warranty. Similarly, the owner and manufacturer may file cross-claims against the other seeking contribution or indemnity. Because of section 12-310, however, the injured tenant's claims against the manufacturer, as well as the owner's cross-claim, may be precluded.

Equipment incorporated in the realty, by virtue of its physical size, degree of annexation to the realty, and essential purpose that it may serve in rendering the premises habitable, may qualify as an improvement to real property pursuant to the common sense test employed by many courts[114] or traditional common law fixture analysis.[115] Accordingly, if the defective product causing the tenant's injury is characterized as an improvement and the tenant fails to file suit within ten years after the product was first available for use, the manufacturer may assert the bar raised by the statute to relieve itself

112. This is not an entirely hypothetical situation. In Oates v. H.G. Smithy Co., Civil Action No. 6999-79 (D.C. Sup. Ct. 1979), a tenant burned by water heated by an allegedly defective water heater installed more than 10 years before the injury occurred brought suit against the owners and managing agent of the realty, the plumbing company that installed the water heater, and the manufacturer of the water heater. This author's firm represented the manufacturer. The manufacturer and plumbing company argued, inter alia, that § 12-310 precluded suit against them on the basis of an allegedly unsafe and defective improvement to real property. The trial court granted both the manufacturer's and plumbing company's motions for summary judgment.

Of course, § 12-310 is applicable to situations other than personal injury or wrongful death actions. The statute also applies to actions to recover damages for injury to real or personal property. Nevertheless, the personal injury example is a relatively common situation and vividly portrays the potential wide-ranging ramifications of the statute.

113. The District of Columbia has not expressly adopted strict liability in tort; however, several decisions suggest that the District of Columbia Court of Appeals would follow the majority of other jurisdictions and allow such a claim. *See, e.g.*, Russell v. G.A.F. Corp., 422 A.2d 989 (D.C. 1980); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130 (D.C. 1979); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978); Cottom v. McGuire Funeral Serv., 262 A.2d 807 (D.C. 1970); Young v. Up-Right Scaffolds, Inc., 637 F.2d 810 (D.C. Cir. 1980); *In re* Air Crash Disaster at Washington, D.C., 559 F. Supp. 333 (D.D.C. 1983).

114. *See, e.g.*, Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977) (furnace an improvement).

115. *See, e.g.*, Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952) (water heater attached to building by gas and water pipes may constitute fixture); Schofer v. Hoffman, 182 Md. 270, 34 A.2d 350 (1943) (oil heater and water tank fixtures); Wood Hydraulic Hoist & Body Co. v. Norton, 269 Mich. 341, 257 N.W. 836 (1934) (residential heating system a fixture even though system could easily be removed by means of wrench without damaging realty). Moreover, the legislative history of section 12-310 also contemplates that "equipment" located on the realty may constitute an improvement to real property subject to the statute. *See supra* note 45 and accompanying text.

of any liability to the tenant as well as to the owner on any cross-claim.[116]

The ten-year limitations period set forth in section 12-310 does not apply to "any action based on a contract, express or implied."[117] The tenant's claims against the manufacturer premised upon negligence and strict liability are based in tort, not in contract.[118] Hence, the tenant is precluded from obtaining recovery on these theories of liability if the other prerequisites of section 12-310 are satisfied.

Characterizing the tenant's breach of warranty claim is more problematic, and involves consideration of the esoteric and somewhat mysterious evolution of the law of warranty. Furthermore, regardless of whether this warranty claim is based on contract—and thus excepted from the application of section 12-310—the tenant must nonetheless satisfy the requirements of the District of Columbia's version of the Uniform Commercial Code. The requirements of the Uniform Commercial Code, independent of the operation of section 12-310, may preclude a tenant's breach of warranty action.

Both the genesis of warranty law and the question whether a breach of warranty is based in tort or contract principles have provided a fertile ground for exploration by legal scholars.[119] There is general agreement that originally a breach of warranty action was grounded in tort, closely resembling the tort of deceit.[120] Gradually, grievants seeking relief for a breach of warranty brought suit under *indebitatus assumpsit*, an action based on a contractual relationship between the buyer and seller. Under this theory, the seller expressly or impliedly promised the quality or safety of goods and was

116. D.C. CODE ANN. § 12-310(b)(1) (1981 & Supp. 1985).

117. An "express contract" is one in which the terms of the parties' agreement are declared by the parties in writing or orally. Implied contracts consist of two generic types. Where the parties' agreement is inferred from their conduct, without written or spoken words, the contract is said to be "implied in fact." In contrast, "implied in law" contracts or "quasi contracts" are obligations imposed by law to do justice between the parties, even though no promise was made or intended. *See generally* 1 S. WILLISTON, A TRETISE ON THE LAW OF CONTRACTS §§ 3, 3A (Jaeger ed. 1957); A. CORBIN, CORBIN ON CONTRACTS §§ 18-19 (1963); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS (2d ed. 1965); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 1-12 (2d ed. 1977); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

118. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A comment *l* (1965) ("The liability stated [i.e., in strict liability] is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.").

119. *See, e.g.*, Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1124-34 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 800-05 (1966). *See generally* W. PROSSER, THE LAW OF TORTS, § 95, at 634-39 (4th ed. 1971).

120. *See* Berman v. Watergate West, Inc., 391 A.2d at 1355; Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 920 (D.C. 1962). *See generally* W. PROSSER, *supra* note 119, at § 95.

held liable for breaching this promise. Persons other than the buyer, however, were considered "strangers to the contract," and without privity. Absent privity of contract, these more remote persons originally were deemed unable to maintain a warranty action.[121]

The hybrid nature of warranty claims is complicated further by the imprecise terminology sometimes used by courts in describing strict liability and warranty actions. Courts may characterize strict liability actions as conceptually identical to those of implied warranty.[122] The implied warranty re-

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121. *See supra* note 120. Privity of contract consists of two distinct types. Vertical privity of contract exists where there is a direct buyer-seller relationship. Conversely, there is lack of vertical privity where a person is only a subpurchaser in the chain of distribution. Thus, there is no vertical privity of contract between a manufacturer of a product and a person who purchases the product from a person or entity other than the manufacturer, such as a local retailer.

The second type of privity, known as horizontal privity, encompasses the rights of those persons who are neither purchasers nor subpurchasers, but who consume, use, or are otherwise affected by the goods. Whether these persons may enforce a particular warranty depends upon an interpretation of the particular jurisdiction's version of § 2-318 of the Uniform Commercial Code. The District of Columbia's version, entitled "Third Party Beneficiaries of Warranties Express or Implied," defines the class of persons who are deemed to be in horizontal privity with the buyer and capable of enforcing the seller's warranties. D.C. CODE ANN. § 28:2-318 (1981 & Supp. 1985). *See generally* Freeman & Dressel, *Warranty Law in Maryland Product Liability Cases: Strict Liability Incognito?*, 5 U. BALT. L. REV. 47, 52 (1975). Section 2-318 does not concern the issue of vertical privity and the ability of persons in the product's distribution chain to maintain an action. *See* U.C.C. § 2-318 comment 3 (1972). *See also* Cottom v. McGuire Funeral Serv., 262 A.2d 807 (D.C. 1970). *See generally* Annot., 100 A.L.R.3d 743 (1980).

122. Two commentators describe the overlapping terminology used by courts in describing strict liability and implied warranty actions as follows:

> The principal effort expended in the warranty area has been in the obliteration of the defense of privity. For this reason, and because of the historical affinity to warranty law which product liability cases have had, courts often talk of strict liability cases being one of a "warranty" to all users or consumers, in the same sense as results under the concept of strict liability in tort. There certainly is no magic in the name given to the cause of action, and strict liability in warranty is as useful a term as strict liability in tort, so long as the use of it is not confused with the contract trappings which have traditionally accompanied warranty law. The drafters of the Restatement, Second, of Torts Section acknowledged this when, in Comment *m* to Section 402A, it was written:
>
> "There is nothing in this section which would prevent any court from treating the rule stated as a matter of 'warranty' to the user or consumer."
>
> But in the next sentence it is pointed out that,
>
> "if this is done, it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales."
>
> If a court does not require, *inter alia*, privity of contract, a sale, or notice of a breach of warranty, and does not give effect to a disclaimer, does it matter that the defendant is being held strictly liable in warranty rather than in tort? The answer

ferred to by these courts, however, is different from the kind of warranty usually found in the sale of goods. This latter kind of warranty is governed by the particular jurisdiction's version of the Uniform Commercial Code.

In the example of the injured tenant, the tenant may assert both broad types of warranty claims. The first, synonymous with a strict liability cause of action, is not based on an express or implied contract exempt from section 12-310, but it is imposed in tort as a matter of social policy. The second, warranties provided by the Uniform Commercial Code, are also arguably based in tort if there exists no vertical privity of contract between the tenant and manufacturer.[123]

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seems obvious. If a court imposes strict warranty liability irrespective of contract and sales rules, then strict liability in warranty and tort are synonymous.

2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, § 16A[4][a], at 3B-33 (1984) (footnote omitted).

The confusion prevalent in this area is demonstrated in Cottom v. McGuire Funeral Serv., 262 A.2d 807 (D.C. 1970). There, a pallbearer filed suit against the sellers of a funeral casket for injuries received when the casket fell and struck him. Although the plaintiff was not the purchaser, the court nonetheless allowed the plaintiff to proceed on an implied warranty theory of recovery. In doing so, the court spoke in terms strongly reminiscent of strict liability in tort, even though it expressly disavowed adoption of this theory of liability:

> Whether contract or tort, there is a liability imposed for injury caused by placing a defective product into the stream of commerce in the District of Columbia. For present purposes we are not required to adopt the theory of strict liability in tort with all its implications.
>
> . . . .
>
> There is no logical or legal reason why only a purchaser may recover for injuries sustained due to a defective product. The cases are too numerous to mention where nonpurchasers have been allowed to recover. Certainly, an intended user or consumer is entitled to as much protection as a purchaser.
>
> . . . .
>
> Appellant was an intended user of the handles on this casket. He can recover if he can prove that the product entered the stream of commerce in a defective state, that the defect existed at the time of the injury, and that the defect caused the injury.

262 A.2d at 809-10. *See also* Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1305 (D.C. Cir. 1983); Towers Tenant Ass'n v. Towers Ltd. Partnership, 563 F. Supp. 566, 574 n.5 (D.D.C. 1983) ("In the District of Columbia, these theories [implied warranty/strict liability] are conceptually identical."); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1133 (D.D.C. 1979). Although the District of Columbia Court of Appeals has not expressly adopted strict liability in tort, *Cottom* and subsequent decisions have been cited as precedent indicating the District of Columbia's endorsement of this doctrine. *See* Young v. Up-Right Scaffolds, Inc., 637 F.2d 810, 813 (D.C. Cir. 1980); *In re* Air Crash Disaster at Washington, D.C., 559 F. Supp. 333, 345 (D.D.C. 1983); Towers Tenant Ass'n v. Towers Ltd. Partnership, 563 F. Supp. 566, 574 (D.D.C. 1983); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1134 (D.C. 1979) (Kelly, Jr., concurring).

123. Lack of vertical privity of contract in itself does not preclude a warranty cause of action in the District of Columbia. In Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962), the District of Columbia Court of Appeals expressly abandoned the requirement of vertical privity of contract allowing an indirect purchaser of an automobile to sue the manufacturer on the basis of a breach of an implied warranty. Yet, while the District of

Nevertheless, even if this second type of warranty action is premised on contract and not subject to the preclusive effect of section 12-310, requirements of the Uniform Commercial Code may bar the tenant's warranty claim. The tenant is not likely to have purchased the product but rather is more likely to have used a product purchased by another. As such, the tenant must fall within the class of beneficiaries of the manufacturer's warranties as defined in section 28:2-318 of the District of Columbia Code, the most restrictive of the three section 2-318 alternatives proposed by the drafters of the Uniform Commercial Code.[124] Further, section 28:2-725 of the District

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Columbia has vitiated the requirement of vertical privity, this is not to say an action brought by a nonvertical privity plaintiff is premised upon contract and hence exempt from the operation of § 12-310. Without vertical privity, there is no contract between plaintiff and some remote party. *Cf.* Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960) ("No one doubts that, unless there is privity, liability to the consumer must be in tort and not contract."). *See also Picker*, 185 A.2d at 921 ("courts have begun to disassociate contract from warranty and to recognize that a warranty is a duty imposed by law for protection of the buying public, regardless of the consent of the parties."); Kinney v. Goodyear Tire & Rubber Co., 134 Vt. 571, 367 A.2d 677, 679 (1976) ("If the absence of any contractual relationship between the parties does not bar liability, it is difficult indeed to perceive how the liability can 'sound' in contract."). *But see* § 2-314 of the Uniform Commercial Code which states that the Code's warranty of merchantability is "[i]mplied in a contract" for the sale of goods. U.C.C. § 2-314 (1972).

An approach relying on the presence or lack of privity in characterizing the nature of a party's warranty claim may be criticized as revitalizing archaic privity principles in an age where the importance of privity has all but vanished. In fact, the legislative history accompanying H.R. 6527, an earlier version of § 12-310 that did not pass Congress, faintly suggests that Congress may have intended the exception pertaining to actions based on an express or implied contract to include breach of warranty claims. *See Hearing Before Subcommittee No. 1 of the Committee on the District of Columbia House of Representatives*, 90th Cong., 1st Sess. 11, 46 (1967). *See also* 113 CONG. REC. 28,158 (1967); President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 577 (D. Md.), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981). However, the more analytically sound view is that a breach of warranty claim where there exists no direct buyer-seller relationship rests on tort principles, and not on an express or implied contract. This view also is more consistent with the evolution of the law of warranty, which has its origin in tort, not contract. If Congress' intent were to exclude warranty actions from the statute, the best means to achieve that result is to amend the statute and specify the actions not subject to the 10-year limitations period.

124. D.C. CODE ANN. § 28:2-318 (1981 & Supp. 1985) provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Jurisdictions that have adopted the same or similar versions of § 2-318 have concluded that tenants are not within the class of persons who may assert a manufacturer's breach of warranty. *See* Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976); Horne v. Armstrong Prods. Corp., 416 F.2d 1329 (5th Cir. 1969). Before the revision of Maryland's version of § 2-318 extending a seller's warranties to the "ultimate consumer," the Maryland Court of Appeals also restrictively interpreted the parameters of § 2-318. *See, e.g.*, Blanken-

of Columbia Code provides that a breach of warranty claim must be brought within four years after the cause of action accrues.[125] A cause of action for breach of warranty normally accrues when "tender of delivery is made."[126] To the extent that this four-year statute of limitations governs personal injury actions,[127] section 28:2-725, like section 12-310, may foreclose an in-

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ship v. Morrison Mach. Co., 255 Md. 241, 257 A.2d 430 (1969) (employee of purchaser not within § 2-318). *See also* Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D. Ga. 1974) (member of armed forces injured by product purchased by federal government not within class of persons specified by § 2-318. *See generally* Annot., 100 A.L.R.3d 743 (1980).

125. D.C. CODE ANN. § 28:2-725 (1981 & Supp. 1985) provides in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within four years after cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id.

126. D.C. CODE ANN. § 28:2-725(2) (1981 & Supp. 1985).

127. *Compare* Garvie v. Duo-Fast Corp., 711 F.2d 47, (5th Cir. 1983) (personal injury action must be brought within four-year limitations period of § 2-725); Johnson v. Hockessin Tractor, Inc., 420 A.2d 154 (Del. 1980) (same); Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765 (Tenn. 1979) (same); General Motors Corp. v. Tate, 257 Ark. 347, 516 S.W.2d 602 (1974) (same) *with* Becker v. Volkswagen of American, Inc., 52 Cal. App. 3d Supp. 794, 125 Cal. Rptr. 326 (1975) (personal injury action governed by California one-year statute of limitation, not § 2-725); Salvador v. Atlantic Steel Boiler Co., 256 Pa. Super. 330, 389 A.2d 1148 (1978) (four-year limitation period of § 2-725 does not apply to third-party personal injury actions arising from defective products). *See also* Stanford v. Lesco, 10 U.C.C. Rep. Serv. (Callaghan) 812, 813-14 (D.D.C. 1972) (breach of warranty claim in District of Columbia governed by D.C. CODE ANN. § 28:2-725 (1981 & Supp. 1985); Sears, Roebuck & Co. v. Goudie, 290 A.2d 826, 830 (D.C.), *cert. denied*, 409 U.S. 1049 (1972) (implying that § 28:2-725 would apply to plaintiff's claim had it accrued after the effective date of the statute). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 11-9 (2d ed. 1980); Annot., 20 A.L.R.4th 915 (1983); Burch, *A Practitioner's Guide to the Statutes of Limitations in Product Liability Suits,* 5 U. BALT. L. REV. 23, 28-29 (1975), where the author argues that the limitations period set forth in § 2-725 of the Uniform Commercial Code is not as unfair as it might appear because the remedies contained in the Code are in addition to other common law or statutory remedies available to an injured person.

Excepted from this normal accrual date is any warranty that "[e]xplicitly extends to future performance of the goods and discovery of the breach must await the time of such performance . . . ." In such a case, the cause of action "[a]ccrues when the breach is or should have been discovered." Some courts have concluded that the Code's implied warranties do not explicitly extend to the future performance of goods. "It does not seem logical that the Code intended that an implied warranty be explicitly extended to future performance. The words 'explicit' and 'implied' are contradictory." General Motors Corp. v. Tate, 257 Ark. 347, 516 S.W.2d 602, 605-06 (1974). *See also* Stumler v. Ferry-Morse Seed Co., 644 F.2d 667, 669 (7th Cir. 1981) (implied warranties by definition do not explicitly extend to future performance); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 820 (6th Cir. 1978), *cert. denied*, 441

jured person's cause of action before the occurrence of an injury that otherwise might be compensable.[128]

Yet other traps lurk to ensnare the unwary litigant proceeding on a warranty-based theory of recovery under the Uniform Commercial Code. Lack of requisite notice,[129] contributory negligence,[130] assumption of risk,[131] and disclaimers[132] all may thwart a warranty action.

The restrictions imposed by the Uniform Commercial Code are of little practical significance when the breach of warranty action is brought in conjunction with claims of negligence and strict liability in tort. If the warranty claim is dismissed, the litigant still may proceed on the negligence and strict liability claims. When viewed in connection with section 12-310, however, the requirements of the Code take on much greater significance. Unless an action is brought within the ten-year period specified in the statute, section 12-310 precludes tort-based negligence and strict liability causes of action.

Of course, this is not to say that the requirements of the Uniform Commercial Code serve no useful function. Rather, the salient point is the drafters of section 12-310 did not foresee the statute's potentially far-reaching consequences. Although drafted with the intent to protect design and construction professionals from indefinite liability, the statute also invites application to situations not expressly contemplated by Congress. Persons

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U.S. 923 (1979) (same); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1103 (N.D.N.Y. 1977). *See generally* J. WHITE & R. SUMMERS, *supra* at § 11-10; Annot., 92 A.L.R.3d 690 (1979).

128. Pursuant to § 28:2-725, a cause of action for breach of warranty normally expires four years after tender of delivery is made. Thus, a person injured more than four years after tender of delivery possesses no warranty cause of action unless the warranty in issue "explicitly extends to future performance of the goods." *See* D.C. CODE ANN. § 28:2-725(2) (1981 & Supp. 1985). *See also supra* note 127.

129. *See* D.C. CODE ANN. § 28:2-607(3) (1981 & Supp. 1985). *See also* Rock Creek Ginger Ale Co. v. Thermice Corp., 352 F. Supp. 522 (D.D.C. 1971). *See generally* J. WHITE & R. SUMMERS, *supra* note 127, at § 11-10; Annot., 6 A.L.R.3d 363 (1979). *See also* W. PROSSER, *supra* note 119, § 97, at 655 (§ 2-607(3) is a "booby-trap for the unwary").

130. Courts are divided concerning whether contributory negligence may preclude a warranty action. *Compare* Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965) (contributory negligence no defense) *with* Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955) (contributory negligence a defense); Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962) (contributory negligence no defense but may demonstrate lack of proximate causation). Two commentators advocate this last view, arguing that contributory negligence may "[a]ttenuate the causal connection between defendant's act and plaintiff's injury to bar recovery." *See* J. WHITE & R. SUMMERS, *supra* note 127, § 11-8, at 411. *See generally* Annot. 4 A.L.R.3d 501 (1965).

131. Unlike contributory negligence, assumption of risk is generally recognized as a defense in a warranty action. *See, e.g.*, Bronson v. Club Comanche, Inc., 286 F. Supp. 21 (D.V.I. 1968); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). *See generally* J. WHITE & R. SUMMERS, *supra* note 127, § 11-8, at 412; Annot., 4 A.L.R.3d 501 (1965).

132. D.C. CODE ANN. § 28:2-316 (1981 & Supp. 1985).

injured by defective products incorporated into the realty may find that the only cause of action they may pursue is a breach of warranty claim subject to the various requirements of the Uniform Commercial Code. Ironically, their potential claims are limited merely because they were injured by a product that has gained stature as an improvement to real property. Other litigants who have been injured similarly, perhaps by the identical product that did not form part of the realty, may raise the full panoply of claims without regard to the preclusive effect of section 12-310.

Section 12-310(b)(2) specifically excludes actions against the real property owner.[133] Thus, a plaintiff theoretically may obtain relief against the owner for injuries attributable to defective improvements to the realty. Actions against the real property owner, however, may present several practical barriers for effective relief. In the example of the tenant injured by a defective product, the theory of strict liability may not be available in an action against the owner of the realty.[134] Consequently, the plaintiff must proceed upon an alternative theory such as negligence or breach of warranty.[135] An action premised on these theories requires the plaintiff to present different elements of proof, and is subject to different defenses, than an action grounded in strict liability in tort.

In addition, plaintiff's injury may be attributable solely to the defective product. The owner's actions may be entirely in accordance with those of the hypothetical reasonable person. Plaintiff, unable to demonstrate negli-

133. *Id.* § 12-310(b)(2).

134. Courts are divided whether a tenant may proceed on a strict liability theory against the lessor for a defective condition in the demised premises. *Compare* Becker v. IRM Corp., 192 Cal. Rptr. 570, 144 Cal. App. 3d 321 (1983) (strict liability appropriate) *with* Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973) (no strict liability cause of action). In *Berman v. Watergate West, Inc.*, the District of Columbia Court of Appeals suggested that a strict liability action was available against landlords, but expressly reserved ruling on this issue. 391 A.2d 1351, 1359-60. *See also* George Washington Univ. v. Weintraub, 458 A.2d 43, 49 n.9 (D.C. 1983). *Cf.* Towers Tenant Ass'n v. Towers Ltd. Partnership, 563 F. Supp. 566 (D.D.C. 1983) (strict liability action exists against builder/vendor/developer of condominium units). *See generally* Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982).

135. It is unclear whether a breach of warranty action is available in the first instance in this situation. The applicable "warranty" in the landlord-tenant context is the implied warranty of habitability, which requires the landlord to keep the premises in a habitable condition. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.); *cert. denied*, 400 U.S. 925 (1970); George Washington Univ. v. Weintraub, 458 A.2d 43 (D.C. 1983). Several courts, however, have held the implied warranty of habitability does not apply in a personal injury action by the tenant against the landlord. *See, e.g.*, Porter v. Lumbermen's Inv. Corp., 606 S.W.2d 715 (Tex. Civ. App. 1980); Morris v. Kaylor Eng'g Co., 565 S.W.2d 334 (Tex. Civ. App. 1978) (*writ ref'd n.r.e.*); Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973).

gence or breach of warranty on the part of the owner, consequently may be denied recovery.

Alternatively, if a jury renders a "sympathy" verdict in plaintiff's behalf, the owner may be precluded from seeking contribution or indemnity by virtue of section 12-310(a)(1)(B). Accordingly, the owner may shoulder a disproportionate share of liability that properly should be borne by a third party.[136]

Finally, although a majority of owners presumably carry liability insurance for injuries occurring on their premises, some owners either are uninsured or carry insufficient liability coverage. In situations where the owner and a third party would be jointly and severally liable to the plaintiff but for the protection afforded the third party under section 12-310, plaintiff may be deprived of a "deep pocket" to satisfy a potential judgment.

V. THE EFFECT OF SECTION 12-310 ON THE RIGHT TO CONTRIBUTION OR INDEMNIFICATION

The foregoing discussion focused on the rights of an injured party vis-à-vis the manufacturer of an allegedly defective product that qualifies as an improvement to real property within the ambit of section 12-310. Under certain circumstances, the statute may foreclose the party's claims based upon strict liability, negligence, and breach of warranty against the manufacturer. Section 12-310 may bar other claims as well. Specifically, section 12-310(a)(1)(B) prohibits a claim for "contribution or indemnity" brought as a result of any injury or death subject to the statute.[137]

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136. In Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), the potential unfairness of a statute similar to § 12-310 was cited in support of the court's conclusion that the Illinois statute was unconstitutional:

> It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity; the statute takes away his action for indemnity against the architect or contractor.

38 Ill. 2d at 460, 231 N.E.2d at 591. *See also* Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1974).

137. Although sometimes described synonomously, the doctrines of contribution and indemnity are conceptually distinct. Contribution involves the distribution among responsible tortfeasors of loss caused to an injured party; indemnity involves the full shifting of liability to another. *See generally* 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 44.02[2] (1984); W. PROSSER, *supra* note 114, at § 51 (4th ed. 1971); Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203 (1975); Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974); Annot., 28 A.L.R.3d 943, 947-48 (1969). The state of confusion inherent to the law of contribution and indemnity has proven disconcerting to commentators attempting to analyze these two doctrines:

> The authors of the present text want to utter the caveat here, at the outset of this

Although the bar relating to contribution and indemnity claims contained in section 12-310(a)(1)(B) appears straightforward, section 12-310(b) introduces confusion into this statutory scheme. This provision specifically excludes the following from the statute's operation: (1) any action based on an express or implied contract, and (2) actions against the person who, at the time of the injury or death, either was the owner of or was in actual possession or control of the real property. The source of confusion is twofold.

First, an indemnification action may be premised on an express contract between an indemnitor and indemnitee. If the action is based on an express contract, clearly it is excluded from operation of the statute. Even absent an express indemnification agreement, however, an indemnity action also is premised on contract. In this situation, indemnification is characterized as based on a contractual obligation implied in law or quasicontract.[138] Further, although the right of contribution arises from equitable principles requiring persons under a common burden to share that burden equitably, this right also is quasicontractual in nature.[139] In the broadest sense then, every indemnification and contribution action can be construed as based on either an express or implied contract. Accordingly, even absent an express contract, an owner could seek indemnification or contribution against the archi-

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> discussion of indemnity between or among tortfeasors, that any attempt to reconcile the numerous decisions and particularly the sweeping pronouncements often found in them, is an exercise frustrating utility. The law as to indemnity among tortfeasors, like that of contribution among them, is in a state of development, flux, and evolution. In some aspects, the two appear to merge.

S. SPEISER, C. KRAUSE, & A. GANS, THE AMERICAN LAW OF TORTS, § 3:26, at 479 (1983) [hereinafter cited as S. SPEISER].

138. *See, e.g.*, Nordstrom v. District of Columbia, 213 F. Supp. 315, 318 (D.D.C.), *rev'd on other grounds*, 327 F.2d 863 (D.C. Cir. 1963). *See also* Larson Mach., Inc. v. Wallace, 268 Ark. 192, 600 S.W.2d 1 (1980) where the court noted:

> The basis for the right to indemnity in a case where there is no express contract, therefore, is liability upon an implied contract or quasi-contract. . . . [t]he doctrine of indemnity is based upon the equitable principles of restitution which permit one who is compelled to pay money, which in justice ought to be paid by another, to recover the sums so paid unless the payor is barred by the wrongful nature of his own conduct.

Id. at 213-14, 600 S.W.2d at 12. *See also* 3A L. FRUMER & M. FRIEDMAN, *supra* note 137, at 15-19 (1983) ("[i]ndemnity is premised on contract principles, either express or implied . . . .").

139. Implied in law or quasi-contracts are obligations imposed by law to do justice between the parties, regardless of the parties' consent. *See supra* note 12 and accompanying text. Although courts have stressed the equitable nature of contribution, the principle of contribution coincides with the definition and purpose of implied in law contracts. *See* Builders Supply Co. v. McCabe, 366 Pa. 322, 336, 77 A.2d 368, 375 (1951) ("[t]he right of contribution is a quasi-contractual right arising by reason of an implied engagement of each to help bear the common burden. . . ."). Some courts have also applied the statute of limitations governing contracts to claims for contribution. *See generally* Annot., 57 A.L.R.3d 927 (1974).

tect, builder, or any other beneficiary of section 12-310 irrespective of the time limitation set forth in the statute.

This result, of course, flies in the face of the legislature's intent to eliminate the threat of continued liability for defective or unsafe improvements to real property. If the plaintiff is prohibited from suing a beneficiary of section 12-310 directly, it makes little sense to allow the owner to sue the same person on a contribution or indemnification claim based upon an implied contract that is excluded from the statutory scheme.[140] Although the legislative history of section 12-310 is silent on this issue, the statutory exemption for express or implied contract claims as it relates to contribution and indemnification actions probably refers to the underlying theory of liability supporting contribution or indemnity. Thus, for example, an indemnity claim based on the negligence of a third party is precluded. Conversely, an indemnity action based on a breach of contract between the indemnitor and indemnitee is not barred by section 12-310.[141]

A second element of confusion arises from section 12-310(b)(2) which provides that the ten-year limitations period does not apply to any action brought against the owner or person in actual possession of the real property. Literally, this may be interpreted to mean that in any action in which the owner is sued, the limitations period does not apply to the owner's claim for contribution or indemnity. If this were the case, the owner could seek contribution or indemnity any time a claim was filed against him. This interpretation, although arguably supported by a literal reading of the statute,

140. Even without the specific ban of contribution and indemnity claims set forth in § 12-310(a)(1)(b), if the person from whom contribution of indemnity is sought possesses an immunity against the original plaintiff's claim, contribution and indemnity ordinarily will not be allowed. *See generally* W. PROSSER & P. KEETON, *supra* note 8, at § 50; S. SPEISER, *supra* note 137, at § 3:22. *See also* Agus v. Future Chattanooga Dev. Corp., 358 F. Supp. 246 (E.D. Tenn. 1973) (claim for indemnity barred by Tennessee statute of repose even though statute did not specifically address indemnity actions). Where potential liability once existed to the original plaintiff and subsequently is discharged, such as by the expiration of the statute of limitations, contribution and indemnity may nonetheless be allowed. *See, e.g.*, Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960) (fact that plaintiff's claim against one defendant barred by statute of limitations did not preclude contribution claim against this defendant by another defendant); Tsz Ki Yim v. Home Indemnity Co., 95 F.R.D. 349 (D.D.C. 1982) (indemnity claim proper even though party against whom indemnity sought could not be held liable to plaintiff because of statute of limitations).

141. A complicating element is introduced if the person from whom indemnity or contribution is sought is a person in the distributive chain of an allegedly defective product. In such a case, the theories of contribution or indemnity are likely to be strict liability, negligence, or breach of warranty. Again, like the injured tenant's claim against the manufacturer, claims of contribution or indemnity based on strict liability or negligence are not contractual in nature, and, hence, are not exempted from the statute. In characterizing a claim for contribution or indemnity premised on an alleged breach of warranty, the analysis applied to the injured tenant's warranty claim is equally applicable.

is irrational. Although imprecisely stated, the exception set forth in section (b)(2) was intended to exempt claims brought by a third party against the persons described in that subsection, but not the owner's claims of contribution or indemnity.[142]

Another question raised by section 12-310 is whether the statute alters the time within which an owner or other person may file a claim for contribution or indemnity. A cause of action for contribution normally accrues upon the party's payment of more than a pro rata portion of a judgment.[143] Similarly, an action for indemnity accrues when the person seeking indemnity pays the primary liability.[144] In the District of Columbia, a claim for contribution or indemnity is governed by a three-year statute of limitations.[145] Thus, a per-

142. *See, e.g.*, Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), where the court, interpreting exclusionary language similar to that in § 12-310, rejected an interpretation of the North Carolina statute that would allow owners and those in possession of the realty to bring claims for contribution or indemnity after expiration of the six-year period set forth in the statute:

> [This] result would be wrong for two reasons. First, it would have the effect of giving owners in possession a more favorable position than third parties who are less able to discover defects . . . .
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> . . . .
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> Second, to hold that the six-year limitation affords no protection to designers and builders from claims brought by those in actual possession and control of realty would emasculate the statute and destroy the 'repose' that the legislature intended to give. Third parties injured by defects in improvements cannot claim against architects, for example, beyond the six-year period under the statute. They can and in all cases probably would, however, sue persons in possession and control at the time of the injury. But if persons in possession and control are excluded from the ambit of the statute, they could crossclaim against the architects for contribution or indemnity. Yet the first sentence of the statute expressly prohibits "any action for contribution or indemnity" beyond the six-year period. We think it clear that the legislature intended to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought *against* persons in possession and control of an improvement to real property who might also have designed or built the improvement. If, of course, persons in possession and control neither designed nor built the improvement, then the first sentence would by its own terms have no application.

308 N.C. at 431, 302 S.E.2d at 975. *See also* Salesian Soc'y v. Formigli Corp., 120 N.J. Super. 493, 295 A.2d 19 (1972), *aff'd*, 124 N.J. Super. 270, 306 A.2d 466 (1973); Good v. Christensen, 527 P.2d 223 (Utah 1974). *But see* Deschamps v. Camp Dresser & McKee, Inc., 113 N.H. 344, 306 A.2d 771 (1973).

143. *See, e.g.*, Bair v. Bryant, 96 A.2d 508, 510 (D.C. Mun. App. 1953). *See generally* Annot., 57 A.L.R.3d 867, 875-79 (1974).

144. *See, e.g.*, Aetna Casualty & Surety Co. v. Windsor, 353 A.2d 684 (D.C. 1976); District of Columbia v. D.C. Transit System, 248 A.2d 184 (D.C. 1968); Keleket X-Ray Corp. v. United States, 275 F.2d at 169 (citing general rule); Tsz Ki Yim v. Home Indemnity Co., 95 F.R.D. at 349. *See generally*, Annot. 57 A.L.R.3d 867 (1974).

145. A cause of action for contribution or indemnity is distinct from the underlying action for which contribution or indemnity is sought. Several courts have characterized contribution

son seeking contribution or indemnity normally has three years from the date of payment of the judgment or primary liability to file a claim.

The language of section 12-310 does not state whether the statute abrogates the general statute of limitations governing claims for contribution and indemnity. The focal point of section 12-310, both for plaintiff's claims and those for contribution and indemnity, is the relationship between the date of injury or death and the date the improvement was substantially completed.[146] The statute does not expressly require that a plaintiff's cause of action, and claims seeking contribution and indemnity, must be commenced within this ten-year period.

Despite this omission in the statutory language, the legislative history clearly reveals Congress' intent to require all claims, including those for contribution and indemnity, to be commenced within the ten-year period set forth in the statute.[147] For example, an owner who is sued in the ninth year following completion of the improvement has only one year to file a claim for contribution or indemnity against a beneficiary of section 12-310, who might be jointly or wholly liable. If payment of the judgment or primary liability occurs after the ten-year period following substantial completion of the improvement, and the payor failed to file a claim for contribution or indemnity within the time specified by section 12-310, the payor's claim for contribution or indemnity is time-barred.

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claims as being based upon an implied contract and have applied the contract statute of limitations to such claims. *See generally* Annot., 57 A.L.R.3d 927 (1974). A similar analysis would apply to indemnity actions that also are based on an express or implied contract. The District of Columiba has a three-year statute of limitations for express or implied contracts. *See* D.C. CODE ANN. § 12-301(7) (1981 & Supp. 1985). The District of Columbia also has a residuary three-year statute of limitations for actions for which "[a] limitation is not otherwise specially prescribed." *See* D.C. CODE ANN. § 12-301(8) (1981 & Supp. 1985).

Where the theory of the contribution or indemnity claim is based upon the warranties provided by the Uniform Commercial Code, the general rule concerning the statute limitations for contribution and indemnity claims may conflict with § 2-725 of the Code. That section provides a four-year statute of limitations for breach of warranty actions and further states that such actions normally accrue upon "tender or delivery" of the goods. *See* D.C. CODE ANN. § 28:2-725 (1981 & Supp. 1985). *See also* Stanford v. Lesco Assoc., 10 U.C.C. Rep. Serv. (Callaghan) 812, 813-14 (D.D.C. 1972); Sears, Roebuck & Co. v. Goudie, 290 A.2d 826, 830 (D.C.), *cert. denied*, 409 U.S. 1049 (1972) (implying that four-year statute of limitations set forth in § 2-725 would apply if claim had accrued after the effective date of the statute). The only warranty actions exempted from the four-year statute are for warranties which explicitly extend to the future performance of the goods. Thus, the time for bringing a breach of warranty action may expire before the time when a contribution or indemnity claim would otherwise accrue.

146. D.C. CODE ANN. § 12-310(a)(1)(B) (1981 & Supp. 1985).

147. *See supra* note 27 and accompanying text.

VI. SECTION 12-310: NEED FOR AMENDMENT

As presently drafted, section 12-310 may be interpreted to insulate from liability all persons other than those identified in subsection (b) of the statute, if the other statutory prerequisites are satisfied. Such an all-inclusive reading, however, is undesirable, and the statute should be amended to specifically delineate those persons who may assert the limitations period embodied in the statute.[148]

Various policy reasons have been offered in support of architects' and builders' statutes of repose. Abolishing the privity defense extended the liability of design and construction professionals to an unlimited class of third parties. This unlimited scope of liability is exacerbated by its indefinite duration. After completing a project, the architect and builder have no control over the actions of the owner in maintaining the premises. Despite this lack of control, however, an action can be brought many years after the project is completed and accepted by the owner. At this point in time, the factor most likely causing plaintiff's damage is the negligence of the owner in maintaining the premises. Absent a statute of repose, persons participating in the construction process would be required to defend claims indefinitely, armed with evidence no doubt faded with the passage of time.[149]

Proponents of architects' and builders' statutes of repose also cite statistical studies to justify the existence of these statutes.[150] These studies suggest that nearly 98% of all claims against members of the construction industry are brought within seven years after substantial completion of the project.[151]

148. This has been accomplished in other jurisdictions in one of two ways. The statute could be amended to expressly list those persons who are within the statute and may raise the limitations defense. *See, e.g.*, COLO. REV. STAT. § 13-80-127(1)(a) (Supp. 1981) (statute applies only to "architect, contractor, builder or builder vendor, engineer or inspector" performing certain acts in relation to the construction). *See also supra* note 17 and accompanying text. Alternatively, subsection (b) of the statute could be amended to list those persons who are not within the statute. *See, e.g.*, VA. CODE § 8.01-250 (1984) (manufacturers and suppliers of products specifically excluded).

149. *See, e.g.*, S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972); *Hearing Before the Senate Subcomm. on Business, Commerce, and Judiciary of the Committee on the District of Columbia*, 92d Cong., 2d Sess. 7, 8, 10-12, 15, 18 (1972); 118 CONG. REC. 36,939 (1972). *See also Hearing Before House of Representatives Subcomm. No. 1 of the Comm. on the District of Columbia*, 90th Cong., 1st Sess. 24-26 (1967).

150. *See, e.g., Hearing Before the Senate Subcomm. on Business, Commerce, and Judiciary of the Comm. on the District of Columbia*, 92d Cong., 2d Sess. 16, 19 (1972); 118 CONG. REC. 36,941 (1972). *See also Hearing Before House of Representatives Subcomm. No. 1 of the Comm. on the District of Columbia*, 90th Cong., 1st Sess. 28 (1967).

151. *See, e.g., Hearing Before the Senate Subcomm. on Business, Commerce, and Judiciary of the Comm. on the District of Columbia*, 92d Cong., 2d Sess. 19 (1972); *Hearing Before House of Representatives Subcomm. No. 1 of the Comm. on the District of Columbia*, 90th Cong., 1st Sess. 27-28 (1967).

Statutory provisions such as section 12-310, which allow more than seven years to commence an action, purportedly strike an appropriate balance between the policies of repose and a person's right to pursue a remedy.

The stated rationales underlying architects' and builders' statutes of repose are not free from doubt. The evidentiary problems confronting the beneficiaries of these statutes when actions are commenced many years after completion of the improvement plague potential plaintiffs and defendants alike, and provide little support for a policy choice granting certain defendants immunity from suit. Additionally, although the majority of claims against architects and builders may be commenced prior to the limitations period established by the statute of repose, some meritorious claims doubtlessly arise after this time period has elapsed. Finally, if 98% of all plaintiffs' claims are brought against members of the construction industry within seven years after substantial completion of the improvement, the fear that absent a statute of repose these potential defendants will be forced to defend claims indefinitely is exaggerated.

Whatever the merits of a policy insulating architects, builders, and other persons directly involved in the construction process from liability after a certain period of time, the arguments in support of this policy are even less persuasive when applied to parties such as manufacturers,[152] whose only connection with the construction is the inclusion of their products in the structural improvement. Like the architect and builder, the manufacturer has no control over the owner whose negligent maintenance may allow the product to deteriorate to a dangerous condition. But here the similarities between architects and builders, on the one hand, and manufacturers, on the other hand, largely disappear. Manufacturers are best able to allocate the risk of defective or unsafe products to the public at large. Indeed, this notion of efficient risk allocation lies at the heart of strict liability in tort.[153] Rather than imposing the loss attributable to a defective or unsafe product on the individual, manufacturers may distribute this loss most efficiently to the general population.[154]

152. Use of the term "manufacturer" in this context includes all those persons in the product's distribution chain.

153. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965); W. PROSSER, *supra* note 8, at § 97.

154. The nature of the manufacturer's business renders it better able to efficiently distribute loss than members of the construction industry. "Unlike mass manufacturing products, there is no mass consumption of building projects over which to spread the economic risk of liability." Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 FED'N INS. COUNS. Q. 41, 67 (1978).

Several states have enacted product liability statutes of repose to provide a time period within which actions against the manufacturer of defective products must be commenced. *See,*

Further, manufacturers occupy a role qualitatively different from that of members of the construction industry. Manufacturers produce and distribute standardized products and, through standardized processes, are best able to monitor quality control. Building design and construction professionals, on the other hand, have little opportunity to pretest their ideas and services.[155]

In addition to delineating those persons who are exempt from the statute,

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e.g., ARIZ. REV. STAT. ANN. § 12-551 (1980) (twelve-year statute of repose); COL. REV. STAT. § 13-80-127.6(1)(b) (Supp. 1984) (ten-year statue of repose); CONN. GEN. STAT. ANN. § 52-577(a) (West Supp. 1985) (same). *See generally* McGovern, *supra* note 6. Congress is also considering products liability legislation that would create uniform national standards governing products liability litigation. *See* S. 44, 98th Cong., 2d Sess. (1983) introduced by Senator Kasten ("Kasten bill") and H.R. 2729, 98th Cong., 1st Sess. (1983) introduced by Rep. Shumway ("Shumway bill"). The Kasten and Shumway bills are outgrowths of the Model Uniform Products Liability Act drafted by the Department of Commerce. *See* Model Uniform Products Liability Act, *reprinted in* 44 Fed. Reg. 62,714 (1979).

Both the Kasten and Shumway bills contain a repose provision. Subject to certain exceptions, the Kasten bill requires all actions for harms allegedly caused by a defect in the design or warning of a capital good be brought within 25 years from the time the product was first delivered. *See* S. 44, 98th Cong., 2d Sess. § 11 (1983). Similarly, the Shumway bill, also subject to certain exceptions, requires all product related actions to be commenced within 10 years after the sale of the product. *See* H.R. 2729, 98th Cong., 1st Sess. § 12 (1983). However, even assuming that a repose period applicable to products liability actions is justified, such a limitations period should be the result of explicit debate, not the unforeseen consequence of a statutory provision such as § 12-310.

155. Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible of the quality control standards of the factory.

Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381, 1386 (La. 1978). *See also* McMacken v. State, 320 N.W.2d 131, 135, *aff'd on rehearing*, 325 N.W.2d 60 (S.D. 1982); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 277, 382 A.2d 715, 719 (1978).

One commentator suggests manufacturers should be considered among the beneficiaries of statutes of repose for architects and builders depending upon both the role the product plays in the improvement and the theory upon which the manufacturer is sued:

> A sound approach is that the statute should protect a manufacturer of machinery or construction materials that are necessary in order for the improvement to function as it was intended. A manufacturer should be protected, however, only to the extent he is accused of faulty design, supervision, planning, or construction of the machine. When he is accused of faulty manufacture of the machine, or of faulty warnings or instructions with regard thereto, and those activities take place at a plant away from the construction site, a manufacturer should not be immune. Nor would a manufacturer be immune under this analysis when the machine—even if it is a 'fixture'—is not required for the use of the improvement by the owner.

Rogers, *supra* note 6, at 13-14. *See also* Howell v. Burk, 90 N.M. 688, 568 P.2d 214, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977). Yet it would be extremely difficult, if not impossible, to distinguish between claims of "faulty design . . . or construction of the machine" that

other portions of section 12-310 also require clarification. A definition or listing of the "express or implied contracts" exempted from the statute's operation is necessary to determine which actions the statute governs. Similarly, the statute currently is confusing concerning whether claims for contribution and indemnity are barred when an action is brought against the owner or other person in possession of the realty. Although this was the likely intent of the draftsmen, this intent is imprecisely stated in the statute.

There also is a need to specify the relationship between section 12-310 and the various statutes of limitations set forth in the District of Columbia Code. In its present form, the statute is silent concerning whether it requires a plaintiff's action and a defendant's claims for contribution and indemnity to be actually commenced within ten years following substantial completion of the improvement. The legislative history of section 12-310 strongly suggests that this is the case.[156] Nevertheless, if the statute is intended to require all such claims to be filed within this period, this intent easily can be reflected in the statutory language.

Finally, the statute should be amended to provide a grace period for claims that accrue near the expiration of the ten-year period established by section 12-310. Indeed, the absence of such a grace period may render section 12-310 unconstitutional.[157] If the statute is interpreted to require that all claims must be commenced within ten years of substantial completion of the improvement, a person injured on the day before the tenth anniversary of completion has only one day in which to file suit. Most analogous statutes in other jurisdictions provide grace periods that permit persons whose cause of action would otherwise be extinguished almost immediately by the statute of repose a reasonable length of time in which to file suit.

VII. CONSTITUTIONALITY OF SECTION 12-310

Section 12-310 poses several constitutional issues. In its present form, or as amended to exclude from its operation actions against manufacturers and other persons not directly involved in the construction process, the statute distinguishes among potential classes of defendants. Some of these defendants are granted immunity from suit while others are not given immunity. The classification scheme inherent in section 12-310 is vulnerable on equal protection grounds.

The statute is subject to constitutional challenge for other reasons as well.

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would allow the manufacturer to raise the statute, from claims of "faulty manufacture of the machine" that are outside the statute's protection.

156. *See supra* note 27 and accompanying text.

157. *See infra* text accompanying notes 202-07.

The statute effectively forecloses any cause of action ten years after substantial completion of the improvement irrespective of the date of injury or death. The statute thus may eliminate, even before a party has suffered injury or death, a cause of action that otherwise would be actionable.[158] Further, to the extent the injury or death occurs near the expiration of the ten-year period established in the statute, section 12-310 also may deprive litigants of a reasonable time period in which to file suit before their claim is extinguished. These consequences raise due process concerns.[159]

In *President and Directors of Georgetown College v. Madden*,[160] the United States District Court for Maryland examined the constitutionality of section 12-310, and concluded the statute withstood constitutional scrutiny. Thus, the court joined the majority of courts in other jurisdictions that have found similar statutes of repose to be a proper exercise of legislative authority.[161]

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158. This consequence has prompted some courts questioning the validity of these statutes to cite Judge Frank's dissent in Dincher v. Marlin, 198 F.2d 821, 823 (2d Cir. 1952):

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.

See, e.g., Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873, 876 n.5 (D.S.D. 1981). *See also* McMacken v. State, 320 N.W.2d 131, 141, *aff'd on rehearing*, 325 N.W.2d 60 (S.D. 1982) (Henderson, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 899 comment g (1979). *Cf.* Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288, 295 (1983) (New Hampshire products liability statute of repose unconstitutional).

159. The analysis used to determine whether a particular statute violates the due process or equal protection provisions of the fifth and fourteenth amendments to the United States Constitution is largely the same. Where no fundamental right is implicated, the relevant due process inquiry centers upon whether the law arguably is rationally related to a legitimate legislative objective. Only when the legislation infringes upon a specific civil liberty such as the freedom of speech will the court scrutinize the basis for the legislation more carefully.

The analysis used to determine whether a statute violates the equal protection clause of the fourteenth amendment is virtually identical. If the statute involves no fundamental right or suspect class, the classification scheme created by the statute does not violate the equal protection clause provided that the classification rationally relates to a legitimate legislative purpose. Conversely, "strict scrutiny" is required if the statute touches upon a fundamental right or suspect class. In the past several years, the Supreme Court also has developed an intermediate standard of review between the "rational basis" and "strict scrutiny" tests. *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW, ch. 12, § III(A), ch. 16 § II(C) (2d ed. 1983).

160. 505 F. Supp. 557 (D. Md. 1980), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981).

161. *See* Cournoyer v. Mass. Bay Transp. Auth., 744 F.2d 208 (1st Cir. 1984); Brown v. M.W. Kellogg Co., 743 F.2d 265 (5th Cir. 1984); Hartford Fire Ins. Co. v. Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984); Hasty v. Rust Eng'g Co., 726 F.2d 1068 (5th Cir. 1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Skeen v. Monsanto Co., 569 F. Supp. 232 (S.D. Tex. 1983); Adair v. Koopers Co., 541

In *President and Directors*, plaintiff argued that section 12-310 violated the

F. Supp. 1120 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984); Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212 (D.C. Colo. 1981); Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); Salinero v. Pon, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); Wagner v. State, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978); Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 462 A.2d 416 (Del. Super. 1983); Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507 (1983); Mullis v. Southern Co. Servs., 250 Ga. 90, 296 S.E.2d 579 (1982); Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); Matayka v. Melia, 119 Ill. App. 3d 221, 74 Ill. Dec. 851, 456 N.E.2d 353 (1983) (subsequent to amendment of Illinois statute); Beecher v. White, 447 N.E.2d 622 (Ind. Ct. App. 1983); Carney v. Moody, 646 S.W.2d 40 (Ky. 1982); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); O'Brien v. Hazelet & Erdal Consulting Eng'r, 410 Mich. 1, 299 N.W.2d 336 (1980); Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) (subsequent to amendment of Minnesota statute); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982) (statute does not violate equal protection, however, in light of the particular facts of the case, does deny due process); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, *cert. denied sub nom.* Albuquerque v. Howell, 91 N.M. 3, 569 P.2d 413 (1977); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); [illegible] Gamble Deaconess Home Assoc. v. Turner Constr. Co., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984); Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc., v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); McMacken v. State, 320 N.W.2d 131, *aff'd on rehearing*, 325 N.W.2d 60 (S.D. 1982); Harmon v. Angus R. Jessup Assoc., 619 S.W.2d 522 (Tenn. 1981); Sowders v. M.W. Kellog Co., 663 S.W.2d 644 (Tex. Civ. App. 1983); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981), *appeal dismissed*, 459 U.S. 802, *rehearing denied*, 459 U.S. 1059 (1982); Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. 1977) (*writ ref'd n.r.e.*); Good v. Christensen, 527 P.2d 223 (Utah 1974); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972); United States Fire Ins. Co. v. Wesley, 100 Wis. 2d 59, 301 N.W.2d 271 (Wis. Ct. App. 1980) (subsequent to amendment of Wisconsin statute), *modified on appeal*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982) (Supreme Court did not reach constitutional issue). *See generally* Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 FED'N INS. COUN. Q. 41 (1978); Knapp & Lee, *supra* note 6, at 351; McGovern, *supra* note 6, at 579; Rogers, *supra* note 6, at 1; Sisson & Kelley, *Statutes of Limitations for the Design and Building Professions—Will They Survive Constitutional Attack*, 49 INS. COUNS. J. 243 (1982); Comment, *Defective Design*, *supra* note 6, at 87; Comment, *Limitation of Action*, *supra* note 6, at 361; Annot., 93 A.L.R.3d 1242 (1979).

The constitutional questions raised by statutes of repose for architects and builders are similar to those surrounding state medical malpractice and products liability statutes of repose. *See, e.g.*, ALA. CODE § 6-5-482 (1975) (medical malpractice statute of repose); FLA. STAT. ANN. § 95.11(4)(b) (1982) (same); MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984) (same). *See also supra* note 149 and accompanying text. *See generally* McGovern, *supra* note 6, at 579. Courts are divided on the constitutionality of these statutes as well. *Compare* Kennedy v. Cumberland Eng'r Corp., 471 A.2d 195 (R.I. 1984) (Rhode Island products liability statute of repose violates open access to courts provision of state constitution); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983) (New Hampshire product liability statute of repose unconstitutional); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (New Hampshire

fifth and fourteenth amendments of the United States Constitution. The court framed the relevant issue as follows:

> The question arises as to whether the different treatment accorded to builders, architects, engineers, and other design professionals engaged in improvements to real property on the one hand, and owners, occupiers and suppliers on the other hand, is valid. The former group is benefited by the limitation on liability granted by section 12-310; the latter group is not so benefited, and the liability of its members is not so limited.[162]

In answering this question, the court noted the United States Supreme Court had dismissed an earlier appeal from the Supreme Court of Arkansas, *Carter v. Hartenstein*,[163] for lack of a substantial federal question. The principal issue presented in *Carter* concerned the constitutionality of a statute of repose analogous to section 12-310. The court in *President and Directors* cited the Supreme Court's dismissal of *Carter* as precedent supporting the constitutional validity of statutes of repose similar to section 12-310.[164] The

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medical statute of repose unconstitutional); *with* Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) (Indiana product liability statute of repose constitutional), *cert. denied*, 104 S. Ct. 2690 (1984); Mathis v. Eli Lilly Co., 719 F.2d 134 (6th Cir. 1983) (Tennessee product liability statute of repose constitutional); Jewson v. Mayo Clinic, 691 F.2d 405 (8th Cir. 1982) (Minnesota medical malpractice statute of repose did not violate due process).

For a thorough review of the constitutional issues raised by statutes of repose such as § 12-310, see McGovern, *supra* note 6, at 579. There, the author observes that the constitutional analysis employed by most courts to date in examining statutes of repose has been less than satisfactory:

> The treatment of these [constitutional] issues by state appellate courts generally has been unilluminating. The opinions tend to be conclusory and founded upon unarticulated rationales. The definition that a court gives to the statute under constitutional attack often is dispositive.

Id. at 581. Of course, to the extent that a statute is challenged on equal protection and due process grounds, this criticism is perhaps more a function of current equal protection—due process analysis than a conscious abandonment by courts of rigorous constitutional review. Under the current "tiered" equal protection-due process framework, statutes are assigned minimum, intermediate, or strict review. Once the appropriate standard is selected, the outcome in most instances is assured. Statutes involving economic regulation almost invariably are upheld as a valid exercise of legislative authority; statutes touching upon fundamental rights or suspect classes merit strict scrutiny that nearly always proves to be "strict" in theory but "fatal" in fact. No such predictability is associated with intermediate review, which is reserved for classifications involving important, but not fundamental, rights. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 16-2, 16-3, 16-6, 16-30 (1978).

162. 505 F. Supp. at 577 (referring to D.C. CODE ANN. § 12-310(b)(2) (1981 & Supp. 1985). The court's dicta that suppliers may not raise the limitations period set forth in § 12-310 is not free from doubt. The court's citation to § 12-310(b)(2) in support of this statement is overstated. That provision excepts only the person, who at the time of the injury or death, "[w]as the owner of or in actual possession or control of such real property."

163. 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

164. "A summary dismissal of a case for want of a substantial federal question is a decision

court applied the customary two-tiered equal protection-due process analysis, and concluded that section 12-310 bore a rational relationship to the legislature's goals:

> After 'applying principles established by prior [Supreme Court] decisions,' this Court concludes that section 12-310 is constitutional. Section 12-310 is an economic regulation and does not focus on either a fundamental right or a suspect class. It therefore does not merit strict scrutiny and passes muster under the rational basis test. In sum, this Court concludes that the classifications constructed by section 12-310 are rational, and that section 12-310 does not violate any provisions of the federal constitution.[165]

Other federal precedent is virtually unanimous in upholding the validity of architects' and builders' statutes of repose.[166] State decisional law, however, is more evenly divided. The majority of state courts that have considered the constitutionality of their respective statutes of repose have sustained the validity of these statutes.[167] On the other hand, a substantial minority of state courts have found to the contrary, concluding that these statutes impermissibly infringe upon constitutional guarantees.[168]

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by the United States Supreme Court on the merits of that case which this Court is not free to disregard." 505 F. Supp. at 578. A constitutional challenge to to the analogous Texas statute of repose also was dismissed for want of substantial federal question. *See* Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981, *appeal dismissed*, 459 U.S. 802, *rehearing denied*, 459 U.S. 1059 (1982). In sustaining the validity of the Texas statute, the Fifth Circuit cited the Supreme Court's dismissal of *Ellerbe* as binding precedent. *See* Hasty v. Rust Eng'g Co., 726 F.2d 1068, 1070 (5th Cir. 1984); *see also* Hartford Fire Ins. Co. v. Lawrence, Dykes, Gooden, Berger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984).

165. 505 F. Supp. at 578-80.

166. *See supra* note 161 and accompanying text. Only one federal court expressly has found such a statute constitutionally defective. In *McClanahan v. American Gilsonite Co.*, the court concluded that the Colorado statute violated equal protection clause of the federal constitution as well as state constitutional provisions. 494 F. Supp. 1334, 1344-46 (D. Colo. 1980). Later, however, the Colorado Supreme Court, faced with a constitutional attack of the same statute, subsequently upheld the validity of the Colorado statute and expressly declined to adopt the reasoning of *McClanahan*. *See* Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 828 n.8 (Colo. 1982) (en banc). Further, another federal judge in the same judicial district as *McClanahan* refused to adopt that decision and, instead, found the statute constitutionally permissible. *See* Cudahy Co. v. Ragnar Benson, Inc., 514 F. Supp. 1212, 1216-17 (D. Colo. 1981). *See also* Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873 (D.S.D. 1981) (implying that the South Dakota statute was unconstitutional but not reaching this issue). *See also In re* Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) (interpreting Kentucky law; Kentucky statute unconstitutional based upon state constitutions; *but see* Carney v. Moody, 646 S.W.2d 49 (Ky. 1982) (Kentucky statute constitutional).

167. *See supra* note 161 and accompanying text.

168. *See In re* Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983) (interpreting Kentucky law); Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Plant v. R.L. Reid Co., 294 Ala. 155, 313 So. 2d 518 (1975); Bagby Eleva-

In cases where architects' and builders' statutes of repose have been declared unconstitutional, the court's decision often rests on a peculiar provision of the state constitution, rather than on a violation of the federal Constitution. Courts have found their respective statutes unconstitutional on the basis of the state constitution's equal protection,[169] special legislation[170] or open court provisions,[171] vagueness,[172] and other guarantees provided by state law.[173] Some courts, however, have found that the statute in question conflicts with federal constitutional mandates as well.[174]

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tor & Elec. Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974); Overland Const. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); Pacific Indemn. Co. v. Thompson-Yeager, Inc., 260 N.W.2d 548 (Minn. 1977); State Farm Fire & Casualty Co. v. All Elec., Inc., 99 Nev. 222, 660 P.2d 995 (1983); Antoniou v. Kenick, 124 N.H. 606, 474 A.2d 566 (1984); Henderson Clay Prods., Inc. v. Edgar Wood & Assocs., 122 N.H. 800, 451 A.2d 174 (1982); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Dangaard v. Baltic Co-Op Bldg. & Supply Ass'n, 349 N.W.2d 419 (S.D. 1984); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

The lack of consensus concerning the constitutionality of these statutes is vividly portrayed by several decisions examining the South Dakota statute. In Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck, 507 F. Supp. 873 (D.S.D. 1981), the court implied that the statute was unconstitutional, but declined to reach this issue. Shortly thereafter, the Supreme Court of South Dakota upheld the statute from constitutional attack in McMacken v. State, 320 N.W.2d 131, *aff'd on rehearing*, 325 N.W.2d 60 (S.D. 1982), a result also reached by the Court of Appeals for the Eighth Circuit. *See* Van Den Hul v. Baltic Farmer's Elevator Co., 716 F.2d 504 (8th Cir. 1983). Still later, in Dangaard v. Baltic Co-Op Bldg. & Supply Ass'n, 349 N.W.2d 419 (S.D. 1984), the Supreme Court of South Dakota overruled *McMacken*, and found the South Dakota statute unconstitutional because it violated the "open court" provision of the state constitution.

169. *See, e.g.*, Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); Henderson Clay Prods. v. Edgar Wood & Assocs., 122 N.H. 800, 451 A.2d 174 (1982) (New Hampshire statute violates both federal and state constitutions); State Farm Fire & Casualty Co. v. All Elec., Inc., 99 Nev. 222, 660 P.2d 995 (1983).

170. *See, e.g.*, Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (Wyoming statute provides special immunity and also violates state constitution).

171. *See, e.g.*, Jackson v. Mannesman Demag Corp., 435 So. 2d 725 (Ala. 1983); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Saylor v. E.H. Hall, 497 S.W.2d 218 (Ky. 1973); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (Wyoming statute violates special legislation and open court provisions of state constitution).

172. *See, e.g.*, Plant v. R.L. Reid Co., 294 Ala. 155, 313 So. 2d 518 (1975).

173. *See, e.g.*, Bagby Elevator Co. v. McBride, 292 Ala. 191, 291 So. 2d 306 (1974) (title of statute does not clearly express subject; body of statute contains two subjects); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (Wisconsin statute violates federal equal protection and provision of state constitution guaranteeing every person a remedy).

174. *See, e.g.*, Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); State Farm Fire and Casualty Co. v. All Elec., Inc., 99 Nev. 222, 660 P.2d 995 (1983) (statute violates both federal and state equal protection guarantees); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Henderson Clay Prods. v. Edgar Wood & Assocs., 122 N.H. 800, 451

The earliest decision striking a statute of repose analogous to section 12-310 is that of the Supreme Court of Illinois in *Skinner v. Anderson*.[175] In *Skinner*, plaintiff brought suit against various parties, including an architect, who allegedly failed to design a building with proper ventilation. The trial court dismissed the defendant-architect on the basis of the Illinois architects' and builders' statute of repose. On appeal, plaintiff argued the statute was unconstitutional. The appellate court held the state statute violated a provision of the Illinois constitution that prohibited special legislation granting immunity to certain classes of persons.[176] The classification scheme created by the statute—between those immunized from liability and those who were not—was deemed unrelated to any legitimate legislative purpose.[177]

Following *Skinner*, other state courts found their respective statutes of repose constitutionally defective. In *Fujioka v. Kam*,[178] for example, the court was confronted with a constitutional attack on the Hawaiian architects' and builders' statute of repose. Although the court acknowledged that the legislature may change or abrogate common law remedies,[179] the court held that the statute in question violated both federal and state equal protection mandates because it arbitrarily differentiated potential classes of defendants:

> Stated another way, the cause of the injuries is the same, the plaintiff is the same and injuries are the same—but under the statute the plaintiff may not recover from the engineer and the contractor even

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A.2d 174 (1982) (statute violates both federal and state equal protection guarantees); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) (statute violates federal equal protection as well as provision of state constitution guaranteeing every person a remedy).

175. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

176. The specific constitutional provision violated in *Skinner* provided:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for . . . Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

38 Ill. 2d at 459, 231 N.E.2d at 590.

177. *Id.* at 460, 231 N.E.2d at 591. Although the plaintiff also challenged the Illinois statute on federal constitutional grounds, the court expressly based its decision on Illinois constitution, and reserved judgment on the other constitutional claims advanced. *Id.* at 458, 231 N.E.2d at 590.

In dicta, the court also implied manufacturers and suppliers were not within the class of persons protected by the Illinois statute:

> If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement.

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

178. 55 Hawaii 7, 514 P.2d 568 (1973).

179. *Id.* at 10, 514 P.2d at 570.

> 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 damages from the owners, and the owners will have no right to have the engineer and the contractor reimburse or contribute to them the amount of damages they are required to pay the plaintiff. We are unable to see any rational basis for treating the engineer and the contractor differently from the owners under the same circumstances.[180]

Although *Fujioka* and other courts have invalidated architects' and builders' statutes of repose because they deny equal protection, attacks based on due process guarantees have been less successful.[181] Several courts have relied upon the Supreme Court's decision in *Silver v. Silver*[182] to sustain the validity of these statutes of repose against claims that they deny due process by eliminating before the occurrence of the injury or death a claim that otherwise would be actionable.[183]

In *Silver*, the Court held that a Connecticut statute that abolished a cause of action by automobile guests against owners and operators did not violate the equal protection clause. In dicta, the Court opined that the Connecticut statute did not violate due process by abolishing a common law right of action.[184]

Several state legislatures have amended and reenacted their statutes of repose for architects and builders after the statutes were declared unconstitutional.[185] These amendments allegedly were designed to alleviate the

180. *Id.* at 12, 514 P.2d at 571. The question before the court was whether the statute violated "[a]ny provision of the Hawaii State Constitution or the United States Constitution." *Id.* at 10, 514 P.2d at 570. In answering this question in the affirmative, the court does not state whether the basis of its opinion is a violation of the state or federal constitution, or both. Since the court cites both federal and state precedent in support of its analysis, presumably the statute was deemed constitutionally infirm in both respects.

181. *See generally* McGovern, *supra* note 6, at 613. The author notes that "no state appellate court . . . has relied solely upon due process to overturn a product liability statute of repose." *Id.*

182. 280 U.S. 117 (1929).

183. *See, e.g.*, President & Directors of Georgetown College v. Madden, 505 F. Supp. 557, 578 (D. Md.), *aff'd in part and appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981); Adair v. Koppers Co., 541 F. Supp. 1120, 1128 (N.D. Ohio 1982), *aff'd*, 741 F.2d 111 (6th Cir. 1984).

184. "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative objective." 280 U.S. at 122 (1969). *See also* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88 n.32 (1978) (citing Second Employers' Liability Cases, 223 U.S. 1, 50 (1912) ("[a] person has no property, no vested interest, in any rule of the common law."). *See also* Wayne v. Tennessee Valley Auth., 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 908 (1985) (Tennessee products liability statute of repose constitutional).

185. *See, e.g.*, HAWAII REV. STAT. § 657-8 (Supp. 1984); MINN. STAT. ANN. § 541.051

constitutional infirmities declared by the state's judiciary. In fact, some of these statutory amendments made no substantive changes to the prior law.[186] In *Shibuya v. Architects Hawaii Ltd.*,[187] the Supreme Court of Hawaii declared the Hawaiian statute of repose, which had been amended after the court's opinion in *Fujioka*, unconstitutional on equal protection grounds.[188]

Although a substantial minority of state courts have invalidated architects' and builders' statutes of repose, the doctrinal analysis employed by the majority of courts in sustaining these statutes from constitutional challenge is anchored on more substantial footing, at least on the basis of federal constitutional principles. Decisions invalidating these statutes often appear to mask a subtle judicial hostility toward the practical effect of these statutes of repose. Unlike traditional statutes of limitations, which punish the dilatory plaintiff, statutes of repose may bar a cause of action regardless of how promptly a grievant may attempt to perfect his legal remedy. In addition, statutes of repose permit some potential defendants to escape liability, while allowing the action to proceed against others, merely because a certain amount of time has passed following substantial completion of the improvement.

Despite judicial reluctance to embrace statutes of repose such as section 12-310, the better view is that these statutes are a constitutional exercise of legislative authority. The authority of legislatures to abolish or modify existing common law causes of actions is established beyond peradventure.[189] Moreover, statutes are not rendered unconstitutional merely because they treat some defendants differently than others. Of course, both in eliminating

(West Supp. 1985); OKLA. STAT. ANN. tit. 12, §§ 109-110 (West Supp. 1984-1985); WIS. STAT. ANN. § 893.89 (West 1983). After the Florida statute was declared unconstitutional in Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), the statute was reenacted without revision, but with a preamble setting forth the legislature's intention. *See* Act of July 2, 1980, ch. 80-322, 1980 FLA. LAWS 1389, 1390 (codified at FLA. STAT. ANN. § 95.11(3)(c) (West 1982)). *See also The Crumbling Tower of Architectural Immunity*, *supra* note 8, at 226.

186. *See generally* Knapp & Lee, *supra* note 6, at 365; Comment, *Defective Design*, *supra* note 6, at 103.

187. 65 Hawaii 26, 647 P.2d 276 (1982).

188. *Id.* at 43-45, 647 P.2d at 288. Other courts, however, have found the amended statutes constitutional. *See, e.g.*, Matayka v. Melia, 119 Ill. App. 3d 221, 456 N.E.2d 353 (1983) (amended Illinois statute constitutional); Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) (amended Minnesota statute constitutional); United States Fire Ins. Co. v. Wesley, 100 Wis. 2d 59, 301 N.W.2d 271 (Wis. Ct. App. 1980) (amended Wisconsin statute constitutional), *modified on appeal*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982) (court did not reach constitutional issue).

189. *See supra* note 184 and accompanying text; *see also* Adair v. Koppers, Co., 541 F. Supp. 1120 (N.D. Ohio 1982); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

traditional common law rights and in distinguishing classes of defendants, the legislature must act rationally to further some permissible objective. It is here where the battle concerning the constitutionality of these statutes is waged.

The legislative history of section 12-310 demonstrates Congress' intent to limit the potentially indefinite liability of persons involved in the design and construction of improvements to real property. In support of the bill's passage, proponents of the legislation cited specific cases that demonstrated the need to adopt a time limitation for actions arising from allegedly unsafe or defective improvements to real property.[190] In enacting section 12-310, Congress chose a rational means to eliminate a perceived problem. Although the validity of the assumptions underlying statutes of repose such as section 12-310 may be subject to some question,[191] whether Congress chose the wisest or most desirable course is irrelevant to the constitutional inquiry.[192]

Section 12-310 also is not constitutionally defective because it distinguishes potential classes of defendants. Because the statute involves neither a fundamental right nor suspect class, the relevant examination hinges upon whether the classification scheme inherent in the statute is rationally related to a legitimate legislative objective.

In connection with section 12-310, Congress considered the disparate positions of those involved in the construction process who may invoke the statute, and owners of realty who are specifically exempted from the statute's operation.[193] The former have no control over the improvement once it is accepted by the owner.[194] Owners, on the other hand, through proper maintenance and supervision, are in the best position to protect the improvement from dangerous or unsafe conditions that may develop over time. In view of the owner's control over the improvement, section 12-310 does not deny equal protection of the law. Simply stated, owners of the realty occupy a position dissimilar to those who may invoke the statute, and this different position justifies different treatment under the statute.[195]

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190. *See* 118 CONG. REC. 36,939 (1972).

191. *See supra* text accompanying notes 152-55.

192. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949); *see also* McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

193. *See* S. REP. NO. 1274, 92d Cong., 2d Sess. 2 (1972); 118 CONG. REC. 36,939 (1972).

194. *Id.*

195. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork, Co., 476 Pa. 270, 276-78, 382 A.2d 715, 718 (1978); Lamb v. Wedgewood South Corp., 308 N.C. 419, 435-38, 302 S.E.2d 868, 877-78 (1983); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Beecher v. White,

Other factors not expressly reflected in the legislative history of section 12-310 have been cited by courts upholding the constitutionality of architects' and builders' statutes of repose. The potential scope of liability between design and construction professionals and owners differs appreciably. Owners are liable to others who come onto their land while architects, builders, and others involved in the construction process may be liable to both owners and others who use the land.[196] Further, the owner's liability typically lies only in tort and is subject to various common law rules limiting liability, such as "undiscovered trespassers" and "mere licensees."[197] Design and construction professionals, on the other hand, may be liable for construction defects under various legal theories. These theories include contract, warranty, negligence, and, perhaps, strict liability in tort.[198] In addition, their liability is not diminished by common law rules that may limit the owner's responsibility.[199] Finally, and perhaps most fundamentally, an owner's liability generally ceases once ownership is transferred. Liability of those involved in the construction process is coextensive with the life of the structure.

Not only does scope of liability differ between owners and design and construction professionals, architects' and builders' statutes of repose may induce certain public benefits. Design and construction innovation may entail increased risk. Although perhaps not empirically verifiable, limiting the potential liability of construction industry members may encourage innovation in design and construction techniques.[200]

Amending the statute specifically to exclude from its operation manufac-

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447 N.E.2d 622, 626 (Ind. App. 1983); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1385 (La. 1978); *see also* Overland Const. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979), where the dissent, citing the findings of the House Report accompanying an earlier version of § 12-310 that failed to pass Congress noted: "If the [Florida] legislature in enacting [the Florida statute], had made findings similar to those [of the United States House of Representatives], there could be little doubt that it would have shown an overpowering public necessity and the absence of a less onerous alternative." *Id.* at 577 (Alderman, J., dissenting).

196. Beecher v. White, 447 N.E.2d 622, 627 (Ind. Ct. App. 1983); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715, 718 (1978).

197. Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1385-86 (La. 1978); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, 220, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1979); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 270, 382 A.2d 715, 718 (1978).

198. *See generally The Crumbling Tower of Architectural Immunity*, *supra* note 8, at 246-50.

199. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork, Co., 476 Pa. 270, 382 A.2d 715, 718 (1978).

200. *See, e.g.*, Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 828 n.7 (Colo. 1982); O'Brien v. Hazelet & Erdal Consulting Eng'r, 410 Mich. 1, 299 N.W.2d 336, 342 (1980); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868, 878 (1983). One commentator, however, suggests that architects' and builders' statutes of repose actually may discourage rather than encourage preventive design and care since the statute eliminates the threat of liability after a certain number of years. *See* Comment, *Defective Design*, *supra* note 6, at 93. Never-

turers and other persons located at the fringe of the construction process also raises no substantial constitutional concerns. These parties, like the owner of the realty, occupy a position wholly dissimilar to persons such as architects and builders. Manufacturers and other persons in a product's distribution chain can most efficiently spread the risk of defective products to the general population. In addition, unlike architects and other persons in the construction industry, manufacturers can pretest their products.[201] The disparate positions of these parties justify different treatment under section 12-310.

Even though section 12-310 generally satisfies all constitutional requirements, there exists one situation in which the statute may deny due process. Currently, section 12-310 provides no grace period for claims arising near the expiration of the ten-year period established by the statute. If the statute is interpreted to require all claims to be filed within ten years after substantial completion of the improvement, a person injured on the 364th day of the ninth year following substantial completion of the improvement has only one day in which to file suit. Many analogous statutes in other jurisdictions provide a special grace period for claims that arise near the expiration of the time set forth in the statute of repose.[202] The effect of these grace periods is to allow a party who possesses a cause of action that otherwise would be precluded by the statute to commence an action after the time limit established by the statute.[203] Thus, in the example of the person injured on the last day before the statute of repose normally would bar all claims, the person typically is given one more year in which to file suit.

In *Terry v. New Mexico State Highway Commission*,[204] the plaintiff argued that the New Mexico architects' and builders' statute of repose was unconstitutional because it did not provide sufficient time to file suit for persons whose cause of action accrued near the expiration of the period set forth in the statute. The New Mexico statute[205] required all actions arising from defective or unsafe improvements to real property to be commenced within

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theless, building codes, licensing requirements, and regulation of members of the construction industry appear sufficient to deter this concern.

201. *See, e.g.*, Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918, 920, *appeal dismissed*, 401 U.S. 901 (1971); Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 828 (Colo. 1982); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1386 (La. 1978); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647, 651 (1976); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 878 (1983); Howell v. Burk, 90 N.M. 688, 568 P.2d 214, 220, *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1979); Freezer Storage, Inc. v. Armstrong Cork, Co., 476 Pa. 270, 270, 382 A.2d 715, 719 (1978).

202. *See supra* note 19 and accompanying text.

203. *Id.*

204. 98 N.M. 119, 645 P.2d 1375 (1982).

205. N.M. STAT. ANN. § 37-1-27 (1984).

ten years of substantial completion of the improvement and, like section 12-310, provided no grace period for claims accruing near the end of this ten-year period. The death forming the basis of plaintiff's action in *Terry* occurred three months before expiration of the ten-year statute of repose.[206] The court held that since the plaintiff possessed only three months to file suit before the statute of repose extinguished his cause of action, the statute deprived him of a reasonable amount of time to pursue a remedy and, accordingly, violated his due process rights. *Terry* provides persuasive support for the adding a grace period to section 12-310.[207]

VIII. CONCLUSION

The abolition of traditional defenses insulating members of the construction industry from liability prompted many states to enact special legislation establishing a finite period during which these persons may be liable. These architects' and builders' statutes of repose differ in various respects, but all are designed to protect certain persons, principally architects, builders, and other members of the construction industry, from the possibility of defending claims many years after an owner accepts an improvement to the realty.

The District of Columbia's architects' and builders' statute of repose differs from statutes enacted in other jurisdictions because it does not identify the statute's intended beneficiaries. Consequently, while architects, builders, and other persons involved in the construction process may assert the protection offered by section 12-310, so, too, may other persons not directly involved in the construction of a structural improvement to the realty. Section 12-310 thus may deprive litigants of potential claims against these more remote parties and may force those persons specifically excepted from the statute's operation to bear a disproportionate share of the liability resulting from defective improvements.

The consequences resulting from the virtually unlimited class of beneficiaries of section 12-310 suggest that the statute should be amended to re-

206. 98 N.M. at 121, 645 P.2d at 1379.

207. *Id.*, 645 P.2d at 1379. *See also* Jackson v. Mannesmann Demag Corp., 435 So. 2d 725, 729 (1983); O'Brien v. Hazelet & Erdal Consulting Eng'r, 410 Mich. 1, 299 N.W.2d 336, 341 n.18 (1980) (noting potential constitutional problem if statute of repose provided a person an unreasonably short period of time to file suit). Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1367 n.7 (6th Cir. 1984) (same). *See generally* Rogers, *supra* note 6, at 19-20; Comment, *Limitation of Action*, *supra* note 6, at 372-73. The statute also may be constitutionally infirm if it denies a reasonable period of time to file a claim for contribution or indemnity before expiration of the time limitation relating to these claims. *See* Calder v. City of Crystal, 318 N.W.2d 838, 844 (Minn. 1982). *Cf.* Pickett v. Brown, 462 U.S. 1 (1983) (Tennessee statute that provided insufficient time to bring paternity and child support actions unconstitutional).

strict its application. Arguably, manufacturers and other persons in the product's distributive chain should be excluded; such an amendment will place the risk of defective products on those best able to distribute the loss to the general population. Similarly, other portions of the statute also must be amended to clarify the statute's scope and application.

Finally, section 12-310 presents substantial constitutional questions. The statute should survive most equal protection and due process claims, but the lack of a grace provision for claims accruing near the expiration of the ten-year period established by the statute may render the statute constitutionally infirm. The inclusion of a grace period will eliminate this constitutional concern and will provide persons injured near the tenth anniversary of substantial completion of the improvement an equitable period of time in which to file suit.