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Actions Arising out of Improvements to Real Property: Special Statutes of Limitations

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NOTE

ACTIONS ARISING OUT OF IMPROVEMENTS TO REAL PROPERTY: SPECIAL STATUTES OF LIMITATIONS

I. INTRODUCTION

The scope of liability for builders[1] over the centuries has been subject to great variation. It has shifted from the Babylonian Code of Hammurabi, which at times required the death of a builder's son if a house were unsoundly built, to the English and early American rules which afforded almost total immunity to builders.[2] The shelter of immunity once available to American builders was stripped away, however, by the judicial abandonment of the requirement of privity between the builder and the injured party.[3] In some jurisdictions the scope of liability has been expanded further by the adoption of a discovery rule.[4] The result has been to expose builders in many jurisdictions to potentially perpetual liability to an unlimited class of people.

In response to demands for protection by members of the

1. The term "builder" as used in this Note includes architects, engineers, contractors, and all others who are engaged in the design, planning, supervision or observation of construction, or construction of improvements to real property, unless otherwise indicated.

2. *See generally* Witherspoon, *Architects' and Engineers' Tort Liability*, 16 DEF. L. J. 409 (1967). *See also* Neeson, *The Current Status of Professional Architects' and Engineers' Malpractice Liability Insurance*, 45 INS. COUNSEL J. 39 (1978).

3. *See generally* Witherspoon, *supra* note 2.

4. Courts which apply the discovery rule generally hold that a cause of action accrues and the applicable statute of limitations begins to run when the plaintiff knows or should know of a breach of duty. *See* Comment, 25 DE PAUL L. REV. 568 (1976). *See also* J. ACRET, ARCHITECTS AND ENGINEERS: THEIR PROFESSIONAL RESPONSIBILITY 255-66 (1977); Note, *Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. PRAC. & PROC. 287, 302-03 (1976).

construction industry, and perhaps in an attempt to achieve a balance between conflicting concerns, the legislatures of many states, including North Dakota, have enacted special statutes governing actions arising out of improvements to real property.[5] While these statutes differ individually, they have as their common characteristic a time limitation after which no action may be brought against a builder.[6]

The special statutes limiting the time within which an action may be filed against a builder have produced a great deal of commentary and controversy. The purpose of this Note will be to analyze North Dakota's special statute, section 28-01-44 of the North Dakota Century Code,[7] in light of recent developments, and to suggest possible methods of resolving some of the problems which may arise in connection with this statute.

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5. *See* Comment, *Limitation of Action Statutes for Architects and Builders — Blueprint for Non-Action,* 18 CATH. U.L. REV. 361 (1969). *See also* Vandall, *Architects' Liability in Georgia: A Special Statute of Limitations,* 14 GA. S.B.J. 164 (1978); Note, *Malpractice: The Design Professional's Dilemma,* 10 J. MAR. J. PRAC. & PROC. 287 (1977); Note, *Legislation: Oklahoma's Statute Limiting Actions Against Designers and Builders of Improvements to Real Property,* 27 OKLA. L. REV. 723 (1974).

States which have not enacted a special statute to limit the time period in which actions against builders may be brought are Arizona, Idaho, Iowa, New York, Vermont, and West Virginia. Some other states have defined the group of people covered by the statute more narrowly than is generally assumed for the purposes of this Note. *See, e.g.,* MICH. COMP. LAWS § 600.5839 (1968) (applying the limitation period to licensed architects and professional engineers).

6. *See* Neeson, *supra* note 2, at 44. Some of the differences among the statutes include the class of potential defendants who may invoke the statute, the actions to which the statute applies, the time period designated in the statute, and the time at which the statute begins to run.

7. Section 28-01-44 of the North Dakota Century Code provides:

> 1. No action, whether in contract, oral or written, sealed or unsealed; in tort or otherwise, to recover damages:
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> a. For any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property;
>
> b. For injury to property, real or personal, arising out of any such deficiency; or
>
> c. For injury to the person or for wrongful death arising out of any such deficiency,
>
> shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction, or construction of such an improvement more than ten years after substantial completion of such an improvement.
>
> 2. Notwithstanding the provisions of subsection 1, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the tenth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than twelve years after the substantial completion of construction of such an improvement.
>
> Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.
>
> 3. The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.
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> 4. As used in this section, the term "person" shall mean an individual, corporation, partnership, business trust, unincorporated organization, association, or joint stock company.

N.D. CENT. CODE § 28-01-44 (1974).

II. INTERPRETATION OF SECTION 28-01-44

Section 28-01-44 was enacted by the legislature in 1967 as a special statute of limitations applying to "any person performing or furnishing the design, planning, supervision or observation of construction, or construction" of an improvement to real property.[8] The Supreme Court of North Dakota has not had an opportunity to construe or determine the validity of this special statute. Furthermore, there is little legislative history to guide the courts which may be called upon to construe the statute.[9] Thus, the decisions of other jurisdictions construing similar statutes may play an important part in the initial interpretation of section 28-01-44. Courts should be cautious, however, in applying the decisions of other jurisdictions because of the dissimilarities which exist among the various statutes.[10]

A. WHAT CONSTITUTES AN IMPROVEMENT TO REAL PROPERTY?

The threshold question in determining whether the special statute of limitations applies in a particular case is whether the case is one involving an "improvement to real property." The legislature failed to define this phrase within the provisions of the statute itself.[11] As a result of this omission, courts will be called upon to define what constitutes an improvement to real property before applying section 28-01-44.

One approach that has been employed by courts in determining what constitutes an improvement to real property involves a complicated analysis under the common-law fixture laws. Under this approach, a chattel determined to be a fixture is considered by its very nature to be an improvement to real property.[12]

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8. N.D. CENT. CODE § 28-01-44(1)(1974).

9. Section 28-01-44 was enacted "[t]o provide a period of limitation within which time claims for damages may be brought against persons performing or furnishing the design, planning, supervision or observation of construction of improvements on real property." 1967 N.D. Sess. Laws ch. 254.

The legislature never articulated the reason underlying the enactment of section 28-01-44. The only legislative minutes in existence are those of the 1967 Senate Judiciary Committee, which indicate that fourteen architects and engineers from North Dakota appeared in support of the statute, then Senate Bill 303. A letter was filed and testimony was given by representatives of design professionals, suggesting that the bill be passed to alleviate insurance problems and to limit the possibility of perpetual liability for design professionals.

10. *See supra* note 6.

11. It is not uncommon for a statute to contain a definition of such a word. For example, a provision of the North Dakota Century Code relating to mechanics' liens defines "improvement" as "any building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for its permanent benefit." N.D. CENT. CODE § 35-27-01(3)(1980).

12. Allentown Plaza Assoc. v. Suburban Propane Gas Corp., 43 Md. App. 337, _____, 405 A.2d 326, 331 n.9 (1979).

A fixture is defined in the North Dakota Century Code:

> A thing [which] is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or embedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws.[13]

This definition would offer some guidance if the fixture approach to determining what constitutes an improvement to real property were adopted in North Dakota. In determining whether personalty has become a fixture under such an approach, courts would also be required to consider the intention of the person making the annexation, the manner in which the thing was annexed, and its adaptation to the use of the realty.[14]

The fixture approach has not been popular among states faced with the issue. Courts have recognized that all improvements to real property are not necessarily fixtures.[15] Thus, the fixture approach cannot always provide an answer when the issue is raised. Therefore, a "common-sense" interpretation of the phrase[16] is preferable to the fixture approach.

The common-sense approach to what constitutes an improvement to real property has been preferred by most courts which have addressed this issue. Under this approach, the question of what constitutes an improvement to real property is generally considered to be one of law,[17] while under the fixture approach the issue is considered a mixed question of law and fact.[18] Although courts employing the common-sense approach may consider many of the same factors that are considered under the fixture approach, they are freed from the strictures of common law and may determine the meaning of the statute "on the basis of the common usage of language."[19]

Black's Law Dictionary defines an improvement to real property as a "valuable addition made to property (usually real estate) or an

13. N.D. CENT. CODE § 47-01-05 (1978).
14. Strobel v. Northwest Grand Forks Mut. Ins. Co., 152 N.W.2d 794, 796 (N.D. 1967).
15. *See, e.g.*, Pinneo v. Stevens Pass, Inc., 14 Wash. App. 848, 851, 545 P.2d 1207, 1209 (1976).
16. *See* Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) (court applied a common-sense interpretation to the phrase "improvement to real property").
17. *See* Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 386, 225 N.W.2d 454, 457 (1975).
18. Allentown Plaza Assoc. v. Suburban Propane Gas Corp., 43 Md. App. 337, _____, 405 A.2d 326, 331 n.9 (1979).
19. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 386, 225 N.W.2d 454, 456 (1975).

amelioration in its condition amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."[20] A somewhat similar, but more liberal, definition is found in the North Dakota Century Code provisions relating to mechanic's liens.[21] Both of these definitions suggest that to be an improvement the work must in some way enhance the value or usefulness of the property, and, in addition, be permanent in nature.

Similar requirements have been articulated by courts which have applied the common-sense approach. Under such an analysis, the nature of the improvement, its relationship to the land and its occupants, and its permanence have been considered.[22] In addition, it has been suggested that the parties through contract can establish whether or not a thing is to be considered an improvement to real property by designating that a particular chattel is to remain personalty.[23] This use of contract, however, "is limited to chattels which are attached to the realty in such a manner that they may be detached without being destroyed or materially injured or without materially injuring the realty to which they are attached."[24]

In enacting section 28-01-44, the legislature chose not to define what constitutes an improvement to real property. This omission avoided difficulties which might have arisen if courts had been bound by a formal definition of this phrase. Therefore, North Dakota courts are free to adopt the common-sense approach in applying section 28-01-44, thereby permitting a determination of what constitutes an improvement to real property based upon the facts of each particular case. Under the circumstances, courts should not restrict themselves unnecessarily by incorporating the inflexible rules which may be applicable under fixture laws. Rather, the common-sense approach, which gives courts flexibility in determining what constitutes an improvement to real property, should be adopted.

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20. BLACK'S LAW DICTIONARY 682 (5th ed. 1979).

21. N.D. CENT. CODE § 35-27-01(3) (1980). *See also supra* note 11. The definition found in the North Dakota Century Code would apply the term "improvement to real property" to repairs as well as original improvements. Because those who provide repairs are faced with problems of liability similar to those faced by builders, this broader definition may be preferable. To limit the definition to those who provide services originally, thereby excluding those who provide repairs from the operation of the statute, might also produce equal protection problems.

22. Allentown Plaza Assoc. v. Suburban Propane Gas Corp., 43 Md. App. 337, _____, 405 A.2d 326, 332 (1979) (holding that gas meters and their couplings were not an improvement to real property because they were not permanent in nature).

23. *Id.* at _____, 405 A.2d at 332-33.

24. 1 THOMPSON, REAL PROPERTY § 80, at 358 (1980).

B. ACTIONS GOVERNED BY SECTION 28-01-44

There are generally two classes of people who bring actions against builders for damages for injuries arising out of an improvement to real property — owners or possessors of the property[25] and third parties who are injured while on the property.[26] Such actions may be based upon malpractice,[27] negligence,[28] breach of contract,[29] breach of warranty,[30] and various other theories of tort.[31] The type of action brought generally depends upon the party bringing the lawsuit and their relationship to the builder.

After considering the various theories of liability and the potential plaintiffs, some jurisdictions have interpreted their special statute of limitations applying to builders in such a way as to allow certain types of actions to be filed after the expiration of the special time limit. For instance, in *Duncan v. Schuster-Graham Homes, Inc.*,[32] the Supreme Court of Colorado held that the state's special statute of limitations[33] did not apply to contractual claims based upon deficiencies in the structure itself.[34] The court reasoned that the legislature did not intend to substitute a two-year bar for the six-year statute of limitations[35] which ordinarily governed such actions.[36] A similar decision was reached by the Supreme Court of Minnesota in *Kittson County v. Wells, Denbrook & Associates.*[37] In

25. *See, e.g.,* Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972) (action by a cold storage warehouse owner and lessee for property damage allegedly caused by the defective design and installation of a faulty refrigeration system).

26. *See, e.g.,* Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed,* 401 U.S. 901 (1971) (action for the wrongful death of a fourteen-year-old newspaperboy who was crushed to death while attempting to use an elevator in a public building).

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

28. *See* Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

29. *See* Kittson County v. Wells, Denbrook & Assocs., 308 Minn. 237, 241 N.W.2d 799 (1976).

30. *See* Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973).

31. *See* Bouser v. City of Lincoln Park, 83 Mich. App. 167, 268 N.W.2d 332 (1978) (failure to warn); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976) (failure to warn and provide adequate instructions); Nevada Lakeshore Co. v. Diamond Elec., Inc., 89 Nev. 293, 511 P.2d 113 (1973) (strict liability in tort); Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. 1977) (wrongful death).

32. 194 Colo. 441, 578 P.2d 637 (1978).

33. COLO. REV. STAT. § 13-80-127 (1974) (current version at COLO. REV. STAT. § 13-80-127 (Supp. 1979)). This statute required that an action be brought within two years after the claim arose, and set an outside time limit of ten years within which such actions must be filed. *Id.* This statute was substantially amended in 1979. Modifications include an expanded grace period for injuries late in the ten-year period and a provision establishing a discovery rule, *see supra* note 4, under the statute. The statute, however, still provides for a two-year period of limitation in the ordinary case. COLO. REV. STAT. § 13-80-127 (Supp. 1979).

34. Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 445, 578 P.2d 637, 640 (1978) (home bought from builder-vendor was defective).

35. COLO. REV. STAT. § 13-80-110 (1974) (current version at COLO. REV. STAT. § 13-80-110 (Supp. 1979)).

36. 194 Colo. at 441, 578 P.2d at 640.

37. 308 Minn. 237, 241 N.W.2d 799 (1976).

Kittson County, the court avoided a constitutional challenge to Minnesota's special statute of limitations[38] by finding that the statute did not apply to actions which sounded in breach of contract and warranty when the plaintiff was in privity with the defendants.[39]

The statutes interpreted in *Kittson County* and *Duncan* both used general language to preclude the filing of an action after a certain time, without specifically stating the types of actions to which the statute applied.[40] In each case a contrary result would have significantly reduced the time allowed in which to bring that particular type of action.[41]

Problems such as those which existed in *Kittson County* and *Duncan* will not arise under section 28-01-44, because this section is not worded in general terms. It specifically states that "no action" to recover damages shall be brought against a person who has provided services in connection with an improvement to real property, whether that action be "in contract, oral or written, sealed or unsealed; in tort or otherwise."[42] This explicit wording indicates that the legislature did not intend to exclude from the operation of the statute any type of action or any potential class of plaintiffs. This conclusion is reinforced by the care taken in both *Duncan* and *Kittson County* to distinguish statutes similar to section 28-01-44 which contain additional language that specifically broadens their scope to include actions by owners sounding in breach of contract.[43] Furthermore, section 28-01-44 does not change the statute of limitations generally applicable in any type of action which may be brought.[44] It merely establishes an absolute

38. MINN. STAT. § 541.051 (1976) (current version at MINN. STAT. § 541.051 (1980)).

39. Kittson County v. Wells, Denbrook & Assocs., 308 Minn. 237, 243, 241 N.W.2d 799, 802 (1976). In *Kittson County,* the court held that such actions are governed by the six-year statute of limitations applicable to contracts in general. *Id.* Subsequently, in Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 555 (Minn. 1977), the special statute of limitations was declared unconstitutional.

40. Section 541.051(1) of the Minnesota Statutes, as in effect at the time of *Kittson County,* provided in part: "Except where fraud is involved, no 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, . . . shall be brought . . . ." MINN. STAT. § 541.051(1) (1976) (current version at MINN. STAT. § 541.051(1) (1980)).

Section 13-80-127(1) of the Colorado Revised Statutes provided in part: "All actions . . . brought to recover damages for injury to person or property caused by the design, planning, supervision, inspection, construction or observation of construction of any improvement to real property shall be brought . . . ." COLO. REV. STAT. § 13-80-127(1) (1974) (current version at COLO. REV. STAT. § 13-80-127(1) (Supp. 1979)).

41. *See infra* note 44.

42. N.D. CENT. CODE § 28-01-44(1) (1974).

43. 194 Colo. at 445 n.5, 578 P.2d at 640 n.5; 308 Minn. at 243, 241 N.W.2d at 802.

44. N.D. CENT. CODE § 28-01-44(2) (1974). Unlike section 28-01-44, the Colorado and Minnesota statutes each provided a new two-year statute of limitations which began to run upon discovery of the defect, in addition to the special ten-year absolute cut-off of claims. Thus, if these statutes had been applied to actions arising in contract the result would have been to shorten the

cut-off of actions ten years after construction is complete. Courts should therefore be wary of defining the scope of this statute too narrowly. Section 28-01-44 should be applied in any action as long as it arises out of a defect in an improvement to real property.[45]

C. PERSONS WHO MAY INVOKE SECTION 28-01-44

There has been some disagreement among jurisdictions regarding what classes of persons will receive the protection of the special statutes of limitations. The issue has at times been significant, because the exclusion of certain classes from the operation of a statute may have an effect on the constitutionality of the statute.[46]

Section 28-01-44, like most of the special statutes of limitations, is specifically worded to exclude persons in actual possession or control of the property, such as owners and tenants.[47] It is unlike the Michigan special statute, however, which limits the class of persons entitled to invoke the statute to licensed professionals.[48] Section 28-01-44, aside from excluding those in possession and control of the property, is phrased in general terms.[49] Given the relative absence of legislative history to clarify the general language adopted by the legislature,[50] the task of determining who may invoke the protection of section 28-01-44 will eventually fall to the judiciary.

Courts which have been faced with the problem of interpreting generally worded statutes similar to section 28-01-44 have arrived at differing conclusions regarding who may invoke the protection of such statutes. For example, in *Skinner v. Anderson,*[51] the Supreme Court of Illinois found that its special statute[52] granted exclusive

limitation period in each case by four years. Such an intent should not be inferred without a more specific directive from the legislature. Therefore, the courts in *Kittson County* and *Duncan* seem to be justified in reaching their conclusions. As a general rule, North Dakota's special statute does not upset existing statutes of limitations, but merely provides an absolute cut-off of claims after ten years. Thus, the problems which arose in Minnesota and Colorado have been avoided, and courts should not unnecessarily limit application of section 28-01-44.

45. *See supra* notes 11-24 and accompanying text.

46. *See, e.g.,* Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (holding the Illinois special statute to be a violation of equal protection because it granted a special immunity to architects and engineers, excluding others involved in the construction industry, such as materialmen).

47. N.D. CENT. CODE § 28-01-44(3) (1974).

48. *See* MICH. COMP. LAWS § 600.5839 (1968) (governing actions against "any state licensed architect or professional engineer performing or furnishing the design or supervision of construction" of an improvement to real property). By its specific language this statute excludes anyone who is not licensed who takes part in the construction of an improvement to real property, or who supplies materials used in the construction. This statute is therefore distinguishable from statutes which are worded in general terms and are capable of a broader interpretation.

49. *See supra* note 7.

50. *See supra* note 9.

51. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

52. ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966) (reenacted as ILL. ANN. STAT. ch. 83, §

immunity to architects and contractors,[53] excluding materialmen and all others who furnished services in the construction of an improvement to real property.[54] A different conclusion was reached in *Rosenberg v. Town of North Bergen,*[55] in which the Supreme Court of New Jersey noted that the phrase "any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property"[56] included a class "much larger than architects and builders."[57] The court in *Rosenberg,* however, did not go on to describe the class of persons which would fall within the language of the statute.

Section 28-01-44 contains language almost identical to that construed in both *Rosenberg* and *Skinner.*[58] The use of the phrase "any person" in the statute arguably suggests that the statute was not intended to apply to any particular vocation or occupation.[59] The court's decision in *Skinner,* limiting the application of the statute to architects and building contractors, may therefore have been unnecessarily narrow. Since the North Dakota legislature did not include a requirement in section 28-01-44 that one must be an architect or a contractor by profession in order to invoke the statute's protection, courts may avoid reading such a requirement into the special statute.[60] Rather, section 28-01-44 may be read "as applying to all who can, by a sensible reading of the words of the act, be brought within its ambit."[61] Such an approach would seem to be appropriate because it is consistent with the general policy underlying the special statutes: protection of those who provide services in connection with the construction of an improvement to real property.[62]

Assuming that section 28-01-44 does not apply solely to professional architects and contractors, but rather applies to anyone who provides services in connection with an improvement to real property, there is the additional question of whether the

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22.3 (Smith-Hurd Supp. 1980)).

53. Skinner v. Anderson, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 590 (1967).

54. *Id.* at 460, 231 N.E.2d at 591.

55. 61 N.J. 190, 293 A.2d 662 (1972).

56. N.J. STAT. ANN. § 2A: 14-1.1 (West Supp. 1972) (currently codified at N.J. STAT. ANN. § 2A: 14-1.1 (West Supp. 1980)).

57. Rosenberg v. Town of North Bergen, 61 N.J. 190, _____, 293 A.2d 662, 668 (1972).

58. *Compare* ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966) *with* N.D. CENT. CODE § 28-01-44(1) (1974) *and* N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1972) (currently codified at N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1980)).

59. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, _____, 503 P.2d 108, 111 (1972).

60. Such an interpretation cannot be avoided, however, if the special statute is specifically worded to include only certain professionals. *See supra* note 48.

61. 61 N.J. at _____, 293 A.2d at 666.

62. *See generally* Comment, *Limitation of Action Statutes for Architects and Builders — Blueprint for Non-Action,* 18 CATH. U.L. REV. 361 (1969).

statute applies to materialmen.[63] Several courts have held that materialmen are excluded from the class of persons who may invoke the special statute of limitations,[64] while others have ignored this question[65] or have found it unnecessary to resolve the issue on the facts presented.[66] At least one court, however, has suggested that materialmen are entitled to the protection of the special legislation.[67]

The language employed in section 28-01-44 offers some guidance in the resolution of the issue. As in any problem of statutory construction, courts will be guided by the plain language of the statute when interpreting section 28-01-44.[68] The statute specifically designates those activities in which an individual must be engaged before claiming the protection of the statute: "the design, planning, supervision or observation of construction, or construction" of an improvement to real property.[69] The common characteristic of all these activities is that they are services. Therefore, if the plain language of the statute controls, materialmen probably will not be included within the class entitled to invoke the protection of section 28-01-44, because they are persons who provide goods rather than services.

A careful reading of section 28-01-44 suggests that the only plausible argument for including materialmen under the statute is that they are persons performing construction. In order to reach such a conclusion, however, a court would have to stretch the ordinary meaning of the word "construction."[70] To "construct"

63. The term "materialman" is used in this Note to distinguish those who provide materials and parts from those who provide services in connection with the construction of an improvement to real property. In this regard, it might be possible for an entity to be both a supplier of goods and a supplier of services, and thus be subject to suit in differing capacities.

64. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

These decisions are based on generally worded statutes similar to section 28-01-44. Specifically worded statutes may by their language also exclude materialmen. *See supra* note 48.

65. *See, e.g.*, Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972) (opinion does not mention the issue of whether materialmen fall within the special statutes).

66. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978) (court found it unnecessary to determine whether materialmen were excluded because of the particular facts involved).

67. *See, e.g.*, Wiggins v. Proctor & Schwartz, Inc., 330 F. Supp. 350 (E.D. Va. 1971) (manufacturer of 4,500-pound jute picker machine affixed to a heavy concrete foundation in a jute factory by means of heavy hold-down bolts was entitled to invoke the special statute). In response to this interpretation of the Virginia Code, the legislature subsequently amended the special statute to provide: "This limitation shall not apply to the manufacturer or supplier of any equipment or machinery or any other articles which are installed in or become a part of any real property either as an improvement or otherwise." 1973 Va. Acts ch. 247 (current version at VA. CODE § 8.01-250 (1977)).

68. Tormaschy v. Hjelle, 210 N.W.2d 100, 102 (N.D. 1973).

69. N.D. CENT. CODE § 28-01-44(1) (1974).

70. *See* BLACK'S LAW DICTIONARY 283 (5th ed. 1979) (construction defined as "[t]he process of bringing together and correlating a number of independent entities, so as to form a definite entity").

commonly means to "build," "erect," or "put together constituent parts."[71] Thus, performing construction is distinguishable from merely providing the constituent or component parts which are necessary in the construction process, and one whose only contribution to an improvement is to provide such things as lumber, paints, or nails should arguably not be considered to have performed "construction."

The conclusion that materialmen should be excluded from the operation of the special statute is reinforced by another consideration. To construe section 28-01-44 to include materialmen would require a court to find that by enacting the special statute in 1967 the legislature intended to "severely limit the development of products liability."[72] It is doubtful that such an intention existed, especially in light of the legislature's recent enactment of legislation similar to section 28-01-44 in the area of products liability.[73] Therefore, courts that are called upon to construe section 28-01-44 should interpret the words as they are commonly understood and exclude materialmen from the protection of the statute.

D. The Limitation Periods Under Section 28-01-44

Section 28-01-44 provides that no action shall be brought "more than ten years after substantial completion"[74] of the improvement to real property giving rise to the injury.[75] Read alone, this particular provision might seem to create a new statute of limitations applicable to all actions arising out of improvements to real property.[76] Subsection 2 of section 28-01-44, however, goes on to state: "Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action."[77] This additional provision indicates that the special

71. *Id.* (construct defined: "To build; erect; put together; make ready for use. To adjust and join materials, or part of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order.").

72. Sevilla v. Stearns-Roger, Inc., 101 Cal. App. 3d 608, 161 Cal. Rptr. 700 (1980).

73. N.D. Cent. Code ch. 28-01.1 (Supp. 1979) (granting an absolute cut-off of actions against manufacturers after ten years).

74. In light of case law in this area, the issue of what constitutes substantial completion of an improvement to real property does not appear to be of major significance. This may be due in part to the fact that the term is defined in many of the special statutes. *See, e.g.*, Colo. Rev. Stat. § 13-80-127(5) (1974 & Supp. 1979) (defining "substantial completion" as "that degree of completion of an improvement to real property as which the owner can conveniently utilize the improvement for the purposes for which it was intended").

75. N.D. Cent. Code § 28-01-44(1) (1974).

76. Some of the special statutes of limitations do provide for a new statute of limitations, as well as an absolute cut-off of actions after a specified time period. *See, e.g.*, Minn. Stat. § 541.051 (1980) (providing a two-year statute of limitations following discovery and a ten-year absolute cut-off of actions).

77. N.D. Cent. Code § 28-01-44(2) (1974).

statute was not meant to supersede or modify existing statutes which would otherwise be applicable. Decisions from other jurisdictions reinforce this conclusion.

In *O'Connor v. Altus,*[78] an action was brought by a child and her father for injuries sustained when she walked through a glass sidelight adjoining a glass door in an apartment building. The Supreme Court of New Jersey noted that the special statute[79] was not a typical statute of limitations.[80] Rather, the statute was found to have impliedly incorporated the two-year statute of limitations generally applicable to all personal injury actions in New Jersey.[81] Thus, the court indicated that the two-year personal injury statute "operate[s] to restrict the period in which actions can be initiated for accidents occurring within ten years after construction; but it does not serve to extend beyond ten years from the date construction was completed the time within which suit may be filed."[82] A similar conclusion was reached in *Comptroller of Virginia ex rel. Virginia Military Institute v. King,*[83] an action by an owner against an architect for the alleged negligent design of a building. In *King,* the Supreme Court of Virginia ruled that the special statute of limitations[84] "sets an outside limit within which the applicable statutes of limitation operate,"[85] noting that the purpose of the statute was "to establish an arbitrary termination date after which no litigation of the type specified may be initiated."[86] These decisions indicated that the special statutes of limitations in question did not supersede existing limitation periods, even though the statutes interpreted[87] contained no specific language directing such a result.[88]

A Louisiana statute[89] similar to section 28-01-44 was interpreted in *Carr v. Mississippi Valley Electric Co.*[90] The Supreme Court of Louisiana held that a person who was injured more than ten years after substantial completion of work on an improvement

78. 67 N.J. 106, 335 A.2d 545 (1975).
79. N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1972) (currently codified at N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1980)).
80. O'Connor v. Altus, 67 N.J. 106, _____, 335 A.2d 545, 553 (1975).
81. *Id.*
82. *Id.*
83. 217 Va. 751, 232 S.E.2d 895 (1977).
84. VA. CODE § 8.01-250 (1977).
85. Comptroller of Virginia *ex rel.* Virginia Military Inst. v. King, 217 Va. 751, _____, 232 S.E.2d 895, 899 (1977).
86. *Id.*
87. N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1980); VA. CODE § 8.01-250 (1977).
88. *Compare* N.D. CENT. CODE § 28-01-44(2) *with* N.J. STAT. ANN. § 2A:14-1.1 (West Supp. 1980) *and* VA. CODE § 8.01-250 (1977).
89. LA. REV. STAT. ANN. § 9:2772 (West 1965).
90. 285 So. 2d 301 (La. Ct. App. 1973).

to real property was precluded from filing a tort suit against the contractor who constructed the improvement.[91] The plaintiff in *Carr* argued that such an interpretation of the special statute would result in a conflict with the one-year statute of limitations prescribed for such an injury in ordinary cases.[92] The court dismissed this argument, explaining that it was for the legislature to determine which party should bear the loss in such cases.[93]

In light of the decisions in other jurisdictions and of the particular language of section 28-01-44, that statute should be construed as establishing a ten-year absolute cut-off of actions which arise out of improvements to real property, but not as otherwise affecting the previously existing limitation periods.[94] Viewed in this manner, the statute modifies the law applicable to

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91. Carr v. Mississippi Valley Elec. Co., 285 So. 2d 301, 302 (La. Ct. App. 1973).

92. *Id.*

93. *Id.*

94. The general rules governing the time within which actions must be commenced in North Dakota are found in chapter 28-01 of the North Dakota Century Code. Section 28-01-16 applies to damages arising out of contracts, express and implied obligations, general injuries to persons, injuries to chattels, and in other cases not specifically provided for. N.D. CENT. CODE § 28-01-16 (Supp. 1979). A six-year limitation period is provided for in such cases. *Id.* Wrongful death actions are governed by section 28-01-18(4), which provides for a two-year limitation period that begins to run upon the death of the injured party. N.D. CENT. CODE § 28-01-18(4) (Supp. 1979).

Some builders, professional architects and engineers especially, may wish to argue that they fall within the terms of section 28-01-18(3), which applies in actions to recover damages resulting from malpractice. N.D. CENT. CODE § 28-01-18(3) (Supp. 1979). North Dakota is one of a handfull of states which do not specifically list those professionals who may invoke the malpractice limitation period. New York has a malpractice statute of limitations similar to section 28-01-18(3). N.Y. CIV. PRAC. LAW § 214(6) (McKinney 1972).

In County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. 1974), an action against an architect for alleged negligence in the design and supervision of construction of the county library, the court held that, although the relationship between the parties originated in contract, the gravamen of the action was professional malpractice. Therefore, the applicable statute of limitations was three years, rather than the six-year period generally provided for contracts. This decision was followed in Sears Roebuck & Co. v. Enco Assocs., 54 A.D.2d 13, 385 N.Y.S.2d 613 (1976), in which the court again applied the malpractice statute of limitations to an action for negligent design. The court noted that the services provided were clearly professional and similar to services provided by an attorney or doctor. The case was later modified to the extent that it applied the shorter malpractice statute. Sears Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977). In reversing the lower court on this point, the court noted that all the obligations of the architects, whether characterized in tort for malpractice or in contract for the nonperformance of a particular provision, arose out of the contractual relationship between the parties. *Id.* at _____, 372 N.E.2d at 558, 401 N.Y.S.2d at 770.

Although the argument that architects should be governed by the malpractice statute of limitations has been rejected by New York, a North Dakota court might be persuaded that such a statute should apply, in view of the fact that the term "malpractice" has been used to describe the negligence of a variety of professionals. For example, Michigan now allows a malpractice action against "any person professing or holding himself out to be a member of a state licensed profession." MICH. COMP. LAWS § 600.2912 (1968). Dean Prosser has articulated a reason for the expanded meaning of the term "malpractice":

> Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability. Most of the decided cases have dealt with physicians and surgeons, but the same is undoubtedly true of dentists, pharmacists, psychiatrists, attorneys, architects and engineers, accountants, abstractors of title, and many other professions and even skilled trades.

W. PROSSER, LAW OF TORTS § 32, at 161-62 (4th ed. 1971) (footnotes omitted).

cases arising out of improvements to real property only in certain instances.[95]

Prior to the passage of the special statute, a person who was injured eleven years after the date on which construction of an improvement to real property was substantially complete would have had a cause of action accruing at the time of the injury,[96] and would have had six years within which to bring an action.[97] Under section 28-01-44, however, an individual who is injured in the eleventh year after construction is substantially complete has no cause of action against the architects, engineers, contractors, and others who provided services in connection with the construction of the improvement.[98] In such cases the special statute operates to prevent a right of action against the builders from ever accruing, rather than merely limiting the rights of the individual to proceed against these parties.[99]

The ten-year period provided in section 28-01-44 does not extend the time period within which a suit against builders may be filed. If an injury occurs in the first year following completion of construction, the special statute will have no effect whatsoever. The cause of action in such cases is governed solely by the statute of limitations generally applicable to such actions.[100] The special statute will be applicable, however, when an injury occurs later in the ten-year period. In such instances, the statute might serve to shorten the time period within which the action must be filed, although it might not eliminate the right of action completely.[101] For example, if a person is injured eight years and nine months after construction is substantially complete, the injured party will have one year and three months within which he must file his claim.[102]

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95. *See infra* notes 96-104 and accompanying text.

96. Ordinarily the statute of limitations begins to run when the right to prosecute a cause of action to a successful conclusion comes into existence. Wittrock v. Weisz, 73 N.W.2d 355 (N.D. 1955). Therefore, if a person was injured eleven years following the completion of construction prior to the enactment of section 28-01-44, that person had no cause of action until the time of the injury, and the statute of limitations did not begin to run until that time. *Id.* Under section 28-01-44, however, the ten-year limitation period runs from the time construction is substantially complete, regardless of the time of the injury.

97. N.D. CENT. CODE § 28-01-16(5) (Supp. 1979).

98. *See supra* notes 78-95 and accompanying text.

99. *See infra* notes 277-84 and accompanying text.

100. N.D. CENT. CODE § 28-01-44(2) (1974); *see supra* note 44.

101. Under section 28-01-44 the determinative event is the filing of the action. It is not sufficient that the injury, which causes the generally applicable statute of limitations to begin to run, occurs within the ten-year period. The action must actually be filed within the ten-year period or it will be barred, even though it might not have been barred in the absence of the special statute. Therefore, in cases where the generally applicable statute of limitations would not run before the expiration of the ten-year period, the generally applicable statute of limitations is of no consequence.

102. Ordinarily, the injured party would have six years within which to file an action under the generally applicable statute of limitations. *See* N.D. CENT. CODE § 28-01-16(5) (Supp. 1979).

Under the general operation of section 28-01-44, the time for filing an action would be extremely short if the injury occurred very late in the ten-year period.[103] The legislature, however, recognized the harsh consequences that could result if someone were injured very late in the ten-year time period and created an exception for such cases. When an injury to a person or property occurs during the tenth year, an action in tort may be brought within two years after the date on which the injury occurred.[104] The adoption of this grace period has the desirable result of preventing the harsh and seemingly unfair consequences that would otherwise occur.

III. THE CONSTITUTIONALITY OF SECTION 28-01-44

The special statutes of limitations applicable to builders have been the subject of much controversy in recent years. Since their enactment they have been attacked in many jurisdictions as being violative of the federal and state constitutions.[105] Such attacks have generally been made on two grounds:[106] that the special statutes violate equal protection[107] and due process.[108]

Among those jurisdictions which have considered the constitutionality of these statutes, there is a fairly equal split in results reached. The highest courts of nine states[109] and one federal

103. Without the special grace period established for such cases, a person injured nine years and 364 days following the completion of construction would have one day within which to file a lawsuit against the builders.

104. N.D. CENT. CODE § 28-01-44(2) (1974).

105. The issue of whether a party has standing to contest the special statute on constitutional grounds is beyond the scope of this Note. For a discussion of this issue, see McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

106. The special statutes have been attacked on other grounds on a limited basis. *See* Plant v. R. L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975) (statute held invalid on the grounds that it was unconstitutionally vague); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977) (special statute challenged on grounds that the title of the statute did not sufficiently identify the subject matter contained therein).

107. *See infra* notes 118-56 and accompanying text. For the purposes of this Note, the term "equal protection" will be used as including equal protection claims under the federal and state constitutions, as well as claims that the statute establishes a special classification or grants a special immunity in violation of state constitutions. These claims are generally treated by the courts as equivalent. *See* Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed,* 401 U.S. 901 (1971).

108. *See infra* notes 251-84 and accompanying text. For the purposes of this Note, the term "due process" will be used as including due process claims under the federal and state constitutions, as well as claims that the statute denies access to the courts in violation of state constitutions. These claims are generally treated by the courts as being equivalent. *See* Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381, 1387-88 (La. 1978).

109. Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975); Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

district court[110] have struck down special statutes for constitutional reasons. In addition, one state supreme court has found its statute to be unconstitutional in its application to a particular fact situation.[111] Conversely, the highest courts of nine states,[112] three state intermediate appellate courts,[113] and one federal district court[114] have considered the constitutionality of the special statutes and found the legislation to be proper. In addition, five state supreme courts,[115] three state intermediate appellate courts,[116] and one federal district court[117] have applied or construed special statutes without discussing their constitutionality, or after finding it unnecessary to reach the issue. An analysis of these decisions may provide important insights to courts faced with the task of determining the constitutionality of section 28-01-44.

A. EQUAL PROTECTION

1. Cases From Other Jurisdictions

The most common basis for holding the special statutes of limitations unconstitutional has been that such statutes violate equal protection.[118] This conclusion was first reached in *Skinner v. Anderson,*[119] in which the Supreme Court of Illinois held that the special statute of limitations applicable to suits arising out of the defective condition of improvements to real property[120] violated the state constitution by granting a special or exclusive privilege or

110. McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980).

111. Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973).

112. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed,* 401 U.S. 901 (1971); Burmaster v. Gravity Drainage Dist. No. 2, 366 So. 2d 1381 (La. 1978); O'Brien v. Hazelet & Erdal, ____ Mich. ____, 299 N.W.2d 336 (1980); Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978); Good v. Christensen, 527 P.2d 223 (Utah 1974); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972).

113. Regents of Univ. of Calif. v. Hartford Accident & Indem. Co., 59 Cal. App. 2d 675, 131 Cal. Rptr. 112 (1976), *rev'd on other grounds,* 21 Cal. 2d 264, 581 P.2d 197, 147 Cal. Rptr. 486 (1978); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977); Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. 1977).

114. Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974).

115. Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 578 P.2d 637 (1978); City of Newark v. Edward H. Richardson Assoc., 375 A.2d 475 (Del. 1977); Deschamps v. Camp Dresser & McKee, Inc., 113 N.H. 344, 306 A.2d 771 (1973); Nevada Lakeshore Co. v. Diamond Elec., Inc., 89 Nev. 293, 511 P.2d 113 (1973); Watts v. Putnam County, 525 S.W.2d 488 (Tenn. 1975).

116. Luxurious Swimming Pools, Inc. v. Tepe, ____ Ind. App. ____, 379 N.E.2d 992 (1978); Allentown Plaza v. Suburban Propane Gas Corp., 43 Md. App. 337, 405 A.2d 326 (1979); Smith v. American Radiator & Standard Sanitary Corp., 38 N.C. 457, 248 S.E.2d 462 (1978).

117. Grissom v. North Am. Aviation, Inc., 326 F. Supp. 465 (M.D. Fla. 1971).

118. *See* Annot., 93 A.L.R.3d 1242 (1979).

119. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

120. ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966) (re-enacted as ILL. ANN. STAT. ch. 83, § 22.3 (Smith-Hurd Supp. 1980)).

immunity to architects and contractors.[121] The court acknowledged that not all legislative classifications are constitutionally prohibited, but stated that such classifications must be "reasonably related to the legislative purpose."[122] In *Skinner,* the court first found that the Illinois statute included within its coverage only architects and contractors, excluding owners, possessors, materialmen, and others.[123] Without discussing the legislative purpose for such a classification or the underlying history of the special statutes of limitations, the court then held that the classification was constitutionally impermissible.[124]

The *Skinner* court did little more than define the classification scheme which existed under the Illinois statute.[125] The differences among the various classes of potential defendants in actions arising out of the construction of improvements to real property were not discussed by the court. The major weakness of the decision in *Skinner,* however, may lie in the court's failure to apply the standard which it had previously found to be appropriate — that the classification be "reasonably related to the legislative purpose."[126] Under such circumstances, it is questionable whether the decision in *Skinner* should be considered persuasive. The decision is somewhat significant, however, in that it correctly defines the two classes of potential defendants who may be denied the special protection granted to builders — the owners or possessors of the real property and materialmen.[127]

Despite the failure of the court in *Skinner* to consider the differences among the various classes, every other reported decision

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121. Skinner v. Anderson, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 590 (1967).
122. *Id.* at 460, 231 N.E.2d at 591.
123. *Id.*
124. *Id.*
125. The court in *Skinner,* in support of its conclusion, stated:

> [O]f all those whose negligence in connection with the construction of an improvement to real estate might result in damage to property or injury to person more than four years after construction is completed, the statute singles out the architect and the contractor, and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity; the statute takes away his action for indemnity against the architect or contractor.
>
> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completetd a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement.

Id.

126. *Id.*
127. *Id.*

which has held a special statute of limitations unconstitutional on equal protection grounds has relied, at least in part, on the opinion of the Supreme Court of Illinois.[128] These decisions recite general rules which are applicable in equal protection cases,[129] but like the opinion in *Skinner* they generally fail to discuss the legislative policies underlying the special statutes and the possible distinctions between the potential classes of defendants.[130]

An example of a decision which failed to discuss the legislative policies behind the special statutes is *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*[131] In *Pacific Indemnity,* the Supreme Court of Minnesota reviewed prior cases from other jurisdictions which had considered the constitutionality of the special statutes and concluded that the better-reasoned decisions were those which found the statutes to be unconstitutional.[132] The court stated that it could see "no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injuries, such as owners and material suppliers."[133]

A similar approach to the problem is found in *Kallas Millwork Corp. v. Square D Co.*[134] This case, like *Skinner,* has been relied upon by many courts to justify a ruling that the special statute is unconstitutional.[135] In *Kallas,* the Supreme Court of Wisconsin, with little further discussion, stated: "While there are public policy reasons that might justify a limitations period that takes into consideration those who are engaged in the construction business, there appears no reason why only a very restricted class of those

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128. *See, e.g.,* Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 389, 225 N.W.2d 454, 458 (1975) (noting that the opinion in *Skinner* made it clear that the classification was constitutionally improper).

129. *Id.* (discussing the standards employed in Wisconsin to test whether a legislative classification satisfies federal and state constitutional guarantees of equal protection).

130. *But see* Phillips v. ABC Builders, Inc., 611 P.2d 821, 830 (Wyo. 1980). In *Phillips,* the court noted the distinctions between builders and those excluded by the special statute and found those distinctions to be unpersuasive. *Id.*

131. 260 N.W.2d 548 (Minn. 1977).

132. Pacific Indem. Co. v Thompson-Yaeger, Inc., 260 N.W.2d 548, 555 (Minn. 1977). In *Pacific Indemnity,* the court stated:

> We have reviewed these cases carefully and are convinced that the better reasoned position is embodied in the decisions which hold such statutes to be unconstitutional because they grant an immunity from suit to a certain class of defendants, without there being a reasonable basis for that classification. We find the discussions in *Skinner v. Anderson, supra, Fujioka v. Kam, supra,* and *Kallas Millwork v. Square D Co., supra,* particularly thorough on this point . . . ."

Id.

133. *Id.*

134. 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

135. *See* 260 N.W.2d at 555.

thus occupied is protected by the statute."[136] The court dismissed the defendant's reliance upon cases upholding the constitutionality of such statutes, finding that such cases "do not come to grips with the real problem presented — what factors distinguish the favored class so that it requires or deserves an immunity not accorded others who appear to be similarly situated."[137] This comment is not totally without merit, because some of the courts which have upheld the constitutionality of the special statutes have employed the same type of conclusory reasoning that is found in decisions striking down these statutes.[138] Given the general presumption in favor of the constitutionality of legislation,[139] however, such analysis may be more readily justified in cases in which the special statutes are upheld.

It would be erroneous to conclude that all of the decisions involving the constitutionality of the special statutes of limitations have discussed the matter in summary fashion. The issues were discussed at some length in *Howell v. Burk.*[140] In resolving the equal protection issue, the New Mexico Court of Appeal initially considered the purpose of the special statute.[141] That purpose was found to be to provide a reasonable measure of protection against the increased hazard to builders.[142] The court in *Howell* also considered the classification scheme created by the statute, and determined that the owners or tenants of real property and materialmen, who do no more than manufacture or supply materials, do not benefit from the statute.[143] Although the court acknowledged the fact that owners and materialmen may be exposed to claims for many years following the completion of a construction project, the court distinguished them from builders:

> The difficulties of those covered by the statute in providing a reasonable defense to a claim made years after the construction was completed, the absence of

136. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 391, 225 N.W.2d 454, 459 (1975).

137. *Id.* at 393, 225 N.W.2d at 460.

138. *See, e.g.,* Good v. Christensen, 527 P.2d 223 (Utah 1974). The court in *Good* dismissed the plaintiff's claim that the special statute was unconstitutional simply by stating that the claim was without merit. *Id.* at 225.

139. *See* Benson v. North Dakota Workmen's Compensation Bureau, 283 N.W.2d 96, 98 (N.D. 1979) ("an act of a legislature is presumed to be valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity").

140. 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977).

141. N.M. STAT. ANN. § 23-1-26 (Supp. 1976) (currently codified at N.M. STAT. ANN. § 37-1-27 (1978)).

142. Howell v. Burk, 90 N.M. 688, ____, 568 P.2d 214, 220 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977).

143. *Id.* at ____, 568 P.2d at 219.

> control of the premises by those covered by the statute, and the historical differences in liability between owners and occupiers of land and those covered by the statute provide a reasonable basis for excluding owners and tenants from the benefits of the statute.
>
> There is also a reasonable basis for distinguishing between materialmen and persons covered by the statute. That reasonable basis lies in the work performed. "The manufacturer makes standard goods and develops standard processes. Defects are harder to find in the contractor's special jobs." . . . "[T]he legislature could reasonably have concluded that evidentiary problems facing the architect and contractor are greater than those facing the materialmen."[144]

The court in *Howell* therefore concluded that there was a reasonable basis for the legislature's distinction between those covered by the statute and owners, tenants, and materialmen.[145] Accordingly, the court held that New Mexico's special statute of limitations did not violate equal protection[146] and was not improper legislation.[147]

Another in-depth analysis of the equal protection issue has been provided by the Supreme Court of Pennsylvania in *Freezer Storage, Inc. v. Armstrong Cork Co.*[148] In *Freezer,* the court concluded that the special statute[149] was not a special law in violation of the Pennsylvania Constitution because of the distinctions that exist between the classes of potential defendants under the statute.[150] The court initially distinguished builders from owners, stating that builders may be liable to a larger class of persons than owners, that builders may be liable under various theories of liability while the liability of landowners generally lies in tort, and that builders, unlike owners, have no control over their liability following the completion of construction.[151] The court then determined that the

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144. *Id.* at _____, 568 P.2d at 220 (citations omitted).
145. *Id.*
146. *Id.*
147. *Id.*
148. 476 Pa. 270, 382 A.2d 715 (1978).
149. 42 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1977) (currently codified at 42 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1980)).
150. Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, _____, 382 A.2d 715, 720 (1978).
151. *Id.* at _____, 382 A.2d at 718. In *Freezer Storage,* the court discussed the three distinctions, stating:

> First, the class of persons to whom builders may be liable is larger than the class to which owners may be liable. Landowners may be liable to others who come onto their land. Builders, however, may be liable both to the landowners and to others who use

distinction in the statute between builders and suppliers was based upon "real differences in the business world."[152] The court concluded that it was rational for the legislature to place a limitation on the liability of builders but not suppliers because of the difficult working conditions under which builders must function.[153] In support of this conclusion, the court reasoned that suppliers who produce thousands of items "can easily maintain high quality-control standards in the controlled environment of the factory."[154] This is not the case with builders, who face unique problems with every construction project, and who can only pre-test designs and construction in limited ways.[155]

Decisions such as *Howell* and *Freezer* indicate that there are distinctions between builders and owners or materialmen. Whether such distinctions are a sufficient basis for sustaining the classifications made by the special statutes is another question. This question is one which must be considered in light of the wording of each particular statute and in light of the system of analysis which is applicable in the jurisdiction determining the validity of a statute challenged upon equal protection grounds. Under no circumstances, however, should courts ignore distinctions which may exist, as these distinctions may have been important considerations in the legislature's decision to enact the special statute of limitations.[156]

2. *North Dakota's Standards of Review*

Article 1, section 22 of the North Dakota Constitution provides that "[a]ll laws of a general nature shall have a uniform

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> the land. Second, a builder may be liable for construction defects under various legal theories — contract, warranty, negligence and perhaps strict liability in tort. Landowner liability for such defects, on the other hand, typically lies only in tort. . . . Third, landowners can ordinarily avoid liability by taking adequate care of their land and structures and by regulating the number and type of person entering the land and regulating the conditions of entry. The builder has no such control over his product after relinquishing it to the landowner. Landowner's liability is also controlled by the myriad of common law rules limiting liability to such classes as "undiscovered trespassers", "mere licensees", and so forth. Builder's insurance and owner's insurance structures and pricing are also different.

Id. Although North Dakota has abolished the common-law categories of licensee and invitee, *see* O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977), the discussion in *Freezer* is still persuasive.

152. 476 Pa. at ____, 382 A.2d at 719.

153. *Id.*

154. *Id.*

155. *Id.*

156. Eyen the strictest standard of equal protection review involves some type of inquiry into the legislative purpose, as a classification which is suspect may be sustained if the legislation was enacted to further a compelling state interest. *See* Johnson v. International Harvester Co., 487 F. Supp. 1176, 1178 (D.N.D. 1980).

operation,"[157] and section 21 prohibits the granting of special privileges or immunities.[158] These provisions have been held to be substantially equivalent to the guarantee of equal protection found in the federal constitution.[159] Thus, the Supreme Court of North Dakota has noted that a statute which does not offend equal protection considerations generally applicable under the state constitution should be constitutional under both the North Dakota Constitution and the United States Constitution.[160] In certain instances, however, courts in North Dakota may apply a standard of review which is stricter than that applicable under federal constitutional law.[161] At one time the Supreme Court of North Dakota applied a traditional two-tiered equal protection analysis.[162] Currently, however, the court applies a three-tiered equal protection analysis.[163] Although this system of analysis was adopted several years ago, the supreme court has provided little guidance with regard to its application.

The standards of constitutional review applicable in North Dakota were recently identified in *Law v. Maercklein*.[164] The North Dakota Supreme Court in *Law* defined the standards as follows:

> (1) the traditional rational-basis standard under which a statute is upheld if the classification is not patently arbitrary or if it bears some reasonable relationship to a legitimate government interest;
> (2) the strict judicial scrutiny standard used when the classification is inherently suspect or concerns a

157. N.D. CONST. art. I, § 22.

158. N.D. CONST. art. I, § 21. Section 21 provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." *Id.*

159. *See* Snyder's Drug Store, Inc. v. North Dakota State Bd. of Pharmacy, 219 N.W.2d 140, 150 (N.D. 1974); Johnson v. Hassett, 217 N.W.2d 771, 774-76 (N.D. 1974) (comparing state and federal law).

160. *See* Caldis v. Board of County Comm'rs, 279 N.W.2d 665, 672 (N.D. 1979).

161. *See, e.g.*, Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974). The court in *Johnson* applied an intermediate standard of equal protection review in a challenge under the state constitution. *Id.* at 780.

Although an intermediate standard has been applied by courts testing state laws against the federal equal protection clause, its application is limited to cases in which the statute makes a quasi-suspect classification, such as a classification based on gender. *See* Orr v. Orr, 440 U.S. 268, 279 (1979). When a challenged statute does not involve a suspect classification or a fundamental right, however, it is seen only as an economic regulation and the standard of review is a minimum rational-basis standard. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

162. *See* Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39 (N.D. 1974). The court in *Tharaldson* noted that cases involving a suspect classification or a fundamental right are subject to strict judicial scrutiny and that other cases are tested under the "traditional" equal protection analysis. *Id.* at 46-47. This "traditional" equal protection analysis requires that a legislative classification bear a reasonable relationship to a legitimate governmental interest. Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974).

163. *See infra* notes 164-94 and accompanying text.

164. 292 N.W.2d 86 (N.D. 1980).

> fundamental interest; and
> (3) an intermediate standard that has been difficult to label or define but which closely approximates the historical, substantive due process test. This standard requires a close correspondence between statutory classifications and legislative goals.[165]

The court in *Law* did not articulate any factors to be considered in deciding which of these three standards to apply in a particular case. Rather, in choosing to apply the rational-basis test, the court simply noted that the issues involved in the case[166] were "similar to those found in cases that have applied the traditional rational-basis test."[167] Thus, the language of the court in *Law* suggests that the key in determining which of the three standards to apply when a statute is challenged on equal protection grounds is a comparison of the case in question with prior equal protection cases. This conclusion is also supported by an earlier case, *Herman v. Magnuson.*[168]

A review of past North Dakota equal protection cases reveals that the most severe test of constitutionality, strict scrutiny, was applied in *State ex rel. Olson v. Maxwell.*[169] In *Maxwell,* the Supreme Court of North Dakota held that a hearing was required before a female prisoner could be transferred to a facility outside North Dakota for incarceration.[170] The strict scrutiny standard was applied because the case involved a suspect classification — sex.[171]

Under the traditional equal protection standards, the Supreme Court of North Dakota has applied a reasonable or rational-basis test when no suspect classification or fundamental interest is involved.[172] This standard was applied in *Tharaldson v. Unsatisfied Judgment Fund,*[173] in which the court rejected an equal protection challenge to statutes[174] limiting the recovery from the Unsatisfied Judgment Fund to five thousand dollars in cases in which the

165. Law v. Maercklein, 292 N.W.2d 86, 91 (N.D. 1980).

166. The case involved an attempt by a non-resident mother to recover from the Unsatisfied Judgment Fund on a judgment for the wrongful death of her son, a North Dakota resident. The court found the case to be analagous to Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39 (N.D. 1974), a case in which the rational-basis test was employed. 292 N.W.2d at 91.

167. 292 N.W.2d at 91.

168. 277 N.W.2d 445, 451 (N.D. 1979).

169. 259 N.W.2d 621 (N.D. 1977).

170. State *ex rel.* Olson v. Maxwell, 259 N.W.2d 621, 629 (N.D. 1977).

171. *Id.* at 632. In *Maxwell,* the court found sex to be a suspect classification. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion which suggests that a classification based upon gender should be subject to strict judicial scrutiny).

172. Snyder's Drug Store, Inc. v. North Dakota State Bd. of Pharmacy, 219 N.W.2d 140, 148 (N.D. 1974).

173. 225 N.W.2d 39 (N.D. 1974).

174. N.D. CENT. CODE § 39-17-03.1,-07 (1980).

tortfeasor could not be identified, while allowing a recovery of ten thousand dollars in other cases.[175] In *Tharaldson,* the court determined that the purpose of the statutes was to provide some compensation to victims of automobile accidents who would otherwise be left without a means of recovery.[176] The court concluded that the means by which this purpose was to be achieved were "matters within the competency of the legislature."[177]

Until recently, the traditional standards for determining the constitutionality of a statute challenged on equal protection grounds were the only standards employed by the North Dakota Supreme Court. In *Johnson v. Hassett,*[178] however, the court identified an intermediate standard, requiring a "close correspondence between statutory classifications and legislative goals."[179] In *Johnson,* the court held that the distinction between paying and nonpaying passengers in North Dakota's guest statute[180] was violative of provisions of the North Dakota Constitution forbidding the granting of special privileges and immunities to any class of citizens.[181] Although it did not specify the standard of review to be applied in its decision, the court in *Johnson* stated: "We find that the statutory classification is unreasonable for any purpose of legislation and is not based upon justifiable distinctions concerning any purpose of the law, and that it it arbitrary and overinclusive."[182] This language was later interpreted as being an application of what has become known as the intermediate standard of review.[183]

The most recent North Dakota case in which the intermediate standard of equal protection analysis was applied is *Herman v. Magnuson.*[184] In *Herman,* the North Dakota Supreme Court examined prior cases in which equal protection had been an issue to determine which of the three equal protection standards it should apply.[185] After doing so, the court rejected the traditional standards in favor of the intermediate standard of equal protection analysis.[186]

175. Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 47 (N.D. 1974).
176. *Id.*
177. *Id.*
178. 217 N.W.2d 771 (N.D. 1974).
179. Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974). For further discussion of the development of the intermediate standard of equal protection analysis, see Reed v. Reed, 404 U.S. 71 (1971); Tribe, *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 121-22 (1973).
180. N.D. CENT. CODE § 39-15-01 (repealed 1979).
181. 217 N.W.2d at 780.
182. *Id.*
183. Herman v. Magnuson, 277 N.W.2d 445, 451 (N.D. 1979). *See also supra* notes 160-63 and accompanying text.
184. 277 N.W.2d 445 (N.D. 1979).
185. *Id.* at 451.
186. *Id.*

The issue in *Herman* was the validity of a ninety-day notice requirement in actions against municipalities.[187] This issue was found to be more closely related to the issue in *Johnson* than to the issues in cases which had applied either of the two traditional standards.[188] In support of this conclusion, the court stated that, like *Johnson, Herman* involved a "limitation upon the authority of an injured party to bring an action against the tortfeasor."[189] The ninety-day notice requirement was upheld by the court under the intermediate standard against claims that it violated equal protection.[190] The court concluded that there was a close correspondence between the statutory classification and the legislative goal of protecting municipal corporations from the consequences of damage suits arising out of claims which they would not otherwise have an opportunity to properly investigate.[191]

The strict scrutiny test was easily rejected in *Herman* because the case did not involve a suspect classification or fundamental interest.[192] The court also rejected the rational-basis test and distinguished *Tharaldson* by stating that, because the plaintiff in *Tharaldson* had no recourse except for the action of the legislature, it was constitutionally permissible for the legislature to impose reasonable limits on the right to bring that action.[193]

3. Equal Protection and Section 28-01-44

Courts called upon to determine the validity of section 28-01-44 in light of claims that the statute violates equal protection should initially determine which of the three North Dakota standards of review[194] should be applied.[195] Under the present state

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *See supra* notes 134-39 and accompanying text.
195. In State v. Carpenter, 301 N.W.2d 106 (N.D. 1980), section 6-08-16.2 of the North Dakota Century Code was challenged on state and federal equal protection grounds. Section 6-08-16.2 allowed the drawer of a non-sufficient fund check to be prosecuted for the commission of a felony if he had been previously convicted under section 6-08-16 of the Code. N.D. CENT. CODE § 6-08-16.2 (Supp. 1979). In *Carpenter,* the Supreme Court of North Dakota applied an intermediate standard of review requiring that the classification made by the statute be substantially related to an important state interest. 301 N.W.2d at 109-10. The court then held section 6-08-16.2 unconstitutional on equal protection grounds. *Id.* at 110. The court, however, did not specify whether the case was decided upon state or federal grounds. If the court's decision was based upon state constitutional law it would result in a stricter level of scrutiny at the intermediate level. Although it is not clear that the court decided the case solely on federal equal protection grounds, this seems to be the most probable conclusion. It is unlikely that the supreme court would modify the important intermediate standard without specifically acknowledging that fact. Furthermore, in its discussion of the various equal protection standards, the court focused exclusively on United States

of the law in North Dakota, it appears that this decision should be based upon a comparison with prior equal protection cases.[196] Such a comparison indicates that the intermediate standard of review should be applied in a case in which section 28-01-44 is challenged on equal protection grounds. The statute does not involve a suspect classification or a fundamental interest,[197] nor does the statute create a new remedy which would not exist in the absence of the statute.[198] Rather, the special statute of limitations, like the statutes at issue in *Herman* and *Johnson,* is a "limitation upon the authority of an injured party to bring an action against the tortfeasor."[199] Thus, in light of the criteria suggested by the North Dakota Supreme Court, it appears that an intermediate standard of review should be applied if section 28-01-44 is challenged as being violative of equal protection.

Once a court has decided which standard of review to apply in determining the constitutionality of section 28-01-44, it should make a two-fold inquiry: 1) whether the required relationship between the classification established by the statute and the legislative purpose exists, and 2) whether the statute applies uniformly to those similarly situated within a class.[200] The first inquiry requires an application of the equal protection considerations previously discussed.[201] The latter inquiry should involve an analysis of the distinctions which exist between the various classes affected by the statute to determine whether the classification made by the statute is justifiable.[202]

North Dakota's intermediate standard of review requires a "close correspondence between statutory classifications and legislative goals."[203] This requirement suggests that a court should first determine the legislative purpose, and then evaluate the classification scheme in light of that purpose.

The goal of the legislature in enacting the special statute of limitations for builders was not specifically stated in section 28-01-44.[204] Furthermore, the preamble to the original bill merely indicates that the statute was enacted "[t]o provide a period of

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Supreme Court cases. *Id.* at 109-10. Thus, the court's decision in *Carpenter* apparently has had no effect on North Dakota's system of equal protection analysis under its state constitutional provisions.

196. *See supra* notes 134-39 and accompanying text.
197. *See* State *ex rel.* Olson v. Maxwell, 259 N.W.2d 621, 632 (N.D. 1977).
198. *See* Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 47 (N.D. 1974).
199. 277 N.W.2d at 451.
200. *See* Caldis v. Board of County Comm'rs, 279 N.W.2d 665, 670 (N.D. 1979).
201. *See supra* notes 192-94 and accompanying text.
202. *See infra* notes 227-48 and accompanying text.
203. Law v. Maercklein, 292 N.W.2d 86, 91 (N.D. 1980).
204. *See* N.D. CENT. CODE § 28-01-44 (1974).

limitation within which time claims for damages may be brought against persons performing or furnishing the design, planning, supervision or observation of construction or improvements on real property.''[205] This statement does not identify the underlying reasons for the special legislation. Courts[206] and commentators[207] which have analyzed similar statutes, however, generally agree that these statutes were enacted in an attempt to provide relief for those faced with increased exposure to liability as a result of the construction of improvements to real property.[208] The limited legislative history available with regard to section 28-01-44 appears to support this conclusion.[209]

Assuming that the legislature intended section 28-01-44 to provide relief to those faced with a significant recent increase in exposure to liability as a result of the construction of improvements to real property, the general classifications made by the statute appear to be reasonable. Builders historically were not liable to

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205. 1967 N.D. Sess. Laws ch. 254.

206. Rosenberg v. Town of North Bergen, 61 N.J. 190, _____, 293 A.2d 662, 665 (1972).

207. *See* Neeson, *The Current Status of Professional Architects' and Engineers' Malpractice Liability Insurance,* 45 INS. COUNSEL J. 39, 44 (1978); Vandall, *Architects' Liability in Georgia: A Special Statute of Limitations,* 14 GA. S.B.J. 164, 166 (1978).

208. The goal which other courts and commentators suggest should be attributed to the legislatures in their enactment of special statutes of limitations is similar to that explicitly stated in the recently enacted North Dakota Products Liability Act. N.D. CENT. CODE ch. 28-01.1 (Supp. 1979). This act provides a ten-year period of limitation for actions against manufacturers similar to that provided in section 28-01-44 for builders. N.D. CENT. CODE § 28-01.1-02 (Supp. 1979). The opening provisions of the act serve as a declaration of legislative findings and intent:

> 1. The legislative assembly finds that the number of lawsuits and claims for damages and the amount of judgments and settlements arising from defective products has substantially increased in recent years. Because of these increases, the insurance industry has drastically increased the cost of products liability insurance. The effect of increased insurance premiums and increased claims has increased product cost through manufacturers, wholesalers, and retailers passing the cost of premiums to the consumer. Certain product manufacturers are discouraged from continuing to provide and manufacture certain products because of the high cost and possible unavailability of products liability insurance.
> 2. Because of these recent trends, and for the purpose of alleviating the adverse effects which these trends are producing in the manufacturing industry, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide products liability insurance.
> 3. It is the purpose of sections 28-01.1-01 through 28-01.1-05 to provide a reasonable time within which actions may be commenced against manufacturers, while limiting the time to a specific period for which products liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

N.D. CENT. CODE § 28-01.1-01 (Supp. 1979).

The opening provisions of the Products Liability Act indicate that the legislation is designed to alleviate the adverse effects on the manufacturing industry that have been produced recently because of the substantial increase in litigation, and to protect the public interest by ensuring that private insurance companies continue to provide products liability insurance. *Id.* A similar rationale might be attributed to the legislature's enactment of section 28-01-44, because the problems faced by the construction industry are similar to those which prompted the legislature's enactment of the Products Liability Act to protect manufacturers. *See* Neeson, *The Current Status of Professional Architects' and Engineers' Malpractice Liability Insurance,* 45 INS. COUNSEL J. 39, 44 (1978).

209. *See supra* note 9.

third parties once a structure was accepted,[210] but owners and possessors of land have always remained potentially liable to third parties who enter on land, owing them some specific duty of care under the common-law rules.[211] This liability to third parties has generally been regarded as part of the responsibility of possessing or controlling the land.[212] Like owners and possessors of land, materialmen were not faced with an increase in liability before the enactment of section 28-01-44. The doctrine of privity as applied to manufacturers was first rejected over fifty years before section 28-01-44 was enacted.[213] Thus, it is reasonable to conclude that the legislature was concerned only with builders. Whether the distinctions between the various groups are sufficient to justify this concern and the classification resulting from it is a separate inquiry.[214]

There is one classification made by section 28-01-44 which does not bear a close correspondence to the legislative goal. This improper classification results from the difference in the time allowed for the bringing of actions by those injured in the ninth year and those injured in the tenth year following construction.[215] For instance, one injured nine years and one day after construction is complete has one year and 364 days within which to file an action against the builders.[216] A person injured eight years and 364 days following the completion of construction, however, has only one year and one day within which to bring an action.[217] This distinction, arising out of the grace period provided by the legislature for those injured in the tenth year following the completion of construction,[218] does not relate to the primary legislative goal of providing relief to builders faced with increased

210. After completion and acceptance of a building, the builder was relieved of liability for accidents caused by defective construction, and the liability attached to the owner. Ford v. Sturgis, 14 F.2d 253, 254 (D.C. Cir. 1927). This rule was later rejected in Hanna v. Fletcher, 231 F.2d 469, 474 (D.C. Cir. 1956), in which the court overruled *Ford* and adopted the rule of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). *See infra* note 213. *See also* Comment, 60 KY. L.J. 462, 463 (1972) (discussion of the policy articulated in *Ford*).

211. *See* Comment, 60 KY. L.J. 462, 463 (1972).

212. *Id.* The owner was thus liable for damages attributed to his own negligence (for example, for not properly maintaining an improvement to his property) as well as for the negligence of the builders. *Id.*

213. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (holding that lack of privity was no defense in an action for injuries allegedly arising out of the manufacturer's negligence). The requirement of privity between parties, however, was not abolished in cases involving builders until much later. *See* Inman v. Binghamton Housing Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *See also* Neeson, *The Current Status of Professional Architects' and Engineers' Malpractice Liability Insurance,* 45 INS. COUNSEL J. 39, 43-44 (1978).

214. *See infra* notes 224-48 and accompanying text.

215. One injured in the ninth year has the remainder of the ten-year period, while one injured in the tenth year has two years from the date of the injury. N.D. CENT. CODE § 28-01-44 (1974).

216. *Id.*

217. *Id.*

218. N.D. CENT. CODE § 28-01-44(2) (1974).

exposure to liability. Although it is true that the grace period was created because the legislature wished to avoid the harsh consequences that might otherwise result,[219] the arbitrary distinction between those injured in the ninth and tenth years after construction probably does not satisfy North Dakota's intermediate standard of review. In fact, it is doubtful whether the classification arising out of the grace period would be sustained if the traditional rational-basis test were applied, as there appears to be no reason for distinguishing between the affected groups in such a manner.[220]

Although the grace period found in section 28-01-44(2) may result in an improper classification, the entire statute need not be invalidated. North Dakota courts have consistently held that even though one part of a law is declared unconstitutional the remainder generally should not be declared void.[221] An entire statute should be declared unconstitutional only if all of the provisions in that statute are so connected and dependent upon each other that it cannot be presumed that the legislature would have enacted the valid sections without those found to be unconstitutional.[222] Because the grace period is ancillary to the primary purpose of the statute and because the statute is worded in such a way that this provision can be severed without doing violence to the whole, the fact that an improper classification arises out of the grace period arguably should not affect the validity of the remainder of the statute.[223]

Because the general classifications made by section 28-01-44 apparently satisfy the requirement that they closely correspond to the legislative purpose, and the improper classification arising out of the grace period is severable, it is necessary to consider whether the special statute applies uniformly to those similarly situated.[224] The resolution of this issue turns upon the distinctions between those entitled to invoke the protection of the statute and

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219. *See supra* note 103.

220. *See* Comment, *Limitation of Action Statutes for Architects and Builders — Blueprint for Non-Action*, 18 CATH. U.L. REV. 361 (1969).

221. Arneson v. Olson, 270 N.W.2d 125, 137 (N.D. 1978).

222. *Id.*

223. The rules applicable to constitutional challenges in North Dakota make it unlikely that the issue of the improper classification made by section 28-01-44(2) will ever be raised. Generally, if a statute may be constitutionally applied to a person, that person lacks standing to challenge the statute on the grounds that it might conceivably be applied unconstitutionally to others. State v. Unterseher, 255 N.W.2d 882, 886 (N.D. 1977). Thus, because only those injured in the ninth year following the completion of construction are adversely affected by the classification resulting from the grace period, only this limited group of individuals should be allowed to raise the issue in court. *Id.* In addition, because of policies which mandate that a court inquire into the constitutionality of a statute only to the extent required by a particular case, Tooz v. State, 76 N.D. 599, 38 N.W.2d 285 (1949), it would be improper for a court to raise the issue of the improper classification in section 28-01-44(2) as justification for invalidating the entire statute.

224. *See supra* notes 200-02 and accompanying text.

those excluded. Owners are excluded by the specific language of section 28-01-44,[225] and therefore a discussion of the factors that distinguish owners from builders is appropriate. The distinctions between materialmen and builders will also be discussed, although the court's construction of section 28-01-44 will dictate whether or not this issue will arise.[226]

The differences between owners and builders justify the exclusion of owners and possessors of land from the coverage of section 28-01-44. Even courts which have struck down special statutesof limitations as violative of equal protection have suggested that it was proper to exclude owners and tenants.[227] The distinction generally cited to support this exclusion is that owners and other possessors of land have control over the real property.[228] This is a significant difference, because it allows such persons to regulate their liability by controlling those who enter the property and defining the conditions of entry.[229] Owners and possessors of property can also avoid liability through proper maintenance of the land.[230] Builders, however, have no such control over the property once construction is complete. Furthermore, owners and possessors of land can terminate their liability by disposing of the property. No such relief is available to builders, who in the absence of legislation similar to section 28-01-44 would be faced with perpetual liability.[231]

The more difficult question in determining the validity of section 28-01-44 involves the distinctions between builders and materialmen. This is because materialmen, like builders, do not have control over the property after the improvement has been completed. Therefore, materialmen are clearly distinguishable from owners and possessors.[232]

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225. N.D. CENT. CODE § 28-01-44(3) (1974).

226. Some courts have suggested that materialmen should be included among those allowed to invoke the special statutes of limitations because of the language used in these statutes. *See* Wiggins v. Procter & Schwartz, Inc., 330 F. Supp. 350, 353 (E.D. Va. 1971). If such a construction of section 28-01-44 were adopted, the issue of the distinctions between materialmen and builders would not arise.

227. Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Muzar v. Metro Town Houses, Inc., 82 Mich. App. 368, 266 N.W.2d 850 (1978). *But see* Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977).

228. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, _____, 382 A.2d 715, 718 (1978) (the builder has no control over the property and consequently has no way to avoid liability once the property is relinquished to the landowner).

229. *Id.*

230. *Id.*

231. A third party injured at any time in the future could allege negligence on the part of the builder. Because the cause of action would not accrue until the time of the injury, a builder is potentially liable as long as the improvement exists. A builder may also be perpetually liable to an owner if the discovery rule adopted for medical malpractice in Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968), is extended to actions involving builders. *See also* Note, *Malpractice: The Design Professional's Dilemma*, 10 J. MAR. J. PRAC. & *Proc.* 287, 308 (1976).

232. *See supra* notes 221-22 and accompanying text.

The distinction between builders and materialmen in section 28-01-44 is one between those who provide services and those who provide goods. Such a distinction exists in other areas of the law. Perhaps the most obvious example is the Uniform Commercial Code.[233] In North Dakota, the provisions of the Uniform Commercial Code apply to goods, but not to services.[234] Another area of the law in which a distinction is made between those who provide goods and those who provide services is strict liability in tort, with many jurisdictions refusing to apply the doctrine to those who provide only services.[235] In light of the existing areas of law which have distinguished between those who provide goods and those who provide services in defining the scope of liability, it does not seem unreasonable for the legislature to have employed such a distinction in section 28-01-44.

Perhaps a more obvious distinction between builders and materialmen, and another reason for upholding the constitutionality of section 28-01-44, is the difference in the working conditions of the two groups.[236] Manufacturers work in a controlled environment where they can more easily maintain quality control. The working conditions generally allow manufacturers to test a product before beginning production, to discover flaws, and to make the necessary modifications. In addition, manufacturers can test individual items while production is ongoing to ensure that standards are being maintained.[237]

The position of the builder is completely different from that of the manufacturer. Even in projects in which a standardized design is implemented or the materials are pre-cut, builders must still concern themselves with the particular location of the building and soil and climate conditions.[238] Because they do not work in a controlled environment, builders may be required to adapt the construction process to delays caused by such things as poor weather or the failure of one of the many different groups involved in the construction process to meet its obligations.[239] The process of construction is a process of integration.[240] Because of the many constituent parts involved and the case-by-case judgments which

233. N.D. CENT. CODE chs. 41-01 to 41-09 (1968 & Supp. 1979).

234. Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649 (N.D. 1977).

235. *See, e.g.*, St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, 534 P.2d 781 (1975) (holding that strict liability did not apply to the providing of medical services because the sale of a product is a necessary element of such a cause of action).

236. Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, _____, 382 A.2d 715, 719 (1978).

237. *Id.*

238. *Id.*

239. *Id.*

240. *See supra* note 70.

must be made as to how the system can best be integrated, the builder's responsibilities differ significantly from those of a materialman.

The burden of defending potential lawsuits, as a practical matter, may weigh more heavily on builders than on manufacturers. An action against a manufacturer will generally be founded upon strict liability in tort.[241] In such cases, the plaintiff has the burden of proving that there was a defect in the product at the time it left the manufacturer's hands.[242] If this burden of proof is met, the manufacturer's only defense entails proving that the later action of another party somehow has relieved the manufacturer of liability.[243] The gravamen of the complaint against a builder, however, is generally negligence.[244] Thus, the builder may avoid liability if he can show that he exercised reasonable care under the circumstances.[245] In order for the builder to establish that he exercised reasonable care, it may be necessary for him to save the thousands of documents produced in connection with each construction project, so that the appropriate records will be available.[246] This would definitely become a problem if section 28-01-44 were found to be invalid, because it would result in potentially perpetual liability for those involved in construction.[247] A similar burden does not exist under the theory of strict liability, because the manufacturer's reasonable care in the production of a product is not a defense.[248]

It is true that the operation of the limitation period contained in section 28-01-44 may produce harsh and seemingly inequitable consequences to individuals in particular cases. Courts should recognize, however, that the absence of such a statute might have an equally unjust and burdensome effect on builders as a class. By enacting section 28-01-44, the legislature has determined that the burden of deficiencies in construction will remain with the builder for ten years, and thereafter will fall upon individuals. Although there may be disagreement as to the wisdom of the legislature's judgment in this matter, acts of the legislature in North Dakota are

241. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978).

242. Herman v. General Irrigation Co., 247 N.W.2d 472, 479 (N.D. 1976).

243. The plaintiff in a strict liability action is relieved of the burden of showing negligence on the part of the manufacturer, and whether the manufacturer actually was negligent is immaterial. *Id.* at 476. To escape liability or reduce damages, the manufacturer must show that the product was materially altered or misused, or that the plaintiff assumed the risk of injury. *See* Olson v. A. W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977).

244. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978).

245. Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188, 201 (N.D. 1973).

246. *See* Vandall, *Architects' Liability in Georgia: A Special Statute of Limitations*, 14 GA. S.B.J. 164, 166 (1978).

247. *See supra* note 231.

248. *See supra* note 243.

presumed to be constitutional.[249] To rebut this presumption, one must show that a statute clearly violates some provision of the state or federal constitution.[250] In light of this presumption of validity and the important distinctions that have been recognized between builders and those excluded by section 28-01-44, the statute should not be invalidated on the grounds that it violates equal protection.

B. Due Process

The second major challenge made against the special statutes of limitations for builders is that such statutes deny a plaintiff due process.[251] Due process challenges may be based upon federal or state constitutional provisions.[252] Such challenges are generally based upon the proposition that the legislature should not be able to deprive an injured person of a remedy.[253] Although the due process issue has not been determinative in most cases,[254] it is an issue which will be raised if the constitutionality of section 28-01-44 is challenged.

1. Cases From Other Jurisdictions

The majority of jurisdictions which have considered the due process issue have concluded that the special statutes of limitations do not violate this constitutional guarantee.[255] Many of the courts which have found such statutes to be unconstitutional have not reached the due process issue.[256] Some courts which have found the special statutes unconstitutional on equal protection grounds, however, have concluded that the statutes do not deny due process.[257]

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249. State v. Hanson, 256 N.W.2d 364, 366 (N.D. 1977).

250. *Id.*

251. *Compare* Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977) *with* Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971). Both courts employed similar reasoning and language, and both relied upon Silver v. Silver, 280 U.S. 117, 122 (1929), in which the Court stated that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." The court in *Howell,* however, based its decision on due process, while the court in *Josephs* relied on a state constitutional provision guaranteeing access to the courts.

252. *See, e.g.,* Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143, 145 (Okla. 1977).

253. *Id.*

254. Only two cases have relied primarily on due process as grounds for finding a special statute unconstitutional. Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 418 (Ky. 1973).

255. *See infra* notes 257-59 and accompanying text.

256. *See, e.g.,* Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (holding the special statute unconstitutional based upon state equal protection grounds, and therefore finding it unnecessary to discuss due process).

257. Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977).

Only two cases have relied primarily on due process grounds for striking down special statutes of limitations for builders.[258] In *Overland Construction Co. v. Sirmons,*[259] the Supreme Court of Florida held that the special statute[260] was unconstitutional as a violation of the state constitutional provision[261] requiring that courts be open to every person for redress.[262] The court found that the right of an injured person to bring an action against builders for injuries suffered as a result of alleged negligence in construction was a right to redress which was guaranteed.[263] The court acknowledged that cases in other jurisdictions have reached contrary results, but distinguished such cases as having been decided "under a much less exacting standard" than is applicable in Florida.[264]

In *Saylor v. Hall,*[265] the Supreme Court of Kentucky employed reasoning similar to that relied upon in *Overland.* The court ruled that the Kentucky special statute of limitations[266] was unconstitutional in its application to the facts presented in that case.[267] The court declined, however, to formulate any broader rule of constitutionality. The case involved an improvement that had been constructed before the statute was passed, but which did not produce an injury until after the statute had been enacted. The court recited the general rule that the legislature has no power to cut off an existing remedy entirely or to shorten the applicable limitation period once it has begun to run.[268] Thus, the court concluded: "Surely then, the application of purported limitation statutes in such manner as to destroy a cause of action before it legally exists cannot be permissible if it accomplishes destruction of a constitutionally protected right of action."[269]

The arguments relied upon in *Overland* and *Saylor* were countered in *Freezer Storage, Inc. v. Armstrong Cork Co.,*[270] in which the Supreme Court of Pennsylvania upheld a special statute[271] against a claim that it violated the state constitutional provision[272]

258. *See infra* notes 259-69 and accompanying text.
259. 369 So. 2d 572 (Fla. 1979).
260. FLA. STAT. ANN. § 95.11(3)(c) (West Supp. 1974) (currently codified at FLA. STAT. ANN. § 95.11 (3) (c) (West Supp. 1981)).
261. FLA. CONST. art. 1, § 21.
262. Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 573 (Fla. 1979).
263. *Id.*
264. *Id.* at 575.
265. 497 S.W.2d 218 (Ky. 1973).
266. KY. REV. STAT. § 413.135 (1972).
267. Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973).
268. *Id.*
269. *Id.*
270. 476 Pa. 270, 382 A.2d 715 (1978).
271. 42 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1977) (currently codified at 42 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1980)).
272. PA. CONST. art. 1, § 11.

which guaranteed open courts.[273] The court noted that it is within the legislature's power to abrogate common-law rights.[274] Furthermore, the court noted that a decision to the contrary would produce a "stagnation of the law in the face of changing societal conditions,"[275] and would offend the system of checks and balances appropriate between the various branches of government.[276]

Other courts which have upheld the special statutes against claims that they violate due process by barring a cause of action before it has arisen have noted that the statutes are not improper because they do not interfere with a vested right.[277] The reasoning of the Supreme Court of New Jersey in *Rosenberg v. Town of North Bergen*[278] is persuasive in this regard:

> This formulation suggests a misconception of the effect of the statute. It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria* — a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.[279]

Even courts which have held the special statutes of limitations unconstitutional on equal protection grounds have acknowledged

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273. Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, _____, 382 A.2d 715, 720 (1978).

274. *Id.*

275. *Id.* at _____, 382 A.2d at 720 (quoting Singer v. Shepard, 464 Pa. 387, 399, 346 A.2d 897, 903 (1975)).

276. 476 Pa. at _____, 382 A.2d at 721. The court in *Freezer Storage* stated:

> This Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the court. To do so would be to place certain rules of the "common law" and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and of the flexibility required for the healthy growth of the law.

Id.

277. Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied,* 91 N.M. 3, 569 P.2d 413 (1977).

278. 61 N.J. 190, 293 A.2d 662 (1972).

279. Rosenberg v. Town of North Bergen, 61 N.J. 190, _____, 293 A.2d 662, 667 (1972).

that the statutes do not violate due process considerations by abrogating a common-law right.[280] Thus, regardless of the position courts take on the constitutionality of the special statutes, the majority of courts agree that such statutes do not violate due process.

Claims that the special statutes deny access to the courts or violate state constitutional provisions guaranteeing a remedy for any injury have generally been analyzed in terms similar to those employed in general discussions of the due process issue.[281] Courts have found that state constitutional provisions are satisfied by the statutes, noting that legislatures have not disturbed vested rights by their enactment of the special statutes.[282] Furthermore, it has been pointed out that third parties who are injured after the passage of the special limitation period are not completely without a remedy.[283] Because the special statutes do not affect the responsibility of owners, tenants, and persons in actual possession of the property, a third party who is injured on the property may have a cause of action against this group of people.[284]

2. Section 28-01-44 and Due Process Considerations

Article 1, section 9 of the North Dakota Constitution provides in part that "[a]ll courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law."[285] In addition, section 12 of article 1 mandates that no person be "deprived of life, liberty or property without due process of law."[286] These provisions form the basis for any due process challenge to section 28-01-44 under the state constitution.

Like the special statutes interpreted in other jurisdictions, North Dakota's special statute of limitations is one of abrogation with respect to claims which accrue against builders after the applicable limitation period has elapsed, since it precludes any action from being filed against a builder ten years after construction is complete.[287] It therefore operates to define substantive rights,

280. Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977).

281. *See supra* note 254.

282. *See, e.g.*, Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978) (holding that the special statute of limitations did not constitute special legislation and did not violate state constitutional provisions requiring courts to be open for any person injured).

283. Reeves v. Ille Elec. Co., 170 Mont. 104, _____, 551 P.2d 647, 652 (1976).

284. *Id.*

285. N.D. CONST. art. 1, § 9.

286. N.D. CONST. art. 1, § 12.

287. N.D. CENT. CODE § 28-01-44(1) (1974).

and prevents a cause of action for injuries incurred more than ten years following the completion of construction from ever accruing.[288]

The provisions of the North Dakota Constitution applicable in a due process challenge to section 28-01-44 are similar to those interpreted in other jurisdictions.[289] As noted, the overwhelming weight of authority indicates that the special statutes do not violate state constitutional guarantees of due process. Therefore, the reasoning of these courts should be persuasive in resolving a due process challenge to section 28-01-44, and courts should find that the statute does not unconstitutionally deny access to the courts.

North Dakota courts have applied standards of review to due process claims similar to those applied in cases where a statute is challenged on equal protection grounds.[290] The application of such considerations, however, does not preclude the elimination or limitation of a right, but simply requires that any such action not be arbitrarily taken.[291] Thus, the same reasoning which justifies the statutory classifications created by section 28-01-44 against equal protection claims[292] should suffice to uphold the statute when it is challenged on due process grounds.

IV. CONCLUSION

Section 28-01-44 is representative of the legislative trend of enacting special statutes of limitations for particular groups such as builders.[293] Although the wisdom of this trend is questionable,[294]

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288. *See supra* notes 74-99 and accompanying text.

289. *See, e.g.*, Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 214 (1977) (statute challenged was upheld under state constitutional provisions providing that courts be open to every person who is injured and under due process).

290. *See* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974).

291. Arneson v. Olson, 270 N.W.2d 125, 129 (N.D. 1978).

292. *See supra* notes 195-208 and accompanying text.

293. Under current North Dakota law, a products liability action against a manufacturer must be brought within ten years. N.D. CENT. CODE § 28-01.1-02 (Supp. 1979). In addition, actions for alleged medical malpractice must be brought within six years of the date of the alleged negligent act. *See* N.D. CENT. CODE § 28-01-18(3) (Supp. 1979).

294. Watts v. Putnam County, 525 S.W.2d 488, 494-95 (Tenn. 1975). In *Watts*, the court noted:

> We do not necessarily agree philosophically with the results we reach. We can only construe the statute as it is, not as we think it ought to be.
>
> We note with concern the recent tendency of special interest groups to promote the passage of particularized statutes of limitations in the area of tort law. We do not impugn the motives of any such group, but we are concerned with the fundamental fairness involved in the imposition of differing periods of limitation on different individuals and groups. For example, Tennessee now has a three-year statute of limitations on medical malpractice, a four-year statute governing malpractice actions against architects, and a one-year statute governing actions against lawyers; all complicated by the fact that the discovery rule no longer applies to medical

the function of a court called on to determine the validity of the statute is to "'determine whether the legislature has acted reasonably in respect to their mandate from the people as set out in the Constitution.'"[295] Thus, the fact that a court may consider the special statute unwise or potentially unfair should not be determinative of the issue.

Courts should consider the classifications made by section 28-01-44 in light of the distinctions which exist among the various groups affected by the statute. Possible legislative goals should also be considered in determining the validity of the special statute. Such considerations suggest that the classifications made by section 28-01-44 are not unreasonable.

Admittedly, the limitation period established by section 28-01-44 may result in a hardship in some cases, but the statute also operates to prevent hardship to builders. In this regard, section 28-01-44 is not unique. Many other statutes serve to work for some and against others.[296]

It is for the legislature to weigh the conflicting concerns that exist. Section 28-01-44 represents the legislature's judgment as to how the existing concerns in this area of the law can best be balanced. In the absence of constitutional infirmities in section 28-01-44, courts should therefore consider the balance struck by the legislature on this issue to be decisive.

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malpractice actions but does apply against architects and attorneys. All of this points to the urgency of the need for a comprehensive revision of all statutes of limitations in Tennessee to the end that uniform periods of limitation be established and applied.

Id.

295. Carter v. Hartenstein, 248 Ark. 1172, ____, 455 S.W.2d 918, 921 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

296. *Id.*