The Commonwealth of Massachusetts

REPORT
OF THE
LEGISLATIVE RESEARCH COUNCIL
RELATIVE TO
A STATUTE OF LIMITATIONS
FOR MALPRACTICE AGAINST ARCHITECTS,
ENGINEERS AND SURVEYORS

For Summary, See
Text in Bold Face Type

April 3, 1968
The Commonwealth of Massachusetts

ORDERS AUTHORIZING STUDY

(House, No. 4815 of 1967)

Ordered, That the legislative research council be directed to investigate and study the subject matter of current house document numbered 2603, providing a limitation of three years for the bringing of actions of contract or tort for malpractice, error or mistake against architects, professional engineers and land surveyors, and to file the results of its statistical research and fact-finding with the clerk of the senate on or before the last Wednesday of January, nineteen hundred and sixty-eight.

Adopted:
By the House of Representatives, July 11, 1967
By the Senate, in concurrence, July 13, 1967

(Unnumbered Joint Order of January 29, 1968)

Ordered, That the time be extended to the second Wednesday of March, 1968 wherein the Legislative Research Council is required to file its reports relative to voting by eighteen year old persons (See Senate, No. 934 of 1967); and relative to the statute of limitations in malpractice suits against architects and engineers (see House, No. 4815 of 1967).

Adopted:
By the House of Representatives, January 29, 1968
By the Senate, in concurrence, January 30, 1968

(Unnumbered Joint Order of February 20, 1968)

Ordered, That the time be extended to the first Wednesday in April of the current year wherein the Legislative Research Council is required to file the results of its investigations and studies relative to restricting local zoning powers as required by Senate document numbered 933 of 1967; relative to the promotion of the Port of Boston as required by House document numbered 4562 of 1967; and relative to the statute of limitations in malpractice suits against architects and engineers as required by House document numbered 4815 of 1967, as amended by an unnumbered Joint order of January 29, 1968.

Adopted:
By the House of Representatives, February 20, 1968
By the Senate, in concurrence, February 21, 1968
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LETTER OF TRANSMITTAL TO THE
SENATE AND HOUSE OF REPRESENTATIVES

To the Honorable Senate and House of Representatives:

GENTLEMEN: — The Legislative Research Council submits herewith a report prepared by the Legislative Research Bureau in accordance with House Order, No. 4815 of 1967, relative to reducing the statute of limitations period for suits on contract or tort for malpractice, error or mistake against architects, professional engineers and land surveyors.

Since the Legislative Research Bureau is limited to statistical research and fact-finding, this report contains no recommendations for legislative action. It does not necessarily reflect the opinions of the members of the Council.

Respectfully submitted,

MEMBERS OF THE LEGISLATIVE RESEARCH COUNCIL
SEN. JOSEPH D. WARD of Worcester,
Chairman
REP. JOSEPH B. WALSH of Boston,
Vice-Chairman
SEN. ANDREA F. NUCIFORO of Berkshire
SEN. JOHN F. PARKER of Bristol
SEN. ALLAN F. JONES of Cape and Plymouth
REP. DAVID J. O'CONNOR of Boston
REP. RAYMOND F. ROURKE of Lowell
REP. ANTHONY J. SCALLI of Boston
REP. SIDNEY Q. CURTISS of Sheffield
REP. HARRISON CHADWICK of Winchester
REP. BELDEN G. BLY, Jr. of Saugus
REP. ARTHUR L. DESROCHER of Nantucket
The Commonwealth of Massachusetts

LETTER OF TRANSMITTAL TO THE LEGISLATIVE RESEARCH COUNCIL

To the Members of the Legislative Research Council:

GENTLEMEN: — House, Order, No. 4815 of 1967 directed the Legislative Research Council to study the provisions of House, No. 2603 of 1967 relative to a three year statute of limitations in actions of contract or tort for malpractice, error or mistake against architects, engineers and land surveyors.

The Legislative Research Bureau submits a report in accordance with the above directive. Its scope and content have been determined by the statutory provisions which limit Bureau output to factual reports without recommendations.

The preparation of this report was the primary responsibility of Robert D. Webb of the Bureau Staff.

Respectfully submitted,

DANIEL M. O'SULLIVAN,
Director, Legislative Research Bureau
The Commonwealth of Massachusetts

A STATUTE OF LIMITATIONS FOR MALPRACTICE AGAINST ARCHITECTS, ENGINEERS AND SURVEYORS

SUMMARY OF REPORT

Subject of Report

In compliance with legislative directive, this report deals with a proposal to include registered architects, engineers and surveyors among certain professional classes now protected against delayed suits for malpractice, error and mistake. The proposal, filed by the engineering profession in 1967, has been refiled for current legislative consideration.

At present, law suits based on malpractice, error and mistake against architects, engineers and surveyors must be brought within six years after the cause of action accrues (G.L. c. 260, s. 2). The proposal under study would bring these professions under the so-called medical malpractice statute (G.L. c. 260, s. 4) which provides for a limitation of three years for such actions against doctors, dentists, optometrists and certain health facilities.

Scope of Report

In evaluating the bill, the report (1) traces the development of the law of liability against the architectural and engineering professions, (2) summarizes the purpose and object of statutes of limitations, (3) reviews judicial interpretation of the medical malpractice statute, and (4) examines statutory approaches to the problem by other states.

Liability of Architects and Engineers

At common law, architects, engineers, and builders enjoyed a long period of absolute immunity from liability to third persons for any mistakes or errors that produced harmful results. Only those having privity of contract with these parties could bring a suit for damages. The doctrine was carried over to American case law.
Gradually, however, courts began to qualify this doctrine of absolute protection and in time these professions were held liable for negligence in several areas of activity, e.g., in selection of equipment and materials, preparation of cost estimates, approval of progress payments, issuance of certificates of completion, and late delivery of plans.

Much of this liability stems from a landmark New York decision of 1916 wherein a manufacturer of a defective chattel was held liable to a third party purchaser because the product was inherently dangerous (*McPherson v. Buick Motor Co.*). The rationale of that case was eventually applied to the field of building construction and protection under the old privity of contract doctrine soon began to disappear.

Modern courts now look to the nature of the product of service in determining liability. In New York, if there is evidence of a latent defect or hidden danger, there will be liability for harm to a third person. Other courts, however, have gone further, on the basis that even patent dangers may be unappreciated (by children, for example) and unconcealed risks may be unreasonable, and thus hold that liability will result in any case where there is foreseeable harm and reasonable certainty of injury from failure to exercise ordinary care in planning and supervising a structure.

Architects and engineers, being skilled persons, are held to degree of care commensurate with their training and their professed ability. In general, they are liable, in tort or contract, for failure to exercise the ordinary skill or care exercised by their profession. But they are not warrantors of their plans and specifications nor do they guarantee or imply even a satisfactory result.

**Statutes of Limitation**

A statute of limitation refers to the period of time designated by law, within which actions or proceedings in law or equity must be brought. The state, in effect, declares that, after a lapse of a specified period of time, a claim shall no longer be enforceable in a judicial proceeding.

The purpose and object of such a statute is to encourage prompt litigation of adversary proceedings. By compelling a person to exercise his right of action within a reasonable time, various problems
Massachusetts Statutes of Limitation

are avoided: defective memories, lost records, unavailability of witnesses, and possible fraudulent claims. The statute neither confers nor extinguishes any right; it merely withdraws from the parties, after a specified period of time, the privilege of using the courts to enforce their claims.

It is for the Legislature to determine the reasonableness of the time period of the statute. Courts will not inquire into the wisdom of a legislative decision unless the time allowed is manifestly unjust.

**Massachusetts Statutes of Limitation**

Chapter 260 of the Massachusetts General Laws contains various statutes of limitation. They vary from one year for actions of libel to 20 years for certain contracts.

Architects and engineers, presently governed by section 2 of chapter 260, which provides for a six-year statute of limitations, seek to be covered by provisions of section 4 which requires action to be commenced within three years. A separate provision of the bill under study would allow six years in the case of certain actions in tort or contract to recover damages for personal injury, bodily injury or wrongful death.

The provisions of section 4 are now limited to suits for malpractice, error and mistake against physicians, surgeons, dentists, optometrists, hospitals and sanatoria. A considerable body of case law has resulted from judicial interpretation of the statute. In applying the statute the Supreme Judicial Court has frequently been faced with two issues: (1) ascertaining when the cause of action accrues, and (2) determining when the statute should begin to run. The court has consistently stated that the cause of action accrues at the time of the malpractice and the statute begins to run at that time and not when the damage is sustained by the wrong done. In effect, this has meant that in Massachusetts it is immaterial that the injured party does not discover the act of malpractice until after the statute has barred suit. The application of this doctrine has produced many instances of hardship in cases where the harm could not possibly be detected by the most prudent observers. If this same interpretation were applied to suits against architects and engineers, the probabilities of an injured party being left remediless would be even greater since most mistakes of architects and
engineers are not apt to be as readily apparent as those of doctors or dentists.

Such situations have prompted courts in several states to apply the so-called "discovery" or California rule, whereby the statute of limitation is operative only from the time the injury becomes known. There is limited judicial support for this theory in Massachusetts. However, very recent legislative action which specifically sets out the effective time for the operation of the statute forecloses any chance of judicial adoption of such principle in this state.

The proposal therefore raises several troublesome questions such as (1) the reasonableness of the shorter period sought in the bill; (2) the wisdom of including these professions with those of the healing arts; and (3) ascertaining the act of malpractice by an architect or engineer, from which the statutory period would run.

State Statutes Elsewhere

At least 29 states have enacted statutes of limitation covering architects, engineers and contractors in the past few years. Nearly all of these are based in part on a model statute prepared by these groups. Unlike the Massachusetts proposal, these laws are specifically tailored for these groups and do not involve any other profession.

All of these statutes were examined for scope of liability, professional coverage, preciseness of language, time periods allowed and the point at which a cause of action accrues.

As to the period of liability, 11 states have set a ten-year statute, nine a six-year statute, and the remainder have chosen periods ranging from four to seven years. The model statute suggests four years.

Determining when the statute begins to run has produced more variety. In 13 states, it begins to run a certain number of years "after substantial completion" of construction (only seven of those states define "substantial completion"). Eight states hold that the statute begins to run so many years "after performance or furnishing of services."

In most of the states the statutes include persons engaged in design, planning and construction. Several other activities are also
mentioned that relate to these functions such as observation of construction, inspection, supervision and surveying.

Most statutes also refer to actions arising out of (1) any deficiency in design or (2) any defective and unsafe condition. In the majority of statutes, “any” or “all” actions are permitted but in a few laws contract actions are excluded.
CHAPTER I. INTRODUCTION

Origin and Background

House, No. 2603 of 1967 filed by Representative Maurice E. Frye Jr., of Boston for the Consulting Engineers Council of New England, Inc., provided for a three year statute of limitations in actions of contract or tort for malpractice, error or mistake against architects, professional engineers and land surveyors. The bill was referred to the Joint Committee on the Judiciary which reported House, No. 4815, an order directing the Legislative Research Council to study and report on the provisions of House, No. 2603. The Order was adopted by the House of Representatives on July 11, 1967 and by the Senate, in concurrence, on July 13, 1967.

The subject matter of House, No. 2603 is currently before the Judiciary Committee in Senate, No. 339 of 1968 which is identical in content to the 1967 proposal. A somewhat similar proposal (House, No. 2135) was referred to the Judicial Council for study in 1965 (C. 34 of Resolves). That action resulted in the following terse conclusion from the Council:

"We can see no reason to class architects and engineers with doctors and beauticians. The mistakes of engineers and architects sometimes do not become fully and immediately apparent as do those of the surgeon or the hairdresser. We do not recommend this bill."1

Study Approach

The legislation proposed in House, No. 2603 of 1967 (and in

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1 Judicial Council, 41st Report, 1965, p. 27.
Senate, No. 339 of 1968) treats three aspects of law: (1) the statute of limitations, (2) actions for malpractice, and (3) the law of liability of certain professional persons.

This report reviews the developments as to legal liability of architects and engineers. There has been a definite broadening of the base of liability for those who practice these professions, thus resulting in a greater exposure to litigation for acts required in the performance of their duties. Secondly, the purpose and object of statutes of limitations are discussed. Architects and engineers now come under the provisions of G.L. c. 260, s. 2 which allows actions of contract or tort up to six years after the cause of action accrues. Third, inasmuch as the study proposal would place these professions in the same classification as doctors, dentists and other practitioners of the healing arts, the report reviews the case law that has developed in actions for medical malpractice, error and mistake. This body of law would at least be a strong influence in the application of the statute (c. 260, s. 4) to architects and engineers. Were it to be faced with the situation, it is likely that the judiciary, in any malpractice case involving architects, would have to modify application of medical malpractice decisions because of the different relationships of the parties concerned.

Fourth, the document examines approaches adopted in other states and points out the language problem confronted by draftsmen. Judicial interpretations of certain phrases have required, in some instances, specific statutory provisions which spell out in precise detail the date when the cause of action accrues and the date when the statute begins to run. This is one of the problems that appears to be inherent in the language of the Massachusetts proposal, particularly if it should be incorporated as part of the medical malpractice clause (G.L. c. 260, s. 4).

Finally, throughout the report references to architects will, in most instances, also apply to engineers. However, there seems to be very little case law in respect to land surveyors. Therefore surveyors are not usually included in discussions of liability or duties. The scope of a land surveyor's duties is generally limited to fixing the form and boundaries of a site, thus much of the content of this report has no bearing upon that occupation.
CHAPTER II. LIABILITY OF
ARCHITECTS AND ENGINEERS

General Aspects

Architects and engineers hold themselves out as competent to produce work requiring (1) skill in the preparation of plans, drawings or designs suitable for the particular work to be performed, (2) knowledge of the materials to be used and their proper application or use, and (3) knowledge of construction methods and procedures.

If the architect or engineer fails to use reasonable care in the performance of his duties he may be sued either for negligence of for breach of contract. In general, an architect is liable for failure to exercise the ordinary skill or care exercised by reputable architects in the same area but he is not a warrantor of his plans and specifications. Liability may exist in favor of anyone who may foreseeably be injured through the architect's negligence, e.g., by defective plans, or inadequate supervision of construction. Failure to observe customary practice as to specifications, however, is not negligence per se.

Early Theories

The law of liability of architects, engineers and builders has seen considerable refinement since the earliest known legal references to these fields of activity. According to the Babylonian Code of Hammurabi, an architect or builder paid with his life if a carelessly built structure caused the death of the owner. That swift and severe form of punishment was also adopted by the Romans. Under early English law, however, the pendulum swung to the opposite extreme. For a long period in the evolution of English common law, architects and builders enjoyed complete immunity from liability to third persons, based on the doctrine of privity of contract. If the injured party did not have privity of contract, that was an absolute defense to any suit against an architect or builder.

Early American decisions accepted this view and applied it to cases involving structures on real property. In substance, courts adopting this rule of law held that those who design structures...
on land should not be liable to a person injured after completion of the structure except in cases where the injured party had hired the professional person. The apparent rationale of this view was the possible tide of litigation that might flow if the doctrine of lack of privity of contract was rejected. Among reasons cited in support of this position is the argument that once an owner has accepted a structure, the architect has no control over its maintenance. Critics have attacked this argument, however, asserting that control of the premises is irrelevant in cases where liability is based on negligence in the preparation of plans and specifications, or in supervision of construction. And in the case where a structure may endanger a large number of people, critics state that possibility strengthens the need to hold architects and engineers liable if negligence is to be discouraged during planning and construction stages.

Architects and engineers, sheltered from extensive liability for so many centuries, have naturally fought to preserve their status. In so doing, they have been likened to members of the medical profession when faced with malpractice suits. Critics argue that attempts to prove failure to exercise skill and care or even simple and apparent negligence meet the usual problem of producing an architect or engineer who can give impartial testimony. This criticism is perhaps too broad and probably would be more accurate if limited to testimony involving the judgment of a colleague. Engineers with any sense of ethics would be bound to comment on the professional competence of an engineering job.

**Modern View**

Modern courts have gradually shorn away much of the protection formerly afforded architects and engineers, exposing them to liability in several areas. Thus, architects have been held liable for negligence in (a) the selection of equipment and materials, (b) the preparation of cost estimates, (c) the approval of progress payments, (d) the issuance of certificates of completion, (e) the misrepresentation of building costs, and (f) late delivery of plans. The wide variety of functions performed by these professions suggests the extent of possible liability: an architect may design not only a building's exterior but also its structural members,
heating, ventilation, air conditioning and electrical and mechanical units. He may also supervise construction and issue certificates of payment and completion.

In general, members of these professions are held by the courts to be skilled persons and are therefore held to a higher degree of care than are unskilled persons. Liability will result in those cases where they fail in their duty owed, whether it be in preparing plans, supervising work, or issuing certificates. However, it should be pointed out that courts have drawn some lines circumscribing the bounds of liability. An architect or engineer does not warrant the perfection of his plans or the safety or durability of the structure any more than a doctor warrants a cure or a lawyer guarantees a case will be won. No more is expected of the architect or engineer than the exercise of ordinary skill and care in the light of current knowledge in these professions. When they possess the required skill and knowledge that are common to their professions practicing in the same locality and exercise it in a reasonable manner, using their best judgment, they have done all that is required by law.

Perhaps the most important law case contributing to the broadened base of liability for architects and engineers is MacPherson v. Buick Motor Co.\(^1\) which involved a defective chattel rather than a structure. The plaintiff had purchased from a dealer an automobile that proved to have a defective wheel which subsequently was the cause of his injury. Suit was brought against the manufacturer and the traditional privity of contract doctrine was placed squarely at issue. The court held the manufacturer liable on the ground that the product was inherently dangerous to a third party purchaser. Following this landmark decision, courts began to look at the nature of the article rather than the contracting parties in their determination of liability for injuries to third parties. Where an article was inherently dangerous if defectively made, the manufacturer could be liable.

The MacPherson doctrine was eventually carried over to the field of building construction and the former strict requirement of privity of contract between architect and in-

\(^1\) 217 N. Y. 382, 111 N. E. 1050 (1916).
The injured party has been limited, modified or rejected by various courts in recent years. The widened application of the MacPherson rule had its first real impact on architects and engineers in the case of Inman v. Binghampton Housing Authority, a New York case decided in 1957. Until the Inman decision most courts had continued to hold that once the architect and builder had completed their work and it had been accepted by the owner, absent any privity of contract with the plaintiff, there was no liability as a matter of law. The Inman case was an action by a two year old child who was injured in a fall from a porch of a unit of a governmental housing project. The fall occurred from a point on the porch where no provision had been made for a protective railing. The architect was joined as a party defendant and the complaint specifically alleged negligence in the design of the porch that was used for egress. In holding that the complaint stated a good cause of action despite lack of privity, the court decided two issues: (1) as to the architect and builder of a structure on real property, it said the defense of lack of privity was no longer absolute; and (2) it stated that once the building was accepted by the owner, there was no liability to third persons as a matter of law, unless there was evidence of a latent defect or hidden danger.

The latent-patent defect test, however, has been criticized and in one recent case a court, rejecting it, stated that “dangers may be unappreciated though patent and risks may be unreasonable though unconcealed.” More recently, a California decision held that an architect who plans and supervises construction work as an independent contractor is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services. This case rejects the privity doctrine by requiring the architect to exercise the duty of care to foreseeable plaintiffs. It also rejects the theory of shifting responsibility after acceptance of the building by the owner.

The many and varied activities and relationships involving architects and engineers have resulted in several theories of liability with new ones still being developed. But the most common classes of cases, are (1) those relating to defects attributable to plans and specifications, and (2) those concerned with issuance of an improper certificate.

*Concerns Expressed by Architects and Engineers*

Experience indicates that in personal injury cases, the usual suit involves the architect, engineer, contractor, and sometimes the owner, as party defendants. Usually the architect and engineer are concerned about the consequences such suit will have on their professional integrity and reputations even if only a nominal judgment is awarded the plaintiff. They feel that their life’s efforts may be destroyed by court proceedings. One of the more common complaints of the profession is the attempt to hold an architect or engineer to the most recent developments of his profession in an action for damages brought years after the original design.

It is argued that in any test of an architect’s efficiency, consideration should be given only to (1) the knowledge that was available to his profession at the time he prepared the plans and drawings, and (2) the then existing building code requirements. In other words, the duty of an architect or engineer is measured by conditions as they exist at the time of his service, not by what they have been in the past or what they might be in the future. Acceptable practices in engineering today, for example, may be obsolete in only two or three years because of the advanced knowledge constantly being developed by research.

In addition to being accused of preparing faulty plans and specifications, the architect will also be charged with negligent supervision in most cases. It is customary for the architect’s contract to provide for supervision of the erection of the building he has planned. Generally, this is accomplished by occasional inspection of the work in progress. If the contract so provides, the supervisory authority may be delegated to a clerk of the works who is appointed by the architect. Because of judicial uncertainty over
the term “supervision,” contract language involving architects has undergone considerable revision to further clarify the exact duty of an architect in his visits to a construction site so as to avoid responsibility that is properly that of the contractor.1

As a general proposition, courts recognize that an architect merely supervises the results and does not dictate methods of construction. It is generally agreed that the architect’s duty to the owner is to see that, before the final acceptance of the work, plans and specifications have been complied with, proper materials have been used, and the owner obtains the building for which he has contracted.

Architects argue, and courts have held, that the architect’s work does not make him an insurer nor does it guarantee or imply a perfect plan or even a satisfactory result. Many reasons are advanced for not holding an architect to strict accountability. The architect must have a keen aesthetic sense if he is to design a structure of beauty and dignity. He must have a technical knowledge of structural factors that influence strength and stability of design. Materials that he recommends for use are produced by others, thus beyond his control and influence. In some cases his work may be, to a degree, experimental. Finally, many natural factors must be considered such as soil texture and various physical elements.

CHAPTER III. STATUTES OF LIMITATION

Origin

At common law there was no fixed period of time for the bringing of suits. However, pleas of limitation were allowed and there was nothing to prevent contracting parties from establishing a time limit as part of their agreement. Legislation fixing a period for the commencement of suits dates to the reign of Henry VIII in a law that was confined to real actions.2 Limitations were later

1 For responsibility in construction contracts, see Judicial Council, 43d report, P.D. 144, pp. 133-136.
2 Statute of 32 Henry VIII, c. 2
extended to personal actions under James I. This latter statute is the basic source of existing legislation pertaining to limitations.

The terms "limitation" or "limitation of action" generally refer to the period of time designated by statute, within which actions or proceedings in law and equity must be brought. There are varied definitions of the phrase "statute of limitations"; as used in this report it will refer to a legislative act whereby the state declares that after the lapse of a specified time, a claim shall no longer be enforceable in a judicial proceeding. (As will be seen in a later chapter, some state statutes of limitation extend to administrative proceedings as well.) Limitations thus are created by statute and derive their authority from such laws; they are legislative, not judicial acts.

Purpose and Object

A statute of limitation fixes an absolute time for the initiation of litigation. Such a law is based on the general experience of mankind that a valid claim usually does not lie dormant if the right to sue thereon exists. Thus, to encourage the prompt bringing of actions, this kind of statute restricts to a fixed, arbitrary period the time within which a right, otherwise unlimited, may be asserted. It does not confer any right of action, and rarely operates against the enjoyment of a right. A limitation statute is essentially remedial; it is available only as a defense and runs only against the remedy sought by permitting the party involving the statute to state that his adversary's claim is stale and should not be enforced. It is often stated that the statute may be used as a shield but not as a sword. However, the shield may not serve to protect anyone in the enjoyment of the fruits of fraud.

Such a statute is also described as a statute of repose with the object of compelling one to exercise his right of action within a reasonable time. The purpose is not only to prevent undue delay in bringing suit on a claim but also to suppress the assertion of fraudulent and stale claims that would surprise the defendant party at a time when all proper records and evidence are lost or when

1 Statute of 21 James I, c. 16.
2 For a detailed discussion and specific case citations, see both American Jurisprudence and Corpus Juris Secundum.
facts are obscure due to a long time lapse, defective memories, or the unavailability of witnesses. All of these factors cause substantial inconvenience to parties thus affected. Generally the statute does not extinguish any right but merely withdraws from the parties, after a specified period, the privilege of using the courts to enforce their claims. However, it should be pointed out that a statute can, either deliberately or inadvertently, be worded so as to extinguish a right.

**Reasonableness of Limitation Period**

The Legislature is the primary judge as to whether the time allowed by a statute of limitation is reasonable. Although the determination of the Legislature is subject to judicial review, the courts will not inquire into the wisdom of the legislative decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.

It is firmly established that when a new limitation is made to apply to existing rights or causes of action, a reasonable time must be allowed before it takes effect in which such rights may be asserted or in which suit may be brought on such causes of action. A limitation statute is void if the period allowed is unreasonably short.

**Massachusetts Law**

Statutes relating to limitation of actions are found in Chapter 260 of the Massachusetts General Laws. Section 1 provides that certain actions shall be brought within 20 years after the cause of action accrues. These actions include those upon (1) sealed contracts, (2) bills and notes, (3) certain promissory notes, and (4) certain other contracts. Also covered by this section are actions to recover for the support of inmates in state institutions.

Section 2 provides that actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section 1 (above) or actions upon judgments or decrees of federal or state courts, shall be brought within six years after the cause of action accrues.

Section 2A states that, except as otherwise provided, actions
of tort, actions of contract to recover for personal injuries, and actions of replevin shall be brought within two years after the cause of action accrues.

Section 3 relates to actions against sheriffs and section 3A deals with claims against the state.

Section 4, which would be amended by the bill which is the subject of study in this report, provides for limitations of three years for commencing certain malpractice actions, of two years for certain tort actions, and of one year for actions of libel.

The purpose of House, No. 2603 of 1967 is to establish a limitation of three years for the bringing of actions of contract or tort for malpractice, error or mistake against (a) architects, (b) professional engineers and (c) land surveyors.

Statutes of limitations affecting these professions in other jurisdictions differ in many respects from the Massachusetts proposal. Invariably such statutes are separated from those provisions controlling other professions. That is, the statute is specifically tailored for these groups whereas the Massachusetts proposal would simply weave these professions into existing law applied to doctors, dentists and hospital facilities, the apparent intended object being to take advantage of the existing case law interpreting that section as well as the shorter period of liability.

Thus, section 1 of the proposal would amend G.L. c. 260, s. 4, par. 1, by adding to those presently covered by the three year statute of limitations, viz., physicians, surgeons, dentists, optometrists, hospitals and sanatoria, the following groups: (1) registered architects under G.L. c. 112, ss 60A, to 60M, and (2) registered professional engineers and land surveyors under G.L. c. 112, ss. 81D to 81T.

Following this basic amendment, the bill adds a proviso that would bar:

(1) an action in contract or tort to recover damages
   (a) for any injury to the person, or
   (b) for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, and

(2) any action for contributions or indemnity for damages sustained on account of such injury against architects, con-
resulting engineers or land surveyors who perform or furnish:

(a) the design, planning or supervision or
(b) general administration or
(c) observation of construction of such improvement to real property, more than six years after the performance or furnishing of such services.

For these claims, the statute would thus begin to run six years from the date that the architect, engineer or surveyor has completed performance or furnished his professional services.

As indicated by the following table, a random sample of 570 professional liability claims pending against architects and engineers in 1964 showed that most claims are brought within six or seven years after completion of the construction project. However, that date may be somewhat later than the period when the architect's design has been completed but not yet put to test of use.

Table 1.

<table>
<thead>
<tr>
<th>No. of Years After Completion of Project Before Claim is Brought</th>
<th>No. of Claims</th>
<th>Percentage of Claims</th>
<th>Cumulated Percentage of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>215</td>
<td>37.7</td>
<td>37.7</td>
</tr>
<tr>
<td>2</td>
<td>106</td>
<td>18.6</td>
<td>56.3</td>
</tr>
<tr>
<td>3</td>
<td>96</td>
<td>16.8</td>
<td>73.1</td>
</tr>
<tr>
<td>4</td>
<td>64</td>
<td>11.2</td>
<td>84.3</td>
</tr>
<tr>
<td>5</td>
<td>31</td>
<td>5.4</td>
<td>89.7</td>
</tr>
<tr>
<td>6</td>
<td>18</td>
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<td>93.0</td>
</tr>
<tr>
<td>7</td>
<td>28</td>
<td>4.9</td>
<td>97.9</td>
</tr>
<tr>
<td>8</td>
<td>5</td>
<td>.8</td>
<td>98.7</td>
</tr>
<tr>
<td>9</td>
<td>3</td>
<td>.5</td>
<td>99.2</td>
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<tr>
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</tr>
<tr>
<td>13</td>
<td>1</td>
<td>.2</td>
<td>99.8</td>
</tr>
<tr>
<td>14</td>
<td>1</td>
<td>.2</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Total 570 100.0

Malpractice Actions and the Statute of Limitations

A person who is the victim of medical error must commence an action to recover damages within the three year time limit specified in the statute. Litigation is generally based on (a) mistaken or erroneous diagnoses or (b) errors in administering prescribed treatment or (c) inept performance of surgery.

From the viewpoint of the professional person, the three year time limit is justifiable as a means of assuring reliable evidence. Yet the wronged patient is entitled to an ample period of time to assert his claim. Some legal commentators have argued that the patient’s physical status would be a better basis for malpractice limitation statutes. There are, for example, a number of cases in which a substantial period of time elapsed before the patient discovered the injury. In many of these cases the facts indicate that no prudent observer could have discovered the injury sooner. However, in jurisdictions following the traditional rule that the statute begins to run on the date the malpractice was committed, the patient is left without legal resource.

Many jurisdictions have avoided this unfortunate result by advancing the date when the period of limitation commences. Among these are changes in dates to (a) the time of the injury, (b) the final day of successive contributing injury, (c) the end of continuous surgeon-patient relationship and (d) the day of discovery of the injury or the date when a diligent person would have discovered the injury.

In cases involving the tolling of the statute until continuous treatment is terminated, courts have held that the relationship arises out of contract and the statute begins to run when the contractual relationship is terminated.

However, the continuous treatment doctrine is of no help to the many patients who have ended their relationship with the treating physician long before the results of the act of malpractice become manifest. To correct this injustice, a number of jurisdictions, by judicial construction, have thus adopted what is called the discovery doctrine (Calif., Colo., Fla., La., Mo., N.C., N.D., N.J., Okla., Pa., and Tex.). This doctrine will toll the statute until the patient discovers, or should have discovered, his injury.
The Massachusetts court, only recently, was disposed to review the traditional rule but in line with its own view of the governing principle in applying statutes of limitation it declined to consider any modification.

**Massachusetts Malpractice Doctrine**

The basic principle governing the application of a statute of limitations in Massachusetts was stated by the Supreme Judicial Court in *Cheney v. Dover*, 205 Mass. 501, 503:

"... when a remedy has been created by statute and the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, the court has no jurisdiction to entertain proceedings for relief begun at a later time."

The court reaffirmed this rule in *DelGrosso v. Board of Appeal of Revere*, 330 Mass. 29, 32, noting the frequency with which it has been followed even where hardship at times was the result. In that case, the court stated that "time is not merely a procedural limitation but is an essential part of the remedy."

The harshness of the Massachusetts rule as applied in malpractice cases has long been recognized. As indicated, several states have adopted the discovery rule and even the Massachusetts court has said that were it not for the recent legislative action that seemingly was a reaffirmation and strengthening of what has been the legislative policy for years, it too would have reconsidered the traditional rule. What seemed to be the seeds of an expected judicial reappraisal were written by Justice Spiegel in a dissenting opinion in *Hagerty v. McCarthy*, 344 Mass. 145:

"To hold that the statute of limitations begins to run prior to that date (when plaintiff first became aware that a vestige of his appendix which was removed eight year previous, had been left in him) is to charge the plaintiff with knowledge of facts well nigh impossible for him to discover until he began to feel pain in the region of the abdomen. The 'inherently unknowable' should not bar the plaintiff of his right to compensation."

Two recent developments, however, have further strengthened the rule that is criticized in Justice Spiegel's dissent. A 1965 legislative proposal specifically sought a modification of that rigid view that has been followed for so long (House No. 530). The
General Court, however, rejected the proposal but did amend the statute to extend the statutory period from two years to three years (Acts of 1965, c. 302). And in the following year when the Supreme Judicial Court had to consider a malpractice case, it specifically referred to the previous year's legislative review of the malpractice statute as the compelling factor in denying plaintiff relief. The case, *Pasquale v. Chandler*, 350 Mass. 450, is explicit as to when the statute begins to run but it is most valuable to this study for its review of the bill before the General Court which was designed to modify the statutory language governing the time when the cause of action accrues and thus determining when the statute begins to run.

The court had previously stated that (1) in contract cases the statute begins to run from the time of the breach (*Boston Tow­boad Co. v. Medford National Bank*, 232 Mass. 38), and (2) in medical malpractice cases, the statutory period begins to run at the time of the operation and not when the actual damage results or is ascertained. In other words, the damage sustained by the wrong done is not the cause of action; rather, it is the act of mal­practice at the time when the medical service giving rise to the action was performed (*Capucci v. Barone*, 266 Mass. 578). This definition of “accrues” was relied upon in *Maloney v. Brackett*, 275 Mass. 479, 481.

The Capucci doctrine, which computes the statute's period from the date of malpractice, is however, at odds with a growing body of case law that holds that the statute begins to run upon the discovery of the act of malpractice, — the so-called discovery or “California” rule.¹ In the recent Pasquale case the Massachusetts court stated that it would have been disposed to reconsider the question of the time from which the statute begins to run in view of the trend in other jurisdictions except for recent legislative history of the Commonwealth. The Court itself reviewed that history as follows:

We are . . . confronted by very recent legislative history in this field. In March of 1965, the Massachusetts House of Representatives considered a bill, House No. 530, which would have amended G.L. c. 260, s. 4, by sub-

¹ See *Pasquale v. Chandler*, 350 Mass. 450, 456, footnote 2, listing jurisdictions that reject the Massachusetts interpretation. See also p. 24 of this report.
In the Pasquale case, the surgeon who left an eight-inch clamp in the patient's abdominal cavity that eventually led to the latter's death could not be reached for liability because the foreign object was not discovered until after the (then two year) statute had barred any action against the surgeon.

That the legislation was ever proposed in this form is sufficient indication that G.L. c. 260, s. 4, was understood by the sponsors of House No. 530 to have incorporated the Capucci interpretation of "accrues" in each of the several amendments enacted subsequent to the decision in that case. Apart from that consideration, the last sentence of House No. 530 employed the word "accrues" as it was interpreted in the Capucci case.

The House of Representatives, in House No. 530, had before it a two year "sliding scale discovery rule" and a five year "outer limit" and, thus, the opportunity to afford recognition to both theories which has been expressed singly or in combination in statutes of limitation, i.e., the theory of "absolute repose" as well as the theory of "estoppel of the plaintiff." Prior to this proposal, G.L. c. 260, s. 4, had apparently embraced only the theory of "absolute repose." House No. 530 was sent to the Senate with only one change; the five year "outer limit" was excised leaving only the two year "sliding scale discovery rule." During its third reading, House No. 530 was rejected by the Senate, with a substitute, Senate No. 924, being adopted.

Senate No. 924 was a simple republication of G.L. c. 260, s. 4, as it stood before, but extending for one year the period of limitations which that statute provided as follows: "Actions of contract or tort for malpractice . . . shall be commenced only within three years next after the cause of action accrues." Senate No. 924 became St. 1965, c. 302, and is now the law.

From this account of the legislative history of House No. 530, it is apparent that the Legislature, having in mind its previous acceptance of the Capucci case's interpretation of "accrues," intended to reject the theory of a "sliding scale discovery rule," notwithstanding the proposal of the five year "outer limit" to be placed upon actions of this type. The recent legislation would seem to be a reaffirmation and strengthening of what has been the legislative policy in the years since the Capucci case. ***

In the Pasquale case, the surgeon who left an eight-inch clamp in the patient's abdominal cavity that eventually led to the latter's death could not be reached for liability because the foreign object was not discovered until after the (then two year) statute had barred any action against the surgeon.

It is thus immaterial, under Massachusetts law, that the injured party does not discover the act of malpractice until after the statute has barred suit. The court has, in view of the Legislature's rejection of the proposal to base the limitation in part on knowledge of the existence of the cause of action, reaffirmed the rule that a medical malpractice action accrues at the time of treatment and not when
the patient discovers the injury. The court considered it relevant to note that the Legislature has chosen to provide for a six-month “sliding scale” discovery rule with a three-year “outer limit” in s. 4B of c. 260 (re hit-and-run accidents) and commented that other jurisdictions have stated that the existence of another statute of limitations that does provide for a discovery rule is further indication that the Legislature did not intend, in the absence of specific language to that effect, to incorporate a discovery rule into the statute of limitations regarding malpractice.

Of course, the application of the body of case law interpreting section 4 of chapter 260 to litigation that might arise involving architects, engineers and surveyors, should those professions be added to the scope of that section, probably would be qualified because of the difference in physician-patient relationships and those of architect-employer or engineer-employer. Because of the particular relationship between physicians, dentists, and persons in like positions and their patients, the law exacts a higher duty of care than is required in other types of negligence actions. Nevertheless, there are many holdings in the current body of case law interpreting section 4 that would probably trouble a court in a case involving an architect, engineer or surveyor. For example, in the case of an architect who designs a faulty structure, case law now applied under section 4 would mean that a cause of action accrues at the time of malpractice. Would this mean at the time the architect furnishes the completed plans to the employer “and not when the actual damage results or is ascertained,” to use the language of the Capucci case? Unless otherwise provided in a contract, the architect’s participation in the building project could end on the day he delivers his completed plans, and any duty he has with regard to application of those plans also could end on that day. Similarly, an engineering consultant responsible for implementing the plans might miscalculate the quality of the soil on which the building will rise and such error may in time produce serious damage. In that case, damage may not be ascertainable until a period of several years after completion of the engineer’s services. If the cause of action accrues at the time the service is performed and not when the damage is discovered, the statute could in this type of case, in the absence of any contract pro-
visions anticipating such possibilities, put the erring engineer beyond reach.

In view of the foregoing discussion, it would seem that any legislative proposal to change the status quo as to limitations of actions against architects, engineers and surveyors should be weighed against the answers to the following questions:

1. In light of the problems faced by these professions, is the existing statutory period too long?

2. Assuming an affirmative answer to the first question, is the medical malpractice statute the wisest choice in achieving the object of the petitioner?

3. In light of the many and varied steps involved from initial design through final completion of a structure, should determination of vital questions such as when the cause of action arises or when the statute shall begin to run be left to judicial interpretation or should it be spelled out with some degree of preciseness in the statute?

4. Should land surveyors be treated separately? A Michigan statute treats liability of land surveyors in a clause separate from that covering architects and engineers, and Hawaii specifically excludes application of its statute of limitations to surveyors for their own errors in boundary surveys.

5. Given the possible lapse of time after the commission of an error or mistake in design, planning, supervision, etc., and before the results of such error would become manifest, is the proposed change too short a period?

Some guidance in answering these questions may be found in a review of recent legislation in other states. The following chapter provides a synopsis of the more important features of that legislation.

CHAPTER IV. STATE STATUTES ELSEWHERE

By the close of 1967 at least 29 states had enacted new or amended statutes of limitations for actions against architects, engineers and surveyors. Many provisions of these laws are based
on a model statute discussed below. Other provisions reflect the problems encountered in litigation over the years, particularly in cases involving malpractice or injuries to third persons.

**Model Statute**

A model statute developed by the joint efforts of the National Society of Professional Engineers, the American Institute of Architects and the Associated General Contractors has been used as a guide in the preparation of state statutes of limitations for architects, engineers and contractors. The model law fixes the period within which an action must be brought at four years. With slight changes in format, the model law, titled, *Actions arising out of death or injury caused by defective or unsafe improvements to real property*, is as follows: Section (a) (1) provides that any action (A) to recover damages for (i) personal injury, (ii) injury to real or personal property, or (iii) wrongful death, resulting from the defective or unsafe manner of effecting an improvement to real property; and (B) for contribution or indemnity which is brought as a result of such injury or death, shall be barred unless the action is commenced before the period specified in paragraph (2) has elapsed.

Paragraph (2) states that the period referred to in paragraph (1) is the shorter of (A) two years from the date such injury or death occurred, or (B) four years from the date the improvement was substantially completed; provided, however, that in case such injury (including injury causing death) occurred during the fourth year after the date the improvement was substantially completed, the period referred to in paragraph (1) shall end one year after the date on which such injury occurred (whether death occurred thereafter or not).

Paragraph (3) provides that for purposes of this subsection, an improvement to real property shall be considered substantially completed when (A) it is first used, or (B) it is available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first. Section (b) states that the limitation of actions prescribed in section (a) shall not apply to (1) any action based on a contract;
express or implied, or (2) any action brought against the person who, at the time the defective unsafe condition of the improvement to real property caused injury or death, was the owner of or in actual possession or control of such real property.

Relevant Statutes of Limitations in Other Jurisdictions

In the past five years more than half of the states of the nation have enacted statutes of limitations relative to the practice of architecture and engineering, and the field of construction. Most of these laws were passed in the 1965 to 1967 period, with 12 states enacting such legislation in 1967 alone. Appendix B of this report lists these states, provides statutory citation references and indicates the time period within which suits must be filed. In many states the statute closely resembles the provisions of the model law prepared by proponents of such legislation. However, throughout these statutes there are three areas of coverage that reflect points of view different from that of the model statute, namely, (1) the duration of a reasonable period of liability, (2) the operation of the statute, and (3) the scope of liability.

In the following pages, pertinent extracts from various statutes are examined to indicate (1) the divergent opinions among legislatures which have considered substantially similar, and in some cases, identical, proposals, and (2) the treatment of vital terms by the draftsmen of these laws. In some statutes, definitions are more precise than others, thus facilitating judicial consideration of litigation arising out of the statute.

Alaska. In 1967 Alaska enacted a law to provide for a statute of limitations in design and construction cases. (Alaska Code, s. 09.10.055). An action must be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or the contractor, within six years after substantial completion of an improvement. Within that period, an action in contract, tort, or otherwise will lie against such person for any deficiency in the design, etc., or for any injury to person or property arising out of such deficiency. In case of injuries occurring in the sixth year after substantial completion, the statutory period is extended two years. The law does not define "substantial completion."
California. The California Code of Civil Procedure was amended in 1967 by adding a new section to its statute of limitations applicable to improvement of real estate (Calif. Session Laws, 1967, c. 1326). This statute bars actions against 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 (1) any patent deficiency in the design, specification ... (etc) ... ; (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."

The law provides that if injuries caused by such patent deficiency occur during the fourth year after substantial completion, a tort action may be brought within one year after the date of the injury but in no event later than five years after substantial completion. Patent deficiency is defined in the statute as "a deficiency which is apparent by reasonable inspection." The law specifically does not apply to an owner-occupied single-unit residence. It also contains provisions found in most statutes on this subject that prohibits its use as a defense by any person in actual possession or control of the premises, as owner, tenant or otherwise.

There are provisions of the model statute interwoven in this law but the reference to patent deficiency appears in only one or two other statutes and the exclusion of owner-occupied single unit residences is an added precaution. The statute, unlike the model law, does not define "substantial completion," nor does the statute refer to actions for contribution or indemnity.

Florida. Florida amended its statute of limitations in 1967 by adding a subsection applicable to professional engineers or registered architects. (Fla. Stat. s. 95.11 (10); Session Laws 67-284).

The act applies to any cause of action "arising out of any deficiency in design or planning or for any deficiency in the design or planning of an improvement to real property." The cause of action accrues, and the time of limitation begins to run, "from the date of substantial completion of any such construction, or upon the completion or termination of the contract between the pro-
Idaho. In 1965, Idaho added new section 5-241 to its code, entitled "Accrual of Actions Arising out of the Design or Construction of Improvement to Real Property."

The statute of limitations begins to run as to actions "against any person by reason of his having performed or furnished the design, planning, supervision, or construction of an improvement to real property, as follows:

(a) Tort actions . . . the applicable limitation statute shall
begin to run six (6) years after the final completion of construction of such an improvement.

(b) Contract actions . . . the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement.”

As in other jurisdictions, the statute is not a defense that can be asserted by any person in possession or control as owner, tenant, or otherwise. The law also defines “person” so as to include an individual, corporation, partnership, business trust, unincorporated organization, association or joint stock company.

This law uses the phrase “final completion of construction” in place of “substantial completion” favored by draftsman of the model statute. “Final completion” is not defined in the statute, undoubtedly because there is no likelihood of ambiguity of meaning.

Illinois. A statute of limitations applicable to defective real estate was added by the Illinois Legislature in 1963 (Ill. Rev. Stat., s. 29 amending Act of 1872).

The language of this statute is very similar to the text of Section 2, paragraph 1 of House, No. 2603 of 1967. However, it applies to those responsible for construction as well as to “any person performing or furnishing the design, planning, (or) supervision of construction.” The cause of action must accrue within four years after the performance of furnishing of such services and construction. It contains the familiar clause excluding owners, lessees, tenants, etc. from its provisions.

Indiana. An Indiana law enacted in 1967 (c. 63) applies limitations on actions to recover damages based on contract, tort, nuisance or otherwise for (a) any deficiency, or alleged deficiency, in the design, planning, supervision or observation of construction of an improvement to real property, or (b) for an injury to property, either real or personal, arising out of any such deficiency, against “any person performing or furnishing the design, planning, supervision or observation of construction of an improvement to real property, unless such action is commenced within ten years from the date of substantial completion of such improvement.”

The law defines the terms “person,” “contract,” “tort,” and
"substantial completion." Substantial completion is "the date upon which construction of an improvement to real property is sufficiently completed, in accordance with a contract of construction, as may be modified by an alteration or amendment agreed to by the parties to the contract, so that the owner of the real property upon which the improvement is constructed can occupy, and use the premises, or the specified area of the premises, in the manner contemplated by the terms of the contract."

The statute has a separate provision for injuries to a person, or injury causing wrongful death that occur during the ninth or tenth year after substantial completion of a project. In such case a tort action for damages may be brought within two years after the date of injury, irrespective of the date of death, but is barred after twelve years following substantial completion of the construction.

The familiar exclusion of owner, tenant, etc., asserting the statute as a defense, is also included.

Kansas. Kansas amended its general statute of limitations applicable to tort actions, wrongful death and fraud in 1963 (c. 303; 60-513). The statute does not limit application of its provisions to any particular profession or trade. Under its language, a cause of action does not accrue until the incident of substantial injury, "or, if the fact of injury is not reasonably ascertainable until some time after the initial act (of injury), then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action."

Kentucky. Kentucky added s.413.115 to its Revised Statutes in 1966. In substance the law is quite similar to that of Indiana. Among differences are (1) the law applies also to those responsible for "inspection" of a real property improvement (rather than "observation of construction," as used by other draftsmen); (2) the term "substantial completion" means simply "the date upon which the owner of the structure, project or facility first entered upon the occupancy or commenced the use thereof," and (3) actions to recover damages are barred "after the expiration
of five years following the substantial completion of such improve-
ment.” In the event injury occurs during the fifth year following
substantial completion of an improvement, the law permits an
action to be brought within one year from the date of injury but
in no event more than six years after substantial completion.

**Louisiana.** A 1964 amendment to Louisiana Revised Statutes
added new s.2772 to Title 9 which applies to actions brought (a)
for any deficiency in the design, planning, inspection, supervision
or observation of construction or in the construction of an improve-
ment to immovable property; (b) for damage to property, movable
or immovable, arising out of any such deficiency; (c) for
injury to the person or for wrongful death arising out of any
such deficiency; and (d) any action brought against a person for
the action or failure to act of his employees.

The law bars all actions in contract, tort of otherwise, against
any person performing or furnishing services listed in clause (a)
above, after the following periods and acts:

(a) More than 10 years after the date of registry in the
mortgage office of acceptance of the work by owner; or
(b) If no such acceptance is recorded within six months from
the date the owner has occupied or taken possession of
the improvement, in whole or in part, more than ten
years after the improvement has been thus occupied by
the owner; or
(c) If the person furnishing the design and planning does not
perform any inspection of the work, more than ten years
after he has completed the design and planning with re-
gard to actions against the person.

The statute provides that if the incident of injury occurs during
the ninth year following the dates stipulated above, the action may
be brought within one year after the date of injury but no later
than eleven years after the date indicated in paragraphs (a), (b)
and (c) above. Provisions barring owners, tenants, etc. from as-
serting the statute as a defense are also part of the law.

**Michigan.** A new section (600.5839 of Michigan Compiled Laws)
was added in 1967 applicable to state licensed architects, engi-
neers and land surveyors. In subsection (1) the law states "No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of such improvement more than six years after the time of occupancy of the completed improvement, use or acceptance of such improvement." The familiar clause excluding owners, tenants, etc. from its application is included.

In subsection (2) the law bars any actions to recover damages based on error or negligence of a state licensed land surveyor in the preparation of a survey or report more than six years after the delivery of the survey or report to the person for whom it was made or his agent.

Subsection (3) defines architect, engineer and land surveyor. The statute is tersely phrased and indicates precisely the dates from which the statute shall begin to run.

*Minnesotan.* By 1965 legislative action (c.564), a new statute of limitations became effective (Minn. Stat. s.541.051). The text of subdivision 1 of the law is similar to the Michigan law quoted above (subsection 1) except that Minnesota coverage extends to "construction" services as well, and does not specifically identify any particular professional group as Michigan has, with respect to licensed architects, engineers and surveyors. The Minnesota law bars actions, except where fraud is involved, "more than two years after discovery thereof, . . . (and) in any event more than ten years after the completion of such construction."

If an injury occurs during the tenth year after completion of construction an action may be brought within one year after the date of injury but no later than eleven years after completion of construction (subsection 2).

*Mississippi.* This law, c.397 of 1966, is similar in form to most of the statutes cited above. It (like California's law) substitutes the phrase "patent deficiency" in place of the more commonly
found “defective and unsafe condition” relative to design, planning, etc. The statute does contain an excepting clause not generally found among the other state laws which would permit suit for contribution or indemnity for damages sustained because of injury, “by prior written agreement.” It is not absolutely clear whether this excepting clause also applies to all actions covered by the statute.

The law bars actions brought “more than ten (10) years after the written acceptance of such construction by the owner pursuant to the performance or furnishing of such services and construction.”

**Nevada.** Statutory provisions bar any action in tort, contract or otherwise “more than six years after the substantial completion”, of an improvement to real property (Nevada Revised Statutes, 11.205). The language is similar to that found in most other states and applies also to construction services. Section 2 covers injuries occurring in the sixth year after substantial completion of an improvement and allows suit in such cases up to seven years after substantial completion.

**New Hampshire.** Relevant legislation enacted in 1965 provides scope and coverage that is found in most states that have modified the provisions suggested in the model statute (N.H. Rev. Stat., 508.4-b). It also applies to construction services. Actions brought “more than six years after the performance or furnishing of services and construction” are barred.

**New Jersey.** New Jersey recently added a statute of limitations which is similar to that of New Hampshire (1967, c. 59). The New Jersey statute, however, bars suit “more than ten years after the performance or furnishing of . . . services and construction.”

**New Mexico.** This statute was added in 1967 (N.M. Stat., 67-12-1.2). Its scope extends to those “performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property . . .” Suit is barred “after ten years from the date of substantial completion of such improvement” but this limitation does not apply to “any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith.” Substantial completion
is defined as "the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever occurs last."

North Carolina. The North Carolina statute was enacted in 1963 [c. 1030, amending G.S. 1-50 (5)]. It is similar in content to that of New Hampshire and New Jersey. No action may be brought "more than six (6) years after the performance of furnishing of such services and construction."

North Dakota. By 1967 legislation, the State of North Dakota adopted a statute of limitations on this score (c. 254). Its language is substantially the same as used in most jurisdictions although format is slightly different. The language specifically bars contract actions whether "oral or written, sealed or unsealed"; all actions are barred "more than ten years after substantial completion of such an improvement."

Section 2 extends the limitation for injuries that occur during the tenth year after substantial completion; in such case, a tort action may be brought within two years of the date of injury but no later than 12 years after substantial completion.

Oklahoma. Oklahoma added its statute in 1967 (c. 360) which is similar to the North Dakota law except that Oklahoma's limitations apply only to actions in tort, and the limitations period is five years after substantial completion with a two-year extension in case of injuries occurring in the fifth year after substantial completion.

Ohio. The Ohio statute bars all actions against certified or licensed architects or professional engineers more than ten years after "the performance or furnishing of such services as an architect or professional engineer." (s. 2305.131).

Pennsylvania. This statute took effect in 1966 and is similar to others discussed above (12 Pa. Stat. 65.1-65.5). However, not only are actions in contract and tort barred but also arbitration pro-
ceedings. No such actions may be brought "more than twelve years after completion of such an improvement (to real property)". In section 2, the limitation is extended two years for injuries occurring during the 12th year after completion but no later than 14 years after completion.

**South Carolina.** This state's statute is much the same as the majority of statutes described above [S.C. Code of Laws, Title 10, s. 10-143 (9)]. An action must be brought "within six years after the substantial completion" of the improvement.

**South Dakota.** The South Dakota law approved in early 1966 follows the similar pattern. It includes actions against persons performing "inspection" and provides that all actions must be brought within ten years after substantial completion of construction. The date of substantial completion "shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended." Section 3 extends the limitation one year after the date of any injury occurring during the sixth year after substantial completion.

**Tennessee.** This state's law was passed in 1965 (Tenn. Code, Title 28, c. 3, ss. 1-6). It includes among the usually defined defendant parties any person performing "land surveying in connection with" the improvement to real property and provides that all actions must be brought within four years after substantial completion of the improvement. In section 2 the limitation is extended one year for injuries occurring during the fourth year after completion. Section 4 excludes the usual parties (owner, tenant, etc.) from asserting the statute as a defense but it also stipulates that the law is not available as a defense to any person guilty of fraud in any phase of the improvement.

Substantial completion is defined as "that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use same for the purpose for which it was intended. The date of substantial completion may be established by written agreement between the contractor and the owner."
Utah. Utah enacted its statute of limitations law in 1967 (Utah Code Ann. 1953, s. 78-12-25.5). The language is substantially the same as most other jurisdictions and actions are barred “more than seven years after construction” which is defined as “the date of issuance of a certificate of substantial completion by the owner, architect, engineer or other agents, or the date of the owner’s use or possession of the improvement on real property.”

Virginia. Virginia added its statute in 1964 (Va. Code, Title 8, s. 24.2). Actions are barred “more than five years after the performance or furnishing of such services and construction.”

Washington. The State of Washington enacted its law in 1967 (c. 75). The phrasing is a little different than that found in most of the statutes. It applies to “all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired, any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.”

Section 2 provides that all claims and causes of action shall accrue and the statute shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in section 1, whichever is later. Substantial completion is defined as “the state of completion reached when an improvement upon real property may be used or occupied for its intended use.”

Wisconsin. This statute was enacted in 1961 (c. 412, adding Wis. Stat. 330.155). The language is generally the same as that found in most of the later enacted laws. Actions brought more than six years after the performance or furnishing of services and construction are barred.

Congressional Action

Last year the House of Representatives’ Committee on the District of Columbia favorably reported an amended version of the
model statute that would be applicable to the District of Columbia. The committee draft passed the House without further amendment and is now before the Senate Committee on the District of Columbia. The measure calls for a five-year limitation period beginning on the date the improvement was substantially completed. Substantial completion of the improvement is defined as when (a) it is first used, or (b) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first. The bill does not apply to actions based on contract.

Period of Liability

Of the 29 state statutes of limitations affecting architects and engineers, there is strong preference for two frequently adopted time periods. One group of eleven states has set ten years as the period within which actions must be brought (Ha., Ind., Kan., La., Minn., Miss., N.J., N.M., N.D., Ohio and S.D.), and another group of nine states favors a six-year period (Alas., Ida., Mich., Nev., N. H., N.C., S.C., Wash. and Wis.). Three states have a four-year statute (Calif., Ill. and Tenn.), another three have a five-year statute (Ky., Okla., and Va.), one has settled on seven years (Utah), and two extend it to 12 years (Fla. and Pa.).

By itself, the time period does not give an accurate picture of comparative legislative preference. This is because the statutory liability period is set by anchoring it to a particular point of time in a construction project. Several different "anchor points" thus produce a variance in the actual time span of liability among the states with the same statutory period. It is therefore important to know when the statute begins to run.

Determination of Basic Date

There are about a dozen differing descriptions of when the statute begins to run in the state statutes examined. Again, there is strong preference for two frequently adopted phrases. In 13 states the statute commences a designated number of years "after substantial completion" of the construction. Eight states hold that the statute begins to run so many years "after performance or
furnishing of services." In the former group, the terminology "substantial completion" is defined in seven of the 13 statutes in which it is used. The Florida statute offers four alternatives in deciding the point of substantial completion. A few states simply define it as the date when the property can be used or occupied for its intended use.

Thus, although Ohio and Indiana each have a ten year statute of limitations, the Ohio architect must be sued within a ten year period after he has performed or furnished his services; while the Indiana colleague can be sued up to ten years after the project he designed has been "substantially completed."

To illustrate the extent of these differences among the statutes, the following compilation lists the statutory language used to indicate when the statute shall begin to run, and the states adopting that phraseology. The number of years before the statute will bar suit have been inserted in parentheses. States listed more than once have alternative provisions in their statutes.

<table>
<thead>
<tr>
<th>Statute Begins to Run</th>
<th>State — Limitation Period in Years</th>
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<tr>
<td>After final completion of construction:</td>
<td>Ida. (6).</td>
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<tr>
<td>After completion of construction:</td>
<td>Minn. (10), Pa. (12), Utah (7)</td>
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<tr>
<td>After performance or furnishing of services:</td>
<td>Ha. (10), Ill. (4), N.H. (6), N.J. (10), N.C. (6), Ohio (10), Va. (5), Wis. (6).</td>
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<tr>
<td>After date of activity giving rise to the cause of action:</td>
<td>Kan. (10).</td>
</tr>
<tr>
<td>On completion or termination of contract between architect or engineer and employer:</td>
<td>Fla. (12).</td>
</tr>
<tr>
<td>After time of occupancy of the completed improvement, use, or acceptance of completed improvement:</td>
<td>Mich. (6).</td>
</tr>
<tr>
<td>After written acceptance by the owner:</td>
<td>Miss. (10).</td>
</tr>
<tr>
<td>After termination of services:</td>
<td>Wash. (6).</td>
</tr>
<tr>
<td>After acceptance is recorded, or after date of occupancy, or after completion of design and planning:</td>
<td>La. (10).</td>
</tr>
</tbody>
</table>
Scope of Application

The statutes generally apply to those engaged in the performance or furnishing of the "design," "planning," and "observation of construction" but some statutes include other related activities such as "specifications," "surveying," "supervision of construction," "inspection," "administration of construction," "alteration or repairs." Most statutes include "construction" as such, thus including the contractor. Few statutes specifically name the professions such as "registered architect or engineer." The terminology is fairly uniform with respect to describing the nature of the action at law. Most statutes either refer to actions "arising out of any deficiency in design, etc." or "any patent deficiency" or "any defective and unsafe condition."

The statutes also vary in regard to types of suits allowed, "any action" and "all actions" are used frequently. Some states use "any action in contract or tort." Some statutes exclude contract actions.
AN ACT PROVIDING A LIMITATION OF THREE YEARS FOR THE BRINGING OF ACTIONS OF CONTRACT OR TORT FOR MALPRACTICE, ERROR OR MISTAKE AGAINST ARCHITECTS, PROFESSIONAL ENGINEERS AND LAND SURVEYORS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Section 1. The first paragraph of section 4 of chapter 260 of the General Laws, as most recently amended by chapter 302 of the acts of 1965, is hereby further amended by adding after the words “hospitals and sanitoria” the words: — architects registered under sections sixty A to sixty M inclusive of chapter one hundred and twelve, and professional engineers and land surveyors registered under sections eighty-one D to eighty-one T inclusive of said chapter one hundred and twelve — so as to read as follows:

1 Section 4. Actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitoria, architects registered under sections sixty A to sixty M inclusive of chapter one hundred and twelve, and professional engineers and land surveyors registered under sections eighty-one D to eighty-one T inclusive of said chapter one hundred and twelve, shall be commenced only within three years next after the cause of action accrues; actions for assault and battery, false imprisonment, slander, actions against sheriffs, deputy sheriffs, constables or assignees in insolvency for the taking or conversion of personal property, actions of tort for injuries to the person against counties, cities and towns and actions of contract or tort for malpractice, error or mistake against hairdressers, operators and shops registered under sections eighty-seven T to eighty-seven JJ, inclusive, of chapter one hundred and twelve, actions of tort for bodily injuries or for
27 death the payment of judgments in which is required to be 
28 secured by chapter ninety and also actions of tort for bodily 
29 injuries or for death or for damage to property against offi-
30 cers and employees of the commonwealth, of the metropolitan 
31 district commission, and of any county, city or town, arising 
32 out of the operation of motor or other vehicles owned by the 
33 commonwealth, including those under the control of said 
34 commission, or by any such county, city or town, suits by 
35 judgment creditors in such actions of tort under section one 
36 hundred and thirteen of chapter one hundred and seventy- 
37 five and clause (Tenth) of section three of chapter two hun-
38 dred and fourteen and suits on motor vehicle liability bonds 
39 under section thirty-four G of said chapter ninety shall be 
40 commenced only within two years next after the cause of ac-
41 tion accrues; and actions for libel shall be commenced only 
42 within one year next after the cause of action occurs.

1  SECTION 2. The first paragraph of section 4 of said chap-
2 ter 260 is hereby amended by adding after the word “accrues” 
3 in line 40, the following three paragraphs: —
4  1. Provided, however, that no action on contract or tort to 
5 recover damages for any injury to the person, or for bodily 
6 injury or wrongful death, arising out of the defective and un-
7 safe condition of an improvement to real property, nor any 
8 action for contribution or indemnity for damages sustained 
9 on account of such injury, shall be brought against any archi-
10 tects, consulting engineers or land surveyors performing or 
11 furnishing the design, planning or supervision of general ad-
12 ministration or observation of construction of such improve-
13 ment to real property, more than six years after the perform-
14 ance or furnishing of such services.
15  2. This limitation shall not apply to any person in actual 
16 possession and control as owner, tenant or otherwise, of the 
17 improvement at the time the defective and unsafe condition of 
18 such improvement constitutes the proximate cause of the in-
19 jury for which it is proposed to bring an action.
20  3. Whenever the words “architects” or “consulting engi-
21 neers” or “land surveyors are used in the foregoing paragraphs
22 of this act, they shall be considered also to mean and include a partnership or any other firm of architects or consulting engineers or land surveyors or a combination of them, or any corporation lawfully practicing architecture or any corporation lawfully practicing engineering, having a registered engineer in charge of its engineering practice, or any corporation lawfully practicing land surveying.
### Statutory References to Statutes of Limitations Against Architects and Engineers

<table>
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<tr>
<th>State</th>
<th>Statutory Reference</th>
<th>Time Period in Years</th>
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<td>1. Alaska</td>
<td>Code s. 09.10.055</td>
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<td>2. California</td>
<td>Sess. Laws 1967, c. 1326</td>
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<td>3. Florida</td>
<td>Stat. s. 95.11(10)</td>
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<td>5. Idaho</td>
<td>Code 5-241</td>
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</tr>
<tr>
<td>6. Illinois</td>
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<td>8. Kansas</td>
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<td>10. Louisiana</td>
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<td>11. Michigan</td>
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<td>12. Minnesota</td>
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<td>15. New Hampshire</td>
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<td>17. New Mexico</td>
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<td>21. Ohio</td>
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<tr>
<td>29. Wisconsin</td>
<td>Stat. 330.155</td>
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