Suppose Repose Were Indisposed: A True Story Prediction of Collapse and Disaster for the Construction Industry

By James Duffy O'Connor

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In this "Crystal Ball" issue of *The Construction Lawyer*, Editor-in-Chief Stephen Hess has asked the authors to predict the course of the industry with particular care to identify dangerous curves, recent washouts, and downed bridges. It is the last of these obstacles that concerns me most. But first a few words about scrying.

Reading signs in crystals, pools, or scrying stones is a tricky business. Skeptics abound,[1] and have forever, yet still there exists a demand for fortune tellers. In the days that Adrian Bastianelli edited this journal, he would recall vaguely (a common characteristic of his recollections) a clearing mist on a forest floor, where the stones are tossed and a scry begins. Charles Meeker and Tom Stipanowich suspected it was simply dust in the eyes of the blind. Doug Oles would gather himself into himself and fuse the scattered selves into a polished crystal ball, which he used to see the moons and flashing suns of the construction industry. Charles Sink often resorted to his Magic 8 Ball.[2] For John Ralls, it involved crossing a river of wacky, navigating by the movement of clouds that languished effortlessly in the deceleration of time.

In this edition of *The Construction Lawyer*, Stephen Hess rejects the inclination to mock what the Gypsy Rose knows. He harbors the notion that she may show us the future and our poverty in history. He believes that the world within our grasp is already in our hands. And so, I respectfully submit the following prediction—conforming as it must to the nature and scope of all *TCL* articles—about how our aging infrastructure can bind us to a past that is legally inescapable, and to a future of endless liability.

Forty years ago, one drawing detail in a set of hundreds for a steel truss bridge denoted the use of two ½″ alloy steel plates for the gusset plates intended to "sandwich" the U10 and L11 joints. The drawing is not an original, and no one knows whether it is a final design, nor whether the gusset detail was designed by the engineering firm or the state's engineers who were integrally involved in the design effort. No one can authenticate the drawing, and no one alive can remember anything about it. To complicate matters more, a handful of old correspondence suggests that the selection of alloy steel was compelled by the state. On August 1, 2007, the bridge collapsed into the Mississippi River during rush hour, killing 13 people and injuring hundreds of others. Two weeks later, the state's outside experts offered a theory for the collapse: the U10 gusset plate was undersized and likely caused the collapse. That's the theory the NTSB adopted a year later, initiating litigation in the Minnesota court system that would end five years later when the US Supreme Court let stand a decision of the Minnesota Supreme Court that revived a claim against the engineering company that had long been extinguished by Minnesota's statute of repose. This article addresses the historical importance of repose immunity to the construction industry and reports the final decision by Minnesota's highest court that stands in contrast to the long body of case law protecting vested rights.

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Part I: Repose Immunity Has a Storied History of Vested Property Rights

The US Supreme Court Established Long Ago That Revival of Claims Previously Extinguished by Statutes of Repose Violates Due Process

Long-standing US Supreme Court precedent has set forth a line of analysis that is fundamental for courts and legislatures to determine the constitutionality of retroactive enlargement of a statutory period for bringing suit. Decades ago, the Court recognized the distinction between a statute of limitations, which simply erects a procedural bar to a plaintiff bringing suit after a specified period, and a statute of repose, which extinguishes any existing liability and thus confers an outright immunity from suit upon potential defendants after the specified period has elapsed. The Court first drew this distinction in *William Danzer & Co. v. Gulf & S.I.R. Co.*[3] In *Danzer*, a plaintiff failed to file suit against a railroad within the time prescribed by the Interstate Commerce Act, which both created and limited the plaintiff's cause of action.[4]

Congress then enacted the Transportation Act, which, if applied retroactively, would revive the plaintiff's claim.[5] The railroad argued that retroactive application of the Transportation Act was unconstitutional because reviving the plaintiff's expired cause of action amounted to a taking of the railroad's property without due process.[6]

In finding in favor of the railroad, the Court determined that "the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff."[7] The Court explained that some limitations statutes "related to the remedy only" and did not invest a defendant with any right to be free from suit.[8] Accordingly, repeal or alteration of such "statutes of limitation" cannot deprive a defendant of any property right in violation of the Due Process Clause.[9] In contrast, the Court acknowledged that another class of statutes "operate[s] as a limitation on liability" and that the time limitation "constitute[s] part of the definition of a cause of action."[10] Retroactively amending such a statute to revive a liability that had already been extinguished under prior law "would . . . deprive [the] defendant of its property without due process of law."[11] Because the statute at issue in *Danzer* belonged to this latter class of statutes—statutes of repose—the Court held that it could not be applied retroactively to revive a cause of action consistent with due process.[12]

The Supreme Court subsequently reaffirmed the distinction announced in *Danzer* in its decision *Chase Securities Corp. v. Donaldson.*[13] The Court in *Chase* upheld a law retroactively amending a statute of limitations that revived a previously barred claim. The Court observed that such legislation "d[id] not parallel . . . the *Danzer* case" because it "merely . . . reinstate[d] a lapsed remedy" and did not infringe a defendant's "right to immunity."[14] In upholding the retroactive legislation, the Court also made a number of observations about statutes of limitations, stating that such statutes "represent a public policy about the privilege to litigate" and "find their justification in necessity and convenience rather than in logic," representing "expedients, rather than principles."[15] As a result, lifting a bar imposed by a statute of limitations did not violate due process because such statutes were simply procedural and applied only to the remedy.[16] The Court again commented on the distinct aspects of statutes of limitations, and the fact that such differences from statutes of repose were dispositive in constitutional analysis:

> This Court . . . adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.[17]

This "workable concept" established by *Danzer* and *Chase* has continued to be used by the Court in later decisions. For example, in *International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc.*,[18] the Court used the distinction to reject a challenge to a retroactive enlargement of a statute of limitations. In that case, a fired employee sued her ex-employer for racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The Act required that she file a charge with the EEOC within 90 days of discharge, but she did not do so until 108 days after her discharge. Congress later amended the Act to extend the time limitation to 180 days, and her charge was timely under the amended Act. The respondent argued that, under *Danzer*, "Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period."[19] The Court held, however, that the constitutional test in *Chase* applied instead to statutes of limitations, which found no due process violation for retroactive legislation that lifted the bar restoring a remedy lost through the mere lapse of time.[20]

The Majority of Lower Courts Similarly Recognize Distinctions Between Statutes of Limitations and Statutes of Repose That Are Meaningful to Constitutional Analysis

Along with other state and federal courts, Minnesota courts also adhered to the distinctions set forth in *Danzer* and *Chase* with respect to statutes of limitations and statutes of repose.[21] These courts recognize that a statute of repose denotes a distinct type of statute imposing a time bar qualitatively different in purpose and implementation from a statute of limitations.[22]

Statutes of limitations are generally seen as running from the time of injury and serve to limit the time within which an action may be commenced after the cause of action has accrued.[23] As such, they are "remedial and procedural."[24] Statutes of limitations "are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect."[25] Statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay."[26]

In contrast, statutes of repose run from the occurrence of some event other than the event of an injury that gives rise to a cause of action; therefore, statutes of repose "terminate[] any right of action after a specific time has elapsed, regardless of whether or not there has as yet been an injury" to the plaintiff.[27] Thus, while statutes of limitations have been described as affecting only a party's remedy for a cause of action, the running of a statute of repose serves to "nullify both the remedy and the right."[28] Further, statutes of repose are considered substantive, conferring substantive rights on parties under their protection. "Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action. Where a statute of repose has

been enacted, the time for filing suit is engrafted onto a substantive right created by law."[29]

As set forth in *Danzer*, the substantive nature of statutes of repose is crucial for constitutional analysis because the Due Process Clause prohibits a legislature from abolishing "property" rights that have already accrued or vested, i.e., from "depriv[ing] any person of property without due process of law."[30]

The Supreme Court has held that the type of state law interests that rise to the level of protected vested property interests under the Due Process Clause are not limited to interests in real or tangible property. Rather, the words *liberty* and *property* in the Due Process Clause "are broad and majestic terms" and "relate to the whole domain of social and economic fact."[31] The interests that rise to the level of property for purposes of the Due Process Clause are "not limited by a few rigid, technical forms," but rather include "a broad range of interests that are secured by 'existing rules or understandings.'"[32] The Court has held that if, under state law, the party claiming due process protection merely has "an abstract need or desire for [the benefit]" or a "unilateral expectation of it," then the party does not have a property interest that is protected by the Due Process Clause.[33] If, however, the party claiming the benefit has a legitimate statutory claim of entitlement to it under the law that gives rise to the interest, then the party has a property interest that may not be retroactively abrogated by the legislature.[34]

As a result, the Supreme Court has long recognized that an accrued cause of action is a vested property right protected by the guarantee of due process.[35] Likewise, immunity from suit that has accrued is also a vested property right deserving of constitutional protection.[36] Indeed, a vested right in immunity from suit should be afforded the same treatment and protections as a vested right in a cause of action.[37]

Courts' Treatment of Legislation Attempting to Revive Actions Previously Barred by Statutes of Limitations Further Upholds the Meaningful Differences Between Procedural and Substantive Laws

Other state and federal courts have continued to rely on the distinction set forth in *Danzer* and *Chase* to *reject* challenges to the retroactive amendment of statutes of limitations, as opposed to statutes of repose.[38] These decisions recognize the continued vitality of the Supreme Court's analysis in *Danzer* and *Chase*.

Compelling Policy Reasons Justify the Constitutional Significance of Vested Rights Conferred by Statutes of Repose

Many modern statutes of repose were enacted in response to the insurance "crisis" of the late 1960s and 1970s.[39] This crisis was precipitated by courts around the country abolishing or restricting traditional tort defenses and thereby exposing defendants to potentially vast liability of theoretically infinite duration.[40] As a result, the number and scope of lawsuits increased dramatically, and insurers were either driven out of the market or forced to raise their rates significantly.[41]

In order to ameliorate the harmful impact of these trends, legislatures around the country enacted "statutes of ultimate repose" that were designed to "fix a limited and predictable time period in which a [potential defendant] would be exposed to a . . . civil action."[42] Indeed, statutes of repose are considered to "represent a response by the legislature to the inadequacy of traditional statutes of limitations."[43] Consequently, a majority of states have passed statutes of repose limiting the time in which an action may be brought against architects, builders, and material suppliers for defects arising out of improvements to real property.[44] By 1995, more than 20 states had enacted product liability statutes of repose.[45] There are hundreds of repose statutes in effect today that have enormous collective impact on substantial segments of the national economy.

The Supreme Court subsequently reaffirmed the distinction announced in *Danzer* in its decision *Chase Securities Corp. v. Donaldson.*

Courts have identified with approval many compelling policy reasons for statute of repose protections that eliminate suits against architects, designers, or contractors who have completed the work in question and turned the improvement to real property over to the owners.[46] For example, statutes of repose serve, among others, the following important policy objectives:

- Avoid litigation of "stale" claims—particularly because when long periods of time have elapsed, many witnesses may be unavailable or may have memory loss and there may be a lack of adequate records—and help to prevent the assertion of false claims;[47]
- Prevent the potential for liability throughout a professional's lifetime, which both is unfair to the professional and fosters instability in the construction industry;[48]
- Prohibit the application of current "state-of-the-art" standards when the installation and design took place many years before when different standards were in place;[49] and prevent liability where the modification to, or use of, the property was unforeseeable at the time the improvements were made although it might be deemed "foreseeable by a modern jury";[50]
- Decrease rising liability insurance costs (and allow greater actuarial precision in setting insurance rates)

and reduce record storage costs; decreasing such costs will facilitate efficient business planning and will ultimately benefit businesses, professionals, consumers, and the economy;[51]

- Limit the increasing costs of design professionals' liability insurance, which has in part resulted because the requirement of privity of contract to impose liability has been greatly eroded;[52]
- Statute of repose protections have been upheld because they do not preclude the vast majority of lawsuits because most claims are brought within 10 years after an improvement to real property is completed.[53]

Minnesota courts had long recognized the important policy considerations underscoring statutes of repose. In *Sartori*, the Minnesota Supreme Court upheld the statute of repose period found in Minnesota Statutes section 541.051 (1980) (which at the time set a 15-year period during which actions had to "be brought against architects, builders and material suppliers for defects arising from improvements to real property").[54] The respondents challenged the constitutionality of section 541.051 on the grounds that it violated the Due Process and Remedies Clause of the Minnesota Constitution.[55] In denying respondent's challenge, the court explained that the statute serves important policy objectives:

> We find the legislative objection behind Minn. Stat. § 541.051, subd. 1 (1980), a legitimate one. The statutory limitation period is designed to eliminate suits against architects, designers and contractors who have completed the work, turned the improvement to real property over to the owners, and no longer have any interest or control in it. By setting forth a 15-year period of repose, the statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed. The lapse of time between completion of an improvement and initiation of suit often results in the unavailability of witnesses, memory loss and lack of adequate records. Another problem particularly crucial is the potential application of current improved state-of-the-art standards to cases where the installation and design of an improvement took place many years ago. Minn. Stat. § 541.051 (1980) was designed to eliminate these problems by placing a finite period of time in which actions against certain parties may be brought. We hold this objective is a reasonable legislative objection and should not be lightly disregarded by this court absent a clear abuse.[56]

The Utah Supreme Court also upheld a statute of repose in *Craftsman Builder's Supply, Inc. v. Butler Manufacturing Co.*[57] There, the court discussed several "stated evils" that the statute of repose was designed to protect against:

> The builders statute of repose at issue in the present case lists the specific evils it desires to eliminate. Two of the stated evils concern costs to the construction industry: liability insurance costs and record storage costs. Absent a statute of repose, these costs would continue for the life of both the provider and the improvement. Such costs could be significant and would likely increase the cost of building, which undoubtedly would be passed on to consumers. This may very well adversely impact the state's economy by increasing the cost of living. The legislature also found that liability risk extending for the lifetime of a provider and an improvement constituted a social and economic evil. Many buildings in this state were constructed decades ago, and some are even older than a century. While some of the business entities responsible for such construction may still exist, the individual providers who assisted in the construction may have long since retired or passed away. The perpetual risk of liability to retired individuals or to businesses whose current owners had nothing to do with construction projects in the past undoubtedly creates a hardship to those involved. We have recognized such hardship and have stated that "certainly there is a valid social interest in providing a time of repose—in wiping the slate clean and not allowing possible mistakes of the past to becloud an individual's life forever[.]"[58]

The Utah court also noted that "a study revealed that 99.6% of claims brought against architects or builders for design defects were brought within ten years" and that, as a result, the Utah House of Representatives found that "the claims the builders statute of repose would cut off represented less than one percent of the claims brought."[59] Accordingly, the court upheld the builders statute of repose contained in Utah Code section 78-12-25.5 (1996).

Similarly, in *Gibson v. West Virginia Department of Highways*,[60] the West Virginia Supreme Court determined that the 10-year statute of repose period at issue, which barred "the filing of a suit for design or construction defects against architects, builders, and others ten years after the construction project [was] complete," did not violate any constitutional guarantees.[61] In reaching its conclusion, the court noted the important purposes such statutes serve and also discussed some of the same factors noted by the *Sartori* and *Craftsman* courts. The court explained, "this type of statute of repose . . . protect[s] architects and builders from the increased exposure to liability as a result of the demise of the privity of contract defense."[62] In addition, the court found that "[w]ithout a statute of repose, a party injured because of a latent design or defect could sue an architect or builder many years after a construction project was completed. This could result in stale claims with a distinct possibility of loss of relevant evidence and witnesses."[63]

Numerous other courts have also found that statute of repose protections to builders, architects, or other professionals serve important and valuable interests.[64]

Part II: The Emergence of a Different Standard of Review Threatens the Vested Rights Analysis of *Danzer* and *Chase*

The constitutional standard of review articulated in the decisional law promoted in Part I of this article does not stand alone. Indeed, in more recent years, decisions from inferior courts have challenged the holdings in *Danzer* and *Chase*, arguing that a vested rights analysis should take a back seat to the rational basis test, virtually guaranteeing the demise of heretofore vested property rights in repose immunity.[65] Today there is a clear split among state and federal courts that have been faced with the issue of whether a statute that retroactively abrogates a statute of repose may constitutionally revive causes of action that have already been extinguished by the prior statute of repose. The split provides precedent for ignoring *Danzer*/*Chase* and its progeny. The split presents the reviewing court with two options: (1) follow the direction set forth in *Danzer* and *Chase* and followed by courts in other jurisdictions, which would invalidate retroactive revival of a cause of action already barred by a previous repose statute, or (2) apply rational basis review of retroactive legislation, which results in no due process violation.[66]

The divergent analysis giving rise to the current split of authority is most clearly demonstrated by the decision and reasoning set forth in *Shadburne-Vinton v. Dalkon Shield Claimants Trust.*[67] There, the plaintiff used an IUD manufactured by A.H. Robins Co. from 1974 to 1976 and alleged that it caused infertility and multiple sclerosis. The plaintiff filed suit against A.H. Robins in January 1983 in federal district court in Maryland. Because the plaintiff was an Oregon resident, Oregon law controlled. Thus, A.H. Robins moved for judgment on the pleadings based on Oregon's statute of repose, which required that product liability actions be commenced within eight years of the product's initial purchase. The district court granted A.H. Robins' motion since the plaintiff's suit was filed more than eight years after she first purchased the IUD. The plaintiff appealed. During the appeal, A.H. Robins filed for bankruptcy, and the appeal was stayed. In the meantime, the Oregon legislature amended the statute of repose to exclude IUD manufacturers as protected defendants. The plaintiff obtained a consent order from the bankruptcy court tolling the time for filing suit under the new IUD statute. Following conclusion of the bankruptcy proceedings, the bankruptcy court certified the plaintiff's claim. The plaintiff then filed an amended complaint against Dalkon Shield Claimants Trust, which had been substituted for A.H. Robins under the bankruptcy reorganization. The trust filed a motion for judgment on the pleadings, claiming that the new IUD statute was unconstitutional and that the plaintiff's complaint should be dismissed under the original statute of repose. The district court held that the new IUD statute violated the trust's due process rights and granted the trust's motion. The district court's rationale was that statutes of repose involved substantive rights: they make filing within a specified period of time a substantive part of a cause of action. Citing the Supreme Court authority of *Danzer* and *Chase*, the district court determined that the new IUD statute was unconstitutional because its effect was to revive substantive rights that had been extinguished when the original period of repose expired. As a result, this deprived the trust of property rights without due process.

Immunity from suit that has accrued is also a vested property right deserving of constitutional protection.

The Fourth Circuit reversed, employing a different constitutional analysis. The Fourth Circuit determined that the constitutionality of the retroactive legislation depended on whether it was supported by a rational basis, citing *Usery v. Turner Elkhorn Mining Co.*[68] and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*[69] In *Usery*, the Supreme Court rejected a due process challenge to legislation subjecting coal mine operators to liability for illnesses suffered by miners in connection with work done long before the legislation was enacted. In *Pension Benefit*, the Supreme Court upheld a statute imposing liability on employers for withdrawing from pension plans, including employers who withdrew before enactment of the statute. Neither of these precedents involved "vested rights."[70] On the basis of these cases, the Fourth Circuit in *Shadburne* held that retroactive application of a statute was constitutional if the statute had a legitimate legislative purpose that is furthered by rational means. For purposes of constitutional analysis, the Fourth Circuit emphasized that the same rational basis test applied whether the statute was one of repose or of limitations.

The other federal circuit case that fuels the fire for ignoring *Danzer*/*Chase* is *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*[71] There the seminary sued the manufacturer and supplier of asbestos-containing ceiling tiles. The defendant had manufactured and supplied the tiles that were installed in multiple buildings at the Wesley Theological Seminary campus between 1957 and 1960. Some 25 years after substantial completion, the owner claimed to have discovered that the asbestos had become friable, necessitating substantial repairs and remediation of the buildings. The lawsuit against the manufacturer/supplier sought the

recovery of these costs. Among the defenses raised by the manufacturer/supplier was its repose immunity that had "vested" more than 15 years before commencement of the action. Subsequent to the owner's commencement of the action, the District of Columbia enacted legislation that abrogated repose immunity for manufacturers and suppliers of equipment, machinery, or articles installed in improvements to real property. The new repose statute, by its terms, provided that it was to be applied retroactively to any case then pending in a court of competent jurisdiction. The owner sought to employ the new repose statute to eliminate the manufacturer/supplier's repose defense. The district court rejected the owner's efforts and ruled that the manufacturer/supplier's vested right to repose immunity barred the owner's claim. On appeal, the US Court of Appeals for the D.C. Circuit reversed. Citing *Usery* and *Pension Benefit*, the court literally ignored the holding in *Danzer*, reasoning that

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> multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.[72]

Applying the rational basis test, the court concluded the newly enacted retroactive statute of repose could fairly revive the owner's tort claims against the manufacturer/supplier of the asbestos-containing ceiling tiles. By ignoring *Danzer*, the court also ignored the notion of "vested rights" and concluded that the only test applicable to the statute's challenge was the outcome-determinative analysis inherent in the rational basis test.[73]

Before the Minnesota Supreme Court weighed in, *Shadburne-Vinton*, *Wesley Theological Seminary*, and *Harding* were the only reported decisions that addressed directly the issue of revival of claims previously barred by a vested repose right of immunity. By contrast, a legion of other courts had held precisely the opposite—that is, the Due Process Clause prohibits the retroactive resuscitation of liabilities extinguished by statutes of repose. Such is the law, for example, in Maryland and Wisconsin.[74] The same result was reached in North Carolina in *Colony Hill Condominium I Ass'n v. Colony Co.*[75] Nebraska, Virginia, and Rhode Island have followed suit, reaching the identical conclusion under state constitutions that are interpreted coextensively with the federal constitution.[76]

Part III: The Minnesota Supreme Court Rejects the *Danzer/Chase* Vested Rights Analysis and Decades of Prior Minnesota Decisional Law Applying It

The Minnesota Supreme Court fell victim to the "one-two" punch of *Shadburne-Vinton* and *Wesley Theological Seminary*. In *In re Individual 35W Bridge Litigation*,[77] the Minnesota Supreme Court ruled that the Minnesota legislature was constitutionally empowered to abrogate long-established repose rights of the engineering company that had designed the interstate bridge 40 years earlier. Accepting the pleaded allegations as uncontested fact, the court determined that the engineer had contributed to the cause of the collapse by negligently designing the bridge in the 1960s. Squarely facing the due process challenge, the court reasoned that

> [t]o prevail on its claim Jacobs has the burden of proving that the interest allegedly interfered with rises to a level of a constitutionally protected "liberty" or "property" interest, and that this interest has been interfered with to an extent that violates the Due Process Clause.[78]

The court characterized the analysis as two-pronged. First, the right affected must be a "property" or "liberty" right, recognized as a substantive property interest; anything less does not trigger the protections of the Due Process Clause. Second, the statutory abrogation of the right must rise to the level of a constitutional offense.[79]

The court looked to its own precedent to determine whether a "vested" right to repose immunity is one that has "become so fixed that it would be inequitable to abrogate [the right] by retrospective regulation."[80] The court identified other such protected "vested rights," such as real property rights and certain statutory rights.[81] Addressing directly whether a repose right of immunity is such a "vested property right," the court ruled that it is. Applying its own precedent, the court ruled: "we conclude that when the repose period expires, a statute of repose defense ripens into a protectable property right."[82] It reasoned that its conclusion rested on the premise that "the statute of repose defense is a substantive limit on a cause of action. It is a defense created and defined by statute that ripened into a fixed right upon expiration of the repose period."[83] Thus, the court concluded, "a statute of repose defense is an expectancy that ripens into a protectable property right when the repose period expires and the cause of action can no longer accrue."[84]

Danzer said as much more than 80 years ago. The Minnesota Supreme Court, however, neglected to cite *Danzer*. Instead, it cited *Buchanan v. Warley*[85] and *Hodges v. Snyder*[86] for the proposition that "the private right of parties which have been vested . . . cannot be taken away by

subsequent legislation, but must be thereafter enforced by the court regardless of such legislation."[87] Indeed, Minnesota precedent mirrored this "vested rights" analysis and the application of that rule to repose immunity as *Danzer* compelled for more than 80 years.[88] The court even cited the *Chase* case that originated in the Minnesota Supreme Court, and which the court would use to reaffirm the rule in *Danzer*.[89]

The Supreme Court's "vested rights" analysis clearly and unequivocally provides that the legislative abrogation of a "vested" property right is constitutionally offensive. That is the rule in *Danzer*, which could explain why the Minnesota Supreme Court neglected to mention the *Danzer* case. Instead, the court turned to the "second prong" of its analysis and introduced a brand new standard of review for the taking of "vested rights." The court hinted at the outcome of the opinion when it stated, "we apply the rational basis test unless a fundamental right is involved."[90] What it failed to discern was that a "vested right" *is fundamental*. That was the point of *Danzer*. That was the point of *Peterson.* Once the defendant establishes that the right affected is a vested property right, the Due Process Clause is offended by its taking. The court noted that its ruling in *Peterson* had not "replaced" the rational basis test.[91] Of course it hadn't: the court has never employed that test in a "vested rights" case—at least not until now.

The rest of the court's due process analysis is a head-nod to *Wesley Theological Seminary* and *Shadburne-Vinton*, concluding with an almost apologetic acknowledgment of the outcome-determinative nature of rational basis analysis:

> We recognize that Jacobs has a protectable property right in the defense of the statute of repose. But that right is not absolute and must be balanced against the State's legitimate interest in addressing a Bridge collapse that was a "catastrophe of historic proportions." We acknowledge that it may be economically unfair to allow a cause of action previously extinguished by a statute of repose to be revived by subsequent legislation, but we find nothing in the Due Process Clause to preclude this result. . . . In our view, the compensation statutes are rationally related to a legitimate state interest.[92]

That reasoning must be why the court didn't cite *Danzer*. The holding flies in the face of *Danzer*. Indeed, the court's ruling conflicts with decades of long-established "vested rights" jurisprudence in Minnesota.[93] Two concurring justices cautioned against ruling that repose immunity is a vested property interest. Justice Stras wrote that he would rule to the contrary, finding no legal difference between a statute of repose and one of limitation, as the Kansas Supreme Court presumably ruled in *Harding.*[94] Curiously, he chastised the majority for relying on *Wesley Theological Seminary* and *Shadburne-Vinton* as they were not Supreme Court precedent. Yet he too neglected to explain away *Danzer*, the very Supreme Court precedent he was demanding from others, and which awkwardly stands in direct opposition to his intended holding.

Conclusion, Prediction, and Advice

Suffice it to say that the Minnesota Supreme Court's decision erects a bridge too far. The holding threatens the private rights of individuals and businesses and gives the state nearly boundless authority to trample those private rights through retroactive legislation. And to what purpose? So that the state may add to its own coffers and protect its own economic and political interests? The State of Minnesota certainly had a political interest in addressing the concerns of those citizens harmed by the consequence of the collapse of the I-35W bridge. After all, the state owned it, modified it, failed to maintain it, and ultimately watched it fall into the Mississippi River. It was politically expedient to waive its immunity and fund the Victims' Compensation Fund. But to rewrite well-settled law and frustrate business risks settled into long-standing contracts fashioned upon legally protected expectations is another matter altogether. Pete Dexter described politics as the organized, publicly sanctioned amplification of the infantile itch to always have one's own way. In this decision of the Minnesota Supreme Court, political expedience and vested property rights experienced the uncomfortableness of association. The decision is spicy with portent. Considering who is empowered by its holding, it could prove to be more dangerous than the hiss of asps in the rain.

Numerous other courts have also found that statute of repose protections to builders, architects, or other professionals serve important and valuable interests.

The United States' surface transportation network is the broken backbone of our nation's economy. It has provided American businesses and consumers with huge competitive advantages and access to markets for more than a century. But we are not attending to it as we continue to use it at levels ridiculously greater than its design loads. It has become obsolete and dangerous. The National Surface Transportation Policy and Revenue Commission has reported that half of all vehicle miles on our roads today fail a passing grade for comfort and safety. Twenty-five percent of all our bridges are considered structurally deficient or functionally obsolete.

Our elected officials and their transportation agencies

have taken our roads and bridges for granted, foolishly believing that they will last forever without adequate care and maintenance. When they fail, these same elected officials and transportation administrators look to others to blame for the consequence of their own failures. The federal government's annual investment in necessary repairs and maintenance of our interstate surface transportation inventory is two-thirds less than what it considers adequate for current need.

Our counties and cities stupidly figure that they actually save money when they don't spend on these necessary repairs. In point of fact, the cost of necessary repairs increases exponentially as our elected officials cut the purse strings for maintenance and repair of our roads and bridges. What is worse is the calculable cost of maintenance and repair does not include the cost of human lives lost or dramatically injured by their penurious transportation budgets.

And when the worst occurs—when an interstate bridge collapses during rush hour, killing 13 and injuring hundreds others—our elected officials scramble to blame anyone other than themselves. That is the story of the creation of the Minnesota Legislature's I-35W Victims' Fund legislation that for the first time in the history of similar acts insinuated a mechanism to reimburse the state for payments made to the victims of the collapse. The dirty little secret of the I-35W bridge collapse was that the state could have and should have prevented the collapse months before it happened. But instead of fixing the cause of the collapse, it decided instead to watch it fall into the Mississippi River so that it could construct a statutory mechanism that allowed it to finance the economic cost of its negligence. To accomplish this, the Minnesota legislature needed the assistance of the executive branch to sign it into law and the assistance of the judicial branch to overlook more than a hundred years of constitutional jurisprudence prohibiting such self-serving state action. The plan ultimately came together in a constitutionally catastrophic collapse when the US Supreme Court let stand the decision of the Minnesota Supreme Court that upheld the reimbursement provisions of the Victims' Fund legislation.

Will another bridge collapse from the weight of state and municipal truancy? Of course. The Minnesota experience, unfortunately, produces a road map for state action to finance its negligence on the shoulders of the construction industry and the engineering profession. Minnesota demonstrated that it can be done. It is up to the construction industry to resist future state legislative action that is modeled on the Minnesota statutory scheme. Of all the "Victims' Funds" models enacted by state legislatures nationally, only Minnesota introduced the notion that the state could make money from its negligent behavior by abrogating repose immunity of contractors, architects, suppliers, engineers, and others who, in decades previously, had some involvement in the creation of the aging structure. Only Minnesota has allowed it to hold accountable the original bridge designer for the condition of the structure rendered deficient and dangerous from decades of negligent inspection, maintenance, and repair.

Minnesota's response to foreseeable liability arising from its failure to maintain and repair its infrastructure is the worst possible strategy for protecting the traveling public throughout our surface transportation network. Notwithstanding, I predict that other states and municipal entities will use the Minnesota model to "self-correct" the economic consequence of negligent maintenance of long-standing infrastructure. Can it be stopped? Yes, and it must be. Become involved in the drafting of the Victims' Fund legislation. Force a legislative debate on the notion of retroactive abrogation of repose immunity. Get the industry involved in the legislative debate. There must be an informed discussion about the consequence of holding designers and builders of our infrastructure strictly liable for the behavior of their structures forever. The very notion is preposterous. The Minnesota legislative model is what happens when state legislators are not challenged to discuss the economic impact of their actions. It is what happens when a group of half-informed statute writers write a half-advised piece of legislation. To prevent a recurrence of the Minnesota model in your backyard, the industry must become active in the creation of the legislation.

Here is my advice: to prevent a recurrence of the Minnesota model in your backyard, get involved at the inception of any legislative solution. Silence only reveres landscapes. The typical state legislator will trade beads for his reflection. Left to their own devices they will inevitably demonstrate that ignorance is a renewable resource. Even if you are permitted to participate in the effort, the best you can hope for is often statutory uncertainty. But if you don't get involved until after the fact, like the industry did in Minnesota after the I-35W Bridge collapse, you can always implement Plan B: build an Ark!

Endnotes

1. In Shel Silverstein's "Crystal Ball," he writes:

> Come see your life in my crystal glass—
> Twenty-five cents is all you pay.
> Let me look into your past—
> Here's what you had for lunch today:
> Tuna salad and mashed potatoes,
> Green pea soup and apple juice,
> Collard greens and stewed tomatoes,
> Chocolate milk and lemon mousse.
> You admit I've told it all?
> Well, I know it, I confess,
> Not by looking in my ball,
> But just by looking at your dress.

2. All too often, Charles shook out his favorite dodge: "Reply hazy, try again."
3. 268 U.S. 633 (1925).
4. *Id.* at 635.
5. *Id.* at 634.
6. *Id.* at 635.
7. *Id.* at 636 (citations omitted).

(Continued on page 47)

Comments from the Chair

(Continued from page 4)

None of these initiatives could be possible without the dedicated support of Forum leadership. We are fortunate to have leaders that welcome change, generate new ideas, and devise ways to bring future value to our membership. As Thomas Jefferson once famously said: *If you want something you've never had, then you've got to do something you've never done!*

Many thanks to Will Hill, our chair of Marketing, for all his efforts in rolling out the name change and new logo; Wendy Venoit, our Membership chair, who has tirelessly run our campaign for new members and was recognized by the ABA for her efforts; Kristine Kubes, our chair of SPEC, who enthusiastically gives new meaning to distance learning products to better educate our members and give them the value that is essential to their livelihood; Cary Wright, our Technology chair, who worked around the clock to bring the Forum current in providing QR codes and a Forum app to best serve our members; Aaron Silberman, our Publications chair, who ensures that our publications continue to provide scholarly content commensurate with our reputation as the leading resource for written materials for construction lawyers; Chris Montez, our Diversity chair, who constantly seeks to recruit new diverse members to the Forum and provide blockbuster diversity programs at each of our meetings; and, finally, Kerry Kester, our chair of the Division Chairs Committee, who safeguards and presides over our 14 active divisions, which continue to serve as the foundation of our success.

Personal thanks to our Governing Committee, division chairs, and our Chair-Elect Harper Heckman for their valuable input and tireless dedication to this Forum. And special gratitude to Past Forum Chairs Andy Ness and Terry Brookie, who have guided the Forum in its quest to achieve continued success in promoting people, programs, and publications to make a difference in construction law.

This is an exciting time for the Forum. And, if you are not yet in the mix, I encourage you to jump in with both feet. Active participation in the Forum will make you a better construction lawyer with the unique opportunity to network with colleagues from throughout the world, forge personal relationships, develop business, provide opportunities to publish, speak at national events, and enhance your reputation.

At the Forum on Construction Law, we are building the best construction lawyers. Be part of the Forum, take an active role, and blow the roof off your construction career!

Suppose Repose Were Indisposed

(Continued from page 12)

8. *Id.* at 637.
9. *Id.* at 636–37.
10. *Id.* at 637.
11. *Id.*
12. *Id.*
13. 325 U.S. 304, *reh'g denied*, 325 U.S. 896 (1945).
14. *Id.* at 312, n. 8.
15. *Id.* at 314.
16. *Id.* at 316 ("[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.").
17. *Id.* at 314.
18. 429 U.S. 229 (1976).
19. *Id.* at 243.
20. *Id.* at 243–44.
21. *See, e.g.*, K.E. v. Hoffman, 452 N.W.2d 509, 513 (Minn. Ct. App. 1990) ("Where the court acknowledged that the question whether this statute accords respondents a constitutionally protected right hinges on which of three types of statutes of limitation was involved.") (citing *Chase*); State v. Bies, 103 N.W.2d 228, 235 (Minn. 1960) (establishing the rule that there is no vested right in the defense of a statute of limitations and it does not apply where both right and remedy are cut off) (citing *Danzer* and *Chase*).
22. Although the Supreme Court has never overruled *Danzer*, two federal courts of appeals have declined to follow *Danzer*. *See* Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). The *Wesley* court held that it was free to ignore *Danzer* as "outdated" and instead applied other Supreme Court precedent establishing that retroactive legislation must simply serve a legitimate legislative purpose that is furthered by rational means to comport with due process. 876 F.2d at 122. This contravenes *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), where the Court clearly admonished the federal courts of appeal to not disregard controlling Supreme Court precedent. *Id.* at 484. ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").
23. *See* City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872, 875 (Minn. 1994) ("[A] statute of limitations defense does not negate liability; it is only a procedural device that is raised after the events giving rise to liability have occurred, and which precludes the plaintiff from collecting on that liability.").
24. Harding v. K.C. Wall Prods., Inc., 831 P.2d 958, 967 (Kan. 1992).
25. Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987). *See also* Dalton v. Dow Chem. Co., 158 N.W.2d 580, 584 n. 2 (Minn. 1968). "Statutes of limitation, though they can have a material effect on the outcome of a case, are usually characterized as procedural." Wayne v. Tenn. Valley Auth., 730 F.2d 392, 400 (5th Cir. 1984). *Accord* State v. Johnson, 514 N.W.2d 551, 555 (Minn. 1994) (recognizing substantive aspect of statutes of limitations because they are outcome determinative, but finding that statutes of limitations "are procedural in that they regulate when a party may file a lawsuit.") (citing *Chase*).

26. Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982) (citing *Chase*).

27. Hoffner v. Johnson, 660 N.W.2d 909, 914 (N.D. 2003).

28. Via v. Gen. Elec. Co., 799 F. Supp. 837, 839 (W.D. Tenn. 1992). *See also* Burlington N. & Santa Fe Ry. Co. v. Skinner Tank Co., 419 F.3d 355, 363 (5th Cir. 2005) (statutes of repose establish a "right not to be sued" rather than a "right to sue").

29. *Goad,* 831 F.2d at 511. *See also* Colony Hill Condo. I Ass'n v. Colony Co., 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) (statute of repose defines substantive rights to bring an action and that "[f]iling within the time limit prescribed is a condition precedent to bringing the action"), *review denied*, 325 S.E.2d 485 (N.C. 1985).

30. U.S. Const. amend. XIV. Minnesota's Due Process Clause is identical in scope to the federal clause. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988). *See also* Holen v. Minneapolis–St. Paul Metro. Airports Comm'n, 84 N.W.2d 282, 287 (Minn. 1957) ("Retrospective or curative legislation is, of course, prohibited under U.S. Const. Amend. XIV, when it divests any private vested interest."); Wichelman v. Messner, 83 N.W.2d 800, 816 (Minn. 1957) ("Retrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights.").

31. Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972).

32. Perry v. Sindermann, 408 U.S. 593, 601 (1972) (citation omitted).

33. *Roth*, 408 U.S. at 577.

34. *Id.* This abrogation may not occur even if the "legitimate claim of entitlement" giving rise to the protected property right was granted by the legislature in the first place. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970) (recognizing that welfare benefits are a matter of statutory entitlement and are subject to due process protection).

35. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933) (acknowledging that "a vested cause of action is property and is protected from arbitrary interference" under due process). *Accord* Hunter v. Sch. Dist., 293 N.W.2d 515 (Wis. 1980) (plaintiff had vested property right in her personal injury cause of action; to divest her of such a right would violate the Due Process Clause of the 14th Amendment).

36. *See* K.E. v. Hoffman, 452 N.W.2d 509, 513 (Minn. Ct. App. 1990) (noting that the statute at issue was unlike "one involving adverse possession where the passage of time extinguishes the plaintiff's right and remedy, and gives the defendant a vested property right").

37. Jackson v. Am. Best Freight Sys., Inc., 709 P.2d 983, 985 (Kan. 1985) ("There is no distinction between a vested right of action and a vested right of defense. Accordingly, the general rule is that a vested right to an existing defense is protected in like manner as a right of action, with the exception only of those defenses that are based on informalities not affecting substantial rights.").

Based on the foregoing principles, the majority of courts recognize that legislatures may not abrogate retroactively rights of repose:

- Hall v. Summit Contractors, Inc., 158 S.W.3d 185, 188 (Ark. 2004) (once cause of action is barred, defendants "had a vested right to rely on that statute as a defense . . . and the legislature's subsequent repeal of the Limitations Act could not revive a claim that was already time-barred") (citations and internal quotation marks omitted); *accord* Miller v. Subiaco Acad., 386 F. Supp. 2d 1025, 1028 (W.D. Ark. 2005) ("The Arkansas Supreme Court has long held that the legislature may retroactively increase the length of a statute of limitations period to cover claims already in existence, however, it 'may not expand a limitation period so as to revive a claim already barred.'").
- Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361 (Fl. 1992) (repeal of statute of repose did not reestablish cause of action that was previously extinguished when statute of repose was in effect because statute of repose gave manufacturer a vested right not to be sued).
- Sepmeyer v. Holman, 642 N.E.2d 1242, 1245 (Ill. 1994) (legislature may not expressly revive time-barred cause of action, giving statute of limitations substantive nature under state law and finding that expiration of statute of limitations creates a vested right beyond legislative interference).
- *In re* Alodex Corp. Secs. Litig., 392 F. Supp. 672, 680–81 (S.D. Iowa 1975) (under *Danzer* and *Chase*, retroactively enlarging applicable period under preexisting statute of repose to revive previously extinguished claim violates Due Process Clause), *aff'd*, 533 F.2d 372, 374 (8th Cir. 1976) (per curiam).
- Smith v. Westinghouse Elec. Corp., 291 A.2d 452, 455 (Md. 1972) (relying on *Danzer* to invalidate retroactive enlargement of period for commencing action already extinguished.
- Colony Hill Condo. I Ass'n v. Colony Co., 320 S.E.2d 273, 276 (N.C. Ct. App. 1984) (to "revive a liability already extinguished [by repose] . . . would . . . deprive [defendants] of due process"), *review denied*, 325 S.E.2d 485 (N.C. 1985).
- Clark v. Jeter, 518 A.2d 276, 278 (Pa. Super. Ct. 1986) (finding that, "once the right to sue has expired, no subsequent legislation can revive it").
- Allstate Ins. Co. v. Furgerson, 766 P.2d 904, 907–08 (Nev. 1988) (statute of repose for suits against contractors and others for latent defects could not be applied to latent defect discovered before the enactment of the statute; retrospective application of the current statute would violate due process).
- Markey v. Robert Hall Clothes, 99 A.2d 552, 554 (N.J. Super. Ct. App. Div. 1953) ("The principle is embedded in our jurisprudence that where a right of action has become barred under existing law, the statutory defense constitutes a vested right which is proof against legislative impairment.").
- State *ex rel*. Hove v. Doese, 501 N.W.2d 366, 369 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and thus violates due process. These courts have taken the position that the passing of the limitations period creates a vested right of defense in the defendant, which cannot be removed by subsequent legislative action expanding the limitations period.") (citing decisions of 21 states); *accord* Gross v. Weber, 112 F. Supp. 2d 923, 926 (D.S.D. 2000) ("[T]he South Dakota Supreme Court has made it clear, that notwithstanding the legislature's intent, 'legislation attempting to revive previously time-barred claims impermissibly interferes with a defendant's vested rights and violates due process.'") (quoting Dotson v. Serr, 506 N.W.2d 421, 423 (S.D. 1993).
- Lester v. State Workmen's Comp. Comm'r, 242 S.E.2d 443, 452 n. 15 (W. Va. 1978) (*Danzer* prohibits a state legislature from "extend[ing] a period of limitation after it has expired where the limitation period is considered a part of the substantive right").
- Haase v. Sawicki, 121 N.W.2d 876, 881 (Wis. 1963) ("retrospective extension of the limitation period [in a statute of repose] after its expiration amount[s] to a taking of property without due process of law").
- Wenke v. Gehl Co., 682 N.W.2d 405, 425–26 (Wis. 2004) ("[n]early all jurisdictions treat the expiring of modern statutes of repose as substantive" and that courts "have expressly held that the running of a statute of repose creates a vested right not to be sued").
- School Bd. of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325, 328 (Va. 1987) (right of repose could not be abrogated

by retroactive application of revival statute; *Chase* distinguished because it did not involve a statute of repose that "grant[ed] a defendant [a right of] immunity from liability").

38. *See, e.g.,* Starks v. S.E. Rykoff & Co., 673 F.2d 1106, 1109 (9th Cir. 1982) (because "statutes of limitation go to matters of remedy only," retroactive amendment of such statute is constitutional, distinguishing *Danzer*); Davis v. Valley Distrib. Co., 522 F.2d 827, 830 n. 7 (9th Cir. 1975) (*Chase* distinguished *Danzer* on the ground that in *Danzer* "Congress had intended the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy alone"), *cert. denied*, 429 U.S. 1090 (1977); Chevron Chem. Co. v. Superior Court, 641 P.2d 1275, 1282 (Ariz. 1982) ("right to raise a one year statute of limitations defense . . . is [not] a vested property right," distinguishing *Danzer*); Vigil v. Tafoya, 600 P.2d 721, 725 (Wyo. 1979) (retroactive application of statute of limitations does not contravene due process where the "duty [has] not cease[d] to exist even though judicial enforcement is barred by an artificial statute of limitation"); Roe v. Doe, 581 P.2d 310, 317 (Haw. 1978) (retroactive amendment to statute of limitations is constitutional where "there is no reason to believe that the legislature intended to confer, through the statute of limitations . . . 'any vested right or proprietary interest in immunity from liability'") (quoting *Davis*, 522 F.2d at 830 n. 7); Ohlsen v. J.S., 268 N.W.2d 781, 786 (N.D. 1978) ("reviving causes of action previously barred [by a statute of limitations] does not violate the due process clause [because] . . . [defendants] have no vested right in not being made a party" to the suit); Twomey v. Carlton House, 320 A.2d 98, 101 n. 5 (R.I. 1974) (retroactively restoring a cause of action barred by a statute of limitations is constitutional, but distinguishing statutes, which "as in . . . *Danzer* . . . extinguish the right rather than just the remedy").

39. Michael John Byrne, *Let Truth Be Their Devise:* Hargett v. Holland *and the Professional Malpractice Statute of Repose*, 73 N.C. L. Rev. 2209, 2220 (1995).

40. *See*, e.g., MacPherson v. Buick Motor Co., 111 N.E. 1050, 1054 (N.Y. 1916) (abolishing privity of contract rule requiring a contractual relationship between defendant and party seeking relief); Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956) (relying on *MacPherson* and abandoning privity requirement in action against building contractor); Klein v. Catalano, 437 N.E.2d 514, 519–20 (Mass. 1982) (noting that statutes of repose are response to abolition of "completed and accepted" doctrine, which terminated liability of those involved in construction of a project once owner accepted finished product).

41. *See generally* Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 Vand. L. Rev. 627 (1985).

42. Erickson Air-Crane Co. v. United Techs. Corp., 735 P.2d 614, 616 (Or. 1987), *modified on other grounds*, 736 P.2d 1023 (Or. 1987).

43. Tex. Gas Exploration Corp. v. Fluor Corp., 828 S.W.2d 28, 32 (Tex. App. 1991) (discussing the Texas statute of repose that applies to claims against architects and builders).

44. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 n. 6 (Minn. 1988) (identifying statutes of 42 states and the District of Columbia). *See also* Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 827–28 (Mo. 1991) (noting that, by 1991, at least 46 states had enacted repose statutes to protect architects and engineers from otherwise potentially never-ending liability).

45. *See generally* Christopher C. McNatt Jr., *The Push for Statutes of Repose in General Aviation*, 23 Transp. L.J. 323 (Fall 1995).

46. Contrary policy reasons have also been proffered for eliminating statute of repose protections for professionals. *See, e.g.*, Michael J. Vardaro & Jennifer E. Waggoner, *Statutes of Repose—The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment 697, 714 n. 115 (Summer 1995) ("Arguments against the statute of repose are: (1) that liability insurance is available to the design professional and the increased cost can be passed on to the customer; (2) the passage of time hinders the plaintiff more than the defendant since the plaintiff bears the burden of proof; and (3) plaintiff bears the burden to show that it was a defect and not improper maintenance which was the culprit of the injury or damage.") (citation omitted).

47. *See, e.g.*, *Sartori*, 432 N.W.2d 448.

48. *See, e.g.*, Vardaro & Waggoner, *supra* note 46, at 714.

49. *See Sartori*, 432 N.W.2d 448.

50. *See* Andrew A. Ferre, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. Envtl. Aff. L. Rev. 345, 355 (2006).

51. *See, e.g.,* Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194 (Utah 1999); Ferre, *supra* note 50, at 355.

52. *See* Gibson v. W. Va. Dep't of Highways, 406 S.E.2d 440, 442 (W. Va. 1991).

53. *See* Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 826 (Colo. 1982) ("A 1967 random study of 570 lawsuits brought against architects indicated that the vast majority of suits for design problems are brought against architects within the first seven years after completion of the building. Over 99% of claims had been brought within ten years after completion.") (citations omitted).

54. 432 N.W.2d at 453.

55. *Id.* at 452–53.

56. *Id.* at 454.

57. 974 P.2d 1194 (Utah 1999).

58. *Id.* at 1200 (citation omitted).

59. *Id.*

60. 406 S.E.2d 440 (W. Va. 1991).

61. *Id.* at 442.

62. *Id.* at 446.

63. *Id.*

64. *See, e.g.*, Whiting-Turner Contracting Co. v. Coupard, 499 A.2d 178, 183 (Md. 1985) (upholding the statute in question in part because it appropriately balanced "the interests of those potentially subject to liability, of those directly suffering Injury, and of the public in having improvements built safely and at a reasonable cost"); Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 826 (Colo. 1982) (finding that the statute of repose helped avoid "stale" claims and also did not prevent many claims since "most types of defects would reasonably be discovered within ten years of substantial completion"); Beecher v. White, 447 N.E.2d 622, 626 (Ind. Ct. App. 1983) (noting various reasons for upholding statutes of repose, including the fact that a builder cannot "guard against neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair, because he has no control over the premises" once they are turned over to the owner); Klein v. Catalano, 437 N.E.2d 514, 520 (Mass. 1982) (explaining that "[t]here comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared'").

65. The more relaxed scrutiny dovetails with the standard of review applied to constitutional challenges to enacted laws. A party seeking to invalidate any legislative statute bears a very compelling burden. The standard of review a court will apply to invalidating even retroactive legislation is extremely high. Enacted statutes are presumed to be constitutional, and the challenging party bears the burden of establishing the unconstitutionality of the statute beyond a reasonable doubt. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation

to establish that the legislature has acted in an arbitrary and irrational way."). *See also* Sartori v. Harnischfeger, 432 N.W.2d 448, 453 (Minn. 1988).

66. *See, e.g.*, Henderson Clay Prods. v. Edgar Wood & Assocs., 451 A.2d 174, 175 (N.H. 1982); State Farm Fire & Cas. v. All Elec., Inc., 660 P.2d 995, 999 (Nev. 1983); Skinner v. Anderson, 231 N.E.2d 588, 590–91 (Ill. 1967).

67. 60 F.3d 1071 (4th Cir. 1995).

68. 428 U.S. 1 (1976).

69. 467 U.S. 717 (1984).

70. *Usery* and *Pension Benefit* can be reconciled with *Danzer*. In each case, the defendants had no legitimate expectations that rose to the level of a protected property right that the retroactive application of the new legislation abrogated; the defendants did not have a property right in the prior state of the law before the new legislation was enacted. In *Danzer*, by contrast, the defendant did acquire a protected property right once a statutory provision specifically extinguished a potential cause of action and thus granted the defendant immunity from suit.

71. 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

72. *Id*. at 121–22 (citation omitted).

73. *See also* Harding v. K.C. Wall Prods., Inc., 831 P.2d 958, 967 (Kan. 1992) (where the Kansas Supreme Court stated in dictum that the prevailing federal constitutional standard of review for retroactive abrogation of vested repose rights of immunity was the rational basis test).

74. *See* Smith v. Westinghouse Elec. Corp., 291 A.2d 452, 454–55 (Md. 1972) (retroactive revival of liability under wrongful death statute violated due process); Haase v. Sawicki, 121 N.W.2d 876 (Wis. 1963).

75. 320 S.E.2d 273, 276 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985).

76. *See* Farber v. Lok-N-Logs, Inc., 701 N.W.2d 368, 375–78 (Neb. 2005) (holding that the legislature could not, consistent with due process, "resurrect an action which the prior version of the statute [of repose] had already extinguished"); Givens v. Anchor Packing, Inc., 466 N.W.2d 771, 773 (Neb. 1991) (same); Keller v. City of Freemont, 790 N.W.2d 711, 713 (Neb. 2010) (per curiam) ("We have interpreted the Nebraska Constitution's due process . . . clause[] to afford protections coextensive to those of the federal Constitution."); Sch. Bd. of the City of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325, 328 (Va. 1987) (invalidating on due process grounds retroactive revival of liability under the repose statute); Shivaee v. Commonwealth, 613 S.E.2d 570, 574 (Va. 2005) (state and federal due process clauses coextensive); Theta Props. v. Ronci Realty Co., 814 A.2d 907, 916–17 (R.I. 2003) (retroactive application of subsequent statute to reposed rights violates due process); R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 102–04 (R.I. 1995) (analyzing due process challenge under Rhode Island and U.S. constitutions to retroactive legislation as one and the same); Pelland v. Rhode Island, 317 F. Supp. 2d 86, 97 (D.R.I. 2004) (due process analysis "identical" under both constitutions). *See also* cases at footnote 37 *supra*.

77. 806 N.W.2d 811 (Minn. 2011).

78. *Id.* at 829.

79. *Id.* at 830.

80. *Id*.

81. *Id*. at 830–831 (citations omitted).

82. *Id.* at 831.

83. *Id.*

84. *Id*.

85. 245 U.S. 60 (1917).

86. 261 U.S. 600 (1923).

87. *Id*. at 603.

88. Peterson v. City of Minneapolis, 173 N.W.2d 353 (Minn. 1969); Weston v. McWilliams & Assocs., 716 N.W.2d 634 (Minn. 2006).

89. *See* Donaldson v. Chase Sec. Corp, 13 N.W.2d 1 (Minn. 1943); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, *reh'g denied*, 325 U.S. 896 (1945).

90. *In re* Individual 35W Bridge Litig., 806 N.W.2d 811, 830 (Minn. 2011).

91. *Id*. at 830, n. 7.

92. *Id.* at 833.

93. By insinuating the rational basis test into vested rights analysis, the court overturned more than 100 years of decisional law:

- Kipp v. Johnson, 17 N.W. 957, 958 (Minn. 1884). Statutes that "merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected," give the legislature "a perfect right to restore the remedy already barred, because it would not take away any vested rights of property." "No man has a vested right to a mere remedy, or in an exemption from it." *Id.* at 959.
- Farnsworth Loan & Realty Co. v. Commonwealth Title Ins. & Trust Co., 86 N.W. 877 (Minn. 1901). Action was brought to recover costs and expenses incurred in mortgage foreclosure. Borrower challenged statute that validated previous untimely filed affidavits of costs and expenses in mortgage foreclosure proceedings. Court upheld the statute: "A person has no vested right in a defense or cause of action based upon an informality not affecting his substantial equities, and a retroactive statute curing defects which are mere irregularities, and do not extend to matters of jurisdiction, is not void on constitutional grounds." *Id.* at 879. Failure to file a proper affidavit was an irregularity not affecting the substantial or equitable rights of the borrower.
- Snortum v. Snortum, 193 N.W. 304 (Minn. 1923). Deed of real property from wife to husband was invalid at the time of wife's death. As a result, she died intestate, and the real property descended to the surviving spouse and remainder to surviving children. Apparently, a law was subsequently passed that would have validated the deed transfer between the husband and wife. However, the court held that the children had already acquired a vested right in the property at the time of the wife's death and "the legislature has no power to deprive them of such right by a curative statute." *Id.* at 306. "If a right, which is vested before the passage of the act, is thereby taken away, then the act deprives the owners of their property without due process of law." *Id.* The court defined a vested right to mean "some right or interest in property that has become fixed or established." *Id.*
- Donaldson v. Chase Sec. Corp., 13 N.W.2d 1 (Minn. 1943), *aff'd*, 325 U.S. 304 (1945). Plaintiff sued for securities law violations that were barred by a general statute of limitations. After the trial court judgment and while the appeal was pending, the legislature lifted the bar of the statute of limitations. Held: The statute of limitations only applied to the remedy and did not vest rights; thus the legislature could lift the statute of limitations bar. Court recognized three classes of statutes: (1) where lapse of a time period not only bars the remedy but extinguishes the right and vests a perfect title in the adverse holder (no revival) (citing *Kipp*), (2) where the statute merely takes away or suspends certain remedies or forms of action but leaves the property rights of the parties unaffected (legislature may revive because no vested property right) (citing *Kipp*), and (3) where a cause of action is created by statute and the statute prescribes the period of limitation (no revival) (citing *Danzer*). The securities law violations were based on common law tort claims and not on statutorily created liability; accordingly, the claims fell into the second class of statutes where the effect of the legislation was merely to reinstate a lapsed remedy, and there was no vested right or 14th Amendment prohibition.

- Donaldson v. Chase Sec. Corp., 325 U.S. 304 (1945). Supreme Court affirmed the Minnesota Supreme Court. It noted that *Danzer* stood for the proposition that where a statute creating a liability also put a period to its existence, i.e., the third class of statutes, a retroactive extension of the period after its expiration amounted to a taking of property without due process. Court also extensively discussed the nature of the statute of limitations, including: "This Court, in *Campbell v. Holt* [115 U.S. 620 (1885)], adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Id*. at 314.
- Holen v. Minneapolis–St. Paul Metro. Airports Comm'n, 84 N.W.2d 282 (Minn. 1957). Held: Taxpayers sought enforcement of a public right (i.e., requiring a public hearing before an airport expansion) and therefore could not have any protected vested private property right. The taxpayers won at the district court; while the appeal was pending, the legislature amended the law to eliminate the need for public hearings. First, court found it was not a final judgment because appeal was pending ("There is no vested right in an existing law nor in an action until final judgment has been entered therein."). *Id.* at 287. Then the court noted that "[r]etrospective or curative legislation is, of course, prohibited under the U.S. Const. Amend. XIV, when it divests any private vested interest." *Id.* However, the case involved public, not private, rights and public rights could always be modified or annulled by subsequent legislation without running afoul of due process.
- Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957). Action was brought to determine adverse claims and possession of certain real property. The parties disputed the interpretation and effect of the Marketable Title Act, which contained retrospective legislation and a statute of limitations (requiring filing a notice to preserve a claim in real estate founded upon any instrument or transaction occurring more than 40 years prior). "Retrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights." *Id.* at 816. "The constitutional prohibitions against retrospective legislation do not apply to statutes of limitation, 'for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.'" *Id.* at 817. The Marketable Title Act was constitutionally valid because it provided reasonable time to preserve old claims.
- Yaeger v. Delano Granite Works, 84 N.W.2d 363 (Minn. 1957). Additional compensation was awarded to surviving wife and children of deceased employees. Court held that liability for additional compensation from special compensation fund was fixed at the date of the employees' deaths, and subsequent amendment of statute shifting burden of payment of additional compensation to employer and insurer was unconstitutional as retroactively applied. "It is true that a statute may be constitutionally retroactive where it relates to a remedial or procedural right but the statute in question as applied to the circumstances here relates to a substantive matter in that it imposes an entirely new liability. . . . [A] liability is imposed upon the employer and insurer which did not exist at the time of the employee's death when the rights of the parties were determined." *Id.* at 366. At the time of the employee's death, the employers and insurers had a "vested right to a fixed liability under the 1949 laws. When a right has arisen upon a contract . . . , authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it, it becomes vested and the repeal of the statute does not affect it or the action for its enforcement." *Id.* "It is recognized that vested rights include not only legal or equitable title to enforcement of a demand but include as well an exemption from new obligations created after the right vested." *Id.* "Where, as here, the liability of the employers and insurers has become fixed [under the statute], their vested right in such determined liability may not be destroyed by legislation which imposes a new obligation or an additional liability." *Id.*
- State v. Bies, 103 N.W.2d 228 (Minn. 1960). State brought action to collect additional income taxes. Held: "The state's claim for additional taxes has expired by operation of two statutes of limitation, integral parts of the Income Tax Act itself, constituting an absolute bar to the assessments for additional tax and the right to bring a proceeding to collect thereon; the rule that there is no vested right in the defense of the statute of limitations has no application where the right to tax has been cut off and the remedy ceases to exist." *Id.* at 239. In other words, since the legislature has the power to create the right to assess an income tax, it has the power to provide conditions, including time conditions, under which the tax can be enforced. Expiration of that statute of limitations thus cuts off the right and not just the remedy. "The time limit being therefore an element of the right granted, the rule that there is no vested right in the defense of the statute of limitations has no application." *Id.* at 235 (citing Kannellos v. Great N. Ry. Co., 186 N.W. 389, 390 (Minn. 1922), and *Danzer* and *Chase*) [this is the third class of statutes under *Chase*].
- Peterson v. City of Minneapolis, 173 N.W.2d 353 (Minn. 1969). Plaintiff brought personal injury action for injuries from an allegedly defective sidewalk. Held: Comparative negligence rule should have been submitted to the jury even though legislation establishing the comparative negligence rule (and replacing the contributory negligence rule) was not yet in effect at the time of the injuries. Retroactive statute did not abrogate vested rights. "While the courts generally express varying degrees of distaste with retroactive laws, they are usually upheld as long as they do not interfere with vested legal rights. The rule itself seems simple enough, but the difficulty comes in defining what is a vested right. Probably the closest that we have come to attempting its definition is in *Halverson v. Rolvaag*, 274 Minn. 273, 275, 143 N.W.2d 239, 241 [(Minn. 1966)], where we held that a law reducing death benefits for a Minnesota National Guard member by the amount of certain federal payments could be retroactive. With respect to the term vested rights we said: '. . . The term "vested interests," when used in the constitutional sense to describe the kind of interest that cannot be impaired by retroactive legislation, reflects a determination that justice and equity require that the interest be preserved.' It is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retroactive legislation." *Id.* at 356–57 (citing *Chase* and its holding that expiring statutes of limitations create no vested right). The court cited a *Harvard Law Review* article outlining three factors to determine whether a law may constitutionally be retroactive: (1) the nature and strength of the public interest served by the statute; (2) the extent to which the statute modifies or abrogates the pre-enactment right; and (3) the nature of the right the statute alters. The court's "main difficulty" was with the third factor, where "we must simply use our best judgment in determining whether the right is one that has become so fixed that it would be inequitable to abrogate it by retrospective legislation." *Id.* at 357. In looking

at cases from other jurisdictions, the court found that at the time of an accident, an injured person did not have a vested right to contributory v. comparative negligence application.

- McClelland v. McClelland, 393 N.W.2d 224 (Minn. Ct. App. 1986). Husband appealed divorce order awarding custody, child support, and permanent maintenance to wife. During appeal, spousal maintenance statute was amended. Held: District court, on remand, correctly applied amended statute. "First, there is no mature or vested right in an existing law or action until a final judgment has been entered." *Id.* at 227 (citing *Holen*). Also cited 1983 Iowa Supreme Court case (Schwarzkopf v. Sac Cnty. Bd. of Supervisors, 341 N.W.2d 1, 8 (Iowa 1983)) defining vested right as "something more than a mere expectation, based on anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy."
- Olsen v. Special Sch. Dist. No. 1, 427 N.W.2d 707 (Minn. Ct. App. 1988). Student injured in gym class brought personal injury action. At time of trial, awards for future damages were discounted to a present value under a statutory formula. While appeal was pending, legislature repealed the future damages discount statute. In deciding whether to apply the changed law, the court considered "whether repeal of the discount statute adversely affects private vested rights." *Id.* at 710. The school district's interest in the reduced judgment was not yet fixed or established as a vested right because judgment was not final while it was on appeal. In addition, the "remedial character of the repealing legislation and the procedural nature of the discounting provisions of [the statute] also suggest the school district's interest in the reduced judgment is not a vested interest. 'No [person] has a vested right to a mere remedy, or in an exemption from it.'" *Id.* at 711 (citing *Chase.*)
- K.E. v. Hoffman, 452 N.W.2d 509 (Minn. Ct. App. 1990). Former student brought suit against former teacher and school district for sexual abuse 13 years earlier. Defendants won on summary judgment at the trial court based on statute of limitations, but while case was on appeal, legislature enacted statute providing that sexual abuse claim does not arise until the victim knew or had reason to know his injury was caused by the abuse. Court first found that the statute was intended to be retroactive, then recognized that "the fourteenth amendment prohibits retroactive legislation when it divests any private vested interest." *Id.* at 512 (citing *Holen*). However, the trial court's judgment was "not sufficiently fixed or established to be a vested right." *Id.* (citing *Olsen*). With respect to a more general question as to whether the running of the statute of limitations conferred a vested right, the court stated: "We acknowledge that the question whether this statute accords respondents a constitutionally protected right hinges on which of three types of statutes of limitation was involved." *Id.* at 513 (citing *Chase*). "Plainly, the limitations statute in the present case is not analogous to one involving adverse possession where the passage of time extinguishes the plaintiff's right and remedy, and gives the defendant a vested property right. Moreover, [the statute at issue] is distinguishable from a second class of statutes which creates both a cause of action and a limitation period within which the action must be brought. Instead, in this case, only the appellant's remedy against respondents, and not the parties' respective rights, was affected when the limitations period expired. A limitations statute which applies merely to a party's remedy does not create a vested right in respondents." *Id.* (citing *Chase* and finding no due process violation).
- Indep. Sch. Dist. No. 622 v. Keene Corp., 495 N.W.2d 244 (Minn. Ct. App. 1993), *aff'd in part, rev'd in part*, 511 N.W. 2d 728 (Minn. 1994). School district brought action against manufacturer of asbestos fireproofing materials used in school building. Appellate court held that amendment reducing statute of repose period from 15 years to 10 years did not apply retroactively. First, no clear manifestation existed showing that the legislature intended the 10-year period to apply retroactively. "Furthermore, retroactive application of the 10-year limitation would impermissibly abrogate a remedy for securing a vested right without giving the claimant some time to assert the claim." *Id.* at 249. That is, there was no reasonable time for potential plaintiff to comply with shortened limitations period.
- *In re* Applications of Q Petroleum, 498 N.W.2d 772 (Minn. Ct. App. 1993). Service station owners were denied reimbursement of costs for cleaning up contamination from underground petroleum storage tanks. After they made their requests for reimbursement under the Petroleum Tank Release Cleanup Act, the legislature passed an amendment to the Act preventing reimbursement for costs payable under an insurance policy, this amendment was applied to the requests, and the requests were accordingly denied. The court, citing *Holen*, *Olsen*, *Snortum*, and *McClelland*, found that no vested right existed because no right to reimbursement vested (with constitutional protection) until the reviewing board finally acted on their requests, and the board had not done so when the amendment went into effect.
- Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994). Court recognized that defendants "have obtained a vested right not to be sued under the statute of repose" (citing Firestone Tire & Rubber Co. v. Acosta, 612 So. 2d 1361, 1363–64 (Fla. 1992)).
- Zuehlke v. Indep. Sch. Dist. No. 316, 538 N.W.2d 721 (Minn. Ct. App. 1995). Nonlicensed education employees of dissolved cooperative school district challenged member school district's posting procedures that prevented them from applying for jobs created because of the cooperative's dissolution. After the school board's resolution providing posting procedures, the statute was amended that extended the period during which member districts of a dissolved cooperative must provide reemployment rights to nonlicensed employees. Court held that the school board's resolutions fixed the districts' liability prior to the date of the amendment under a vested rights analysis. It recognized the general rules that an unrealized right is vested when it has "arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it." *Id.* at 725 (citing *Yaeger*). When the liability has been fixed under a statute, the party's vested right cannot be destroyed by legislation that imposes a new obligation or an additional liability. *Id.* at 726.
- Gomon v. Northland Family Physicians, Ltd., 625 N.W.2d 496 (Minn. Ct. App. 2001). Held: Four-year statute of limitations for medical malpractice actions commenced on or after Aug. 1, 1999, does not apply retroactively to revive medical malpractice claim that was time-barred before Aug. 1, 1999. Parties agreed that the legislature could constitutionally revive claims retroactively that had been barred by a statute of limitations (citing *Chase*). Court recognized that revival of time-barred actions is a separate issue from retroactive application of statutes. Court found that statute did not clearly intend to be retroactive and revive time-barred actions.
- Murphy v. Allina Health Sys., 668 N.W.2d 17 (Minn. Ct. App. 2003). Wrongful death action was brought in 2002, after a 1999 amendment to the medical malpractice statute extending the statute of limitations from two to four years but before a 2002 amendment to the wrongful death statute reducing the statute of limitations to three years. The 1999 amendment was

in effect at the time plaintiff brought its claim and controls. The court noted in a footnote that "[w]e note that, because the limitations period is an element of the cause of action in wrongful-death claims, a defendant may, in certain circumstances, have a vested right in the limitations period such that constitutional or other constraints may limit the legislature's power to enact retroactive legislation that revives claims, such as when the time for filing a claim under the former statute of limitations has elapsed at the time that the new statute of limitations extends the period to file a lawsuit." *Id.* at 23 n.2 (citing *Chase*).

- Camacho v. Todd & Leiser Homes, Inc., 706 N.W.2d 49 (Minn. 2005). Homeowners brought suit against a dissolved corporation for negligence and breach of construction warranties based on moisture damage and mold. Under the corporate dissolution statute, the homeowners were required to bring their action against the dissolved corporation within two years of the filing of the notice of dissolution, which the homeowners failed to do. The court noted that the corporate dissolution statute acted as a statute of repose. "Statutes of repose are intended to give finality to the potential defendant and create 'a substantive right in those protected to be free from liability after the legislatively-determined period of time." *Id.* at 55 (citing 54 C.J.S *Limitations of Actions* § 5 (2005)).

94. Harding v. K.C. Wall Prods., Inc., 831 P.2d 958, 967 (Kan. 1992).

Managing Construction Conflict

(Continued from page 26)

note 1, at 4-1 to 4-3.

7. *The Multi-Door Contract*, *supra* note 5, at 364–78.

8. Preventing and Resolving Construction Disputes, *supra* note 1, ch. 8.

9. *See* Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky*, 81 Ky. L.J. 855, 859–61 (1992–93) (discussing the recent wave of initiatives focused on managing and resolving conflict).

10. Preventing and Resolving Construction Disputes, *supra* note 1, at 1-1.

11. *Id*. at 1–2.

12. *See generally id*.

13. The author helped organize and implement these efforts and analyzed the results. *See generally Beyond Arbitration*, *supra* note 1; Thomas J. Stipanowich & Leslie King O'Neal, *Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution—Part I*, 15 Constr. Law., no. 4, Nov. 1995, at 5; Thomas J. Stipanowich & Leslie King O'Neal, *Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution—Part II*, 16 Constr. Law., no. 2, Apr. 1996, at 8.

14. Preventing and Resolving Construction Disputes, *supra* note 1, at 5-1; Adam K. Bult et al., Navigant Constr. Forum, Delivering Dispute Free Construction Projects: Part III—Alternative Dispute Resolution 7–10 (June 2014).

15. Bult et al., *supra* note 14, at 7–10.

16. *Beyond Arbitration*, *supra* note 1, at 147, tbl.DD-4.

17. *Id.* at 156, tbl.EE-4. *See also* Erik Larson, *Project Partnering: Results of Study of 280 Construction Projects*, 11 J. Mgmt. Eng'g, no. 2, Mar. 1995, at 30.

18. Preventing and Resolving Construction Disputes, *supra* note 1, ch. 2.

19. *Id.*, ch. 3.

20. *The Multi-Door Contract*, *supra* note 5, at 360–64.

21. *Id.* at 363–64; Robert Gaitskell, *Trends in Construction Dispute Resolution* (Soc'y of Constr. Law Papers No. 129, 2005).

22. Housing Grants, Construction and Regeneration Act 1996, c. 53, pt. II, § 108 (Eng.).

23. John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century* (Soc'y of Constr. Law Papers No. 3, May 2002).

24. Colin J. Wall, *The Dispute Resolution Adviser in the Construction Industry*, in Construction Conflict Management and Resolution 328 (Peter Fenn & Rod Gameson eds., 1992).

25. *The Multi-Door Contract*, *supra* note 5, at 387–89.

26. Eric Galton, *The Preventable Death of Mediation*, 8 Disp. Resol. Mag., no. 4, Summer 2002, at 23.

27. *Beyond Arbitration*, *supra* note 1, at 94–96.

28. *Id.* at 96–97.

29. *See The Multi-Door Contract*, *supra* note 5, at 336–57. For a good summary of the historical background of construction arbitration, *see* 6 Philip L. Bruner & Patrick J. O'Connor Jr., Bruner & O'Connor on Construction Law §§ 20.1–20.2.

30. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 458–61 (1988).

31. *The Multi-Door Contract*, *supra* note 5, at 339–41.

32. *Id.* at 343–47.

33. Bult et al., *supra* note 14, at 9.

34. Navigant Constr. Forum, Delivering Dispute Free Construction Projects: Part II—Construction & Claim Management 4–5 (James G. Zack Jr. ed., 2014).

35. *See generally* AIA Nat'l & AIA Cal. Counsel, Integrated Project Delivery: A Guide (2007 version 1) [hereinafter Integrated Project Delivery]; Constr. Mgmt. Ass'n of Am., An Owner's Guide to Project Delivery Methods 1, 28–30 (2012) [hereinafter CMAA Owner's Guide].

36. CMAA Owner's Guide, *supra* note 35, at 28. Examples of foreign applications of IPD included project alliancing approaches in the U.K. and Australia. *See* ACCL Princeton Symposium, *Building the Future*, 1 J. Am. Coll. of Constr. Law. (Special Issue) 147–54 (May 2007) (comments of Michael Wilke, C.O.O. Americas, Parsons Brinkerhoff).

37. Integrated Project Delivery, *supra* note 35, at 5.

38. *Id*. at 10.

39. CMAA Owner's Guide, *supra* note 35, at 29.

40. *Id.* at 11.

41. Integrated Project Delivery, *supra* note 35, at 3.

42. *See* Carol C. Menassa & Feniosky Peña Mora, *Analysis of Dispute Review Boards Application in U.S. Construction Projects from 1975 to 2007*, 26 J. Mgmt. Eng'g 65 (2010) (more than 90% of cases heard by DRB panels settled in the wake of panel recommendation; effectiveness of DRB as a prevention technique observed on 50% of projects where no disputes were ever heard by DRB panel).

43. However, a recent study of 3,000 projects over a 10-year period indicates that projects that used DRBs "faced reduced costs and schedule growth" when compared to non-DRB projects. *See* Duzgun Agdas & Ralph D. Ellis, *Analysis of Construction Dispute Review Boards*, 5 J. Legal Aff. & Disp. Resol. in Eng'g & Constr. 122 (2013).

44. *See generally* Kathleen Harmon, *Effectiveness of Dispute Review Boards*, 129 J. Constr. Eng'g & Mgmt. 674 (2003).

45. *See, e.g.*, 2009 Caltrans DRB-DRA Amended 2006 Specifications. Caltrans' specifications call for a DRB in contracts over $10 million and individual DRAs in other projects.

46. Kurt L. Dettman, Martin Harty & Joel Lewin, *Resolving Megaproject Claims: Lessons from Boston's Big Dig*, 30 Constr. Law., no. 2, Summer 2010, at 5.

47. *Id.* at 10.

48. Gaitskell, *supra* note 21, at 1–5, 10, 13.

49. *Id.* at 11 ("Figures given anecdotally are that there have