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Limitation of Actions - Statute of Limitations for Architects and Builders as Special Legislation - Phillips v. ABC Builders, Inc.

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LIMITATION OF ACTIONS

In 1977 the Phillips family purchased a home, built in 1969, but evacuated it when the foundation and basement began to collapse after heavy rains in spring 1978.[1] In fall 1979 the homeowners sued the builder, ABC Builders, Inc., for breach of implied warranty of habitability and negligent construction. The district court granted builder's motion to dismiss for lack of jurisdiction, finding that the ten year statute of limitations applicable in construction defect cases, Section 1-3-111 of the Wyoming Statutes,[2] had run on Phillips' suit. The court found that the suit was not commenced until the eleventh year.[3]

On appeal, homeowners argued the suit was not time-barred for three reasons: (1) the special statute of limitations violated article I, section 34 of the Wyoming Constitution;[4] (2) the warranty on the home's foundation exceeded ten years; and (3) the statute of limitations commenced running with the discovery of the defect in 1978.[5] The builder maintained that the ten year statutory limitation was an effective bar to the homeowners' action, brought in the eleventh year after substantial completion of the home, and that the criticized statute was constitutional. The statute, builder said, provided a liberal time period compatible with recent Wyoming case law which expanded the liability of

1. Phillips v. ABC Builders, 611 P.2d 821, 822 (Wyo. 1980) [hereinafter cited in text as *Phillips*].
2. WYO. STAT. § 1-3-111 (1977), provides:
   (a) No action to recover damages, whether in tort, contract or otherwise, shall be brought more than ten (10) years after substantial completion of an improvement to real property, against any person performing or furnishing the design, planning, supervision, construction or supervision of construction of the improvement for:
      (i) Any deficiency in the design, planning, supervision, construction or observation of construction;
      (ii) Injury to any property arising out of any such deficiency; or
      (iii) Injury to the person or wrongful death arising out of any such deficiency.
   (b) Notwithstanding the provisions of subsection (a) of this section, if an injury to property or person or an injury causing wrongful death occurs during the ninth year after substantial completion of the improvement, an action to recover damages for the injury or wrongful death may be brought within one (1) year after the date on which the injury occurs.
3. Phillips v. ABC Builders, Inc., *supra* note 1, at 823.
4. Brief for Appellants at 14, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980). WYO. CONST. art. I, § 34 reads: "All laws of a general nature shall have a uniform operation."
5. Phillips v. ABC Builders, Inc., *supra* note 1, at 823.

builders in construction defect cases. Furthermore, work-related perils and difficulties unique to the building trade provided the rational basis for a statute of limitations which definitively curtailed liability after ten years.[6] The Wyoming Supreme Court, addressing only the constitutional issue, reversed the dismissal and remanded the action, holding that the statute of limitations was a special law which arbitrarily immunized a narrow class of persons and closed Wyoming courts to persons injured by the immunized class in contravention of article I, section 8[7] and article III , section 27[8] of the Wyoming Constitution.[9]

BACKGROUND

Limitation of Action Statutes and Judicial Review

By its express terms Section 1-3-111 of the Wyoming Statutes bars claims for design and construction defects when those defects surface and cause injury to persons or property more than ten years following substantial completion of the structure.[10] This statute, in contradistinction to other statutes of limitations, contains no provision for running the limitations period "after the cause of action accrues."[11] The ten year time period simply begins to tick from the date the construction is substantially completed. If the defect has not surfaced within ten years from that date or within a one year grace period, the builder and designer of the structure are immune from suit.[12] Consequently, an action may be time-barred before any damage has occurred or a right to sue even exists.

6. Brief for Appellees at 3-4, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).
7. WYO. CONST. art. I, § 8, provides:
   All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay.
8. WYO. CONST. art. III, § 27 provides in pertinent part:
   The legislature shall not pass local or special laws in any of the following enumerated cases . . . . granting to any corporation, association or individual . . . . any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable no special law shall be enacted.
9. Phillips v. ABC Builders, Inc., *supra* note 1, at 831.
10. WYO. STAT. § 1-3-111 (1977).
11. *Compare* WYO. STAT. § 1-3-111 *with* WYO. STAT. §§ 1-3-103, 1-3-105, 1-3-108, *and* 1-3-109 (1977).
12. WYO. STAT. § 1-3-111 (1977).

A special statute of limitations indicates legislative disfavor of a specific type of action.[13] The ten-year-from-completion statute[14] is a special statute of limitations which indicates legislative disapproval of actions against builders initiated long after completion of improvements to real property, long after the owner has been in total control and innumerable external forces may have intervened.[15] Under these circumstances it is in the public interest to terminate liability at a definite point in time.[16] The ten year statute of limitations, then, is a prophylactic measure taken by the legislature to lessen a builder's exposure to extended liability resulting from the growth of implied warranties and the abrogation of the completed and accepted rule.[17]

The Wyoming Supreme Court has not previously construed the subject statute, a 1973 enactment,[18] nor has it previously ruled on the constitutionality of other statutes of limitations. However, the general proposition that statutes of repose are pragmatic devices that foreclose stale claims, prevent the waste of judicial resources, and spare citizens from a defense prejudiced by the lapse of considerable time is accepted in Wyoming jurisprudence.[19] Such statutes express legislative policy decisions to control the right to litigate, and they must be recognized by the courts.[20] Limitation of actions statutes are public policy legislation largely subject to legislative control. They do not destroy claimant's rights; rather, they foreclose his remedies.[21] The statutes find their justification not in theory, but in the deepest instinct of man that after a significant lapse of time, the defendant has acquired the superior right.[22]

13. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1180, 1186 (1950).
14. WYO. STAT. § 1-3-111 (1977).
15. *See* 1975 WISC. SESS. LAWS Ch. 335, § 1 for an express declaration of such a policy by the Wisconsin legislature.
16. *Id.*
17. *See generally* Note, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U. L. REV. 361 (1969). For a discussion of the demise of caveat emptor in defective home cases, *see* Note, *Partial Death of Caveat Emptor in Wyoming*, 11 LAND & WATER L. REV. 633 (1976).
18. 1973 WYO. SESS. LAWS Ch. 82, § 1.
19. Duke v. Housen, 589 P.2d 334, 340 (Wyo. 1979).
20. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
21. *Id.*
22. Holmes, *The Path of the Law*, 10 HARV. L. REV. 476-7 (1897).

Section 1-3-111 of the Wyoming Statutes singles out builders and designers of improvements to real property and affords them special treatment—complete immunity from suit ten years after they perform their services.[23] For this reason, the statute may be attacked as class or special legislation.[24] A statute of limitations that applies to a specific class of individuals may be a valid general law as opposed to an invalid special law if it passes a two-part test. First, the classification must have a reasonable basis.[25] Second, the statute must operate uniformly on all within the class.[26]

> In order to constitute a general law, as opposed to a special law, there must be some distinguishing peculiarity which gives rise to the necessity for the law as to the designated class. A mere classification for the purpose of legislation without regard to such necessity is special legislation condemned by the constitution. It is not what a law includes that makes it special but what it excludes.[27]

Application of the two-part rational relationship test generally results in deference to the legislature, because the legislature is presumed to have determined that different conditions rendered the classification proper.[28] If any state of facts can be conceived which sustain a classification, the court assumes those facts,[29] because a statute is clothed with a presumption of constitutionality,[30] and doubts are resolved in favor of constitutionality.[31]

In short, a statutory classification made for a legitimate reason results in a valid general law, while a statutory classification without a legitimate reason results in a special law subject to constitutional attack under article III, section 27 of the Wyoming Constitution.[32]

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23. WYO. STAT. § 1-3-111 (1977).
24. *See* 2 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 40.04 (4th ed. 1973).
25. Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351, 1356 (Wyo. 1978).
26. *Id.*
27. May v. City of Laramie, 58 Wyo. 240, 131 P.2d 300, 306 (1942).
28. Ludwig v. Harston, 65 Wyo. 134, 197 P.2d 252, 257 (1948).
29. Nickelson v. People, 607 P.2d 904 (Wyo. 1980).
30. Nehring v. Russell, 582 P.2d 67, 74 (Wyo. 1978).
31. Washakie County School Dist. No. One v. Hershler, 606 P.2d 310, 319 (Wyo. 1980).
32. WYO. CONST. art. III, § 27.

Limitation of Action Statutes and Judicial Review in Other Jurisdictions

The ten-year-from-completion statute applicable in Wyoming to construction defect actions[33] is typical of similar statutes enacted in at least forty-two states.[34] These statutes have limitations periods ranging from four to twenty years.[35] The constitutionality of these statutes has been tested in approximately half of these jurisdictions.[36] The tally on constitutionality before *Phillips*[37] was ten courts for, nine against, one uncertain, and two avoiding the question.[38]

Skinner v. Anderson is the leading case on unconstitutionality.[39] In that case an architect had failed to provide a home with ventilation in the air conditioning machinery room resulting in the asphyxiation deaths of the occupants.[40] The architect invoked the protection of the special statute of limitations which barred construction defect actions four years after performance of the services.[41] The Illinois court found that the statute arbitrarily immunized builders and architects and denied protection to others similarly situated, landowners and materialmen, who themselves could be sued after four years, but who could not seek indemnity from the protected class.[42]

Saylor v. Hall takes a position, not widely accepted,[43] that the limitations statute applicable in construction defect cases is unconstitutional because it abolishes the injured party's negligence action before it legally exists, thereby denying open access to the courts.[44] In prior decisions the

33. WYO. STAT. § 1-3-111 (1977).
34. Phillips v. ABC Builders, Inc., *supra* note 1, at 825. For a summary of these statutes in the various jurisdictions, *see* Knapp & Lee, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 ST. LOUIS U. L. J. 351 (1979).
35. *Id.* at 824.
36. Cases are collected in Annot., 93 A.L.R. 3d 1242 (1979).
37. Phillips v. ABC Builders, Inc., *supra* note 1.
38. *Id.* at 825-830. Annot., 93 A.L.R. 3d 1242 (1979).
39. Skinner v. Anderson, 38 Ill.2d 455, 231 N.E.2d 588 (1967) [Hereinafter cited in text as *Skinner*].
40. *Id.* at 589.
41. *Id.*
42. *Id.* at 591.
43. Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979) is the only other case subscribing to the *Saylor* point of view.
44. Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973) [hereinafter cited in text as *Saylor*].

Saylor court had construed the Kentucky Constitution to mean that a wrongful death action was a constitutionally protected right of action which the legislature could not abolish.[45]

A third view, that the special statute of limitations unconstitutionally denies equal protection of the law,[46] essentially mirrors the *Skinner*[47] special law argument.

The leading proponent for constitutionality, *Freezer Storage, Inc. v. Armstrong Cork Co.*, finds that a real distinction exists between the protected class of builders and the unprotected landowners and suppliers and holds the statute of limitations to be a valid general law.[48] Several factors provide a rational basis for the statute: (1) builders have broader liability than owners and suppliers; (2) builders have no control over the premises after completion and relinquishment to the owner; (3) builders have unique quality control problems; and (4) intervening acts of nature and man affect the structure through time.[49]

THE PHILLIPS CASE

The *Phillips* court found equal authority in other jurisdictions for and against the constitutionality of a statute of repose like Section 1-3-111 of the Wyoming Statutes.[50] The court extensively chronicled both points of view[51] and decided to follow the view that such a statute bestowed a discriminatory class privilege rather than the countervailing view that it did not.[52]

The court emphasized the *Skinner*[53] rationale that the arbitrary immunity conferred on builders and architects, and denied to others similarly situated, the landowners and

45. *Id.* at 222.
46. Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973).
47. Skinner v. Anderson, *supra* note 38.
48. Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715, 719 (1978)
49. *Id.* at 718.
50. WYO. STAT. § 1-3-111 (1977).
51. Phillips v. ABC Builders, Inc., *supra* note 1, at 825-830.
52. *Id.* at 829.
53. Skinner v. Anderson, *supra* note 39.

suppliers, was not reasonably related to appreciable differences between the classes based on the type of service performed.[54] By virtue of Kentucky[55] and Florida[56] case authority, but no Wyoming authority, the subject statute was said to abort a negligence action before it was conceived, denying the injured party open access to the courts.[57] From this reasoning the court held that the statute *sub judice* was not a statute of limitations at all, but an unconstitutional grant of immunity from suit and, as a special law, it must fall. It ran afoul, for good measure, of not one but two constitutional provisions—the open court mandate and the special law prohibition.[58]

Under the rational relationship test traditionally applied by the court to statutory classifications,[59] this statute of limitations could withstand constitutional scrutiny and be found a general law as ten state courts have found.[60] And, there is no apparent basis in Wyoming law for the invocation of the article I, section 8 open court mandate in this particular context.[61] The Kentucky and Florida cases on which the Wyoming Supreme Court relied are founded on prior judicial recognition in those states of a constitutionally protected right of access to the courts for certain negligence actions.[62] Such a right of access has not been recognized in Wyoming.[63]

54. Phillips v. ABC Builders, Inc., *supra* note 1, at 826, 830.
55. Saylor v. Hall, *supra* note 44.
56. Overland Construction Co., Inc. v. Sirmons, *supra* note 43.
57. Phillips v. ABC Builders, Inc., *supra* note 1, at 831.
58. *Id.*
59. Mountain Fuel Supply Co. v. Emerson, *supra* note 25.
60. *See* Annot., 93 A.L.R. 3d 1242 (1979) and Phillips v. ABC Builders, Inc., *supra* note 1, at 825-830.
61. WYO. CONST. art. I, § 8 has been construed primarily in the sovereign immunity context. *See* Worthington v. State, 598 P.2d 796, 801 (Wyo. 1979). It has been considered where there was delay in scheduling entry of judgment and trial, Mott v. England, 604 P.2d 560 (Wyo. 1979), and where court proceedings were closed to the public, Williams v. Stafford, 589 P.2d 322 (Wyo. 1979). Significantly, in Nehring v. Russell, *supra* note 30, the guest statute was held unconstitutional under WYO. CONST. art. I, § 34, and no mention was made of a right of access to the courts which the legislature could not abolish.
62. Saylor v. Hall, *supra* note 44; Overland Construction Co., Inc. v. Sirmons, *supra* note 43.
63. *See* note 61, *supra.*

MOXLEY TIPS THE SCALES

The *Phillips* court prefaces its constitutional analysis with a discussion of *Moxley v. Laramie Builders, Inc.*[64] This dictum is the keystone of the court's finding of unconstitutionality.

The ten year statute of limitations in construction defect cases[65] is doomed in *Phillips*[66] because it directly conflicts with the court's expansion of builder's liability in *Moxley*.[67] In *Moxley*, second purchasers of an eighteen-month-old home sued the builder when the home's electrical wiring system malfunctioned. The court held that an implied warranty of habitability, first recognized in *Tavares v. Horstman*,[68] extends to subsequent purchasers of a home for a reasonable time, that the negligent design and construction action can be pursued by subsequent purchasers against the builder in the absence of privity, and that builders, as well as builder-vendors, are legally accountable for their work.[69] The duration of the builder's liability is to be measured by a standard of reasonableness,[70] apparently to be determined ad hoc by the trier of fact. The legislature's statutory limitation of the builder's liability to ten years from substantial completion of the home[71] collides head-on with the judicial formulation of a time period based on reasonableness.[72] The ten year statute of limitations[73] conflicts with the *Moxley* imperative on reasonableness,[74] and constitutional arguments aside, this effectively sounds the statute's death knell in *Phillips*.[75]

Consequently, *Phillips'*,[76] importance is not limited to the narrow finding that a statute of limitations may con-

64. Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979). [hereinafter cited in text as *Moxley*].
65. WYO. STAT. § 1-3-111 (1977).
66. Phillips v. ABC Builders, Inc., *supra* note 1.
67. Moxley v. Laramie Builders, Inc., *supra* note 64.
68. Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975) [hereinafter cited in text as *Tavares*].
69. Moxley v. Laramie Builders, Inc., *supra* note 64, at 736.
70. *Id.*
71. WYO. STAT. § 1-3-111 (1977).
72. Moxley v. Laramie Builders, Inc., *supra* note 64, at 736.
73. WYO. STAT. § 1-3-111 (1977).
74. Moxley v. Laramie Builders, Inc., *supra* note 64, at 736.
75. Phillips v. ABC Builders, Inc., *supra* note 1.
76. *Id.*

stitute an unconstitutional special law. Its sweep is considerably broader. *Phillips*[77] forecloses the builder's only certain statutory defense, and it expands once again the homeowner's rights and remedies as against the builder. It expands rights and remedies by eliminating a technical barrier against suits involving older homes.

Phillips[78] is consonant with the developing homeowner protection law begun in *Tavares*[79] and extended in *Moxley*.[80] *Tavares* involved a one-year-old home;[81] *Moxley*, an eighteen-month-old home.[82] In *Phillips*, the home was nine years old in a suit initiated more than ten years after the home was built.[83] The *Phillips* court implicitly stated that warranties on some parts of a home last considerably longer than ten years.[84] With the trilogy of cases *Tavares-Moxley-Phillips*, builders in Wyoming are liable to a heretofore unprecedented degree. *Phillips*[85] opens the floodgates to litigation involving older homes without setting lines of demarcation, leaving serious questions unanswered as to the duration of the builder's liability in such cases.

THE AFTERMATH OF PHILLIPS

Constitutionality of Other Statutes of Limitations

The malpractice statute of limitations is the one other statute of limitations that classifies on its face.[86] The question arises whether this statute is constitutionally suspect after

77. *Id.*
78. *Id.*
79. Tavares v. Horstman, *supra* note 68.
80. Moxley v. Laramie Builders, Inc., *supra* note 64.
81. Tavares v. Horstman, *supra* note 68.
82. Moxley v. Laramie Builders, Inc., *supra* note 64.
83. Phillips v. ABC Builders, Inc., *supra* note 1, at 822-23.
84. *Id.* at 824.
85. *Id.*
86. WYO. STAT. § 1-3-107 (1977), provides in relevant part:
    (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
        (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
            (A) Not reasonably discoverable within a two (2) year period; or
            (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

Phillips.[87] The two year malpractice statute,[88] markedly similar in purpose to the ten year statute protecting builders and architects,[89] is of recent vintage,[90] provides immunity from suit two years after the services are rendered,[91] and was a response to what legislators saw as increasing liability on doctors and health care services with attendant rising insurance rates.[92]

The malpractice statute of limitations,[93] though akin to the statute stricken in *Phillips*,[94] may nevertheless be a valid general law. It has a provision for accrual of the action with discovery of the injury,[95] and this may be the saving distinction which the *Phillips* statute lacked. Or, it may well be that the ten year limitation of action in construction defect cases,[96] is inconsistent with the developing homeowner protection law and must yield, while the malpractice statute of limitations[97] is consistent with an antipathy toward malpractice suits and can stand.

However, it is not clear that a real justification exists for conferring special two year statute of limitations protection on professionals who render services, or for singling out for special protection licensed professionals and health care services, when unlicensed nonprofessionals who render services[98] are not accorded favored treatment. The latter class must labor under the more lengthy period of liability provided in the general statute of limitations.[99] The malpractice statute, enacted in 1976,[100] has not been construed. Insofar as it affords arbitrary protection to an elite class of licensed professional and health care services, it is arguably

87. Phillips v. ABC Builders, Inc., *supra* note 1.
88. WYO. STAT. § 1-3-107 (1977).
89. WYO. STAT. § 1-3-111 (1977).
90. 1976 WYO. SESS. LAWS Ch. 18, § 1.
91. WYO. STAT. § 1-3-107 (1977).
92. Note, *Medical Liability and Insurance Improvement Act of Texas: The New Legislative Procedure for Amputation of Patient's Rights*, 30 BAYLOR L. REV. 481 (1978).
93. WYO. STAT. § 1-3-107 (1977).
94. Phillips v. ABC Builders, Inc., *supra* note 1.
95. WYO. STAT. § 1-3-107 (1977).
96. WYO. STAT. § 1-3-111 (1977).
97. WYO. STAT. § 1-3-107 (1977).
98. For example, builders, repairmen, etc.
99. WYO. STAT. § 1-3-105 (1977).
100. 1976 WYO. SESS. LAWS Ch. 18, § 1.

an untenable special law after *Phillips*.[101] To the extent that it impairs the operation of the discovery rule and runs the two year period from the date the services are rendered, it is manifestly unacceptable under the *Phillips* rationale—that a statute of limitations cannot abolish an action before it exists.[102]

The constitutionality of certain other limitation of action statutes is also questionable. For instance, a special statute of repose for products liability actions may not be viable in Wyoming after *Phillips*.[103] Such a statute generally uses the date the product is delivered to the consumer to commence the limitations period, which runs for a set number of years after delivery.[104] Such a statute immunizes products manufacturers and designers and closes the courts to the injured party's action before it accrues, all in derogation of *Phillips*.[105]

Uncertainty Regarding the Applicable Statute of Limitations in Home Defect Cases

The immediate practical significance of *Phillips*[106] is clear. Suits against builders are not automatically barred if the home is ten or more years old. Now, owners of homes over ten years old can and should sue on the twin theories of breach of implied warranty of habitability and negligent design and construction, if latent defects have recently surfaced. The sole criteria by which to measure the duration of the builder's liability is the reasonableness standard

101. Phillips v. ABC Builders, Inc., *supra* note 1.
Suppose a homeowner with a collapsing home sues the architect for negligent design and the builder for negligent construction 2½ years after the defect manifests itself. The architect can get immunity invoking the protection of the two year malpractice statute, while the builder, who renders a nonprofessional service, remains suable under the general statute of limitations which allows four years for tort actions. This type of uneven result may be impermissible under the *Phillips* rationale. The four year tort statute of limitations, WYO. STAT. § 1-3-105 (1977), could be applied evenhandedly to all tortfeasors, professionals and nonprofessionals alike, to avoid this disparate result.
102. *Id.*
103. *Id.*
104. See IND. CODE ANN. § 34-4-20A-5 (Burns) (Supp. 1980). For a list of current statutes, *see* Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 BAYLOR L. REV. 137, 144 n. 67 (1980).
105. Phillips v. ABC Builders, Inc., *supra* note 1.
106. *Id.*

iterated in *Moxley*[107] and reiterated in *Phillips*.[108] The precise duration of the builder's liability is left unanswered in *Phillips*,[109] and this leaves a gap in Wyoming homeowner protection law which needs explication.

With the ten-year-from-completion statute of limitations[110] out of the picture, it is uncertain what statute of limitations applies to the implied warranty of habitability claim. The basic question is whether the breach of warranty claim in home defect cases is a tort or a contract action, governed by a tort or a contract statute of limitations. Resolution of this issue is crucial to the builder. If the warranty claim can be time-barred under a contract or sales theory, the homeowner is left with his negligence action which is harder to prove, especially after the lapse of time.

A short statute of limitations, and one the builder might argue is applicable, is Section 34-21-299.5 of the Wyoming Statutes.[111] The sales statute of limitations is a "sane and workable statutory scheme", because a warranty is breached if at all at the time of delivery.[112] By analogizing the house warranty to warranties on consumer goods and applying this statute of limitations, the homeowner's implied warranty claim could be time-barred four years after the home is delivered to the homeowner. Alternatively, the warranty action could be barred ten years from the date of delivery under the general contract statute of limitations.[113] However, it is apparent in the *Phillips-Moxley* line of cases that the court is taking a liberal stand in home defect cases and

107. Moxley v. Laramie Builders, Inc., *supra* note 64, at 736.
108. Phillips v. ABC Builders, Inc., *supra* note 1, at 824.
109. *Id.*
110. WYO. STAT. § 1-3-111 (1977).
111. WYO. STAT. § 34-21-299.5 (1977), reads in part:
(a) An action for breach of any contract for sale must be commenced within four (4) years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one (1) year but may not extend it.
(b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
112. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-9 (2d ed. 1980).
113. WYO. STAT. § 1-3-105 (1977).

is not likely to take a restrictive view of the applicable statute of limitations.

A liberal reading of the applicable limitations statute, and the one homeowners should opt for, would run the contractual warranty claim ten years after discovery of the latent defect and the negligence claim four years after discovery under the general statute of limitations, Section 1-3-105 of the Wyoming Statutes.[114] The discovery rule has been applied in Wyoming in a case involving the professional negligence of an engineer who rendered services on a city water project.[115] There, the statute of limitations was said to run, not from the completion of the engineer's services, but from the discovery of the defect, when the injured party knew or had reason to know that the cause of action existed.[116] The genesis of this rule may be *Town Council of Town of Hudson v. Ladd*, where the court adopted an equitable approach to the running of the statute of limitations.[117] If an act is uncertain to cause injury, the action accrues and the statute begins to run at the time damage is sustained.[118] It is likely that the discovery rule will be applied in home defect cases, since the foundation of the homeowner's claim is his discovery of a latent defect.

Currently, the statute of limitations applicable to the implied warranty of habitability claim is uncertain. "The certainty of fixed time periods clearly serves the interests of everyone, for even plaintiffs benefit from a sure knowledge of the time after which a suit would be futile."[119]

114. WYO. STAT. § 1-3-105 (1977). This writer feels the better view is that the implied warranty of habitability is a form of strict liability in tort, and that a tort statute of limitations, four years from discovery of the latent defect, should apply. The implied warranty here does not "arise out of or depend upon any contract, but is imposed by the law, in tort, as a matter of policy." *See* Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1134 (1960).

115. Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970).

116. *Id.* at 304.

117. Town Council of Town of Hudson v. Ladd, 37 Wyo. 419, 262 P. 703, 705 (1928).

118. *Id.*

119. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950).

Phillips Invites a Legislative Response

In at least three states where courts have stricken statutes of repose similar to Section 1-3-111 of the Wyoming Statutes,[120] state legislatures have retaliated by re-enacting nearly identical replacement statutes again restricting builders' liability. The new Illinois statute is a rule of evidence creating a presumption of reasonable care if the building services have not caused injury or damage for six years.[121]

The Hawaii legislature has altered its displaced statute, declared unconstitutional on equal protection grounds,[122] to include owners and materialmen.[123] Similarly, the Wisconsin legislature inserted land surveyors and materialmen, classes excluded from the earlier statute, and added a savings clause without appreciably changing the form or the substance of the original statute of limitations.[124] Blatantly, legislatures continue to assert their dislike for construction defect actions through the use of restrictive statutes of limitations. This gives rise to an unproductive tug-of-war between court and statehouse.

The concurrence in *Phillips* suggests that if the ten year statute of limitations were all-inclusive it would be constitutional.[125] This may be an appeal to the legislature to correct the underinclusiveness and rehabilitate the statute. The dual finding of unconstitutionality under article I, section 8[126] and article III, section 27[127] of the Wyoming Constitution seems to be a calculated move by the majority to discourage a fix-it statute of the type re-enacted in other states. A replacement statute of limitations, then, is probably not the solution in Wyoming.

The Minnesota legislature has taken a more positive step to provide concrete guidelines in home defect cases, by defining statutory housing warranties, the effective dates

120. WYO. STAT. § 1-3-111 (1977).
121. ILL. ANN. STAT. Ch. 51, § 58 (Smith-Hurd) (Supp. 1979).
122. Fujioka v. Kam, *supra* note 46.
123. HAW. REV. STAT. § 657-8 (Supp. 1979).
124. WIS. STAT. ANN. § 893.155 (West Supp. 1979).
125. Phillips v. ABC Builders, Inc., *supra* note 1, at 831 (concurring opinion).
126. WYO. CONST. art. I, § 8.
127. WYO. CONST. art. III, § 27.

of the warranties, the termination dates, and applicable defenses, such as lack of notice, waiver, etc.[128] Such legislation would have the salutary effect of defining the respective rights and obligations of owners and builders, delineating time limits, promoting settlement, and protecting both sides fairly.

The expansion of the rights and remedies available to homeowners is a welcome development, but the builder

128. MINN. STAT. ANN. § 327A.01-327A.07 (West Supp. 1979), provides in part:
327A.02 Statutory warranties
Subdivision 1. In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that:
(a) During the one year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards;
(b) During the two year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems; and
(c) During the ten year period from and after the warranty date, the dwelling shall be free from major construction defects.
Subdivision 2. The statutory warranties provided in this section shall survive the passing of legal or equitable title in the dwelling to the vendee.
327A.03 Exclusions
The liability of the vendor under sections 327A.01 to 327A.07 is limited to the specific items set forth in sections 327A.01 to 327A.07 and does not extend to the following:
(a) Loss or damage not reported by the vendee to the vendor in writing within six months after the vendee discovers or should have discovered the loss or damage;
(b) Loss or damage caused by defects in design, installation, or materials which the vendee supplied, installed, or had installed under his direction;
(c) Secondary loss or damage such as personal injury or property damage;
(d) Loss or damage from normal wear and tear;
(e) Loss or damage from normal shrinkage caused by drying of the dwelling within tolerances of building standards;
(f) Loss or damage from dampness and condensation due to insufficient ventilation after occupancy;
(g) Loss or damage from negligence, improper maintenance or alteration of the dwelling by parties other than the vendor;
(h) Loss or damage from changes in grading of the ground around the dwelling by parties other than the vendor;
(i) Landscaping or insect loss or damage;
(j) Loss or damage from failure to maintain the dwelling in good repair;
(k) Loss or damage which the vendee, whenever feasible, has not taken timely action to minimize;
(l) Loss or damage which occurs after the dwelling is no longer used primarily as a residence;
(m) Accidental loss or damage usually described as acts of God, including, but not limited to: fire, explosion, smoke, water escape, windstorm, hail or lightning, falling trees, aircraft and vehicles, flood, and earthquake, except when the loss or damage is caused by failure to comply with building standards;
(n) Loss or damage from soil movement which is compensated by legislation or covered by insurance;
(o) Loss or damage due to soil conditions where construction is done upon lands owned by the vendee and obtained by him from a source independent of the vendor.

should not be given shortshrift. The builder should know three things: (1) when the liability against him commences and ends; (2) what his responsibilities are under the law; and (3) what concomitant duties the homeowner bears. Considering the likely post-*Phillips* proliferation of lawsuits involving older homes and the unprecedented liability thrust on builders, the answers to these questions should not be doled out piecemeal by court rule.

Legislative guidelines on home warranties would improve both the nebulous concept of liability based on reasonableness[129] and the inflexibility of the ten year statute of limitations[130] or its possible successor. Such legislation would define the perimeters of the builder's liability, alleviate uncertainty and promote commercial stability. There has been a legislative response in other states following a *Phillips*-type decision and some response, hopefully an ameliorative one, may be anticipated in Wyoming.

CONCLUSION

The statute of limitations immunizing architects and builders from suit ten years after completion of improvements to real property is an unconstitutional special law. Statutes of limitations which arbitrarily protect discrete classes and abolish actions before they legally exist, like the malpractice statute of limitations or statutes of repose in products liability cases which have been passed in other states, are suspect after *Phillips*.[131]

Practically speaking, *Phillips*[132] removes a technical barrier from suits involving homes and other buildings more than ten years old. Owners of older homes can and should sue builders and designers if latent defects have recently surfaced, regardless of the age of the home.

The running of the statute of limitations in home defect cases is uncertain. To remedy this, the implied warranty

129. Moxley v. Laramie Builders, Inc., *supra* note 64, at 736.
130. WYO. STAT. § 1-3-111 (1977).
131. Phillips v. ABC Builders, Inc., *supra* note 1.
132. *Id.*

action should be labelled a tort or a contract, with an identifiable statute of limitations and with due allowance for the operation of the discovery rule.

The gradual liberalization of homeowner rights and remedies, begun in *Tavares*[133] and continued in *Moxley*,[134] is extended again in *Phillips*.[135] The court suggests that ten years is not long enough for warranties on some parts of a house. The *Phillips* court impliedly recognizes the incongruity of extending a warranty to the second buyer in *Moxley*[136] and then arbitrarily limiting that warranty to a ten year period from the date of completion, when the court had explicitly committed itself to a reasonableness standard. The protection granted in *Moxley*[137] would be paper protection, if the immutable ten year statute of limitations were to prevail in *Phillips*.[138] *Phillips*[139] is a logical extension of *Tavares*[140] and *Moxley*[141] and the three cases together are a cohesive trilogy which gradually expand the homeowner's rights and remedies and recognize that a home is not built to last ten years and one day.

Yet, with the ten year statute of limitations stricken and homeowners' rights expanded to an unprecedented degree, homeowner suits involving older homes may proliferate post-*Phillips* without discernible limits. Legislatures in other states have responded with replacement statutes of limitations, which again restrict construction defect actions. In Wyoming a more viable solution is not another statute of limitations but legislative guidelines defining statutory warranties. This legislation could foster policies of repose and predictability in this area of the law which Section 1-3-111 of the Wyoming Statutes[142] failed to provide.

CAROL STATKUS

133. Tavares v. Horstman, *supra* note 68.
134. Moxley v. Laramie Builders, Inc., *supra* note 64.
135. Phillips v. ABC Builders, Inc., *supra* note 1.
136. Moxley v. Laramie Builders, Inc., *supra* note 64.
137. *Id.*
138. Phillips v. ABC Builders, Inc., *supra* note 1.
139. *Id.*
140. Tavares v. Horstman, *supra* note 68.
141. Moxley v. Laramie Builders, Inc., *supra* note 64.
142. WYO. STAT. § 1-3-111 (1977).