STATUTES OF LIMITATION

"DISCOVERING" A DISCOVERY RULE IN PRODUCTS LIABILITY ACTIONS—CONDON V. A.H. ROBINS CO.

INTRODUCTION

A statute of limitations identifies the period of time during which a potential plaintiff may bring an action. The statutory period generally begins to run as soon as the cause of action "accrues" and continues for an arbitrary length of time. State legislatures are empowered to determine the number of years a cause of action will continue to survive.

When a "discovery rule" is incorporated into the statute, the statutory period commences to run when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, facts constituting the basis of his cause of action. The rule is intended to provide for the party whose delay in bringing his action is due to the fact that he is unaware of the injury, its actionability, or its cause. It gives recognition to the reality that some potential plaintiffs find their action time barred because they were unaware of certain circumstances and were not merely "sleeping on their rights."

The legislature may choose to adopt such a rule or may expressly provide that the statute commences to run notwithstanding a person's lack of knowledge. Limitations of actions are creatures of statute.

1. Markel v. Glassmeyer, 137 Neb. 243, 245-46, 288 N.W. 821, 822 (1939): "The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects."
3. Markel, 137 Neb. at 246, 288 N.W. at 822: "Limitations are created by statute and derive their authority therefrom."

4. The discovery doctrine is a natural part of statutes of limitation for some causes of action, such as fraud. See Hellman v. Davis, 24 Neb. 793, 802, 40 N.W. 309, 313 (1888) (holding that the statutory period did not begin until the injured party learned facts sufficient to suggest fraud). Although courts did not characterize the theory as a discovery rule, this type of analysis has evolved into the discovery doctrine.

The discovery rule has become associated with products liability causes of action only within the last two or three decades as products have become more sophisticated and complex. These changes have increased awareness that there may be a temporal gap between consumption and injury due to latent/progressive diseases. It has also been extended to those cases where the plaintiff knew of the injury but did not know of the causal connection between it and the defendant due to the sophistication and complexity of the product. 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 39.01(3), at 12-11 to 12-13 (1984).

5. See notes 78-87 and accompanying text infra.
7. 3A L. FRUMER & M. FRIEDMAN, supra note 4, at § 39.01(3)(a), at 12-15 to 12-16:
ute, and there is nothing to prevent a state legislature from drafting a statute that begins to run when a person sustains the injury—without any regard to the fact it may be undiscoverable.\(^8\)

The court's role is limited to determining whether or not a particular statute will prevent a potential plaintiff from bringing his action.\(^9\) When the enactment clearly provides that the statutory period commences on the date of the injury, the court should not look further.\(^10\) Of course, when the enactment is ambiguous, the court may resort to rules of construction, legislative history, and public policy considerations to aid in its determination of the law.\(^11\)

In the recent case of *Condon v. A.H. Robins Co.*,\(^12\) the Nebraska Supreme Court was confronted with a facially unambiguous statute.\(^13\)

\(^8\) The use of the discovery rule in products cases represents a conscious choice of policy between the value of repose to the defendant and the value of an opportunity for relief to the reasonably unknowing plaintiff."

\(^9\) Id.

\(^10\) See Ray v. Sanitary Garbage Co., 134 Neb. 178, 184, 278 N.W. 139, 143 (1938) (holding that the court may only interpret a statute).

\(^11\) In re Zoellner Trust, 212 Neb. 674, 678, 325 N.W.2d 138, 140 (1982) (concluding that the court's jurisdiction is limited to interpretation of ambiguous statutes).

\(^12\) Nebraska ex rel. Bouc v. School Dist., 211 Neb. 731, 740, 320 N.W.2d 472, 477 (1982) (holding that the court's task in interpreting ambiguous statutes is to determine legislative purpose).


1. All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

2. Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

3. The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

4. Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

5. Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof.
This Note discusses how the court, in its haste to bring the discovery rule to Nebraska products liability law, "found" a discovery rule in Nebraska Revised Statute section 25-224(1). This Note also maintains that, if incorporated, such a rule should be narrowly drawn to include only fraud and latent injuries. The focus will not be on the advantages or disadvantages of the discovery doctrine but will instead concentrate on the issue of whether the legislature has provided for a discovery rule and, if so, the parameters of the rule.

HOLDING

The case of Condon v. A. H. Robins Co. was presented to the Nebraska Supreme Court in the form of a certified question. The court considered the following inquiry from the United States District Court for the District of Nebraska:

Does the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-224(1) (Cum. Supp. 1982) begin to run on the date on which injury or damage complained of occurs or when the person injured discovers the facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery?

claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.


15. This Note also maintains that it is unnecessary to resort to use of the discovery doctrine in fraud and latent injury cases. Latent injuries may be deemed to "occur at the date they become manifest, rather than the date of exposure," Wilkins v. Grays Harbor Community Hosp., 71 Wash. 2d 178, 182, 427 P.2d 716, 719 (1967), and, thus, the statutory period will commence only after the injury is discoverable. The case of MacMillen v. A.H. Robins Co., 217 Neb. 338, 348 N.W.2d 869 (1984), which was decided after Condon, permits the plaintiff to convert the cause of action from one of products liability to one of deceit and apply the more favorable fraud statute of limitations.


The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. Such request shall not obligate the Supreme Court to accept such request for certification and the Supreme Court may, in its absolute discretion, accept or reject such request for certification as it shall in each case determine.

The Nebraska Supreme Court responded that the statute of limitations commences to run when "the party entitled to bring the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of death, injury, or damage."18 In doing so, the court adopted a compromise position, choosing neither the earliest date on which the statutory period could commence nor the latest.19 The court specifically excluded the date on which the injury or damage occurs and the date on which the injured party knows whom to sue.20 The court implicitly recognized that no generic discovery rule exists.21 Indeed, discovery rules are often contoured to fit limited circumstances.22 Because the particular facts usually influence the decision regarding the parameters of the discovery rule, the fact that Condon was brought as a certified question created a somewhat awkward situation.23

The Use of the Certified Question

The facts of Condon had not been established and were not available to the Nebraska Supreme Court.24 The evidence had not been presented in the trial court as of the time of the supreme court opinion.25 It is especially noteworthy that the facts in Condon were very much in dispute.26
The Nebraska Supreme Court recited the statement of facts presented to it in the request for formal certification and concluded that particular facts are not relevant when a question of law is presented in the form of a certified question.\textsuperscript{27} The Nebraska court's brief summary of the facts was limited to a statement of the facts upon which both parties seemed to agree.\textsuperscript{28} The court did not take note of many of the allegations offered by both the plaintiff and the defendant concerning the actual date of discovery.\textsuperscript{29} The court's summary has some persuasive value, and, in fact, the court may have been influenced by its interpretation of the facts.\textsuperscript{30} The court, however, stated that it presented the facts solely for the reason that the statement may be helpful in discussing the legal principles.\textsuperscript{31} Yet a perfectly sound principle as applied to one set of facts might be entirely inappropriate when a factual variance is introduced.\textsuperscript{32} This is particularly true in products liability cases due to the number of complications from the shield; in January, 1982, the plaintiff found she had pelvic adhesions and was infertile as a result of the use of the shield and the adhesions were undiscoverable because of the fraud of the defendant) with Brief for Defendant at 3-6, Condon, 217 Neb. 60, 349 N.W.2d 622 (1984) (acknowledging the facts with respect to the insertion and removal of the shield; alleging that these facts are incomplete because they fail to include events of August, 1976, when the plaintiff learned she was sterile; and claiming that the defendant warned all distributing physicians of the possibility of a link between the Dalkon Shield and adverse effects and that defendant stopped marketing the shield in June, 1974).\textsuperscript{27}

\textit{Condon,} 217 Neb. at 61, 349 N.W.2d at 623. \textit{But see} Lillick & Mundy, \textit{Federal Court Certification of Doubtful State Law Questions}, 18 U.C.L.A. L. REV. 888, 901 (1971) which states that a certification of a question of law should be based on findings of fact and relates that at least one court actually requires a finding of facts before a question can be certified.\textsuperscript{28}

\textit{Condon,} 217 Neb. at 61-62, 349 N.W.2d at 624. The court mentions the fact of plaintiff's hospitalization and permanent sterility. However, the court failed to note the time that this occurred. Thus, an essential time element was still missing.\textsuperscript{29}

\textit{See note 26 supra.} There is no mention of any facts which would indicate that the injury might have been discoverable earlier than January, 1982, when plaintiff's doctor advised her of the pelvic adhesions. The injury may have been discoverable when physicians were allegedly warned of possible adverse effects from use of the shield in June, 1974, or when plaintiff was diagnosed as sterile in 1976 or when plaintiff was put on notice in 1981 by viewing a television program concerning adverse medical effects from use of the Dalkon Shield. \textit{See note 26 supra.}\textsuperscript{30}

\textit{Compare} Condon, 217 Neb. 60, 68, 349 N.W.2d 622, 627 (a physical injury case where the court found the discovery doctrine applicable to products liability) \textit{with Omaha Paper Stock}, 193 Neb. 848, 851, 230 N.W.2d 87, 90 (a property damage case where the court found the discovery doctrine inapplicable to products liability).\textsuperscript{31}

\textit{Condon,} 217 Neb. at 61, 349 N.W.2d at 624.\textsuperscript{31}


\textit{It must be borne in mind that the opinion of a court should be interpreted as a whole, and construed with reference to the facts upon which it is based; the language used must be held as referring to the particular case and read in the light of the circumstances under which it was used and of the issues framed by the pleadings. . . . The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court.} (citations omitted).
ables involved.33

The use of the certified question may present difficulties in addition to those stemming from lack of a concrete factual basis.34 In general, there are limitations on the types of questions which may be certified.35 Additionally, the questions are of an unavoidably abstract nature36 and, as a result, they may compel purely academic answers which are useless to the certifying court.37 Finally, the federal courts are never bound to follow the state courts' decisions.38

BACKGROUND

Judicial Activism

A statute of limitations is by its nature a creature of legislation.39 The authority to legislate has been vested in the Nebraska unicameral.40 With regard to the separation of powers among the legislative, judicial, and executive departments, the Nebraska Constitution states that none of these branches, nor any person belonging to them, "shall exercise any power properly belonging to either of the others."41 In addition, the supreme court is further limited by the powers enumerated in the state constitution.42

The Nebraska Supreme Court cannot legislate.43 Further, it is

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33. See Raymond v. Eli Lilly & Co., 117 N.H. 164, —, 371 A.2d 170, 172 (1977) (noting there are at least four points at which a cause of action may accrue: (1) when the defendant breaches a duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the defendant is the cause of his injury). See also notes 19-21 supra, and notes 78-87 and accompanying text infra.


35. See note 16 supra (when there is controlling precedent a court should not accept the certified question).

36. Lillich & Mundy, supra note 27, at 901 (certified questions lack the judicial concept of "case or controversy").

37. Id. ("the legal question would be severed from the facts that gave rise to it").

38. Id. at 906-07 (a certified question is authorized by state law, yet state law is never controlling of the federal judicial system).


42. Neb. Const. art. V, § 2. See also Sorenson v. Swanson, 181 Neb. 205, 147 N.W.2d 650 (1967) (finding plaintiff's claim to be outside the court's enumerated original jurisdiction).

43. Ray v. Sanitary Garbage Co., 134 Neb. 178, 184, 278 N.W. 139, 143 (1938) (holding that plaintiff's action was barred by the applicable statute of limitations and that the court was without power to expand the statute).
bound to expound the law as written. If necessary, it may apply rules of construction to decipher ambiguous statutory language, but it may not introduce additional doctrines into the statutory scheme. A fine line may exist between legislation and interpretation in some instances, but when a court does not analyze an enactment by the appropriate rules, it does not seem that it has limited itself to its role as statutory interpreter.

Because the authority to legislate is vested exclusively in the state legislature, the people of Nebraska have preserved their power to approve or reject legislation. They may exercise this right at the polls by either rejecting or approving enactments on a referendum vote. If the court usurps the legislative power, this may deny the people of Nebraska their opportunity to reject or approve legislative acts.

Statutes of Limitation

Generally, in the absence of a statute which time bars an action, the judiciary may not impose a limitation and refuse to allow a plaintiff's cause of action when the legislature has remained silent. Since such limitations are statutory creations, they have become a part of the system only as a result of legislation.

In a recent decision, Rosnick v. Marks, the Nebraska Supreme

44. Id.
45. See id. (the court's liberal powers of interpretation apply "to the act as written and not to the addition of words that require an extension of limitation expressly written in the statute").
46. NEB. CONST. art. III, § 1, which provides in pertinent part:
The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.
47. NEB. CONST. art. III, §§ 3, 4 (setting out the procedures for a referendum). See also Klosterman v. Marsh, 180 Neb. 506, 510-11, 143 N.W.2d 744, 748 (1966) (holding that the people's right of referendum is broad and cannot be limited by the legislature or the courts).
48. The Nebraska Constitution does not provide a means for the people of Nebraska to reject a court decision in the same way that it provides for rejection of legislation under article III, section 1 of the Nebraska Constitution. The right to appeal a decision belongs only to the parties to the original action. See Nebraska v. Bloomfield State Bank, 1 Neb. Unof. 526, —, 95 N.W. 791, 791 (1902).
49. Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945). The defendant argued that the plaintiff's action was barred due to the public policy that claims should be barred after a certain length of time. The Court dismissed this argument, stating that statutes of limitation are "good only by legislative grace." Id. at 314.
50. Markel, 137 Neb. at 246, 288 N.W. at 822.
52. 218 Neb. 499, 357 N.W.2d 186 (1984). Rosnick, a legal malpractice case, was decided approximately six months after Condon. The malpractice statute of limitations,
Court emphasized that the purpose of a statute of limitations is to compel one who has a well-founded claim to exercise his right of action within a reasonable time in order to give the potential defendant a fair opportunity to defend. The intent behind such a statute is fairness: it prevents fraudulent claims, eliminates surprise, and bars claims for which evidence may be lost, details forgotten, or witnesses unavailable. Limitations of actions are not meant to compel litigation but to ensure repose. They protect the potential defendant from prolonged fear of litigation. Though the time limits set forth in these statutes may be arbitrary, it is the certainty created by the statutes that protects potential defendants.

**Rules of Construction**

Although the judicial branch cannot legislate, it may interpret the law as written. However, even if a statute is vague or obscure, a court cannot adopt any construction it chooses. It must attempt to

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53. Rosnick, 218 Neb. at 501, 357 N.W.2d at 188: (S)tatutes of limitations stimulate activity and punish unreasonable delay in prosecuting claims. In particular, § 25-222 insures that actions for professional negligence must be brought shortly after the alleged negligence occurs or is discovered, so that the professional can have a fair opportunity to defend against a claim for malpractice and not find defenses eroded or defeated by time. *Id.* (citations omitted). See also Housing Auth. v. Commonwealth Trust Co., 25 N.J. 330, —, 136 A.2d 401, 403-04 (1957).


55. See Plant v. Johnson, 208 Ark. 217, —, 185 S.W.2d 711, 715 (1945) ("the statute of limitations is a shield of defense and not a spear of attack").


57. Tioga R.R. v. Blossburg & Corning R.R., 87 U.S. (20 Wall.) 137, 150 (1873) (Hunt, J., concurring) (stating that statutes of limitation are arbitrary and "rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens").

58. Pearson, 309 F.2d at 559. See also Rosnick, 218 Neb. at 501, 357 N.W.2d at 188 ("Statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in human affairs.").

59. Ray, 134 Neb. at 184, 278 N.W. at 143.

60. See Nebraska *ex rel.* Bouc v. School Dist., 211 Neb. 731, 740, 320 N.W.2d 472, 477 (1982): "Legislative intent is the cardinal rule in the construction of statutes."
discover the meaning intended by the legislature and to give effect to that intent.\textsuperscript{61} Well-established rules of construction exist to be used toward this end.\textsuperscript{62} Through use of these rules the court resolves, rather than creates, uncertainty.\textsuperscript{63}

In general, a court should consider the statute as a whole and in conjunction with related statutes.\textsuperscript{64} An interpretation which is appropriate in the context of the statute as a whole is always preferred over one which is suitable only for a particular provision.\textsuperscript{65} Consider a universe "S", of which "s" is a subset. A statute reads "All S is P, except s. All s is Q."\textsuperscript{66} Reading only the first provision, it might appear satisfactory to interpret P to be an equivalent of Q, a related concept. Yet, in light of the entire statutory language, P=Q would be inappropriate because "all s is Q" would not be an exception to

\textsuperscript{61} Id. See also Rosnick, 218 Neb. at 507, 357 N.W.2d at 191 ("[W]e must honor that legislative selection and preference for one form of statute of limitations over another.").

\textsuperscript{62} See note 61 supra.

\textsuperscript{63} Frye v. Haas, 182 Neb. 73, 82, 152 N.W.2d 121, 128 (1967); see also Rosnick, 218 Neb. at 506, 357 N.W.2d at 191 ("[T]his court cannot indulge in substitutional injection of 'actual damage' into the malpractice statute of limitations, a phrase which would render 'alleged act or omission' meaningless and repudiate the manifest legislative intent found in the unambiguous language of [the statute].").

\textsuperscript{64} Grosvenor v. Grosvenor, 206 Neb. 395, 398, 293 N.W.2d 96, 99 (1980); see also Rosnick, 218 Neb. at 501, 357 N.W.2d at 188 ("[W]e must give effect, if possible, to the several parts of a statute to avoid rejection of a sentence, clause, or word as meaningless or superfluous.").

\textsuperscript{65} Id. See also State v. Kock, 207 Neb. 731, 734, 300 N.W.2d 824, 826 (1981) (holding that particular words were given a specific meaning when the statute was read in its entirety).

\textsuperscript{66} $S$ is an entire class of objects, such as particular causes of action.

$P$ is an entire class of objects, such as particular limitations which may be applied to those causes of action.

$SP$ is the product of both classes, such as the particular causes of action which are controlled by the particular limitations.

$SP$ (or the subset $s$) contains all those things and only those things which belong to the class of particular causes of action which are not governed by those limitations.

$SP$ contains all those things and only those things which belong to the class of particular limitations but which do not govern the particular causes of action.

"all S is P" as the statute dictates. If judicial construction makes the exception the rule, it obviously cannot be the intended interpretation.

The Latin maxim *expressio unius est exclusio alterius* is a related concept which has been adopted as a rule of construction in Nebraska. The maxim means “the expression of one thing is the exclusion of another.” The doctrine can be used two different ways. Where a statute expressly contains provisions limiting its scope to certain circumstances, the rule may operate to prohibit extension of the doctrine to any other situation. Consider circumstances where “if x=a,b,c, or d, then f(x) =m.” Given x=g and applying the maxim, then f(x) ≠ m. On the other hand, if a particular provision is included in various statutes but is absent in other similar statutes, the rule operates to prevent the provision from being incorporated into any other statute. For example, statutes might say “If x=a, then f(x)=m;” “if x=b, then f(x)=m;” “if x=c, then f(x)=m;” and “if x=d, then f(x)=m.” Given a statute “if x=g, then f(x)=n, the rule would require that “n” be interpreted to be something other than “m” because “m” was not expressly included in the last statute as it was in the others. Essentially, the rule works in different ways because the statutory scheme can be constructed in different ways. The result is the same either way—f(x) ≠ m.

Another rule of construction creates the presumption that the legislature is aware of and approves of the judicial construction previously given to language of a certain statute. If the language of a law is ambiguous to the point that the courts have construed the language and the legislature has not interfered with that interpretation, it is assumed that the legislature has adopted or acquiesced in the construction. Where the legislature re-enacts legislation that the supreme court has interpreted and the legislature uses substantially the same phraseology, the statute may also be given the significance accorded it by the court.

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70. *See* Harrington v. Grieser, 154 Neb. 685, 689-90, 48 N.W.2d 753, 755-56 (1951). ("An affirmative description of cases in which powers may be exercised implies a negative on the exercise of such powers in other cases.").

71. *See* IBEW v. City of Hastings, 179 Neb. 455, 459, 138 N.W.2d 822, 825 (1965) (where a statute has been given judicial construction and the legislature has had opportunity to change it but has not done so, it is "clear and convincing" evidence of its acquiescence in the judicial construction).

72. *Id.*

DISCOVERY RULE

In the case of Ray v. Sanitary Garbage Co., the Nebraska Supreme Court interpreted a workmen's compensation statute of limitations using some of these rules of construction. The court refused to incorporate any additional terms into the statute, and, in so doing it enunciated the purpose of the rules of construction:

[U]nder the division of powers found in the constitution, our duty is not to enact but to expound the law . . . , not to legislate . . . but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a coordinate branch of the state government.

Survey of Other Jurisdictions

It is appropriate at this point to look to cases interpreting statutes of limitation for products liability in other jurisdictions to determine the extent to which they have incorporated discovery rules. There is great variety in the statutes and the nature of cases, but even a limited survey provides insight into important issues.

There are many different points in time at which a products liability cause of action might accrue. Theoretically, it might be possible for the cause of action to accrue at the manufacturing or marketing stage. Any of the following times would generally be more acceptable: a) when purchased; b) when consumed or used; c) when the trauma occurs; d) when the injury is discovered, or is

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74. 134 Neb. 178, 278 N.W. 139 (1938).
75. Id.
76. Id. at 185, 278 N.W. at 143.
77. Id. at 184, 278 N.W. at 143.
78. This statement is made in the context of the discovery rule. Recognition is given to the fact that some authorities equate the time of discovery with the point of accrual. See, e.g., Dawson v. Eli Lilly & Co., 543 F. Supp. 1330, 1338 (D.C. Cir. 1982); Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, —, 335 N.W.2d 578, 583 (1983). Others distinguish between the time the cause of action accrues and the point at which the statute begins to run, and, thus, recognize a tolling of the statute of limitations. See, e.g., McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 667 (3rd Cir. 1980); Scott, For Whom the Time Tolls — Time of Discovery and the Statute of Limitations, 64 ILL. B.J. 326 (1976). This Note does not address the issue of which of these is the correct application of the discovery rule.
79. See Raymond v. Eli Lilly & Co., 117 N.H. 164, —, 371 A.2d 170, 172 (1977) (recognizing that a tort cause of action may accrue when the defendant breaches his duty, and, thus, recognizing liability at the manufacturing or marketing stage); Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 554, 335 N.W.2d 578, 580 (1983) (acknowledging that a tort claim may accrue when negligence occurs).
82. See Lofton v. General Motors Corp., 694 F.2d 514, 519 (7th Cir. 1982); Swiss v. Eli Lilly & Co., 559 F. Supp. 621, 624 (D.R.I. 1982).
discoverable in the exercise of reasonable diligence;\textsuperscript{83} e) when the plaintiff knows the cause of his injury;\textsuperscript{84} f) when the injured party knows whom to sue;\textsuperscript{85} g) when the actionability of the injury is discovered;\textsuperscript{86} and h) when the injured party has knowledge of all the facts required to establish a cause of action.\textsuperscript{87} The list is not exhaustive; more permutations could be created simply by identifying different persons’ subjective views of the timing of each of these events.\textsuperscript{88} Yet, the list actually contains more permutations than the average practitioner would probably list.\textsuperscript{89}

It is difficult to state with any accuracy that any one of these times is used more than another. This is due in part to the fact that they are not precise, universally understood points in time.\textsuperscript{90} Not only do different jurisdictions have different statutes, many times decisions in any one jurisdiction have different outcomes.\textsuperscript{91} Most jurisdictions recognize only three or four possibilities for the time the

\begin{footnotes}
\footnotetext{83}{See Fusco v. Johns-Manville Prods. Corp., 643 F.2d 1181, 1183 (5th Cir. 1981); Borel v. Fibreboard Prods. Corp., 493 F.2d 1076, 1101 (5th Cir. 1973).}
\footnotetext{85}{See Williams v. Borden, Inc., 637 F.2d 731, 734 (10th Cir. 1980); Schiele v. Hobart Corp., 284 Or. 488, —, 587 P.2d 1010, 1014 (1978).}
\footnotetext{88}{Consider that several persons may have different ideas of the meaning of the phrase “when the injured party knows whom to sue.” Compare Dawson, 543 F. Supp. at 1338 (when the injured party knows of, or should know of the injury, its cause, and the existence of wrongdoing) with Grigsby v. Sterling Drug, Inc., 428 F. Supp. 242, 243 (1975) (when the injured party knows the injury resulted from an undisclosed defect in defendant’s product) with Anderson, 299 S.E.2d at 161 (when the injured party knows of the nature of the injury and the causal connection) and with Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497, 501 (Ky. 1979) (when the injured party knows that the injury was caused by defendants’ conduct).}
\footnotetext{89}{See Raymond, 117 N.H. at —, 371 A.2d at 172 (noting “there are at least four points at which a tort claim may accrue: (1) when the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant’s misconduct”); Hansen, 113 Wis. 2d at 554, 335 N.W.2d at 580 (stating there are basically “three points in time when a tort claim may be said to accrue: (1) when negligence occurs, (2) when a resulting injury is sustained, and (3) when the injury is discovered,” but holding that the plaintiff should know of both the injury and the accompanying right of action before the statute begins to run).}
\footnotetext{90}{See note 88 supra.}
\footnotetext{91}{Compare three cases interpreting Illinois law: Lofton, 694 F.2d at 519 (cause of action accrues at the point of trauma); Eisenmann v. Cantor Bros., Inc., 567 F. Supp. 1347, 1357 (1983) (cause of action accrues at the last exposure to the drug); and Nolan v. Johns-Manville Asbestos, 85 Ill. 2d 161, —, 421 N.E.2d 864, 868 (1981) (cause of action arising from a latent injury accrues when the plaintiff knows the injury was wrongfully caused).}
\end{footnotes}
statutory period should commence.\textsuperscript{92}

Certain trends, however, have been established. For example, there is a tendency to distinguish between traumatic injuries and latent progressive diseases.\textsuperscript{93} Asbestosis appears to be widely recognized as a latent/progressive disease on which a cause of action does not accrue on the date of exposure.\textsuperscript{94} Further, there seems to be an inclination to distinguish between injuries that involve fraud and those that do not.\textsuperscript{95}

There are good reasons for creating these distinctions. In the case of fraud, the tort may be considered to be continuing until the date when the truth becomes known.\textsuperscript{96} In the case of a latent/progressive disease developing over a number of years, the date of discovery might more closely approximate the date that the injury becomes active and would be more appropriate than the date of exposure.\textsuperscript{97} In that regard, one might argue that a discovery rule is not really being applied, but rather, the cause of action simply does not accrue until approximately the same date as discovery or, at least, there is enough proximity between occurrence and discovery to use the latter date.\textsuperscript{98}

In trauma cases, the date of exposure closely approximates the date of actual injury, and it is difficult to support a distinction be-

\textsuperscript{92} See note 89 supra.

\textsuperscript{93} See Klein v. Dow Corning Corp., 661 F.2d 998, 999 (2d Cir. 1981); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 813 (2d Cir. 1960); Payton v. Abbott Labs, 551 F. Supp. 245, 246 (D. Mass. 1982) (all finding that latent injuries “occur” at a point in time distinct from exposure to or use of the product).


\textsuperscript{95} See R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 787-88 (5th Cir. 1963) (holding that the defendant was estopped from invoking the statute of limitations if it knew its product was dangerous when it advertised it was wholesome); Hoeflich v. William S. Merrill Co., 288 F. Supp. 659, 661 (E.D. Pa. 1968) (holding that “the defendant is estopped from invoking the bar of the limitation of action,” if its fraud caused the plaintiff to “deviate from his right of inquiry”); Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, —, 80 Cal. Rptr. 130, 135 (1969) (holding that the cause of action did not accrue until discovery because the defendant should have known the product was dangerous when it made assurances of its safety).

\textsuperscript{96} Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1874) (statute does not begin to run until the fraud is discovered, if it is concealed, or is of such a character as to conceal itself).

\textsuperscript{97} See note 93 supra.

\textsuperscript{98} See Kristeller v. A.H. Robins Inc., 560 F. Supp. 831, 833 (N.D.N.Y. 1983) (holding that it was invalid to assume that exposure and injury were contemporaneous and, therefore, plaintiff’s action was not time barred unless defendant could prove that the injury did occur at exposure); Harig, 284 Md. at —, 394 A.2d at 305 (“like the victim of undiscerning ignorance, a person incurring disease years after exposure cannot have known of the existence of the tort until some injury manifests itself.”).
tween those two times.99 However, there are jurisdictions that choose a much earlier point in time—the date of purchase.100—and those that choose the latest—when the actionability of the injury is discovered.101 Many choose different times, depending upon the situation.102

Nebraska Limitations of Actions

The Nebraska Supreme Court has previously considered incorporation of a discovery rule into statutes of limitation for fraud, professional malpractice, breach of warranty on improvements to real property, workers' compensation, and even products liability.103 The legislature has also adopted discovery rules for most of these situations although for some statutes the rule is limited to particular circumstances.104

For many years, the courts have applied a "discovery rule" to situations involving fraud.105 Due to the nature of fraud, the discovery doctrine was incorporated into the statute of limitations adopted by the legislature.106 Fraud as a source of injury may be considered to continue up until the time the fraud is discovered.107

The Nebraska Supreme Court, in Spath v. Morrow,108 recognized

99. See LePetre v. Petrie Bros., 113 Ill. App. 3d 484, —, 447 N.E.2d 551, 552 (1983) and cases cited therein. ("Where injuries are suffered as a part of a sudden traumatic event, the statute of limitations begins to run at the time when the injury occurs.").
100. See Teel v. American Steel Foundries, 529 F. Supp. 337, 342 (E.D. Mo. 1981) (holding that the cause of action accrues when the product is tendered to the plaintiff).
101. Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, —, 335 N.W.2d 578, 580 (1983) (holding that the plaintiff must discover the right of action before the claim can accrue).
102. See note 91 supra.
104. See note 13 supra and notes 106 and 116 infra. See also NEB. REV. STAT. § 25-223 (Reissue 1979) (statute of limitations for damages from breach of warranty on improvements to real property).
105. See Wright v. Davis, 28 Neb. 479, 44 N.W. 490 (1890) (holding that the cause of action shall accrue when facts are known which would amount to knowledge); Hellman v. Davis, 24 Neb. 793, 40 N.W. 309 (1888) (holding that the cause of action shall accrue when facts are known which would amount to knowledge).
106. NEB. REV. STAT. § 25-207(4) (Reissue 1979): The following actions can only be brought within four years: . . .

(4) an action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the discovery of the fraud. . . .
a discovery rule for the professional malpractice statute of limitations. The court did not specifically exclude its application to all cases, the court’s language indicated that the rule was intended for use in limited situations. The court also found that there were special public policy considerations which mandated such a rule. There exists a confidential relationship between a professional—a doctor or lawyer—and his client or patient which necessitates application of the rule. It is generally a continuing relationship, and it would be against the best interests of the clients and patients to create a situation which would require them to move from professional to professional, checking on previous work, in order to preserve their legal interests. Additionally, malpractice is similar to fraud in that the doctor's negligence in not detecting his mistake may be said to continue until the date of discovery. The supreme court’s decision in would have allowed a plaintiff an additional two years after discovery, but the legislature reduced this time to one year when it incorporated the discovery language into the statute.

The Nebraska Supreme Court has also considered application of a discovery rule in products liability cases. In , the court determined that the applicable statute began to run when the damage occurred and not when the plaintiff discovered the cause of the damage. It found that there were no public policy considerations which necessitated adoption of the doctrine. The privacy and continuing relationship

109. Id. at 43, 115 N.W.2d at 585.
110. Id. "The general rule is that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. There are, however, many exceptions to this general rule." (citations omitted; emphasis added). Id. at 40, 115 N.W.2d at 583. "We conclude that the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body." Id. at 43, 115 N.W.2d at 585 (emphasis added).
111. Id. at 42-43, 115 N.W.2d at 584.
112. Id. See also Williams v. Elias, 140 Neb. 656, 662-63, 1 N.W.2d 121, 124 (1941).
113. , 173 Neb. at 43, 115 N.W.2d 584-85. "Silence on the part of the physician for the statutory period should not destroy the rights of the patient."
114. See id.
115. was decided pursuant to Neb. Rev. Stat. § 25-208 R.R.S. 1943 which provided: “[A]n action for malpractice [must] be brought within 2 years after the cause of action shall have accrued." , 174 Neb. at 40, 115 N.W.2d at 583. Thus, when the court found that the cause of action accrued upon discovery, the plaintiff was allowed to bring suit within two years of discovery.
[If] the cause of action is not discovered within such two-year period, then the action may be commenced within one year from the date of discovery or from the date of discovery of facts which would reasonably lead to such discovery.
117. 193 Neb. 848, 230 N.W.2d 87 (1975).
118. Id. at 851, 230 N.W.2d at 90.
119. Id.
present in malpractice cases are absent from products liability cases.\textsuperscript{120} The legislature has also enacted a statute of limitations for products liability actions,\textsuperscript{121} later amending it to provide a discovery rule especially for asbestos cases.\textsuperscript{122}

Overall, there are trends to adopt discovery rules, but they are narrowly drawn to provide for special circumstances.\textsuperscript{123} The doctrine is not new to Nebraska, yet the courts and the legislature have never found it appropriate to create a blanket discovery doctrine for all statutes of limitations.\textsuperscript{124}

\textbf{ANALYSIS}

In \textit{Condon} the Nebraska Supreme Court was presented with the question of when the statute of limitations commences to run on products liability actions.\textsuperscript{125} Its task should have essentially involved statutory construction.\textsuperscript{126} The court should have first considered the language of the statute and analyzed it according to the appropriate rules of construction.\textsuperscript{127} It was not imperative that the court weigh public policy considerations since this was a case involving statutory interpretation, but to do so would not have been inappropriate.\textsuperscript{128}

When the judiciary interprets a statute, it should consider the language as a whole to give each word its meaning for the particular context.\textsuperscript{129} In \textit{Condon}, the court only considered the words “occur”

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\item[120.] \textit{Id.} (stating that \textit{Spath} notes strong public policy considerations which set medical malpractice cases apart from other torts and that the same public policy considerations are not present in products liability cases).
\item[121.] \textit{See note 13 supra.}
\item[122.] \textit{Id.} In 1981, the Nebraska Unicameral added to subsection (1) the following language: “except one governed by subsection (5) of this section,” and provided a discovery rule for asbestos cases in subsection (5). Thus, the limitation for asbestos cases—which includes a discovery period—is an exception to the general rule.
\item[123.] \textit{See neb. rev. stat. § 25-207} (although the statute provides limitations for several causes of action, only fraud actions are allowed a discovery period); \textit{Neb. rev. stat. § 25-222} (providing a discovery rule for professional negligence, and, thus, excepting it from the malpractice statute, \textit{Neb. Rev. Stat. § 25-208} (reissue 1979)); \textit{Neb. Rev. Stat. § 25-224(5)} (providing a discovery rule for asbestos, and expressly excepted from subsection (1)).
\item[124.] \textit{See note 123 supra.}
\item[125.] \textit{Condon}, 217 Neb. at 60-61, 349 N.W.2d at 623. \textit{See also} text at note 13 supra.
\item[126.] \textit{Ray}, 134 Neb. 178, 278 N.W. 139 (holding that the court’s role—when faced with a question of the terms of the statute of limitations—is limited to interpretation).
\item[128.] \textit{See Omaha Paper Stock}, 193 Neb. at 851, 230 N.W.2d at 90 (considering essentially the same question concerning the applicability of a discovery rule to the products liability statute of limitations, but determining that the public policy considerations did not necessitate the adoption of the discovery rule for products liability).
\item[129.] \textit{Grosvenor}, 206 Neb. at 398, 293 N.W.2d at 99. The court should consider the
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and "injury" and did so without regard to the language of the entire statute. It urged that the use of "occur" rather than "happen" was significant, suggesting that the favored definition of "occur" implies the discovery of an event rather than just the event. Although it is true that there is a difference between "occur" and "happen," "occur" does not, as the court suggests, compel adoption of a discovery rule. In most instances the words are interchangeable, but in some contexts "occur" implies something more definite—an event—while "happen" merely connotes that something has come to pass. The dictionary definitions offered by the court also comport with this distinction.

The court also utilized a definition from the case of Wilkens v. Grays Harbor Community Hospital, which was not incorrect but was inappropriate as support for a discovery rule which applies in all cases. The Wilkens definition clearly applies only to latent dis-
eases or injuries.\textsuperscript{137} Further, the definition implies that latent injuries occur at a date other than the date of consumption or use of the product, and, therefore, a discovery rule is unnecessary.\textsuperscript{138} The problems resulting from the court's failure to consider the words of the statute in their context was compounded by its failure to consider the context of the definitions it used.\textsuperscript{139}

The court's interpretation of the word "injury" raises similar problems. The court relied upon the \textit{Dortch v. A.H. Robins Co.}\textsuperscript{140} as a basis for adopting its discovery rule.\textsuperscript{141} However, the \textit{Dortch} court presented a distinction between physical and legal injury and found that a legal injury is a "physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant."\textsuperscript{142} The emphasis in \textit{Dortch} was on the plaintiff's discovery of a causal connection between the defendant and the injury.\textsuperscript{143} If that definition of "injury" was to be incorporated into section 25-224(1), the result would be that the statute commences to run only upon the discovery of the cause of the injury.\textsuperscript{144} The definition is inappropriate for use by the \textit{Condon} court because the court expressly excluded that result.\textsuperscript{145} The error of using the \textit{Dortch} definition became even

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\item[137] Id. ("The presence of germs in a body does not cause a disease to occur so long as they are only latent, inactive, and not discoverable.") (emphasis added).
\item[138] See note 136 supra. See also note 93 supra for those cases holding that injuries occur at a much later date than exposure to the product.
\item[139] The court did not consider "occur" in the context of the whole statute and, thus, ignored the discovery rule of subsection (5) which was intended as an exception to the occurrence rule of subsection (1). Further, it applied only a part of a dictionary definition when a reading of the entire definition would have dismissed any discovery interpretation. It also cited a definition that applies only to latent injuries when the statute applies to all injuries.
\item[140] 59 Or. App. 310, 650 P.2d 1046 (1982).
\item[141] Condon, 217 Neb. at 67-68, 349 N.W.2d at 626-27.
\item[142] Dortch, 59 Or. App. at --, 650 P.2d at 1051.
\item[143] Id. at --, 650 P.2d at 1052. In Oregon, the plaintiff must be injured within eight years of the date of sale or his action will be forever barred by the statute of repose. If the injury occurs at any time within that period, the statute of limitations will run an additional two years. In \textit{Dortch}, the plaintiff knew he had suffered a physical injury within eight years from the date of sale but did not know its cause. Thus, the action was time barred because he had not sustained a legal injury within the eight-year period. \textit{Id.} at --, 650 P.2d at 1052-53.
\item[144] Id. at --, 650 P.2d 1051: "Injury" in the legal sense means a physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant. That is when the legal injury occurs; that is when the tort is committed; that is when the cause of action accrues and when the statute of limitations commences to run.
\item[145] Condon, 217 Neb. at 68, 349 N.W.2d at 627: "We are not providing that the statute of limitations does not begin to run until someone advises an individual either
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more obvious when, six months later, the court used that case to support an entirely different definition of "injury." 146

The Condon court contended that a potential plaintiff should not be deprived of his right to maintain a cause of action simply because he was unaware of his injury. 147 This analysis is similar to the constitutional arguments made in Colton v. Dewey. 148 In that case, the medical malpractice statute of repose barred the plaintiff's action, but the court expressly found that the legislature can provide such limitations without violating the Nebraska Constitution. 149 The Nebraska Legislature was, therefore, free to provide the limitations in section 25-224, and the court cannot justify changing the products liability statute of limitations without contending with the holding in Colton. 150 Further, providing that the statute of limitations commences to run upon discovery of the injury will not in all cases grant the plaintiff access to the courts because he may still be unaware of the accompanying right of action. 151

Even if the court's arguments had provided support for its conclusion, they would still have been insufficient because they did not reflect legislative intent. If the court found that the words were unclear, it should have resorted to rules of construction or to legislative history. 152 The court rejected its opportunity for a discussion of legis-

that the injury or damage which they already know they have sustained is actionable or advises them who it is that should be sued." 146 See Rosnick, 218 Neb. at 504, 357 N.W.2d at 190 (stating not only that a legal injury is actually the misconduct of the defendant but also stating that a legal injury exists as soon as the misconduct occurs—the "occurrence rule").

147. Condon, 217 Neb. at 63-64, 349 N.W.2d at 624-25 ("[I]f an individual is wholly unaware that he has in fact suffered injury or damage, it is difficult to see how he can file suit." Id. at 63, 349 N.W.2d at 624.).

148. 212 Neb. 126, 321 N.W.2d 913 (1982) (appellant argued that a statute of repose is unconstitutional because it violates the due process clause of the Nebraska Constitution and denies the plaintiff access to the courts, a guarantee of the Nebraska Constitution).

149. Id. at 129, 321 N.W.2d at 916. "The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that limits may not be imposed upon the time within which one must ask courts to act."

150. Id. at 130, 321 N.W.2d at 916. "The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed." (citation omitted). See also Rosnick, 218 Neb. at 507, 357 N.W.2d at 191 (upholding the constitutionality of a statute of limitations, stating that the due process requirement "does not mean that reasonable limits may not be imposed upon the time within which one must seek redress in the courts.").

151. Hansen, 113 Wis. 2d at 559, 335 N.W.2d at 582. "Although theoretically a claim is capable of enforcement as soon as the injury occurs, as a practical matter, a claim cannot be enforced until the claimant discovers the injury and the accompanying right of action."

152. See note 60 and accompanying text supra; see also Rosnick, 218 Neb. at 500-01, 357 N.W.2d at 188 ("In construing a statute this court must look to the statutory objective to be accomplished, the evil and mischief to be remedied, or purpose to be served,
ative history, even though the history of the statute provides ample opportunity to do so.

Products liability actions were originally governed by a general torts statute of limitations. Fraud actions were also governed by that statute but were expressly subject to a discovery rule. The Nebraska Supreme Court and the Nebraska Legislature adopted discovery rules in other areas. The court specifically decided that a discovery rule was not applicable in products liability actions. A bill was eventually introduced in the unicameral which provided a statute of limitations particularly for products liability actions. The proponents of the bill argued that the bill was necessary to provide certainty for manufacturers regarding the time limitations on their liability. It was especially important for insurance purposes. The proponents also were concerned about the problems of defending actions which arise out of incidents about which evidence is no longer available. The legislature accordingly enacted a separ-

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154. See Omaha Paper Stock, 193 Neb. at 849, 230 N.W.2d at 89: Section 25-207, R.R.S. 1943, is the controlling statute herein. It provides as follows: "The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff; not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in sections 76-288 to 76-298."
155. Id. (emphasis added).
156. Id.
157. See notes 103-22 and accompanying text supra.
158. Omaha Paper Stock, 193 Neb. at 854, 230 N.W.2d at 90 ("An action for an injury to the rights of the plaintiff accrues under section 25-207, R.R.S. 1943, when the damage occurs and not when plaintiff discovers the cause of the damage.").
159. Hearings on LB 665 Before the Committee on Banking, Commerce and Insurance, 85th Leg., 2d Sess. (1978) [hereinafter cited as Nebraska Hearings] (L.B. 665 "defines a 'product liability action,' provides for a specific statute of limitations and a statute of repose."
160. Nebraska Hearings, supra note 158, at 72 (statement of Sen. John W. DeCamp):
We try to solve the problem by having a wall here for predictability and a wall over here so that we know that we are accommodating and solving the vast majority of the claims and so that somebody can go ahead and develop a new product knowing the predictability and the risks involved so that we can have the insurance system continue knowing what it costs to finance it.
161. Id. at 25 (statement of Mr. Marlo Burg):
[When you go to a construction site two or three years or four years after the accident—and that's the first time you ever heard there was an accident and we've had that experience—and you try to locate all the transient people that
rate statute of limitations for products liability actions.\textsuperscript{162}

Three years later a bill was introduced as an amendment to that statute.\textsuperscript{163} It provided an exception to the statute of limitations in section 25-224(1): it created a discovery rule for asbestos cases.\textsuperscript{164} The committee rejected the suggestion that this exception be extended to all other carcinogens.\textsuperscript{165} The statute, as revised, provides for the special exception only in asbestos cases.\textsuperscript{166}

relate to that construction site who know what really happened, it becomes a very difficult task. See also id. at 32-33 (statement of Mr. Dean Kratz): “[W]e have had a very serious problem, of course, with any kind of a lawsuit which came up at any period of time subsequent to that accident. The people are gone, they are dead, documents are destroyed, their memories are dimmed and, consequently, we favor this legislation.”

\textsuperscript{162} Neb. Rev. Stat. § 25-224. See note 13 supra. See also Legislative History of L.B. 665, 85th Leg., 2d Sess. 6479 (1978). At the debate, Sen. DeCamp testified, stating: “But the statute of two years [later amended to four] is in the bill, two years from the injury or date of discovery of the injury to begin his action.” Yet, later the same day, he stated that “the intent is to maintain the law precisely as the Supreme Court decisions has [sic] made it.” Id. at 6488. A week later, Sen. DeCamp stated: “You have to bring your action within four years from the injury. . . . As a general rule we’re imposing the four and ten, but there are exceptions to that.” Id. at 6866.

Sen. DeCamp and others made various statements in regard to the commencement of the statutory period throughout the hearing and debates. Many are contradictory. The legislature did not render an opinion regarding, or even specifically addressing, the issue.

\textsuperscript{163} Hearings on LB 29 Before the Committee on the Judiciary, 87th Leg., 1st Sess. (1981). This bill provided the language “except one governed by subsection (5) of this section,” for part (1) and also added part (5). See note 13 supra. The summary of the bill’s purpose states:

The statute of limitations for asbestos injuries under existing law begins to run at the time of injury or at the time of purchase. LB 29 proposes that the statute of limitations would begin to run upon the discovery of injury and would continue to run for four years after the date of discovery.

Sen. Chris Beutler further explained that “[t]he one we are trying to change is the statute of repose which says suit 10 years after the sale is cut off absolutely. . . . We aren’t asking for a change in that basic four year period.” Id. at 3. A suggestion was made concerning the possibility of including all carcinogens instead of just asbestos, but no action was taken. Id. at 5. When the bill was introduced on the floor, Sen. Nichol stated that

the purpose of LB 29 is to extend the statute of limitations on causes of actions based on asbestos injuries so that the statute of limitations begins to run from the date of discovery, the date of discovery of the injury rather than from the date of [sic] the injury occurred.

Legislative History of L.B. 29, 87th Leg., 1st Sess. 484 (1981) (emphasis added). Sen. Beutler further explained: “By latency period I mean that the time period between the occurrence of the injury, the time of exposure to the asbestos, and the time that the symptoms begin to appear, that is, the time that it is discoverable is far in excess of ten years.” Id. at 485 (emphasis added). The statements in the legislative history of L.B. 29 evidence that the members of the legislature felt that § 25-224 did not provide a discovery period for products liability. The legislators equated injury with exposure to or use of the product and distinguished injury from discovery.


\textsuperscript{165} See note 163 supra.

\textsuperscript{166} See note 13 supra.
Regardless of whether the court had relied upon the foregoing legislative history or had used the rules of construction, its result would have been the same. The conclusion from the application of the rules of statutory construction coincides with the intent expressed in the legislative history. Construing the language of the statute as a whole, the court should have attributed some meaning to the phrase "except one governed by subsection (5) of this section." Subsection (5) provides that the statute of limitations does not commence to run until the person discovers or could have, in the exercise of reasonable diligence, discovered the injury. That subsection is to be regarded as an exception to the statute of limitations contained in subsection (1), yet the construction given to the latter subsection by the Condon court would render the words of exception meaningless.

Further, application of the maxim *inclusio unius est exclusio alterius* would deny the court its interpretation because the discovery language is expressly included in subsection (5) and other statutes. The discovery rule would, therefore, be excluded from subsection (1).

Application of the rule which creates a presumption that the legislature is aware of previous judicial construction would also preclude the result in Condon. In *Omaha Paper Stock*, the court decided that the language of section 25-207—which is essentially the same as that in section 25-224(1)—did not provide for a discovery rule for products liability. The rules of construction require that the court presume the legislature acquiesced with the construction adopted by the *Omaha Paper Stock* court when it enacted section 25-224 with essen-

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167. See note 163 supra (the legislature intended for the statute to run from the date of exposure).
168. Neb. Rev. Stat. § 25-224; see note 13 supra. See also note 64 and accompanying text supra (the court should consider the language of the statute as a whole).
170. Compare Condon, 217 Neb. at 61, 349 N.W.2d at 623 (interpreting § 25-224(1) to mean that all products liability actions, except those governed by subsection (5), shall be commenced within four years after "the party entitled to bring the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of death, injury or damage") with Neb. Rev. Stat. § 25-224(5) (Cum. Supp. 1982) (providing an "action to recover damage based on injury allegedly resulting from asbestos... shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority... or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier.").
171. See notes 13, 106, and 116 supra.
172. See text at notes 66-67 supra.
tially the same language as section 25-207.175

The language of section 25-224 is unambiguous and should not have required interpretation.176 The rules of construction and legislative history indicate that the Nebraska Legislature intended that the statutory period commence to run when the injury occurs, as section 25-224 clearly provides.177 Due to the court's interpretation, the Nebraska Legislature is likely to speak on the subject again. Considering the unicameral's reaction to the court's creation of the discovery rule for medical malpractice—it decreased the length of the statutory period following discovery—it is likely that the legislators will also limit the products liability rule.178 The public policy considerations present in those circumstances are nonexistent in products liability cases.179

While it may be acceptable to allow an injured party to exercise only reasonable diligence in discovering an injury in malpractice cases, he should be held to a stricter standard of discovery in strict liability cases.180 Product manufacturers are subject to enhanced responsibilities in safeguarding the consumer. They have a duty to warn consumers.181 They are liable if the product is defectively designed, manufactured, or labeled.182 Even if the product is misused, they can be liable if that misuse is foreseeable.183 They may even be liable under theories of alternative liability.184 These are just a few of the factors which distinguish products liability from other causes of action and which prompted the legislature to provide a statute of limitations especially for products liability. These same

175. See text at note 71 supra.
176. See notes 60-61 and accompanying text supra.
177. See note 162 supra.
178. See note 116 and accompanying text supra.
179. Omaha Paper Stock, 193 Neb. at 851, 230 N.W.2d at 90.
180. See Witherell v. Weimer, 85 Ill. 2d 146, --, 421 N.E.2d 869, 874-75 (1981) (holding the plaintiff to a standard of reasonable diligence in discovering the injury and the cause of action against the manufacturer and estopping physicians from invoking the statute of limitations).
As used in sections 25-224, 25-21,180 to 25-21,182, and 25-702, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.
182. Id.
183. Id.
factors should compel the legislature to fully consider the subject before amending the statute to include a discovery rule.

CONCLUSION

The decision in Condon v. A.H. Robins may provide persons who have causes of action based on products liability with an extended period of time during which they may sue. To the extent that the opinion assures a plaintiff whose delay was due to fraud or to the latency of his disease that he may still go forward with his action, it is commendable. However, persons bringing such actions need not resort to use of the discovery rule. Those bringing actions based in part on fraud may choose the more favorable fraud statute of limitations. Those bringing actions based on latent injuries might avoid the “necessity” of a discovery rule by successfully utilizing language in cases defining the occurrence of a latent injury as the point in time at which it becomes manifest or active. The use of these alternative theories will protect plaintiffs from exposure to risks and uncertainty inherent in a discovery rule fraught with ambiguity. At the same time, it will allow the courts to avoid the temptation to make unnecessary and impossible distinctions between the occurrence and the discoverability of an event.

Any person whose cause of action arises from a traumatic injury sustained under circumstances devoid of any implication of fraud should beware. A declaration that such injury was not discoverable may not be enough. Although the Condon court did not explicitly recognize any public policy considerations, its attempts to rationalize its decision indicate that it has not eliminated the necessity of justifying the use of a discovery rule. Yet, if a plaintiff is forced to provide cause to distinguish between the time of the injury and the time of its discoverability, there is no language in Condon to which he has recourse.

The court’s refusal to consider either the legislative history or the rules of statutory construction indicates an intent to promulgate its own limitations on actions regardless of the intent of the legislature. While the legislature expressed the need for certainty, the court eradicated certainty from the statute. The legislature is likely to respond with only a limited discovery rule, if any at all. By no means is the statute in its final form nor has it had its final interpretation.

The distinction between the date of injury and the date of discov-

erability is unnecessary and impossible to make. Since alternative means exist to provide for fraud and latent injury cases, the decision unnecessarily removes the certainty the statute was designed to create.

The Condon case will now return to the United States District Court for the District of Nebraska. That court now has an answer to its question regarding Nebraska law. However, the district court is free to entirely ignore the Nebraska court’s response. It could temper the result by finding that, in the exercise of reasonable diligence, a traumatic injury will be discovered on or about the date it is sustained. That is a reasonable assumption, and it will not prevent the use of a discovery rule in fraud and latent injury cases. Inasmuch as the statute of limitations is supposed to bar stale evidence, the court should refuse to allow stale evidence to bar imposition of the statute of limitations. There should be a presumption that a traumatic injury is discoverable on or about the date it is sustained, with the plaintiff having the burden of proving otherwise. Most important of all, the district court should recognize the inconsistencies in the Condon decision and exercise restraint in applying it.

Katherine E. Welch—’86