Nailing Down the Deadlines: A Modified Peremption Scheme for Claims Against Design Professionals

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INTRODUCTION

A newlywed couple empties their combined life savings into the construction of their first family home in Baton Rouge.¹ The couple hires a family member as the general contractor who assures them the home will be perfect. The general contractor immediately hires a new architect firm in Baton Rouge to create the plans for this project and enters into a subcontract with a reliable construction company to build the home according to the architect’s plans.² The contractors complete the work on the home, and the couple’s attorney files acceptance of this work into the East Baton Rouge Parish mortgage records on January 1, 2014.³ Peremption expires on any claims arising from the construction on the home on January 1, 2019. Almost five years later in December, the couple sees something that horrifies them. The architect’s poor design caused the foundation to shift, and cracks emerge in the walls of the home making the couple’s dream home no longer fit to live in. On December 23, 2018, nine days before the peremptive period expires, the newlyweds reluctantly bring suit against the only company they have ever had contact with—the family member who is the general contractor of the project. The general contractor does not receive notice until January 5, 2019.⁴ Two months later, the general contractor files an answer and brings suit for indemnity against the two entities responsible for the work: the architect and the subcontractor. The suit against the subcontractor is timely, but the

¹ The parties negotiated the contract and completed the work in Baton Rouge.
² This process is simplified for clarity in the hypothetical. This fact pattern is modeled closely to Peck v. Richmar Constr. Inc., 144 So. 3d 1042 (La. App. 1st Cir. 2014) case, but the dates and locations have been altered to avoid retroactivity analysis and to illustrate the Louisiana circuit split.
³ Filing acceptance of the work starts to clock on a five year peremptive period on claims against the architect under LA. REV. STAT. ANN. § 9:5607 (Supp. 2014) and for the family contractor and the subcontractor under LA. REV. STAT. ANN. § 9:2772 (Supp. 2014).
⁴ Note that the five year peremptive period expired on January 1, 2019.
suit against the architect is late by two months. With the architect removed, the only possible outcome is one of two sad scenarios. Either the newlyweds will not be able to fully recover and rebuild their dream home or the general contractor will have to pay for the architect’s mistakes.

In construction cases, the timeliness of a third party claim for indemnity is contingent on both the profession of the defendant and where the plaintiff files the suit. This moving target effect has roots in Louisiana’s adoption of a single peremptive statute for construction cases in lieu of the previously controlling liberative prescription statutes. Louisiana instituted peremption to create a shorter and fixed period of time for the possibility of a design professional to be sued from a design, which has several positive consequences—judicial efficiency, higher quality of evidence in construction cases, positive economic impact and heightened creativity in the work of design professionals.

Despite the significant reasons supporting the use of peremptive statutes, peremption is often criticized for being unfair and confusing. The natural consequences of peremption are harsh because the expiration of peremption can extinguish claims before a would be plaintiff even realizes a claim exists. For example, in a construction case, a general contractor’s third party claim for indemnity can be extinguished by peremption before the contractor receives notice of the suit. Peremption causes confusion among courts because peremptive periods are

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6 See infra, II. LOUISIANA’S ADOPTION OF PEREMPTION: THIRD PARTY CLAIMS FOR INDEMNITY.


8 Sally Brown Richardson, Buried by the Sands of Time: The Problem with Peremption, 70 L.A. L. REV. 1179, 1194 (2010) [hereinafter Richardson, Buried by the Sands of Time].

9 Id at 1180.

10 Id.

11 See infra II. LOUISIANA’S ADOPTION OF PEREMPTION: THIRD PARTY CLAIMS FOR INDEMNITY.
often enacted without addressing conflicting procedural law, resulting in ambiguities.\textsuperscript{12} These ambiguities in turn also create space for interpretation, allowing courts to make inequitable and conflicting jurisprudence.\textsuperscript{13} In Louisiana, ambiguities have manifested in a circuit split over whether Louisiana Code of Civil Procedure article 1067 applies to extend peremptive periods for third party claims for indemnity. Louisiana legislators have attempted to patch these problems with new statutes.\textsuperscript{14} Instead of mitigating the unfairness of peremption,\textsuperscript{15} new laws have created different problems by merely shifting the confusion from one topic to another.\textsuperscript{16} Any solution to these problems must account for the confusion caused by conflicting jurisprudence, the injustice peremption creates, and the constructive effects that motivated Louisiana to adopt peremption in 1964.\textsuperscript{17}

Part I of this Comment examines the primary reasons supporting the use of peremption and other strict time limitation periods for claims against design professionals. Part II focuses on Louisiana, detailing the evolution of peremptive statutes in construction cases and explicating the current state of the law, including the analysis of how Louisiana’s amendment to the peremptive period for claims against contractors affects the peremptive period for design professionals. Part III exposes problems posed by Louisiana’s choice to employ a single peremptive period to encompass all claims in construction cases including third party claims for indemnity, and the failure of the mechanisms instituted by courts and the legislature to remedy those problems. Part IV takes a look outside of Louisiana in search of possible remedies utilized by other states to


\textsuperscript{13} \textit{See infra} III. \textsc{Problems Posed by Peremption in Louisiana}

\textsuperscript{14} Richardson, \textit{Buried by the Sands of Time}, supra note 8, at 1187.

\textsuperscript{15} Id. at 1194.

\textsuperscript{16} \textit{See infra}, III. \textsc{Problems Posed by Peremption in Louisiana}

\textsuperscript{17} Act No. 189, 1964 La. Acts 444 (adopting a “pre-emptive [sic] period”).
alleviate the unfair effects of time limitation statutes. Finally, Part V posits that two peremptive periods are better than one to soften the harsh effects of peremption, while exploring solutions to eliminate possible different and confusing outcomes among the courts. Part V concludes that the solution to these problems is not an “either or” proposition, but rather it is possible to be fair to all parties in suggesting an appropriate remedy.

I. REASONS SUPPORTING STRICT TIME LIMITATIONS IN CLAIMS AGAINST DESIGN PROFESSIONALS

Strict time limitations in construction statutes are now commonplace, with all but two states enacting statutes of repose (common law equivalent of peremption) to institute specific cut off dates for the exposure to liability. These precise cut off dates are useful, particularly for design professionals who would otherwise face exposure to liability indefinitely. This is because design professionals design buildings that are intended to last indefinitely. Without a firm cut off date for suits arising from construction cases, design professionals could face suit for a defect in a building for as long as that building is still standing. Avoiding that result has generally five conspicuous and desirable consequences—the prevention of the adjudication of stale claims, the infrequent manifestation of intervening and superseding causes, the stymying of meritless claims against design professionals, and the stimulus of positive economic and creative effects on the design professional industry.

18 Peremption, Black's Law Dictionary (9th ed. 2009) (“See statute of repose.”)
19 Strict time limitation periods refer to “statutes of repose” in all forty-nine states other than Louisiana. In Louisiana, these periods are called “peremptive periods.”
21 The term “design professionals” is broad and encompasses many professions. Louisiana defines design professionals as “No action for damages against any professional engineer, surveyor, engineer intern, surveyor intern…or any professional architect, landscape architect, architect intern…agent…professional interior designer…real estate developer relative to development plans which have been certified by a professional engineer or professional architect.” LA. REV. STAT. ANN. § 9:5607 (A) (Supp. 2014).
22 See, Tricker, Ebeler, & Kortum, Applicability of Statutes of Repose, supra note 20, at 5.
A. How Strict Time Limitations Prevent Exposure to Liability Indefinitely

A combination of two ideas explicates how strict time limitations stymie the design professional’s indefinite exposure to liability. First, design professionals are relatively unique in that they are responsible for designing specifications for buildings intended to last tens and hundreds of years.23 Every day a building exists, the greater the likelihood is that a defect will emerge in the building.24 Second, the difference between the predictable commencement of a strict time limitation as opposed to the commencement a loose time limitation makes the strict time limitation indispensable to achieving a temporal limit on liability.25 Strict time limitations often begin when the construction of the building is completed. Comparatively, loose time limitations begin when the owner knew or should have known about a defect in the building.26 For example, in the absence of a strict limitation period, a looser time limitation period of ten years applicable to a project completed in 1995 with a defect that manifested in 2010 exposes the contractor to liability until 2020—twenty-five years of exposure.27 A five year strict limitation period, which would have begun when the project was substantially completed, would have shielded the contractor from liability in 2000. Thus, it is clear how strict time limitations reduce the period of time a plaintiff can sue a design professional.

B. Five Reasons for the Desirability of Strict Time Limitations

Whereas it is simple to understand how strict time limitations shorten the period a design professional is susceptible to lawsuits, the motives behind strict time limitations are not as

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23 Id.
24 Id at 8.
25 Id at 9. That article contrasts the difference between statutes of limitation, the common law equivalent of liberative prescription, and statutes of repose.
26 See, II.A. VIEWING PEREMPTION THROUGH PRESCRIPTIVE LENSES.
27 This assumes the plaintiff had actual or constructive knowledge of the defect at that time, which starts the ten year prescriptive period in 2010.
conspicuous. First, strict time limitations prevent the adjudication of “stale” claims.\textsuperscript{28} This is
evidentiary concern and refers to claims that happened so long ago, litigants struggle to procure
sufficient evidence. Memories of the project predictably decay over time.\textsuperscript{29} Notes and documents
relating to the project are either harder to obtain or simply no longer exist.\textsuperscript{30} Additionally, the
standard of care design professionals used at the time the project was completed may be different
than current standards, and the past standard may be difficult to ascertain. Simply put, stale
claims are difficult to adjudicate because obtaining the necessary evidence to mount a proper
defense to a claim arising from work done twenty years ago is nearly impossible, which puts the
court in a precarious situation where decisions are made without all of the necessary facts.\textsuperscript{31}
Allowing a fixed and finite period of time for the existence of a claim incentivizes parties to keep
records during that time, reducing the possibility of a “stale” claim.

Second, having a shorter period for the possibility of liability makes the existence of a
superseding or intervening cause less likely.\textsuperscript{32} The architect hands blueprints to a general
contractor who hires subcontractors to build the building according to those specifications.
Consumers who live or work in the building built by the subcontractors are charged with the
preservation and maintenance of the building.\textsuperscript{33} As businesses fail and peoples’ lives change,
these buildings change ownership many times. From the time the architect designs the building
until a claim arises, an architect could have to defend a claim for defect in a building caused by

\textsuperscript{28} H. Bruce Shreves & James S. Holiday, Actions Against Contractors and Architects, LA. PRAC. CONSTR. LAW §
\textsuperscript{29} See, Tricker, Ebeler, & Kortum, Applicability of Statutes of Repose, supra note 20, at 7.
\textsuperscript{30} Id. at 5.
\textsuperscript{31} Michael J. Varnado & Jennifer E. Waggoner, Statutes of Repose—The Design Professional’s Defense to
Perpetual Liability, 10 ST. JOHN’S J. OF LEGAL COMMENT 697, 716 (1995) [hereinafter Varnado & Waggoner,
Statutes of Repose—The Design Professional’s Defense to Perpetual Liability].
\textsuperscript{32} Id at 715.
\textsuperscript{33} Id.
general contractors who negligently hired inept subcontractors or negligent owners of the building who failed to maintain the building properly.\textsuperscript{34}

Third, design professionals often fill the role of scapegoat in construction cases and consequently confront an unrelenting bombardment of meritless lawsuits.\textsuperscript{35} When a plaintiff files suit against a general contractor, it is usually within the contractor’s best interest to file a claim for indemnity against a design professional in order to preserve the chance of proving a faulty design later on in litigation.\textsuperscript{36} General contractors routinely file suit against the design professionals involved in the project both because it is financially sensible and many states enacted strict time limitations that apply to general contractors’ third party claims for indemnity.\textsuperscript{37} In fact, one in three design professional businesses face at least one lawsuit a year.\textsuperscript{38} That figure becomes more disquieting when one realizes that design professionals resolved almost forty percent of these claims without paying a judgment or settlement, which suggests that these claims are meritless.\textsuperscript{39} Still, defense costs are steep. The statistics suggest that design professionals are sued routinely and often without merit. This problem is exacerbated by the consistent excision of defenses historically available to design professionals.\textsuperscript{40} Currently, the best defense against this barrage of meritless litigation are time limitations.\textsuperscript{41}

Fourth, stymying long-term liability to professional designers has salient economic benefits both to design professionals and their liability insurers. The fear of liability causes

\textsuperscript{34} Id.
\textsuperscript{35} Id at 697.
\textsuperscript{36} Id at 719.
\textsuperscript{37} Id at 697.
\textsuperscript{38} Id at 699.
\textsuperscript{39} Id.
\textsuperscript{40} See e.g., Id. at 699-702 (detailing the history of liability of architects dating back to the Hammurabi Code).
\textsuperscript{41} Id. at 711.
design professionals to turn down over one billion dollars worth of work each year.\textsuperscript{42} Trepidation to accept new business finds roots in the barrage of meritless claims design professionals face.\textsuperscript{43} Additionally, liability insurance in the construction industry has “skyrocketed.”\textsuperscript{44} Having a fixed time for the possibility of liability allows insurers to calculate precise liability insurance premiums,\textsuperscript{45} leading to more manageable insurance costs for contractors and architects.\textsuperscript{46}

One might also consider how the fear of liability will affect society as a whole. History’s view of past civilizations often accounts for a society’s sophistication and prestige based on that civilization’s beautiful architecture and ingenious engineering. The Roman aqueducts and Gothic cathedrals—at one point in time, these only existed in the imaginations of men and women. It is strange to think of how a society’s laws determine what stays in the imagination and what becomes reality. Legal scholars believe that strict time limitations allay the fear of liability, which has a cognizable affect on the design profession’s creativity as a whole.\textsuperscript{47} In that sense, time limitation statutes for design professionals benefit the aesthetic sensibilities of the community at large.

II. \textbf{LOUISIANA’S ADOPTION OF PEREMPTION: THIRD PARTY CLAIMS FOR INDEMNITY}

Historically, determining the deadline to file a third party claim for indemnity in Louisiana has been troublesome for courts and practitioners, especially when the initial is filed late in the peremptive period.\textsuperscript{48} Louisiana adopted peremption, the civil law version of a strict time

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\textsuperscript{42} Id. at 698.
\textsuperscript{43} Id. at 697.
\textsuperscript{44} Varnado & Waggoner, \textit{Statutes of Repose—The Design Professional’s Defense to Perpetual Liability}, supra note 40, at 697.
\textsuperscript{46} Id. This is known as the long tail problem in the insurance industry.
\textsuperscript{47} Varnado & Waggoner, \textit{Statutes of Repose—The Design Professional’s Defense to Perpetual Liability}, supra note 40, at 704.
\textsuperscript{48} See, Richardson, \textit{Buried by the Sands of Time}, supra note 8, at 1180.
\end{flushright}
limitation, to remedy liberative prescription’s ineffectiveness to provide a reliable cut off date for the filing of negligence and contract claims against contractors and design professionals.\(^49\) However, these cut off dates have not been reliable as courts have disagreed over whether Louisiana Code of Civil Procedure article 1067, which can add up to ninety days to peremption to allow a defendant to file a third party claim for indemnity, applies to peremptive statutes.\(^50\) This issue first arose in cases involving the peremptive period for claims against contractors, Louisiana Revised Statutes 9:2772, which the legislature later amended to add the ninety day extension from article 1067.\(^51\) Currently, it is the omission of a similar amendment in section 9:5607, the peremptive period for claims against design professionals, that is the source of confusion. One can best understand this current disorientation of peremption law by following the logical progression that first explores basic indemnity concepts, the difference between prescription and peremption as they relate to indemnity, the historical relationship between sections 9:5607 and 9:2772, and finally, the conflicting jurisprudence on the issue of article 1067.

A. **Indemnity Generally**

The precarious aspect of peremption involves third party claims for indemnity. Indemnity claims in construction cases usually arise when a plaintiff sues a general contractor. Typically, the contractor has the option to file a third party claim for indemnity against the parties he contracted with to perform the actual work on the building—such as the subcontractors who

\(^{49}\) Boyer, *Determining Deadlines*, *supra* note 9, at 28.
\(^{50}\) *Id.*
\(^{51}\) *Id.*
installed the plumbing or the architects who designed the plans for the building. General contractors include indemnity agreements in subcontracts as a defense to liability. If anyone files suit against the contractor due to a defect in the construction, indemnity agreements can be raised as a defense for the contractor and allow him to recover all or a portion of the liability the contractor may incur.

“Indemnity in its most basic sense means reimbursement, and may lie when one party discharges a liability which another rightfully should have assumed.” A claim for indemnity often arises contractually and is commonly referred to as a “hold harmless” agreement. The indemnitor protects the indemnitee in that the indemnitor agrees to assume or alter the risk of liability. The indemnitee then will be liable to the indemnitee when the indemnitee has been “cast in judgment,” meaning that the indemnitee has lost a law suit and is now liable to the plaintiff.

B. Viewing Peremption Through Prescriptive Lenses

Indemnity claimants in construction cases must be wary of peremption, and that caution should be at its zenith when the peremptive period nears its expiration. The basic differences between the two doctrines highlights the disparate effects each time limitation period has on indemnity claims. Peremption and prescription share certain similarities. Peremption has even

53 Nassif v. Sunrise Homes, Inc. 739 So. 2d 183, 185 (La. 1999).
54 RONALD SCALISE, OBLIGATIONS § 11.27, in 6 LOUISIANA CIVIL LAW TREATISE (2d ed. 2001). Tort indemnity and implied indemnity also exists, but to delve into that area of law is the topic of another paper, and beyond the scope of this Comment. For the sake of clarity in this paper, assume that the claim for indemnity arises by convention between parties.
55 Id.
56 Reggio v. E.T.I., 15 So. 3d 951, 957 (La. 2008).
been referred to by the Louisiana Supreme Court as a “species of prescription,” and the Court defines the two species similarly. The Court defines liberative prescription, which would be considered a loose time limitation, as a “mode of barring actions as a result of inaction for a period of time,” and defines peremption as “a period of time fixed by the law for the existence of a right.” The end of a peremptive period is fixed because peremptive periods cannot be suspended, restarted, or renounced, whereas at the end of a prescriptive period, the claimant is merely prevented from bringing suit. The similarities end there with the two most important differences between peremption and prescription being the commencement date and the scope of the claims each time limitation period applies to.

1. Commencement of Peremption

The most salient difference between peremption and prescription is when the two periods actually begin to run. Peremption will commence in a construction case if the parties file acceptance of the completed work in the mortgage records of the parish where the building is located. Prescription, however, begins when one has a cause of action to sue, or put another way, when a party knows or should have known about an injury. The Court acknowledged this sentiment in Ebinger v. Venis Construction Corp.

57 Flowers, Inc. v. Rausch, 364 So. 2d 928, 931 (La. 1978).
58 LA. CIV. CODE art. 3447 (2014).
59 LA. CIV. CODE art. 3458 (2014).
60 LA. CIV. CODE art. 3461 (2014) (“Peremption may not be renounced, interrupted, or suspended.”).
61 Id. at 1279 (La. 2011).
64 Id. at 1286.
between peremption and prescription, we are mindful of the difference between the commencement of peremption and the accrual of a cause of action.\textsuperscript{65}

The cause of action in an indemnity claim, is when on party cast been “cast in judgment.”\textsuperscript{66} Being cast in judgment entails either losing a lawsuit or agreeing to a settlement.\textsuperscript{67} Therefore, prescription begins to run on a potential claimant’s claim for indemnity when that party has lost a lawsuit or entered into a compromise. Peremption however, begins to run on claims for indemnity at the same time it begins to run on the underlying claim.\textsuperscript{68}

2. The Scope of Peremption Includes All Claims Including Indemnity

Peremption begins before prescription in almost every instance, and the scope of the claims the peremption applies to is more encompassing. The nature of peremption is such that when the peremptive period expires, it destroys the right to file a lawsuit arising from the underlying claim altogether.\textsuperscript{69} This also includes claims for indemnity.\textsuperscript{70} Therefore, unlike prescription, peremption can commence without knowledge of an injury, or even an injury. This means peremption can destroy a right to bring a third party claim for indemnity before prescription starts.\textsuperscript{71} And if a plaintiff files suit against a contractor late in the peremptive period, peremption can extinguish a contractor’s third party claim for indemnity can before he receives notice of the suit.\textsuperscript{72}

\textsuperscript{65} Id.
\textsuperscript{66} See, Reggio v. E.T.I., 15 So. 3d 951, 957 (La. 2008) (Where the Louisiana Supreme Court held that a one year prescriptive period did not begin until the defendant actually sustained a loss.) In Ebinger v. Venus Const. Corp., 65 So. 3d 1279 (La. 2011), the defendant argued that the right to indemnity vests when the defendant noticed the damage, which was rejected by the Louisiana Supreme Court. \textit{Id} at 1286.
\textsuperscript{67} Reggio v. E.T.I., 15 So. 3d 951, 958 (La. 2008).
\textsuperscript{68} Ebinger v. Venus Const. Corp., 65 So. 3d 1279, 1286 (La. 2011), \textit{Id}.
\textsuperscript{69} \textit{Id}.
\textsuperscript{70} \textit{Id}.
\textsuperscript{71} \textit{Id} at 1287.
\textsuperscript{72} \textit{Id} at 1284 (holding a claim against a third party defendant was preempted before the right to file suit accrued). \textit{See generally}, Ebinger v. Venus Const. Corp., 995 So. 2d 1224 (La. Ct. App. 2008).
C. Evolution of Construction Law Statutes in Louisiana

Many consider it unfair that claims can be perempted before the claimant is made aware of the existence of an injury.73 Louisiana’s attempt at a solution to this inequity is Louisiana Code of Civil Procedure article 1067, which reads in pertinent part: “An incidental demand is not barred by prescription or peremption if it was not barred at the time the main demand was filed and is filed within ninety days of date of service of main demand….”74 Seemingly, this article would extend peremption by ninety days to allow a general contractor to file a third party claim for indemnity. Louisiana amended section 9:2772, the peremptive period for claims against contractors, to adopt this language and omitted a similar amendment to section 9:5607, the peremptive period for claims against design professionals.75 One can ascertain the significance of this omission only by observing the legislative history of the two statutes.

1. Section 9:2772—From 1964 to 2012

Louisiana first adopted peremption in 1964 when the legislature enacted section 9:2772, which assigned a ten year peremptive period to all claims arising out of a construction project, including claims against both contractors and design professionals.76 Currently, section 9:2772 is

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73 Richardson, Buried by the Sands of Time, supra note 8, at 1180.
74 LA. CODE OF CIV. PROC. art. 1067 (2013).
75 Id.
76 Act No. 189, 1964 La. Acts 444 (adopting a “pre-emptive [sic] period”). Interestingly, the legislature at the time failed to amend the prescriptive period continues to persist in the Louisiana Civil Code since 1825: “An action against a contractor or an architect on account of defects of construction, renovation, or repair of buildings and other works is subject to a liberative prescription of ten years.” LA. CIV. CODE art. 3500 (2014). In other words, the same claim still has both ten year prescriptive period and a five year peremptive period. The effect of the five year peremptive period is that peremption will expire before prescription runs every time, rendering the prescriptive period obsolete. See e.g., Reed v. City of Ville Platte, 619 So. 2d 165, 167 (La. Ct. App. 1993) (This exact issue was recognized and the court opined that the prescription issue was moot, a clear indication that the two time periods were not meant to work together). Even if the prescriptive period and peremptive period started on the same day, which is highly unlikely, the right to bring an action is destroyed by peremption five years before the end of the prescriptive period. Because peremption begins typically when acceptance of the work is filed by proper parties, peremption will almost always begin before prescription. Parties to the construction of a building would not file acceptance of the work if prescription began because prescription begins when the potential claimant is aware of a defect in the building. People who are aware of a defect in the building they have paid for, would not likely file
the most widely used statute in construction cases.\textsuperscript{77} In 1999, Louisiana whittled the peremptive period from ten to seven years.\textsuperscript{78} Not pleased with those results, the legislature made two drastic changes in 2003. First, section 9:2772 was amended to reduce the peremptive period from seven to five years.\textsuperscript{79} Second, the legislature enacted section 9:5607, which established a five year peremptive period for all claims against design professionals and superseded section 9:2772.\textsuperscript{80} In effect, section 9:5607 and section 9:2772 were at one time the same statute.

2. Questions about Section 9:5607 after 2012

It is the close relationship between these two statutes that makes the amendment to section 9:2772 important to properly interpret section 9:5607. The legislature made it clear that section 9:5607 is the exclusive remedy for claims against design professionals by adding “[t]he provisions of this Section shall take precedence over and supersede the provisions of R.S. 9:2772,” but it is not clear why the legislature made these changes.\textsuperscript{81} Section 9:5607 states that all actions, arising from tort or contract, against design professionals are limited by a five year peremptive period,\textsuperscript{82} which mirrors the peremptive period of section 9:2772.\textsuperscript{83}

Until 2014, these statutes operated in tandem, effectively performing the same function of establishing a five year peremptive period for construction cases. One can see then how the amendment to section 9:2772, adding the provisions of article 1067, and the failure of the legislature to amend section 9:5607 similarly could give rise to confusion as to whether article acceptance of the work. Prescription then runs on a claim that no longer exists. Thus, the useless prescriptive period is likely no more than another example of legislative oversight.

\textsuperscript{78} Act No. 1024, 1999 La. Acts 2080.
\textsuperscript{81} \textit{LA. REV. STAT. ANN.} § 9:5607(D) (Supp. 2014).
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{LA. REV. STAT. ANN.} § 9:2772 (Supp. 2014).
1067 should be read in conjunction with section 9:5607. If not, a general contractor who a plaintiff sues late in the peremptive period could only file a third party indemnity suit timely against a contractor but not a design professional. One possible explanation is that since section 9:2772 is the more heavily used statute, the failure to amend section 9:5607 is merely an oversight. Alternatively, lobbying efforts could have only focused on section 9:2772 for the same reason.

III. PROBLEMSPOSED BY PEREMPTION IN LOUISIANA

While the reasons supporting peremption are positive, the effects of peremption can be harsh. Consider the hypothetical at the beginning of this Comment, but suppose the newlywed couple did not file suit late in the peremptive period because they discovered the defect late. Instead, the newlyweds purposefully waited until the end of the peremptive period in hopes of pinning the architect’s liability on the general contractor. Legally, the contractor has no recourse unless article 1067 extended the peremptive period to allow the contractor to file a third party claim for indemnity.\(^{84}\) It is the divergence on this issue, whether article 1067 should be read in conjunction with section 9:2772, that leaves open the question of how a court would decide the same issue as applied with section 9:5607.

A. Single Peremptive Period

Louisiana utilizes a one peremptive period scheme, meaning all claims must be brought within a single five year period.\(^{85}\) Naturally, the later a plaintiff files a lawsuit, the less time there is to get all proper parties in the litigation. Since peremption runs also claims for indemnity, one can only obtain equitable results when all parties at fault are brought into the suit within that

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\(^{84}\) In Louisiana, peremption extinguishes third party claims for indemnity and the initial claims from the underlying suit simultaneously.

five-year period. On the other hand, peremption serves critical policy purposes for the design professional by limiting claims against design professionals who face deluges of meritless claims. Thus, one could imagine the delicate balancing act a court or a legislature would perform while deciding these tough issues.

Initial defendants have responded to the harshness of the single peremptive period.\(^\text{86}\) When suit is brought against a defendant late in the peremptive period in Louisiana, the best practice for that defendant might be to bring a third party claim against every entity involved in the project, referred to by litigators as the shotgun approach.\(^\text{87}\) General contractors often utilize this technique so they do not lose the right to file suit at a later time.\(^\text{88}\) One could imagine a set of facts where a general contractor has more time to adequately consider whether to file suit against his business partners. In that scenario, a defendant might consider whether his claim has merit, and whether it is good business judgment to sue the design professionals he may or may not have a longstanding relationship with.\(^\text{89}\) Such a scenario would not only be fair to plaintiffs, but to third party plaintiffs as well. Recognizing this, the legislature enacted Louisiana Code of Civil Procedure article 1067, just a few years after the institution of peremption, to help with precisely these types of scenarios,\(^\text{90}\) but article 1067 has failed.\(^\text{91}\)

### B. The Failure of Article 1067 to Provide an Adequate Remedy

At first glance, article 1067 seems to be an appropriate solution. If applied to the facts of the hypothetical in the introduction, both of the general contractors claims would have been timely. However, article 1067 fails to serve the purposes of both general contractors and design

\(^{86}\) See, Tricker, Ebeler, & Kortum, Applicability of Statutes of Repose, supra note 20, at 5.

\(^{87}\) Id. See also, Thermo Development, Inc. v. Central Masonry Corp., 195 P. 3d. 1166 (Co. Ct. App. 2008).

\(^{88}\) Id.

\(^{89}\) Id.


\(^{91}\) See, Richardson, Buried by the Sands of Time, supra note 8, at 1184.
professionals alike. First, disagreements between Louisiana Courts of Appeals over whether article 1067 should be read in conjunction with the peremptive period of section 9:2772 has created a moving target for deadlines in Louisiana construction cases. Although Louisiana ultimately amended section 9:2772 to resolve the conflict, the omission of a similar amendment to section 9:5607 makes the split between the Louisiana First and Fourth Circuit an analog to how a court would resolve a similar issue that arose under section 9:5607. Second, article 1067 at most provides ninety days to make a decision whether to file a lawsuit against potentially longstanding business partners. Ninety days provides enough time to draft a petition, but not enough time to make an adequately considered decision on the merits of an indemnity claim. Third, article 1067 is a contradiction to peremption doctrine because it fails to cut off claims against design professionals, and therefore undercuts the primary reason peremption was instituted.\textsuperscript{92}

1. \textit{The Louisiana Fourth’s Circuit Silent Application of Article 1067}

The Fourth Circuit, in two separate cases, applied article 1067 to third party claims for indemnity.\textsuperscript{93} In \textit{Metairie III v. Poche Construction, Inc.} the owners of a nursing home sued a general contractor with less than one month before the peremptive period expired.\textsuperscript{94} Five months after peremption expired, the original defendant filed a third party suit for indemnity.\textsuperscript{95} There, the Fourth Circuit concluded that because the third party claim was filed almost two months after

\textsuperscript{92} \textit{See}, Richardson, \textit{Buried by the Sands of Time}, supra note 8, at 1199.

\textsuperscript{93} Klein v. Allen, 470 So. 2d 224 (La. App. 4 Cir.1985); Metairie III v. Poche Construction, Inc. 49 So. 3d. 446 (La. App. 4 Cir 2010).

\textsuperscript{94} Metairie III v. Poche Construction, Inc. 49 So. 3d. 446, 448 (La. App. 4 Cir 2010).

\textsuperscript{95} \textit{Id.}
the ninety day extension of peremption via article 1067, the third party claim was perempted on its face. Still, article 1067 was plainly applied in the analysis.

In *Klein v. Allen*, the Fourth Circuit held that a third party claim for indemnity arising under section 9:2772 that was filed eighty-three days after peremption expired on the main demand, was timely due to the provisions of article 1067. In both instances, the court did not analyze the applicability of article 1067, and simply applied the article. Thus, the Fourth Circuit would likely apply the ninety-day equity mechanism of article 1067 to a case against a professional designer.

2. *Ambiguity in the Wake of Peck v. Richmar*

After June 2014, it became unclear as to whether courts will apply article 1067 to claims for indemnity against design professionals. The Louisiana First Circuit Court of Appeals held, in *Peck v. Richmar*, that article 1067 did not apply to version of the peremptive period in section 9:2772, the peremptive period for contractors, which had not yet been amended. The First Circuit’s decision is important for two reasons. First, the *Peck* court decided a case in opposition to the Fourth Circuit, as acknowledged by the dissent in *Peck*, putting the two courts in opposition to one another regarding the applicability of article 1067 to the 2011 version of

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96 Id. at 454.
97 Id.
98 470 So. 2d 224 (La. App. 4th Cir. 1985).
99 Id. at 224-225.
100 144 So.3d 1042 (La. App. 1st Cir. 2014).
101 See *supra*, III.B.1. *The Louisiana Fourth’s Circuit Silent Application of Article 1067*. That issue is now moot because in 2012, section 9:2772 was amended to add the following language, which mirrors the language of article 1067: “If, within ninety days of the expiration of the five-year peremptive period…a claim is brought against any person…such person or entity shall have ninety days from the date of service of the main demand or, in the case of a third-party defendant, within ninety days from service of process of the third party demand, to file a claim for contribution, indemnity or a third-party claim against any other party.”
102 *Peck v. Richmar Construction, Inc.*, 144 So.3d 1042 (La. App. 1st Cir. 2014) (J. McClendon dissenting, …)
Next, because section 9:5607 (peremptive statute for design professionals) does not contain the article 1067 language included currently in section 9:2772, the inquiry of whether article 1067 applies to the peremptive statute for design professionals is an analog to the dispute between the First and Fourth Circuits. In other words, the best possible way to decide how the First and Fourth Circuits would decide article 1067 applicability to design professionals would be to examine the section 9:2772 circuit split.

a. The Facts and Rationale of Peck v. Richmar

In Peck v. Richmar, the Louisiana First Circuit Court of Appeal held that the version of section 9:2772 prior to the August 2012 amendment, should not be read in conjunction with article 1067, and accordingly, peremption extinguished a general contractor’s third party claim for indemnity filed within ninety days from the notice of the main demand and before the general contractor received notice of the initial suit. The facts of Peck arose from Robert and Misty Peck’s contract with Richmar Construction to build a new home in Ascension parish in 2006. On April 4, 2007, Richmar finished the home and the Pecks filed a certificate of occupancy in the Ascension parish mortgage records, starting the peremptive period. On April 4, 2012 the peremptive period expired for all claims arising out of the construction of that home. Sometime between April 4, 2007 and April 3, 2012, the Pecks noticed that the house’s slab was

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103 The court applied earlier version of section 9:2772 because that was the version of the statute that controlled when the Peck’s filed the suit. *Id.* at 1046.
104 *Id.* at 1044.
105 *Id.*
106 *Id.* at 1049.
107 *Id.* at 1043.
109 The Pecks filed a suit under the New Home Warranty Act, which involved a different statutory scheme. For Richmar Construction Co.’s purposes, the peremptive period was set expire on April 4, 2012. Peck v. Richmar, 144 So.3d 1042, at 1043.
uneven, allegedly causing extensive structural damage. On April 3, 2012 the Pecks filed suit, one day before the peremptive period expired. On May 4, 2012 Richmar received notice of the suit. On July 12, 2012, only sixty-nine days after Richmar was served, Richmar answered and filed a third-party claim for indemnity on the two subcontracting companies that actually built the foundation of the Pecks’ home. Thus, if article 1067 applied to the facts of Peck, Richmar’s claim would have been timely. In deciding that Richmar’s claim was in fact not timely, the court assigned reasons.

Peck gave specific and pointed reasons for the rationale supporting the preclusion of article 1067. First, the court reasoned that the language in the legislative history of the statute suggested that legislature intended no ninety day extensions of peremption prior to the 2012 amendment of section 9:2772. Next, because section 9:2772 is more narrow than article 1067, the more narrow provision controls over the general. The Peck court relied on the language in the statute “the peremptive period shall apply to claims for indemnity” to support the rationale that because the narrow statute applies to claims for indemnity, the general article 1067 that extends peremption for claims for indemnity, is in direct conflict with the statute. Additionally, the court relied on the decision in Ebinger v. Venus Construction Corp., which

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110 Id.
111 Id.
112 Id. at 1044. Notice that Richmar received notice after the peremptive period expired.
113 Id.
114 Id. at 1047. However, it is possible that the Louisiana legislature clarified that statute to avoid a result like the one in Peck, or for interpretative reasons.
115 Id. at 1046 (citing Burge v. State, 54 So. 3d 1110, 1113 (La. 2011)).
116 Peck v. Richmar, 144 So. 3d 1042, 1046.
117 65 So. 3d 1279 (La. 2011).
held that a claim for indemnity can be perempted before a cause of action exists, to support the reasoning that article 1067 did not apply to the facts of Peck.\textsuperscript{118}

\textit{b. Using Peck as a Gauge for a Similar Outcome: Section 9:5607}

The rationale in \textit{Peck} should be applied to the inquiry as to how the First Circuit would decide a similar case involving section 9:5607. First, the \textit{Peck} court concluded that the legislature would not have amended section 9:2772 to mirror the ninety day extension of peremption in article 1067 if article 1067 already applied.\textsuperscript{119} The court reasoned that the amendment to section 9:2772 would have been redundant if article 1067 already applied.\textsuperscript{120} Applying this rationale, because section 9:5607 does not contain a ninety day extension of peremption in the statute, the legislature intended that article 1067 should not be read in conjunction with section 9:5607. However, unlike the statute in \textit{Peck}, section 9:5607 does not contain any helpful legislative comments.

Second, the court gave meaning to the amendment of section 9:2772 in part due to language in the statute that states: “[T]his peremptive period shall extend to every demand, whether brought by direct action or for contribution or indemnity or by third-party practice.”\textsuperscript{121} Because the peremptive statute also runs on claims for indemnity, this factored against article 1067 being applicable to the peremptive period of section 9:2772. Section 9:5607 does not

\textsuperscript{118} Peck v. Richmar. 144 So. 3d 1042, 1049 (“Following the Louisiana Supreme Court’s decision in \textit{Ebinger}, we are left with a unique situation where a claim for indemnity may be perempted before the cause of action arises.”) In \textit{Ebinger} v. Venus Const. Corp., 65 So. 3d 1279 (La. 2011). \textit{Ebinger} only stands for the proposition that the peremptive period of section 9:2772 can extinguish claims before the indemnitee has been cast in judgment. The facts of \textit{Ebinger} did not contain any analysis that is relevant to the peculiar facts of \textit{Peck}, because the third party plaintiff in \textit{Ebinger} filed a claim for indemnity almost three years after the peremptive period expired on the underlying claim. The third party plaintiff in \textit{Peck}, filed a claim for indemnity seventy days after the peremptive period expired. Article 1067 only provides a ninety day grace period. Thus, discussion of the applicability of article 1067 in \textit{Ebinger} would not have made sense when a third party plaintiff files a claim for indemnity three years after the peremptive period has expired. Therefore, to rely on \textit{Ebinger} to support the notion that article 1067 does not apply to the facts of \textit{Peck} is dubious.

\textsuperscript{119} Peck v. Richmar., 144 So.3d 1042, at 1046 (La. App. 1 Cir. 2014).

\textsuperscript{120} Id.

contain this language in the statute. Nevertheless, the First Circuit Court of Appeal, in *Boes Iron Works, Inc. v. M.D. Descant, Inc.*, opined that the peremptive period of section 9:5607 applies to claims for indemnity as well: “The statute applies to all actions against an architect arising out of its services, which includes the City/Parish's claim for indemnity.” Thus, because the peremptive period for design professionals applies to claims for indemnity, the same rationale of *Peck* applies to section 9:5607, making it likely that the First Circuit Court of Appeals would not apply article 1067 to extend the peremptive period for claims for indemnity against design professionals.

C. Article 1067 as a Contradiction to Peremption

Even if Louisiana courts uniformly applied article 1067 and eliminated any source of confusion, article 1067 is still an inadequate solution. The problem with adopting the language of article 1067 is that this mechanism is misaligned with the concepts that make peremption useful. Because nothing may interfere with the running of peremption, and article 1067 produces the effect of extending a peremptive period, article 1067 falls outside of peremption doctrine. When peremption is extended, the societal concerns that caused the legislature to institute peremption for design professionals are undermined. Thus, if article 1067 applies to section 9:5607, design professionals face more litigation, which is the antithesis of why peremption benefits design professionals.

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124 Id. at 4.
125 See, Richardson, *Buried by the Sands of Time, supra* note 8, at 1199.
126 Naghi v. Brener, 17 So. 3d 919, 925 (La. 2009).
127 See, Richardson, *Buried by the Sands of Time, supra* note 8, at 1199.
128 Id.
Still, applying article 1067 is tempting because of the purported fairness benefits it seems to provide such as protecting a defendant from losing the right to file an indemnity claim.\footnote{Moore v. Gencorp, Inc., 633 So. 2d 1268, 1272 (La. 1994) (“Clearly the dissent has misread the legislative intent because Article 1067 was initially added to protect defendants from being lulled into the loss of their right to assert actions and defenses through reconvention by plaintiffs’ guile and delay in bringing forward their ultimate and true demands. Act 472 of 1970.”)} This is misguided however, because ninety days is insufficient to solve the problems that cause the “shotgun approach.” Defendants need more time to consider these consequential decisions. By softening the harsh effects of peremptive periods, misapplications of peremption undermine the effectiveness of peremptive periods to promote judicial efficiency and stymie claims against design professionals.\footnote{See, Richardson, Buried by the Sands of Time, supra note 8, at 1199.} Therefore, article 1067 and any statutes having similar effects, should not apply to the peremptive period of section 9:5607. A solution that both ameliorates the harshness of peremption and promotes the public policy concerns that motivated the institution of peremption should replace article 1067.

IV. A Survey of Unique Time Limitation Statutes

Suggesting a solution of Louisiana’s peremption problem must take into account both dichotomies. Proponents of the peremptive period cite concerns of judicial efficiency, protecting design professionals from frivolous litigation, and the economic effects increased litigation has on the design profession. Opponents cite the harsh effects of an unyielding cut off date of claims, such as the facts of Peck. A survey of America’s time limitation statutes concludes that states’ rules can be lumped into three categories—the single time limitation scheme, the four outlier states whose approach is not focused on claims for indemnity, and the remaining states who also
have conflicting jurisprudence on the issue.\textsuperscript{131} Of these, the most viable solutions come from the single time limitation states and Minnesota’s two strict time limitation schemes.

\textbf{A. The Longer Single Strict Time Limitation Approach}

Twenty-six states employ a single strict time limitation period to all claims arising from a construction project against a design professional, including claims for indemnity.\textsuperscript{132} Yet, those states do not experience the same problems as Louisiana. That is because those states employ a strict time limitation period that is significantly lengthier than Louisiana’s five year period, with an average time limitation period ranging from eight to twelve years.\textsuperscript{133} That range is significant because empirical studies indicate that the vast majority of construction plaintiffs bring suits against design professionals within five to six years of the completion of the project.\textsuperscript{134} Thus, the issue of indemnity suits being filed late in the time period is not a problem in jurisdictions where the time limitation period are significantly longer than five years.

This scheme would not be a proper fit for Louisiana for two reasons. First, the Louisiana legislature has consistently amended its construction statutes to reduce peremptive periods over time, indicating a desire to have a shorter time limitation period.\textsuperscript{135} Second, this scheme allows for more litigation against the design professional. The goal for a strict time limitation for a design professional is to reduce the amount of claims, which is based on the premise that the majority of suits filed against design professionals are frivolous.

\textbf{B. Examining the Outlier States}

\textsuperscript{131} See, Tricker, Ebeler, & Kortum, Applicability of Statutes of Repose, supra note 20, at 14.
\textsuperscript{132} See supra, II. LOUISIANA’S ADOPTION OF PEREMPTION: THIRD PARTY CLAIMS FOR INDEMNITY.
\textsuperscript{133} See, Tricker, Ebeler, & Kortum, Applicability of Statutes of Repose, supra note 20, at 5.
\textsuperscript{134} Id at 6.
\textsuperscript{135} See supra, a II.C.1. Section 9:2772 From 1964 to 2012.
Outlier states are grouped into three categories: Nevada and California’s latent and patent defect distinction; Indiana’s bifurcated work product and work usage scheme; and Minnesota’s separate time limitations period for claims for indemnity. Both Nevada and California have similar statutory schemes that assign different time limitation periods for claims arising from latent defects and patent defects.136 A latent defect is one that is not discoverable by reasonable inspection.137 Patent defects are readily apparent were they to be reasonable inspected.138 Additionally, Indiana employs a unique two-prong time limitation period scheme with one time period that starts when the design professional submits plans for a project, and the other period mimicking a standard time limitation period.139 Nevada, California, and Indiana’s statutes offer solutions to problems other than the preemption problem at issue in Louisiana and are of little use.

Interestingly, Minnesota assigns two time limitation periods. The first time limitation period establishes a ten year time restriction for all main demands: “nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.”140 A

140 Minn. Stat. Ann. § 541.051(a) (West 2014). The statute of repose for all actions here is ten years. This is one of the longer statutes of repose, but notice that this is offset by a two year statute of limitations scheme that operates in tandem with the statute of repose. Here, once a claimant knows about the possible damage he or she has two years to bring a claim. Id. (“[N]o action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury…” Id.
separate time limitation period puts a two year time limit on all claims for indemnity.\textsuperscript{141} This seems to be more useful for Louisiana’s purposes. Having two separate time limitations, one for the main demand that does not encompass claims for indemnity, and the other that encompasses all claims for indemnity, would largely obviate the need for article 1067 extensions of time limitations. There would be no need to extend peremption if a separate peremption period governed claims for indemnity. Additionally, the defendant’s need to employ a shotgun approach resulting in an automatic lawsuit against the design professional is not necessary when the claimant has two years to consider whether or not to file a claim.

Minnesota’s statute is flawed for other reasons, namely the start for the time limitation on claims for indemnity. In this scheme, the claim for indemnity starts when the right of indemnity accrues, meaning when the party claiming indemnity has been cast in judgment. Recognizing that some trials last longer than others, Minnesota placed another limitation on claims for indemnity: “[I]n no event may an action for contribution or indemnity be brought more than 14 years after substantial completion of the construction.”\textsuperscript{142} Essentially, the Minnesota scheme has three statutes of repose and a statute of limitations. This third time limitation could be avoided by simply shifting the commencement date of peremption to when the initial defendant receives notice of the suit. Still, the separate time limitation for claims for indemnity could a good fit for Louisiana’s needs to balance the rights of the parties, promote fairness, and establish a clear scheme for courts to follow uniformly.

\textsuperscript{141} \textit{Id} at § 541.051(b) (“[A]n action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a), provided that in no event may an action for contribution or indemnity be brought more than 14 years after substantial completion of the construction.”)

\textsuperscript{142} \textit{Id.}
V. TWO PEREMPTIVE PERIODS ARE BETTER THAN ONE: A SOLUTION AND COUNTERARGUMENTS

The Louisiana legislature should amend the peremptive statute for claims against design professionals to both eliminate ambiguities and account for the inequity and policy concerns that seemingly are at odds with one another. However, it is not necessary to choose whether equity for the plaintiffs and general contractors is more or less important than preserving the benefits related to finality that peremptive periods serve for design professionals. Rather, a new solution can accomplish both of these goals. First, the single five year peremptive period should be abolished and in its stead, Louisiana should adopt a two peremptive period system with one four year peremption period that extends to the initial demand and the other that extends only to claims for indemnity. Next, Louisiana must expressly preclude application of article 1067 in this statute or repeal the article.

A. Adopting Minnesota’s Separate Time Limitation for Indemnity

Louisiana should adopt the same separate time limitation for the main demand and claims for indemnity like Minnesota by establishing first a five year peremptive period that does not run on claims for indemnity, and a separate one year peremptive period that encompasses only claims for indemnity. Because peremptive periods begin statutorily, rather than Minnesota’s approach that the time limitation begins when the party is cast in judgment, the peremptive period for claims for indemnity should begin the day after the initial defendant receives notice of the suit, giving potential third party plaintiffs one year to decide whether to bring a third party suit for indemnity.

The two peremptive period scheme has considerable fairness effects for both plaintiffs and defendants. It is inequitable that peremption can prevent a defendant from filing a claim for

\[\text{id.}\]
indemnity before one even knows a claim is available.\textsuperscript{144} The two peremptive period scheme eliminates this possibility. A separate peremptive period precludes the possibility of the original defendant’s claim for indemnity being extinguished before he or she receives notice of the suit, because the peremptive period will begin when he or she actually has notice of the suit. This eliminates inequity considerations for the original defendant. The one-year peremptive period for claims for indemnity carries with it several other positive consequences.

The combined benefits of both peremptive periods operating in tandem creates roughly a five year window where suit can be filed against a design professional. Since professional liability insurance in Louisiana likely expects a five year exposure to liability the combined four year and one year peremptive periods should not perturb existing actuarial analysis. Five years is also an optimal length of time for other reasons. Practically, the Louisiana legislature has exhibited a preference for the five year time period. Because most claims are filed in the fifth or six year of time limitations periods, a five year period is also optimal for reducing the amount of claims filed against design professionals.

\textbf{B. Notice Requirement}

Requiring defendants to give notice to all parties involved in a construction project obviates the need for the extension of peremption article 1067 attempts to provide. That extension, if applied uniformly, allows all parties to be added to a suit. Removing article 1067 from the procedural calculus allows for inequitable results for third party defendants who receive notice of an indemnity claim late in the second peremptive period. Without article 1067, the third party plaintiff could time a suit for indemnity in such a way to preclude the third party defendant from being able to file a claim for indemnity, essentially resulting in the same problem as the

\textsuperscript{144} Richardson, \textit{Buried by the Sands of Time}, supra note 8, at 1199.
initial defendant in *Peck*. Fair results can still be obtained by requiring the initial defendant to give notice to all entities engaged in work on the project. The defendant is required to give notice for two reasons. First, the defendant will more likely know the parties involved in the suit than the plaintiff. Second, the notice requirement will promote a dialogue between defendants and possible third party defendants, granting an opportunity to discuss common defense. This notice mechanism will also allow a design professional to intervene in a suit when the design firm is notified that a particularly litigious business partner has been sued. In this way, the design professional, could intervene in the suit and simultaneously file a third claim for indemnity. If the design professional did not have a claim for indemnity, the one year peremptive period would provide peace of mind after that peremptive period expired.

C. **Express Preclusion of Article 1067 is Necessary**

Amending section 9:5607 to expressly preclude the applicability of article 1067 is necessary to eliminate the confusion previously experienced by the courts because it is likely the Louisiana First and Fourth Circuits would not agree on whether article 1067 should extend the peremption period of section 9:5607.\(^{145}\) Admittedly, it is unusual to see in a statute the express preclusion of another statute. To that point, section 9:5607 already expressly precludes and supersedes section 9:2772.\(^{146}\) Another possible alternative to avoid anymore article 1067 confusion is to repeal that article altogether.

D. **Reasonable Alternatives**

One possible solution is to eliminate peremption altogether. It has been argued that peremption does not actually further the policy concerns peremptive periods were instituted to

\(^{145}\) *Id.*

To support this conclusion, analogies are typically drawn to scenarios involving family law matters. However, peremption is uniquely useful for design professionals who are particularly susceptible to myriad meritless lawsuits. Repealing peremption implies that prescription would be used as the time limitation device in construction cases. Because prescription is a loose time limitation, it is uniquely ineffective at preventing the design professionals’ exposure to indefinite liability. While the abolition of peremption may be useful in certain domestic matters, peremption is necessary for the construction industry to thrive.

Another reasonable solution would be to amend section 9:5607 to mimic the amendment made to section 9:2772, by adding the ninety day extension of peremption to claims against design professionals. While such an amendment would solve issues of diverging jurisprudence, article 1067 fails to cut off claims within the allotted five year period and undercuts peremption’s purpose. This is exacerbated by article 1067’s perpetual ninety day extension. Under article 1067, each third defendant could have ninety days to file their own claim for indemnity or contribution. Theoretically, this continuing aspect of article 1067 could extend peremption for a year or more. Then, peremption’s precise cut off dates become less precise. Instead, all parties could be added to the suit and the precise cut off date could be maintained by instituting two peremptive periods and the notice mechanism explained in this Comment.

CONCLUSION

Peremptive periods are a legislative means of imposing societal concerns by creating strict time limitations on the law. Peremptive statutes promote judicial efficiency, increase the quality of evidence in construction cases, and serve as the last line of defense for design

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147 Richardson, Buried by the Sands of Time, supra note 8, at 1180.
148 Id.
149 See supra, I. REASONS SUPPORTING STRICT TIME LIMITATIONS IN CLAIMS AGAINST DESIGN PROFESSIONALS
professionals who are uniquely susceptible to hoards of frivolous suits. This core concept is pure, but the application of peremption breeds inequity and causes confusion in the law. Louisiana must alter peremptive schemes to account for inequities, add needed clarity, and preserve policy concerns—and the peremptive period for design professionals, which protects a unique set a policy concerns, is no different. A singular peremptive period is inadequate, and it is possible to take steps to secure the concerns of all parties by adopting a two peremptive period scheme.

150 Richardson, *Buried by the Sands of Time, supra* note 8, at 1224.
APPENDIX

The suggested changes to section 9:5607 would change the statute as follows, by amending section A, C, F, G, H, and I.

A. No action for damages against any professional engineer, surveyor, engineer intern, surveyor intern, or licensee as defined in R.S. 37:682, or any professional architect, landscape architect, architect intern, or agent as defined in R.S. 37:141, or professional interior designer, or licensee as defined in R.S. 37:3171, or other similar licensee licensed under the laws of this state, or real estate developer relative to development plans which have been certified by a professional engineer or professional architect, whether based upon tort, or breach of contract, or otherwise arising out of an engagement to provide any manner of movable or immovable planning, construction, design, or building, which may include but is not limited to consultation, planning, designs, drawings, specifications, investigation, evaluation, measuring, or administration related to any building, construction, demolition, or work, shall be brought unless filed in a court of competent jurisdiction and proper venue at the latest within four years from:

(1) The date of registry in the mortgage office of acceptance of the work by owner; or
(2) The date the owner has occupied or taken possession of the improvement, in whole or in part, if no such acceptance is recorded; or
(3) The date the person furnishing such services has completed the services with regard to actions against that person, if the person performing or furnishing the services, as described herein, does not render the services preparatory to construction, or if the person furnishes such services preparatory to construction but the person furnishing such services does not perform any inspection of the work.

B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts.

C. The four-year period of limitation provided for in Subsection A of this Section is a peremptive period within the meaning of Civil Code Article 3458 and in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

D. The provisions of this Section shall take precedence over and supersede the provisions of R.S. 9:2772 and Civil Code Articles 2762 and 3545.

E. The peremptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.

F. The peremptive periods provided in Subsections A and B of this Section shall not apply to any proceedings initiated by the Louisiana Professional Engineering and Land Surveying Board or the State Board of Architectural Examiners.

G. The peremptive period provided in Subsections A and B shall not apply to third party claims for indemnity or contribution, but shall only apply to the main demand.

H. A separate one year peremptive period limits all third party claims, including claims for indemnity and contribution. This peremptive period shall commence the day after the original defendant receives notice of the main demand.

I. This provisions of this statute preclude application Louisiana Code of Civil Procedure Article 1067 to any peremptive period in this statute.