CIVIL PROCEDURE—PROPERTY IMPROVEMENT CLAIMS—A HISTORY AND RECOMMENDATION FOR ARKANSAS'S LONE TRUE STATUTE OF REPOSE

I. INTRODUCTION

Imagine a common moment of both gratification and anxiety for an American family—the construction of a new home. Many parties are involved in this process, such as the family who decides to construct the home, the architect, the general contractor, various subcontractors, insurance companies and their representatives, banks, and even the manufacturers that make the products used in the construction process. A successful construction requires the concerted efforts of many people.

Unfortunately, issues frequently develop over the course of construction, or even years after construction is completed. Foundation issues may develop that require the homeowners to expend substantial sums of money to repair. A design issue may produce a leaky roof that leads to water damage. Pieces of the home could even collapse or deteriorate sooner than expected.

Determining the entities to sue for construction defects largely depends on the timing of the malfunction or problem. In allocating blame, the sooner the problem develops after the completion of the home, the more likely that someone involved in the construction process should be held accountable for the problem, for it is more likely that design or installation errors caused the problem. On the other hand, as time passes from the point of completion to the development of a problem, less blame should be placed on those who designed and built the structure because ordinary wear and tear may occur even when the structure was properly designed and constructed.

To handle these issues of timing and responsibility for construction problems, the Arkansas General Assembly enacted section 16-56-112 of the Arkansas Code Annotated ("Statute"),[1] which provides that homeowners may not bring suit against certain parties in the construction process after a specified period of time since the structure was completed. While at first glance the Statute appears to be a statute of limitation, the Statute is more appropriately characterized as a statute of repose. While this difference will

1. ARK. CODE ANN. § 16-56-112 (LEXIS Repl. 2005). The length of the Statute renders it unworkable to cite completely at this point. *See infra* note 13. Suffice it to say that contract suits where damages are sought based on the design, planning, and supervision of the improvement must be filed within five years after substantial completion of the structure. Furthermore, contract or tort actions to recover damages for personal injury or death must be filed within four years of the substantial completion of the structure.

be explored and discussed at length,[2] the timer on a statute of repose begins to run after a stated event (here, substantial completion) rather than accrual of a cause of action for a statute of limitations. Legislatures enact statutes of repose based on the economic best interests of the public as a whole and a balance of the rights of plaintiffs and defendants.[3] Furthermore, according to the Statute, it applies not only to the construction of new homes, but also to the construction of any improvement to real property.

A host of problems have arisen with the Statute. The first and most significant problem is the interpretation of the Statute's scope. To whom does the Statute apply? Does the Statute apply to parties like indemnifiers or tort contributors? What about manufacturers of products used in the property improvement? Where exactly do we draw this line? Second, statutes of repose are inherently different than statutes of limitation yet often confused. Understanding the differences will enable attorneys to advocate their positions more effectively to judges. Finally, Arkansas courts have most often expanded the reach and meaning of the Statute, but two relatively recent aberrational decisions have cut against this trend, destabilizing the courts' previous consistency.[4]

This note seeks to convince Arkansas students, practitioners, and judges that the courts should abandon these aberrational decisions and revert back to a broad interpretation of the Statute in order to correspond to the General Assembly's purpose for enactment. To accomplish this goal, this note first provides the reader with an understanding of the differences between a statute of repose and a statute of limitation and why these differences are significant.[5] Next, this note demonstrates how the Arkansas courts broadly construed the Statute for several years, only to suddenly narrow its interpretation in two somewhat recent decisions.[6] Finally, this note argues that Arkansas courts should abandon its aberrational decisions and continue to broadly interpret the Statute as the General Assembly intended.[7]

II. BACKGROUND

Attorneys may find working with a statute of repose a bit uncomfortable because statutes of repose are typically encountered less frequently than

2. *See infra* Part II.A.

3. First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).

4. Brown v. Overhead Door Corp., 843 F. Supp. 482 (W.D. Ark. 1994); Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 353 Ark. 201, 216–18, 114 S.W.3d 189, 198–200 (2003).

5. *See infra* Part II.A.

6. *See infra* Part III.A.

7. *See infra* Part III.B.

statutes of limitation.[8] Attorneys are more accustomed to working with statutes of limitation instead. In order to properly understand the issue, one must understand the significant differences between statutes of repose and statutes of limitation as well as the origin of the various construction statutes of repose.

A. Statutes of Repose Versus Statutes of Limitations and Why the Difference Matters

Although statutes of repose and statutes of limitation are procedurally related, several differences should be highlighted. Also, statutes of repose and statutes of limitation interplay to form a unique relationship. This section will explore this relationship and many of the differences between these types of statutes and discuss much of the relevant text of the Statute in question.

Both statutes of repose and statutes of limitation involve the running of a clock that, upon reaching a certain time, precludes a plaintiff from winning a suit against a defendant.[9] The first significant difference between the two is the trigger that starts the running of the clock. A statute of limitations begins to run when a specific cause of action accrues to a plaintiff.[10] A statute of repose begins to run after the happening of an event unrelated to the injury in question.[11]

As a result, a statute of repose may cut off a right of action before an injury is suffered. To illustrate, the Statute bars contract claims for property damage five years after substantial completion[12] of the improvement and bars contract and tort claims for personal injury four years after substantial completion of the improvement.[13] This means that an injury could occur five

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8. *See, e.g.*, 2 DAVID NEWBERN, JOHN J. WATKINS, & D.P. MARSHALL, JR., ARKANSAS CIVIL PRACTICE & PROCEDURE § 5:11 (5th ed. 2011), *available at* Westlaw ARCPP (noting that Arkansas's only statute of repose is the construction Statute discussed here). While Arkansas has only a construction statute of repose, statutes of repose may exist in other forms. *See also e.g.*, Jan Allen Baughman, Comment, *The Statute of Repose: Ohio Legislators Attempt to Lock the Courthouse Doors to Product-Injured Persons*, 25 CAP. U. L. REV. 671 (1996) (discussing Ohio's products liability statute of repose); Laura Martin, Comment, *Civil Procedure—*Mills v. Wong*: Procedural Due Process Does Not Toll the Tennessee Medical Malpractice Statute of Repose*, 36 U. MEM. L. REV. 805 (2006) (discussing Tennessee's medical malpractice statute of repose).

9. *Ray & Sons*, 353 Ark. at 216–18, 114 S.W.3d at 198–200.

10. *E.g.* ARK. CODE ANN. § 16-56-111(a) (LEXIS Repl. 2005**)** ("Actions to enforce written obligations, duties, or rights . . . shall be commenced within five (5) years after the cause of action shall accrue."); *see also* Susan C. Randall, *Due Process Challenges to Statutes of Repose*, 40 SW. L.J. 997, 1004 (1986).

11. Randall, *supra* note 10, at 1004.

12. *See infra* note 53 **(**determining when substantial completion occurs).

13. The Statute provides,

years after substantial completion of the improvement, and the Statute would prohibit the injured party from suing the protected parties.

The second way a statute of repose differs from a statute of limitation is that a statute of repose "entirely cuts off an injured person's right of action even before it accrues."[14] While a statute of limitation allows one to simply avoid a suit, a statute of repose extinguishes a claim, making it nonexistent.[15] In effect, then, a statute of limitation is a procedural device that simply bars a remedy while a statute of repose prevents an action from ever arising.[16] A statute of repose thus creates a substantive right in the protected class to be free from liability after a time determined by the legislature.[17]

This apparent theoretical difference has practical significance in two ways. First, characterizing the benefit that a statute of repose affords as a "right" may dissuade a judge from minimizing or narrowly construing the statute when an individual right may be violated as a result. Second, because

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> (a) No action in contract, whether oral or written, sealed or unsealed, to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property or for injury to real or personal property caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement.
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> (b)(1) No action in tort or contract, whether oral or written, sealed or unsealed, to recover damages for personal injury or wrongful death caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repairing of any improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction and repair of the improvement more than four (4) years after substantial completion of the improvement
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> . . . .
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> (c) The foregoing limitations shall also apply to any action for damages caused by any deficiency in surveying, establishing, or making the boundaries of real property, the preparation of maps, or the performance of any other engineering or architectural work upon real property or improvements to real property.

ARK. CODE ANN. § 16-56-112 (LEXIS Repl. 2005).

14. *Ray & Sons*, 353 Ark. at 217, 114 S.W.3d at 199.

15. *Id.* at 218, 114 S.W.3d at 199.

16. *Id.*, 114 S.W.3d at 199.

17. *Id.*, 114 S.W.3d at 199–200 (quoting First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989)).

a statute of repose is not a procedural defense but a substantive right, a defendant need not plead it as an affirmative defense to receive its protection.[18]

The third and final difference between statutes of repose and statutes of limitation is the lack of tolling mechanisms for statutes of repose. Courts frequently toll statutes of limitation for a variety of reasons including fraud,[19] concealment or ignorance of a cause of action,[20] infancy,[21] and occasionally death.[22] Such is not the case for statutes of repose.[23] In fact, to give proper weight to the General Assembly's intent of granting a substantive right, Arkansas courts have "consistent[ly] refus[ed] to graft judicially created exceptions onto the statute of repose."[24] For example, the Arkansas Court of Appeals recently refused to adopt a "repair doctrine" that would toll the Statute during the time when the plaintiff attempted repairs even where the repairman represented that the repairs would cure the underlying defects.[25] Furthermore, the Arkansas Court of Appeals refused to give effect to a private agreement between the parties that would serve to toll the Statute.[26] To summarize, a statute of repose is "an absolute time limit beyond which liability no longer exists and is not tolled for any reason."[27] Although the General Assembly has provided that fraudulent concealment tolls the Statute,[28] Arkansas courts have refused to enact any other tolling mechanisms.

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18. *Id.* at 219, 114 S.W.3d at 200.

19. Miles v. A.O. Smith Harvestore Prods., Inc., 992 F.2d 813, 816 (8th Cir. 1993).

20. Eckels v. Ark. Real Estate Comm'n, 30 Ark. App. 69, 80, 783 S.W.2d 864, 870 (1990).

21. Phipps v. Martin, 33 Ark. 207, 211 (1878).

22. Whipple v. Johnson, 66 Ark. 204, 205, 49 S.W. 827, 828 (1899) ("The general statute of limitation of five years as to notes would not cease to run until letters of administration were granted upon the estate of [decedent].").

23. *See* Rogers v. Mallory, 328 Ark. 116, 120, 941 S.W.2d 421, 423 (1997) (holding that no tolling mechanisms exist except fraudulent concealment, so there are no exceptions for residential property or reasonable length of time to bring suit).

24. Carlson v. Kelso Drafting & Design, Inc., 2010 Ark. App. 205, at 5, 374 S.W.3d 726, 729.

25. *Id.* at 4–5, 374 S.W.3d at 729.

26. First Elec. Coop. Corp. v. Black, 2011 Ark. App. 447, at 5, 2011 LEXIS 486, at *6–7.

27. Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 353 Ark. 201, 216–18, 114 S.W.3d 189, 198–200 (2003).

28. Section 16-56-112(d) of the Arkansas Code Annotated addresses fraudulent concealment:

> The limitations prescribed by this section shall not apply in the event of fraudulent concealment of the deficiency, nor shall the limitation be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in the improvement constitutes the proximate cause of the injury or death.

Finally, while statutes of repose and statutes of limitation are distinct entities, statutes of repose actually work in tandem with statutes of limitation, which may confuse those unfamiliar with statutes of repose. To illustrate, suppose that property damage occurs three years after substantial completion. Because Arkansas imposes a three year statute of limitation in negligence actions,[29] plaintiffs must file suit by year six after substantial completion in order to satisfy the statute of limitation; however, the five-year statute of repose would actually cut this action off in year five. If, however, the injury occurred in year one, the statute of limitation requires plaintiffs to bring suit by year four; therefore, plaintiffs may not rely exclusively on the language of the Statute to conclude that they may file in year five. As a result, the General Assembly enacted a provision that disallows extension of the applicable statute of limitation even when the facts also implicate the statute of repose.[30] An attorney must be aware of this interplay to avoid filing too late under either statute.

B. A Brief History of Construction Statutes of Repose

The rise of construction statutes of repose is relatively recent, occurring only within the last sixty years. During the 1950s, lobbyists on behalf of architects, engineers, and contractors began to lobby state legislatures for changes in the law.[31] Wisconsin adopted the first construction statute of repose in 1961.[32] Today, most jurisdictions within the United States have enacted a construction statute of repose.[33] The reasons for the construction industry's surge in lobbying efforts reveal why the General Assembly enacted the Statute. It will also play an important role in showing how the Arkansas courts strayed from these purposes.

Three particular legal developments helped spur the lobbying surge. First, courts around the country began to discard the privity of contract rule, thus allowing third-party suits against architects, engineers, and contractors for design deficiencies.[34] Previously at common law, courts required privity

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29. *See id.* § 16-56-105 (Repl. 2005).

30. Section 16-56-112(f) of the Arkansas Code Annotated states that "[n]othing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any cause of action, nor shall the parties to any contract for construction extend the above prescribed limitations by agreement or otherwise."

31. *See* Randall, *supra* note 10, at 999.

32. *Id*. at 999–1000; *see* WIS. STAT. ANN. § 893.155 (West 1961) (current version at WIS. STAT. ANN. § 893.89 (West 2012)).

33. Randall, *supra* note 10, at 1000 (noting that forty-six states and the District of Columbia had enacted construction statutes of repose by 1985).

34. The process began with the famous case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1056–57 (N.Y. 1916). *See also* Randall, *supra* note 10, at 1000.

of contract to sustain suits against architects, engineers, or contractors for design or construction deficiencies.[35] As a result, third parties could not bring suit against these classes.[36] Second, the courts began to abolish the related "completed and accepted rule" whereby no liability could attach to the architect, engineer, or contractor once the owner accepted the work as completed.[37] Third, courts increasingly adopted the discovery rule for the triggering of statutes of limitation, which significantly delayed cause of action accruals.[38]

These three legal developments resulted in indefinite liability of a durational nature for architects, engineers, and contractors for personal and property injuries based on their construction work.[39] For example, a contractor may be liable for work it performed several years, or even decades, ago. The potentially liable party may even be long retired or deceased. Indefinite liability certainly seemed unfair to construction-industry defendants; hence, they commenced lobbying efforts.

Courts have identified several reasons why indefinite liability is unfair for defendants. As a result of indefinite liability, insurance costs for those in the construction industry skyrocketed.[40] Furthermore, construction industry members faced difficulty in defending against old claims because of the loss of evidence and the unavailability of witnesses.[41] Finally, state legislatures worried that better technology may yield higher standards of care at the time of trial than at the time the building was constructed several years earlier.[42] Some have even alleged that indefinite liability creates a chilling effect on creativity within the construction arena, causes unnecessary lawsuits, and hinders building innovations.[43] Finally, subjecting members of the construction industry to these suits seems especially unfair when one considers that improvements tend to deteriorate over time, and any problem may be caused by negligent maintenance of the improvement outside of the construction

35. *See* Randall, *supra* note 10, at 1000.

36. *See, e.g.*, Patraka v. Armco Steel Co., 495 F. Supp. 1013, 1018–19 (M.D. Pa. 1980).

37. For more discussion on the completed and accepted rule, see Susan C. Randall's *Due Process Challenges to Statutes of Repose*. Randall, *supra* note 10, at 1000–01. Arkansas discarded the rule in *Suneson v. Holloway Construction Co.*, 337 Ark. 571, 582, 992 S.W.2d 79, 85 (1999).

38. Randall, *supra* note 10, at 1001. The discovery rule was thought to be fairer to plaintiffs who had not yet discovered their injuries. Of course, the commencement of the timer from plaintiff's discovery of injury, rather than from when the defendant inflicted injury, prolonged the period of potential liability for the defendant.

39. *Id.*

40. 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, 715 (1996).

41. *Id.* at 713.

42. *Id.* at 704.

43. *Id.* at 716–17.

industry member's control.[44] These reasons indicate why state legislatures were quick to enact statutes of repose to assist members of the construction industry facing indefinite liability.

C. The Constitutionality of Statutes of Repose

Courts have wrestled with the constitutionality of these peculiar creatures on several occasions. The most successful challenges have arisen not under the Federal Constitution but under more restrictive state constitutions.[45] Typically, successful challengers have attacked the statute under states' open-court provisions, which guarantee citizens access to the court system in order to redress injuries.[46] Some states have determined that barring a cause of action before it accrues violates their open-court provisions.[47] One of the most successful constitutional challenges under the open-court provisions involved an injury that occurred shortly before the repose period expired.[48] Equal protection and due process challenges have been launched as well, often with less successful results.[49]

In order to survive a potential constitutional challenge, the Arkansas General Assembly enacted section 16-56-112(b)(2) of the Arkansas Code Annotated, which gave plaintiffs extra time to file a claim if an injury occurred just before the statute of repose expired.[50] This additional time would likely protect the Statute from being declared unconstitutional.

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44. *Id.* at 713.

45. Baughman, *supra* note 8, at 681.

46. *Id.*

47. *Id.*; *see also* Hazine v. Montgomery Elevator Co., 861 P.2d 625, 630 (Ariz. 1993) (invalidating products liability statute of repose because it violated Arizona's open-court provision). *But see* Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 212–13 (Ind. 1981) (upholding the product liability statute of repose because the open-court provision protects only vested rights, and a right cannot vest after the statute of repose cuts off the cause of action).

48. *See* Randall, *supra* note 10, at 1006. *See also* Baughman, *supra* note 8, at 681–84 (discussing various constitutional challenges to statutes of repose).

49. Baughman, *supra* note 8, at 681–84.

50. Section 16-56-112(b)(2) of the Arkansas Code Annotated provides the following:

> Notwithstanding the provisions of subdivision (b)(1) of this section, in the case of personal injury or an injury causing wrongful death, which injury occurred during the third year after the substantial completion, an action in tort or contract to recover damages for the injury or wrongful death may be brought within one (1) year after the date on which injury occurred, irrespective of the date of death, but in no event shall such an action be brought more than five (5) years after the substantial completion of construction of such improvement.

III. ANALYSIS

Although statutes of repose may allow judges a quick and convenient way to create docket space, judges frequently incur headaches when the phrase "statute of repose" appears in attorneys' briefs for summary judgment. As a question of law, judges are charged with deciding the fate of repose challenges, which may consist of cases that may involve tough questions. To whom does it apply? When does it apply? To what does it apply? In fact, the gray areas surrounding statutes of repose are larger than they may first appear.

These gray areas—or the potential outer contours of a statute of repose's scope—concern judges for two related reasons that do not exist in the context of statutes of limitations. First, judges reject the idea of attaching tolling mechanisms to the statutes of repose.[51] Second, state legislatures generally hoped to squelch the concept of indefinite liability for individuals in the construction industry.[52] By combining this hope with the principle that courts should not toll statutes of repose, the idea was to provide protected individuals with a date after which liability could no longer attach, allowing them to proverbially circle their calendar.

The remaining portion of this note addresses how the Arkansas courts have handled the scope of the Statute as well as a recommendation of change. For several decades following the Statute's adoption, Arkansas courts properly construed it broadly. The Arkansas courts broadly interpreted the major elements of the Statute, such as the timing, improvement, and construction to give proper effect to the Statute's purpose.[53] However,

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51. *See supra* Part II.A.

52. *See supra* Part II.B.

53. The Arkansas courts have never expounded on the meaning of another element—substantial completion. The Arkansas Supreme Court has noted that substantial completion had at least occurred by the time the work was finished in accordance with the construction contract and the owner accepted the work. 65th Center, Inc. v. Copeland, 308 Ark. 456, 466, 825 S.W.2d 574, 580 (1992). In the construction industry, substantial completion typically means "that the building or project has reached a point where it is ready for the use for which it was intended and that whatever work remains to be done is minor." *See* NEWBERN ET AL., *supra* note 8. States use a variety of measuring sticks to determine substantial completion, including application of the industry standard, an owner's acceptance of the improvement, the point in time that it may be used or occupied, or when actually occupied. *Id.* Many times substantial completion is not an issue because courts will often use certain paperwork submissions like certificates of substantial completion to determine when substantial completion occurred. *See* 2 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR CONSTRUCTION LAW § 7:174.62 (2012), *available at* Westlaw BOCL. Problems may develop, however, when parties do not exchange these certificates or when an owner-contractor constructs an improvement to property that the owner-contractor will later sell to another party, for the owner-contractor will not likely issue a certificate to itself.

with the decisions in *Brown v. Overhead Door Corp.*[54] and *Ray & Sons Masonry Contractors, Inc. v. United States Fidelity & Guaranty Co.*,[55] Arkansas courts quickly constricted the Statute's application, effectively injecting uncertainty and risk into a law where uncertainty and risk were the primary targets.

This note will next explore the trend of broad interpretation in Arkansas cases. An overview of this trend serves two purposes. First, it will provide the necessary context to understand how Arkansas law stood at the time of the two aberrational decisions. In fact, *Brown* and *Ray & Sons* cannot be properly understood unless a history of Arkansas decisions regarding the Statute is presented first. Second, and most importantly, the trend provides the first reason why Arkansas courts should overrule both *Brown* and *Ray & Sons*. By undoing these two aberrations, Arkansas courts can return certainty to the Statute by continuing to broadly interpret the statute as they had done since its inception. For these reasons, the trend of broad interpretation will be discussed first.

Next, this note will examine the aberrational cases that cut against this trend. This note proposes that Arkansas courts return to a broad interpretation of the Statute in order to confer proper weight to the General Assembly's purpose for adoption. In adopting the proposal of this note, Arkansas courts would return certainty to the Statute by interpreting the Statute broadly as they had always done, give effect to each word of the Statute, and act within the General Assembly's intent for the Statute by removing the threat of indefinite liability.

A. Arkansas Courts' Interpretation of the Statute

Arkansas first enacted the Statute in 1967.[56] Excluding the two aberrational decisions, the Arkansas courts broadly interpreted the Statute from its enactment so that it would apply in a variety of situations, even changing the actual text of the Statute at one point.[57] Then, in two decisions, the Arkansas courts interpreted the Statute narrowly so that it would not apply to certain situations where the Statute is unclear. The next portion of this note will examine the trend of broad interpretation by presenting and explaining how Arkansas courts broadly interpreted the Statute in several decisions. Then,

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54. 83 F. Supp. 482 (W.D. Ark. 1994).

55. 353 Ark. 201, 114 S.W.3d 189 (2003).

56. 1967 Ark. Acts 42 (codified at ARK. CODE ANN. § 16-56-112 (LEXIS Repl. 2005)).

57. For additional information about this trend, see generally J.W. Looney, *When Third Means Fourth, Contract Includes Tort, and a Five-Year Statute of Limitation Actually Leaves Only Three Years or Less to File Suit: The Strange Saga of the Arkansas "Statute of Repose" in Construction Cases*, 1993 ARK. L. NOTES 87 (1993).

the two aberrational decisions will be inspected to show how Arkansas reverted from the trend despite sound policy considerations.

1. *The Trend of Broad Interpretation*

The Arkansas courts have interpreted the Statute broadly since its adoption. Over time, these broad interpretations increased in magnitude until the courts were interpreting the statute so broadly that they changed its actual text in order to achieve its purposes. What follows is an examination of these court decisions since the Statute's inception.

a. The courts' first interpretations

The Arkansas Supreme Court first encountered the Statute[58] in *Carter v. Hartenstein*,[59] which involved an elevator in an ironic locale—the Arkansas Justice Building.[60] The elevator crushed and killed a newspaper boy, prompting his mother to bring a wrongful death action against the manufacturer and installer of the elevator.[61] The appellant challenged only the constitutionality of the Statute on equal protection and due process grounds.[62] The court dismissed the constitutional claims, classifying the arguments as "semantics."[63] In addressing the constitutional claims, the court avoided delving into the legislative arena, stating that "[t]he court cannot—and it should not try to—make legislative policy in a case like this."[64]

Most importantly, the court sought to exclude two classes of individuals from the protection of the Statute: owners and materialmen.[65] In doing so, the court provided little analysis beyond its conclusion. Without explanation, the court provided a footnote that declared that materialmen who designed components or substantial parts of a building could be protected in some circumstances.[66] Thus, the Arkansas Supreme Court interpreted the Statute broadly, eagerly dismissing constitutional arguments that succeeded in other jurisdictions, while narrowly interpreting the Statute to exclude ma-

58. The court actually interpreted the predecessor to the contemporary version, but because the language of the Statute is identical, this note will treat it the same and call it the "Statute."

59. 248 Ark. 1172, 455 S.W.2d 918 (1970).

60. *Id.* at 1173, 455 S.W.2d at 919.

61. *Id.*, 455 S.W.2d at 919. *See supra* Part II.C (containing more information on the constitutionality of statutes of repose).

62. *Carter*, 248 Ark. at 1174, 455 S.W.2d at 920.

63. *Id.*, 455 S.W.2d at 920.

64. *Id.*, 455 S.W.2d at 920.

65. *Id.* at 1175, 455 S.W.2d at 920. This exclusion gave rise to plaintiff's equal protection argument. *Id.* at 1174, 455 S.W.2d at 920.

66. *Id.* at 1172, 1175 & n.*, 455 S.W.2d at 920 & n.*.

terialmen in certain situations and owners.[67] While narrow constructions surfaced at the beginning, the court would retreat rapidly in subsequent decisions.

The Arkansas Supreme Court next encountered the Statute five years later in *Cherokee Carpet Mills, Inc. v. Manly Jail Works, Inc.*[68] That case involved the definition of "improvement" because an addition to real property must be considered an improvement for the Statute to apply.[69] The appellee designed and constructed a 12,122 gallon water tank for use in the appellant's carpet plant.[70] The tank later ruptured, causing extensive damage throughout the mill.[71] In determining whether the water tank constituted an improvement to the property, the court recognized that a "fixture" must constitute an improvement for purposes of the Statute.[72] The court noted the rule that "all things [are] to be fixtures which are attached to the realty with a view to the purposes for which it is held or employed."[73] The court determined that the water tank was an "improvement" according to this rule because it was put into position to act according to its purpose and interconnected with other equipment in the mill.[74]

Determining what constitutes an "improvement" can be done using different tests, but the fixture test broadens the Statute more than other tests. Courts that use the fixture test typically consider three factors that are often easily satisfied: (1) the sufficiency and mode of adaptation, (2) the adaption of the article to the use or improvement of the property, and (3) the intention of the party that annexed the article.[75] The first two factors are merely evidence of the third factor, which is preeminent.[76] Courts will often look at the large size of the improvement coupled with it being used according to its purpose and used over a period of time.[77]

On the other hand, many courts utilize a more restrictive "commonsense" approach to determine what constitutes an improvement to real property.[78] This more narrow approach focuses on the dictionary definition of

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67. *Id.*, 455 S.W.2d at 920 & n.*.
68. 257 Ark. 1041, 521 S.W.2d 528 (1975).
69. *See supra* note 13.
70. *Cherokee Carpet Mills*, *Inc.*, 257 Ark. at 1041, 521 S.W.2d at 529.
71. *Id.* at 1042, 521 S.W.2d at 529.
72. *Id.* at 1043–44, 521 S.W.2d at 530.
73. *Id.*, 521 S.W.2d at 530.
74. *Id.*, 521 S.W.2d at 530.
75. Karisch v. Allied-Signal, Inc., 837 S.W.2d 679, 680 (Tex. App. 1992).
76. *Id.*
77. *See id.* at 681.
78. For more information on what constitutes an "improvement" for statute of repose purposes as well as how courts have analyzed the problem, see William D. Bremer, Annotation, *What Constitutes "Improvement to Real Property" for Purpose of Statutes of Repose or Statute of Limitations*, 122 A.L.R. 5th 1 (2004).

"improvement"[79] and requires application of four factors: (1) whether the modification adds value to the property for the purposes of its intended use, (2) the nature of the improvement, (3) the relationship of the modification to the land and its occupancy, and (4) permanence.[80] By including an "added property value" requirement to the analysis, a court will discount those improvements that do not add value to the property; under the fixture approach that the Arkansas Supreme Court adopted in *Cherokee Carpet Mills*, the court does not consider the additional value contributed by the improvement.

The commonsense approach seems to incorporate consideration of an important feature of an improvement. One could argue that the term "improvement" carries the connotation that the value to the land should be increased as a result of an "improvement." Thus, increased value should factor into the court's decision.

However, such a result may not always occur. For example, the large water tank in *Cherokee Carpet Mills* may not have added value to the property whatsoever. The aged tank may have lowered the property value because it may have been considered a major problem to prospective buyers of the mill, for the sheer size and weight of the tank may render any attempt to remove it expensive. Additionally, one could consider the prototypical example of a large swimming pool that actually decreases property values due to maintenance or removal costs. Thus, the concept of "improvement" should not turn on the improvement's effect on the value of the particular property in question, for the Statute would protect those constructing swimming pools or other similar improvements only if those improvements raised the value of the property. This could result in a swimming pool being an improvement on one property but not on the property across the street where the pool did not raise the property's value. This diminishes the Statute's predictability, which was a primary virtue for enacting statutes of repose. Thus, the Arkansas Supreme Court correctly chose to adopt this broader, more-inclusive method of analysis for determining what constitutes an improvement under the Statute.

b. The pinnacle of broad interpretation

Although *Carter* and *Cherokee Carpet Mills* took small steps to broad interpretation of the Statute, the Arkansas Supreme Court subsequently began to leap. The court's next opportunity to address the Statute occurred in

79. *E.g.*, Adair v. Koppers Co., 741 F.2d 111, 114 (6th Cir. 1984) ("[A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.") (citation omitted).

80. *Id.*

1983, about eight years after *Cherokee Carpet Mills*.[81] *Okla Homer Smith Furniture Manufacturing Co. v. Larson & Wear, Inc.* involved a conflict in which a general contractor constructed an addition to a furniture factory, but the addition's roof sustained significant damage during a storm about six years after substantial completion.[82] The furniture store alleged that the contractors negligently designed, fabricated, installed, and supervised construction of the roof, which led to property damage.[83]

In arguing that the Statute did not apply, the furniture store cleverly argued, first, that subsection (a)[84] applied in this instance because subsection (b) applied only to wrongful death or personal injury claims.[85] Second, the furniture store argued that, according to its text, subsection (a) applies only to contract claims, whereas the text of subsection (b) applies to both contract and tort claims. Thus, according to the furniture store, since subsection (a) fails to mention tort suits but subsection (b) expressly mentions tort suits, the General Assembly must have intended that the Statute not apply to tort suits where only property damage occurs.[86]

The Arkansas Supreme Court rejected this argument by focusing on the legislative intent behind the Statute. The court, recognizing the problems of indefinite liability, averred that the legislative intent behind the Statute was to "[protect] persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit."[87] The court then focused on the preamble of the act that adopted the Statute, which noted that the Statute was designed to protect against all deficiencies in designing, supervising, and constructing improvements.[88] As a result, the court held that "contract" also encompassed all actions, including tort actions that arise out of a construction contract and that otherwise fit the requirements of the rest of the Statute.[89]

As *Okla Homer Smith* makes clear, justices of the Arkansas Supreme Court thought the Statute should be interpreted broadly in order to give ef-

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81. Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc., 278 Ark. 467, 646 S.W.2d 696 (1983).

82. *Id.* at 468, 646 S.W.2d at 697.

83. *Id.*, 646 S.W.2d at 697.

84. The court is interpreting the predecessor to the modern Statute. The language of the Statute is identical, but neither subsection (a) nor (b) exists in the predecessor version. The two provisions are found in different but adjacent sections. For the sake of clarity, this note refers to each by using the modern subsection rather than by outdated section numbers. *See supra* note 58.

85. *Okla Homer Smith*, 278 Ark. at 469, 646 S.W.2d at 697. *See supra* note 13.

86. *Okla Homer Smith*, 278 Ark. at 469, 646 S.W.2d at 697.

87. *Id.* at 470, 646 S.W.2d at 698.

88. *Id.* at 470–71, 646 S.W.2d at 698.

89. *Id.* at 471, 646 S.W.2d at 698.

fect to the General Assembly's intent. What could possibly be broader than holding that "contract" also included tort actions?

The Arkansas Supreme Court next encountered *Elliotte v. Johnson*,[90] which allowed the court to undo some of its earlier narrow-construction dicta. The plaintiff rented space in a shopping center that the defendant owned, but fire destroyed it eight years after substantial completion.[91] Touching on the dicta found in *Carter*,[92] the plaintiff argued that the Statute did not apply to owners of the building.[93] Despite the earlier dicta, the court determined that the Statute applied to owners of the improvement, especially when the owner contracted for the construction of the improvement and supervised its construction.[94] The court noted that no owner/non-owner distinction can be found in the text of the Statute.[95] Thus, *Elliotte* eradicated the one narrow aspect of *Carter* that the Statute did not apply to certain entities. The court has thus expanded the reach of the Statute with each case that it decided.

The zenith of the Arkansas Supreme Court's era of broad interpretation occurred in 1989 when the court decided *Dooley v. Hot Springs Family YMCA*.[96] This case involved an individual who sued the owners, architect, and builder of a swimming pool for neck injuries he sustained in a diving incident.[97] In deciding the case, the court interpreted the personal injury subsection of the statute, subsection (b), which carries a four year repose period.[98] Subsection (b)(2) provides an exception, however, that states that if injury occurs during the third year after substantial completion, injury or wrongful death suits may be brought within one year after the date of injury but in no event shall suit be brought more than five years after substantial completion.[99] In *Dooley*, the injury occurred one month shy of the four year bar against personal injury suits, but the plaintiff filed suit just after the fouryear bar.[100]

The court determined that the exception would be rendered meaningless if read literally, for if injury occurred during the third year after the improvement was substantially completed, then the extra year provided in subsection (b)(2) would never be triggered because the extra one year period

90. 285 Ark. 383, 687 S.W.2d 523 (1985).
91. *Id.* at 384, 687 S.W.2d at 523.
92. *See supra* notes 65–66.
93. *Elliotte*, 285 Ark. at 384, 687 S.W.2d at 523.
94. *Id.*, 687 S.W.2d at 523.
95. *Id.*, 687 S.W.2d at 523.
96. 301 Ark. 23, 781 S.W.2d 457 (1989).
97. *Id.* at 24, 781 S.W.2d at 457.
98. *Id.*, 781 S.W.2d at 457–58.
99. *See supra* note 50.
100. *Dooley*, 301 Ark. at 24–25, 781 S.W.2d at 457–58.

would always expire before the four year bar in subsection (b)(1).[101] Thus, for the extra year to carry any significance, the General Assembly must have intended "third" to really mean "fourth."[102] Basing its decision on the legislative intent behind the statutes, the court essentially rewrote the language of the Statute. While it makes sense to interpret statutes logically, the court could have simply interpreted the Statute as it read and invited the General Assembly to amend it, much like the trial court in *Dooley*.[103] Instead, the court interpreted the Statute so broadly that it literally changed its text in order to give it the role envisioned by the General Assembly.

Finally, in *East Poinsett County School District No. 14 v. Union Standard Insurance Co.*,[104] the court considered the effect of the Statute in relation to the applicable statute of limitations. The court rejected the plaintiff's argument that only one limitations period should apply based on the rule of law that if two statutes of limitations apply to the same cause of action, then the longest limitations period should apply.[105] The court noted that the Statute is designed to work in tandem with statutes of limitations.[106] Thus, the court again did not wish to limit the application of the Statute but instead desired that the Statute apply in many situations, resulting in yet another broad interpretation. As the cases up to this point indicate, Arkansas courts clearly and consistently favored broad interpretations in order to give effect to the General Assembly's intent.

2. *Narrow Interpretation Aberrations*

After *East Poinsett*, the Arkansas courts did not confront many cases that presented new issues under the Statute. The few cases they decided simply reaffirmed earlier court decisions and principles regarding largely undisputed matters.[107] However, Arkansas courts confronted the two aberrational cases that each presented new issues under the Statute. Despite previous broad rulings, the courts interpreted the Statute narrowly, refusing to apply it in these new situations.

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101. *Id.* at 25, 781 S.W.2d at 458.
102. *Id.*, 781 S.W.2d at 458.
103. *Id.*, 781 S.W.2d at 458.
104. 304 Ark. 32, 800 S.W.2d 415 (1990).
105. *Id.* at 34, 800 S.W.2d at 417.
106. *Id.*, 800 S.W.2d at 417; *see also supra* Part II.A.
107. *See, e.g.*, Zufari v. Architecture Plus, 323 Ark. 411, 417–21, 914 S.W.2d 756, 760–62 (1996) (reaffirming the idea that the Statute works in tandem with statutes of limitation); Curry v. Thornsberry, 81 Ark. App. 112, 117–22, 98 S.W.3d 477, 481–84 (2003) (reaffirming the idea that only fraudulent concealment tolls the Statute).

a. *Brown v. Overhead Door Corp.*

The Arkansas federal court case of *Brown v. Overhead Door Corp.* [108] involved a manufacturer of a garage door opener.[109] The garage door seriously injured a two-year-old child when the door closed on him despite sensors on the door that would raise the door if it met an obstruction.[110] In this diversity suit, the court confronted the issue of whether product manufacturers were within the reach of the Statute.[111] Of course, the Arkansas Supreme Court noted in *Carter* that neither materialmen nor owners were within the reach of the Statute,[112] but then later determined that owners were within the Statute because of a lack of distinction within the text of the Statute.[113]

The federal court, however, narrowly interpreted the Statute so that it did not apply to product manufacturers.[114] Instead, it determined that manufacturers were not within the Statute's protection unless installation actually involved the manufacturer or the manufacturer designed or helped design the improvement.[115] Because the product manufacturer in *Brown* did not participate in on-site installation, it received no protection from the Statute.

b. *Ray & Sons Masonry Contractors, Inc. v. United States Fidelity & Guaranty Co.*

The Arkansas Supreme Court confronted the Statute again in 2003 in the context of indemnity contracts.[116] *Ray & Sons Masonry Contractors Inc., v. United States Fidelity & Guaranty Co.* involved a suit in the general contractor and subcontractor arena.[117] In *Ray & Sons*, a general contractor that had constructed various Wal-Mart stores throughout several states sued Wal-Mart because of its failure to pay the general contractor for its services.[118] Wal-Mart refused to pay on the basis of defective construction.[119] Following settlement of the suit between Wal-Mart and the general contractor, the general contractor sued the subcontractor responsible for the defec-

108. 843 F. Supp. 482 (W.D. Ark. 1994).
109. *Id.* at 483.
110. *Id.*
111. *Id.* at 483–84.
112. *See supra* notes 65–66.
113. *See supra* notes 94–95.
114. *See Brown*, 843 F. Supp. at 490–91.
115. *Id.* at 490.
116. Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. Guar. Co., 353 Ark. 201, 207 114 S.W.3d 189, 193 (2003).
117. *Id.*, 114 S.W.3d at 193.
118. *Id.* at 208, 114 S.W.3d at 193.
119. *Id.*, 114 S.W.3d at 193.

tive construction under a breach of indemnity contract theory.[120] The court narrowly interpreted the Statute and concluded that it did not cover indemnity contracts.[121] The following section will explain why the courts in *Brown* and *Ray & Sons* incorrectly interpreted the Statute narrowly and will call on the courts to reverse course in subsequent decisions.

B. Why Arkansas Courts Should Broadly Interpret the Statute and Abandon *Brown* and *Ray & Sons*

The Arkansas courts should reconsider their holdings in both *Brown* and *Ray & Sons* for a number of reasons. As noted previously, a primary reason for reconsidering *Brown* and *Ray* is to make those decisions consistent with the trend of broad interpretation that the Statute garnered since its adoption. A broad interpretation of a statute of repose is desirable because of the substantive nature of the protection that the statute of repose provides defendants at the specific and intentional consideration of the General Assembly. In other words, a statute of repose, unlike a statute of limitation, is the General Assembly's specific balance of rights between parties and should be given effect where possible. Courts should not narrow the scope on statutes of repose because they would override the General Assembly's clear intent. Accordingly, the first reason for undoing *Brown* and *Ray & Sons* is for the sake of consistency with prior Arkansas decisions, which would reintroduce certainty by giving parties notice that the Statute will be interpreted broadly and applied where possible.

The next reason for reconsidering *Brown* and *Ray & Sons* and returning to broad interpretation is that both decisions ignore a small yet important word in the Statute: "any." The Statute prohibits suits arising from *any* deficiency in the improvement made by *any* person.[122] The Arkansas Supreme Court in *Okla Homer Smith* focused on this important word.[123] The court focused on the General Assembly's prohibition of "any" suit arising out of a construction contract to bridge the wide divide between "contract" and "negligence."[124] The court held that the use of "any" indicated the General Assembly's far-reaching intent for the Statute, and if the court was to ignore "any" and hold that negligence cases did not fall within the Statute, then the court would contravene the purpose of enactment and completely frustrate the General Assembly's intent.[125]

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120. *Id.* at 208–10, 114 S.W.3d at 193–95.
121. *Id.* at 223, 114 S.W.3d at 202.
122. *See supra* note 13.
123. Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc., 278 Ark. 467, 471, 646 S.W.2d 696, 698 (1983).
124. *Id.*, 646 S.W.2d at 698.
125. *Id.*, 646 S.W.2d at 698.

Other courts have focused on the power of "any" in making determinations under their state's construction statute of repose. For example, the Court of Appeals for the Third Circuit recently decided *Fleck v. KDI Sylvan Pools, Inc.*,[126] in which "any" was of critical importance.[127] In *Fleck*, the defendant sold an above-ground swimming pool where a person was later injured.[128] Interpreting a similar Pennsylvania statute of repose, the court focused on "any" and noted that it "is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive."[129] Because the pool seller furnished construction of the pool and contracted with someone to construct it, the pool seller was "any" person that supervised or observed the construction and was protected by the Statute.[130]

To reach its conclusion, the *Fleck* court relied in part on *Catanzaro v. Wasco Products, Inc.*[131] In *Catanzaro*, where a Pennsylvania court determined that a skydome manufacturer/seller fell within the reach of the statute of repose.[132] The *Fleck* court found *Catanzaro* persuasive in its rejection of the argument that the supplier had to customize the product for the specific real estate and actually assist in the installation.[133] According to the *Catanzaro* court, the manufacturer of an improvement, even if off-site, was nevertheless "any" person that planned, designed, or built the skydome.[134] The location where construction occurs, whether off-site or not, should not matter for repose purposes because the language of the construction statute of repose does not contain such a distinction.[135]

The *Brown* court disagreed with the "any"-focused approach and held that manufacturers were not within the Statute's reach.[136] The court noted that manufacturers that do not install or design their products should not receive protection.[137] However, this holding contradicts the text of the Statute because the Statute protects *any* person who constructs an improvement to real property. It should not matter whether construction of the improvement occurs on-site or off.

Some courts have argued that manufacturers of products are different because they often supply standardized goods susceptible to quality con-

126. 981 F.2d 107 (3d Cir. 1992).
127. *Id.* at 115.
128. *Id.* at 111–12.
129. *Id.* at 115.
130. *Id.*
131. 489 A.2d 262 (Pa. Super. Ct. 1985).
132. *Id.* at 266.
133. *Fleck*, 981 F.2d at 115.
134. *Id.*
135. *See supra* note 13.
136. Brown v. Overhead Door Corp., 843 F. Supp. 482, 488–89 (W.D. Ark. 1994).
137. *Id.* at 490.

trol.[138] Apparently, because manufacturers are thus better able to guard against potential hazards that their products may cause, legislators must not have considered them worthy of statute of repose protection.

This argument fails for a few reasons. First, the text of statutes of repose include "any" person and does not create a manufacturer exception.[139] Second, manufacturers of improvements to real property suffer from the same deleterious effects of indefinite liability that state legislatures sought to curb. Third, by insulating only some members of the construction industry, the repose statutes create problems in that manufacturers cannot implead parties like installers or contractors who may actually be at fault for the problem that developed. For example, improper installation may have rendered the product dangerous, but because installers are protected and manufacturers are not, manufacturers may have to answer for installer mistakes despite that installer mistakes often, but not always, manifest themselves soon after substantial completion.[140] Statutes of repose do not command such odd results and should thus not be construed in this manner.[141]

Thus, the *Brown* holding that the Statute does not protect product manufacturers should be reconsidered so as to give proper weight to the text of the Statute, most specifically the word "any." Immunity should turn on the defendant's connection to the improvement itself and not on the type of service that the defendant performed or the product the defendant provided.[142] Like the court did with *Carter*'s reference to owners in *Elliotte*, the court should undo *Carter*'s dicta about materialmen. The text of the Statute commands such a result.

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138. *See, e.g.*, Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 800 F. Supp. 1430, 1435 (E.D. Tex. 1992).

139. *See, e.g.*, ARK. CODE ANN. § 16-56-112(a) (LEXIS Repl. 2003) ("No action in contract . . . shall be brought against *any* person performing or furnishing . . . .") (emphasis added).

140. Of course, this situation assumes that installers have previously agreed to indemnify the manufacturer.

141. Some commentators contend that the legislative history of statutes of repose actually command this manufacturer distinction. *E.g.*, Brian D. Shannon, *The Reach for Repose: Have the Texas Courts Gone Awry?*, 24 TEX. TECH L. REV. 195 (1993). Shannon focuses on Texas's statute of repose and the change in its language over time as well as the fact that no product manufacturers testified before the Texas Legislature when it considered enacting the statute of repose, implying that no protection should be afforded. *Id.* at 215–20. Of course, changes in Texas's statute of repose may indicate certain legislative intent for Texas, but this argument would not apply to Arkansas's Statute. Furthermore, laws are designed to protect those entities that are within the text of the law itself, not who testifies before the enacting body. It seems safe to assume that many proper laws protect individuals and classes who did not actually lobby or appear before the enacting assembly.

142. *See* First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989).

The third reason for reconsidering *Brown* and *Ray & Sons* is that the courts upset the balance that the General Assembly struck. The General Assembly chose three and four years as good balances of the concerns of plaintiffs and defendants. The courts, however, have upset this balance not by creating tolling mechanisms that would obviously upset the legislative purpose of the Statute, but by simply circumventing the Statute by applying it narrowly.[143] Courts re-inject uncertainty and the specter of indefinite liability when they create tolling mechanisms or interpret the Statute narrowly. While the courts have chided tolling mechanisms, they have not done so for narrow interpretations, yet both frustrate legislative intent when construction industry members can no longer "circle the calendar."

Some have contended that statutes of repose should be interpreted narrowly like a statute of limitation because the courts are extinguishing a plaintiff's right.[144] However, statutes of repose serve entirely different functions, which are to provide certainty and defeat indefinite liability for members of the construction industry.[145] The General Assembly struck a particular balance, and a narrow interpretation only frustrates the General Assembly's intent. For example, the Arkansas Supreme Court noted ironically in *Ray & Sons* that,

> [a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. . . . Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.[146]

Furthermore, when a plaintiff's right to sue is extinguished, a defendant receives a reciprocal right not to be sued. Thus, in interpreting the Statute, why favor the plaintiff when it appears that the legislature desired to favor the defendant in a situation where it perceived normal procedural laws unfairly tipped the scales against the defendant?

The problem with the narrow interpretations are illustrated in *Ray & Sons*, in which the Arkansas Supreme Court determined that suits for indemnity do not fall within the Statute's reach.[147] As in *Ray & Sons*, it is common for a subcontractor to agree to indemnify the general contractor for

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143. *See supra* Part II.A.

144. Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc., 278 Ark. 467, 472, 646 S.W.2d 696, 699 (Adkisson, C.J., dissenting).

145. *See supra* Part II.B.

146. Ray & Sons Masonry Contractors, Inc. v. U.S. Fid. & Guar. Co., 353 Ark. 201, 218, 114 S.W.3d 189, 199–200 (2003) (quoting *First United Methodist Church*, 882 F.2d at 866).

147. *Id.* at 208–10, 114 S.W.3d at 193–95.

any loss suffered by the general contractor pursuant to a suit regarding the subcontractor's work.[148]

With little explanation, the *Ray & Sons* court concluded that earlier Arkansas court cases had never construed the Statute in the context of an indemnity provision.[149] To avoid the Statute, the court characterized the case as a breach of contract dispute instead of a claim of defective construction.[150] The problem with this characterization, however, is that one could always argue in construction cases that only a breach of contract occurred. In fact, the problem that gave rise to the suit, or the condition precedent, was a deficiency in an improvement to property. Because the deficiency was the event that resulted in liability, *Ray & Sons* should have been characterized like every other construction deficiency case.

Interestingly enough, the court provided no justification for approvingly citing a South Carolina case[151] for the proposition that contribution actions fall within a construction statute of repose.[152] Due to the similar natures of contribution and indemnity suits, it seems odd that the Statute would protect one but not the other. Indemnity and contribution both allow a defendant subject to suit to seek reimbursement from a third party. In both cases, the condition precedent to liability was the construction deficiency. It is illogical and inconsistent to allow third party contributors to receive protection from the Statute while third party indemnifiers are exposed to liability. Although indemnity is based on contract and contribution on tort, the court determined in *Okla Homer Smith* that this distinction should not matter in the context of the Statute, for to hold otherwise would frustrate the General Assembly's purpose.[153]

Furthermore, the indemnifying parties are typically the very parties that the General Assembly sought to protect. Even though these parties agree to indemnify, they should not necessarily expect that this indemnity obligation should carry indefinitely into the future, especially when one considers that state legislatures have recognized that improvements may suffer problems due to negligent maintenance or installation. The court frustrates the legislative intent of the Statute by injecting uncertainty and indefinite liability, which the General Assembly sought to eradicate.

The final reason for reconsidering *Brown* and *Ray & Sons* is that they are aberrations of the general trend of broad interpretation. The courts pre-

148. *Id.*, 114 S.W.3d at 193–95.

149. *Id.*, 114 S.W.3d at 193–95.

150. *Id.* at 223, 114 S.W.3d at 202.

151. Florence Cnty. Sch. Dist. No. 2 v. Interkal, Inc., 559 S.E.2d 866 (S.C. Ct. App. 2002).

152. *Ray & Sons*, 353 Ark. at 218–19, 114 S.W.3d at 200 (quoting *Florence Cnty. Sch. Dist. No. 2*, 559 S.E.2d at 869).

153. *See supra* notes 82–89.

viously interpreted the Statute broadly for several decades.[154] Thus, for the sake of consistency, the Arkansas courts should overturn these decisions when given the opportunity.

IV. CONCLUSION

State legislatures throughout the country responded to legal changes in construction law by enacting construction statutes of repose to protect construction industry members from indefinite liability and its consequential evils. While the idea of a statute of repose was a bit novel, most enactments have, nonetheless, survived constitutional attacks because courts recognized their importance and rationale. Arkansas, for many years following the Statute's enactment, interpreted the Statute broadly to give proper weight to the General Assembly's intent. Then, in *Brown v. Overhead Door Corp.* and *Ray & Sons Masonry Contractors, Inc. v. United States Fidelity & Guaranty Co.*, the courts suddenly reversed course. This reversal contradicts the text of the Statute itself, the legislative purpose of the Statute, and ruins the Arkansas courts' interpretative consistency. For these reasons, Arkansas courts should abandon *Brown* and *Ray & Sons* if given the opportunity and return to broadly interpreting the Statute.

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154. *See supra* Part III.A.1.

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