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COMMENT/Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*

Recent legislation in some 30 jurisdictions has limited the time during which an action may be brought against architects, designers, engineers, and building contractors.¹ These statutes resulted from pressures brought to bear upon state legislatures by the architectural profession and construction industry after a major extension of their potential liability.² The shelter of the privity of contract doctrine, which insulated architects and builders from liability to third parties long after the doctrine's demise in manufacturers' product liability cases, was shattered in the early 1960's. For architects and contractors, the extension of liability was not merely one of breadth, but also in some instances a significant extension in duration.

An architect is liable for failure to exercise the reasonable care ordinarily required of the profession in preparing his plans, inspecting, and supervising construction.³ The architect in effect warrants that he possesses the average skill of his profession and that he will use this skill with ordinary care.⁴ A contractor is liable for breach of a construction contract or for negligent performance of a

*The author of this Comment, Associate Editor Margaret A. Cotter, is the recipient of the New York Metropolitan Area Alumni Award for the Best Comment to appear in Volume XVIII.

1. ALASKA STAT. § 09.10.055 (Supp. 1968); ARK. STAT. ANN. § 37-237 (Supp. 1967); CAL. CIV. PRO. CODE § 337.1 (West Supp. 1968); FLA. STAT. ANN. § 95.11(10) (Supp. 1969); GA. CODE ANN. § 3-1006 (Supp. 1968); HAWAII REV. STAT. § 657-8 (1968); IDAHO CODE ANN. § 5-241 (Supp. 1967); ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966); IND. ANN. STAT. §§ 2-639 to 2-642 (Supp. 1967); KAN. STAT. ANN. § 60-513 (1964); KY. REV. STAT. § 413.135 (Supp. 1968); LA. REV. STAT. ANN. § 9:2772 (1965); MICH. COMP. LAWS ANN. § 600.5839 (1968); MINN. STAT. ANN. § 541.051 (Supp. 1968); MISS. CODE ANN. § 720.5 (Supp. 1968); NEV. REV. STAT. § 11.205 (1967); N.H. REV. STAT. ANN. § 508:4-b (1968); N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968); N.M. STAT. ANN. § 23-1-26 (Supp. 1967); N.C. GEN. STAT. § 1-50(5) (Supp. 1965); N.D. CENT. CODE § 28-01-44 (Supp. 1967); OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968); OKLA. STAT. ANN. tit. 12, § 109 (Supp. 1968); PA. STAT. ANN. tit. 12, § 65.1 (Supp. 1969); Ch. 117 [1966] S.D. LAWS 403; TENN. CODE ANN. §§ 28-314 to 28-318 (Supp. 1967); UTAH CODE ANN. § 78-12-25.5 (Supp. 1967); VA. CODE ANN. § 8-24.2 (Supp. 1966); WASH. REV. CODE ANN. § 4.16.300-320 (Supp. 1968); WIS. STAT. ANN. § 893.155 (1966).

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

3. See *Miller v. DeWitt*, 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965), *modified*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

4. See, e.g., *Paxton v. Alameda County*, 119 Cal. App. 2d 393, 259 P.2d 934 (1953); *Bayne v. Everham*, 197 Mich. 181, 163 N.W. 1002 (1917); *Johnson v. O'Neill*, 172 Mich. 334, 137 N.W. 713 (1912). The professional engineer is held to a similar standard of conduct. See *Pastorelli v. Associated Eng'rs, Inc.*, 176 F. Supp. 159, 166 (D.R.I. 1959).

contract causing damage to the contractee.⁵ Until recent years, however, the negligent architect or contractor was not liable to third persons injured after the structure had been completed and accepted by the owner.⁶ The landmark decision of *MacPherson v. Buick Motor Co.*,⁷ holding manufacturers of inherently dangerous and defectively made chattels liable for injuries to remote users, and its progeny were slow in being applied to architects and contractors. Once a structure was completed and accepted by the owner, the architect and contractor could no longer remedy defects; both control and responsibility shifted to the owner. The negligence of the owner in maintaining a defective building was considered the proximate cause of the injury.⁸

This rule of non-liability was severely criticized,⁹ and after a protracted history of exceptions, was rejected in most jurisdictions.¹⁰ These exceptions held the architect or contractor liable, for instance, where there was fraud or deliberate concealment,¹¹ where the structure was inherently or imminently dangerous,¹² or where it constituted a nuisance.¹³ During the 1950's a few jurisdictions ruled that absence of privity was no bar to third party liability, but not until the mid-1960's did such a rule gain wide acceptance.¹⁴ The liability of the architect and contractor was extended to members of the general public

5. *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N.E. 503 (1906). Where the building contractor is also the grantor, the doctrines of caveat emptor and merger may be relevant to the question of liability. See Note, *Right of Purchaser in Sale of Defective House*, 4 W. RES. L. REV. 357 (1953).

6. See, e.g., *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457 (1896); *Curtain v. Somers*, 140 Pa. 70, 21 A. 244 (1891).

7. 217 N.Y. 382, 111 N.E. 1050 (1916).

8. See, e.g., *Ford v. Sturgis*, 14 F.2d 253 (D.C. Cir. 1926).

9. W. PROSSER, LAW OF TORTS § 85 (2d ed. 1955); see also RESTATEMENT OF TORTS, § 385 (1934).

10. See, e.g., *Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); *Miller v. DeWitt*, 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965), modified, 37 Ill. 2d 273, 226 N.E.2d 630 (1967). The development of the scope of liability has been fully discussed in legal commentaries and will only be dealt with briefly here. See Allen, *Defense of the Architect in Personal Injury Cases*, 26 ALA. LAW. 201 (1965); Bell, *Professional Negligence of Architects and Engineers*, 12 VAND. L. REV. 711 (1959); Brown, *Building Contractor's Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1967); Gouldin, *Liability of Architects and Contractors to Third Persons: Inman v. Binghamton Housing Authority Revisited*, 33 INS. COUNSEL J. 361, 363 (1966); Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967); Note, *Architects' and Engineers' Third Party Negligence Liability—The Fall of the House of Privity*, 10 W. RES. L. REV. 563 (1959).

11. *Bryson v. Hines*, 268 F. 290 (4th Cir. 1920).

12. *Johnston v. Long*, 56 Cal. App. 2d 834, 133 P.2d 409 (1943).

13. *Kendrick v. Mason*, 234 La. 271, 99 So. 2d 108 (1958).

14. See W. PROSSER, LAW OF TORTS § 93 (3d ed. 1964); Brown, *supra* note 10; Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, *supra* note 10.

whose presence in the structure could be reasonably anticipated.¹⁵ A number of jurisdictions, however, require that the defect be latent.¹⁶

Amenability to third party suits had wide ramifications for persons burdened with the new liability. The architect or contractor was confronted not only with an unlimited class of potential claimants, but also, in many instances, with an extension in duration of the liability for negligence.¹⁷ As to the owner the architect's breach of duty occurs when the defective structure is completed and accepted, and since the owner then has a cause of action, the limitation period may begin to run.¹⁸ A third party, however, has no action against the negligent architect until injury, which may occur many years after performance of services. The statutory period in such a case would usually begin on the date of injury,¹⁹ and the architect theoretically would be liable throughout his professional life and into retirement. The builder's third party liability may also extend the period during which he is amenable to suit. As in the case of the architect, the owner may have an actionable claim at the time of the builder's performance since breach of contract or of warranty would occur at that point and legal injury, although slight and unascertainable, would result. A third party suing for negligence, however, would have no actionable claim until injury.²⁰

The limitation of actions statutes for architects and builders attack the extended duration of liability problem by barring actions at a given point after completion of services rather than after injury.²¹ Since judicial decisions under

15. *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966); *Montijo v. Swift*, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963).

16. *See, e.g., Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

17. Any discussion of the duration of liability suffers from generality. A jurisdiction's legislative enactments alone fail to indicate fairly the duration of liability. In assessing the effect of the statute of limitations in a given jurisdiction, due regard must be accorded the types and elements of a cause of action in the state, the degree of liberality afforded plaintiffs to proceed on a given theory or different theories, and statutory or judicial rules concerning the effect of the continuing nature of a tort and of plaintiff's knowledge or lack thereof.

18. *Wills v. Black & West, Architects*, 344 P.2d 581 (Okla. 1959) (damages for deficiency); *Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E.2d 481 (1966) (injury to property). In *Board of Educ. v. Joseph J. Duffy Co.*, 97 Ill. App. 2d 158, 240 N.E.2d 5 (1968), a plaintiff suing for damages due to defects in the design and construction of a building sought recovery on two theories: breach of contract and negligence. The court held that the claim based on negligence was barred because "[a]s applicable here the period of limitations commences when the negligent act takes place, and is not tolled by the plaintiff's ignorance of his injury." *Id.* at 7. The court held that plaintiff's breach of contract action, however, was not barred.

19. *See Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

20. *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956).

21. The statutes are discussed in text accompanying notes 23 to 52 *infra*. The event commencing the statutory period is not always completion of services, but is some event related to the services. *See* text accompanying notes 41 to 43 *infra*.

the statutes must await the running of the statutory periods, only two cases have reached appellate courts thus far.²² The statutes promise judicial scrutiny in each jurisdiction because of their unique quality of barring an action before actual injury has been sustained and their harsh effect on plaintiffs injured after the statutory bar is in force. This Comment will consider the provisions of these statutes, their constitutionality, and their compatibility with the theory and policies of limitation of actions. The statutes belie a policy decision by 30 legislatures to provide the architect and builder with some form of immunity from suit. This Comment will also examine, as relevant to the merits of such a policy, some aspects of the comparative liability of other groups—manufacturers, physicians and attorneys—and some practical concerns of persons now protected by these statutes.

The Statutes

In coverage, the statutes vary from jurisdiction to jurisdiction—in terms of persons and actions, time limitation, commencement event, as well as in other aspects. Individual statutes were drafted to interact with the state's comprehensive limitation of actions statutes and judicial interpretation of such laws.²³ Their precise effect, even aside from obvious variations, may thus differ from one state to another. The Illinois statute enacted in 1963 is typical:

No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real estate, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction. This limitation shall not be available to any owner, tenant or person in actual possession and control of the improvement at the time such cause of action accrues.²⁴

22. *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

23. *See, e.g., Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967), where the court found it unnecessary to consider the relation of the limitation statute for architects and builders to Section 12 of the Limitations Act (ILL. ANN. STAT. ch. 83, § 13 (Smith-Hurd 1966)), and Section 2 of the Injuries Act (ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1966)) since the statute itself was unconstitutional.

24. ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966). The Illinois statute was held unconstitutional under the Illinois Constitution in *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). See text accompanying notes 53 to 59 *infra*. For a discussion and comparison of the provisions of the statutes, see LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO A STATUTE OF LIMITATIONS FOR MALPRACTICE AGAINST ARCHITECTS, ENGINEERS AND SURVEYORS, Mass. S. Doc. No. 1050 (April 3, 1968).

Most statutes limit actions against those persons furnishing the design, planning, supervising construction, or constructing a building.²⁵ Some states restrict coverage to architects and professional engineers licensed by the state.²⁶ The statutes may expressly include others, *e.g.*, surveyors²⁷ or repairmen.²⁸ The Washington statute is especially comprehensive since it explicitly includes any person "having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property."²⁹ Most jurisdictions expressly exclude from coverage a person in actual possession or control.³⁰ The injured party retains his right of action against the owner, so an architect or builder who is also the owner or occupier would be denied the benefits of the limitation in a third party suit.

A model statute endorsed by the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors suggests four years as a reasonable time limitation.³¹ The enacted statutes fix

25. *See, e.g.*, ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1965); N.H. REV. STAT. ANN. § 508:4-b (1968); N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968); PA. STAT. ANN. tit. 12, § 65.1 (Supp. 1969); UTAH CODE ANN. § 78-12-25.5 (Supp. 1967); WIS. STAT. ANN. § 893:155 (1966).

26. FLA. STAT. ANN. § 95.11(10) (Supp. 1969); MICH. COMP. LAWS ANN. § 600.5839 (1968); OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968).

27. ARK. STAT. ANN. § 37-241 (Supp. 1967); CAL. CIV. PRO. CODE § 337.1(a)(1) (West Supp. 1968); TENN. CODE ANN. §§ 28-314 to 28-318 (Supp. 1967); WASH. REV. CODE ANN. §§ 4.16.300-.320 (Supp. 1968).

28. *See, e.g.*, ARK. STAT. ANN. § 37-237 (Supp. 1967).

29. WASH. REV. CODE ANN. § 4.16.300 (Supp. 1968).

30. *See, e.g.*, N.H. REV. STAT. ANN. § 508:4-b (1968); OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968); TENN. CODE ANN. § 28-317 (Supp. 1967); WASH. REV. CODE ANN. § 4.16.310-.320 (Supp. 1968).

31. The full text of the model statute is as follows:

Section 1. No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages

(i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

(ii) for injury to property, real or personal, arising out of any such deficiency, or

(iii) for injury to the person or for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction, or construction of such an improvement more than four years after substantial completion of such an improvement.

Section 2. Notwithstanding the provisions of Section 1 of this act, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred (irrespective of the date of death) but in no event may

time periods ranging from four³² to 12 years,³³ with a substantial number of states having ten year limitation periods.³⁴ The average lapse of time between completion of services and commencement of an action is relevant to determining a reasonable time limitation. In testimony before the House District Committee, a representative of an insurance company which provides professional liability insurance to architects offered statistical data showing the percentage of claims brought in given years after completion of a project. This data, reproduced in the accompanying table,³⁵ was based on 570 random pending suits against architects.

The table thus indicates, for example, that 84.3 percent of all claims against architects would normally be brought within four years from completion of services.

The time period established may be diminished, extended, or modified by other statutory provisions. Statutes similar to the Illinois enactment, which provides that only actions accruing within four years may be brought, impliedly incorporate other statutory periods to govern the time within which those actions must be commenced.³⁶ Other enactments provide that an action may be

such an action be brought more than five years after the substantial completion of construction of such an improvement.

Section 3. Nothing in this act shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

Section 4. The limitation prescribed by this act shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

Section 5. As used in this act, the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company.

Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 34 (1967).

32. See, e.g., CAL. CIV. PRO. CODE § 337.1(a) (West Supp. 1968); ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966); TENN. CODE ANN. § 28-314 to 28-318 (Supp. 1967).

33. FLA. STAT. ANN. § 95.11(10) (Supp. 1969); PA. STAT. ANN. tit. 12, § 65.2 (Supp. 1969).

34. IND. ANN. STAT. § 2-639 to 2-642 (Supp. 1967); LA. REV. STAT. ANN. § 9:27-72 (1965); MINN. STAT. ANN. § 541.051 (Supp. 1968); MISS. CODE ANN. § 720.5 (Supp. 1969); N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968); N.D. CENT. CODE § 28-01-44(1) (Supp. 1967); OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968).

35. *Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 28 (1967)* (statement of J. Sprigg Duvall, Assistant Vice President of Victor O. Schinnerer & Co., Inc.).

36. The relevant provision of the Illinois statute is: "No action . . . shall be brought . . . unless such cause of action shall have accrued within four years . . ." ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966). See *Laukkanen v. Jewel Tea Co.*, 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966), where the court stated: "This act does not establish a date by which an action must be filed. It establishes a date by which an injury must occur to be actionable. The legislature, by placing a specific limitation on the time within which an injury must occur in relation to the negligent performance of serv-

STUDY OF DISTRIBUTION OF CLAIMS BY LENGTH OF TIME

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

brought only within the stated time period.³⁷ Some statutes of the latter type, however, contain savings provisions by which a party injured late in the statutory period is given time after the bar to bring suit. The savings provisions are of two kinds. A grace period may be provided for institution of a suit when the injury occurs during the final year or final two years of the limitation period.³⁸ Other statutes requiring actions to be brought only within the stated time period may explicitly stipulate that the enactment neither extends nor limits periods otherwise prescribed for commencement of an action, and thus expressly incorporate other provisions to govern the time period for bringing

ices involving design of a building, acknowledged the existence of the plaintiff's cause of action in this case." *Id.* at 163, 222 N.E.2d at 589-90.

37. *See, e.g.*, OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968), which in relevant part provides: "No action . . . shall be brought . . . more than 10 years after the performance . . ." *See also* N.H. REV. STAT. ANN. § 508:4-b (1968).

38. *See, e.g.*, PA. STAT. ANN. tit. 12, §65.2 (Supp. 1969); TENN. CODE ANN. § 28-315 (Supp. 1967).

the action once injury has occurred.³⁹ For example, if injury occurs in the sixth year after performance or completion of services in a state where the statutory period against architects and builders is seven years, the injured party may still have two years to bring his action under a two-year tort statute of limitations. Similarly, if injury occurs in the third year, the injured party cannot take advantage of the remaining four years under the architects' and builders' statute, but must bring it within the two year general tort period. Another effect of the provision concerning "periods otherwise prescribed" might be to deny to an original owner who sues an architect for breach of duty the longer limitation period provided by the new statute, and restrict him to a shorter statutory period applicable in a breach of duty action. Since the owner-buyer suffers legal injury, without actual damages, at the time of the professional's breach of duty, the normal period for bringing an action would also commence at the time of performance or completion of services.⁴⁰

Another provision affecting the time period involves the event which commences the running of the statute. The statute may begin to run from the time of performance or furnishing of services and construction,⁴¹ time of substantial completion,⁴² or time of occupancy or acceptance.⁴³ Where the period commences before occupancy, the time of actual use or testing of a structure may be substantially limited.

Some statutes clearly reflect the type of protection a state wishes to afford its citizens. The California statute, while establishing a four-year period, limits its effect to tort or contract actions arising out of *patent* deficiencies, and totally exempts owner-occupied single unit residences from the limitation.⁴⁴ Generally then, the statute would apply only to defects in a commercial or semi-commercial building which could have been discovered by reasonable inspection. The Mississippi statute, providing a ten-year period, similarly does not apply to latent deficiencies.⁴⁵ A number of statutes also provide that the limitation does not apply where there is fraudulent concealment of a deficiency,⁴⁶ fraud in performance,⁴⁷ or fraud of any kind.⁴⁸ In those states where the statutes do not

39. *See, e.g.*, UTAH CODE ANN. § 78-12-25.5 (Supp. 1967): "No action . . . shall be brought . . . more than 7 years after the completion of construction. . . . This provision shall not be construed as extending or limiting the periods otherwise prescribed by the laws of this state for the bringing of any action."

40. *See* *Wills v. Black & West, Architects*, 344 P.2d 581 (Okla. 1959); *Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E.2d 481 (1966).

41. *See, e.g.*, N.H. REV. STAT. ANN. § 508:4-b (1968).

42. *See, e.g.*, ALASKA STAT. § 09.10.055(b) (Supp. 1968).

43. LA. REV. STAT. ANN. § 9:2772 (1965); MICH. COMP. LAWS ANN. § 600.5839(1) (1968).

44. CAL. CIV. PRO. CODE § 337.1(f) (West Supp. 1968).

45. MISS. CODE ANN. § 720.5 (Supp. 1967).

46. *See, e.g.*, ARK. STAT. ANN. § 37-242 (Supp. 1967).

47. TENN. CODE ANN. § 28-317 (Supp. 1967).

48. MINN. STAT. ANN. § 541.051 (Supp. 1968).

expressly stipulate that the limitation is inapplicable in the case of fraud, state law may provide that the defendant is estopped from pleading the statutory bar.

The statutes limit actions to recover for injury to person or property and for wrongful death arising out of the deficiency. Some states also apply the bar to actions for the deficiency itself.⁴⁹ A number of statutes, such as the Illinois enactment quoted above, proscribe contribution or indemnity actions after the limitation period has run.⁵⁰ Such a provision prevents an owner from obtaining contribution or indemnity either by a separate action or by interpleader after the statutory period has run. Ordinarily, the owner might be able to interplead the architect or builder under state law on the theory that the proximate cause of the injury was error or defect in the original design or construction. Even if an owner is sued by a third party before the limitation period has run, the former would have to bring a separate contribution or indemnity action within the statutory time. Although injury occurred within the statutory period, the architect or builder could still plead the statutory bar in defense if final judgment against the owner is not rendered until after the statutory period has run. A literal reading of these statutes would also limit the effect of any indemnity clause in a contract between owner and builder to indemnity for the statutory period. Perhaps to avoid such results, Mississippi, while barring actions for contribution or indemnity after the limitation period, provides an exception where there is a prior written agreement.⁵¹

Constitutional Implications

In *Skinner v. Anderson*,⁵² the Illinois Supreme Court held the state statute limiting the time for actions against design professionals and contractors unconstitutional under the Illinois Constitution. *Skinner* was an action by a widow against a building contractor, an architect, and a service repairman for personal injury and for the wrongful deaths of her husband and daughter. The plaintiff alleged that the architect had failed to provide ventilation for rooms housing air conditioning machinery. Because of the lack of ventilation, refrigeration gas leaked into an adjoining boiler room, corroded the burner, and caused the escape of lethal gas which resulted in the death of the husband and daughter. The trial court, relying on Section 29 of the Illinois Limitations Act,⁵³ dismissed plaintiff's action against the architect since more than four years had

49. IND. ANN. STAT. §§ 2-639 to 2-642 (Supp. 1967); KY. REV. STAT. § 413.135 (Supp. 1968); N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968).

50. See, e.g., N.J. STAT. ANN. § 2A:14-1.1 (Supp. 1968); N.C. GEN. STAT. § 1-50(5) (Supp. 1965); PA. STAT. ANN. tit. 12, § 65.1(4) (Supp. 1969); WIS. STAT. ANN. § 893.155 (1966).

51. MISS. CODE ANN. § 720.5 (Supp. 1969).

52. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

53. ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966).

elapsed between the furnishing of his services and injury to plaintiff. The supreme court reversed and remanded the case, holding that Section 29 violated Section 22, Article IV of the Illinois Constitution, which provides: "The General Assembly shall not pass local or special laws . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."⁵⁴

The court stated that the constitutional provision requires legislative classification to be reasonably related to legislative purpose.⁵⁵ Plaintiff argued that Section 29 violated the state constitution because it permitted and denied recovery arbitrarily and because the classification was not rational;⁵⁶ plaintiff also urged that Section 29 violated the fourteenth amendment of the United States Constitution for the same reasons.⁵⁷ The court observed, "of all those whose negligence in connection with the construction of an improvement to real estate might result in damage to property or injury to person more than four years after construction is completed, the statute singles out the architect and the contractor, and grants them immunity."⁵⁸ The court thus based its conclusion on the grounds that the supplier of a defective product used in a structure is not immune from suit, and that the owner or person in control might be held liable for injury resulting from a defective condition for which the architect is in fact responsible.

The Illinois constitutional provision relates in a general way to the equal protection clause of the fourteenth amendment. While the court decided *Skinner* on state constitutional grounds, the ultimate question these statutes as a group raise is their harmony with the federal equal protection clause.

The equal protection clause of the fourteenth amendment does not deny a state the power to classify, but only prohibits classification without any reasonable basis.⁵⁹ The legislature has broad discretion in enacting laws which affect some groups of citizens differently than others, and this discretion is abused only if the classification rests on grounds wholly irrelevant to achievement of the state's objective.⁶⁰ A reviewing court is not concerned with the soundness of the statutory distinctions drawn,⁶¹ but only with whether any state of facts reasonably can be conceived that would sustain it.⁶²

54. ILL. CONST. art. IV, § 22.

55. *Skinner v. Anderson*, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 591 (1967).

56. Brief for Appellant at 17.

57. *Id.* at 21-22.

58. *Skinner v. Anderson*, 38 Ill.2d 455, 460, 231 N.E.2d 588, 591 (1967).

59. *Morey v. Doud*, 354 U.S. 457 (1957); *Eastman v. Yellow Cab Co.*, 173 F.2d 874 (7th Cir. 1949).

60. *McGowan v. Maryland*, 366 U.S. 420 (1961).

61. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334 (1959).

62. *Pyeatte v. Board of Regents of Univ. of Okla.*, 102 F. Supp. 407 (W.D. Okla.), *aff'd*, 342 U.S. 936 (1952).

Equal protection thus requires reasonable classification to be determined in relation to the legislative purpose of the enactment.⁶³ Noting that the Illinois statute protected design professionals and contractors but not materialmen, the *Skinner* court concluded that this classification was unreasonable, for either class' negligence during construction might cause injury within the four year period.⁶⁴ The classification thus granted immunity from suit after a given period to one class while denying it to the other.

The classification in question, however, must be considered in relation to the legislative purpose. One important consideration underlying statutes of limitations is the problem of proof, and arguably the legislature could reasonably have concluded that evidentiary problems facing the architect and contractor are greater than those facing the materialmen. Once a plaintiff has made his prima facie case, the architect or contractor must come forth with evidence that he acted with due care, which may necessitate testimony of numerous witnesses and evidence of contract provisions, building inspector's reports, specifications, etc. In the case of materialmen, however, a rule of strict liability often governs,⁶⁵ and where the plaintiff proves a product defective, due care is not a defense. A legislature might have reasonably concluded that, given the differences in the type of evidence required, the shorter period was appropriate in suits against the architect or contractor.

In *Skinner*, the plaintiff argued that Section 29 violated the due process clause of the Illinois Constitution as well as the fourteenth amendment of the Federal Constitution. The court expressed no opinion as to these constitutional issues since the case could be decided on other grounds. In considering the due process implications of these statutes three classes of actions should be distinguished: (1) actions accruing before the limitation bar where the applicable statute provides a savings period; (2) actions accruing before the bar where no such savings period is provided; and (3) actions accruing after the statutory period.

A vested cause of action is property protected by the due process clause.⁶⁶ However, there is no property right, in the constitutional sense, in any particular form of remedy, the only guaranty under the due process clause being the preservation of a substantial right to redress by some effective procedure.⁶⁷ Thus, as to actions accruing before the statutory bar, due process requires that a person not to be deprived of all remedy, although the form and time limitation for

63. *Griffin v. Illinois*, 351 U.S. 12 (1956).

64. *Skinner v. Anderson*, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 591 (1967).

65. *See Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

66. *United States v. Standard Oil Co.*, 21 F. Supp. 645 (S.D. Cal. 1937), *aff'd*, 107 F.2d 402 (9th Cir. 1939).

67. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933).

pursuit of remedy may be modified. The statutes which provide a grace period allow an injured party with a vested cause of action some time for redress, and thus are consistent with due process. A due process problem, however, may arise under certain of these statutes⁶⁸ where injury occurs in the last year or the last few months of the statutory period. Such statutes provide neither a grace period for the suit when injury occurs in the final year nor a provision for incorporation of other statutes of limitations to define a time period for suit once injury has occurred. Where the enactment contains neither of these provisions, thus requiring not only that injury occur but also that the action be brought within the time period defined by the statute, and injury occurs with only a short time remaining, a reasonable time for remedy is denied.

The elusive nature of these statutes becomes apparent when those actions "accruing" after the statutory period are considered. In barring actions which have yet to accrue, these statutes are unique, since a statute of limitations proceeds on the theory that a right of action exists,⁶⁹ with the limitation defining the period for pursuit of judicial redress. For a statute to bar an action which has not accrued is anomalous; such a statute does not merely limit the remedy, but bars the right of action from ever coming into existence. Once a right of action vests, due process requires that some remedy be afforded,⁷⁰ but where the right of action never vests there is no deprivation of property without due process of law. A right of action for a tort which may happen in the future is not property, and may be abrogated by the legislature.⁷¹ The legislatures by enacting these statutes simply abolished all right of action against architects and builders in certain instances. Thus, as to those claims against architects and builders accruing before the statutory period has run, the statutes may act as statutes of limitations, and limit only the remedy. But as to claims accruing after the statutory period has run, the enactments are statutes of limitations in form only, while in essence they are substantive legislative acts defining rights⁷²—*i.e.*, that no right of action against the architect or contractor exists at all.

68. See, e.g., OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968).

69. See *Creedon v. Babcock*, 163 F.2d 480 (4th Cir. 1947).

70. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933).

71. *Harlow v. Ryland*, 78 F. Supp. 488 (E.D. Ark. 1948), *aff'd*, 172 F.2d 784 (8th Cir. 1949); see also *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931); *Steers v. Kinsey*, 68 Ark. 360, 58 S.W. 1050 (1900).

72. The *Skinner* court stated that the statute, by barring a cause of action before it arose, was not concerned with limitations in the ordinary sense. The court noted Section 13, art. IV of the Illinois Constitution, which provides that where an act embraces more than one subject and a subject embraced is not expressed in the title, the act is void as to the unexpressed part, but did not determine the constitutionality of the enactment in relation to this provision since plaintiff had not raised the issue. Presumably the court recognized that the statute, while purporting to be a statute of limitations, also abolished rights altogether and thus might violate the constitutional provision noted.

Insofar as the statutes define substantive rights, they are constitutionally valid, unless violative of equal protection. In *Silver v. Silver*,⁷³ the United States Supreme Court held that a Connecticut statute abolishing actions by gratuitous guests in automobiles against owners and operators for injuries caused by negligent operation did not violate equal protection. Since the Court only considered the single constitutional question adjudicated in the lower court, it did not specifically discuss a due process objection to the statute but stated: "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."⁷⁴ In a similar case, the United States District Court for the Eastern District of Arkansas considered the due process and equal protection implications of a statute which modified a common law right.⁷⁵ The Arkansas statute abolished a guest's cause of action against the owner or operator of an automobile where the guest and operator were related within the third degree. The court held the statute a proper exercise of state police power, stating that although a common law right of property, once vested, could not be taken away consistently with due process, the legislature at its will could change the rule as to those rights which had not vested.⁷⁶

Although the *Skinner* court concluded that the legislature's classification under the Illinois statute was unreasonable, it is likely that similar statutes will be found compatible with both state and federal equal protection clauses. The scope of legislative discretion in enacting laws which affect some groups of citizens differently than others is wide, and at least one arguably reasonable basis, discussed earlier, for according special treatment to architects and builders is apparent. A due process problem may arise, however, in the application of statutes providing no grace period for institution of a suit. The actions affected are those claims which arise from an injury incurred so late in the statutory period that no reasonable period of time is left to pursue a judicial remedy. The statutes as applied to actions accruing after the statutory period, while effectively avoiding invalidity on due process grounds and quite probably valid from an equal protection standpoint, pose serious objections on other

Where both the cause of action and the remedy are created by the same statute, the limitation of the remedy may also limit the right. In such a case, a legislature by its statutory enactment creates a new right and at the same time defines the limits of that right; when the statutory period has run, both the substantive right and the corresponding liability end. *See Adams v. Albany*, 80 F. Supp. 876 (S.D. Cal. 1948). The statutes limiting actions against architects and contractors, however, do not create new liabilities and rights, but affect nonstatutory rights otherwise existing.

73. 280 U.S. 117 (1929).

74. *Id.* at 122.

75. *Harlow v. Ryland*, 78 F. Supp. 488 (E.D. Ark. 1948), *aff'd*, 172 F.2d 784 (8th Cir. 1949).

76. *Id.* at 491.

grounds. While ostensibly statutes of limitations, they function to limit actions in only certain instances, if at all. The form of the limitation of actions statutes is utilized to abolish a right altogether.

The incongruity between the form and substance of these enactments is readily apparent when they are viewed with regard to the theory and policies underlying limitation of actions. Factors to consider include: (1) the traditional *modus operandi* of statutes of limitations as applied in different types of actions, (2) the duration of liability under traditional rules and as affected by these enactments, (3) instances of similar departure from limitation theory, and (4) policies implemented by limitation of actions statutes.

Statutes of Limitations—Accrual of Cause of Action and Underlying Policies

A statute commencing the limitation period before the cause of action has accrued is unusual, although not unprecedented. Normally, the statutory period commences when the cause of action accrues, *i.e.*, when a party can first maintain a suit.⁷⁷ Ignorance of the fact that one has a cause of action does not ordinarily prevent the running of the statute.⁷⁸ In contract, a party has the right to maintain a suit when the other party breaches.⁷⁹ An action for negligence accrues when forces wrongfully put in motion produce injury.⁸⁰ Recovery in negligence is predicated on a showing of actual damages, and since this consequential injury is an element of the cause of action, the limitation period does not commence until damages are sustained by plaintiff.⁸¹ In actions such as malpractice, however, the initial breach of duty constitutes legal injury, and the traditional rule is that the cause of action accrues at the time of the wrongful act.⁸²

Most statutes of limitations simply define the commencement point as the

77. *Creedon v. Babcock*, 163 F.2d 480, 484 (4th Cir. 1947); *Pettibone v. Cook County*, 120 F.2d 850, 854 (8th Cir. 1941); *Thibodo v. United States*, 134 F. Supp. 88, 97 (S.D. Cal. 1955); *Rogers v. Smith Kline & French Lab.*, 5 Ariz. App. 553, 429 P.2d 4 (1967); *Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E.2d 481 (1966); *Manobianco v. City of Hoboken*, 96 N.J. Super. 273, 232 A.2d 856 (1967).

78. *Riley v. United States*, 212 F.2d 692 (4th Cir. 1954); *Adams v. Albany*, 80 F. Supp. 876 (S.D. Cal. 1948); *Calabrese v. Monterey Cty.*, 251 Cal. App. 2d 131, 59 Cal. Rptr. 224 (1967).

79. *See, e.g.*, *Creviston v. General Motors Corp.*, 210 So. 2d 755 (Fla. App. 1968).

80. *See, e.g.*, *Konar v. Monro Muffler Shops, Inc.*, 28 App. Div. 642, 280 N.Y.S.2d 812 (1967).

81. *See, e.g.*, *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580 (Minn. 1968); *Rosenau v. New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968).

82. *Lindquist v. Mullen*, 45 Wash. 2d 675, 277 P.2d 724 (1954). *See also* *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365, 366 (1934): "The test to be generally applied in determining when the statute of limitations begins to run against an action sounding in tort is whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action"

time the cause of action accrues.⁸³ Other statutes are more specific and define or vary the point of accrual for a given action—*e.g.*, in malpractice actions, the date of the wrongful act,⁸⁴ and in personal injury actions, when damage is sustained and capable of ascertainment.⁸⁵ Variations in commencement of the statutory period depend upon the elements of a particular cause of action as defined by a state, the generality or specificity of a statute, legislative determinations that a plaintiff should be accorded a period longer than normal (*e.g.*, discovery, rather than occurrence, of an injury), and judicial interpretation of state law. But the commencement point uniformly does not occur before plaintiff has a right to sue.⁸⁶

The limitation statutes for architects and builders alter this traditional rule in those cases where there is no actionable claim at the time of completion or substantial completion of services. When the action is brought by an owner, the actionable claim often arises at the completion of services,⁸⁷ but when a third party brings an action for injuries incurred after the statutory time limitation, the effect of the statutes is to bar an action before it accrues.

In most negligence actions, wrongful act and resultant injury are concurrent or closely related in time. Where defective products or services are involved, however, a substantial time may elapse between negligent act and resultant injury, and the determination of the statutory commencement event may control plaintiff's right to sue.⁸⁸ In negligence actions, even though substantial time elapses between act and injury, the statutory period is generally held to commence at the time of injury.⁸⁹ The intervening time does not "bear . . . upon a

83. *See, e.g.*, ARK. STAT. ANN. §§ 37-201, 37-213 (1947).

84. ARK. STAT. ANN. § 37-205 (1947).

85. MO. ANN. STAT. §§ 516.100, 516.120 (1949).

86. *Cf. United States v. Wurts*, 303 U.S. 414, 418 (1938): "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued."

87. The owner might have an action for breach of warranty or breach of duty. *See Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E.2d 481 (1966); *Wills v. Black & West, Architects*, 344 P.2d 581 (Okla. 1959). These cases were actions against architects for property damage and held that since the owner could have maintained an action at the time of breach of duty, the actions were barred.

88. Any number of factors influence this determination. Among them are: the state law on the nature and elements of a cause of action; the statutory definition of the commencement event; judicial interpretation of limitations laws; the nature of the action, *e.g.*, breach of warranty, negligence or fraud; and the willingness of the court to allow plaintiff to proceed on one of several theories where one is barred by a limitations statute. *See Annot.*, 4 A.L.R.3d 821 (1965).

89. *See, e.g.*, *Di Gironimo v. American Seed Co.*, 96 F. Supp. 795 (E.D. Pa. 1951); *White v. Schnoebelen*, 91 N.H. 273, 18 A.2d 185 (1941). Where the action is based on a warranty theory, however, the limitation often runs from the date of sale. *See, e.g.*, *Rosenau v. New Brunswick*, 93 N.J. Super. 49, 224 A.2d 689 (1966); *See generally Annot.*, 4 A.L.R.3d 821 (1965); *Kakargo v. Grange Silo Co.*, 11 App. Div. 2d 796, 204 N.Y.S.2d 1010, *appeal denied*, 11 App. Div. 2d 958, 207 N.Y.S.2d 435 (1960).

problem of limitations but upon the problem of proximate cause."⁹⁰ In a typical case, the Supreme Court of New Hampshire held that the six-year statute of limitations for negligence actions did not bar a suit against an installer of a lightning rod, even though the plaintiff was injured nearly seven years after installation.⁹¹ The court noted, "the possibility that injury may result from an act . . . is sufficient to give the quality of negligence to the act . . . but . . . is insufficient to impose any liability or give rise to a cause of action If . . . there has been negligence, there is no cause of action unless and until there has been an injury."⁹²

North Carolina departed from this rule in *Hooper v. Carr Lumber Co.*,⁹³ where the court held that the statute commenced to run from the time of wrongful act or omission and not from the time when injury was caused thereby. Conceding that as a matter of tort law it takes both negligent act and resultant injury to constitute a cause of action, the court felt that where these were widely separated in time, it was only reasonable to compute the running of the statute from the time of the wrongful act. In *Thurston Motor Lines, Inc. v. General Motors Corp.*,⁹⁴ an action for breach of warranty and negligence in the sale of a faulty carburetor, the court indicated a reluctance to affirm the *Hooper* reasoning. Instead, the court based its decision that the action was barred by the statute on the fact that plaintiff did sustain injury and that his rights were invaded at the time of the sale. Plaintiff could have then sued for nominal damages, presumably on the breach of warranty theory, if the defendant had knowledge or reason to know that the carburetor was defective. The *Thurston* case indicates that where plaintiff can sue on more than one theory, *e.g.*, breach of warranty and negligence, and the statutory period on one has run, plaintiff's action on the alternate theory may also be barred.

A Connecticut personal injury statute reverses the rule that a limitation period in a negligence action commences only upon actual injury. The statute requires that an action for injury to person or property, whether "caused by negligence, or . . . wanton misconduct . . . shall be brought . . . within one year from the date when the injury is first sustained or discovered . . . except that no such action may be brought more than three years from the date of act or omission"⁹⁵ A series of Connecticut cases, interpreting the predecessor of this enactment,⁹⁶ held "act or omission" to mean something other than the injury or damage—

90. *Di Gironimo v. American Seed Co.*, 96 F. Supp. 795, 797 (E.D. Pa. 1951).

91. *White v. Schnoebelen*, 91 N.H. 273, 18 A.2d 185 (1941).

92. *Id.* at 274, 18 A.2d at 186.

93. 215 N.C. 308, 1 S.E.2d 818 (1939).

94. 258 N.C. 323, 128 S.E.2d 413 (1962). See *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967).

95. CONN. GEN. STAT. ANN. § 52-584 (1958).

96. CONN. GEN. STAT. § 8324 (1949).

e.g., the defective manufacture and inspection of a tire,⁹⁷ the sale of a defective rifle,⁹⁸ and the installation of a gas main.⁹⁹ Judge Frank, dissenting in *Dincher v. Marlin Firearms Co.*,¹⁰⁰ argued strongly that such an interpretation was unreasonable, even though a literal construction would require the result: "a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit . . . could have been successfully maintained . . ." ¹⁰¹ Judge Frank also considered such a construction violative of the policy of the statute—to penalize one who sleeps on his rights—a policy which had been recognized by the Connecticut Supreme Court. Since *Dincher*, the Connecticut courts have retreated from a literal construction of the statute by employing a continuing negligence theory:¹⁰² when the wrong sued upon constitutes a continuing course of conduct, the limitation period begins only when the course of conduct is complete.¹⁰³

Limitation of actions statutes implement two basic policies of the law—to promote stability in the affairs of men and to avoid uncertainties and burdens in defending stale claims.¹⁰⁴ The primary concern is fairness to the defendant, who should not be forced to defend when evidence has been lost, witnesses have died, and memories have faded.¹⁰⁵ The policies are implemented by compelling assertion of legal rights within a reasonable time.¹⁰⁶ A party failing to act within that time forfeits his right to a judicial remedy.¹⁰⁷ Thus, plaintiff's delay is the traditional justification for the implementation of these policies.

97. *Tralli v. Triple X Stores, Inc.*, 19 Conn. Sup. 293, 112 A.2d 507 (1954).

98. *Dincher v. Marlin Firearms Co.*, 198 F.2d 821 (2d Cir. 1952).

99. *Maynard v. New Haven Gas Co.*, 20 Conn. Sup. 31, 120 A.2d 156 (1955).

100. 198 F.2d 821, 823 (2d Cir. 1952).

101. *Ibid.*

102. *See, e.g., Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d 793 (1957).

103. *Id.* at 321, 130 A.2d at 795. In *Handler* the non-owner-user of defendant's ammunition sued for personal injuries, and the court had to determine whether "the act or omission complained of" was the sale of the cartridge or some other event. The court held that the claim concerned a continuing course of conduct—permitting a product to be available for future use without indicating the danger to which the user would be exposed.

In *Ricciuti v. Voltarc Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960), an action brought by a sign-maker against the manufacturer of neon tubes, a federal court applying Connecticut law held that the limitation under the Connecticut statute began on the date of diagnosis of plaintiff's disease (berylliosis from coating on neon tubes), unless with reasonable diligence he could have discovered the nature of his disease before diagnosis. The court believed that the Connecticut court's interpretation of "act or omission complained of" in *Handler* was the time of injury resulting from an inherently defective product. Since no Connecticut decision had dealt with the *Ricciuti* factual situation, the court examined decisions in other jurisdictions to arrive at its conclusion.

104. *See Summers v. Wallace Hosp.*, 276 F.2d 831 (9th Cir. 1960). *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

105. *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

106. *Titus v. Wells Fargo Bank & Union Trust Co.*, 134 F.2d 223 (5th Cir. 1941); *United States v. Polan Indus., Inc.*, 196 F. Supp. 333 (S.D. W.Va. 1961).

107. *Security Realization Co. v. Henderson*, 120 F.2d 449 (9th Cir. 1941).

Consideration of repose and staleness of claims, however, should be relevant only when there is an actionable claim and plaintiff delays in asserting it. This policy is illustrated by the rule that even when substantial time elapses between act and injury, the statute commences to run only from the time of injury; until there is an injury, there is no actionable claim. The soundness of this rule is rarely questioned, whereas the viability of *Hooper* in its own jurisdiction is doubtful. Cases like *Thurston* and malpractice actions do not undermine this rule; since such cases involve an initial breach of duty there thus is some kind of an actionable claim triggering the commencement of the statute. Judicial interpretation of Connecticut's statute since *Dincher* exhibits a trend towards recognition of the underlying policies of limitation of actions.

The policy of repose and the policy against stale claims are strong, and traditionally even a plaintiff's lack of knowledge of injury did not postpone commencement of the statutory period. The inequity of barring a blamelessly ignorant plaintiff from judicial remedy has prompted legislatures and courts to modify that rule. Thus, commencement of the limitation period may be postponed until the injured party knows or has reason to know of the injury. The Supreme Court has established such a discovery test for actions under the Federal Employers' Liability Act: "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of the statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."¹⁰⁸

The strength of these policies and the weakness of the justification—plaintiff's delay—are readily apparent in the history of pleas of limitation. The legislature establishes an arbitrary time period which may be validly shortened by a subsequent enactment as long as a reasonable time is left for assertion of existing rights.¹⁰⁹ The legislature is the primary judge of the reasonableness of the limitation period,¹¹⁰ and although it is reviewable, courts will not inquire into the wisdom of the legislative determination unless the time allowed is no manifestly insufficient that it amounts to a denial of justice.¹¹¹ Unlike the equitable doctrine of laches, statutes of limitations do not differentiate avoidable and unavoidable delay.¹¹² Traditionally, it has been irrelevant that plaintiff had no knowledge of his actionable claim, that he had no way of obtaining knowledge, or that he regarded litigation of a valid claim before incurrence of substantial injury unworthy of the time and financial effort required. Thus, plaintiff's

108. *Urie v. Thompson*, 337 U.S. 163, 170 (1949).

109. *Vance v. Vance*, 108 U.S. 514, 521 (1883).

110. *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902); *Terry v. Anderson*, 95 U.S. 628, 633 (1877).

111. *Mills v. Scott*, 99 U.S. 25, 27 (1878).

112. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

delay, although legally significant, often lacks practical substance as a justification for barring his right of action.

When applied to those claims arising after the statutory bar takes effect, the architects' and builders' statutes squarely conflict with the traditional rule commencing the running of a limitation period at the time plaintiff can first maintain a suit. They vary from the usual statute in that they do not rely upon the justification of plaintiff's delay. Although this justification often may have been without practical substance, the growing use of a discovery test evidences a legislative and judicial re-evaluation of the type of justice a statute of limitations should afford. Where a limitation bars an action before it accrues, even the purely legal justification fails.

Ostensibly, there is little difference, pragmatically, between barring the accrued but unknowable claim and barring an unaccrued right of action altogether. The policy against stale evidence might be asserted as sufficient justification per se in a compelling factual situation and need not depend on plaintiff's delay. These arguments may warrant abolition of certain unaccrued rights of action in deference to protecting courts from insufficient evidence and protecting defendants from suits long after their negligent acts. But they do not justify straining statute of limitations theory to the point of absurdity. A limitation affects the time for exercise of a right and cuts off a remedy within some reasonable time after the right comes into existence; using a limitation to abolish a right altogether only serves to devitalize the theory, the policies, and the law of limitation of actions.

The statutes now in force in many jurisdictions evidence a legislative determination that the extended duration of architects' and builders' liability warranted an abolition of certain rights of action against them. The lapse of time possible between rendition of services and subsequent injury presents two problems—for the architect and builder, potential liability throughout professional life; for the courts, stale evidence. The type and duration of the liability of other groups whose products affect the public at large or who render professional services—manufacturers, physicians, and attorneys—offers some perspective in assessing the merits of such a policy determination.

*Comparative Liability—Architects and Builders,
Manufacturers, Physicians and Attorneys*

The architects' and builders' liability most closely parallels the liability of manufacturers to the ultimate consumers of their products.¹¹³ The manufactur-

113. The parallels are in extent and duration of liability. Although it has been argued that strict liability should be applied to architects, such a rule has not been applied. See Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55

er's liability, as the architect's in those jurisdictions recognizing third party actions, extends to members of the general public who foreseeably may use his products. Since injury may occur some time after the negligent act, the manufacturer is potentially liable for an extended period of time. In products liability-negligence cases, as in negligence cases generally, plaintiff's action accrues at the time of injury.¹¹⁴ In products liability-warranty cases, when the loss is commercial, the contract statute of limitations is determinative. But when a personal injury occurs, usually the personal injury limitation is applicable.¹¹⁵

The argument for extending architects' and builders' liability to third parties is that no valid distinction exists between persons who supply chattels and those who erect structures.¹¹⁶ The absurdity of the distinction was apparent to the court in *Foley v. Pittsburgh-Des Moines Co.*,¹¹⁷ when opposing counsel clashed over whether a tank was a chattel or realty. The tank had exploded on an employer's premises, and the employee's widow brought a wrongful death action against the builder-installer. Under the existing law the defendant was not liable to a third party if the tank was realty. In determining whether the defendant builder-installer was liable, the court rejected a rule which would make liability contingent on such a distinction.¹¹⁸

Although the liability of both manufacturers and persons in the construction industry is similar, some distinctions can be drawn: "The manufacturer makes standard goods and develops standard processes. Defects are harder to find in the contractor's special jobs. Again, the owner usually gives more thorough inspection to a building or structure than a vendee gives to a chattel. And a longer time may elapse between construction and injury in the contractor's case with the consequently greater opportunity for intervening factors to play a part."¹¹⁹ Harper and James conclude that these distinctions, although insufficient grounds for limiting the construction industry to suits brought by owners, are relevant in determining negligence and should be treated as problems of proof in individual cases.¹²⁰ In considering the length of time the architect or builder should be liable, rather than the breadth of liability, the problems of

CALIF. L. REV. 1361, 1362 (1967). The doctrine of strict tort liability has, however, been recently applied to builders of mass-produced development houses. *Kriegler v. Eichler Homes, Inc.*,Cal. App. 2d...., 74 Cal. Rptr. 225 (1969); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

114. *See, e.g.*, *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949).

115. *Zellmer v. Acme Brewing Co.*, 184 F.2d 940 (9th Cir. 1950); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P.2d 163 (1954).

116. *Inman v. Binghamton Housing Auth.*, 3 N.Y.2d 137, 144, 143 N.E.2d 895, 898, 164 N.Y.S.2d 699, 703 (1957). *See Annot.*, 59 A.L.R.2d 1072 (1958); W. PROSSER *LAW OF TORTS* § 85 (2d ed. 1955).

117. 363 Pa. 1, 68 A.2d 517 (1949).

118. *Id.* at 35, 68 A.2d at 533.

119. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.5 (1956).

120. *Ibid.*

proof become a more complex issue. Lapse of time and the opportunity for intervening negligence have prompted legislatures to establish what is in effect an irrebuttable presumption against the negligence of architects and builders by denying rights of action after a certain period of time. Although this is one method of dealing with a general problem, it has the drawback of arbitrarily barring unaccrued claims that are substantial and provable as well as those lacking substantial evidence.

The physician and attorney are liable to their clients for malpractice—the breach of duty in the failure to use the required degree of care, diligence, and skill.¹²¹ In the case of the physician, the statutory period commences at the time of the wrongful act constituting the alleged malpractice.¹²² Two theoretically sound bases are given for commencing the limitation period at this point. First, the breach of duty alone, viewed as a breach of contract, is actionable. The act of misconduct itself gives rise to a cause of action even though damages are merely nominal, and actual damages do not result or become ascertainable until a later date.¹²³ Secondly, most courts reason that injury actually occurs at the time of defendant's causative act,¹²⁴ and since plaintiff's ignorance of his right of action does not delay the running of the statutory period, he is thus barred when he subsequently discovers his injury after the limitation period has run. In most factual situations involving physician and patient, actual injury is concurrent with wrongful act, and the limitation issue is simply the effect to be given the undiscoverable nature of the injury and right of action.¹²⁵

The inequity of barring plaintiff from suing where injury, although present, is unascertainable until expiration of the statutory period has been the subject of extensive criticism in legal commentary¹²⁶ and has prompted legislative and judicial amelioration of the rule in a significant number of jurisdictions.

121. The action against an attorney for malpractice may be considered to rest upon a breach of duty in tort to exercise due care (*Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943)) or upon a breach of implied contract to exercise reasonable skill (*Schirmer v. Nethercutt*, 157 Wash. 172, 288 P. 265 (1930)).

122. *Lindquist v. Mullen*, 45 Wash. 2d 675, 277 P.2d 724 (1954).

123. *Cappuci v. Barone*, 266 Mass. 578, 581, 165 N.E. 653, 654-55 (1919).

124. See, e.g., *Dorfman v. Schoenfeld*, 26 Misc. 2d 37, 203 N.Y.S.2d 955 (Sup. Ct.), appeal denied, 11 App. Div. 2d 1024, 214 N.Y.S.2d 289 (1960).

125. In cases resolving the limitations issue by determining the effect of failure to discover injury, courts often appear to assume that injury is an element of the cause of action. See *Lindquist v. Mullen*, 45 Wash. 2d 675, 677, 277 P.2d 724, 725 (1954): "Of course negligence which does not produce harm is not actionable, and a cause of action cannot accrue until injury has been sustained." Whether injury is an element of the cause of action and thus necessary to trigger the running of the statute is determined by the state body of law on causes of action.

126. See, e.g., *Lillich, The Malpractice Statute of Limitations in New York and other jurisdictions*, 47 Cornell L.Q. 339 (1962); Comment, *Limitations In Professional Malpractice Actions*, 28 Md. L. REV. 47 (1968); Comment, *Mass. Gen. Laws ch. 260 § 4: The Statute of Limitations as it applies to Medical Malpractice Actions—Should the "Inherently Unknowable" Bar the Plaintiff of His Right to Compensation in Massachusetts?*, 1 PORTIA L. REV. 202 (1966).

A growing number of jurisdictions have rejected the rule that the cause of action accrues at the time of the physician's negligence and now employ a discovery test, *i.e.*, the cause of action accrues at the time plaintiff knows or should have known of the injury.¹²⁷ Other inroads on the rule have been made by a continuing-treatment rationale. Where the relationship between the physician and patient continues for a period of time, the statutory period begins only when the relationship ceases.¹²⁸ In addition, the running of the statute may be suspended in cases of fraudulent concealment; this rule would be of significant value to plaintiffs in jurisdictions where a physician is charged with constructive knowledge of plaintiff's injury.¹²⁹

The rule commencing the statutory period against an attorney at the time of error or omission¹³⁰ is of continuing viability,¹³¹ but recent decisions in a few jurisdictions parallel the ameliorating trends in the physician malpractice area. For instance, the Circuit Court of Appeals for the District of Columbia recently concluded that there was no compelling reason to distinguish malpractice from other negligence actions and held that the statutory period commenced against an attorney when injury resulted from the alleged malpractice.¹³² Courts have allayed the harshness of the rule defining the commencement point as the negligent act in other instances. Thus, when an attorney continues to serve the client in a professional capacity after the alleged malpractice, the statutory period may be extended.¹³³ The Supreme Court of California, employing a continuing duty theory, recently held that where an attorney failed to advise his client of the testamentary effect of an impending marriage, the cause of action accrued at the client's death, when the attorney's negligence became irremediable.¹³⁴ In some cases, the lengthier contract statute may be found applicable,¹³⁵ or plaintiff may be allowed to proceed on alternate theories.¹³⁶

In *Marchand v. Miazza*,¹³⁷ the Louisiana Court of Appeals, noting that an attorney could be held liable on a theory of either breach of contract or mal-

127. See, *e.g.*, ALA. CODE tit. 7, § 25(1) (1960); MO. ANN. STAT. §§ 516.100, 516.140 (1952). See Lillich, *supra* note 126.

128. *Waldman v. Rohrbaugh*, 241 Md. 137, 140, 215 A.2d 825, 827 (1966); *De Haan v. Winter*, 258 Mich. 293, 241 N.W. 923 (1932); *Gillette v. Tucker*, 67 Ohio 106, 65 N.E. 865 (1902). See Lillich, *supra* note 126, at 360.

129. *Crossett Health Center v. Crosswell*, 221 Ark. 874, 256 S.W.2d 548 (1953).

130. *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 43 (1830).

131. See, *e.g.*, *Alter v. Michael*, 64 Cal. 2d 480, 413 P.2d 153, 50 Cal. Rptr. 553 (1966). See generally Annot., 118 A.L.R. 215 (1939).

132. *Fort Meyers Seafood Packers, Inc. v. Steptoe & Johnson*, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968).

133. *Wilson v. Econom*, 56 Misc. 2d 272, 288 N.Y.S.2d 381 (Sup. Ct. 1968).

134. *Heyer v. Flaig*,Cal. 2d...., 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

135. *Registered County Homebuilders, Inc. v. Stebbins*, 14 Misc. 2d 821, 179 N.Y.S. 2d 602 (Sup. Ct. 1958).

136. *Hillhouse v. McDowell*, 219 Tenn. 362, 410 S.W.2d 162 (1966).

137. 151 So. 2d 372 (La. 1963).

practice, stated that if the suit was predicated on tort, the statute of limitations would not begin to run until damages were shown to exist. The great majority of jurisdictions hold that an attorney is not liable to third persons for malpractice in performance of professional services,¹³⁸ but in recent years a few inroads have also been made on this rule. In *Heyer v. Flaig*,¹³⁹ for instance, the Supreme Court of California allowed the testatrix's husband to bring an action against her attorney on the theory that the attorney assumed a relationship with his client's intended beneficiaries as well as with his client. Although these cases represent a minority position, they indicate a trend towards extending the duration of the attorney's liability, and in a few instances, the breadth of responsibility for the consequences of his actions.

The activities of the physician and attorney normally affect only the client, and thus to a great extent there is built-in immunity from third party suits. The architect and the builder, as well as the manufacturer, bear a heavier burden of responsibility, but the *raison d'etre* for such liability lies in their activity's potential effect upon the foreseeable but specifically unknown member of the general public. This extension of architects' and builders' liability to third parties is therefore equitable. A new dimension to the problem of duration of liability emerges, however, when the construction industry is considered. In the case of physicians, attorneys, and manufacturers, the limitation of actions policies of repose and adequate evidence are not as seriously impaired as in the situation of the architect and builder. The attorney's and physician's malpractice is normally manifested within a few years; similarly, the consumable nature of most products limits the time in which injury may occur. But it is very possible that, given the durability of buildings, the consequences of the architect's or builder's negligence may evidence themselves only after many years. Problems of proof are complicated not merely by the passage of time, as in the case of the manufacturer, physician and attorney, but also by the innumerable possibilities of intervening causes for the defective condition of the building, and by the complex of services involved in the initial construction. The legislative solution to these problems evidences a skepticism that the normal judicial process, which requires a claimant to establish negligence, adequately isolates

138. See, e.g., *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); but see *Thomas Fruit Co. v. Levergood*, 135 Okla. 105, 274 P. 471 (1929).

139. ...Cal. 2d..., 449 P.2d 161, 74 Cal. Rptr. 225 (1969). In *Fort Meyers Seafood Packers, Inc. v. Steptoe & Johnson*, 381 F.2d 261, 262 (D.C. Cir. 1967), cert. denied, 390 U.S. 446 (1968), a client requested his attorney to draft and send to plaintiff a contract providing that the plaintiff would send boats to fish in Venezuelan waters and eventually sell fish to the client. The contract was erroneous as to Venezuelan law and eventually the boats were impounded. The court found that the attorney, in filing and processing an application for approval of the boat charters, acted as an attorney for plaintiff. Though plaintiff was not obligated to pay the defendant attorney "it does not follow that there was no attorney-and-client relation."

the tenuous from the substantial claim; or that, even if just adjudication is possible, the burden of tenuous claims upon both court and defendant sufficiently vindicates the denial of a right of action altogether after a period of years.

Conclusion

Using a statute of limitations to bar an action before it accrues is anomalous. These architects' and builders' statutes are actually legislative determinations concerning the substantive rights to be afforded citizens of a state. To obscure the substance of the law by employing the form of a statute of limitations abuses the law-making function and effectively undermines the theory of limitation of actions.

The merits of the issue—liability or no liability after a certain period of years—should be considered in light of the burdens upon the courts and upon architects and builders, and the relative value of affording injured persons some remedial outlet. Some of the relevant concerns of the design and construction industries were discussed earlier. In hearings before the House District of Columbia Committee, members of the architectural and engineering professions and the building trades presented their case. In summary, they argued:

1. Potential liability throughout professional life, vulnerability to tenuous claims, defense expense, and onerous record keeping reflect the need for some limitation of liability.¹⁴⁰
2. Passage of time severely handicaps the defense of an action. Even aside from the obstacles of faded memories, unavailable witnesses and lost evidence, problems of proof are extremely complex not only because of the joint effort involved in initial construction, but also due to any inadequate maintenance, improper use, or improvements and services that may follow. The architect and builder have no control over the owner, whose negligence may be the real cause of dangerous conditions.¹⁴¹
3. The injured party retains his remedy against the owner after the statutory period. With the passage of time, the probability increases that improper maintenance, rather than faulty design or construction, is the proximate cause of injury. Thus, some reasonable time limitation for suit is a fair compromise, and statistical data show that 84.3 percent of all claims against architects and builders would be brought within four years.¹⁴²

140. *Hearing 7 on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 4, 24, 26 (1967).*

141. *Id.* at 24, 26, 31.

142. *Id.* at 5, 11, 24, 29. These arguments, although persuasive, did not convince Congress to provide a limitation of actions statute for the District of Columbia.

These arguments, although persuasive, may be countered by other practical considerations. In recent years professional liability insurance has been available to architects and builders, so the problem of extensive and durable liability, aside from the time and effort required in defending claims, is no longer of compelling significance. Economically, the financial burden of insurance eventually shifts to the owner. Problems of proof hindering an effective defense also handicap the plaintiff, who bears the ultimate burden of proving negligence. The difficulty of impressing a jury with the limited nature of defendant's original services, the duties imposed by the given contract, and the inadequacies of evidence tending to show proximate causation attest to a need for effective defense counsel and strong clear instructions from the court. Although the causal connection between negligent act and resultant injury may be improbable, mere passage of time does not break the chain of causation.¹⁴³ In assessing the merits of these statutes, a legislature may question the competency of a court to fairly adjudicate when lapse of time and complex causative factors are involved, but the burdens of proving and defending are substantially equivalent, and thus it seems legislation should not favor the potential defendant on that basis alone.

The statistical improbability of a meritorious claim after a certain length of time is a potent argument for the enactment of such statutes. There are probably few plaintiffs who have meritorious and provable claims after a given number of years, and many legislatures have already determined that the repose of other classes, the ability of courts to adjudicate after lapse of time, and the complexities of proof, even where evidence is available, weigh more heavily than allowing adjudication of the few meritorious claims. Establishing, limiting and withholding rights is peculiarly within the power and competence of the legislature so long as the legislation is not arbitrary and the classification is reasonably related to the legislative purpose. The availability of insurance, however, coupled with the requirement that plaintiff prove negligence, challenge the wisdom of a policy which abolishes rights of action for meritorious as well as tenuous claims.

A basic outline for a statute which clearly sets forth the legislative intent and the effect of the enactment is suggested for those legislatures which decide to abolish rights of actions altogether. Since most of the statutes incorporate other statutes of limitations to prescribe the period for commencement of an action once injury has occurred,¹⁴⁴ and thus perform no function other than to abolish

143. *See, e.g.*, *Foley v. Pittsburg-Des Moines Co.*, 363 Pa. 1, 36, 68 A.2d 517, 534 (1949).

144. Some of the statutes do not provide for the incorporation of other limitation periods. *See, e.g.*, OHIO REV. CODE ANN. § 2305.131 (Page Supp. 1968). Given the unusual character of the limitation period prescribed and the constitutional implications as applied in certain actions, such statutes might be construed to incorporate implied-

rights after a given period of time, Model Statute I is proposed to achieve that objective:

Model Statute I

A. No person shall have a cause of action against any person performing or furnishing the design, planning, supervision, observation of construction, or the construction of an improvement to real property for recovery of damages for

- (1) any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property, or
- (2) for injury to property, real or personal, arising out of such deficiency, or
- (3) for injury to the person or for bodily injury or for wrongful death arising out of such deficiency, or
- (4) for contribution or indemnity

after ten years have elapsed from the time of the initial occupancy after completion of construction of such improvement to real property.

B. Subsection A shall not apply to, and does not proscribe, a cause of action against any person in actual possession or control as owner, tenant or otherwise of such improvement at the time any deficiency in such improvement constitutes the proximate cause of the injury or death.

The provisions of Model Statute I may be tailored so that existing enactments need be changed only in form, with the substantive effect remaining the same. For instance, coverage might include surveyors and repairmen, or be limited to

ly other provisions, although on their face they do not suggest such a construction. If construed to define the period for commencement of a suit where the action accrues within the statutory period, the time defined would be the time remaining in the statutory period (which began, for instance, at substantial completion of services) after injury has occurred. With each action the time for bringing an action therefore would differ. If a statute provides a ten-year period and injury occurs on the first day after substantial completion, the injured party has ten years to bring his action; if, however, the injury occurs nine and one-half years after substantial completion, the injured party has only six months to bring his suit. Thus, in addition to abolishing rights of action, these statutes would also perform the second function of prescribing the limitation period for commencement of an action where the right of action exists. However, it would be preferable to enact only the statute suggested, thus leaving a party who has a right of action the normal statutory period. Then a party injured at any time during the ten year period would be allowed the time period provided by the personal injury statute to commence his suit.

architects and engineers. Or the statute could be worded to apply only where the defect is patent. The event which determines the commencement of the period may be varied, as well as the term of years. The advisability of any statute at all is certainly questionable, but if such a statute is to be enacted, it is suggested that it exempt from coverage owner-occupied single-unit dwellings as the present California statute provides, and that initial occupancy rather than substantial completion commence the time period since the period then would parallel the time when the building is tested in use. Where under state procedural rules the owner cannot bring in the architect or builder as a third party defendant in an action by a third party, some provision should be made allowing a contribution or indemnity action after the statutory period if the injury occurred and the original suit against the owner was filed within the statutory period.

Since Model Statute I proposes substantive legislation defining rights, there is no need for a separate provision to govern the time during which an actionable claim must be brought; the normal state statute of limitations for various types of actions would be applicable. However, the foregoing discussion of architects' and builders' liability has shown a need for a special statute to define accrual of the cause of action in two situations. First, an owner's action for damages for the deficiency itself would usually accrue at the time of performance or completion of services. Since the owner often may be unaware of such deficiency, he might be barred by an applicable limitation period before he has a practical opportunity to sue. Second, in some jurisdictions an owner's cause of action conceivably might be deemed to accrue at the time of negligent act or omission, even though his action is for a subsequent injury to person or property rather than for the deficiency itself. A statute postponing commencement of the limitation period until discovery of the deficiency or incurrence of the injury would afford the owner a practical remedy. Such a provision is analogous to the discovery test increasingly used in other areas and to the trend towards ameliorating the harshness of statutes of limitations when a plaintiff has no way of knowing his right of action. Jurisdictions currently abolishing rights of action altogether should particularly consider such a statute. Since in those states the owner has no right of action whatsoever after a given period of years, it is only equitable that prior to this extinguishment of all rights of action against the architect or builder, he be afforded the fullest opportunity to sue for damages for the deficiency or the injury. The following statute is therefore proposed:

Model Statute II

Actions by the owner of an improvement to real property against any person performing or furnishing the design, planning, supervision, observa-

tion of construction, or the construction of such improvement to real property shall be commenced only within the periods prescribed by (the limitations statutes of the jurisdiction) after the cause of action shall have accrued, provided that in actions herein described the cause of action shall not be deemed to have accrued when the wrong is done or the technical breach of contract or duty occurs, but in an action to recover damages for

- (1) any deficiency in the design, planning, supervision, observation of construction or construction of an improvement to real property, the cause of action shall be deemed to accrue when the person claiming such damages actually knows or should have known of the deficiency;
- (2) injury to property, real or personal, or injury to the person, or bodily injury arising out of such deficiency, the cause of action shall be deemed to accrue at the time of such injury;
- (3) wrongful death arising out of such deficiency, the cause of action shall be deemed to accrue at the time of wrongful death.

As a postscript to the history of the Illinois statute, the Illinois legislature, shortly after the *Skinner* decision, enacted a statute applicable to land surveyors which has much the same effect as the statute just proposed. Realizing that a plaintiff, whether owner or third party, should be afforded a practical remedy for injuries, the legislature provided that actions against land surveyors must be brought within four years after the person claiming damages for negligence, errors or omissions "actually knows or should have known of such negligence, errors or omissions."¹⁴⁵

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145. ILL. ANN. STAT. ch. 83, § 24g (Smith-Hurd Supp. 1969).