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# Oklahoma's Statute of Repose Limiting the Liability of Architects and Engineers for Negligence: A Potential Nightmare

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# OKLAHOMA'S STATUTE OF REPOSE LIMITING THE LIABILITY OF ARCHITECTS AND ENGINEERS FOR NEGLIGENCE: A POTENTIAL NIGHTMARE*

## I. INTRODUCTION

The creation of rights by tort theory is primarily a matter of state law.[1] States may create such rights, provide defenses to them, and regulate them.[2] Consequently, state legislatures often find themselves being pressured by interest groups who believe that their tort liability should be limited.[3] At times these interest groups have been powerful enough to persuade state legislatures to limit their liability. However, fortunately for the public, state legislatures are not entirely free to limit the tort liability of these interest groups. For one thing, the legislature's action is limited by the due process and equal protection clauses of the fourteenth amendment.[4] Additionally, many state constitutions contain limitations on what legislatures can do with tort laws.

One area of tort law that states have chosen to regulate is the malpractice[5] of architects and engineers. While architects and engineers have not been totally successful in eliminating their liability for negligence, they have been able to get legislation passed in many states that limits the time in which a claim can be brought against them.[6] Legislation limiting the time in which to bring claims against architects and

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1. Kenyon v. Hammer, 142 Ariz. 69, __, 688 P.2d 961, 971 (1984).
2. *Id.*
3. *See, e.g., Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. of the House Comm. on the District of Columbia*, 90th Cong., 1st Sess. (1967).
4. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Northbrook Excess & Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, 300 S.E.2d 507 (1983); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977).
5. "[M]alpractice, in its strict sense, means the negligence of a member of a profession in his relations with his client or patient. . . .[W]e think that malpractice in the statutory sense describes the negligence of a professional toward the person for whom he rendered a service. . . ." Cubito v. Kreisberg, 69 A.D.2d 738, 743, 419 N.Y.S.2d 578, 580 (1979).
6. *See* Rogers, *The Constitutionality of Alabama's Statute of Limitations for Construction Litigation: The Legislature Tries Again*, 11 CUM. L. REV. 1, 2-3 (1980).

engineers is a so-called "statute of limitations."[7] One legislature that has enacted this so-called statute of limitations is the Oklahoma legislature.[8]

This Comment proposes that Oklahoma's so-called statute of limitations be abolished and replaced with a true statute of limitations. The instigation of actions against architects and engineers should be limited to a certain number of years after discovery of the negligence.

## II. BACKGROUND

### A. *Tort Liability of Architects and Engineers*

Traditionally, architects and engineers were only liable for malpractice[9] to persons who purchased a building or had work done on a structure.[10] Because the architect's or engineer's liability for negligence only extended to the owner of the building, third persons who were injured from the architect's or engineer's negligent acts did not have a cause of action. The rationale behind this rule was that there existed no privity between the architect and the injured third party.[11] This privity requirement was also the prevailing rule for injuries arising from defective

7. A statute of limitations is a statute of repose, and is intended to run against those who are neglectful of their rights and fail to use reasonable and proper diligence in enforcing them. Seitz v. Jones, 370 P.2d 300, 302 (Okla. 1961). There were no statutes of limitation at common law, but they are created entirely through statutory enactment. Lake v. Lietch, 550 P.2d 935, 937 (Okla. 1976).

8. Oklahoma's original statute of limitations for architects and engineers took effect on May 22, 1967. OKLA. STAT. tit. 12, § 109 (Supp. 1967).

9. The classic statement of the architect's standard of practice is found in Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896).

> The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.

*Id.* at __, 36 A. at 104-05. The conventional standard of care in architect malpractice cases has been criticized as only holding a professional to average conduct, when the man in the street is held to average prudent conduct. *See* Curran, *Professional Negligence-Some General Comments,* 12 VAND. L. REV. 535 (1959).

10. *See* 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).

11. Comment, *Limitation of Action Statutes for Architects and Builders - Blueprints for Nonaction,* 18 CATH. U.L. REV. 361, 362 (1969). In other words, there was only privity between the architect and the owner of the building or the purchaser. *Id.*

products.[12]

The privity requirement was essentially eliminated with defective products when the landmark case of *MacPherson v. Buick Motor Co.*[13] was decided. *MacPherson* held that manufacturers of inherently dangerous and defective products could be liable for injuries to remote users of the goods.[14] However, the *MacPherson* rule for defective products was not immediately applied to the liability of architects and engineers.[15]

It was not until 1957 that a court recognized the existence of a negligence action against an architect by a remote third party and disallowed the defense of privity.[16] In *Inman v. Binghamton Housing Authority*,[17] the court of appeals of New York held that the designer of an inherently dangerous building could be held liable for injuries remote users sustained.[18] The court equated the product designed by the architect or engineer to other products designed by manufacturers.[19] According to the court, there was no difference between dangerously manufactured goods and defective construction or improvements to realty.[20] Because of the *Inman* decision, by the 1960's the privity requirement was eliminated in negligence actions against architects and engineers.[21]

The effect of eliminating privity as a defense for architects or engineers and other members of the construction profession was that they

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12. *Id.* at 361.
13. 217 N.Y. 382, 111 N.E. 1050 (1916).
14. *Id.* at __, 111 N.E. at 1054.
15. Comment, *supra* note 11, at 362.
16. J. MILLER, ARCHITECT/ENGINEER LIABILITY A GROWTH PERIOD 24 (1984). Nearly all actions brought by remote third parties against architects or engineers are based in negligence since there is no contract with the architect or engineer. *Id.*
17. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *Inman* is taken as the leading case abolishing privity in architectural malpractice defenses. Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1075 n.5 (1979). Without the defense of privity the construction professional may be liable to third parties visiting the job site, to third parties injured because of defective plans or specifications, or to workmen he had a duty to supervise. Comment, *A Defense Catalogue for the Design Professional*, 45 UMKC L. REV. 75, 84 (1976).
18. *Inman*, 3 N.Y.2d at 144-45, 143 N.E.2d at 899, 164 N.Y.S.2d at 704.
19. *Id.* at 144, 143 N.E.2d at 898, 164 N.Y.S.2d at 703. In *Inman*, the plaintiffs claimed that the architect/engineer who designed a housing project in the City of Binghamton should be liable in designing stoops at the project without handrails, with a rear door which opened outward "precariously" close to the edge of the stoop, and with steps that did not extend the entire length of the stoop, allegedly causing injury to a child. *Id.* at 143, 163 N.Y.S.2d at 702, 143 N.E.2d at 898.
20. *Id.* at 144, 143 N.E.2d at 899, 164 N.Y.S.2d at 703-04. The Court, after taking such a step toward wide-open liability, found that the plaintiffs could not recover because all of the defects were reasonably discoverable. *Id.* at 148, 143 N.E.2d at 901, 164 N.Y.S.2d at 707.
21. *See* Comment, *supra* note 11, at 362. It is now generally accepted that the liability of the architect or engineer extends to members of the general public whose presence in the structure can be reasonably anticipated. *See* Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

increasingly found themselves the subject of a negligence-based cause of action.[22] Additionally, they were subject to the ordinary rule of tort liability that the statute of limitations for latent defects does not begin to run until the negligent act is discovered.[23] Consequently, the members of the construction industry were exposed to unlimited liability for the life of the building or other improvement to real estate.[24]

### B. *Statutes of Repose in General*

In an attempt to curtail the expanded liability which devolved upon architects during the 1960's, the construction industry lobbied for legislation that would limit the time within which actions for negligence could be brought against them.[25] The effort resulted in forty-six states enacting such legislation.[26]

22. *See, e.g.*, United States v. Rogers & Rogers, 161 F. Supp. 132, 135 (S.D. Cal. 1958) (privity of contract not necessary in order for the negligent performance of a contractual duty to give rise to liability for damages); Conklin v. Cohen, 287 So. 2d 56, 61 (Fla. 1973) (privity of contract not necessary to give rise to liability); Geer v. Bennett, 237 So. 2d 311, 316 (Fla. Dist. Ct. App. 1970) (privity of contract is not a prerequisite to liability; the architect has a duty to use reasonable care during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by his failure to do so).

23. Rogers, *supra* note 6, at 1-2.

24. *Id.* at 2.

25. Comment, *supra* note 17, at 91-92. The American Institute of Architects (AIA), the National Society of Professional Engineers, and the Associated General Contractors of America lobbied for model legislation to limit the duration of liability. *Id.*

26. ALA. CODE § 6-5-218 (Supp. 1985) (seven years after substantial completion); ALASKA STAT. § 09.10.055 (1973) (six years after substantial completion); ARK. STAT. ANN. §§ 37-237 to -244 (Supp. 1985) (five years after substantial completion); CAL. CIV. PROC. CODE § 337.1 (West Supp. 1982) (four years after substantial completion); COLO. REV. STAT. § 13-80-127 (Supp. 1985) (ten years after substantial completion); CONN. GEN. STAT. ANN. § 584a (West Supp. 1986) (seven years after substantial completion); DEL. CODE ANN. tit. 10, § 8127 (1974) (six years from the earliest date of several which relate to completion); D.C. CODE ENCYCL. § 12-310 (West Supp. 1981) (ten years after substantial completion); FLA. STAT.ANN. § 95.11(3)(c)(1982) (within fifteen years after actual possession of owner, the date of issuance of occupancy, the date of abandonment of construction if not completed, or the date of completion of termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest); GA. CODE ANN. §§ 3-1006 to -1011 (Supp. 1985) (eight years after substantial completion); HAWAII REV. STAT. § 657-8 (Supp. 1984) (ten years after substantial completion); IDAHO CODE § 5-241 (Supp. 1985) (applicable statute of limitations shall begin to run six years after substantial completion); IND. CODE ANN. §§ 34-4-20-1 to -4 (Burns Supp. 1985) (either ten years from substantial completion or twelve years after the completion and submission of plans and specifications to the owner if the action is for deficiency in design); KY. REV. STAT. ANN. § 413.135 (Baldwin 1979) (five years after substantial completion); LA. REV. STAT. ANN. § 9:2772 (Supp. 1986) (consult statute for options); ME. REV. STAT. ANN. tit. 14, § 752-A (1980) (six years after cause of action accrues); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1984) (ten years after entire improvement became available for its intended use); MASS. GEN. LAWS ANN. ch. 260, § 2B (West Supp. 1986) (six years from either (1) the opening of the improvement to use or (2) substantial completion and taking possession for occupancy by the owner.); MICH. COMP. LAWS ANN. § 600.5839 (Supp. 1986) (ten years after the time of occupancy of the complete improvement, use, or acceptance of the improvement); MINN. STAT. ANN. § 541.051 (West Supp. 1986) (fifteen years after substantial comple-

Although all forty-six statutes are not identical, they are strikingly similar. Typically, the statutes provide that actions against those persons furnishing the design, planning, supervising construction, or constructing a building cannot be brought after a certain number of years.[27] Basically, the limitation period starts to run at some date associated with the conclusion of construction.[28] The limitation period varies anywhere from four to twenty years.[29] Despite the differences, all of the statutes have the

tion); MISS. CODE ANN. § 15-1-41 (1972 & Supp. 1985) (six years after written acceptance or actual use whichever occurs first); MO. ANN. STAT. § 516-097 (Vernon Supp. 1986) (ten years from date of completion); MONT. CODE ANN. § 27-2-208 (1983) (ten years after completion); NEB. REV. STAT. § 25-222 (1979) (ten years from rendering service); NEV. REV. STAT. § 11.205 (1979) (six years after substantial completion); N.H. REV. STAT. ANN. § 508:4-b (1983) (six years after the performance or furnishing of services and construction); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1980-1981) (ten years after the performance of furnishing of services and construction); N.M. STAT. ANN. § 37-1-27 (1978) (ten years after substantial completion); N.Y. CIV. PRAC. LAW § 214 (McKinney Supp. 1986) (statute provides that suits for professional malpractice be brought within three years); N.C. GEN. STAT. § 1-50(5) (1969) (six years from the later of the specific last act or ommission giving rise to the cause of action or substantial completion); N.D. CENT. CODE § 28-01-44 (1974) (ten years from substantial completion); OHIO REV. CODE ANN. § 2305.131 (Baldwin 1975) (ten years after the performance or furnishing of such services and construction); OKLA. STAT. tit. 12, § 109 (1981) (ten years after substantial completion); OR. REV. STAT. § 12.135 (1985) (ten years after substantial completion); PA. CONS. STAT. ANN. tit. 42, § 5536 (Purdon Supp. 1980) (twelve years after completion of construction); R.I. GEN. LAWS § 9-1-29 (Supp. 1979) (ten years after substantial completion); S.C. CODE ANN. §§ 15-3-630 to -670 (Law. Co-op. 1976) (ten years after substantial completion); S.D. CODIFIED LAWS ANN. §§ 15-2-9 to -12 (1984) (six years after substantial completion) (repealed 1985); TENN. CODE ANN. §§ 28-314 to -318 (1980) (four years after substantial completion); UTAH CODE ANN. § 78-12-25.5 (1977) (seven years after completion of the construction-meaning the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner's use or possession of the improvement on real property); VA. CODE § 8.01-250 (1984) (five years after the performance of furnishing of such service and construction); WASH. REV. CODE § 4.16.300 (Supp. 1986) (six years after substantial completion); WIS. STAT. ANN. § 893.155 (1983) (six years after substantial completion); WYO. STAT. §§ 1-3-110 to -113 (1977) (ten years after substantial completion). Illinois and Texas have repealed their statutes in this area. Note that this compilation omits Arizona, Iowa, Kansas, Vermont, and West Virginia. These five jurisdictions apparently have never enacted such legislation, although one law review comment indicates that a Kansas statute, which now refers only to medical malpractice, at one time encompassed architectural malpractice. Rogers, *supra* note 6, at 2 n. 6.

27. *See* Comment, *supra* note 11, at 365. However, some states restrict coverage to architects and professional engineers, while others expressly include others. *Id.*

28. Rogers, *supra* note 6, at 3. Conclusion of construction is denominated in some of the statutes as "substantial completion", while others merely say "completion." Many of the states that use "substantial completion" use it as a term of art in the construction trade without defining the term. *Id.*

29. Note, *LIMITATION 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 AND WATER L. REV. 313, 317 (1981). 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. The full text of the model statute is:

> 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

same basic result. They all limit the architect's or engineer's liability for negligence to a certain number of years.

1. Rationale for Statutes of Repose

The rationale for enacting such statutes is based on an alleged unfairness to defendants who are sued after a significant lapse in time from their negligent act. Proponents of the statutes have pointed to "the difficulty of proof which naturally accompanies the passage of time."[30] They argue that after a certain number of years, an architect or other person covered by these statutes would be unable to secure the evidence to zealously defend a negligence suit.[31] Problems of proof are not only complicated by passage of time, but also by the innumerable possibilities of intervening causes for the defective condition of the building.[32] Moreover, proponents believe that it is unfair to subject an architect or other builder to potential liability for his or her work for the duration of his or her life.[33]

2. Effect of Statutes of Repose

While most of these statutes are disguised as statutes of limitation, actually they are unlike traditional statutes of limitation. True statutes

(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 such an action be brought more than five years after the sustantial 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.

Comment, *supra* note 11, at 365-66 n. 31.

30. Overland Constr. Co., Inc. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979) (The need for these statutes is predicated on the difficulty of proof which accompanies the passage of time.).

31. *Id.*

32. *See* Comment, *supra* note 11, at 381.

33. *See* J. ACRET, ARCHITECTS AND ENGINEERS 258 (1984).

of limitation are procedural mechanisms.[34] They normally govern "the time within which a legal proceeding must be instituted after a *cause of action accrues.*"[35] In contrast, the statutes limiting the liability of architects and engineers run from the conclusion of construction. They bar the right of the action before any injury occurs.[36] Statutes of limitation are designed to prohibit a person from bringing a stale claim,[37] but these statutes prevent a person from ever having a claim.

The difference between the two can best be shown through an illustration. Consider a situation wherein an architect designed a hotel that was completed January 1, 1975. On January 2, 1986, the hotel structure collapsed and killed 200 people. The collapse was apparently due to the architect's negligent design.

Under a statute of repose that forbids a claim against an architect after ten years, there is no cause of action against the architect. In essence, the victims never acquired a right to sue the architect for his negligence. Under a normal statute of limitations, the victims would have a certain amount of time after the accident to bring an action. The right to sue would be barred only if they failed to comply with the statute of limitations.

3. Constitutional Validity

The constitutional validity of these statutes of repose has been tested in approximately half of the jurisdictions that have enacted them. There is a split of authority regarding their constitutionality.[38] The challenges

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34. Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 421 (Del. 1984).
35. Loyal Order of Moose v. Cavaness, 563 P.2d 143, 146 (Okla. 1977).
36. *Id.*
37. Special Indem. Fund v. Barnes, 434 P.2d 218, 221 (Okla. 1967). Statutes of limitation are also designed to prevent fraud. *Id.* Statutes of limitation are statutes of repose, the object of which is to prevent fraudulent and stale actions from springing up after a great lapse of time. Adams v. Coon, 36 Okla. 644, 648, 129 P. 851, 853 (1913).
38. Rogers, *supra* note 6, at 17.

CONSTITUTIONAL: Carter v Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Salinero v. Pon, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); 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. Ct. 1983); Mullis v. Southern Co. Services, Inc., 250 Ga. 90, 296 S.E.2d 579 (1982); Twin Falls Clinic & Hospital Building 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); Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983); Burmaster v. Gravity Drainage District 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, 410 Mich. 1, 299 N.W.2d 336 (1980); Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982); 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); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); Lamb v. Wedgewood South Corp., 308 N.C.

most frequently made against the statutes have been based on due process and equal protection guarantees of the federal and state constitutions.[39] Additionally, the statutes have been challenged as violating various other clauses of state constitutions.[40]

While it has been argued that due process is violated because the statutes take away a property right without due process of law, the statutes have generally survived this argument.[41] Generally, the courts' reasoning in rejecting this argument has been that the statutes do not deprive a person of their property because the statutes do not merely limit the remedy, but they bar an action from ever coming into existence.[42] Although once a cause of action vests, due process requires that there be a remedy,[43] where a cause of action never vests, there is never a property right to take away.[44]

Moreover, it is within the power of the state legislature to abolish a

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419, 302 S.E.2d 868 (1983); Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362 (6th Cir. 1984); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); McMacken v. South Dakota, 320 N.W.2d 131 (S.D. 1982); Harmon v. Angus R. Jessup Assoc., Inc., 619 S.W.2d 522 (Tenn. 1981); Sowders v. M.W. Kellogg Co., 663 S.W.2d 644 (Tex. Civ. App. 1983); 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);

UNCONSTITUTIONAL: Shibuya v. Architects Hawaii Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); State Farm Fire And Casualty Co. v. All Elec., Inc., 99 Nev. 215, 660 P.2d 995 (1983); Henderson Clay Products, Inc. v. Edgar Wood & Assoc., 122 N.H. 800, 451 A.2d 174 (1982); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980). Modified from Tabler v. Wallace, 704 S.W.2d 179, 182 n. 4 (Ky. 1985).

39. Rogers, *supra* note 6, at 17. "The most serious constitutional challenges have been pressed under state and federal due process and equal protection clauses and under state constitutional prohibitions of special legislation." *Id.*

40. Some of the statutes have been challenged on the grounds that they violate state open court provisions. *See* Lamb v. Wedgewood South Corp., 308 N.C. 419, __, 302 S.E.2d 868, 880 (1983); Harmon v. Angus R. Jessup Assoc., Inc., 619 S.W.2d 522, 524 (Tenn. 1981). Others have been challenged as violating an adequate remedy provisions. *See* Howell v. Burk, 90 N.M. 688, __, 568 P.2d 214, 221 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

41. *See* Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982); Beecher v. White, 447 N.E.2d 622 (Ind. Ct. App. 1983); 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); Grubaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Terry v. New Mexico State Highway Comm'n, 98 N.M. 119, 645 P.2d 1375 (N.M. 1982); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 269, 382 A.2d 715 (1978); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981), *appeal dismissed*, 459 U.S. 802 (1982).

42. Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 416 (Del. 1984) (eliminates cause of action regardless of whether an action has accrued); Skinner v. Anderson, 38 Ill. 2d 455, __, 231 N.E.2d 588, 590 (1967); Bouser v. Lincoln Park, 83 Mich. App. 167, 268 N.W.2d 332 (1978).

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

44. Comment, *supra* note 11, at 372.

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common law cause of action to attain a permissible state objective.[45] In that regard, it has consistently been held that a legitimate state objective for these statutes of repose exists. The reasoning has been that it is in the public's interest to terminate the liability of an architect or engineer at a definite time because of the difficulty of producing credible evidence after a significant passage of time.[46]

Statutes of repose protecting architects and engineers have also been challenged as violative of due process guarantees of state constitutions.[47] For example, the statutes have been challenged as violating "access to courts", "open court", and "adequate remedy" provisions.[48] However, such arguments have achieved little success.[49]

Most of the states that have invalidated the statutes have done so on the grounds that they violate a person's equal protection under the law.[50] Invalidation most often happens when the statute applies to architects and engineers, but does not apply to others who worked on the building.[51] The reasoning given by courts is that there is no rational basis for treating architects, engineers, and other persons covered by the statutes differently than materialmen or owners and tenants.[52] Therefore, the

45. Silver v. Silver, 280 U. S. 117, 122 (1929) (dictum); Loyal Order of Moose v. Cavaness, 563 P.2d 143, 146 (1977) (It is not within the legislative power to cut off a vested remedy, but unless forbidden by the state constitution, the legislature may create new rights or abolish old ones recognized by the common law.).

46. *See supra* note 30.

47. *See, e.g.*, Reeves v. Ille Elec. Co., 551 P.2d 647 (Mont. 1976); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981), *appeal dismissed*, 459 U.S. 802 (1982).

48. *See, e.g.*, *Ellerbe*, 618 S.W.2d at 873. Section 13 of article I "... is a declaration of a general fundamental principle that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy. . . . This section has been held to prohibit legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and defined in the common law." *See also* Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

49. *See Reeves*, 551 P.2d at 650; *Lamb*, 308 N.C. at __, 302 S.E.2d at 880. *But see*, Saylor v. Hall, 497 S.W.2d 218, 224 (Ky. 1973) (Declaring statute unconstitutional as violating state access to court and open court provisions).

50. *See, e.g.*, Shibuya v. Architects Hawaii Ltd., 65 Hawaii 26, __, 647 P.2d 276, 278 (1982); Broome v. Truluck, 270 S.C. 227, __, 241 S.E.2d 739, 740 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821, 831 (Wyo. 1980).

51. *See supra* note 50.

52. Henderson Clay Products, Inc., v. Edgar Wood and Assocs., Inc., 122 N.H. 800, __, 451 A.2d 174, 175 (1982) (There is no rational basis for treating architects, engineers and other persons covered by the statute differently than materialmen); Broome v. Truluck, 270 S.C. 227, __, 241 S.E.2d 739, 740 (1978) (No rational basis for treating those covered by the statute differently than owners and manufacturers.).

classification is considered to be arbitrary.[53]

Although violation of the equal protection clause has been the most successful means of attack on the statutes of repose, several states have upheld them against such claims.[54] Various reasons have been given in support of a rational basis in giving architects and engineers immunity from suit but not lending this immunity to others.[55] Frequently, the reasons given are based on the theory that the rationale for giving architects and engineers immunity, the problem of proof after many years, does not apply to materialmen and owners.[56] The problem of proof facing the architect or engineer is much greater because their liability is based on negligence; materialmen, however, are often judged by a strict liability standard.[57]

## III. OKLAHOMA'S STATUTE OF REPOSE

### A. *Statute as Originally Enacted*

In response to pressure from architects, builders, and contractors, the Oklahoma Legislature passed a statute of repose in 1967.[58] The statute limited the time for commencement of an action against architects, builders, contractors, or any person performing or furnishing design, planning, supervision, or observation of construction or construction of improvements to five years after the "substantial completion" of construction. Excluded from the protection of the statute were owners or tenants in possession.[59] The Act also provided that for injuries or deaths

53. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). "[T]hat 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 . . . the statute singles out the architect and the contractor and grants them immunity." *Id.* at 591. The court concluded that this was an arbitrary classification. *Id.*

54. *See* Carter v. Hartenstein, 248 Ark. 1172, __, 455 S.W.2d 918, 921 (1970), *appeal dismissed*, 401 U.S. 901 (1971); Regents of Univ. of Cal. v. Hartford Accident and Indem. Co., 21 Cal. 3d 624, 633, 581 P.2d 197, 201, 147 Cal. Rptr. 486, 490 (1976); Northbrook Excess and Surplus Ins. Co. v. J.G. Wilson Corp., 250 Ga. 691, __, 300 S.E.2d 507, 508 (1983); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1387 (La. 1978).

55. One reason given is that builders and owners perform different functions. *See Carter*, 455 S.W.2d at 920. It has also been argued that builders and owners have different quality control standards. *See Burmaster*, 366 So. 2d at 1386.

56. *See* Comment, *supra* note 11, at 371.

57. *Id.*

58. *See supra* note 8.

59. The act pased in 1967 read:

§ 109. Limitation of action to recover damages arising from design, planning or construction of improvement to real property. —No action in tort to recover damages

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

occurring in the fifth year after substantial completion, an action in tort could be brought within two years after the date on which the injury occurred.[60] However, in no event could such an action be brought more than seven years after the substantial completion of construction.[61]

The validity of the 1967 statute was challenged in the case of *Loyal Order of Moose v. Cavaness*.[62] That case involved a plaintiff, Loyal Order of Moose, who hired the defendant, Cavaness, to design and construct its lodge. The lodge was completed in 1967 and occupied by the plaintiff in December of that year. In November of 1974, due to heavy rains, water accumulated on the roof and seeped into the heating and air-conditioning ducts; this in turn caused the roof to collapse. Plaintiff filed a suit for the damages caused in the amount of $30,500. The plaintiff claimed the roof collapsed due to the negligent design, engineering, and installation by defendant. At the trial court, the defendant raised the statute of repose in a demurrer, claiming that the five year limit had passed. The trial court sustained the demurrer and dismissed the action.[63]

On appeal, the plaintiff attacked the constitutionality of the statute. Three constitutional arguments were submitted by the plaintiff. First, it was argued that the legislation abrogated a common law right.[64] Second, it was claimed that the law was special legislation in violation of article V, section 51, of the Oklahoma Constitution.[65] Lastly, it was argued that the law was a violation of the equal protection clause of the fourteenth amendment to the United States Constitution, in that owners were not given the same protection as architects and engineers when they were

(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 five (5) years after substantial completion of such an improvement.

§ 110. Injury occurring during fifth year after substantial completion.— 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 fifth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two (2) years after the date on which such injury occurred (irrespective of the date of death) but in no event may such an action be brought more than seven (7) years after the substantial completion of construction of such an improvement.

OKLA. STAT. tit. 12, §§ 109-110 (Supp. 1967).

60. *Id.* § 110.

61. *Id.*

62. 563 P.2d 143 (Okla. 1977).

63. *Id.* at 145.

64. *Id. See infra* text accompanying note 105. Oklahoma courts in construing article II, § 6 of the Oklahoma Constitution have limited its application to those who have suffered *legal* wrongs. *See* Nash v. Baker, 522 P.2d 1335, 1337-38 (Okla. Ct. App. 1974).

65. *Moose*, 563 P.2d at 145.

defendants.[66]

In response to the first argument, the Oklahoma Supreme Court found that the law did not abrogate a common law right.[67] The court reasoned that generally a cause of action accrues at the moment the party owning it has a legal right to sue.[68] The right does not vest until it accrues.[69] Recognizing the fact that "it is not within the power of the Legislature to cut off an existing or vested remedy entirely," the court, however, held that "unless a state constitution specifically forbids it, the Legislature may create new rights or abolish old ones recognized by the common law, if there are permissible legislative objectives."[70] Because the statute in question was an absolute bar to a cause of action before it ever vested, the court concluded that the challenged statute did not abrogate an absolute vested right.[71] Therefore, the plaintiff's first constitutional attack failed to persuade the court.[72]

The court was also not swayed by the plaintiff's second argument that the statute was special legislation[73] and, therefore, violated the Oklahoma Constitution. The plaintiff argued that the statute violated the special law provision by affording immunity from suit to architects, engineers, and contractors, while excluding other workers in the construction business. The court did recognize that the legislature's power to abolish a cause of action could not be exercised "in a manner that is unreasonably discriminatory or violates a constitutional mandate."[74] However, even though the statute did not specifically mention other workers, the court held that it was not special legislation.[75] The court reasoned that "[t]he 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

66. *Id.*

67. *Id.* at 146. The court recognized that the contested statute was not a true statute of limitation. *Id.*

68. *Id.*

69. *Id.* ("There is no vested right to a remedy after the substantive right is lost.")

70. *Id.* "[I]t is within the power of the Legislature to modify or abolish an old right under common law as long as no vested right is disturbed." *Id.*

71. *Id.* "In this case the right abolished after 5 years is the right to an action in tort for property damages against those protected by the statute." *Id.*

72. *Id.*

73. *Id.* at 147. In Oklahoma, the legislature is constitutionally forbidden from creating special legislation that grants any association, corporation, or individual, any exclusive rights, privileges or immunities within this State. OKLA. CONST. art. V, § 51.

74. *Moose*, 563 P.2d at 147.

75. *Id.*

construction."[76]

Even though the court implied from the statute that other materialmen were included in the statute, it found that the statute did exclude owners and tenants in possession.[77] This excluded group was significant enough to have the statute invalidated for violating the equal protection provision of the fourteenth amendment to the United States Constitution.[78] The court indicated that in order to be constitutionally valid, the discriminatory portion of the statute must be supported by important legislative objectives and be reasonable.[79] The court could find no justification for an owner of a building being subject to liability for injuries caused by the protected party's negligence.[80] Thus, the statute was held to be unconstitutional.

B. *Oklahoma's Current Statute of Repose*

Subsequent to the *Moose* decision, the Oklahoma Legislature amended Oklahoma's statute of repose in 1978 to include "any person owning, leasing, or in possession of such an improvement."[81] The amended statute, which is nearly identical to the first, restricts architect's and engineer's liability for negligence to remote third parties to ten years after "substantial completion" of such an improvement.[82] This restrictive statute indicates the legislature's continued dislike for construction defect actions.[83] By making this assertion, the legislature has set itself up for a potential "unproductive tug-of-war" with the Oklahoma Supreme

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76. *Id.*

77. *Id.*

78. *Id.* The court recognized there might be public policy reasons to justify outlawing legitimate claims in order to have a definite end to potential litigation. *Id.* at 148.

79. *Id.* at 148.

80. *Id.*

81. OKLA. STAT. tit. 12, § 109 (Supp. 1978). The 1978 statute has not been amended to date and reads:

> No action in tort 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 owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

82. *Id.*

83. Note, *supra* note 29, at 326. "A special statute of limitations indicates legislative disfavor of a specific type of action. The [statute of repose] is a special statute of limitations which indicates legislative disapproval of actions against builders initiated long after completion of improvements. . . ." *Id.* at 315. In at least three other states where courts have stricken statutes of repose, the legislatures have re-enacted almost identical legislation. HAWAII REV. STAT. § 657-8 (Supp. 1979)

Court.[84]

There are still unresolved constitutional and constructional problems with the statute as amended. Although the statute as amended has not been scrutinized by the Oklahoma Supreme Court, it is certain that it will be soon.[85] Plaintiffs faced with a defendant using the statute as a defense should be aware of several arguments that would likely persuade the court to invalidate the present statute.[86]

### C. *Constitutional Issues*

#### 1. Violation of Right to Wrongful Death Action

At the very least, the new statute of repose is in violation of article XXIII, section 7, of the Oklahoma Constitution. This section provides: "The right of action to recover damages for injuries resulting in death shall never be abrogated. . . ."[87] "Shall never be abrogated" means shall never be withdrawn or taken away by legislative act or other legislative authority.[88] The statute of repose does exactly that. It is a legislative act that takes away the right to recover damages for wrongful death.[89]

While true statutes of limitation have been upheld in regard to wrongful death actions,[90] that is no reason to uphold this statute of repose. True statutes of limitation have been upheld because they are procedural in nature.[91] They are based on a time period after the wrong occurs.[92] Therefore they are not abrogating a substantive right.[93]

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(amended 1980 and 1983); ILL. ANN. STAT. ch. 51, § 58 (Smith-Hurd Supp. 1979) (repealed 1982); WIS. STAT. ANN. § 893.155 (West Supp. 1979).

84. Note, *supra* note 29, at 326.

85. Presently Oklahoma's statute of repose is before the Oklahoma Supreme Court in Smith v. Westinghouse Elec. Corp., No. 64,801 (Okla. Sup. Ct. filed July 15, 1985).

86. An increasing number of states are invalidating these types of statutes on constitutional grounds. *See* Tabler v. Wallace, 704 S.W.2d 179, 182 (Ky. 1985).

87. OKLA. CONST. art. XXIII, § 7.

88. F.W. Woolworth Co. v. Todd, 204 Okla. 532, 534, 231 P.2d 681, 684 (1951).

89. Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973) (statute of repose abolishes a cause of action before it legally exists).

90. *See* Brookshire v. Burkhart, 141 Okla. 1, 7, 283 P. 571, 577 (1929) (Statutes of limitation for wrongful death cases do not violate Oklahoma Constitution because they focus on the action taken after the cause of action.)

91. Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364, 1366 (Okla. 1984) ("Statutes of limitations are viewed as procedural rather than substantive. No rights vest in them until a claim comes to be barred by a statute which governs it.").

92. *Id.* "The theory of the limitation statutes is that a defendant be given notice within a certain period that he will be called upon to defend a certain action, and that he be given sufficient notice to adequately prepare." C & C Tile Co., Inc. v. Independent School Dist., 503 P.2d 554, 559 (Okla. 1972).

93. *See* Trinity Broadcasting Corp. v. Leeco Oil Co., 692 P.2d 1364 (Okla. 1984); Brookshire v. Burkhart, 141 Okla. 1, 283 P. 571 (1929).

In contrast, the present statute is substantive in nature because it abrogates a fundamental right.[94] A "fundamental right" has generally been defined as a right "explicitly or implicitly guaranteed by the Constitution."[95] In regard to wrongful death actions, it is clear that article XXIII, section 7, of the Oklahoma Constitution, makes an action for wrongful death a fundamental right.[96] That is, Oklahoma's constitution guarantees that a person's cause of action for wrongful death shall not be abrogated. Because the statute of repose can effectively preclude a person from ever having a claim, it is substantive in nature.[97] It abrogates the fundamental right of being able to institute a wrongful death action.[98]

A similar statute of repose has been held unconstitutional for violation of Kentucky's constitutional provision that guarantees a right to a wrongful death action.[99] The Kentucky Supreme Court in *Saylor v. Hall* reasoned that the purported limitations statute destroyed a cause of action before it actually vested in the person.[100] Therefore, the statute was not permissible because it accomplished the destruction of a constitutionally protected right.[101]

The potential success of this argument was alluded to by the Oklahoma Supreme Court in *Moose*. The court said that article XXIII, section 7, of the constitution "appears to preclude the portion of [the statute] barring actions for wrongful death."[102] Because the 1978 amendment did not change the part barring actions for wrongful death, it is almost certain that the supreme court will declare it unconstitutional if presented with the question.[103]

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94. *See* Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977).

95. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1972).

96. *Kenyon*, 142 Ariz. at __, 688 P.2d at 975. (Abolishing a person's cause of action impinges on a fundamental right when it is guaranteed by the constitution.)

97. Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 421 (Del. 1984).

98. *Kenyon*, 142 Ariz. at __, 688 P.2d at 975.

99. Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973). In May, 1955, the defendant, a builder, completed construction of a house on a lot he owned and sold it to Thomas and Kathlyn Johnson. In July, 1969, James Saylor and his wife rented the property from the Johnsons and moved in. Four months later, a stone fireplace and mantel collapsed and crushed the Saylors' son to death. *Id.* at 220. Kentucky's statute of repose required an action to be brought within five years of the time of original occupancy of the improvements which the builder caused to be erected. *Id.* at 220.

100. *Id.* at 222.

101. *Id.* at 225. "Surely then, the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action." *Id.* The court also considered the fact that the state constitution contained an "access to courts" provision.

102. *Moose*, 563 P.2d at 146, n. 15.

103. Since then, the Oklahoma Supreme Court has stated that a statute of limitations which

2. Violation of Litigant's Access to Courts Provision

Another possible approach to having the statute invalidated is on the grounds that it violates article II, section 6, of the Oklahoma Constitution.[104] Article II, section 6, provides:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.[105]

From the language of this section, it appears that the framers of the consitution "clearly intended to open the courts of justice to every person, no matter whom, for redress for wrongs and for reparation for injuries."[106]

The Florida Supreme Court in 1979 invalidated its state's repose statute on the grounds that it violated the state constitution's "access to courts provision."[107] This provision is substantially similar to Oklahoma's access to courts provision.[108] The Florida court reasoned that a cause of action for injuries caused by an architect or engineer created a fundamental right.[109] Where a claimant has a right to a cause of action, "the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an *overpowering public necessity* for the abolishment of such right."[110] The court could find no overpowering public necessity to justify this absolute immunity from suit for certain professionals.[111]

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could bar the remedy before the cause of action accrued is clearly unconstitutional. *See* City of Norman v. Liddell, 596 P.2d 879, 882 (Okla. 1979).

104. *See, e.g.*, Jackson v. Mannesman Demag Corp., 435 So. 2d 725 (Ala. 1983); Daugaard v. Baltic Coop. Bldg. Supply Ass'n., 349 N.W.2d 419 (S.D. 1984); *but see* Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Harmon v. Angus R. Jessup Assoc. Inc., 619 S.W.2d 522 (Tenn. 1981).

105. OKLA. CONST. art. II, § 6.

106. Fielder v. Fielder, 42 Okla. 124, 127, 140 P. 1022, 1024 (1914). *But see* Nash v. Baker, 522 P.2d 1335, 1338 (Okla. Ct. App. 1974).

107. Overland Constr. Co., Inc. v. Sirmons, 369 So. 2d 572 (Fla. 1979).

108. Article I, Section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Id.* at 573. *See supra* text accompanying note 105.

109. *Overland,* 369 So. 2d at 573. The court recognized that when the "access to courts" provision of the constitution was re-adopted in 1968, there existed a right of redress against contractors for injuries to remote third parties. *Id.* at 574.

110. *Id.* at 573 (emphasis added).

111. *Id.* at 574. The court recognized the problems "in exposing builders and related professionals to potential liability for an indefinite period", but concluded that the problems were not sufficiently compelling to justify the enactment of this legislation. *Id.*

3. Special Legislation

Even though the Oklahoma Supreme Court in *Moose* held that the Oklahoma statue of repose was not special legislation, one can still argue that it is.[112] Article V, section 46, of the Oklahoma Constitution, states that "[t]he Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: . . . [f]or limitation of civil or criminal actions."[113] One might argue that the Oklahoma statute of repose is not in violation of this section of the constitution because it has been held in the past that statutes of limitation are not special legislation.[114] However, as argued above, the statute of repose is not a true statute of limitations, because it extinguishes a cause of action before it accrues.[115] True statutes of limitation operate on the remedy directly without extinguishing a right.[116]

With that in mind, the fundamental question is whether the Oklahoma legislature had a "reasonable basis for this legislation sufficient to justify creating the separate classification for certain persons engaged in the construction of improvements to real property, granting these persons a special immunity."[117] In that regard, a recent Kentucky Supreme Court case of *Tabler v. Wallace* held that their general assembly did not have a reasonable basis for granting such a special immunity.[118] Kentucky's special legislation provision is similar to Oklahoma's.[119]

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112. *See* Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (Violation of constitutional provision precluding passage of "special laws").

113. OKLA. CONST. art. V, § 46.

114. *See* McCarroll v. Doctors Gen. Hosp., 664 P.2d 382 (Okla. 1983) (Section 18 of Title 76, Oklahoma Statutes setting forth two-year limitations period for actions against health care providers was constitutional, despite claims that statute denied equal protection, and was a special law conferring special immunities upon members of the medical profession).

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

116. *Id.*

117. *Id.* at 185.

118. In *Tabler*, the Court felt that the justifications offered for the statute were self-contradictory. "For instance, one brief argues that the justification for the statute is to prevent the protected class from being inundated by law suits; another that ninety percent or more the cases of this type involved damages or injuries occurring within five years of construction and the statute addresses very few stale claims. . . ." *Id.* at 185. Subsequent to Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973), Kentucky's statute of repose was somewhat revitalized in the case of Carney v. Moody, 646 S.W.2d 40 (Ky. 1982). *Carney* reached an opposite result from *Saylor* while conceding there was no real factual distinction and without overruling it. *Id.* The basis for the differing results concerns the issue of whether privity was a component of a negligence-based cause of action prior to the enactment of the 1891 Kentucky Constitution. *See also* Capps v. Herman Schwabe, Inc., 628 F. Supp. 1353, 1357-58 (W.D. Ky. 1986) (criticizing the *Saylor* court on these grounds). The court in *Tabler*, instead of writing chapter three of the debate on privity, chose to concentrate on constitutional issues not raised in either of the two previous cases. *Tabler*, 704 S.W.2d at 186-87.

119. Kentucky Constitution provides: "The General Assembly shall not pass local or special

The court in *Tabler v. Wallace* reasoned that "there is no social or economic basis presented to justify a special class, only their own self interest."[120] This legislative windfall is not shared by those other groups who are similarly situated.[121] The subjective reasons given by the architects in support of such special legislation would not withstand public policy analysis.[122]

#### 4. Void for Vagueness and Uncertainty

There is also a problem with the current statute of repose in that it may violate the due process clause of the fourteenth amendment for being vague and uncertain.[123] Non-criminal statutes have been held to be unconstitutionally vague under the due process clause where the language of the statute does not convey a warning sufficiently definite as to the proscribed conduct when measured by common understanding and practices.[124] When the Oklahoma Legislature amended section 109 of the statute of repose, it failed to amend section 110. Section 110 allows an action arising in the fifth year after "substantial completion" to be brought within two years.[125] This provision made sense under the original statute because the original statute barred a claim after five years from "substantial completion". Because the amended statute bars an action after ten years from "substantial completion", section 110 now makes no sense. The statute as amended does not sufficiently convey to victims injured in the fifth or tenth year after completion when their cause of action will become barred by the statute. Thus, it is uncertain and vague.[126]

### D. *Construction Issues*

#### 1. Does the Statute Apply to Manufacturers and Materialmen?

The issue whether the statute of repose can be used by a manufacturer or materialman is presently before the Oklahoma Supreme

acts concerning any of the following subjects, or for any of the following purposes, namely: . . . Fifth: To regulate the limitation of civil or criminal causes." KY. CONST. § 59.

120. *Tabler*, 704 S.W.2d at 187.

121. *Id.*

122. *Id.*

123. *See* Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975).

124. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Neblett v. Carpenter, 305 U.S. 297 (1938).

125. OKLA. STAT. tit. 12, § 110 (1981).

126. *See* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

Court.[127] The statute does not expressly include or exclude manufacturers or materialmen. However, in *Moose* the court indicated that manufacturers and materialmen were implicitly covered by the statute.[128] In broadly interpreting the statute of repose the court stated that it included "materialmen, manufacturers or anyone involved in providing material or service in the construction."[129] Because the current statute is nearly identical to the one the court was interpreting in *Moose*, one can be persuaded that the Oklahoma Supreme Court will again interpret the statute to include manufacturers and materialmen.[130]

The possibility of the court construing the statute to apply to manufacturers and materialmen is further supported by the fact that in construing it that way, the court will be avoiding a constitutional conflict.[131] That is, if the statute is interpreted narrowly to not include manufacturers and materialmen, the issue will be raised again as to whether the classification is arbitrary and in violation of the equal protection clause.[132] Many times courts prefer to avoid an interpretation that would present that type of conflict.[133]

However, it would not be surprising if the court holds that the statute is not a defense available to manufacturers and materialmen.[134] Be-

127. Smith v. Westinghouse Elec. Corp., No. 64,801 (Okla. Sup. Ct., filed July 15, 1985). The case involves the explosion of two high-voltage electrical transformers. The explosions occurred in a vault beneath the sidewalk adjacent to the Beacon Building at Fourth Street and Boulder Avenue in Tulsa, Oklahoma. Both transfomers were manufactured by defendant Westinghouse Electric Corporation, and each transformer contained a highly toxic chemical dielectric coolant, commonly known as "PCB", manufactured by defendant Monsanto Co. The transformers were purchased from Westinghouse and placed in service by defendant Public Service Company of Oklahoma (PSO). Following each transformer explosion, PSO hired I.T. Corp. to clean up the area. Plaintiffs sued for injuries resulting from the "PCB's". On March 7, 1985, Westinghouse filed a motion for summary judgment based on Oklahoma's statute of repose. On May 13, 1985, Monsanto filed its motion for summary judgment based on the same grounds (the statute of repose). The trial court granted both summary judgments. Plaintiffs appealed. Appellants' Brief at 1-5, Smith v. Westinghouse Elec. Corp., No. 64,801 (Okla. Sup. Ct., filed July 15, 1985). A main issue on appeal is whether the statute of repose applies to appellees because they are manufacturers or materialmen.

128. *Moose*, 563 P.2d at 147.

129. *Id.*

130. In *Westinghouse*, Appellee Westinghouse argued that the broad interpretation of the statute in *Moose*, to include manufacturers and materialmen should be applied to the instant case. If it is, then Westinghouse is immune under the statute. Answer Brief of Appellee Westinghouse at 9, Smith v. Westinghouse Elec. Corp., No. 64,801 (Okla. Sup. Ct., filed July 15, 1985).

131. Statutes of limitations, like other statutes, must, if possible, be construed so as to have effect and so as to avoid conflict with constitutional provisions. *See* Williams v. Bailey, 268 P.2d 868, 871 (Okla. 1954).

132. *See, e.g.*, Henderson Clay Products, Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982); Loyal Order of Moose v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

133. *See, e.g.*, Williams v. Bailey, 268 P.2d 868 (Okla. 1954).

134. In *Westinghouse*, the appellants argue that manufacturers and materialmen should not be

cause the court has declared an almost identical statute unconstitutional previously, it is apparent that the court may dislike the statute of repose. If the court does dislike the statute, it could strictly interpret the statute to significantly limit the number of cases in which the statute could be used.[135] Furthermore, it could conceivably exclude manufacturers and materialmen from the statute and then declare it unconstitutional for violating the equal protection clause.[136] The basis for holding that the exclusion violates equal protection would be identical to the rationale employed in *Moose*. That is, there is no rational basis for the classification.[137]

2. What is an Improvement to Real Property?

Another possible area of controversy is the exact meaning of "improvement to real property."[138] While it is certain that buildings and additions to or remodeling of existing buildings are within the statute, a more difficult question arises as to whether manufactured products that become fixtures are within the statute.[139] In determining whether something constitutes an improvement to real property, courts have looked at various factors.[140] These factors include whether the improvement was meant to be permanent or temporary; whether it enhanced the value of the property; and whether it enhanced the use of the property.[141]

With regard to manufacturers, a sound approach would be to pro-

covered by the statute. According to the appellants, the rationale for not applying the statute to manufacturers and materialmen "can be found in the functional quality control and standardization differences existing between those engaged in manufacturing. . . . Manufacturers and materialmen, by the nature of mass producton of products and standardization of goods, have the opportunity to closely monitor and control the quality of their product in a controlled environment, e.g., a factory. Builders, on the other hand, by the nature of their product, have very limited means of controlling the quality of their product." Appellants' Brief at 18, Smith v. Westinghouse Elec. Corp., No. 64,801 (Okla. Sup. Ct., filed July 15, 1985).

135. There are many manufacturers and materialmen involved in the construction of or improvements to real property. Excluding them should have the effect of significantly decreasing the situations where the statute could be used.

136. *See, e.g.*, Henderson Clay Products, Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978).

137. *Moose*, 563 P.2d at 147.

138. In *Westinghouse*, at issue is whether transformers and poisonous chemicals employed in the generation of electricity are "improvements to real property." *See* Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (playgrounds and roads included); Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 545 P.2d 1207 (1976) (ski lift included).

139. Rogers, *supra* note 6, at 13.

140. *Id.*

141. *See, e.g.*, Allentown Plaza Assoc. v. Suburban Propane Gas Corp., 43 Md. App. 337, __, 405 A.2d 326, 331-33 (1979); Washington Natural Gas Co. v. Tyee Constr. Co., 26 Wash. App. 235, 238-39, 611 P.2d 1378, 1381 (1980); Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 545 P.2d 1207, 1208 (1976).

tect materials that are necessary in order for the improvement to function as it was intended.[142] However, a manufacturer should only be protected for his faulty design, supervision, planning, or construction of the product and not for the faulty manufacture of the product or faulty warnings.[143]

E. *Is the Statute of Repose Good Law?*

Assuming that the Oklahoma statute is held to be constitutional, one must still question whether the statute is good law. The rationale behind the statute seems to be weak when scrutinized closely. The main argument for this type of statute is that with passage of time, the difficulty of producing evidence would increase for the defendants.[144] However, the alleged difficulties of proof would seem to fall just as heavily on the injured plaintiffs.[145] The plaintiffs are the ones who have the burden of production and the burden of persuasion in an action for negligence.[146] Because they have to make a prima facie showing of negligence before a defendant has to produce evidence, it would most likely create more difficulty for the plaintiff than the defendant.[147] Furthermore, concerns about stale evidence are unfounded because plans and specifications of architects and engineers become public record.[148]

In any event, these alleged problems are not unique to the construction industry and they are not sufficiently compelling to justify the enactment of legislation which totally abolishes an injured person's cause of action.[149] The statute benefits only one class of defendants, at the expense of an injured party's right to sue.[150]

Likewise, the argument that injuries from the negligence of this protected class would not normally occur after ten years from completion is

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142. Rogers, *supra* note 6, at 13.

143. Howell v. Burk, 90 N.M. 688, __, 568 P.2d 214, 222-23 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977). *See* Rogers, *supra* note 6, at 13.

144. Overland Constr. Co., Inc. v. Sirmons, 369 So. 2d 572, 574 (Fla. 1979). Comment, *supra* note 11, at 383.

145. *See Overland*, 369 So. 2d at 574 (difficulties of proof fall just as heavy on plaintiffs who carry the initial burden of showing negligence); *see also Tabler*, 704 S.W.2d at 185.

146. Cunningham v. Pratt, 392 P.2d 725, 728 (Okla. 1964).

147. *Saylor*, 497 S.W.2d at 225. The passage of time operates to the disadvantage of the injured plaintiff. Proof is harder to come by; the issue of proximate cause makes the plaintiff's prospect of recovery more difficult. *Id.*

148. J. ACRET, *supra* note 33, at 268.

149. *Overland*, 369 So. 2d at 574. (The problems are not sufficiently compelling to justify the enactment of legislation which totally abolishes an injured person's cause of action.).

150. *Id.*

unfounded.[151] It is not unusual for a defect in a building to suddenly appear after a decade or more.[152] Hence, it is important to consider the consequences of a major catastrophe that could occur due to the negligence of someone who had worked on a building. This negligence could cause many people to lose their lives, yet if the accident occurred ten years and one day from "substantial completion", there would be no recovery for the victims.[153]

### F. *Suggested Change*

It is clear that the amended statute of repose for architects and engineers in Oklahoma presents some serious questions as to its constitutionality when applied to wrongful death actions, and maybe when applied to other actions. The legislature will certainly have to amend the statute to remedy these problems.

Constitutionality aside, the unfairness of the statute is sufficient justification for repealing the statute. The statute, allowing the cause of action to accrue on substantial completion, produces an unwanted result of barring a plaintiff's cause of action before it actually vests.[154] To reach a solution the legislature should balance the architect's and engineer's interest against the plaintiff whose claim may be barred before injury occurs.[155] This balancing approach leads one to the conclusion that the solution should be to implement the discovery rule.[156] A plaintiff's cause of action should not accrue until the plaintiff discovers or should have

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151. J. ACRET, *supra* note 33, at 258.

152. *Id.* "Likewise, survey mistakes may not be revealed until the neighbor starts to build, years after the survey." *Id.*

153. *See Overland*, 369 So. 2d at 575. (No judicial forum would ever have been available to the plaintiff if the statute were given effect.).

> The general public is exposed to injury, death and property damage from the collapse of a building. As in the recent catastrophe involving the collapse of the overhead walkway in the Hyatt Regency Hotel in Kansas City, many people from all walks of life may be injured in one catastrophe caused by faulty construction.

*Tabler*, 704 S.W.2d at 187.

154. J. ACRET, *supra* note 33, at 252.

155. "The modern solution is to balance the difficulty of the defendant's proof as time passes against the hardship to a plaintiff whose cause of action may be barred before being discovered." J. ACRET, *supra* note 33, at 252.

156. City of Aurora v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979). All professionals owe a special duty to peform their services with skill. The layman may not be able to recognize even patent design defects. The discovery rule does not frustrate the policies underlying statute of limitations. *Id.* at 389. "While the discovery standard increases the burden upon the professional because of the indefinite extension of liability into the future, the advocates of the discovery rule view the alternative injustice . . . to be a far greater burden." Comment, *Statute of Limitations: Discovery Rule for Malpractice*, 17 AKRON L. REV. 655, 661 (1984).

discovered the negligent act.[157]

The rationale for using the discovery rule for architect and engineer liability for personal injuries is two-fold.[158] First, architect's and engineer's liability should be compared to that of other professionals.[159] As noted above, the architect's and engineer's liability is based on the same standard of care that attorneys and doctors are required to use.[160] However, other professionals are not immune from their negligent acts because of statutes of repose.[161] Their liability for negligent acts are only limited by true statutes of limitation, under which the cause of action accrues on the date the plaintiff knew or should have known, through the exercise of reasonable diligence, that a cause of action existed.[162] Because these professionals are not protected by statutes of repose, the discovery rule for architects and engineers would be appropriate.[163]

Secondly, the architect's or engineer's liability most closely parallels the liability of manufacturers to the ultimate consumers of their products.[164] Manufacturers' liability extends to members of the general public who may foreseeably use their products.[165] Because injury may occur sometime after the negligent act, the manufacturer is potentially liable for an extended period of time, as is the architect or engineer.[166] However, in products liability cases, manufacturers are not insulated by statutes of repose.[167] As in a negligence case, the plaintiff's action accrues at the time of the injury.[168] Because the architect's or engineer's liability is closely related to that of manufacturers of products, the architect or engineer should be liable from the date of the injury also.

157. Under the discovery rule, the trier of fact inquires into when the plaintiff actually discovered or in the exercise of reasonable care and diligence should have discovered the injury. Comment, *supra* note 156, at 662.

158. Comment, *supra* note 11, at 379-84. (Comparing architects and engineers to lawyers, doctors, and manufacturers of products.).

159. *See* Coombs v. Beede, 89 Me. 187, 36 A. 104 (1896); J. ACRET, *supra* note 33, 1-37 (discussing the architect's and engineer's liability for negligence and comparing it to other professionals.).

160. *See Coombs*, 89 Me. 187, 36 A. 104.

161. Comment, *supra* note 11, at 381-82.

162. *Id.*

163. *See* City of Aurora v. Bechtel Corp., 599 F.2d 382 (10th Cir. 1979).

164. *See Inman*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699; Comment, *supra* note 11, at 380.

165. Comment, *supra* note 11, at 380.

166. *Id.*

167. *Id.*

168. In Oklahoma the period of limitations to be applied to manufacturers' products liability cases is two years from date of injury. O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614, 614 (Okla. 1974).

## IV. CONCLUSION

The present Oklahoma statute of repose for architects and engineers is clearly unconstitutional. Furthermore, using the statute of limitations to bar an action before it accrues is anomalous. At the very least, the Oklahoma Supreme Court should strictly construe the statute. At most, the court should declare it unconstitutional. The Legislature should, in turn, repeal the statute and implement a true statute of limitation. That statute of limitation should employ the discovery rule to avoid injustice to injured plaintiffs.

*Timothy L. Olsen*