Statutes of Repose--The Design Professional's Defense to Perpetual Liability

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STATUTES OF REPOSE—THE DESIGN PROFESSIONAL’S DEFENSE TO PERPETUAL LIABILITY

American engineering firms turn away over one billion dollars of work each year due to the fear of liability.\(^1\) The reluctance to accept work on new or existing projects stems from the fact that one out of every three firms is sued each year.\(^2\) More disturbing is the fact that thirty-nine percent of all claims made against design professionals were ultimately resolved without any payment to the claimant.\(^3\) Imposing this unduly burdensome liability upon design professionals has quelled innovative designs because of the heightened susceptibility to lawsuits.\(^4\)

These sobering statistics suggest that design professionals\(^5\) are being sued more often than they should and are serving as scapegoats for incidents caused by other parties or factors.\(^6\) The unjust

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\(^1\) AMERICAN CONSULTING ENGINEERS COUNCIL AGAINST LAWSUIT ABUSE, DESIGN PROFESSIONAL’S COALITION OF LONG ISLAND 1 (1995) [hereinafter ACEC]. “The average small engineering firm turns down $176,000 in work because of the threat of liability concerns and 90% of all firms have turned down work in the last year.” Id.; see also Judy Schriener, Design Firms “Go Bare” Due to the High Cost of Liability Coverage, ENGINEERING NEWS-RECORD, Dec. 10, 1990, at 19. This figure does not include the cost of premiums which is about four percent of a firm’s billings. Id. An additional important factor is that approximately 20% of the consulting engineering firms across the United States do not carry liability insurance. Id.

\(^2\) Milton F. Lunch, Liability Concerns Reshaping . . . Legal Environment; Opportunities and Risks, BUILDING DESIGN & CONSTRUCTION, Oct. 1990, at 84. In addition, 5132 construction arbitration cases were submitted to the American Arbitration Association in 1990. Id.; see also Robert Greenstreet, Legal Liability in Perspective P-A Practice, PROGRESSIVE ARCHITECTURE, Mar. 1986, at 55 (detailing rising number of claims against design profession and difficulties in obtaining adequate insurance).

\(^3\) See Schriener, supra note 1, at 19. Even where claims are settled successfully, the design professional spends an average of 115 hours on the case. Id.

\(^4\) See ACEC, supra note 1, at 1. A 1994 survey revealed 72% of the firms felt innovative engineering technology is discouraged because of the threat of lawsuits. Id.

\(^5\) See John J. Hare, Selecting the Best Construction Expert, N.J. LAW., Jan. 25, 1993, at 23 (defining terms “architect” and “engineer” under New Jersey law). The term “design professional” as used in this Note will encompass architects and engineers. Although education and licensing requirements are unique to each occupation, the judicial system has not differentiated between the two when imposing liability. Id.; see also Rabinowitz v. Hurwitz-Mintz Furniture Corp., 133 So. 498, 499 (La. Ct. App. 1931) (noting that “these two professions overlap, and in some instances, particularly where structural work is contemplated, it might as well be undertaken by an engineer as an architect”); Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178, 181 (Md. 1985).

\(^6\) William Jackson, Contractors Watch Warily as Court Weighs Design Case, BUSINESS FIRST (Columbus), May 2, 1994, at 4. Jackson argues that a design professional who has
placement of liability upon the design professional is magnified as the completed structure ages. Although design professionals customarily are involved in the design and construction of a structure they rarely play a role in its maintenance or repair, particularly when such maintenance is to be performed over a period of many years. The unfortunate consequence is that design professionals are held liable for structures over which they exercise no control.

Design professionals commonly rely upon a state's statute of limitations as a defense in such cases. However, a recent judicial trend across the United States applies the "discovery rule" to statute of limitations defenses. The discovery rule holds that a cause of action accrues the date the plaintiff discovers, or should have discovered, the defect at issue. This has severely curtailed the protection afforded design professionals by the statute of limitations. In response, many states have chosen to create an innovative alternate shield of protection—statutes of repose.

Although statutes of repose are referred to frequently as a type of statute of limitations, they are unique and have great significance in the context of the construction industry. They embody important policy decisions, and are imposed in society's best interest.

Part One of this Note will examine the history surrounding liability of design professionals. It will trace the evolution of design liability from the imposition of strict liability under the Hammurabi Code to the erosion of the doctrine of privity under United

had no control of a structure for over 25 years should not have to pay insurance premiums to protect himself from lawsuits arising from the design of that structure. Id.

7 See infra notes 118-120 and accompanying text.


11 See infra notes 97-98 and accompanying text.

12 See infra note 99 and accompanying text.


15 See Phillip Purcell, Statutes of Limitation-Clear as Mud Puddles, Specifying Eng'r 59 (Oct. 1987).

16 Nischwitz, supra, note 13.
States common law. Part Two will discuss the policies and theories supporting the use of statutes of limitations and their application to the design context. The differing judicial interpretations of such statutes will be addressed, namely the traditional rule and the discovery rule. Part Three will explain the theory and use of statutes of repose and their ability to limit the liability of design professionals. Finally, this Note will advocate the use of statutes of repose as an effective way to reduce the burden of liability on design professionals.

I. HISTORY OF DESIGN PROFESSIONAL LIABILITY

The scope of liability imposed upon design professionals for negligent design claims has varied greatly throughout history. In ancient Babylon, the Hammurabi Code, promulgated around 1775 B.C., held that a master builder who designed and built

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17 William D. Flatt, *The Expanding Liability of Design Professionals*, 20 *Mem. St. U. L. Rev.* 611, 615 (1990) (tracking different standards used to determine whether liability should be imposed upon design professionals). This Note will deal only with negligent design claims. A plaintiff is required to show four elements to prove a prima facie case against a design professional: (1) the design professional had a duty or obligation to conform to a required standard of conduct (duty); (2) the design professional failed to conform to the standard (breach); (3) the design professional's conduct was the proximate cause of the plaintiff's resulting injury (proximate cause); and (4) the injury resulted in actual loss or damage (damage). *Id.* at 616. *See also* Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985) (describing elements for negligent design and construction cause of action in context of architectural landscaping); *Black's Law Dictionary* 1032 (6th ed. 1990) (defining "negligence" as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"). "Malpractice" is defined as: [Failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or those entitled to rely upon them. *Id.* at 959.

Thus, a malpractice action is brought by the client of the design professional, while a negligence claim is brought by party who is injured and is not in the professional relationship. *See* Cubito v. Kreisberg, 69 A.D.2d 738, 742, 419 N.Y.S.2d 578, 580 (2d Dep't 1979), aff'd, 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980). The distinction becomes significant in determining which statute of limitation applies. *Id.*

18 *See infra* notes 19-45 and accompanying text.

19 William H. Rodgers, *Where Environmental Law And Biology Meet: Of Pandas' Thumbs, Statutory Sleepers, and Effective Law*, 65 *U. Colo. L. Rev.* 25, 33 (1993). Hammurabi, the King of Babylon, ruled from 1792 to 1750 B.C., and had inscribed almost three hundred laws into stone pillars to govern people's actions. *Id.* This code of "stipulated law" was the first of its kind, as earlier laws were simply the customs and habits of the people. *Id.*

20 Jay A. Felli, *The Elements of Ohio's Liability Provisions for Contemporary Design Build Architects an Unwillingness to Expand the Plan*, 17 *Dayton L. Rev.* 109, 110-11 (1991). The historical "master builder" had final authority over the design, engineering, and construction of the project. *Id.* The current role of the architect in some cases has reverted back to this "master builder" notion. *Id.; see also* Ronald H. Kahn, *Introduction: The Changing Role of the Architect*, 23 *St. Louis U. L.J.* 216, 217 (1979) (stating that,
structures was subject to strict liability. This harsh rule inflicted a punishment upon the master builder equivalent to the damage caused by the negligent design. Roman law subsequently modified this by adding a requirement of privity. The master builder still remained strictly liable for property damage and injuries caused by faulty design and construction. The law, however, imposed a duty to provide adequate plans and specifications for construction only to persons with whom the design professional directly contracted. This policy reduced the number of claims by substantially limiting the class of persons with standing to sue.

During the Renaissance period, a decrease in the liability of design professionals could be attributed to a redefinition of the role of the design professional. Complexities in the construction traditionally, typical master builder “was charged with responsibility for total success of construction project”).


If a builder has built a house for a man, and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain. If the child of the householder be killed, the child of that builder shall be slain. If the slave of the householder be killed, he shall give slave for slave to the householder. If goods have been destroyed, he shall replace all that has been destroyed; and because the house that he built was not made strong, and it has fallen in, he shall restore the fallen house out of his own personal property. If a builder has built a house for a man, and his work is not done properly, and a wall shifts; then that builder shall make that wall good with his own silver.

Id. 22 Nischwitz, supra, note 13, at 228-30 (discussing law of retaliation).

23 See generally OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW (1993). The history of Roman law begins in 753 B.C., when the city has been thought to have been founded, and continues to the date of Justinian’s death in 565 A.D. FREDERICK P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW (4th ed. rev. 1994).

24 WALTON, supra note 23, at 219-21. The punishments were still harsh as the Roman doctrine of lex talionis controlled. See BLACK’S LAW DICTIONARY 913 (6th ed. 1990) (“A[n] eye for an eye; a tooth for a tooth.”).

25 See Felli, supra note 20, at 112. The design professional was still liable for injuries arising from both the design and the erection of the structure despite the fact that the pool of claimants with standing significantly decreased under the privity doctrine. See also CLARENCE W. DUNHAM ET. AL., CONTRACTS, SPECIFICATIONS AND LAW OF ENGINEERS 435 (1979).

26 DUNHAM ET AL., supra note 25, at 429 (discussing how former privity requirement limited architect liability to persons with whom they contracted).

27 Id. at 435.

28 See generally TREVOR DEAN & KATE LOWE, CRIME, SOCIETY AND THE LAW IN RENAISSANCE ITALY (1994); FREDERIC W. MAITLAND, ENGLISH LAW AND THE RENAISSANCE (1901). Roman law was first taught in England around 1200, about the beginning of the Renaissance period which lasted into the 1500’s. FRANCIS DEZULUETA & PETER STEIN, THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200 (1990).

29 Felli, supra note 20, at 112-13. The Renaissance period recognized the separation of duties between the construction of a building and the design and supervision of the same. Id. Thus, architect liability in this era was limited to negligence with respect to the design and supervision of the construction. Id. at 113.
process and time constraints imposed by clients forced the master builder to specialize nearly exclusively in either the design or construction phase of the project. Design specialists, for example, were responsible for the "designing and planning of buildings," while having "only supervisory control of the construction process." This separation of the design and construction phases of a project reduced the potential liability of design professionals since they no longer assumed control of the entire project.

English law, as well as early American common law, assessed liability only when fraud or collusion was involved. Over time, American courts, following the lead of their English counterparts, expanded liability by recognizing claims based on negligent design. Two rules were applied to this new category of liability: a requirement of privity between the design professional and the claimant and an absolute bar to claims against the design professional arising after owner acceptance. These two rules protected design professionals by effectively shielding them from claims of third parties after acceptance. This policy encouraged innovative designs and provided courts with a "bright-line" standard to determine liability.

The next major development occurred with the erosion of the privity doctrine in the early 1900s and the ultimate abandon-
ment of privity in the area of architecture and engineering.\textsuperscript{40} The general rejection of the "owner acceptance rule" soon followed.\textsuperscript{41} These two radical changes in doctrine reflected a shifting trend in the law, emphasizing consumer welfare over design professionals' creativity.\textsuperscript{42} The prevailing attitude was that business entities were better equipped to spread the cost in such cases by obtaining liability insurance and passing the increased cost of business on to the clients.\textsuperscript{43}

With the fall of these common law shields, present day design professionals face an exponential increase in liability.\textsuperscript{44} Their liability extends to a class of people even the ancient Babylonian society failed to include in its strict and uncharitable rules.\textsuperscript{45}

that privity is not required in product liability case which resulted in personal injury to consumer due to manufacturer's negligence. However, the same New York court refused to extend this rule to professionals in Ultramares Corp. v. Touche, 255 N.Y. 170, 188, 174 N.E. 441, 448 (1931) (requiring element of fraud by professional to allow recovery for economic loss).


\textsuperscript{41} Nischwitz, supra note 13, at 622. Some jurisdictions still apply the owner acceptance rule. See, e.g., Easterday v. Masiello, 518 So. 2d 260, 261-62 ( Fla. 1988) (stating that if defect is patent and owner accepts project, contractor, architect or engineer is insulated from liability).

\textsuperscript{42} Flatt, supra note 17, at 615. This trend promoting consumer welfare is evident by the strict liability standards imposed on product manufacturers. Id.

\textsuperscript{43} Id. at 619.

\textsuperscript{44} See id. at 611; see also Boswell v. Laird, 8 Cal. 469, 490 (1857).

\textsuperscript{45} See State v. Ireland, 20 A.2d 69, 69-71 (N.J. 1941). In Ireland, an architect was indicted for manslaughter when a bathhouse collapsed and killed a woman. Id. at 445. The design was found to be negligent because it violated the building code. Id. The Court found the negligent design created a public nuisance and therefore was a continuous offense which disallowed any statute of limitations defense. Id.; see also JAMES ACRET, ARCHITECTS AND ENGINEERS 94 (3d. ed. 1993) [hereinafter ARCHITECTS AND ENGINEERS].
II. Statutes of Limitation

With the loss of traditional defenses, design professionals now must rely heavily upon statutes of limitations defenses to protect themselves against any unjustified negligence claims.46 These statutes are intended to further several policy interests.47 First, the primary purpose of statutes of limitation is to protect the defendant.48 These statutes protect the design professional from the excessive burden of defending claims where "evidence has been lost, memories have faded, and witnesses have disappeared."49 Statutes of limitation are also meant to protect against false and fraudulent claims.50 In addition, public policy dictates that there should come a time when the design professional is relieved of liability arising from old and stale claims.51 Finally, unsettled claims disrupt and frustrate the public's interest in finaliz-
ing commercial transactions. Statutes of limitations are affirmative defenses to be pleaded by the defendant, however, statutes of limitations do not prevent the filing of unjustified claims. Moreover, since each state creates its own statute of limitations, they vary greatly from state to state, and are subject to differing judicial interpretations.

An additional issue to consider, especially in the construction context, is whether the design professional should be held to a higher standard at the time the suit is brought than existed at the time of design. A jury deciding whether a design professional was negligent in designing a structure twenty-five years ago might have a difficult time evaluating the actions of the professional in the context of the technology available at that past date and would be likely to impose standards based on present-day technology. In this scenario, the potential for prejudice to the design professional is enormous.

Courts have offered two conflicting approaches to interpreting the application of statutes of limitations to cases involving design professionals. Some courts read these statutes liberally in an effort to promote certainty and finality. Other courts view the defense as a technicality that deprives plaintiffs of an action, and seek alternatives to enforcing them.

\[52\] Cruz, supra note 48, at 518. See, e.g., Sweet, supra note 50, at 495. "[Statutes of limitation] work to promote certainty and finality in transactions, by terminating contingent liabilities at specific points in time." Id.


\[54\] N.Y. Civ. Prac. L. & R 3018(b).

\[55\] Construction Litigation Handbook, supra note 9, at 405.

\[56\] Id. at 336.

\[57\] Id. Although it is not legally proper, a jury may be unable to separate the present level of technology from that which existed at the time the design professional allegedly was negligent in the design. Id.

\[58\] Id.


\[60\] See infra notes 61-62 and accompanying text.

\[61\] See Construction Litigation Handbook, supra note 9, at 405 (noting that liberal construction encourages prompt enforcement of rights when fact finding is easiest).

\[62\] See Architects and Engineers, supra note 45, at 336.
When applying statutes of limitations, courts have two basic tasks. The first task is to determine which statute of limitations is applicable to the specific circumstances. Second, the court must determine the point at which the statutory period accrues.

A. The Traditional Rule of Accrual

The traditional rule holds that a cause of action accrues at the time of the negligent act, thereby causing the statute of limitations to begin to run. This view focuses on the time of the defendant's act, rather than the time the plaintiff discovers the negligent design or construction. Thus, a cause of action may accrue long before any actual injury has occurred.

63 See infra notes 64-65 and accompanying text.

64 Architects and Engineers, supra note 45, at 336-37. The statute of limitations establishes certain periods for each cause of action. Id. Typical classifications are: negligence, breach of warranty, breach of contract, malpractice, bodily injury, property damage, fraud, deceit, misrepresentation and causes arising under the U.C.C. or special statute (e.g. improvements to real property). Id. A criticism of the statute of limitations is that the length of time for actions based in contract is usually longer than that based in tort. Id. at 337. Accordingly, it is questionable to hold the defendant open to liability longer on the basis of contract compared to tort. Id. The problem is especially evident where the design may be negligent and also a breach of contract. Id. The court must choose which statutory period to apply. Id. Recovery by the plaintiff may be determined by which period is chosen. Id.

65 Construction Litigation Handbook, supra note 9, at 405. The time the statute begins to run is generally a question of law which is determined by the court. See Devenney v. North Franklin Township Volunteer Fire Dep't, 228 A.2d 61 (N.J. 1967); Smith v. Bell Tel. Co., 153 A.2d 477, 481 (Pa. 1959) (stating "whether the statute has run on a claim is usually a question of law for the judge but where, as here, the issue involves a factual determination, i.e. what is a reasonable period, the determination is for the jury").

66 Cruz, supra note 48, at 520. Although this is described as the traditional rule, it is only traditional in the sense it preceded the discovery rule. The more proper term would be "time of the negligent act." Id.

67 65th Center Inc. v. Copeland, 825 S.W.2d 574, 580 (Ark. 1992) (holding that four year statute of limitations barred negligent design claim by pedestrian in absence of fraudulent concealment). See generally, Construction Litigation Handbook, supra note 9, § 22.05; Cruz, supra note 48, at 521.

68 See E.J. Korvette Div. of Spartan Industries, Inc. v. Esko Roofing Co., 350 N.E.2d 10, 11-12 (Ill. 1976) (stating traditional rule but not following it). A number of states still follow the traditional rule, including Arkansas, Kentucky, Iowa, Florida, and New York. Construction Litigation Handbook, supra note 9, at § 22.00. However, many of these states have modified the rule to allow for the continuous treatment doctrine. See, e.g., Board of Educ. v. Thompson Constr. Corp., 111 A.D.2d 497, 499, 488 N.Y.S.2d 880, 882 (2d. dept. 1985).

69 See E.J. Korvette, 350 N.E.2d at 12; see also Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975) (holding cause of action accrued for statute of limitations purposes at time defective materials were installed).

70 Construction Litigation Handbook, supra note 9, at 348. The time of accrual is the moment the plaintiff could first maintain a cause of action against the defendant. Id. at 351. Negligent design or construction could constitute legal injury to the plaintiff even if he is not aware of the wrong. Id. This construction of the time of accrual for statute of limitations purposes has been criticized when applied to situations where the negligent act may not cause injury until some indefinite time in the future. Id. at 348.
and the statute of limitations may run long before a defect is found.\textsuperscript{71} In support of this view, many courts have held that "mere ignorance that a cause of action exists will not stop the statute from running."\textsuperscript{72} Indeed, a suit may be brought before there is any palpable injury because the "breach" for which the architect is responsible refers to the breach of the duty of reasonable care, rather than the injury itself.\textsuperscript{73}

This rule varies substantially from jurisdiction to jurisdiction,\textsuperscript{74} depending on the services the design professional provides.\textsuperscript{75} Although it is often assumed that architects and engineers are responsible solely for the preparation of plans, in reality they frequently are responsible for much more.\textsuperscript{76} Courts have noted that dates of accrual occur at different times, depending upon whether the design professional was merely the designer of the structure or more extensively involved in the construction and maintenance of the structure.\textsuperscript{77}

\textsuperscript{71} See, e.g., Mastellone v. Argool Corp., 82 A.2d 379, 383 (Del. 1951); Wellston Co. v. Sam N. Hodges, Jr. & Co., 151 S.E.2d 481, 482 (Ga. Ct. App. 1966) (holding that right of action for collapse of roof accrued when building was negligently designed and constructed, not when building collapsed).

\textsuperscript{72} See Cruz, supra note 48, at 521.

\textsuperscript{73} Id. at 521.

\textsuperscript{74} Construction Litigation Handbook, supra note 9, at 406. Particularly in construction cases, it is common for the plaintiff to assert various causes of action for the same defect. In one California case, a homeowner sued his architect when he noticed hairline cracks in his home; he alleged fraud, strict liability, negligence and breach of warranty. McClosky v. Carlton Builders, 211 Cal. Rptr. 659, 659 (1985) (holding that three different statutes of limitations applied). See also Farash Constr. Corp. v. Standco Developers Inc., 139 A.D.2d 899, 900, 527 N.Y.S.2d 940, 941 (4th Dept 1988) (restating New York rule that claim against design professional for defective construction accrues for statute of limitations purposes upon completion of construction); South Barrington Sch. Dist. v. Goodrich, 382 A.2d 220, 223 (Vt. 1977) (ruling that statute began to run once building was completed, accepted and architect certified that building was constructed according to his specifications); Nelson v. Commonwealth, 368 S.E.2d 239, 248 (Va. 1988) (holding that statute of limitations began to run when design plans were completed and accepted).

\textsuperscript{75} See, e.g., Jervis & Levin supra note 8. Although the resulting time of commencement varies depending on the kind of services the design professional provides, in reality the traditional rule remains that the statute begins to run "at the time of the negligent act". See Cruz, supra note 48, at 521-22; see also, Sweet, supra note 50, at 323-24. Thus, the negligent act itself will differ when the design professional has different duties, but the statute of limitations starts to run at the time of the negligent act. See generally Nischwitz, supra note 13, at 234-46 (discussing duties of architect arise in light of various tasks for which he or she is responsible).

\textsuperscript{76} See Clarence W. Dunham & Robert D. Young, Contracts, Specifications, and Law for Engineers 385-86 (2d. ed. 1971). Besides designing the structure, the architect typically will also prepare cost estimates, obtain bids from contractors, and inspect the contractor's work. Id. at 386.

\textsuperscript{77} See supra notes 75-76 and accompanying text.
The traditional role of an architect or engineer is to design a structure, often working in conjunction with an owner to develop a unique building plan. In common practice, the architect specifies the materials to be used, while the engineer performs the calculations to assure that the chosen materials are suitable for the design and location of the structure. Where these are the only services provided to the owner, the traditional rule is that the statute of limitations begins to run upon completion and tender of the design.

Today, however, it is quite common for the architect not only to design the building, but also to supervise its construction. Where this occurs, the statute of limitations begins to run when the building is completed. Courts, however, differ in their definition of a completed building. Some courts have held that a building is "completed" when it is "substantially complete" or ready for use by the owner. Before the contractor is paid, many states require the architect to certify that the building is built to the specifications in the design plans, a process called final certification.

78 See Jervis & Levin, supra note 8, at 60; Felli, supra note 20, at 115.
79 Dunham & Young, supra note 76, at 384-85.
80 See, e.g., Comptroller ex rel. Virginia Military Inst. v. King, 232 S.E.2d 895, 900 (Va. 1977). The Court held that the Institute's action for negligent design accrued when the architect's designs were accepted and paid for by the institute. Id. The court reluctantly followed the rule that the statute of limitations begins to run when the cause of action accrues, not when the injury is discoverable. Id. Additionally, although other claims of the Institute might not be barred, the negligent design claim was barred. Id. See City of Bluefield v. Autotrol Corp. 723 F. Supp. 362, 366 (S.D.W.V. 1989) (holding cause of action for breach of reasonable care in design arose at tender of design).
81 Jervis & Levin, supra note 8, at 62. Thus an architect may offer services to the customer, similar to those of a general contractor. Felli, supra note 20 at 115. "The architect's duty to supervise encompasses two distinct areas: (1) supervision to prevent deviations from the plans and specifications, and (2) supervision of construction methods and techniques." Nischwitz, supra note 13, at 234.
82 Sears, Roebuck and Co. v. Enco Associates, Inc., 43 N.Y.2d 389, 395, 372 N.E.2d 555, 557, 401 N.Y.S.2d 767, 770 (1977). Two rationales behind this rule are that the architect had the power to correct any defect in the work prior to its completion, and the owner has a reasonable expectation that the architect will perform his duties properly, including finding and correcting flaws. Construction Litigation Handbook, supra note 9, at 353.
83 See supra notes 81-82, infra notes 84-85 and accompanying text.
84 Cruz, supra note 48, at 522. "Substantial completion" does not require that every detail is complete. Id. at 522 n.66. "Substantial performance" has been defined as: "That performance of the contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promisee the full contract price subject to the promisor's right to recover whatever damages may have occasioned him by the promisee's failure to render full performance." Ocean Ridge Dev. Corp. v. Quality Plastering, Inc., 247 So. 2d 72, 75 (Fla. Dist. Ct. App. 1971).
85 See Cruz, supra note 48, at 522.
86 Id. Final certification differs from substantial completion in that final certification signifies that the structure is satisfactorily completed and the owner should now pay the con-
When a state statute requires it, the courts often hold that a structure is complete upon final certification. However, courts are reluctant to hold that the statute only begins to run after final certification when final certification is merely a formality.

In states applying the traditional rule of accrual, liability is often expanded by the doctrine of continuous treatment. This doctrine was developed in medical malpractice cases, based on the reasonable expectation that a professional would remedy any mistake found in their own work. When the design professional continues to work on a building, the statute of limitations will not begin to run until the professional relationship is severed. Under this doctrine, the statute of limitations will not begin to run, even when the architect issues final certification, if he or she continues to modify an element of the structure. The statute begins to run when the design professional has concluded all modifications, regardless of how long they take.

tractor and sever the contractual relationship. *Id.* at 522 n.66. Substantial completion only refers to the status of the project being fit for use. *Id.*; see also JERVIS & LEVIN, supra note 8, at 74-75.


88 *See* State v. Lundin, 60 N.Y.2d 987, 989, 459 N.E.2d 486, 487, 471 N.Y.S.2d 261, 262 (1983). The court held that the construction was complete for purposes of the statute of limitations when it was substantially complete. *Id.* The court did not allow the statute of limitations to be extended to the time of final certification because it was the owner, as opposed to the architect, who controlled the issuance of this certificate. As a result, the issuance of that certificate represents a significant contractual right of the owner and concomitant right of the architect. *Id.*


90 *See* Cotter, *supra* note 59, at 381.

91 CONSTRUCTION LITIGATION HANDBOOK, *supra* note 9, § 11.11, at 384. See County of Broome v. Vincent Smith, Inc., 358 N.Y.S.2d 998, 1000 (Sup. Ct. Spec. T. Broome County 1974) (defining continuous treatment doctrine as accruing when treatment is ended after course of treatment by professional which includes wrongful acts and omissions that are continuous); see also Cotter, *supra* note 59, at 381-82 (discussing physician/patient relationship as analogous to architect/owner relationship).

92 *See* Northern Montana Hosp. v. Knight, 811 P.2d 1276, 1280 (Mont. 1991) (holding that because hospital relied on architect's repeated inspections and assurances that heating and ventilation problems were due to negligence of hospital employee or contractor, hospital's cause of action did not arise until professional relationship was severed).

93 *See* CONSTRUCTION LITIGATION HANDBOOK, *supra* note 9, § 11.11, at 384-87; § 22.05, at 413-14.
B. The Discovery Rule

Many actions are barred under the traditional rule because the statute of limitations expires long before the defect is discovered.\(^{94}\) A growing number of jurisdictions, however, have rejected the traditional rule in favor of the discovery rule.\(^{95}\) Under the discovery rule, the statute begins to run when a person of ordinary intelligence has sufficient facts to know, or to have reason to know, that a defect exists.\(^{96}\)

The current judicial trend favors the discovery rule over the traditional view.\(^{97}\) Although courts seem willing to apply the discovery rule to the construction industry, they often limit the application to cases in which the lapse of time does not raise additional problems of proof or facilitate fraudulent claims.\(^{98}\)

Courts generally have held that issues regarding statutes of limitation are resolved by determining when the plaintiff knew or should have known of the defect.\(^{99}\) Some courts, however, require an additional step and hold that, in addition to discovery of the

\(^{94}\) See, e.g., Garvey v. Rosaneli, 601 A.2d 1334, 1338 (Pa. 1992); Argust v. Dick Mackey Gen. Contracting Co., 568 A.2d 255, 257 (Pa. 1990). The discovery rule applies not only to personal injury claims but also to property damage claims. \(\text{Id.}\)

\(^{95}\) Nischwitz, supra note 13, at 224 (noting that discovery rule should be used when injury is "likely to occur long after the negligent act"). There is some question as to whether the day the action accrues is to be included in the statutory period. See generally James D. Ghiardi, \textit{Statute of limitation—Computing Time}, 66 Wis. Law. 16 (March 1993).

\(^{96}\) \textit{CONSTRUCTION LITIGATION HANDBOOK}, supra note 9, at § 22.05.

\(^{97}\) See, e.g., Board of Directors of Assoc. of Apartment Owners of Regency Tower Condominium Project v. Regency Tower Venture, 635 P.2d 244, 248 (Haw. Ct. App. 1981) (stating developer's claims for damages from architectural malpractice were barred by statute of limitations); Rozny v. Marnul, 250 N.E.2d 655, 663 (Ill. 1969) (holding surveyor liable for inaccurate survey); Hilliard and Bartko Joint Venture v. Fedco Sys., Inc., 522 A.2d 961, 969 (Md. 1987) (holding that arbitration was timely where owner found defect within one year and then filed for arbitration within three years where construction contract provided that contractor would correct defects found within one year of completion of contract); Board of Regents v. Wilscam Muffins Birge, Inc., 433 N.W.2d 478, 484-85 (Neb. 1988) (holding University's action was barred by two year statute of limitations since University knew or should have known of facts that would have led to discovery of architect's negligence at earlier date); Hall v. Luby Corp., 556 A.2d 1317, 1318 (N.J. 1989) (holding elevator installation was improvement to real property within personal injury statute of limitations); Gevaart v. Metco Constr. Inc., 760 P.2d 348, 349 (Wash. 1988) (holding claims against builders for negligent construction and design accrued when plaintiff should discover injury resulting from negligence).


\(^{99}\) Allen v. Sundean, 137 Cal. Rptr. 883, 886 (1982). "[A] plaintiff's cause of action for property damage caused by latent defects accrues 'from the point in time when plaintiff's became aware of defendant's negligence as a cause . . . .' \(\text{Id.}\) Shaw v. Ortel, 484 N.E.2d 780, 787 (Ill. 1984). "Under a discovery rule, a cause of action does not accrue until a person knows or reasonably should know that it was wrongfully caused. \(\text{Id.}\)"
defect, the identity of the tortfeasor must be known before the cause of action accrues. 100

Although the traditional view brings about a fair result when the injury or damage occurs contemporaneously with the negligent act, this is seldom the case with negligent design claims. 101 Latent design defects may be undetectable until many years after the statute of limitations has lapsed, leaving the injured plaintiff with no cause of action against the negligent designer. 102 Due to this potentially harsh result of the traditional application of the statute of limitations, courts have developed the discovery rule. 103

III. STATUTES OF REPOSE

For the reasons described above, the statute of limitations defense has not reduced significantly the liability of design professionals. 104 In response, groups such as the Associated General Contractors of America, National Society of Professional Engineers, and American Institute of Architects have lobbied state legislators to pass special statutes of limitation for design professionals, known as statutes of repose. 105 These statutes specify a

100 See Construction Litigation Handbook, supra note 9, § 22.05, at 413.
101 See Nischwitz, supra note 13, at 223.
102 Id. at 224.
104 See Mills v. Killian, 254 S.E.2d 556, 558 (S.C. 1979) (“The modern trend in professional negligence or malpractice cases . . . is that accrual is upon discovery by the injured party.”). Since the date of accrual could be many years after the design, the design professional still faces liability well into retirement. Cotter, supra note 59, at 363.
certain length of time during which a cause of action may arise against the design professional.\footnote{106} Once this time has elapsed, all causes of action are barred completely, regardless of when the defect is discovered.\footnote{107}

As of 1994, forty-six states and the District of Columbia have enacted statutes of repose for design professionals.\footnote{108} These statutes provide a means for the design professional to combat the far reaching effects of the discovery rule.\footnote{109} Without statutes of repose, design professionals are potentially liable as long as their projects exist.\footnote{110} While these statutes create limited protection for

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\footnote{106}{See \textit{Black's Law Dictionary} 1411 (6th ed. 1990). Statutes of repose are also known as completion statutes. See \textit{Sweet}, supra note 50, at 510.}

\footnote{107}{Universal Eng'g Corp. v. Perez, 451 So. 2d 463, 465 (Fla. 1984). Statute of repose provisions "cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of accrual of the cause of action or of notice of the invasion of a legal right." \textit{Id.} at 465 (alteration in original). See Kline v. J.I. Case Co., 520 F. Supp. 566, 566 (N.D. Ill. 1981). "This statute [of repose] . . . limits a manufacturer's potential liability by limiting the time during which a cause of action can arise . . . the statute serves to bar a cause of action before they accrue." \textit{Id.}}

\footnote{108}{J. ALPERN, supra note 48, at 2014-24. Iowa has no statute of repose. Kansas, New York and Vermont have not specifically enacted statutes for design professionals but in certain circumstances general statutes are deemed to apply. \textit{Id.}}

\footnote{109}{\textit{Id.}}

\footnote{110}{\textit{Id.}}
architects and engineers, other parties involved in the construction process, such as building owners, tenants, suppliers and distributors are not similarly protected.\textsuperscript{111} This circumstance has led to numerous constitutional challenges to statutes of repose on the basis of equal protection.\textsuperscript{112} Such statutes, however, have been held constitutional even where the legislature has chosen to exclude certain parties in the construction process.\textsuperscript{113} Courts in these instances have allowed legislatures leeway in selectively specifying parties to be covered under the statutes.\textsuperscript{114}

A. Rationale Behind Statutes of Repose

Legislatives have set forth three basic policy arguments to justify statutes of repose for design professionals.\textsuperscript{115} First, the unfairness of liability throughout a professional's lifetime fosters insta-
bility in the construction industry.\textsuperscript{116} Second, the difficulty in producing reliable evidence long after the completion of the design and construction causes great concern.\textsuperscript{117} Finally, buildings have long life spans\textsuperscript{118} and are particularly susceptible to deterioration.\textsuperscript{119} In these cases negligent maintenance, rather than improper design or specification of materials, could be the cause of injuries.\textsuperscript{120}

Therefore, statutes of repose are needed to promote fairness to the design professional. Statutes of repose differ from the traditional statutes of limitation.\textsuperscript{121} Statutes of repose can circumvent the cause of action before it manifests because discovery of the defect, as required by the discovery rule, could occur after the repose period.\textsuperscript{122}

A key distinction between the two forms of limitation is the time at which the limitation period begins.\textsuperscript{123} The ordinary statute of

\textsuperscript{116} Cotter, supra note 59, at 363 (addressing concern that architects theoretically could be liable throughout their lifetime and opposes principle that liability should come to end).

\textsuperscript{117} Id. at 384. "Passage of time severely handicaps the defense of an action." Id.; see also Nischwitz, supra note 13, at 225. "The passage of time prejudices the defendant in his defense." Id.

\textsuperscript{118} See Gary Herfel, Engineer's Liability: Does It Ever End?, SPECIFYING ENG'R, July 1983, at 51 ("Buildings designed by engineers typically have effective useful lives of 20 to 100 years or longer."). "Building and engineering projects have life expectations measured in decades, if not centuries . . . ." See E. Wayne Taff, A Defense Catalogue for the Design Professional, 45 UMKC L. Rev., 75, 91 (1976).

\textsuperscript{119} Id.

\textsuperscript{120} See Nischwitz, supra note 13, at 225. "The question of improper maintenance by an owner becomes a possibility as the proximate cause of an injury caused by structural failures." Id.; see also Herfel, supra note 118, at 51. One example of this phenomenon involves reinforced concrete parking garages in the northern states in the late 1960s. Id. De-icing salts and freeze-thaw cycles deteriorated these structures resulting in dangerous conditions and injuries. Id.


\textsuperscript{122} See Nischwitz, supra note 13, at 225-26. This difference explains the terminology used in describing the statutes. Id. Statutes of repose are considered preemptive, while statutes of limitation are prescriptive. Id.; see also Kush v. Lloyd, 616 So. 2d 415, 418 (Fla. 1992) The court stated:

[In contrast to a statute of limitation, a statute of repose precludes a right of action after a specified time which is measured from the incident of malpractice, sale of a product, or completion of improvements, rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued.

\textsuperscript{123} SWEET, supra note 50, § 1107, at 258. See Moore, supra note 121, at 1148 n.22; ; see also Bauld v. J. A. Jones Constr. Co., 357 So. 2d 401, 402 (Fla. 1978)).
limitations commences on the date the cause of action accrues, while the statute of repose period begins to run on a specific date.\textsuperscript{124} This date is usually the point at which the project is substantially completed, regardless of whether there has been an injury or whether a cause of action has accrued.\textsuperscript{125} Statutes of repose merely define legal rights or the lack thereof on the basis of time.\textsuperscript{126}

B. Interrelationship of Statutes of Limitation and Repose

Statutes of limitation and statutes of repose co-exist so that the legislative enactment of a statute of repose does not nullify a de-

Rather than establishing a time limit within which [an] action must be brought, measured from the time of accrual of the cause of action, these [statutes of repose] provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work. They do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right.

\textit{Id.} \textsuperscript{124} See Moore, \textit{supra} note 121, at 1148 n.22 (explaining statutes of repose begin to run at artificial points in time not relating to injuries sustained).

\textsuperscript{125} \textit{Id.} One problem with statutes of repose is determining when completion occurs. Some statutes have addressed this problem by specifically defining the point at which the statute runs. \textit{See, e.g., 10 DEL. CODE ANN. § 8127 (Supp. 1987).} The Delaware statute allows actions to be brought within six years from the earliest of the following dates:

\begin{itemize}
  \item \textit{a.} The date of purported completion of all the work called for by the contract as provided by the contract if such date has been agreed to in the contract itself;
  \item \textit{b.} The date when the statute of limitations commences to run in relation to the particular phase or segment of work performed pursuant to the contract in which the alleged deficiency occurred, where such date for such phase or segment of work has been specifically provided for in the contract itself;
  \item \textit{c.} The date when the statute of limitations commences to run in relation to the contract itself where such date has been specifically provided for in the contract itself;
  \item \textit{d.} The date when payment in full has been received by the person against whom the action is brought for the particular phase of such construction or for the particular phase of such designing, planning, supervision, and/or observation of such construction or manner of such construction, as the case may be, in which the alleged deficiency occurred;
  \item \textit{e.} The date the person against whom the action is brought has received final payment in full, under the contract for the construction or for the designing, planning, supervision, and/or observation of construction, as the case may be, called for by contract;
  \item \textit{f.} The date when the construction of such improvement as called for by the contract has been substantially completed;
  \item \textit{g.} The date when an improvement has been accepted, as provided in the contract, by the owner or occupant thereof following the commencement of such construction;
  \item \textit{h.} For alleged personal injuries also, the date upon which it is claimed that such alleged injuries were sustained; or after the period of limitations provided in the contract, if the contract provides such a period and if such period expires prior to the expiration of 2 years from whichever of the foregoing dates is earliest.
\end{itemize}

\textit{Id.} \textsuperscript{126} ARCHITECTS AND ENGINEERS, \textit{supra} note 45, at 365; CONSTRUCTION LITIGATION HANDBOOK, \textit{supra} note 9, § 22.04, at 408. "The unique and distinctive feature of statutes of repose is that they dissolve all grounds of liability . . . solely by the lapse of time." \textit{Id.}
fense based on a statute of limitations.\textsuperscript{127} Nevertheless, they must be considered separately. The statute of repose does not extend the statute of limitations.\textsuperscript{128} Rather, it is an absolute limitation preventing all claims outside the specified period.\textsuperscript{129} Claims instituted under the statute of repose are actionable so long as they are also instituted within the statute of limitations period.\textsuperscript{130}

IV. IN SUPPORT OF STATUTES OF REPPOSE

It is clear that the ineffectual protection offered by statutes of limitations has posed significant obstacles for innovative design professionals.\textsuperscript{131} Skyrocketing insurance rates faced by design professionals and requirements that small practitioners obtain unreasonable amounts of coverage are palpable examples of the weakness of statutes of limitation and evidence the need for statutes of repose.\textsuperscript{132}

Further, reliance on statutes of limitation for protection of design professionals is misplaced.\textsuperscript{133} The traditional rule, although offering more protection than the discovery rule in the construction context, seems to have little support in the judiciary.\textsuperscript{134} Areas in which the discovery rule is enforced, such as the medical profession and the manufacturing industry, are manifestly different from the construction industry.\textsuperscript{135} Both the medical profession and the manufacturing industry involve the repetition of a technique or product that is proven to be effective.\textsuperscript{136} By its very nature, the work of a design professional calls for artistic creativity, and thus requires a different standard than other industries.\textsuperscript{137}

\textsuperscript{127} See Architects and Engineers, supra note 45, at 122.
\textsuperscript{128} Id.
\textsuperscript{129} See Nischwitz, supra note 13, at 225.
\textsuperscript{130} Id. Statistical evidence, which supports the need for statutes of repose, suggests few legitimate claims are brought after a certain period of time elapses. Cotter, supra note 59, at 363.
\textsuperscript{131} See Nischwitz, supra note 13, at 226-27. In the area of workers' compensation, for example, the design professional is exposed to liability. Id. While workers' compensation laws do not permit employees to sue their employers, injured parties are not precluded from suing the design professional. Id.
\textsuperscript{132} See Attorney General Comm., supra note 48, at 1-5.
\textsuperscript{133} See supra notes 94-103 and accompanying text.
\textsuperscript{134} See Attorney General Comm., supra note 48, at 1-5.
\textsuperscript{135} See Cotter, supra note 59, at 383.
\textsuperscript{136} Id. at 380. In assessing the differences between manufacturing and construction, Cotter notes, "[t]he manufacturer makes standard goods and develops standard processes." Id. (quoting 2 F. Harper & James, The Law of Torts § 18.5 (1956)).
\textsuperscript{137} Id.
Expanded liability has a "chilling effect on creativity."\textsuperscript{138} In addition, in medical malpractice and attorney malpractice, the injury is likely to occur between parties in privity.\textsuperscript{139} Hence the time that might elapse between the injury and discovery is naturally limited.\textsuperscript{140} Herein lies the major difference between the two varieties of professional malpractice.\textsuperscript{141} Furthermore, in medical malpractice and products liability, the chance of a defect being aggravated by intervening forces in the control of the plaintiff is slim.\textsuperscript{142} What may have been a harmless error on the part of the architect or engineer can be aggravated greatly by subsequent acts of owners or those responsible for upkeep of the facility.\textsuperscript{143}

V. CONCLUSION

The design professional’s stock-in-trade is creativity. Innovative structural designs are the signatures of America’s great architects and engineers. In this era, however, an alarmingly high rate of projects are refused each year due to the threat of liability for defects that are beyond the control of the design professional. Such long-term, seemingly perpetual, liability impedes creativity and increases costs throughout the construction industry.

One measure intended to alleviate the liability of design professionals is the statute of limitations. Under the traditional rule, a statute of limitations frequently protected a design professional from liability due to a latent defect that did not appear until years after the statute had run. The more modern discovery rule, however, offers little protection because the statute of limitations usually does not begin to run until the defect is found. Since the judicial trend favors the discovery rule, statutes of limitation are increasingly ineffective to protect design professionals. Statutes

\textsuperscript{138} Earley, supra note 37, at 317 (1977). In discussing the “chilling effect on creativity” that results from excessive liability “[t]he availability of third party liability coupled with the publicity of a few disproportionate recoveries serves to deter creativity.” Id. (citation omitted).

\textsuperscript{139} Cotter, supra note 59, at 383. The activities of physicians and attorneys usually affect only the patient or the client. Id. This provides built-in immunity from third party suits in most cases. Id.

\textsuperscript{140} Id.

\textsuperscript{141} Id. at 383. “The attorney’s and physician’s malpractice is normally manifested within a few years... but it is very possible that, given the durability of buildings, the consequences of the architect’s or builder’s negligence may manifest themselves only after many years.” Id.

\textsuperscript{142} Id.

\textsuperscript{143} Id.
of repose offer a far more effective form of protection against perpetual liability.

Statutes of repose strike a balance between protecting design professionals against stale claims and offering claimants the right to seek redress for their injuries. Statutes of repose place an absolute time limit on when a design professional can be held liable for a negligent design. Holding design professionals perpetually liable for structures over which they have no future control costs society in the form of unnecessary lawsuits and impedes innovation in building design. The most effective way to revitalize the construction industry is to limit the liability of design professionals through the use of statutes of repose.

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