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California Code of Civil Procedure Sections 337.1 and 337.15: Defective Construction Defect Statutes

Michael F. Boyle* and
Leslie M. Hastings**

I. INTRODUCTION

When a California practitioner considers a construction defect lawsuit “priority one” is determining whether the lawsuit was filed within the applicable the statute of limitations. In all construction cases there may be several possible limitation periods. If a plaintiff pleads negligence, nuisance, or strict liability, the lawsuit must be filed within three years of discovery.¹ Breach of implied or express warranty claims must be filed within either two or four years respectively.² When suing on these theories, the lawsuit obviously must be brought within the time period set by the applicable statute of limitations. However, in California, two other less obvious limitation periods also apply.

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1. CAL. CIV. PROC. CODE § 338(b) (West 1982); *Liptak v. Diane Apartments, Inc.*, 109 Cal. App. 3d 762, 167 Cal. Rptr. 440 (1980).

2. See CAL. CIV. PROC. CODE § 337(1) (West 1987) (governing actions on express warranties or breach of implied warranty for work or materials furnished under a written contract); *Regents of Univ. of Cal. v. Hartford Accident & Indem. Co.*, 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978). See also CAL. CIV. PROC. CODE § 339 (governing actions on implied warranties); *Aced v. Hobbs-Sesack*, 55 Cal. 2d 573, 360 P.2d 847, 12 Cal. Rptr. 257 (1961).

Where the lawsuit alleges construction defects, the time limitation on filing a lawsuit is also governed by two special construction statutes. California Code of Civil Procedure³ section 337.1 sets a four-year limit on the right to commence an action based on patent, or readily discoverable defects.⁴ Section 337.15, on the other hand, imposes a ten-year limitation on the right to commence an action based on latent, or hidden defects.⁵ These statutes set two absolute

3. Unless otherwise noted all further references to code sections shall be to the California Code of Civil Procedure and shall be designated merely as "section."

4. CAL. CIV. PROC. CODE § 337.1 (West 1982) states in its entirety:

Four years; actions for damages from persons performing or furnishing design, specifications, surveying, planning, supervision or observation of construction or construction of improvement to realty

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency;

or
(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs 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 substantial completion or construction of such improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section 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.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

(Added by Stats. 1967, 1326, sec. 1, at 3157).

5. CAL. CIV. PROC. CODE § 337.15 (West 1982) states in its entirety:

Ten years; developer, contractor, architect, etc., of real property; latent deficiency in design, supervision, etc.; injury to property.

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

time limits on the right to initiate construction defect lawsuits against developers, contractors or design professionals,⁶ regardless of whether or not a cause of action has accrued.⁷

In ordinary statutes of limitations, "accrual" of a cause of action is the trigger that sets the statutory clock ticking.⁸ However, in California's special construction defect statutes, the statutory clock begins to tick regardless of whether a plaintiff has discovered a cause of action exists. Sections 337.1 and 337.15 may run to completion even if no actionable damage has been discovered in the meanwhile.

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

(e) The limitation prescribed by this section 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 the improvement constitutes the proximate cause for which it is proposed to bring an action.

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

(1) The date of final inspection by the applicable public agency.

(2) The date of recordation of a valid notice of completion.

(3) The date of use or occupation of the improvement.

(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

(Added by Stats. 1971, 1569, sec. 1, at 3149. Amended by Stats. 1979, c. 373, p. 1265, § 49; Stats. 1979, c. 571, p. 1797, § 1; Stats. 1980, c. 676, § 63; Stats. 1981, c. 88, § 1.)

6. These terms include architects, engineers, surveyors, planners, construction supervisors, construction observers and construction testers. See CAL. CIV. PROC. CODE § 337.1(a) (West 1982); CAL. CIV. PROC. CODE § 337.15 (a) (West 1982).

7. These two statutes set absolute time limits of four and ten years on the plaintiff's ability to recover whether or not he has suffered any damage. See *infra* note 8 for the definition of accrual.

8. Accrual means vested. A cause of action accrues when a suit may be maintained thereon. A cause of action "accrues" on the date that the damage is sustained and not the date when causes are set in motion which ultimately produce injury. The point in time when a statute accrues is important for the purposes of the running of statutes of limitations. BLACKS LAW DICTIONARY 19 (5th ed. 1979); see also *infra* note 22.

These statutes automatically begin to run when an improvement is "substantially completed"⁹ and continue to run until four years and ten years, respectively, have passed. Once these statutes have run, they forever bar a plaintiff's right to sue the contractor, developer, or design professional.

Since California's two statutes constitute absolute bars to legal action, they are actually "statutes of repose," rather than ordinary statutes of limitations.¹⁰ California's construction statutes and similar statutes from other jurisdictions have been the subjects of much legislative scrutiny and appellate interpretation.¹¹ Decisions interpret-

9. CAL. CIV. PROC. CODE § 337.15 (West 1982) (defining "substantial completion" as being no later than the following, whichever first occurs: (1) The date of final inspection by the applicable public agency; (2) the date of recordation of a valid notice of completion; (3) the date of use or occupation of the improvement; or (4) one year after termination or cessation of work on the improvement). There is no specific definition of "substantial completion" in section 337.1 of the California Code of Civil Procedure. *Id.* § 337.1 (West 1982).

10. "A product liability statute of ultimate repose that starts out, 'In no event' shall any action be commenced more than [the specified number of years], cannot be extended because of unfairness to the plaintiff. It indicates plainly that the limitation is to be effective regardless of circumstances." S. SPEISER, C. KRAUSE, & A. GANS, *THE AMERICAN LAW OF TORTS*, 971 (1983) [hereinafter *THE AMERICAN LAW OF TORTS*]. The drafting of these statutes of repose in product liability is nearly identical to that of California's construction defect statutes. The California statutes state that 'No action may be brought to recover damages . . . more than four (or ten) years after the substantial completion.' CAL. CIV. PROC. CODE §§ 337.1, 337.15 (West 1982). In fact, statutes providing a cut-off date of ultimate repose for persons designing, making, etc., improvements to real property are not regular statutes of limitations. They do not "bar" a remedy in the sense of providing an injured person a certain time to instigate suit after the 'accrual' of a 'cause of action.' The statute prevents what might otherwise be a cause of action from ever arising The statute is a grant of immunity." *THE AMERICAN LAW OF TORTS*, at 998; J. ACRET, *CONSTRUCTION LITIGATION HANDBOOK* 407, 408 (McGraw-Hill 1986). Many states enacted statutes of repose in the late 1960's to protect architects, engineers, builders, contractors, subcontractors, and designers of improvements to real property. Rather than limiting the time in which a plaintiff may enforce a cause of action, statutes of repose, after a lapse of years, prevent the cause of action from ever arising. Statutes of limitations only extinguish the right to pursue an accrued cause of action after a prescribed time.

11. See *Salinero v. Pon*, 124 Cal. App. 3d 120, 128, 177 Cal. Rptr. 204, 208 (1981) (California courts have found legitimate purpose in construction defect statutes); *Wagner v. State of California*, 86 Cal. App. 3d 922, 929, 150 Cal. Rptr. 489, 493 (1978) (section 337.1 challenged on equal protection grounds and found to be constitutional because the statute touched neither a suspect class nor a fundamental right and was thus, not subject to strict scrutiny. The statute bore a rational relationship to the legitimate state purpose of promoting construction.); *Eden v. Van Tine*, 83 Cal. App. 3d 879, 885-86, 148 Cal. Rptr. 215, 219 (1978) (section 337.15 challenged as constitutionally void for vagueness—court held that language was clear—statutes must be upheld unless their unconstitutionality clearly appears). Statutes of repose from other jurisdictions have been similarly scrutinized. The majority have withstood the constitutionality test. Some have failed. See ACRET, *CONSTRUCTION LITIGATION HANDBOOK* 408-9 (1986); Volk, *Statutes of Repose for Improvements to Real Property: Equal Protection Considerations*, 22 AM. BUS. L.J. 343 (1984); Knapp & Lee, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 ST. LOUIS U.L.J. 351 (1979); Comment, *Oklahoma's Statute of Repose Limiting the Liability of Architects and Engineers for Negligence*:

ing sections 337.1 and 337.15 reflect obvious confusion over their character. California courts have labeled them as ordinary statutes of limitations, but applied them as both statutes of limitations and statutes of repose.¹² Lack of a true understanding of the nature and purpose of these statutes has ultimately resulted in their misapplication.¹³

To further complicate matters, California's construction statutes differ from construction statutes in most other jurisdictions.¹⁴ California is one of a minority of states having separate statutes of repose for "latent" versus "patent" construction defects.¹⁵ Sections 337.1 and 337.15 were not drafted to coordinate with each other. While related, these two statutes are not mirror image companions working in harmony and accord.¹⁶ Rather, they are separate statutes, enacted at different times. This temporal theoretical separation further complicates an unsettled and complex area of the law.

California's "defective" construction defect statutes demand clarification and proper application. In part II, this article addresses the difference between statutes of limitations and statutes of repose.¹⁷ Part III focuses on the legislative history of sections 337.1 and 337.15 as well as appellate interpretations of these sections.¹⁸ Part IV compares California's construction defect statutes with those in other jurisdictions.¹⁹ Part V analyzes drafting differences between Califor-

A Potential Nightmare, 22 TULSA L.J. 85 (1986); Comment, *Statutes of Limitations and Repose, the Decline and Rise of Statutes of Repose—Witherspoon v. Sides Construction Co.*, 19 CREIGHTON L. REV. 509 (1986) [hereinafter *Statutes of Limitations and Repose*]; Comment, *Due Process Challenges to Statutes of Repose*, 40 SW. L.J. 997 (1986); Comment, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985); Comment, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for A Statute of Limitations for Architects*, 9 VT. L. REV. 101 (1984); Note, *Daugaard v. Baltic Cooperative Building Supply Association: Statutes of Limitation Held Unconstitutional*, 30 S.D.L. REV. 157 (1984); Note, *Limitation of Actions: The Effect of Lamb v. Wedgewood South Corp. on Future Cases Determining the Constitutionality of G.S. 1-50(6)*, 19 WAKE FOREST L. REV. 1049 (1983); Note, *Actions Arising Out of Improvements to Real Property: Special Statutes of Limitations*, 57 N.D.L. REV. 43 (1980); *Limitations of Action - Architects and Builders*, 370 FIC QUARTERLY 42 (Fall 1978) [hereinafter *Builders*]; Comment, *Limitation of Action Statutes for Architects and Builders - Blueprints for Non-Action*, 18 CATH. U. L. REV. 361 (1969); Comment, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) [hereinafter *Developments*].

12. See *infra* notes 70-140 and accompanying text.

13. See *infra* notes 39-69 and accompanying text.

14. See *infra* notes 141-159 and accompanying text.

15. See *infra* notes 144-155 and accompanying text.

16. The five drafting differences between sections 337.1 and 33.15 are addressed in detail *supra* at notes 160-166 and accompanying text.

17. See *infra* notes 22-38 and accompanying text.

18. See *infra* notes 39-140 and accompanying text.

19. See *infra* notes 141-159 and accompanying text.

nia's two statutes and examines the effects of these differences.²⁰ Finally, part VI proposes a revised model incorporating both statutes.²¹

II. STATUTES OF LIMITATIONS VERSUS STATUTES OF REPOSE

Traditionally, the terms statute of limitations and statute of repose, were considered to embody the same idea.²² However, as the doctrine of privity disintegrated and statutes of limitations evolved, a distinguishing line between statutes of limitations and statutes of repose emerged.²³ Sections 337.1 and 337.15 are codified in Title Two of

20. See *infra* notes 160-166 and accompanying text.

21. See *infra* notes 167-168 and accompanying text.

22. "A statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained in such causes of action unless brought within a specified period after the right accrued. Statutes of limitations are statutes of repose." BLACK'S LAW DICTIONARY 835 (5th ed. 1979). Historically, in America, "statutes of limitations were considered to operate as statutes of repose, and were labeled as such by judges." See Comment, *Statutes of Limitations and Repose*, *supra* note 11, at 512. Early American statutes of limitations adopted the accrual concept from the English Limitations Act. *Id.* However, courts began to extend the statutory period, waiting until the plaintiff had actually suffered some harm. *Id.* The most favored method of accrual became the "discovery rule" method, in which the cause of action does not accrue until the plaintiff is injured. *Id.* at 516. As history progressed the accrual doctrine in tort moved slowly from using the act on which the asserted negligence was premised to using the date of actual injury to start the statute running. *Id.* See also *id.* at 522 (brief summary of the evolution of statutes of repose). From these historical developments, current construction statutes of repose dating from completion of an improvement became a full-circle response to what eventually became ever-widening liability under the expansion of the accrual doctrine. *Id.* Statutes of repose provide substantive repose for the defendant. *Id.*

23. See Volk, *Statutes of Repose for Improvements to Real Property: Equal Protection Considerations*, 22 AM. BUS. L.J. 343, 352 (1984) [hereinafter *Repose for Improvements*] ("Statutes of limitation fix a time within which an injured person must institute an action seeking redress, as measured from the moment the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action."); Comment, *Due Process Challenges to Statutes of Repose*, 40 SW. L.J. 997, 1002 (1986) ("Strictly speaking, 'statute of repose' is a generic term of which a statute of limitation is but a variety As commonly used, however, statute of repose denotes a distinct type of statute imposing a time bar different in purpose and implementation from a statute of limitation."); Comment, *Oklahoma's Statute of Repose Limiting the Liability of Architects and Engineers for Negligence: A Potential Nightmare*, 22 TULSA L.J. 85, 90-91 (1986) ("True statutes of limitation are procedural mechanisms In contrast, [construction statutes of repose] bar the right of action before any injury occurs."); Comment, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629 (1985) ("[I]mportant differences exist between statutes of limitations and statutes of repose. Statutes of limitations limit the time in which a plaintiff may bring suit *after* the cause of action accrues, whereas statutes of repose potentially bar the plaintiff's suit *before* the cause of action arises." (emphasis in original); Comment, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for a Statute of Limitations for Architects*, 9 VT. L. REV. 101, 114 (1984) ("A special statute of limitations which accrues upon completion of construction is a 'statute of repose,' since it can potentially bar suits before the cause of action arises.").

the California Code of Civil Procedure along with other statutes of limitations.²⁴ However, both statutes are actually statutes of repose.²⁵

A. *The Difference Between Statutes of Limitations and Statutes of Repose*

A statute of limitations is considered a procedural device because it extinguishes the plaintiff's remedy but not his or her underlying right to sue.²⁶ Two theories are employed to determine when a regular statute of limitations begins to run. Under the older "event rule," a statute of limitations begins to run when the event that ultimately causes the damage occurs even if the plaintiff is ignorant of his cause of action.²⁷ Under the newer "discovery rule," a statute of limitations begins to run when the damage upon which the claim is based occurs and the plaintiff discovered or should have discovered their cause of action.²⁸

In contrast, a statute of repose is considered substantive because it actually limits the right to pursue a cause of action.²⁹ Statutes of repose may circumscribe the plaintiff's fundamental right to sue by

24. CAL. CIV. PROC. CODE §§ 312-565 (West 1982) ("Time of Commencing Civil Actions").

25. See ACRET, *supra* note 11 at 407-408. "These statutes, although they are formulated in the language of statutes of limitations, are truly quite different. Rather than *limiting* the time within which a plaintiff may sue to *enforce* a cause of action, statutes of repose, after a lapse of years, *prevent* the cause of action from ever arising. . . . [T]hey dissolve all grounds of liability . . . solely by lapse of time." *Id.* at 408 (emphasis in original).

26. Regents of the Univ. of Calif. v. Hartford Accident & Indem. Co., 21 Cal. 3d 624, 644-49, 581 P.2d 197, 208-210, 147 Cal. Rptr. 486, 497-503 (1978) (Clark, J., dissenting). Compare Comment, *Limitations of Actions: The Effect of Lamb v. Wedgewood South Corp. on Future Cases Determining the Constitutionality of G.S. 1-50(6)*, 19 WAKE FOREST L. REV. 1049, 1050 (1983) [hereinafter *Limitations of Actions*] (statute of limitation procedural); Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 CATH U.L. REV. 361, 372 (1969) (statute of limitations procedural) with Comment, *Statute of Limitations and Repose*, *supra* note 11, at 521 ("statutes of repose are considered substantive because they either destroy a right to sue before it exists, or cut off such a right to sue.").

27. KEETON, PROSSER AND KEETON ON TORTS 165-67 (5th ed. 1984); *Lattin v. Gillette*, 95 C. 317, 319, 30 P. 546 (1892).

28. *Id.* at 166-7; *Statutes of Limitations and Repose*, *supra* note 11, at 515; *Allred v. Bekins Wide World Van Services*, 45 Cal. App. 3d 984, 990, 120 Cal. Rptr. 312, 315 (1975).

29. *Aetna Casualty & Surety Co. v. Industrial Accident Comm.*, 30 Cal. 2d 388, 394-95, 182 P.2d 159, 162 (1947) (statute is substantive in effect when it "imposes a new or additional liability and substantially affects existing rights and obligations"). See also *Statutes of Limitations and Repose*, *supra* note 11, at 521, 534; *Repose for Improvements*, *supra* note 23, at 352; *Limitations of Actions*, *supra* note 26, at 1050 - 1052, 1063; Note, *Actions Arising Out of Improvements to Real Property: Special Statutes of Limitations*, 57 N.D.L. REV. 43 (1980) (statutes of Limitations similar to California's sections 337.1 and 337.15 are labeled as "special" statutes of limitations throughout); *Builders*, *supra* note 11, at 51.

running to completion during a time period before the occurrence of the plaintiff's injuries.³⁰ Thus, statutes of repose may function to prevent judicially recognizable claims, while regular statutes of limitation preserve claims for a stated period of time.³¹

Construction defect statutes of repose begin to run from the date of substantial completion of an improvement (the event). However, once knowledge of a defect or the damage caused by a defect occurs (the discovery), a regular statute of limitations begins to limit the time in which to file a construction lawsuit. The shorter of the two remaining time periods will determine the amount of time in which a lawsuit may be filed.³² For a plaintiff, the problem occurs when "substantial completion" starts running the period of repose without the plaintiff having been damaged then, subsequent to the statutes' expiration, the plaintiff is damaged, yet has no legal recourse.³³

B. *The Necessity of Statutes of Repose*

Although seemingly harsh, there is a widespread need for statutes of repose in the construction industry. The need arises from a combination of events unique to that industry. First, products liability (and its subsequent application to construction improvements) has undergone progressive expansion since the landmark case of *MacPherson v. Buick*³⁴ abolished the need for privity and extended liability horizontally through the chain of production. Second, statutes of limitations increasingly have been measured from the date of the plaintiff's injury rather than the event causing the injury.³⁵ In the construction industry, the lengthy useful life of the "product" (an improvement to real property), has exposed architects, engineers, builders and others in the construction industry to liability indefinitely after the completion of an improvement.³⁶

30. *Developments, supra* note 11, at 1186-90; *see supra* notes 23, 25 & 26.

31. Compare Comment, *Daugaard v. Baltic Cooperative Building Supply Association: Statutes of Limitation Held Unconstitutional*, 30 S.D.L. REV. 157, 162 (1984), with CAL. CIV. PROC. CODE § 338 (West 1982) (in an ordinary statute of limitations a plaintiff has three years to file after discovering a cause of action).

32. *Regents of the Univ. of Calif. v. Hartford Accident & Indem. Co.*, 21 Cal. 3d 624, 640-641, 581 P.2d 197, 206-207, 147 Cal. Rptr. 486, 495 (1978).

33. Under sections 337.1 and 337.15 a plaintiff's cause of action has a limited life span within the boundaries of the period of repose. *See Regents of the Univ. of Calif. v. Hartford Accident & Indem. Co.*, 21 Cal. 3d 624, 640-42, 541 P.2d 197, 206-7, 147 Cal. Rptr. 486, 495-6 (1978) (suit must be filed within the shorter of the two time periods).

34. 217 N.Y. 382, 111 N.E. 1050 (1916).

35. *Repose for Improvements, supra* note 23, at 350-51. *See supra*, note 28 and accompanying text.

36. *See infra* notes 42-49 and accompanying text.

In response to these events, the American Institute of Architects (A.I.A.), the National Society of Professional Engineers, the Associated General Contractors of America, and other construction organizations have lobbied continuously since the 1960's for statutes limiting the duration of liability for improvements to real property.³⁷ In California, the movement resulted in the enactment of two construction statutes of repose, sections 337.1 and 337.15. Although section 337.1 and section 337.15 were enacted in the late 1960's and early 1970's respectively as statutes of repose, California courts have not recognized them as substantive statutes of repose.³⁸

III. ENACTMENT, INTERPRETATION, AND APPLICATION OF CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 337.1 AND 337.15

In 1967 the California legislature enacted section 337.1 and thereby limited the time for bringing actions based on patent defects against architects and contractors to four years from the date of substantial completion.³⁹ In 1971, the legislature enacted a similar statute, section 337.15, which provided a ten-year limitation period for actions brought on latent defects.⁴⁰ The legislative histories of these statutes show the intent behind their passage and highlight the decisional confusion that has followed.

A. Legislative History

1. California Code of Civil Procedure Section 337.1: The Four-Year Statute of Repose for Patent Defects

In 1963, Assembly Bill Number 648 (A.B. 648) was introduced during the regular session of the California legislature. This bill proposed a six-year construction statute of limitations, which was

37. AMERICAN LAW OF TORTS, *supra* note 10, at 990. The California Council of the American Institute of Architects continues to monitor and support California construction statutes and attempts to further modernize the statutes. Telephone interview with David A. Crawford, Legislative Aide, California Council of the American Institute of Architects, October 18, 1989.

38. See *infra* notes 70-146 and accompanying text.

39. CAL. CIV. PROC. CODE § 337.1 (West 1982). See *supra* note 4; see *infra* notes 41-56 and accompanying text.

40. CAL. CIV. PROC. CODE § 337.15 (West 1982). See *supra* note 5; see *infra* notes 57-69 and accompanying text.

worded as a statute of repose.⁴¹ One year later, an interim committee meeting was held to discuss the pros and cons of the bill and to create a record to be used at a full meeting of the executive committee. An attorney representing the California Council of the A.I.A. made a presentation on behalf of that organization.⁴² He opened the meeting stating that statutes of limitations pervade our "social, political and legal life" to provide a period of peace after the expiration of the period of limitations.⁴³ He testified that nothing remained of the privity doctrine, and no particular statute existed to limit the liability of an architect to the owner or third parties. He proposed that the person furnishing the design of an improvement should be allowed to be at peace after a reasonable period, while the owner or land occupier would still be responsible to potential plaintiffs under the regular duty rules relating to owners and occupiers of real property.⁴⁴

The California Council of the A.I.A. submitted the A.I.A. suggested form of the statute to the committee. The A.I.A. believed their statute was superior in form to A.B. 648, being more definitive, having tighter language, and having been drafted after consultation with many lawyers who were familiar with the design and construction fields.⁴⁵

41. A.B. No. 648, 1963 Calif. Leg. Reg. (General) Sess. The bill read: "No action to recover damages for any injury . . . shall be brought . . . more than six years . . ."

42. *Assembly Interim Committee on Judiciary, Transcript of Proceedings on Statute of Limitations*, October 20, 1964.

43. *Id.* at 2.

44. *Id.* at 5.

45. *Id.* The complete text of the model statute was as follows: Model Statute of Limitations for Architects, Engineers and Contractors.

Section 1. No action in contract or tort to recover damages for deficiencies in design, planning, supervision of construction or construction or for injury to property, real or personal, or for injury to the person or for wrongful death, arising out of the defective or unsafe condition of an improvement to real property, shall be brought against any person or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement more than six years after the last performance or furnishing of services or construction by such person or corporation, and in no event more than six years after the substantial completion of construction of such improvement; provided however, that, notwithstanding the above, an action in tort to recover damages for any such injury to property or the person or for any such wrongful death may be brought within one year after the date on which such injury occurred or, in the case of wrongful death, within one year after the date on which the injury causing such wrongful death occurred.

Section 2. 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 3. The limitation prescribed by this act shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition of such improvement

The committee's questions revolved around the unfairness of barring recovery for latent defects that might appear after the proposed six-year statute ran. The President of the California Council of Architects stated that although the appearance of latent defects after six years was possible, the council still hoped that a cut-off period would be established.⁴⁶ The council maintained that the desperate need for housing and the policy against allowing stale claims outweighed any unfairness to possible plaintiffs.⁴⁷ This early discussion of latent defects appears to have been the initial catalyst for excluding latent defects from the statutory bar and necessitated the enactment of a separate latent defect statute (section 337.15) several years later.

The committee discussion noted the fundamental difference between the proposed statute and traditional statutes of limitations. One assemblymember argued that a statute such as the one proposed would actually remove the construction industry from the "normal theory of why we have statutes of limitations in the first place; you shouldn't sleep on your rights."⁴⁸

However, the A.I.A. attorney contended that fairness and justice required the proposed statute because of the many forces that could intervene in the time period between completion and repose.⁴⁹ Despite these discussions which pinpointed the repose imposed by the statute, the committee never officially recognized nor openly stated that the proposed statute was actually a statute of repose rather than an ordinary statute of limitations.

The committee recommended against passing the bill because it felt that: 1) it would bar justifiable claims, 2) the proponents had adequate legal protection, and 3) the burden imposed by the statute

constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

Assembly Interim Committee on Judiciary, Transcript of Proceedings on Statute of Limitations, Oct. 20, 1964 at 6. The A.I.A. statute differed from the proposed bill in several ways. The model statute limited the application of the statute to those not in actual possession or control as the owner, tenant or otherwise, and started the statute running upon "substantial completion," but did not define this term. Neither did the standard A.I.A. statute define "substantial completion." Since "substantial completion" had not yet been defined in California law, the A.I.A. representative substituted in language which tied substantial completion into mechanics lien law which had defined substantial completion. *Id.*

46. *Id.* at 10.

47. *Id.* at 20-21.

48. *Id.* at 19 (the assemblymember seemed to be cognizant of the repose nature of the statute, having noticed that by barring a cause of action before it arose, the statute barred the right to sue before it arose. Thus, a plaintiff would have no right to sue after a certain time period and could not "sleep" on such right).

49. *Id.* at 20.

was too great.⁵⁰ One member felt that the bar imposed by the proposed statute was so extreme in its effect that it should be characterized as the extinction of a cause of action before it arose, rather than a statute of limitations.⁵¹

Although A.B. 648 was defeated, Assemblymember Powers introduced a similar bill only fourteen days later.⁵² However, this bill also died in committee.

Two years later, Senator Combs introduced Senate Bill 309 (S.B. 309) (a bill similar to A.B. 648). S.B. 309 proposed a bar of any action brought on a construction deficiency, including actions for injury or wrongful death subsequently arising out of such a deficiency.⁵³ This bill was amended three times; first, to include those who furnish specifications and surveying;⁵⁴ second, to limit the section's coverage to only patent defects;⁵⁵ and finally, to disallow coverage of owner-occupied single-unit residences.⁵⁶

Two months later the bill passed the senate unanimously and then the assembly by a forty-four to thirteen majority. It was submitted to Governor Reagan for approval on August 17, 1967. The bill, as finally passed, sidestepped the major stumbling block of prior attempts by limiting actions brought only on patent defects. These actions were totally barred four years after completion of the improvement. The issue of a period of repose for latent defects was left for future legislation.

2. California Code of Civil Procedure Section 337.15: The Ten-Year Statute of Repose for Latent Defects

The next significant legal development in the construction industry occurred in 1969 when the doctrine of strict liability was extended to the home development industry. In *Kriegler v. Eichler Homes*,

50. *The Final Reports of the Assembly Interim Committee on Judiciary*, 19 (January 11, 1965) reprinted in ASSEMBLY INTERIM COMMITTEE REPORT, Vol. 23, No. 5 (1963-1965).

51. *Id.* at 19. Obviously, this assemblymember recognized the difference between the proposed statute and an ordinary statute of limitations yet failed to label the distinction. *Id.*

52. A.B. No. 480, California Legislature Regular Session (1965). This bill was requested by the Associated General Contractors represented by Mr. Kim Ross. *Assembly Committee on Judiciary Bill Analysis Work Sheet* (undated) (on file at the *Pacific Law Journal*).

53. S.B. No. 309, 1967 Cal. Leg. Reg. Sess. (as amended, introduced February 8, 1967).

54. S.B. No. 309, 1967 Cal. Leg. Reg. Sess. (as amended in Senate, March 30, 1967).

55. S.B. No. 309, 1967 Cal. Leg. Reg. Sess. (as amended in Senate, April 28, 1967). The concern over barring actions brought on latent defects had been a major issue with previously defeated Assembly Bill No 648. See A.B. 648, 1963 Cal. Leg. Reg. (General) Sess.

56. S.B. No. 309, 1967 Cal. Leg. Reg. Sess. (as amended in Senate, May 3, 1967).

Inc.,⁵⁷ a developer was held strictly liable for a defective central heating system installed in a home in 1951. The existing Code of Civil Procedure sections 338 and 337.1 provided no protection from the infinite liability exposure imposed by the application of strict liability to the construction industry. Thus, *Kriegler* obliterated the main justification for not time barring liability for latent defects, namely that builders could rely on the protection provided by the necessity that the plaintiff prove negligence.⁵⁸

In apparent response to *Kriegler*, Assemblymember Powers introduced Assembly Bill number 2528 (A.B. 2528) on April 14, 1970. This bill proposed an eight-year statute of limitations for actions brought on latent defects. After three amendments to Powers' bill an interim committee hearing was held⁵⁹ to determine whether a statute of limitations could be drafted for latent defects,⁶⁰ and whether an entirely new statute was necessary.⁶¹ However, after a brief statement by Mr. James Acret, who was the attorney representing the California Builders Council, the committee meeting focused instead on the issues of the availability, cost, and need to carry insurance indefinitely to assure that building professionals would be covered if latent defects surfaced at some later date. No additional discussion focused on problems posed by time-barring actions on latent defects. However, a statement on the subject by Mr. Acret was attached to the transcript as an appendix. In this statement the patent versus latent defect limitation problem was illustrated. Mr. Acret explained the limited effect of section 337.1. He noted that the vast majority of construction defect cases would not be barred by the four-year patent defect statute because "[a]lmost any problem with a building can be considered "latent" unless it is somehow

57. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

58. *Assembly Interim Committee on Judiciary, Transcript of Proceedings on Statute of Limitations*, 13-14 (October 23, 1964).

59. According to Mr. James Acret, a construction attorney from Los Angeles who spoke for the California Builders Council and fourteen other associations who were interested in the issue:

The problem faced by the construction industry is one that arises out of, I think, three different factors. One is the destruction of the doctrine that the acceptance of a project by the owner terminates the contractor's liability. The second is the fact that the statute of limitations in construction cases does not start to run until the injury occurs, . . . and the third is the sudden flourishing of the doctrine of strict liability which is applied to real estate.

Assembly Judiciary Interim Committee Transcript of Hearing on the Application of the Doctrine of Strict Tort Liability to Building Construction at 5 (October 23, 1970).

60. *Id.* at 1.

61. *Id.* at 4.

clearly visible on the walls, ceiling, roof, or floor. Thus, section 337.1 is virtually meaningless. A patent deficiency would seemingly be covered by other sections of the statute of limitations, since a patent deficiency is one which should be known to the claimant.”⁶² The bill did not pass.

Six months after the interim committee hearing, Senate Bill number 905 (S.B. 905) was introduced.⁶³ This bill proposed a six-year statute of limitations for latent defects but was apparently eclipsed by Assembly Bill number 2742 (A.B. 2742), introduced three days later.⁶⁴

A.B. 2742, proposing a six-year statute of limitations for latent defects, was drafted by the California Builders Council, based on the model statute previously reviewed by the interim committee.⁶⁵ It was amended three times. The first amendment deleted definitions of “improvement” and “substantial completion” and re-worded the prohibition against applying the statute to those in possession and control.⁶⁶ The second amendment changed the statutory period from six to ten years and deleted the provision allowing the statute to be applied in actions for personal injury or wrongful death.⁶⁷ The third and final amendment deleted reference to injury or death from the section describing parties who may not assert the limitation period as a defense.⁶⁸

The latent defect bill passed in November 1971 by a unanimous senate vote and a fifty-eight to four majority in the assembly. Although repeated references had been made in the committee hearings to section 337.1, A.B. 2742 failed to indicate how the new bill interrelated with section 337.1.

Thus, the two “special” statutes of limitations, sections 337.1 and 337.15, having been discussed, debated, and enacted more than four years apart, became law. They were codified with other “statutes of

62. *Id.* at Appendix A, p. 7-8 (Mr. Acret seemed to be pointing out that a patent defect must by definition be discoverable upon completion at which point the regular statutes of limitations governing lawsuit within the shorter of the two time periods. Since none of the other statutes exceed four years a patent defect lawsuit is always controlled by the other statutes).

63. S.B. No. 905, 1971 Cal. Leg. Reg. Sess. (introduced April 12, 1971).

64. A.B. No. 2742, 1971 Cal. Leg. Reg. Sess.

65. Memo from Charles Warren dated July 12, 1971, regarding A.B. No. 2742 (on file at the Pacific Law Journal). See also *Assembly Judiciary Committee, Transcript of Hearing on Application of The Doctrine of Strict Tort Liability to Building Construction* at 12, October 23, 1970.

66. A.B. No. 2742, 1971 Cal. Leg. Reg. Sess. (as amended in Assembly July 13, 1971).

67. A.B. No. 2742, 1971 Cal. Leg. Reg. Sess. (as amended in Assembly July 22, 1971).

68. A.B. No. 2742, 1971 Cal. Leg. Reg. Sess. (as amended in Assembly October 22, 1971) (effective March 4, 1972).

limitations'' for actions in tort and contract, although these statutes, being statutes of repose, varied greatly in effect from regular statutes of limitations. The legislature provided no express instructions regarding how sections 337.1 and 337.15 interrelated with the regular limitations. Thus, a series of decisions emerged evidencing obvious confusion over the nature of these statutes and their proper application in different factual situations. In addition, there continued to be a steady stream of amendments to existing section 337.15 and regular attempts to further amend the statute.⁶⁹

B. Case Law Interpreting California's Statutes of Repose

Courts interpreting section 337.15 frequently characterize both sections 337.1 and 337.15 as ordinary, procedural statutes of limitations rather than substantive statutes of repose. These statutes were intended to provide ultimate repose for those in the construction industry. As the true nature of the statutes have been misinterpreted, repose has been and continues to be threatened in construction defect cases.

In *Balido v. Improved Machinery, Inc.*,⁷⁰ the court of appeal for the Second District interpreted section 337.15 in a products liability

69. See A.B. No. 3715, 1981-82 Cal. Leg. Reg. Sess. (introduced by Assemblymember Papan to decrease the limitation period in section 337.15 from ten to five years. This bill was supported by the Consulting Engineers Association, Association of General Contractors, Association of General Contractors of San Diego, Nor. Cal. Engineering Contractors Ass'n, Nor. Cal. Construction Contractors Association, Flasher Barracade, Underground Contractors, and CIBA. The bill was opposed by the California Trial Lawyers Ass'n and was defeated). See also A.B. No. 1818, 1983-84 Cal. Leg. Reg. Sess. (introduced by Assemblymember Johnson to amend section 337.15 to include a bar of actions for damages for bodily injuries or wrongful death outside the ten-year limitation period. As amended, the bill did not reduce the time limitation from ten to five years. The bill was defeated.); S.B. No. 1494, 1984 Cal. Leg. Reg. Sess. (as amended in Senate April 5, 1984) (introduced by Senator Dills to provide that actions based on strict liability, inverse condemnation or liability without fault against developers of real property be barred three years after substantial completion. The bill did not pass.); S.B. No. 2873, 1987-88 Cal. Leg. Reg. Sess. (introduced by Senator Keene to decrease the time period in section 337.15 from ten to five years, except for bodily injury or wrongful death actions); S.B. No. 1609, 1988-89 Cal. Leg. Reg. Sess. (introduced by Senator Stirling to standardize all statutes of limitations to three years. The bill was not heard and put over to the 1989 session.); A.B. No. 915, 1988-89 Cal. Leg. Reg. Sess. (introduced by Assemblymember Lancaster to decrease the time limit of section 337.15 from ten to five years. The bill was not heard and put over to the second year of the two-year session.).

70. 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1972). *Balido* involved an action by the operator of a plastic molding press against a prior owner of the press, the manufacturer, and the operator's employer for injuries sustained to the operator's hand due to the press closing on the operator's hand during an adjustment. *Id.* at 637, 105 Cal. Rptr. at 892. Although *Balido* involved strict products liability, the court faced the issue of time lapse and the causal connection

case involving the effect of time lapse on causation.⁷¹ The *Balido* court noted that in the building and medical professions, the legislature had provided the courts with a solution to the problem of determining a fair limitation period in areas where the effects of time, changed conditions, and questions of causation have been troublesome factors affecting the fairness of a lawsuit.⁷² This was done by providing an "arbitrary, mechanical solution" in the form of particular statutes of limitations.⁷³ The court explained that these statutes, although "couched as procedural limitations," have the effect of terminating substantive liability by providing that after a specified amount of time, no causal connection between the defect and the injury will be legally recognized.⁷⁴ The court cited sections 340.5 and 337.15 as examples of special statutes of limitations that terminate substantive liability after a specified time.⁷⁵ The *Balido* court recognized section 337.15 as a substantive limitation on the plaintiff's ability to bring suit and dismissed the plaintiff's claim.

1. *The Hartford Decision: Majority Opinion*

Five years later in *Regents of the University of California v. Hartford Accident and Indemnity Co.*,⁷⁶ the California Supreme Court specifically refuted the definition of section 337.15 contained in *Balido* indicating that the statute was intended to be a procedural rather than a substantive limitation.⁷⁷ In *Hartford*, the owner of an apartment complex brought an action against the architect, general contractor, and the general's surety for damages resulting from latent defects in construction. The apartments had been completed in 1962.

between the plaintiff's injury and the design. In this context the court noted other areas where causality had been dealt with statutorily, i.e. the construction industry. *Id.* at 642, 105 Cal. Rptr. at 896.

71. The *Balido* court considered the effect of the passage of time between the deficient design of the press and the injury. In discussing this problem, the court used section 337.15 as an example of a statute intended by the legislature to solve the problems of time and the accompanying reliability of proof, by specifying a particular time after which a causal connection between the defect and injury will not be recognized. *Id.* at 642, 105 Cal. Rptr. at 896.

72. *Id.* at 642, 105 Cal. Rptr. at 896.

73. *Id.*

74. *Id.*

75. *Id.* (Civil Procedure Code section 340.5 limits the time in which certain malpractice actions against health care providers may be brought to three years from the date of injury. Section 337.15 is the statute precluding actions brought on latent defects against developers, contractors, and architects occurring more than ten years from the date of substantial completion).

76. 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978).

77. *See supra* notes 26-34.

Latent defects were discovered at least by 1972, and the lawsuit was filed in 1974, almost twelve years after completion.⁷⁸ The court held that although the general contractor was protected by the statutory bar of section 337.15, the construction surety was not protected.

In *Hartford*, the defendant-surety retained the right to seek reimbursement from the principal. The court adhered to the “established principle that the running of a period of limitations on the principle obligation does not exonerate the surety.”⁷⁹ The court then had to address the question, whether recognizing a suit against the surety (and the surety’s right to proceed against the general for reimbursement) defeated the legislative purpose of section 337.15.⁸⁰ In order for the court to find that the statute of limitations did not bar the action against (or by) the surety, the court had to find that section 337.15 was an ordinary, procedural limitation on the plaintiff’s cause of action subject to the same rules as other statutes of limitations.⁸¹ The court viewed section 337.15 as a procedural limitation and held therefore that it did not bar an action against the surety.

The majority justified its holding on the ground that although section 337.15 was a total bar, nothing in the placement or language of section 337.15 supported its interpretation as a substantive limitation.⁸² Further, the majority relied on the codification of section 337.15 in the portion of the Code of Civil Procedure set aside for other procedural statutes of limitations.⁸³

Finally, the majority stated that the legislature did not intend for the enactment of section 337.15 to invoke the “collateral consequences” that a substantive statute would invoke.⁸⁴ The majority explained that although section 337.15 might occasionally bar a

78. *Hartford*, 21 Cal. 3d at 629, 581 P.2d at 199, 147 Cal. Rptr. at 488.

79. *Id.*

80. *Id.* at 640, 581 P.2d at 206, 147 Cal. Rptr. at 495.

81. *Id.* at 642, 581 P.2d at 207, 147 Cal. Rptr. at 496.

82. *Id.* at 642, 581 P.2d at 206, 147 Cal. Rptr. at 495.

83. *Id.*

84. *Id.* at 641, 581 P.2d at 207, 147 Cal. Rptr. at 496. Collateral consequences are interpretations applied to a statute that flow from the statute by virtue of its classification, or type, rather than its actual drafting. Examples of collateral consequences of a statute are questions of pleading, waiver, choice of law, and retroactivity. Limitation of a substantive right means that a right upon which a suit could have been maintained expires. Because of its nature there are particular effects that accompany a substantive statute. These are referred to as collateral consequences of the statute. 3 B. WITKIN, CALIFORNIA PROCEDURE 345-46 (3d ed. 1985). For example, where a statute is substantive the plaintiff must allege facts showing that the statute did not expire, rather than the usual situation in which the defendant raises the statute of limitations as a defense. *Williams v. Pacific Mut. Life Ins. Co.*, 186 Cal. App. 3d 941, 949-50, 231 Cal. Rptr. 234, 239 (1986).

plaintiff's remedy before the plaintiff discovers a latent defect, section 337.15 was no different from any other "admittedly procedural statutes of limitation[s]" running from the date of an event rather than discovery.⁸⁵

The *Hartford* majority countered *Balido* stating that it had "mischaracterized" section 337.15 by classifying it as a substantive limitation.⁸⁶ The majority stated that since the statute excludes owners and tenants of the property and mentions the liability of laborers and materialmen only in regards to indemnity actions, the cause of action is not obliterated and thus the statute is not substantive in nature.⁸⁷ The majority said that actions against sureties are not supposed to be time barred, as evidenced by the legislative intent indicated by their omission from the statute.⁸⁸ The weakness in this argument became apparent one year later when section 337.15 was amended by the legislature to include protection of the statutory bar for sureties.⁸⁹

In retrospect, in *Hartford*, the Supreme Court of California properly applied the statute to the facts of that case, but in doing so the court caused subsequent courts attempting to follow the opinion to misinterpret section 337.15. The confusion was created by classifying the statute as the same as any procedural statute that accrued upon the occurrence of an event rather than discovery. The majority neglected to point out that historically, those "admittedly procedural" statutes of limitations that accrued upon the occurrence of an event *had actually been considered substantive in nature*.

2. *The Hartford Dissent*

Justice Clark in his dissent maintained that allowing the surety's right to reimbursement, in effect, constituted recognition of a suit

85. *Hartford*, 21 Cal. 3d at 641 n.13, 581 P.2d at 207 n.13, 147 Cal. Rptr. at 496 n.13.

86. *Id.* at 641-42, 581 P.2d at 207, 147 Cal. Rptr. at 496.

87. *Id.* at 641-42, 581 P.2d at 207, 147 Cal. Rptr. at 497. This reasoning is erroneous. The statute obliterates the right to sue the design professional, not just the remedy. Therefore, the substantive nature is not mitigated by the availability of other defendants. For example, the fact that an owner cannot assert the statute does nothing to preserve the plaintiff's cause of action for negligent construction against the builder.

88. *Id.* at 642, 581 P.2d at 207, 147 Cal. Rptr. at 496. The court inferred the legislative intent by omission of sureties from the statute. *Id.*

89. See 1979 Cal. Stat. ch. 571, sec. 1, at 1797 (amending CAL. CIV. PROC. CODE § 337.15) (adding the phrase "or the surety of a person" to subdivision a).

against the principal after the ten-year limitation period.⁹⁰ Justice Clark further maintained that because section 337.15 is a substantive limitation on the right to bring an action against the principal, it is unfair to impose a duty of reimbursement on the principal.⁹¹ The dissent contended that section 337.15 is not an ordinary procedural statute but rather a substantive limitation upon the contractor's duties and the plaintiff's cause of action.⁹²

Justice Clark adhered to the *Balido* interpretation which classified the statute as a "statute of limitations" phrased to constitute a substantive limitation.⁹³ He attacked the majority view that by excluding owners and tenants from protection section 337.15 was not a substantive bar. He explained that owners and tenants are excluded from the statute's reach because they continue to control and maintain improvements.⁹⁴ Since they are in control of the improvement, it would be "absurd to provide that no action for property damage . . . could be brought against them more than ten years after . . . completion of the improvement."⁹⁵

Finally, Justice Clark criticized the majority for classifying section 337.15 as a procedural limitation on the basis that the legislature had not expressly indicated that the "collateral consequences" to be applied were those that attach to a substantive limitation.⁹⁶ Legislative failure to expressly specify the collateral consequences of a statute requires that those interpreting the statute classify the statute as procedural or substantive in order to determine the collateral consequences that flow from the statute. The failure to specify collateral consequences does not conversely determine whether the statute is

90. *Hartford*, 21 Cal. 3d at 644, 581 P.2d at 208-9, 147 Cal. Rptr. at 497-98 (Clark, J., concurring and dissenting). Justice Clark concurred in the majority's finding that running of a statute on the creditor's claim against a principal does not bar action against the surety. Justice Clark agreed with the majority that if compelled to pay, a surety could recover from his principal. However, since the limitation on the creditor's claim was substantive, Justice Clark stated that the duty to reimburse could not be imposed on the principal. *Id.* See also *id.* at 646 n.2, 581 P.2d at 210 n.2, 147 Cal. Rptr. at 449 n.2 (Clark, J., concurring and dissenting).

91. *Id.* at 645, 581 P.2d at 209, 147 Cal. Rptr. at 498 (Clark, J., concurring and dissenting). Justice Clark noted the unfairness in imposing liability on the surety since the surety is unable to obtain reimbursement. *Id.*

92. *Id.* at 645, 581 P.2d at 209-10, 147 Cal. Rptr. at 498-99 (Clark, J., concurring and dissenting).

93. *Id.* at 645, 581 P.2d at 209, 147 Cal. Rptr. at 498 (Clark, J., concurring and dissenting).

94. *Id.* at 646 n.1, 581 P.2d at 210 n.1, 147 Cal. Rptr. at 499 n.1 (Clark, J., concurring and dissenting).

95. *Id.* (Clark, J., concurring and dissenting).

96. *Id.* at 646 n.2, 581 P.2d at 210 n.2, 147 Cal. Rptr. 499 at n.2 (Clark, J., concurring and dissenting).

procedural or substantive.⁹⁷ Thus, failure by the legislature to specify the collateral consequences should not have been used by the majority as determinative that the statute was intended to be a procedural limitation.⁹⁸

3. Post Hartford Decisions

a. Hartford Followed—Section 337.15 Labeled Procedural

One month after *Hartford*, the use of collateral consequences to classify section 337.15 resurfaced in the case of *Eden v. Van Tine*.⁹⁹ *Eden* involved an action by home buyers against a co-owner builder and a soil engineer for damages arising from the discovery of a failed patio wall.¹⁰⁰ Discovery of the failure led the plaintiffs to discover that the land under the home was unstable causing the residence to suffer substantial structural problems.¹⁰¹ The improvement had been substantially completed on February 5, 1963. The plaintiffs discovered defects on December 1, 1972, and filed their complaint on May 11, 1973, subsequent to the enactment of section 337.15.¹⁰²

Prior to the enactment of section 337.15, the plaintiffs would have had three years after discovery in which to commence an action on the defect.¹⁰³ However, subsequent to the enactment of section 337.15 in 1971, the plaintiff in *Eden* had less than two months after discovery of the defect in which to file a complaint before the statute ran.¹⁰⁴ Thus, a collateral consequence of the statute became an issue. The

97. See *id.* (Clark, J., concurring and dissenting).

98. *Id.* (Clark, J., concurring and dissenting).

99. 83 Cal. App. 3d 879, 148 Cal. Rptr. 215 (1978).

100. *Id.* at 882, 148 Cal. Rptr. at 216-17 (failure had been concealed).

101. *Id.* at 882, 148 Cal. Rptr. at 217.

102. See 1971 Cal. Stat. ch. 1569 sec. 1, at 2149 (enacting CAL. CODE CIV. PROC. § 337.15).

103. CAL. CIV. PROC. CODE § 338 (West 1982) (three years from date of discovery for negligence, nuisance or strict liability).

104. In *Eden*, the date of substantial completion was February 5, 1963. *Eden*, 83 Cal. App. 3d 879, 885, 148 Cal. Rptr. 215, 218-19 (1978). The date that the plaintiff first noticed a defect was December 1, 1972. *Id.* at 882, 148 Cal. Rptr. at 216. The ten-year statutory period of section 337.15 ran on February 5, 1973. *Id.* at 885, 148 Cal. Rptr. at 219. After investigating the defect, the complaint was filed May 11, 1973, under section 338. *Id.* at 881, 148 Cal. Rptr. at 216. Prior to enactment of section 337.15, the plaintiff would have had until December 1, 1975 to file (three years from notice of the defect). *Id.* at 888, 148 Cal. Rptr. at 220.

collateral consequence at issue in *Eden* was whether section 337.15 would be applied retroactively to bar the action.¹⁰⁵

In order to determine whether the statute could be applied retroactively, the court cited *Hartford* for the proposition that section 337.15 was a procedural statute of limitations.¹⁰⁶ The court held that since section 337.15 was a procedural statute,¹⁰⁷ the collateral consequence of retroactive application was proper. However, within the facts of this case, the court held that fairness dictated that the plaintiff be given a "reasonable" period after discovery of the defect in which to file his complaint.¹⁰⁸ Thus, the court found that the statute could be applied retroactively based on its "procedural" nature, but in this case the statute was not used to bar the plaintiff's cause of action.

Two years later the retroactivity issue again prompted a finding that section 337.15 is a procedural limitation. In *Liptak v. Dianne Apartments, Inc.*,¹⁰⁹ an improvement was completed in 1967 and found to be defective in 1978. Since section 337.15 had not been enacted until 1972, the plaintiffs had more than five years to file. The court retroactively applied section 337.15 to bar the action.

In holding that retroactive application of the statute was proper, the court stated that "a change in the limitation period merely effects

105. *Eden*, 83 Cal. App. 3d at 886, 148 Cal. Rptr. at 219. The issue was whether the ten-year bar of section 337.15 would be applied to a time period that began running before the enactment of the statutes. See, e.g., *Wagner v. State of California*, 86 Cal. App. 3d 922, 928, 150 Cal. Rptr. 489, 492 (1978) (the court of appeal for the Third District stated that the application of a newly enacted period of limitations whose operation depends upon some facts or conditions which were in existence prior to the enactment does not mean the statute is being retroactively applied).

106. "Section 337.15 is a procedural statute of limitations." *Eden*, 83 Cal. App. 3d at 886, 148 Cal. Rptr. at 219.

107. See *Rosenfield Packing Co. v. Superior Court*, 4 Cal. 2d 120, 47 P.2d 716 (1935) ("[I]t has been specifically held that the legislature may shorten or extend the period of the statute of limitations, or similar time statutes relating to procedures, and that the changed time period may be made applicable to pending proceedings . . ."). Thus, the *Eden* court was forced to call the statute procedural in order to utilize the language in *Rosenfield*. *Eden*, 83 Cal. App. 3d at 887, 148 Cal. Rptr. at 220.

108. *Eden*, 83 Cal. App. 3d at 887, 148 Cal. Rptr. at 220. The court allowed the statute to be applied retroactively based on its procedural nature but at the same time defeated the statutory bar by granting the plaintiffs a reasonable time after discovery in which to file. Other jurisdictions have held that tort statutes of limitations such as those for medical malpractice or construction statutes of repose will not be applied retroactively unless the legislature expressly or in the language of the statutes impliedly showed an intention that it be so applied. THE AMERICAN LAW OF TORTS *supra* note 10, at 899 n.14.

109. 109 Cal. App. 3d 762, 167 Cal. Rptr. 440 (1980). The subject property was graded and filled in 1967. The property shifted in 1978 causing damage to a home constructed on the property. The complaint was filed in 1978. *Id.* at 767, 167 Cal. Rptr. at 442.

a change in procedure.”¹¹⁰ In a footnote, the court noted that *Balido* had considered the statute substantive and *Hartford* had held that interpretation in error.¹¹¹ No comment was made regarding the *Hartford* characterization of the statute, or the effect that finding the statute substantive would have on the issue of retroactivity. *Liptak* followed *Hartford* in labeling the statute procedural for the purpose of applying it retroactively. However, at the same time the court defined the statute as an “absolute requirement that a suit . . . be brought . . . within ten years of . . . substantial completion.”¹¹² Thus, although the *Liptak* court identified section 337.15 as a procedural rather than a substantive limitation, the statute was applied to bar plaintiff’s lawsuit brought more than ten years after completion.

b. Hartford Sidestepped—Section 337.15 Recognized as Substantive

Amidst the confusion generated by the statutes themselves and the *Hartford* characterization of section 337.15 as a procedural limitation, there have been several appellate decisions that have sidestepped *Hartford* and correctly recognized both the nature and effect of section 337.15.

In *Hahn v. Superior Court of Los Angeles*,¹¹³ the court stated that section 337.15:

fixes the point at which the period of limitations begins to run at the completion of construction and not the accrual of any cause of action resulting therefrom. Further, since it deals with latent defects and places a finite limit on the time in which an action can be brought, the limitation period contained therein is not one that can be extended by any reasonable failure to discover the defect or the cause of action.¹¹⁴

The court acknowledged that the public policy behind section 337.15 was, “to promote construction and . . . to remove the peril of remote and distant liability which would tend to deter persons from entering into the construction business.”¹¹⁵

110. *Id.* at 773, 167 Cal. Rptr. at 446 [footnote omitted].

111. *Id.* at 773 n.6, 167 Cal. Rptr. at 446 n.6.

112. *Id.* at 769, 167 Cal. Rptr. at 443.

113. 108 Cal. App. 3d 587, 166 Cal. Rptr. 644 (1980).

114. *Id.* at 570, 166 Cal. Rptr. at 646.

115. *Id.*

In *Barnhouse v. City of Pinole*,¹¹⁶ plaintiffs discovered damage to their real property more than ten years after substantial completion. On appeal, the plaintiffs contested the constitutionality of section 337.15 which had been used to bar the action in the trial court. The court of appeal cited *Hartford* for the proposition that section 337.15 was no different than any other “admittedly procedural statutes that run from the date of an event rather than discovery.”¹¹⁷ However, after quoting *Hartford*’s mischaracterization of the statute, the *Barnhouse* court acknowledged the repose imposed by the statute, stating that “[t]o accept appellants’ argument—that they must be permitted reasonable time from the discovery of the damage to bring their lawsuit—would render the discussion in *Regents* meaningless.”¹¹⁸ *Barnhouse* evidences an understanding of the true nature of section 337.15 and a look beyond the semantics of *Hartford*.

In the years following *Barnhouse*, many cases address the distinction between latent and patent;¹¹⁹ how fraud affects sections 337.1 and 337.15;¹²⁰ whether personal injury or wrongful death are included in the bar imposed by these statutes;¹²¹ and how the statutes affect indemnification.¹²² The issue of the substantive versus procedural nature of the two statutes rested for a while.¹²³ However, the con-

116. 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982).

117. *Id.* at 186, 183 Cal. Rptr. at 889 (quoting *Regents v. Hartford Acc. & Indem. Co.*, 21 Cal. 3d 624, 641 n.13, 581 P.2d 197, 207 n.13, 147 Cal. Rptr. 486, 496 n.13 (1978)).

118. *Id.*

119. *Preston v. Goldman*, 42 Cal. 3d 108, 720 P.2d 476, 227 Cal. Rptr. 817 (1986) (previous owners not liable for injury when they no longer owned property); *Bingham Toyota v. Marks-Gobel & Assocs., Inc.*, 178 Cal. App. 3d 786, 224 Cal. Rptr. 50 (1986) (the issue of whether a defect was latent or patent was an issue of fact, however an appeal to the California Supreme Court for review was denied and the opinion depublished); *Mosley v. Adams*, 170 Cal. App. 3d 355, 216 Cal. Rptr. 40 (1985) (latent defects); *Kralow Company v. Sulley-Miller Contracting Co.*, 168 Cal. App. 3d 1029, 214 Cal. Rptr. 630 (1985) (although unable to find any legislative history regarding section 337.1, the legislature intended that section 337.1 would apply to defects that were patent at the substantial completion of an improvement); *Renown, Inc. v. Hensel Phelps Constr. Co.*, 154 Cal. App. 3d 413, 420, 201 Cal. Rptr. 242, 245 (1984) (the “critical distinction between a defect which is latent and one which is patent is its susceptibility to detection.” The court opined that reasonable inspection for a defect is to be determined from the “totality of the circumstances”).

120. *E.g.*, *Felburg v. Don Wilson Builder*, 142 Cal. App. 3d 383, 191 Cal. Rptr. 92 (1983) (statute of limitations no bar in fraud case).

121. *Martinez v. Traubner*, 32 Cal. 3d 755, 758, 653 P.2d 1046, 1048, 187 Cal. Rptr. 251, 253 (1982) (California Supreme Court held that Civil Procedure Code section 337.15 does not limit the time for bringing an action for personal injury or wrongful death).

122. *Tech-Bilt, Inc. v. Woodward, Clyde & Assocs.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985) (indemnity action).

123. *Sandy v. Superior Court*, 201 Cal. App. 3d 1277, 247 Cal. Rptr. 677 (1988) (under Civil Procedure Code section 337.15, architect not held liable for defects in original construction more than ten years before action was filed); *Stoneson Development Corp. v. Superior Court of San Mateo County*, 197 Cal. App. 3d 178, 242 Cal. Rptr. 721 (1987) (ten-year limitation of Civil Procedure Code section 337.15 applies to a cause of action based on strict product liability).

fusion over the characterization of section 337.15 continues, and even courts recognizing the repose imposed by section 337.15 (and 337.1) continue to confuse others by labeling these statutes similar to “other *admittedly procedural* statutes that run from the date of an event instead of the date of discovery.”¹²⁴

c. Cascade Gardens—*A Recent Misapplication of Section 337.15*

In September 1987, the court of appeal for the Fourth District once again relied on *Hartford* to mischaracterize section 337.15. In *Cascade Gardens Homeowners Association v. McKeller & Associates*,¹²⁵ a condominium project developed leaky roofs soon after the original homeowners moved in. The developer, McKeller, promised to correct the situation by contracting with a roofing company to perform the necessary repairs. Those repairs took four months to complete.¹²⁶ Approximately seven years later the roofs began to leak again and the condominium homeowners association sued McKeller.¹²⁷ Although the plaintiff filed suit more than ten years after substantial completion, the court of appeal reversed the trial court’s decision that section 337.15 barred the action.¹²⁸

Cascade Gardens held that during the time period while the roof repairs were being made, the statute had been tolled.¹²⁹ The court stated that, “[s]ince section 337.15 is an ordinary statute of limitations . . . it is subject to the same rules which toll other statutes of limitations.”¹³⁰ The court further stated that “[t]he dispositive issue is whether the statute of limitations set forth by section 337.15 was tolled or suspended during ‘this period of repair’. Clear authority establishes that repairs, such as those undertaken by McKeller and Hutchinson, toll statutes of limitations as a matter of law.”¹³¹

124. *Hartford*, 21 Cal. 3d 624, 641 n.13, 581 P.2d 197, 207 n.13, 147 Cal. Rptr. 486, 496 n.13. (Emphasis added).

125. 194 Cal. App. 3d 1252, 240 Cal. Rptr. 113 (1987).

126. *Id.* at 1254-55, 240 Cal. Rptr. at 114-15.

127. *Id.* at 1255, 240 Cal. Rptr. at 115.

128. *Id.* at 1258, 240 Cal. Rptr. at 117.

129. *Id.*

130. *Id.* at 1256, 240 Cal. Rptr. at 116 (citing *Regents of University of California v. Hartford Accident & Indem. Co.*, 21 Cal. 3d at 642, 581 P.2d at 197, 147 Cal. Rptr. at 486 (1978)).

131. *Cascade Gardens*, 194 Cal. App. 3d at 1256, 240 Cal. Rptr. at 116 (citing *Mack v. Hugh Comstock Assocs.*, 225 Cal. App. 2d 583, 589-90, 37 Cal. Rptr. 466, 470 (1964); *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 585, 360 P.2d 897, 904 (1961); *Southern California*

The *Cascade Gardens* court cited *Mack v. Hugh Comstock Associates, Inc.*,¹³² in which the court allowed the limitation period to be tolled by repairs. *Cascade Gardens* stated that *Mack* allowed section 337.1 to be tolled. The *Cascade Gardens* court reasoned that since sections 337.1 and 337.15 are so similar that the *Mack* tolling principle should be applied to section 337.15.¹³³ This analysis was an error in research and reasoning by the *Cascade Gardens* court. The *Mack* decision allowed tolling of section 337 subdivision 1, which is the four-year statute of limitation on a written contract, not section 337.1¹³⁴ which is the four-year statute of limitations for patent construction defects. The California Legislature had not yet enacted section 337.1 when *Mack* was decided in 1964.¹³⁵ Section 337.1 therefore could not rationally set precedent for the tolling of section 337.15.

The court's principal rationale for tolling the statute was the classification of section 337.15 as an ordinary statute of limitations. Had the court recognized the statute as a substantive statute of repose, the decision to toll the statute would have required a far more intricate analysis of the legislative intent and the principle of tolling.¹³⁶

Commentators and case law recognize that the tolling of a statute may vary with the circumstances and drafting of different statutes.¹³⁷ Although there are several conditions that are generally recognized as probable bases for tolling a statute of limitations, other states have codified tolling provisions for greater clarity, and more probable fulfillment of the legislative intent.¹³⁸ Additionally, if a statute provides a period after which the defendant may have complete repose,

Enterprises v. D.N. & E. Walter & Co., 78 Cal. App. 2d 750, 755, 178 P.2d 785, 788 (1947)). The court stated that *Mack v. Hugh Comstock* was factually similar to the case at bar as each involved tolling an ordinary statute of limitations during repairs. *Id.* at 1257, 250 Cal. Rptr. at 116. The court failed to recognize the repose imposed section 337.15, an entirely different statute than in *Mack*. Also, the court incorrectly stated that *Mack* interpreted section 337.1. At the time of the decision in *Mack*, section 337.1 had not yet been enacted. The California legislature enacted Section 337.1 in 1967; *Mack* was decided in 1964.

132. 225 Cal. App. 2d 583, 37 Cal. Rptr. 466 (1964).

133. *Cascade Gardens*, 194 Cal. App. 3d at 1257 n.4, 240 Cal. Rptr. at 116 n.4.

134. CAL. CIV. PROC. CODE § 337(1) (West 1982). See *Mack*, 225 Cal. App. 2d at 589, 37 Cal. Rptr. at 470.

135. 1967 Cal. Stat. ch. 1326, sec. 1, at 3157 (enacting CAL. CIV. PROC. CODE § 337.1).

136. "Generalization in the area of tolling is unwarranted largely because of the difference underlying considerations and policies entailed in the various forms of tolling." Note, *Tolling Provision of the Statute of Limitations—A Haven for the Dilatory Plaintiff*, 10 SETON HALL 585 (1980). See also AMERICAN LAW OF TORTS, *supra* note 10, at 910.

137. AMERICAN LAW OF TORTS, *supra* note 10, at 910-11.

138. *Id.*

a court may find that the assurance of repose outweighs the burden on the plaintiff of not tolling the statute.¹³⁹ Thus, by failing to adequately address the tolling issue and misinterpreting prior precedent, *Cascade Gardens* became the latest in a long line of cases which misapply California's statutes of repose.

The legislature enacted sections 337.1 and 337.15 for the purpose, and with the intent, of protecting those in the business of design, construction, and related industries.¹⁴⁰ However, this protection continues to be eroded by decisions in which application of the statutes fails to recognize the legislature's intent. *Cascade Gardens* is yet another decision where the *Hartford* misinterpretation of section 337.15 as an "ordinary statute of limitations" was used to improperly apply the statute. These statutes are neither ordinary nor regular statutes of limitations.

Hartford has been, and continues to be, the shaky foundation upon which courts have based their opinions regarding whether to characterize sections 337.1 and 337.15 as procedural statutes of limitations or substantive statutes of repose. The character of these statutes must correctly be defined in order to assure their proper and effective application.

Recognizing sections 337.1 and 337.15 as substantive statutes of repose is essential to fulfilling the legislative intent behind their enactment. Only complete understanding of these statutes will assure that they are properly applied and that the intended collateral consequences flow from their use. Proper labeling and use of these statutes will allow purchasers of real property improvements to be aware of the difference between these statutes and other statutes of limitations and provide them with adequate notice that their rights will be absolutely extinguished after a designated number of years. Finally, proper identification of these statutes as statutes of repose should promote a decrease in unnecessary litigation by encouraging the granting of a motion for summary judgment when it is obvious that one of these statutes of repose has run.

Proper classification and application of statutes of repose is unlikely as long as they remain categorized with regular statutes of

139. *Id.* at 970-71. The court in *Cascade Gardens* should have found that protecting the policy of repose outweighed the grant of the four month tolling period. In *Cascade Gardens*, the plaintiffs allowed three years to pass between the recurrence of the defect and filing their lawsuit. They also allowed ten years and one month to elapse between the original occurrence of the defect and filing. *Cascade Gardens*, 194 Cal. App. 3d at 1254-5, 240 Cal. Rptr. at 114-115.

140. See *supra* note 49 and accompanying text.

limitations. Thus, this article recommends that California's statutes of repose should be codified separately from the other limitations, in a section entitled "Statutes of Repose."

However, in order to increase effectiveness and clarify legislative intent, sections 337.1 and 337.5 demand not only reclassification, but also redrafting and consolidation. The first step in redrafting sections 337.1 and 337.15 requires an analysis of the statutes themselves, and a comparison to similar statutes that are now in effect nation-wide.

IV. A COMPARISON OF CALIFORNIA'S DUAL CONSTRUCTION STATUTES OF REPOSE WITH THOSE OF OTHER JURISDICTIONS

Presently, forty-six states and the District of Columbia, have enacted legislation which attempts to bar construction based lawsuits after a designated number of years.¹⁴¹ While most of the statutes are

141. Arkansas has a five-year statute for contract actions and a four-year statute for wrongful death actions. ARK. STAT. ANN. §§ 37-237-37-238 (1985). California has a four-year statute for patent defects that includes actions for wrongful death and a ten-year statute for latent defects which does not mention wrongful death actions. CAL. CIV. PROC. CODE §§ 337.1, 337.15 (West 1982). Colorado has a six-year statute which includes wrongful death actions. COLO. REV. STAT. § 13-80-104 (1986). Connecticut has a seven-year statute that includes wrongful death actions. CONN. GEN. STAT. ANN. § 52-584a (West 1987). Delaware has a six-year statute that bars wrongful death actions. DEL. CODE ANN. tit. 10 § 8127 (1974). The District of Columbia has a ten-year statute that bars wrongful death actions. D.C. CODE ANN. § 12-310 (1987). Florida has a four-year limitation on actions brought on patent defects and a fifteen-year limitation on actions brought on latent defects. Both limitation periods are included in the same statute. The statute does not specifically mention wrongful death actions. FLA. STAT. ANN. § 95.11 (West 1982). Georgia has an eight-year statute that includes wrongful death actions. GA. CODE ANN. § 9-3-51 (1982). Hawaii has a ten-year statute that does not specifically mention wrongful death. HAW. REV. STAT. § 657-8 (1985). Idaho has a six-year statute that does not specifically mention wrongful death but impliedly mentions it saying, "[t]he times fixed by these sections shall not be asserted by way of defense by any person in actual possession or control . . . of an improvement at the time any deficiency in such an improvement constitutes that proximate cause of an injury or death for which it is proposed to bring an action." IDAHO CODE § 5-241 (1979). Illinois has a twelve-year statute that does not specifically mention wrongful death actions. ILL. ANN. STAT. ch. 110, para. 13- 214 (Smith Hurd 1984). Indiana has a ten-year statute that includes wrongful death actions. IND. CODE ANN. § 34-4-20-2 (West 1983); IND. CODE ANN. 34-40-20-3 Cum. Annual Pocket Part (West 1987-88). Iowa has a fifteen-year statute. IOWA CODE § 614.1(11) (West Supp. 1989); Kansas has a two-year limitation on actions in tort and a ten-year limitation on latent defect actions. KAN. CIV. PROC. CODE ANN. § 60-513 (K.S.A. Supp. 1988). Kentucky has a five-year statute that bars wrongful death actions. KY. REV. STAT. ANN. § 413.135 (Baldwin 1986). Louisiana has a ten-year statute that bars actions for wrongful death. LA. REV. STAT. ANN. § 9-2771 (West 1965). However, at this time, a movement exists which is attempting to lower this period. Telephone interview with Ms. Cheryl Terio, Director, Government Affairs, The American Institute of Architects, (April 8, 1988). Maine has a ten-year statute that does not mention wrongful death. ME. REV. STAT. ANN. tit. 14 § 752-B (1964). Maryland has a ten-year statute that bars actions for wrongful death. MD. ANN. CODE § 5-108 (1984). Massachusetts has a six-year statute which does not mention wrongful death actions. MASS. GEN. LAWS ANN. § 15-1-41 (1972). Missouri has a ten-year statute that bars wrongful death actions. MO. ANN. STAT.

similarly drafted, California's statutes differ from the others in two significant areas. First, the majority of foreign statutes do not distinguish latent from patent defects.¹⁴² California does distinguish latent and patent defects and the period of repose varies for each. Second, approximately half of the statutes specifically include wrongful death actions in their limitations period.¹⁴³ California bars wrongful death actions only in suits brought on patent defects. Not surprisingly, these two areas in which California's statutes differ are also areas in which California courts have had continuing interpretive difficulties.

A. The Distinction Between Latent Versus Patent Defects in Statutes of Repose

Since the majority of the construction statutes of repose in the United States do not distinguish latent from patent defects,¹⁴⁴ the length of the statutory period is the same whether or not the defect sued upon was apparent at the time the improvement was substan-

§ 2-208 (Vernon 1987). Nebraska has a ten-year statute (four years if the cause of action could reasonably be discovered within that period). NEB. REV. STAT. § 25-223 (1985). Nevada has two separate statutes, a six-year statute for patent defects, including a bar of wrongful death actions and an eight-year statute for latent defects including a bar of wrongful death actions. NEV. REV. STAT. §§ 11.204, 11.205 (1985). New Jersey has a ten-year statute including a bar of wrongful death actions. N.J. STAT. ANN. § 37-1-27 (West 1987). North Carolina has a six-year statute that does not mention wrongful death. N.C. GEN. STAT. § 1-50 (1983). North Dakota has a ten-year statute that includes a bar of wrongful death actions. N.D. CENT. CODE § 28-01-45 (1974). Ohio has a ten-year statute that includes wrongful death actions. OHIO REV. CODE ANN. § 2305.131 (Anderson 1981). Oregon has a ten-year statute that does not mention wrongful death actions. OR. REV. STAT. § 12.135 (1985). Pennsylvania has a twelve-year statute that includes a bar of wrongful death actions. 42 PA. CONS. STAT. ANN. § 5536 (Purdon 1981). Rhode Island has a ten-year statute that includes wrongful death actions. R.I. GEN. LAWS § 9-1-29 (1985). South Carolina has a thirteen-year statute including wrongful death actions. S.C. CODE ANN. § 15-3-640 (Law. Co-op 1976). South Dakota has a ten-year statute that includes wrongful death actions. S.D. CODIFIED LAWS ANN. § 15-2-9 (1984). Tennessee has a four-year statute that includes wrongful death actions. TENN. CODE ANN. § 28-3-202 (1980). Texas has a ten-year statute that includes wrongful death actions. TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (Vernon 1988). Utah has a seven-year statute including wrongful death actions. UTAH CODE ANN. § 78-12-25.5 (1987). Virginia has a five-year statute including wrongful death actions. VA. CODE ANN. § 8.01-250 (1987). Washington has a six-year statute. WASH. REV. CODE § 4.16.310 (1962) (amended in 1987). West Virginia has a ten-year statute including wrongful death actions. W. VA. CODE § 55-2-6a (1981). Wisconsin has a ten-year statute including wrongful death actions. WIS. STAT. ANN. § 893.89 (West 1983). Wyoming has a ten-year statute including wrongful death actions. WYO. STAT. § 1-2-111 (1977).

142. See *infra* notes 144-55 and accompanying text.

143. See *infra* notes 156-160 and accompanying text.

144. See *supra* note 141.

tially completed.¹⁴⁵ Other than California, only Florida, Nebraska, Kansas, and Nevada differentiate between latent and patent defects,¹⁴⁶ and only Nevada has separate statutes for each.¹⁴⁷

The principal difference in the treatment of the two types of defects is that the period of repose varies according to the classification of the defect.¹⁴⁸ Facially, this distinction seems simple enough, but the problems inherent in applying dual statutes are enormous.

In order to apply the proper statute the court must first determine whether the defect is latent or patent. Since this determination may create a factual question, a trial may be necessary simply to determine which statute applies. Additionally, California has failed to adequately define what constitutes a patent defect and whether it must exist upon substantial completion or may arise after completion.¹⁴⁹

The questions of fact arise from the different methods of discovering a latent versus a patent defect.¹⁵⁰ A latent defect is usually

145. These are four to fifteen-year limitation periods in the U.S. construction defect statutes. Generally these limit actions for damages, contribution, indemnity, tort, contract, or a combination of these. For example, the actions are usually brought based on, "any deficiency in the survey or plat, planning, design, specifications, supervision, or observation of construction, or construction of an improvement to real property." GA. CODE ANN. § 9-3-51 (1982).

146. FLA. STAT. ANN. § 95.11 (1980); NEB. REV. STAT. § 23-223 (1985); NEV. REV. STAT. §§ 11.204-11.205 (1985).

147. NEV. REV. STAT. §§ 11.204-11.205 (1985). Nevada has a six-year statute of limitations period for patent defects and an eight-year period for latent defects. Other than the time limitations on patent versus latent defects the statutes are identical.

148. FLA. STAT. ANN. § 95.11 (1980) (four years for defects, 15 years for latent defects); NEB. REV. STAT. § 23-223 (1985) (four years from act or omission if reasonably discoverable or two years from discovery if not capable of reasonably being discovered but in no event after ten years have passed from the act giving rise to the cause of action); NEV. REV. STAT. § 11.204-11.205 (1985) (six years for patent defects, eight years for latent defects).

149. See, e.g., *Kralow v. Sulley-Miller Contracting Co.*, 168 Cal. App. 3d 1029, 214 Cal. Rptr. 630 (1985) (declining to follow *Nicholson-Brown, Inc. v. City of San Jose*, 62 Cal. App. 3d 526, 133 Cal. Rptr. 159 (1976); plaintiff may recover for claims arising from patently deficient construction work regardless of whether the claims existed upon substantial completion. Court believed that intent was to provide a cause of action for patent deficiencies existing upon substantial completion); *Baker v. Walker & Walker, Inc.*, 133 Cal. App. 3d 746, 184 Cal. Rptr. 245 (1982) (defect in air conditioning and heating system considered latent based solely on nature of defect with no mention of time of occurrence); *Anderson v. Browner*, 49 Cal. App. 3d 176, 160 Cal. Rptr. 65 (1979) (defects appearing within four months of completion considered latent); *Wagner v. State of California*, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) (allegation that defendant was "negligent in regards to the designing, planning and construction of a road and intersection" deemed to fall under patent defect statute); *Eden v. Van Tine*, 83 Cal. App. 3d 879, 148 Cal. Rptr. 215 (1978) (defects occurring every three years after substantial completion labeled patent by trial court, reversed and called latent by court of appeal); *Nicholson-Brown, Inc. v. City of San Jose*, 62 Cal. App. 3d 526, 133 Cal. Rptr. 159 (1976) (patent defect statute section 337.1 held to have been applicable to defects arising before substantial completion).

150. Compare *Grimmer v. Harbor Towers*, 133 Cal. App. 3d 88, 183 Cal. Rptr. 634 (1982) (a railing was considered latent) with *Mattingly v. Anthony Industries, Inc.*, 109 Cal. App. 3d 506, 167 Cal. Rptr. 292 (1980) (absence of a fence around a pool deemed patent). See also

discovered because damages lead to an investigation disclosing the actual defect. In essence, the latent statutes of repose operate as “discovery” type statutes of limitations within the boundaries of the repose period.¹⁵¹

The patent defect, however, is now defined as a defect that is “apparent by reasonable inspection” at the time of substantial completion of the improvement.¹⁵² Thus, patent defect statutes of repose actually operate as “event” type statutes. The burden is on the plaintiff to discover the defect upon substantial completion, whether or not any damages have resulted.¹⁵³ “Reasonable inspection” is a question of fact.

Since the defect is now required to be patent upon substantial completion, then as Mr. Acret pointed out during the committee hearing for section 337.15

[s]uch a statute that applies only to patent defects you really don't need because it would already come under the other provisions of the statute of limitations. If it is a patent defect, the owner should have known about it anyway so the statute should have started to run at the time that the defect occurred or at the time the act occurred.¹⁵⁴

Construction statutes of repose that do not distinguish between latent and patent defects avoid the redundancy and questions of fact that arise from the distinction.

The fact that construction defect statutes in all other jurisdictions except Nevada and California are singular begs the question as to why California has dual statutes. Unfortunately, the legislative history leaves no definitive answer.¹⁵⁵ Section 337.1 was enacted in response to the increasing liability that resulted from the advent of discovery

Renown, Inc. v. Hensel Phelps Const. Co., 154 Cal. App. 3d 413, 420, 201 Cal. Rptr. 242, 245 (1984) (the “critical distinction” between latent and patent was the susceptibility to detection and “what is reasonable” regarding inspection for a defect “is a matter to be determined from the totality of circumstances of the particular case”).

151. See *Romo v. Estate of Bennett*, 97 Cal. App. 3d 304, 308, 158 Cal. Rptr. 635, 638 (1979) (citing *Wagner v. California*, 86 Cal. App. 3d 922, 150 Cal. Rptr. 489 (1978) for the proposition that no accrual was involved since *Wagner* was a cross-complaint for indemnity based on patent defects).

152. *Preston v. Goldman*, 42 Cal. 3d 108, 123, 720 P.2d 476, 485-86, 227 Cal. Rptr. 817, 826-27 (1986) (using objective test, unfenced backyard deemed patent).

153. See *supra* notes 14-26 and accompanying text regarding event accrual of statute of limitations.

154. See *Committee Transcript, supra* note 59, at 13-14. Mr. Acret refers to the fact that a patent defect is reasonably discoverable and once discovered, the two, three, or four-year applicable statute begins to run confining the plaintiff to those time frames, regardless of section 337.1. *Id.*

155. See *supra* notes 33-58 and accompanying text.

for accrual of statutes. Section 337.15 was enacted in response to expanded liability in the form of strict liability and the realization that 337.1 did not provide adequate protection. California's dual statutes appear to have been a form of "historical accident" by which, over a period of years, two statutes were enacted rather than one comprehensive statute.

B. Other Jurisdictions Include Wrongful Death Actions in the Statutory Bar

Many foreign construction statutes of repose specifically include wrongful death actions as being time barred by the statute.¹⁵⁶ In California, wrongful death actions are expressly included in the patent defect statute. However, the latent defect statute is silent on the issue of whether a wrongful death action is time barred.¹⁵⁷ California case law has held that wrongful death actions based on latent defects are not time barred by section 337.15.¹⁵⁸

Jurisdictions that exclude or fail to mention wrongful death in their statutes of repose defy the legislative intent behind statutes of repose; ie. to limit long-term liability.¹⁵⁹ This exclusion of wrongful death actions may have been an attempt to mitigate a perceived harshness of an absolute statutory bar. However, if the case involves a non-owner plaintiff, although the plaintiff's action against the builder or contractor might be time barred, the plaintiff still has recourse against the owner or possessor of the property under the well-established principles that define a land occupier's duties. If the plaintiff is an owner-plaintiff, then it must be remembered that the use, care, and maintenance of structures by those in direct control have increasing effects on the integrity of an improvement as the years pass. This is exactly why those in the construction industry who constructed an improvement should not be subject to liability after a number of years.

With the historical perspective and noted weakness of sections 337.1 and 337.15, a brief look at the drafting differences in Califor-

156. See *supra* note 141.

157. See *supra* notes 4-5 and accompanying text for complete text of sections 337.1 and 337.15.

158. *Martinez v. Traubner*, 32 Cal. 3d 755, 760, 653 P.2d 1046, 187 Cal. Rptr. 251, 253, (1982).

159. See *Committee Transcripts, supra* note 42, at 2-8.

nia's statutes identifies areas that are ripe for revision at a time when no external pressures might function to cause another historical accident.

IV. CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 337.1 AND 337.15—DRAFTING DIFFERENCES

California's construction defect statutes of repose contain five obvious drafting differences. The most obvious difference is that section 337.1 imposes a repose period of four years on patent defects, whereas section 337.15 imposes a repose period of ten years on latent defects.¹⁶⁰ Section 337.1 preceded section 337.15 by four years and was based on the A.I.A. statute, which did not distinguish between patent and latent defects.¹⁶¹

The second major difference is that while section 337.1 expressly includes actions for personal injury and wrongful death, section 337.15 makes no reference to personal injury or wrongful death actions.¹⁶² This inadvertence seems to contradict the legislative intent behind all statutes of repose to limit long-term liability of those involved in the construction industry. Personal injury and wrongful death actions are lawsuits which are likely to be brought long after an improvement is complete and long after those in the construction industry have handed the improvement over to others. These lawsuits are no less difficult to defend than any other lawsuit when it comes to stale evidence, lost records, and lost witnesses. In addition, these lawsuits are likely to be costly, thus subjecting the contractor or architect to large scale liability.

The third difference is that while section 337.1 is silent on the issue of whether suits against sureties are time barred, section 337.15 includes the protection of the statutory bar for sureties.¹⁶³

The fourth drafting difference is that section 337.1 does not make any exception for actions based on willful misconduct or fraudulent concealment. Section 337.15, however, expressly excludes actions based on willful misconduct or fraudulent concealment.¹⁶⁴

160. See *supra* notes 4-5 for full text of sections 337.1 and 337.15.

161. See *supra* note 45 and accompanying text.

162. See *supra* notes 4 and 5.

163. See *supra* notes 4 and 5.

164. See *supra* notes 4 and 5.

Finally, section 337.1 does not define substantial completion. Section 337.15, however, sets specific guidelines for what constitutes substantial completion and defines substantial completion as completion "of the development or improvement."¹⁶⁵ This definition allows courts to hold that each party to the construction is deemed to have the date of substantial completion of his work apply with regard to the liability period for long-term projects¹⁶⁶ and furthers the legislative intent to limit long-term liability. Since section 337.1 does not define substantial completion of a development or improvement, the potential for misapplication exists unless reference to section 337.15 is made.

These individual drafting differences in California's "separate but related" sections 337.1 and 337.15 prove that the growing process for these two statutes remains incomplete. The addition of the ten-year statute of repose for latent defects four years after the enactment of the four-year statute of repose for patent defects has left California with two statutes that fail to be as effective as one statute could be. Consequently, California's construction defect statutes are a source of confusion in California construction lawsuits. In re-evaluating the use, the intent, and the drafting of the dual construction defect statutes, the time has come to blend these statutes into one comprehensive statute.

VI. PROPOSAL

This article proposes a model statute that incorporates a combination of elements from sections 337.1 and 337.15. The model statute provides a limitation period of eight years that is defined as a period of repose. This time limit balances the competing interests of assuring repose to those in the construction industry with the law of diminishing returns based on the percentage of claims filed within years after completion statistics.¹⁶⁷

165. See *supra* notes 4 and 5.

166. See *Liptak v. Diane Apts., Inc.*, 109 Cal. App. 3d 762, 167 Cal. Rptr. 440 (1980).

167. *Amend Statute of Limitations, 1967: Hearing before subcommittee no. 1 of the Committee on the District of Columbia of the House of Representatives, 90th Cong., 1st Sess. 28 (1967)* (study of distribution of claims by length of time). This study was made in 1964, using random sample of 570 professional liability claims then pending against architects and engineers and attached to the record as an exhibit. The cumulative percentage of claims in year eight was found to be 98.7% whereby adding two years the cumulative percentage of claims rose only to 99.6%. Comment, *Limitation of Actions: The Effect of Lamb v. Wedgewood South Corp. on*

A MODEL STATUTE FOR CALIFORNIA-UNIFICATION OF C.C.P.
SECTIONS 337.1 AND 337.15

EIGHT YEARS REPOSE; DEVELOPER, CONTRACTOR, ARCHITECT, ETC. OF REAL PROPERTY; ANY DEFICIENCY IN DESIGN, SUPERVISION, ETC.; INJURY TO PROPERTY

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, observation of construction, or construction of an improvement to real property more than eight years after the substantial completion of the development or improvement for any of the following:

- (1) Any deficiency in the design, specification, surveying, planning, supervision, observation of construction, or construction of an improvement to, or survey of, real property.
- (2) Injury to property, real or personal, arising out of any such deficiency.
- (3) Injury to the person or for wrongful death arising out of any such deficiency.

(b) If, by reason of such deficiency, an injury to property or the person or an injury causing wrongful death occurs during the seventh 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 nine years after the substantial completion of construction of such improvement.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section. Except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by other laws of this state for bringing any action.

(e) The limitation prescribed by this section shall not be asserted

Future Cases Determining the Constitutionality of G.S. 1-50(6), 19 WAKE FOREST L. REV. 1049 (1983). See also, Comment, *Limitation of Action Statutes for Architects and Builders - Blueprints for Nonaction*, 18 CATH. U. L. REV. 361 (1969).

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 the improvement constitutes the proximate cause for which it is proposed to bring an action.

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

(g) The eight year period specified in subdivision (a) shall commence upon substantial completion of the specific improvement. This date will be no later than the date of one of the following, whichever occurs first:

- (1) The final date of inspection of the improvement by the applicable public agency.
- (2) The date of recordation of a valid notice of completion.
- (3) The date of use or occupation of the improvement.
- (4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

VII. CONCLUSION

This model statute is proposed in response to the difficulties created by the existing statutes, and in the spirit of California's perpetual striving for progressive legislation and judicial application. Additionally, this model statute is proposed in response to the specific difficulties mentioned in this article that arise from the separate-but-related nature of sections 337.1 and 337.15. The combination of these statutes into one comprehensive statute that resolves their drafting differences should assure that the model statute is properly interpreted and applied.

First, the proposed statute will eliminate the need to distinguish whether the subject defects are latent versus patent. Once discovered any defect will then be subject to the regular applicable statutes of limitations. One statute for both types of defects will eliminate the need to decide a question of fact—whether the defect was latent or patent—before the proper statute can be applied.

Second, although the model statute will bar actions for wrongful death and personal injury, the plaintiff will retain the right to sue those in possession and control of the property. The model statute

gives a one-year grace period to personal injury or wrongful death actions that accrue in the last year before the statute runs. These two factors should provide a reasonable period of repose for those in the construction industry, yet still assure an adequate time period over which to discover and file a construction lawsuit.

Third, the model statute protects the plaintiff by excluding all actions based on willful misconduct or fraudulent concealment. This protection previously existed only in section 337.15.

Fourth, the model statute limits the time for bringing a construction-related lawsuit. The time period of eight years is chosen particularly for its statistical relationship to the number of claims filed within eight years after substantial completion¹⁶⁸ and the interest in limiting long term liability in the construction industry. Eight years is proposed as the balancing point between the competing rights and liabilities here.

Finally, the model leaves no doubt regarding its nature. It states in its preface that it is a statute of repose.

When future California practitioners consider a construction defect lawsuit "priority one" is determining whether a lawsuit was filed within the applicable statute of limitations. If enacted this model statute will assure that when California practitioners are faced with applying a limitation statute to the facts of their case, they will not also be faced with a mass of confusion. This model statute will assure that every practitioner recognizes the statute's character as a statute of repose. Furthermore, the practitioner will not have to guess whether or not subject defects are latent or patent. Finally, the new eight-year time limit serves as a compromise between plaintiffs and defendant's interests and the old four-year and ten-year statutes. Adoption of the model statute proposed here should simplify and streamline a currently cumbersome and confusing area of the law.

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