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Architectural Malpractice: Toward An Equitable Rule For Determining When The Statute Of Limitations Begins To Run

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ARCHITECTURAL MALPRACTICE: TOWARD AN EQUITABLE RULE FOR DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN

I. Introduction

In the past thirty years, the architectural profession has been characterized by dramatic changes in both its legal liabilities and in its relationship with other members of the construction industry.[1] At one time, architects' liability for design defects was limited to those with whom they enjoyed privity of contract.[2] With the recent abrogation of the privity doctrine,[3] however, strangers to the professional relationship may now sue in tort and architects inevitably

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1. *See infra* note 3 and accompanying text. The New York Education Law, which requires licensing for the practice of architecture, provides the following definition:

> The practice of the profession of architecture is defined as rendering or offering to render services which require the application of the art, science and aesthetics of design and construction of buildings, groups of buildings, including their components and appurtenances and the spaces around them wherein the safeguarding of life, health, property and public welfare is concerned. Such services include, but are not limited to consultation, evaluation, planning, the provision of preliminary studies, designs, construction documents, construction management and the administration of construction contracts.

N.Y. EDUC. LAW § 7301 (McKinney 1985); *see* Steiner v. Wenning, 53 A.D.2d 437, 444, 386 N.Y.S.2d 429, 434 (2d Dep't 1976) (Shapiro, J., dissenting).

In general, the courts considering the issue of statute of limitations have subjected "design professionals," such as engineers and surveyors, to the same rules applied to architects. Indeed, the term "A/E," for architect/engineer, is commonly used interchangeably with "design professional." Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 346, 499 A.2d 178, 181 (1985).

2. The privity doctrine originated in England with the case of Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. Ch. 1842).

3. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (American case generally credited with extending tort liability to third parties). The leading case for architectural negligence is Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

find themselves exposed to a multitude of lawsuits.[4] In addition to this expansion of liability,[5] the architect's traditional role of designer/supervisor or "Master Builder"[6] has been significantly altered by new construction methods, such as design-build[7] and fast track,[8] and

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4. One commentator reported astonishing figures:

> In 1985, there were 44 claims filed for every 100 insured architecture firms: "This justifies the architect's fear that, regardless of the quality of his practice, there is a 50-50 chance he will be sued."

From Bauhaus to Courthouse, 13 BARRISTER 24 (1986) (quoting A. Abramowitz, Associate General Counsel, American Institute of Architects).

The architect's expanding liability encourages the filing of frivolous suits; nonetheless, the architect must endure the trouble and expense of defending these actions. *See, e.g.*, Easterday v. Masiello, Nat'l L.J., Feb. 22, 1988, at 31, col. 2 (Fla. Jan. 7, 1988). In *Easterday*, the mother of a man who committed suicide in prison brought a wrongful death action against the architect and engineer for the construction of the jail on theories of negligence and strict liability. The Supreme Court of Florida affirmed the lower court's finding that the architect could not be held liable for a patent defect. *Id.* at 31, col. 2; *see also* Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1982). In 1977, Yarbro's wife tripped on a radiator and fell through a window in a hotel designed by noted architect I.M. Pei. *Id.* at 824. Decedent's husband brought suit in 1979, nineteen years after substantial completion of the hotel in question. *Id.* The Supreme Court of Colorado declined to hold unconstitutional the state's ten-year statute of repose for design professionals and affirmed the lower court's grant of summary judgment for Pei. *Id.* at 825. *See generally* Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 OHIO STATE L.J. 217 (1984) (discussing architect's expanding tort liability).

5. *See also* Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME L. REV. 306, 308-09 (1977); Berreby, *Architects: After the Fall*, Nat'l L.J., July 19, 1982, at 1, col. 1 [hereinafter Berreby].

6. *See* Jackson, *The Role of Contract in Architectural and Engineering Malpractice*, 51 INS. COUNS. J. 517 (1984) [hereinafter Jackson]. One authority described the "Master Builder" concept and its implications for architects' liability in the following manner:

> The symbolic "Master-Builder" concept, in which the architect is assumed to be the final authority in the construction process, regardless of contract, has been cited as a reason "why so many architects are targets when something goes wrong"; this outmoded concept militates against the contractual separation of the traditional A/E functions.

Id. at 521 & n.40 (citing N.Y. Times, Feb. 12, 1978, at 54, col. 2); *see also* Kahn, *Introduction: The Changing Role of the Architect*, 23 ST. LOUIS U.L.J. 216 (1979) (describing Michaelangelo and da Vinci as "the prototypes of the omniscient master builder who was charged with responsibility for the total success of a construction project" and suggesting that a new type of master builder is emerging).

For a general discussion of the traditional building contract arrangement, see J. Sweet, *Owner-Architect-Contractor: Another Eternal Triangle*, 47 CALIF. L. REV. 645 (1959) [hereinafter *Triangle*].

7. "Design-build," sometimes called "turnkey," denotes an arrangement in which the owner has very little input—sometimes the owner will supply the site and nothing else. The owner contracts with another party who agrees to perform both the design and construction phases of the project in an effort to save time

by new roles, such as construction manager (CM)[9] and developer.[10] As a result, the rights and duties of architects today are much less susceptible to precise definition.

Courts, legislatures and commentators have struggled with the legal and policy issues which attend the emerging law of architectural malpractice.[11] Malpractice is properly viewed as a specific type of

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and money. *See* Hapke, *Construction Industry Contracts*, 23 ST. LOUIS U.L.J. 249, 251 (1979) [hereinafter Hapke]. *See generally* Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. MARSHALL L. REV. 1 (1984) (discussing architect's expanded liability under design-build); Note, *The Architect in the Design-Build Model: Designing and Building the Case for Strict Liability in Tort*, 33 CASE W. RES. 116 (1982) (same).

8. Fast track differs from design-build:

> In a typical fast-track situation, the owner identifies and retains the construction contractor prior to the completion of the contract documents. The AE issues drawings and specifications as they are ready and in a sequence to permit construction. Time is saved since the design effort overlaps the construction work. Money is saved, presumably, since the project is completed sooner and the owner can shift to permanent financing earlier than under normal circumstances. The principal disadvantage of the fast-track approach is that an agreement between the owner and contractor must be reached without the benefit of a complete set of contract documents. Such items as price and time of completion may be more difficult to establish and agree upon under these circumstances.

Hapke, *supra* note 7, at 250.

9. Construction management is still a relatively new concept. In the traditional owner/contractor arrangement, the owner provides the plans and specifications and hires a general contractor to execute them. The general contractor, in turn, hires subcontractors (*e.g.*, plumbing, excavation, electric, dry wall, carpentry, etc.) to perform the work. In the construction management model, the CM constitutes a kind of "think-tank" comprised of contractors, architects, engineers and other construction experts. The owner contracts with the CM to manage the progress of the construction, but the owner himself hires prime contractors to do the work. Thus, the CM has virtually no liability for the design of, execution of, or payment for the work. Some experts believe that this method is more efficient for owners who are familiar with the construction industry, such as public entities and developers. *See generally* J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS § 21.04(D), at 451-53 (3d ed. 1985) [hereinafter SWEET]; AMERICAN INSTITUTE OF ARCHITECTS DOCUMENT B801, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER (6th ed. 1987); *see also* Hart, *Construction Management "C.M. for Short" The New Name for an Old Game*, 8 FORUM 210 (1972); Note, *The Roles of Architect and Contractor in Construction Management*, 6 U. MICH. J.L. REF. 447 (1973).

10. Kennedy, *Architects Now Double as Developers*, N.Y. Times, Feb. 7, 1988, § 8 (Real Estate), at 20, col. 1 (20% of those responding to AIA survey of 300 architects "indicated that they were active in development, construction management or joint ownership situations").

11. *See* Note, *Architectural Malpractice: A Contract Based Approach*, 92 HARV. L. REV. 1075, 1101 n.178 (1979) (discussing New York's attempts "to find an

negligence, arising only when there is an existing professional relationship between the parties.[12] The law of architectural malpractice draws many analogies from the most common and familiar species of malpractice—medical and legal malpractice. It is thought that because the architect is a licensed professional in whom the client reposes some measure of trust, he should be subject to the same broad principles which govern medical and legal malpractice. These analogies, however, do not withstand close analysis and have resulted in confusion and inequity.

For example, when exactly does a cause of action accrue and a statute of limitations begin to run against an architect for malpractice? This issue becomes particularly difficult when the defect is latent and the damage caused by the alleged malpractice does not occur at the time of the act of malpractice. Courts of the various jurisdictions have generally responded in the same way they have to the same problem as it arises in the medical and legal professions. Some courts have chosen a modern rule[13] which favors plaintiffs, while others have retained a common law[14] rule which favors defendants. These choices, while arguably practical for the legal and medical professions where the professional relationship is based solely on a common law duty of reasonable care,[15] cannot be applied mechanically to the architectural profession. The primary reason for this is the contractual nature of the professional relationship between the owner, architect and contractor.

This Note will explore this issue in three parts. Part II discusses the contractual nature of the owner/architect relationship and the judicial attempts to analogize to relationships in other professions. Part III considers the prevailing judicial theories as to when a cause of action accrues against architects and against professionals in general. Finally, Part IV defines the architect's rights and duties

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analysis adequate to decide whether the tort or contract statute of limitations should apply in suits alleging architectural malpractice") [hereinafter *Architectural Malpractice*].

12. *See infra* notes 120-24 and accompanying text.

13. *See infra* notes 99-114 and accompanying text.

14. *See infra* notes 63-98 and accompanying text.

15. *But see* Guilmet v. Campbell, 385 Mich. 57, 69, 188 N.W.2d 601, 606 (1971) (under some circumstances, trier of fact might conclude that doctor contracted to cure his patient); Mason v. W. Pennsylvania Hosp., 286 Pa. Super. 354, 358-59, 428 A.2d 1366, 1368 (1981); Tierney, *The Contractual Aspects of Malpractice*, 19 WAYNE L. REV. 1457 (1973) (discussing *Guilmet*); Annotation, *Recovery Against Physician on Basis of Breach of Contract to Achieve Particular Result or Cure*, 43 A.L.R.3D 1221 (1972) (discussing cases in which doctor contracts for specific result).

vis-à-vis the several different classes of plaintiffs: parties to the contract, third-party beneficiaries, and strangers to the contract. This Part then proposes a rationale for determining when the statute of limitations should run for the different plaintiffs. This Note asserts that the contractual relationship between architect and owner distinguishes architectural malpractice from other types of professional malpractice, and that this relationship should be a substantial factor in determining the date of accrual.

II. The Contractual Nature of the Owner/Architect Relationship

A. The Analogy to Other Professional Relationships

The owner, architect and contractor involved in a construction project are co-adventurers in a common enterprise and parties to a complex set of contracts.[16] The relationship between the owner and the architect, unlike that of physician/patient or attorney/client, is typically based on a contract; in fact, the standard form contracts drafted by the American Institute of Architects (AIA) are widely used and are influential.[17] Within this commercial contractual context, owner and architect owe each other various specific duties and are entitled to specific rights.[18] Conversely, the professional owes a common law duty to exercise the care of a reasonable professional in providing service to a patient or client.[19] Moreover, not only does

16. In the typical situation, the "contract documents" consist of the contracts between owner and architect and between owner and contractor, the general conditions, technical specifications and drawings. *See* Hapke, *supra* note 7, at 249; Jackson, *supra* note 6, at 517 (citing J. ACRET, ARCHITECTS AND ENGINEERS: THEIR PROFESSIONAL RESPONSIBILITIES § 9.1, at 130 (1977) [hereinafter ACRET]). *See generally Triangle*, *supra* note 6; *Architectural Malpractice*, *supra* note 11.

17. The AIA documents are the most widely used standard form contracts in the construction industry. The AIA has updated eight of the 24 AIA A-Series documents, two of the 12 B-Series, and one of the five C-Series in the 1987 editions. Some of these documents had not been revised in over ten years. *See* Taylor, *AIA Publishes Revised Forms*, 12 LITIGATION NEWS 3 (Summer 1987).

The standard form contract between owner and architect is AMERICAN INSTITUTE OF ARCHITECTS DOCUMENT B141, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT (14th ed. 1987) [hereinafter OWNER-ARCHITECT AGREEMENT]. For an excellent overview of these standard form contracts, see generally, AMERICAN INSTITUTE OF ARCHITECTS, HANDBOOK OF PROFESSIONAL PRACTICE [hereinafter HANDBOOK]. *See also* Coplan, *Law: Liability and AIA Contracts*, 68 PROGRESSIVE ARCHITECTURE 71 (Jan. 1987).

18. *See infra* notes 23-31 and accompanying text.

19. The standard of care required of a design professional was stated 100 years ago:

> The undertaking of an architect implies that he possesses skill and ability,

the existence of a contract render the architectural professional relationship fundamentally different from the medical and legal relationships, but the owner/architect/contractor model itself is subject to wide variation. Supervisory duties shared by an architect and contractor in one project may be strictly and separately defined in another.[20] Authorizations for change orders[21] may issue from the architect in one instance and require both owner and architect approval in another.[22]

Some generalizations, however, can be made about the respective duties of owner, architect and contractor. The owner provides financing for the project and makes all final decisions regarding the execution of the contract.[23] The owner is also responsible, prior to construction, for the survey and legal description of the site and

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> including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply, in the given case, his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result.

Groff, *Legal Considerations for Architects and Engineers: Avoiding the Pitfalls*, 41 WASH. ST. B. NEWS 17 (Mar. 1987) (quoting Coombs v. Beede, 89 Me. 187, 188, 36 A. 104, 105 (1896)). This standard of care remains viable today:

> Theoretically, American courts determine the negligence of design professionals by the same standard of care used to determine the professional negligence of attorneys, physicians and others "engaged in professions requiring the exercise of technical skill, [*i.e.*,] whether the professional performed in accordance with the skill usually exercised by others of his profession in the same general area.

Jackson, *supra* note 6, at 519-20 & n.29 (quoting Pittman Const. Co. v. New Orleans, 178 So. 2d 312, 321 (La. Ct. App.), *writ refused*, 248 La. 434, 179 So. 2d 274 (1965)).

20. *See* SWEET, *supra* note 9, § 15.08, at 275-94.

21. "A [c]hange [o]rder is a written order to the [c]ontractor signed by the [o]wner and the [a]rchitect, issued after execution of the contract, authorizing a change in the [w]ork or an adjustment in the [c]ontract [s]um or the [c]ontract [t]ime . . . ." *See* AMERICAN INSTITUTE OF ARCHITECTS DOCUMENT A201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION ¶ 12.1.1 (14th ed. 1987) [hereinafter GENERAL CONDITIONS]. The AIA forms also provide that the architect may approve minor changes (sometimes called field orders) in the work without the signature of the owner. *See id.* ¶ 2.4.1; *see also* Ricchini, *The Authority and Responsibility of the Architect as Administrator of the Contract*, 23 ST. LOUIS U.L.J. 370, 375 (1979) [hereinafter Ricchini].

For example, during the construction of a dam, suppose the contractor finds that the site does not contain enough fill material for the project. The contractor must then request from the owner and architect a change order authorizing him to seek fill material from another site.

22. *See* GENERAL CONDITIONS, *supra* note 21, ¶ 2.2.15.

23. *See* Robinson, *Construction Contract Administration* (1985), in HANDBOOK, *supra* note 17, § B-7, at 2 [hereinafter Robinson].

for securing approvals, easements or permits as required by local law.[24]

The contractor performs the actual building of the project and his duties typically include supervising the work, obtaining materials and hiring subcontractors.[25] The contractor determines the appropriate means, methods, techniques, sequences and procedures for construction according to the plans provided by the architect.[26] Ordinarily, the contractor is also responsible for job site safety.[27]

The architect administers the contract between the owner and the contractor and is responsible for observing the construction process.[28] It is the architect's duty to interpret the plans, specifications and contract documents for the contractor, to process and approve shop drawings,[29] to certify applications for payment and to keep the owner informed about the progress of the project.[30] Under the AIA standard form owner/contractor document, the architect has the additional duty of hearing and settling claims and disputes.[31]

B. Legal and Medical Professions

This arrangement of contracts, with its attendant allocation of rights and duties among several parties, is quite different from

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24. *See id.*

25. The AIA's *Handbook of Professional Practice* distinguishes among "superintendence and supervision" which are the responsibility of the contractor, "observation" which is the responsibility of the architect, and "inspection" which is the responsibility of public building inspectors or representatives of governmental agencies. *See* Robinson, *supra* note 23, § B-7, at 2.

26. *See id.*

27. *See* SWEET, *supra* note 9, §§ 35.01-35.10, at 811-34.

28. *See* Robinson, *supra* note 23, § B-7, at 2; *see also* Ricchini, *supra* note 21, at 372.

29. *See* Ricchini, *supra* note 21, at 372; *see also infra* note 75 and accompanying text.

30. *See* GENERAL CONDITIONS, *supra* note 21, ¶ 2.2.5 ("on the basis of his on-site observations as an architect, he will keep the owner informed about the progress of the work"); *see also* Ricchini, *supra* note 21, at 372.

31. GENERAL CONDITIONS, *supra* note 21, ¶¶ 4.3.2-4.4.4, at 11-12. The 1987 revisions provide that when either the owner or the contractor has a claim against the other, the parties must submit the dispute to the architect for initial determination. The architect's decision will be final, subject to arbitration in accordance with the American Arbitration Association Construction Industry Rules. Furthermore, the General Conditions expressly provide that submission of the claim to the architect shall be a condition precedent to any arbitration or litigation of the claim.

This requirement that claims must first be submitted to the architect and that such submission shall be a condition precedent to arbitration or litigation includes claims "alleging an error or omission by the [a]rchitect." *Id.* ¶ 4.3.2.

professional relationships in the legal and medical fields.[32] The professional relationship between physician and patient, and between attorney and client, differ from the architectural setting both in foundation and purpose. For example, patient and physician are not contracting parties who contemplate a common commercial purpose or venture.[33] Compared to the professional, the patient/client is a layman whose medical condition or legal predicament compels him to repose complete trust and confidence in the expertise of the professional. In return, the professional owes a common law duty to exercise the care of a reasonable professional in providing services to the patient or client.[34] Arguably, one who requires the services of a physician or attorney is in a position of vulnerability—even if that position does not entail a lawsuit or sickness.

When an owner, however, contracts for architectural services, both parties assume a set of rights and duties in a commercial relationship. These duties will vary according to the terms of the signed agreement and these terms will vary according to the relative sophistication and bargaining power of the parties. While it is true that the owner of a project must repose trust and confidence in the expertise of the architect, that trust is of a lesser magnitude than that which the patient/client reposes in the expertise of the physician/attorney. If the owner is a public body, which it often is,[35] then it is certainly familiar with the construction industry and service contracts in general.[36] A patient or client, on the other hand, is an outsider to the legal or medical profession. Moreover, the owner reposes a lesser

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32. *See generally* S. SCHREIBER, PROFESSIONAL NEGLIGENCE (1967) (discussing legal, medical and scientific malpractice).

33. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1985). "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may: 1. Acquire a lien granted by law to secure his fee or expenses. 2. Contract with a client for a reasonable contingent fee in a civil case." *Id.*

34. "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." RESTATEMENT (SECOND) OF TORTS § 299A (1977).

35. *See* SWEET, *supra* note 9, § 9.02, at 156-57.

36. Public owners commonly account for a sizable portion of the construction industry. Indeed, many state statutes specifically address the relationship between public owners and private contractors. *See, e.g.*, N.Y. STATE FIN. LAW § 135 (McKinney 1974) (requiring that all contracts for construction provide separate contracts for: (1) heating, ventilating and air-conditioning; (2) plumbing; and (3) electric); N.Y. PUB. BLDGS. LAW § 8 (McKinney Supp. 1988) (requiring that all contracts for construction of a state building be let by competitive bidding).

degree of trust in the architect because, even though he contracts directly with the architect, the construction process is a multi-party, multi-professional endeavor.[37] This allows risk to be kept at a minimum. The fact that all the contracting parties are represented by counsel reduces risks even further. This involvement of other professionals and counsel does not typically exist in the medical and legal contexts.

C. The Professional Standard of Care

Among the duties assumed by the architect is the duty to render services to the owner in accordance with local professional standards.[38] Thus, an action for malpractice may properly sound in tort.[39] Nevertheless, the professional relationship remains grounded in a contract between the client and the architect. The legal or medical professional, however, owes a common law duty of care which is neither grounded in contract nor commercial in nature.[40]

III. When Does the Statute of Limitations Begin to Run on a Malpractice Claim Against an Architect?

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37. *See* SWEET, *supra* note 9, § 5.01, at 51. "The private design professional will make contracts with, among others, clients, consultants, employees, landlords and sellers of goods. In addition, contracts are made between owners and prime contractors, prime contractors and subcontractors, contractors and suppliers, employers and employees, buyers and sellers of land, and brokers and property owners." *Id.*

38. *See supra* note 34 and accompanying text.

39. *See In re* Paver & Wildfoerster and Catholic High School Ass'n, 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976); Sosnow v. Paul, 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975).

40. The design professional's standard of care, however, remains contractual in nature:

> [T]o determine a design professional's liability solely on foreseeability without reference to contractual provisions creates a risk of exposing that professional to unlimited liability. Every single responsibility of an A/E need not be specified in a contract (certain duties are implied) and an A/E should not be permitted to deny reasonably foreseeable responsibility to a reasonably foreseeable class of individuals; however, the foreseeability of harm to a particular plaintiff should be viewed in light of the contracts involved in the project and an A/E's duty should be determined by the foreseeable consequences of those tasks which he contractually agreed to perform.

Jackson, *supra* note 6, at 520-21.

A. Competing Policies

Statutes of limitations are favored by the law and serve a number of significant policy interests.[41] Statutes of limitations: (1) protect defendants from false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable; and (2) protect the public's interest of certainty and finality in the administration of its affairs, especially in commercial transactions, and thus, terminate contingent liabilities at specific points in time.[42]

Without the protection of statutes of limitations, the architect may be subject to lawsuits many years after the completion of a project. This creates the danger that the defendant-architect might be held to professional standards existing at the time of the claim rather than at the time of the conduct.[43] "While technically this would not be correct, juries might actually hold the [professional] to such a higher standard in order to compensate the plaintiff."[44] In addition, the possibility of such claims being made many years later would require insurance companies to keep large reserves. This, in turn, would drive up premiums.[45]

Since the policies underlying statutes of limitations are geared toward protecting defendants, a statute of limitations is expressed as "one of grace, permitting avoidance of liability."[46] As such, it must be pleaded and becomes an affirmative defense with the burden of establishing it on the defendant.[47] The statute is triggered by the

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41. *See* Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 429, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 25 (1969).

42. *See* SWEET, *supra* note 9, § 27.03(G), at 596 (citing Gates Rubber Co. v. U.S. Marine Corp., 508 F.2d 603, 611 (7th Cir. 1975) (Stevens, J., currently United States Supreme Court Justice); *see also* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944) (statutes of limitations "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared").

43. *See* SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS § 32.06, at 733 (2d ed. 1977).

44. *Id.*

45. *Id.*

46. Gattis v. Chavez, 413 F. Supp. 33, 35 (D.S.C. 1976) (citing South Carolina Mental Health Comm'n v. May, 226 S.C. 108, 83 S.E.2d 713 (1954)).

47. *See* Immediate v. St. John's Queens Hosp., 48 N.Y.2d 671, 673, 397 N.E.2d 385, 386, 421 N.Y.S.2d 875, 876 (1979) (in order to preserve affirmative defense of statute of limitations, defendant need only state the defense in its answer; no need to set out argument until facts are made available); N.Y. CIV. PRAC. L. & R. § 3018 (McKinney Supp. 1988) (requiring certain affirmative defenses to be pleaded; otherwise they are waived).

accrual of a cause of action.[48] State statutes generally do not define when a cause of action accrues and thus when the statute begins to run. In this situation, the issue is left to judicial determination and is generally a question of law for the court.[49] Only where a factual determination is involved should the issue be submitted to a jury.[50]

Depending on the applicable law and facts, a statute of limitations for architectural malpractice[51] can begin to run either at the time

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48. *See* N.Y. CIV. PRAC. L. & R. § 203(a) (McKinney 1972).

49. *See* Smith v. Bell Tel. Co., 397 Pa. 134, 142, 153 A.2d 477, 481-82 (1959).

50. *See* Cluett, Peabody & Co. v. Campbell, Rea, Hayes & Large, 492 F. Supp. 67, 75 n.10 (M.D. Pa. 1980) (citing Smith v. Bell Tel. Co., 397 Pa. 134, 142, 153 A.2d 477, 481-82 (1959)).

51. The various legislatures have enacted two kinds of statutes that specifically govern suits against design professionals—statutes of limitations and statutes of repose. Statutes of limitations begin to run when a cause of action accrues against the defendant. Statutes of repose, also known as completion statutes, begin to run at some specific date, usually the date of substantial completion of the project, without regard to whether a cause of action has arisen. *See* SWEET, *supra* note 9, § 27.03(G), at 597. The significant distinction between these statutes is that a statute of limitations cuts off the plaintiff's remedy, whereas a statute of repose cuts off the right of action itself, before it ever vests. *See* ACRET, *supra* note 16, § 1107, at 258-59.

See ALASKA STAT. § 9.10.055 (1983); ARK. CODE ANN. § 16-56-112 (Supp. 1987); CAL. CIV. PROC. CODE §§ 337.1, 337.15 (West 1982); COLO. REV. STAT. § 13-80-127 (1987); CONN. GEN. STAT. § 52-584a (Supp. 1988); DEL. CODE tit. 10, § 8127 (Supp. 1987); D.C. CODE § 12-310 (Supp. 1987); FLA. STAT. ANN. § 95.11(3)(c) (West 1982); GA. CODE ANN. §§ 9-3-51 to 9-3-52 (1982); HAW. REV. STAT. § 657-8 (1985); IDAHO CODE § 5-241 (1979); IND. CODE ANN. §§ 34-4-20-1, 34-4-20-3, 34-4-20-4 (Burns 1973), 34-4-20-2 (Burns Supp. 1986); LA. REV. STAT. ANN. § 9:2772 (West 1983 & Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 752-A (1980); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (1984); MASS. ANN. LAWS ch. 260, § 2B (Michie/Law. Co-op Supp. 1988); MICH. COMP. LAWS ANN. § 600.5839 (1987); MISS. CODE ANN. § 15-1-41 (Supp. 1987); MO. ANN. STAT. § 516.097 (Vernon Supp. 1988); MONT. CODE ANN. § 27-2-208 (Supp. 1987); NEB. REV. STAT. § 25-223 (1985); NEV. REV. STAT. §§ 11.202, 11.206 (1973); N.H. REV. STAT. ANN. § 508.4-b (1983); N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1977); N.M. STAT. ANN. § 23-1-26 (Supp. 1975); N.C. GEN. STAT. § 1-50(5) (1983); N.D. CENT. CODE § 28-01-44 (1974); OHIO REV. CODE ANN. § 2305.131 (1981); OKLA. STAT. ANN. tit. 12, § 109 (West Supp. 1988) (amended 1978); OR. REV. STAT. § 12.135 (1983); PA. STAT. ANN. tit. 12, § 65.1 (Purdon 1977); R.I. GEN. LAWS § 9-1-29 (Supp. 1977); S.D. CODIFIED LAWS ANN. §§ 15-2-9, 15-2-11 (Supp. 1978), 15-2-10 (1967); TENN. CODE ANN. § 28-314 (Supp. 1978); TEX. REV. CIV. STAT. ANN. art. 5536a (Vernon Supp. 1978); UTAH CODE ANN. § 78-12-25.5 (1977); VA. CODE ANN. § 8-24-2 (Supp. 1976); WASH. REV. CODE ANN. §§ 4.16.300, 4.16.310 (Supp. 1988); WIS. STAT. ANN. § 893.155 (West 1966) (amended 1975); WYO. STAT. §§ 1-3-110 to 1-3-112 (1985).

These so-called statutes of repose have been the more popular legislative solution to the problem of expanding tort liability in the construction industry. Between 1964 and 1969, some thirty states enacted completion statutes. *See* ACRET, *supra*

of the malpractice, at the time of damage, at completion of the project or at discovery of the damage.[52] Because a plaintiff may find his action barred before he discovers his injury and an architect may be hauled into court many years after he has fulfilled his contractual duties and the building has left his control, there are several views as to how a court properly determines when a cause of action accrues for architectural malpractice.

The traditional view holds that the architectural malpractice statute of limitations begins to run at the time of the wrongful conduct.[53] A contrary view, which represents the modern judicial trend, holds that the statute begins to run when the plaintiff discovers or should have discovered his damage.[54] This Note contends that the architect/owner/contractor relationship is fundamentally different from the other professional relationships to which it has been analogized;[55] therefore, the issue of when a statute begins to run should depend on the nature of the professional relationship between the plaintiff and the architect. In malpractice actions, where the plaintiff and defendant relationship is grounded in a contract defining their rights and duties, the better rule is that the statute begins to run at the time of the alleged malpractice.[56] In negligence actions, where the plaintiff and defendant have no professional relationship and no contractual rights and duties, the better rule is that the statute begins to run when the plaintiff discovers or should have discovered his injury.[57]

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note 16, § 11.09, at 262 (citing Rosenberg v. N. Bergen, 61 N.J. 190, 293 A.2d 662 (1972)). New York has declined to join those jurisdictions that have enacted special statutes of repose for design professionals. This Note asserts that the statute of repose approach fails to consider that the plaintiff suing an architect for malpractice stands in a much different position than does a plaintiff suing for negligence.

52. *See* Annotation, *When Statute of Limitations Begins to Run on Negligent Design Claim Against Architect*, 90 A.L.R.3D 507 (1979) [hereinafter Annotation]; ACRET, *supra* note 16, at 244-72.

53. *See infra* notes 58-92 and accompanying text.

54. *See infra* notes 94-111 and accompanying text.

55. *See supra* notes 32-40 and accompanying text.

56. *See infra* notes 126-37 and accompanying text.

57. *See infra* notes 138-41 and accompanying text.

Two states have adopted a "mixed rule" different from the rule recommended by this Note. In Florida, the four-year statute begins to run from the date of actual possession of the project or completion of the contract, whichever is later, except that when the action involves a latent defect, the time runs from when the defect is or should have been discovered. FLA. STAT. § 95.11(3)(c) (1982); *see also* Kelley v. School Bd. of Seminole County, 435 So. 2d 804, 805 (Fla. 1983).

In Nebraska, the statute provides for a four-year period running from the time

B. The Completion Rule

The traditional view, adopted by a majority of states, is that an action for architectural malpractice accrues at the time of the wrongful conduct.[58] Thus, the statute begins to run even if a structural or other type of failure[59] has not yet occurred. Some courts take the position that mere ignorance of facts constituting a cause of action, that comes into existence when there is a breach of duty,[60] does not prevent the statute from running. Difficulty in discovering damage is irrelevant.[61] Other courts state that at the time of the malpractice, in the allegedly negligent design, there is an actionable legal injury, no matter how slight.[62] According to one court, one could not seriously contend that if the plaintiff had discovered the negligence of the defendant architect at the time it was committed, the plaintiff would have had no right of action simply because the building had not yet fallen down at that time.[63]

Under the traditional view, the date of accrual should be directly related to the architect's duties under the contract. If the architect has contracted to provide only plans and specifications, the statute should begin to run no later than at the time of tender of the documents.[64] It is at this point that the architect has fulfilled his contractual obligations and is entitled to demand payment for services

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of the act or omission that gave rise to the cause of action. If, however, the cause of action could not reasonably have been discovered within four years, the plaintiff is then entitled to a two-year period beginning at the date of discovery of the cause of action or of facts which would reasonably lead to such discovery, whichever is earlier. NEB. REV. STAT. § 25-223 (1985); *see also* Grand Island School Dist. v. Celotex Corp., 203 Neb. 559, 565, 279 N.W.2d 603, 607 (1979) ("even without section 25-223, R.S. Supp. 1978, a discovery rule is applicable to a tort action based on latent defects in improvements to real property").

58. *See* County of Milwaukee v. Schmidt, Garden & Erikson, 43 Wis. 2d 445, 455, 168 N.W.2d 559, 562 (1969); *see also* Comptroller of Virginia *ex rel* Virginia Military Inst. v. King, 217 Va. 751, 759, 232 S.E.2d 895, 900 (1977) (owner's cause of action for improper design by architect accrues when the plans receive final approval); S. Burlington School Dist. v. Goodrich, 135 Vt. 601, 604, 382 A.2d 220, 222 (1977) ("the rule in Vermont, except where modified by statute, has been that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known").

59. *See* Thornton, *Failure Statistics Categorized by Cause and Generic Class*, 1985 LEGAL HANDBOOK FOR ARCHITECTS, ENGINEERS AND CONTRACTORS 151 (1985).

60. *See* Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981).

61. *See King*, 217 Va. at 759, 232 S.E.2d at 900.

62. *See* Wellston Co. v. Sam N. Hodges, Jr. & Co., 114 Ga. App. 424, 151 S.E.2d 481 (1966).

63. *See* Annotation, *supra* note 52, at 514 (citing *Wellston,* 114 Ga. App. at 425, 151 S.E.2d at 482).

64. *See* SWEET, supra note 9, §§ 16.01-16.02, at 313-21.

rendered. If, however, the architect has contracted to supervise construction of the project, his contractual duties are not discharged until the building is "substantially completed."[65]

1. Substantial Completion/Final Certification

The term "substantial completion" is a term of art, and should be distinguished from "final certification." Substantial completion generally means that the building or project has reached a point where it is ready for the use for which it was intended and that whatever work remains to be done is minor.[66] It has been held in New York that the statute at issue did not begin to run until the architect authorized issuance of the final certificate for payment.[67] The same courts, however, point out that the statute will be tolled[68] until final certification for payment only when such certification represents a significant duty of the architect and concomitant right of the owner.[69] Where issuance of the final certificate is merely an administrative act, courts will choose a more appropriate date for accrual of the action.[70] New York courts realize and recognize that

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65. *See infra* notes 70-77 and accompanying text.

66. "When the [a]rchitect on the basis of an inspection determines that the work or designated portion thereof is substantially complete, he will then prepare a [c]ertificate of [s]ubstantial [c]ompletion which shall establish the [d]ate of [s]ubstantial [c]ompletion . . . ." *See* GENERAL CONDITIONS, *supra* note 21, ¶ 9.8.1.

"Substantial completion" describes the status of a construction project that is ready for its intended use. This does not mean, however, that every detail must be in place. "Final certification" refers to the point at which the contractor has fulfilled all his obligations under the contract and the architect is prepared to certify to the owner that the project is built to his satisfaction and that the contractor is entitled to payment of sums due on the contract.

67. *See* Board of Education v. Celotex Corp., 88 A.D.2d 713, 714, 451 N.Y.S.2d 290, 291 (3d Dep't), *aff'd*, 58 N.Y.2d 684, 444 N.E.2d 1006, 458 N.Y.S.2d 542 (1982).

68. Tolling has been defined in the following manner: "To suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority." BLACK'S LAW DICTIONARY 1334 (5th ed. 1979).

69. *See Celotex*, 88 A.D.2d at 714, 451 N.Y.S.2d at 291.

70. *See* State v. Lundin, 60 N.Y.2d 987, 459 N.E.2d 486, 471 N.Y.S.2d 261 (1983). The AIA Owner-Architect Agreement expressly provides an accrual date:

> Causes of action between the parties to this [a]greement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of [s]ubstantial [c]ompletion for acts or failures to act occurring prior to [s]ubstantial [c]ompletion, or the date of the issuance of the final [c]ertificate for [p]ayment for acts or failures to act occurring after [s]ubstantial [c]ompletion.

OWNER-ARCHITECT AGREEMENT, *supra* note 17, ¶ 9.3.

the architect/owner relationship is contractual in nature, not simply a matter of common law duty.

The "completion rule" serves the second policy enunciated above.[71] If it is desirable for commercial entities to obtain certainty and finality in the administration of their affairs, then it is also certainly imperative for architects, whose exposure to liability is expanding and whose insurance costs are skyrocketing, to obtain such certainty and finality.[72] On the other hand, it is argued that this interest is protected at the expense of plaintiffs whose suits are barred before there is actual injury or before actual injury is discovered.[73]

2. *New York's Completion Rule*

The New York Legislature has not promulgated a statutory date of accrual, and consequently the courts have adopted the completion rule. In *Sears, Roebuck & Co. v. Enco Associates*,[74] the New York Court of Appeals held that an action for architectural malpractice brought more than three but less than six years after the date of accrual was barred as to tort damages but timely as to contract damages.[75] The *Sears, Roebuck* court reaffirmed an earlier rule, enunciated in *Sosnow v. Paul*,[76] that an action against an architect, whether in tort or contract, accrues at the time of completion of construction.[77] Another New York court has added that "[c]ompletion is not a statutorily defined word but must be judicially interpreted in light of the given situation and the responsibilities of the parties

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71. *See supra* notes 41-42 and accompanying text.

72. *See* Hapke, *supra* note 7, at 255. For an excellent discussion of the different types of A/E malpractice insurance, see Note, *The Current Status of Professional Architects' and Engineers' Malpractice Liability Insurance*, 45 INS. COUNS. J. 39 (1978) (discussing "claims made" and "occurrence" insurance policies); *see also* Chapman, *The Liability of Design Professionals to the Surety*, 20 FORUM 591 (1985).

One commentator described the situation in this way:

> [W]ith the annual premium for a typically sized five-member engineering or architectural firm anywhere from $5,000 to $20,000 or more, and with deductibles going from a minimum of $2,000 to $25,000, $50,000 or even $100,000 for larger firms, some design professionals are dropping their insurance coverage and "going bare"—practicing without insurance—on the assumption that costs will be lower if their firms simply defend claims made against them with their own resources.

Berreby, *supra* note 5, at 31.

73. *See infra* notes 94-111 and accompanying text.

74. 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977).

75. *See id.* at 393, 372 N.E.2d at 556, 401 N.Y.S.2d at 769.

76. 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 780, 330 N.E.2d 643, 369 N.Y.S.2d 693 (1975).

77. *See supra* notes 66-73 and accompanying text.

in carrying out their agreement.''[78] In some cases, the architect's duties are complete when construction is finished or when fees have been paid.[79] In other instances, the architect's duty will extend beyond these events until the issuance of a final certificate for payment.[80] If the issuance of the certificate was "not merely a ministerial act but represented a substantial contractual right of plaintiff-owner and a [concomitant] contractual responsibility of defendant-architect in completing the project," then the professional relationship continued until the issuance.[81] The courts of other jurisdictions are in accord with regard to this distinction.[82]

New York courts also recognize the distinction between a plaintiff with whom the architect has a professional relationship and a plaintiff who is a stranger to the contract. In *Cubito v. Kreisberg*,[83] the plaintiff, a tenant in an apartment house designed by the defendant-architect, slipped and fell in the building's laundry room.[84] She brought suit alleging that the room was negligently designed so that water collected on the floor.[85] The architects had completed their contract and issued a final certificate on May 7, 1973.[86] The plaintiff sustained her injury on October 6, 1977.[87] The trial court denied the architect's motion to dismiss and was affirmed by the appellate division.[88] The court held that because the plaintiff was not a party to the professional relationship, the cause of action sounded in simple negligence rather than in malpractice.[89] Therefore, the cause of action accrued at the time of injury, as the plaintiff contended, rather than at the completion date, as the architect contended.[90] The statute of limitations applicable in this case provides a three-year period for both negligence and malpractice other than medical mal-

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78. Board of Education v. Celotex Corp., 88 A.D.2d 713, 714, 451 N.Y.S.2d 290, 291 (3d Dep't), *aff'd*, 58 N.Y.2d 684, 444 N.E.2d 1006, 458 N.Y.S.2d 542 (1982).

79. *See supra* note 66 and accompanying text.

80. *See supra* note 67 and accompanying text.

81. *See Celotex*, 88 A.D.2d at 714, 451 N.Y.S.2d at 291.

82. *See, e.g.*, County of Milwaukee v. Schmidt, Garden & Erikson, 43 Wis. 2d 445, 452, 168 N.W.2d 559, 562 (1969).

83. 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dep't 1979), *aff'd*, 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980).

84. *See id.* at 740, 419 N.Y.S.2d at 579.

85. *See id.*

86. *See id.*

87. *See id.*

88. Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dep't 1979), *aff'd*, 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980).

89. *See id.* at 742, 419 N.Y.S.2d at 580.

90. *See id.* at 744, 419 N.Y.S.2d at 582.

practice.[91] An action founded on simple negligence accrues "when the wrongful invasion of personal rights occurred by reason of conduct of the wrongdoer."[92] The court implied, however, that the completion rule properly applies only where there is a professional relationship between the parties and the action sounds in malpractice.[93]

C. The Discovery Rule

The modern trend favors the "discovery rule." Under this rule, a plaintiff's cause of action for architectural malpractice accrues when the plaintiff discovers, or should have discovered in the exercise of due diligence, his damage.[94] For example, in the leading Florida case, a school board sued its architect for damages resulting from a leaking roof.[95] The three school buildings in question were com-

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91. *See id.* at 742, 419 N.Y.S.2d at 580 (citing N.Y. CIV. PRAC. L. & R. § 214(5)-(6) (McKinney 1986)).

92. *See Cubito*, 69 A.D.2d at 743, 419 N.Y.S.2d at 581.

93. *See id.*

94. *See* Mills v. Killian, 273 S.C. 66, 70, 254 S.E.2d 556, 558 (1979) ("[t]he modern trend in professional negligence or malpractice cases . . . is that accrual is upon discovery by the injured party"); *see also* Med-Mar, Inc. v. Dilworth, 214 Pa. Super. 402, 257 A.2d 910 (1969); Lumbermen's Mutual Casualty Co. v. Pattillo Const. Co., Inc., 254 Ga. 461, 461, 330 S.E.2d 344, 345 (1985) (because defendant contractor initiated construction without working drawings approved by owner, by amendment to the contract defendant agreed to assume all responsibilities of architect for this project); Society of Mt. Carmel v. Fox, 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975); Chrischilles v. Griswold, 260 Iowa 453, 150 N.W.2d 94 (1967); Orleans Parish School Bd. v. Pittman Const. Co., 261 La. 665, 260 So. 2d 661 (1972); Steelworkers Holding Co. v. Menefee, 255 Md. 440, 258 A.2d 177 (1969); Board of Directors v. Regency Tower Venture, 2 Haw. App. 506, 635 P.2d 244 (1981); Greenbrier Village Condominium Two Ass'n v. Keller Inv., Inc., 409 N.W.2d 519, 524 (Minn. Ct. App. 1987); Bulau v. Hector Plumbing & Heating Co., 402 N.W.2d 528, 530 (Minn. 1987); Kundahl v. Barnett, 5 Wash. App. 227, 486 P.2d 1164 (1971) (discovery rule applied to surveyor). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 144-45 (4th ed. 1971).

95. *See* Kelley v. School Bd. of Seminole County, 435 So. 2d 804 (Fla. 1983) (discussing FLA. STAT. § 95.11(3)(c) (1977)). The applicable statute contains the following provision:

> [The statute of limitations shall be four years in] action[s] founded on the design, planning or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence.

FLA. STAT. ANN. § 95.11(3)(c) (West 1982 & Supp. 1988).

pleted in 1969 and 1970, and the leaks began in 1970 and 1971.[96] Extensive repairs were attempted, but eventually all three roofs had to be replaced.[97] The leaks continued through 1977 at which time the board brought suit.[98] The Supreme Court of Florida affirmed a grant of summary judgment and held that the four-year statute of limitations, which specifically applies to architectural malpractice, began to run at the discovery of the defect.[99]

The discovery rule remedies a significant injustice by allowing plaintiffs to pursue legal action without fear that their suit will be barred before its crucial elements are discovered or discoverable. At the same time, it may work a severe hardship on architects by subjecting them to lawsuits many years after a plan has been carried out and the building has left their control. Indeed, in some jurisdictions, a minor, for whom the statute is tolled until the age of majority,[100] could potentially bring a suit twenty years after completion of the project.[101] This clearly violates the important public policy of promoting stability and finality in commercial transactions.[102] In addition, such stale suits are difficult to defend.[103] It has been argued that the essential materials for a defense are the plans and specifications themselves and that the architect suffers no detriment by the passage of time if these documents have been preserved.[104] This view, however, is again the result of an oversimplification of the construction process. The original design is drawn by the architect along with consulting engineers, approved by the owner, executed by the contractor, and often subjected to many change orders and field orders during the course of construction.[105] Witnesses and other evidence regarding these transactions may prove difficult to obtain after the passage of many years.

The discovery rule is imported from the vocabulary of medical malpractice, and if it is to be applied to architectural malpractice the analogy warrants examination. In *Flanagan v. Mount Eden General Hospital*,[106] the New York Court of Appeals distinguished

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96. *See Kelley*, 435 So. 2d at 805-06.
97. *See id.* at 805.
98. *See id.*
99. *See id.*
100. New York prohibits a minor from suing more than 10 years after his cause of action accrues. N.Y. CIV. PRAC. L. & R. § 208 (McKinney 1986).
101. *See supra* note 43.
102. *See supra* note 42 and accompanying text.
103. *See* SWEET, supra note 9, § 27.03(G), at 597.
104. *See* ACRET, *supra* note 16, at 257.
105. *See supra* note 24 and accompanying text.
106. 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

mere negligent medical treatment cases, for which the cause of action accrues at the time of the malpractice, from cases where a "foreign object" is negligently left in the patient's body, to which the discovery rule applies:

> The policy of insulating defendants from the burden of defending stale claims brought by a party who, with reasonable diligence, could have instituted the action more expeditiously is not a convincing justification for the harsh consequences resulting from applying the same concept of accrual in foreign object cases as is applied in medical treatment cases. A clamp, though immersed within the patient's body and undiscovered for a long period of time, retains its identity so that a defendant's ability to defend a "stale" claim is not unduly impaired.[107]

The court found a "fundamental difference" between the two types of cases. When a foreign object is left in the body, the court continued, "no claim can be made that the patient's action may be feigned or frivolous [and] there is no possible causal break between the negligence of the doctor or hospital and the patient's injury."[108] The foreign object/discovery rule is codified in the New York Civil Practice Law and Rules (CPLR).[109]

An action for medical malpractice accrues at the time of the act and the statute runs for two years and six months;[110] however, an action based on a foreign object left in the body accrues at the date of discovery and must be commenced within one year.[111] The distinction provided by *Flanagan* and the CPLR suggests that a physician who leaves a foreign object commits a grievous wrong which is qualitatively different from garden-variety medical malpractice.

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107. *Id.* at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.

108. *Id.* at 430, 248 N.E.2d at 872-73, 301 N.Y.S.2d at 26.

109. N.Y. CIV. PRAC. L. & R. § 214-a (McKinney Supp. 1986). The statute provides that "where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier."

110. *See id.* Section 214-a contains the following provision:

> An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure . . . .

Id.

111. *See supra* note 109 and accompanying text.

D. The Continuous Treatment Doctrine

In jurisdictions which have adopted the completion rule for architectural malpractice actions, the plaintiff-owner is entitled to an extension of the statutory period for as long as the professional relationship continues.[112] This "continuous treatment" doctrine, like the foreign objects exception, is borrowed from the law of medical malpractice.[113] The traditional justification for the doctrine is that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim."[114] In the context of architectural malpractice, failure to adopt the rule could provide an incentive to conceal design defects or to delay progress of the work until the statutory period has run.[115]

IV. A Proposed Mixed Rule

A. Distinguishing Malpractice From Negligence

Malpractice and negligence, while very similar in terms of the legal analyses which attend them, are not synonymous. One court has observed:

> [M]alpractice, in its strict sense, means the negligence of a member of a profession in his relations with his client or patient. . . . [A]n action for malpractice springs from the correlative rights and duties assumed by the parties through the relationship. On the other hand, the wrongful conduct of the professional in rendering services to his client resulting in injury to a party outside the relationship is simple negligence.[116]

This distinction is notable especially as to the architect whose malpractice liability has a contractual context and whose negligence liability is grounded in a common law duty of reasonable care.[117]

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112. *See* County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. Broome County 1974).

113. *See* Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

114. *See id.* at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321-22.

115. The doctrine is now applied to other professionals, as well as to physicians and architects. *See* Greene v. Greene, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982) (attorneys).

116. *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).

117. *See supra* note 34 and accompanying text.

With respect to substantive law, architectural malpractice embraces aspects of both tort and contract.[118] Accordingly, the procedural law in this area should reflect this duality as well.

Malpractice properly refers only to parties involved in a professional relationship; thus, an architectural malpractice action can only be brought by one who contracts with the architect or one who is intended to benefit from such a contract. The typical third-party beneficiary in this context is the contractor, or perhaps the subcontractor. It is not unusual for an owner and architect to anticipate this situation and to provide in their agreement that they intend to create no third-party rights.[119]

B. Elements of Both Tort and Contract

All professionals owe a duty of care, whether based in contract or tort. Medical and legal malpractice are based squarely on a common law tort duty to exercise the care of a reasonable professional in treating the patient or counseling the client.[120] By contrast, an architect's duties, including the duty to exercise reasonable care, arise in a contractual and commercial context. Thus, when an architect breaches his contract by failing to exercise due care, the damaged party may sue in either contract or tort.[121]

As shown by cases determining whether to apply the tort or contract statute of limitations in a given situation, the law of architectural malpractice is informed by both tort and contract principles. In *Sears, Roebuck*, the New York Court of Appeals held that choosing the applicable limitations period "is properly related to the remedy sought," not to the theory of liability:

> Absent the contract between [owner and architect], no services would have been performed and thus there would have been no claims. It should make no difference then how the asserted liability is classified or described, or whether it is said that, although not expressed, an agreement to exercise due care in the performance of the agreed services is to be implied; it suffices that all liability alleged in this complaint had its genesis in the contractual relationship of the parties.[122]

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118. *See infra* notes 120-25 and accompanying text.
119. *See* OWNER-ARCHITECT AGREEMENT, *supra* note 17, ¶ 9.7.
120. *See supra* note 34 and accompanying text.
121. *See infra* note 123 and accompanying text.
122. *See* Sears, Roebuck & Co. v. Enco Associates, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 769, 770-71 (1977).

The action against the architect in this case was brought after the three-year tort statute had run, but within the six-year contract statute; therefore, the court allowed the malpractice action to proceed, but limited the proof of damages to those allowed in contract.[123] The court gave proper recognition to the tort and contract elements of the case in choosing the six-year contract statute.[124] The court, however, did not have to decide the issue of when the cause of action accrued. Following state precedent, the court reaffirmed that the cause of action accrues and the statute begins to run at the completion of the project.[125]

Sears, Roebuck stands for the proposition that the law of architectural malpractice, both procedural and substantive, is informed by both tort and contract principles. Therefore, the question of when the cause of action accrues should be similarly informed. The contractual nature of the professional relationship deserves due consideration. Contractual concepts and policies are crucial to any discussion of when the cause of action accrues.

C. A Proposed Rule

This Note recommends adoption of an equitable rule that borrows from both the completion rule and the discovery rule and takes into account the tortious and contractual aspects of a cause of action.

1. Owner Versus Architect

A true "malpractice" cause of action lies only where the parties have a professional relationship, such as patient and physician or client and attorney.[126] Even if the malpractice action sounds in tort and is governed by a tort statute of limitations (which is shorter than the contract statute),[127] the professional relationship between owner and architect remains one based on contract. Because of this contractual relationship, an owner has a cause of action as soon as the malpractice occurs.[128] Accordingly, if an architect negligently designs a stairway by specifying the wrong type of screws, for

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123. *See id.*
124. *Id.*
125. *Id.* at 770.
126. *See supra* note 96 and accompanying text.
127. *Compare* N.Y. CIV. PRAC. L. & R. § 213 (McKinney 1983) (breach of contract statute of limitations is six years from date of breach) *with id.* § 214 (McKinney 1986) (negligence statute of limitations is three years from date of accrual).
128. *See supra* note 60 and accompanying text.

example, the owner immediately has an action for malpractice. The owner need not wait until more serious damage occurs in order to sue. At the latest, the cause of action may accrue upon completion of construction.

a. Continuous Treatment

The contractual nature of the relationship suggests that the continuous treatment doctrine would still apply.[129] Nevertheless, a subtle distinction should be noted. In the medical and legal contexts the continuous treatment doctrine is premised on the great reliance placed by the patient or client in the professional's expertise. The statute is tolled because the patient or client's vulnerable position renders the option of bringing suit impractical.[130] So too, an owner must repose trust and confidence in the architect's expertise; however, the owner is a contracting party with contractually defined rights and duties. As a contracting party, who has the benefit of counsel, the owner does not rely on the architect in the same way that the patient or client relies on the professional. The continuous treatment doctrine, in the architectural context, is more properly based on the contractual relationship. Until the terms of the contract are fully performed, the professional relationship continues and the architect is responsible for his services.[131] Thus, where the architect attempts to remedy a leaking roof after the project has been substantially completed, the statute is tolled until the architect completes his services and authorizes issuance of a final certificate for payment.[132] The continuous treatment in this context is properly viewed as a continuation of contractual duties, rather than the continuation of a relationship based heavily on trust.

b. Restricted "Discovery Rule"

Owners should nonetheless be entitled to a narrowly applied discovery rule for cases involving fraud, gross negligence and intentional wrongdoing on the part of the architect. In New York, an exception to the general rule that a cause of action for malpractice accrues at the time of the negligent act has been carved out for medical malpractice cases which involve a "foreign object" negligently left

129. *See supra* notes 112-15 and accompanying text.
130. *See supra* note 114 and accompanying text.
131. *See generally* OWNER-ARCHITECT AGREEMENT, *supra* note 17.
132. *See supra* notes 66-70 and accompanying text.

in the patient's body.[133] In these cases, the various policies behind the statute of limitations are not violated by deviation from the general rule. There is no risk of fraudulent claims, nor is there a lack of evidence after the passage of time.[134] This distinction between the foreign object cases and the ordinary medical malpractice cases suggests that where professional misconduct rises to the level of gross negligence, such as leaving a clamp or sponge in a patient's body, the patient is entitled to a later date of accrual.

Similarly, the owner is entitled to a relaxation of the "contractual" standard of accrual when the architect's misconduct rises to this more egregious level. Where the architect has committed fraud, gross negligence or intentional wrongdoing, there is no risk that the plaintiff's claims are stale or without merit. In addition, where the architect's misconduct is more flagrant than mere negligence, he should not be entitled to the benefit of the presumption that older claims are more difficult to defend.[135] This is especially true where the architect's misconduct was deliberately calculated to conceal the wrongdoing.

2. *Contractor as Third-Party Beneficiary Versus Architect*

Even though the contractor is not a party to the owner/architect agreement, he should be subject to the same accrual dates as the owner by virtue of his status as a third-party beneficiary of the contract.[136] Even when the owner/architect agreement purports to negate all third party rights,[137] the fact remains that the owner/architect agreement does not exist in a vacuum. The owner and architect cannot alone construct a building or bridge. The agreement necessarily foresees the eventual hiring of a general contractor or a series of prime contractors to execute the plans and specifications.

3. *Strangers to the Contract Versus Architect*

Third parties who are not beneficiaries to the contract have no professional relationship with the architect. As strangers to the con-

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133. *See supra* notes 106-11 and accompanying text.
134. *See supra* note 108 and accompanying text.
135. *See id.*
136. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 302-315 (1981).
137. Article 9 of AIA Document B141 contains such a provision. "Nothing contained in this [a]greement shall create a contractual relationship with or a cause of action in favor of a third party against either the [o]wner or [a]rchitect." *See* OWNER-ARCHITECT AGREEMENT, *supra* note 17, ¶ 9.7.

tract and the professional relationship, their injury, when proximately caused by the architect, does not give rise to an action for malpractice.[138] Their cause of action sounds in simple negligence.[139] As such, the negligence cause of action properly accrues when the plaintiff has knowledge, or should have knowledge, of all the essential elements of the cause of action. Therefore, no action arises until the plaintiff discovers or should have discovered his injury.[140]

The discovery rule is the fairer rule for strangers to the owner/architect contract for the same reasons that the completion rule is the fairer rule for parties to the contract. A party to the contract is immediately damaged and a cause of action for malpractice accrues as soon as the malpractice occurs.[141] A stranger to the contract, however, is not damaged until he knows or should know that injury has taken place.

V. Conclusion

When selecting a rule to determine when a cause of action accrues against an architect, the courts of the various jurisdictions tend to choose either the discovery rule or the completion rule without considering the relationship between the parties. This Note has established that a strict adherence to either rule will produce hardships for both plaintiffs and defendants. It is recommended that a more flexible rule be applied which takes into account the contractual setting of the professional relationship between owner and architect, and that analogies to the medical and legal professions be avoided.

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138. *See supra* notes 116-19 and accompanying text.
139. *See supra* note 116 and accompanying text.
140. *See supra* note 94 and accompanying text.
141. *See supra* notes 58-63 and accompanying text.