STATUTES OF LIMITATIONS AND REPOSE

THE DECLINE AND RISE OF STATUTES OF REPOSE—WITHERSPOOL v. SIDES CONSTRUCTION CO.

INTRODUCTION

In the recent case of Witherspoon v. Sides Construction Company, the Nebraska Supreme Court used the phrase "statutes of repose" in such a manner as to distinguish it from the more general phrase "statutes of limitations." Many state and federal courts are ruling upon statutes of repose. Since these courts are not in agreement, there is widespread discussion and confusion concerning the accrual dates, retroactivity, and constitutionality of these statutes. Witherspoon provides an unusually well-equipped springboard from which to leap into a discussion of statutes of repose, as the opinion addresses the three types of actions which statutes of repose most often cover: professional negligence, negligence in improvement to real property, and products liability. This allows a comparison of

2. Id. at 124, 362 N.W.2d at 41. The court stated: "A statute of repose is a type of statute of limitations." Id. An Illinois federal district court stated:

   Statutes of limitations extinguish, after a period of time, the right to prosecute an accrued cause of action. This statute [of repose], by way of contrast, limits a manufacturer's potential liability by limiting the time during which a cause of action can arise . . . . [T]he statute serves to bar causes of action before they accrue.


   3. See Hatfield v. Bishop Clarkson Memorial Hosp., 679 F.2d 1258, 1261 (8th Cir. 1982), rehearing en banc, 701 F.2d 1266 (1983) (certifying question to Nebraska Supreme Court) (holding that minority tolls a statute of repose under Nebraska law); Kline, 520 F. Supp. at 566 (holding that a products liability statute of repose applies retroactively under Illinois law); Regents of Univ. of Cal. v. Hartford Accident & Indem. Co., 21 Cal. 3d 624, —, 581 P.2d 197, 201, 147 Cal. Rptr. 486, 490 (1978) (holding that an improvement to real property statute of repose is inapplicable to a surety); Rosenberg v. Town of North Bergen, 61 N.J. 190, —, 293 A.2d 662, 667-68 (1972) (holding that an improvement to real property statute of repose is constitutional); Bolick v. American Barmag Corp., 306 N.C. 364, —, 293 S.E.2d 415, 420 (1982) (holding that a products liability statute of repose does not apply retroactively); McMacken v. State, 320 N.W.2d 131, 139 (S.D.) (holding that an improvement to real property statute of repose is constitutional), aff'd on rehearing, 325 N.W.2d 60 (1982).

4. See note 3 supra.

how the court applies these slightly different repose statutes to these three causes of action.

In addition to discussing and examining the Witherspoon decision, this Note analyzes the development and purpose of statutes of limitations and statutes of repose. This Note demonstrates that statutes of repose are legislative responses to judicial interpretations of statutes of limitations. Such interpretations have deprived defendants of the substantive protection they had originally been granted. By enacting statutes of repose, state legislatures have returned modern law to the spirit and intent of the original English Limitation Act of 1623.

BACKGROUND
DEVELOPMENT OF STATUTES OF LIMITATIONS AND STATUTES OF REPOSE

Originally, personal actions were unlimited as to when suit could be brought in both the Roman law and the English common law, although personal actions in England generally did not survive either party. In 424 A.D., the Roman Emperors Honorius and Theodosius decreed that the bringing of personal actions would be limited to thirty years, though a few forty year exceptions existed. Centuries later, English law also began to limit actions concerning estates in real property by forbidding the bringing of any suit which had accrued before a certain historic event. Unfortunately, these statutes in effect ran "backwards." A modern statute of limitations for personal actions was not enacted in England until 1623 A.D. The act was titled: "An Act for

6. See notes 93-120 and accompanying text infra.
7. See notes 14-20 and accompanying text infra.
8. R. Sohm, The Institutes of Roman Law 283 (3d ed. 1907). In Roman law, personal actions were known as actiones perpetuae, a label which was retained even after the adoption of statutes of limitations. Id.
11. R. Sohm, supra note 8, at 283.
12. See J. Angell, A Treatise on the Limitation of Actions at Law 9 (5th ed. 1869). Before the Statute of Merton, in the time of Henry III (1216-1272 A.D.), the limitation period for a writ of right was that no claim could be brought if it had accrued before the reign of Henry I (1100-1135). The Statute of Merton made this limitation forbid the bringing of such a writ if it had accrued before the reign of Henry II (1154-1189). This statute allowed a limitation period of nearly 90 years. Id.
13. Id. As these statutes were based upon the occurrence of a past historical event, the time period for bringing suit grew larger rather than smaller with the passing of a new day.
14. Comment, supra note 9, at 1178.
Limitations of Actions, and for avoiding Suits in Law. It set a limit of six years on suits of trespass quare clausum fregit, debt, detinue, replevin, action on the case, and actions for account. Trespass, assault, battery, wounding, and imprisonment were limited by a four year period, and an action on the case for words was limited by a two-year period. The statute further had a disability tolling provision, which allowed up to an additional ten years for those in minority, married women, incompetents, prisoners, or plaintiffs who "were beyond the seas." This statutory tolling for those "beyond the seas" was later modified to apply when a defendant was out of the realm as well. Except for cases dealing with past due accounts, these statutes were strictly enforced, or in the terms of the day, "liberally construed."

Courts then began to modify the application of the Limitations Act. The Act read in part: "[A]fter his or their right or title, which shall hereafter first descend or accrue to the same." It was the word "accrue" which the English courts would seize upon to begin modifying the application of the Act. The courts of the American states, which had adopted similar statutes as a result of their colonial

15. 21 Jac., ch. 16 (1623).
16. Comment, supra note 9, at 1192 n.148.
17. Id.
18. 21 Jac., ch. 16 (1623). A disability tolling provision is that part of a statute of limitations which prevents the statute from running upon the normal accrual date, because the potential plaintiff suffers from a legal disability and is unable to bring suit. Generally, the statute will begin to run from the point when the disability is removed. Tolling provisions usually do not apply if the disability is acquired after the statute has already started running. See Mercer's Lessee v. Selden, 42 U.S. (1 How.) 37, 52-53 (1843); Sacchi v. Blodig, 215 Neb. 817, 822, 341 N.W.2d 326, 330 (1983).
21. See notes 28-29 and accompanying text infra. In cases of past due accounts, the English courts, because they believed debts should be paid, helped plaintiffs recover unpaid past due accounts. They did so by creating the acknowledgment doctrine. It was held that an acknowledgment of a debt by the debtor would remove the debt from the statute's enforceability. The courts began to find acknowledgments where none existed. Eventually, "Lord Tenderden's Act" was passed requiring an acknowledgment to be in writing. (Memorandum Act), 9 Geo. 4, ch. 14 (1828) (essentially, a statute of frauds provision). See Bryan v. Horseman, 102 Eng. Rep. 960, 961 (K.B. 1804) (saying that the debt barred by the statute of limitations was held to be a sufficient acknowledgment); Mucklow v. St. George, 128 Eng. Rep. 471, 471 (C.P. 1812) (disallowing Bryan type of acknowledgment). See also Clementson v. Williams, 12 U.S. (8 Cranch) 72, 74 (1814) (American view of this doctrine).
23. 21 Jac., ch. 16 (1623) (emphasis added).
24. See notes 31-35 and accompanying text infra.
heritage, likewise adopted this accrual interpretation.  

These American jurisdictions considered their statutes of limitations to be, in spirit, identical with the English Limitations Act. Statutes of limitation were considered to operate as statutes of repose, and were labeled such by judges. The statute of limitations defense was considered creditable, and both judges and scholars warned against any judicial encroachment upon these statutes. Despite these admonitions, modifications occurred.

In statutes of limitations cases, the American courts followed English precedents. It appears that originally the word "accrue" was used as a term of art, expressing that point in time when the incident occurred which would be the basis of the suit, i.e., the point when the legal rights of the plaintiff were violated.

In many actions, courts began to lengthen the period during which suit could be

25. See J. Angell, supra note 12, at xxxiv app.
26. See, e.g., Cook v. Wood, 12 S.C.L. (1 McCord) 57, 58 (1821). The court stated: "All the American acts appear to have followed the statute of James. Where any difference is apparent, it is verbal and not substantial. . . ." Id. See also Note, supra note 19, at 434 (discussing the foundation of modern statutes of limitation).
28. Id. A statute of limitations, "instead of being viewed in an unfavourable light, as an unjust and discreditable defense, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose." Id.
29. See Pillow v. Roberts, 54 U.S. (13 How.) 472, 477 (1851) (stating that "[s]tatutes of limitation are founded on sound public policy. They are statutes of repose, and should not be evaded by a forced construction." Id. Fisher v. Harden, 9 F. Cas. 120, 151 (C.C.D.N.Y. 1812) (No. 4,819), rev'd on other grounds, 14 U.S. (1 Wheat.) 300 (1816). "The court here disclaims all right or inclination to put on acts of limitation, which are among the most beneficial to be found in our books, any other construction than their words naturally import . . . when the will of the legislature is clearly expressed, it ought to be followed without regard to consequences." Fisher, at 131; Green v. Johnson, 3 G. & J. 389, 394 (Md. 1831). The court said:
The act of the assembly is explicit, is positive; it leaves nothing on the subject, on which conjecture or freedom of construction can operate. "All actions of account, shall be sued within three years, ensuing the cause thereof." It has justly been denominated "a statute of repose" and is one of the most important, and beneficial legislative enactments which our statute book contains. This is not the epoch, when that salutary protection, which the legislature have wisely thrown around us, as a safeguard against fraud and oppression, should be frittered away by judicial refinements, and subtle exceptions that never entered into the contemplation of its enlightened framers. For many years it has been a subject of avowed and sincere regret, with the most distinguished judges and eminent jurists of the age, that any constructive innovations were ever engraved on this statute. We certainly are not disposed to increase the number of such interpolations.
Id. See also Benyon v. Evelyn, 124 Eng. Rep. 614, 636 (1664). The court stated: "[I]t is better to suffer a particular mischief than a general inconvenience; and such a one must happen if way be given to equitable constructions against the letter of the Act. . . ." Id.
30. See notes 31-35 and accompanying text infra.
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brought by waiting to start the statutory period until the plaintiff had suffered actual harm, instead of starting the period when the act had occurred. 33 This was labeled the "accrual doctrine," 34 for the statute was not said to run until the cause of action had "accrued," and the cause would not accrue until harm had been suffered. 35

A probable motive for the development of the accrual doctrine was the avoidance of seemingly harsh results caused by the statute's application. 36 In an age of increased surgery, patients who had medical instruments left inside their bodies were often barred from legal redress. 37 Similarly, the users of defectively manufactured products had their suits dismissed by either a statute of limitation defense, or lack of privity. 38 These were the problems judges had hoped to solve by diluting the statute; instead they created confusion. 39

The confusion occurred because the accrual doctrine had a different application for suits sounding in negligence. 40 Causes of actions involving most intentional torts accrued immediately upon violation of the plaintiff's legal rights, regardless of whether that violation resulted in only nominal damages. 41 Suits in negligence, requiring damages as part of plaintiff's case, 42 would not have accrued until those damages had occurred. 43 Hence, the real change in the application of the statute was in the negligence area.

Furthermore, the actual point of accrual was not consistently determined by the various state courts, and those inconsistencies caused accrual dates to vary. 44 The different methods historically and presently used to determine accrual include: (1) the "first breath" method; (2) the "last breath" method; (3) the "time of medical injury" method; and (4) the "discovery rule" method. 45

33. Comment, supra note 9, at 1200.
35. See White v. Schnoebelen, 91 N.H. 273, —, 18 A.2d 185, 186 (1941) (holding that accrual for faulty installation of lightning rod accrues when damage from lightning is suffered); State ex rel. Cardin v. McClellan, 113 Tenn. 616, —, 85 S.W. 267, 270 (1905) (holding that accrual against clerk for misfiling of realty deed is at time when injury from mistake is suffered).
36. Comment, supra note 9, at 1187.
37. See, e.g., Steele v. Gann, 197 Ark. 480, —, 123 S.W. 520, 523 (1939).
39. See notes 40-45 and accompanying text infra.
40. Comment, supra note 9, at 1200-01.
41. Id.
42. W. PROSSER & W. KEETON, supra note 10, § 30, at 165.
43. See note 35 supra.
44. See Comment, supra note 34, at 503.
45. Id. at 505.
The "first breath" method is similar to the original application of the Act and the present application of the accrual date in the intentional tort field. This method assumes that injury occurs upon the first exposure (or first breath) of a hazard, thereby accruing the cause of action immediately and starting the running of the statute. Each subsequent exposure is treated as an aggravation of the initial injury, not a new or separate injury, and there is no continuing accrual. From a recent decision, it appears that New York still adheres to this method.

The "last breath" method treats the exposure to the hazard as one continuous tort, and therefore the cause of action does not accrue until the action ceases (the last breath). This method was recently judicially adopted by Alabama. Despite the passage of a statute of repose there, this method of accrual will still apply to ascertain the accrual date for the statute of limitations provided that the outer period of the statute of repose is not exceeded.

An example illustrates the inconsistent result caused by the application of the different accrual methods. It would appear that a miner who worked for twenty years in New York would have suit barred before he retired. However, a similar miner in Alabama, because the statute would not begin running until after his last day at work, would not be time-barred.

The "time of medical injury" method treats the action as accruing at that point when the "plaintiff was hurt." It is intended to soften the rigid application of either of the above methods, and to be applied to each plaintiff individually. This method "pinpoints the precise date of injury with a reasonable degree of medical certainty." This is accomplished by the court examining expert medical testimony, which attempts to trace the injury to the date upon which it began in the body. This does not necessarily indicate the

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46. See Comment, supra note 9, at 1179-80.
47. Comment, supra note 34, at 505-07.
48. Id. at 505.
50. Comment, supra note 34, at 507.
51. Id. at 508.
54. Comment, supra note 34, at 509.
56. See Comment, supra note 34, at 509.
57. Locke, 221 Va. at —, 275 S.E.2d at 905.
58. See Comment, supra note 34, at 509.
point in time when the injury manifested itself to the plaintiff.\textsuperscript{59} It only allows suit to be brought if the medical injury suffered by the plaintiff did not occur at a point in the past greater than the statutory period.

The cause of action of a miner employed in Virginia, which uses the "time of medical injury" method, would begin to accrue at some unspecified point between his first exposure and the manifestation of his injury, as determined by medical evidence and judgment. It is possible, with slow-progressing diseases, that before such a manifestation would have occurred, the statute would have run.\textsuperscript{60}

The last and most significant method is so prevalent that it is often considered an extension beyond the other accrual methods.\textsuperscript{61} This is the discovery rule method. The rapid adoption of this method is the most probable reason for the passage of statutes of repose.\textsuperscript{62} This method provides that a cause of action does not accrue until the injury has manifested itself to the plaintiff.\textsuperscript{63} This manifestation is the first time the potential plaintiff becomes aware of his injury or his ability to sue.\textsuperscript{64}

This idea originally arose in subadjacent mining cases.\textsuperscript{65} The English Parliament adopted this idea, passing a statute forbidding fraud from concealing a cause of action.\textsuperscript{66} Later, similar statutes

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\item \textsuperscript{59} Locke, 221 Va. at —, 275 S.E.2d at 905. The court stated:
\begin{quote}
We merely conclude that the accrual point is when damage occurs. Under this rule, it is conceivable that when the disease manifests itself by symptoms, such as pain, discomfort or impairment of function, expert medical testimony will demonstrate the injury occurred weeks, months or even years before the onset of the symptoms. Thus, the cause of action would accrue and the limitations period would run from the earlier and not the later time.
\end{quote}
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\textit{Id.}

\textsuperscript{60} Id.

\textsuperscript{61} Comment, supra note 34, at 512.


were passed by several state legislatures. As a result, the statute of limitations is often tolled until the fraud is, or could have reasonably been, discovered. Courts adopted an exception to the statute of limitations when a foreign object had been left inside a patient because of the doctor-patient relationship, and the patient's necessary reliance upon the doctor. The discovery rule method was then applied to other types of actions outside the medical malpractice area.

It is said that for every action there is an equal and opposite reaction, and the adoption of the discovery rule method was no different. Pressured by the lobbying of various professional associations, insurance companies, the business community, and the construction industry, many states began passing statutes of repose. These statutes, like statutes of limitations, limit the time in which suit can be brought, but provide for the substantive repose of the defendant as well. A typical statute of repose is constructed with:

(1) a section that defines the scope of the statute in terms of legal theory, subject matter, and defendants; (2) a defined event which triggers the running of the statute; (3) a length of repose period; (4) the consequences of suit after the passage of the repose period; (5) an effective date and application provision; (6) at least several exceptions.

Nebraska's professional negligence section provides a good example:

Any action to recover damages based on alleged professional
negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; provided, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and provided further, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.  

The applicability of statutory disability tolling provisions varies from state to state. Disability tolling is the postponement of the running of the statute because the injured party suffers from a legal disability, and therefore cannot bring suit. Originally, these provisions applied to minors, married women, incompetents, prisoners, and those who were out of the country when the cause of action would normally accrue. In England, the tolling for prisoners and persons out of English jurisdictions was removed by statute. In the United States, the Married Women's Acts generally removed tolling for married women. It is now a general rule of law that, absent a specific statutory provision, status will not toll a limitations statute.

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75. NEB. REV. STAT. § 25-222 (Reissue 1981). This idea of having different periods, one for the limitations section and one for the repose section, is not an American innovation. The West German, Swiss, and French codes have had similar provisions for decades. Comment, supra note 9, at 1178.


77. See note 18 supra.

78. See note 19 and accompanying text supra.


81. Simon v. United States, 244 F.2d 703, 705 (5th Cir. 1957). The Fifth Circuit stated: "[I]t is now conceded that [the courts] will not as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reason-
The question of whether Nebraska law provides for the tolling of statutes of repose was first discussed in *Hatfield v. Bishop Clarkson Memorial Hospital*. 82

In *Hatfield*, a minor brought suit for medical malpractice claiming that the statute had been tolled by his minority. 83 The Eighth Circuit Court of Appeals agreed, and ruled that the statutes of repose were subject to the tolling provisions. 84 The court did not, however, consider the historical context of tolling in its decision. The Nebraska Supreme Court later agreed with the *Hatfield* rationale. 85

The courts in other states do not always agree, and some hold statutes of repose are exempt from disability tolling provisions. 86 The usual rationale for such a holding is that language similar to "in no event may any action be commenced" appears in the statutes, and is held to be an absolute bar to disability tolling. 87 Tolling in and of itself is important as it indicates the substantive nature of both statutes of limitations and statutes of repose. 88

The constitutionality of statutes of repose is sometimes challenged. 89 While statutes of repose have been found unconstitutional as violative of due process and equal protection clauses in state constitutions, they have also been upheld as constitutional. 90 Often, however, when these statutes do fall, they are determined to violate "access to the courts" or "no special legislation" provisions in state constitutions. 91 The United States Supreme Court has recently dis-

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82. 679 F.2d 1258, 1260-61 (8th Cir. 1982), rehearing en banc, 701 F.2d 1266 (8th Cir. 1983) (certifying question to Nebraska Supreme Court).
83. Id. at 1259-60.
84. Id. at 1264.
85. Sacchi, 215 Neb. at 822, 341 N.W.2d at 330.
86. See, e.g., Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, —, 425 N.E.2d 522, 526-27 (1981) (holding that a products liability statute of repose is not tolled by minority); O'Connor v. Altus, 67 N.J. 106, —, 335 A.2d 545, 554 (1975) (holding that an improvement to real property statute of repose is not tolled by minority); Mahathy, 584 S.W.2d at 522 (holding that an improvement to real property statute of repose is not tolled by minority).
87. See Note, supra note 73, at 153-54.
88. See notes 111-16 and accompanying text infra.
89. See McMacken v. State, 325 N.W.2d 60, 61-62, (S.D. 1982) (Henderson, J., dissenting) (listing states where constitutionality of statutes of repose have been challenged).
91. Overland Constr. Co. v. Sirmons, 369 So. 2d 572, 575 (Fla. 1979) (holding that a statute of repose violates state "access to court" provision); Skinner v. Anderson, 38 Ill. 2d 455, —, 231 N.E.2d 588, 596 (1967) (holding that an improvement to real property statute of repose violates "no special legislation" provision); Saylor v. Hall, 497 S.W.2d
missed appeals of cases where these statutes have been upheld by state supreme courts.92

PURPOSE OF STATUTES OF LIMITATIONS AND STATUTES OF REPPOSE

Though several explanations have been expounded over the past 350 years as to the purpose of statutes of limitations, the one which is most compelling is that statutes of limitations were created to protect defendants and give them repose.93 Certainly that is the purpose of present day statutes of repose.94

This assertion is demonstrated by a careful analysis of the historical legal context in which the original English Limitation Act was passed. Before 1603, actions on overdue simple contracts were sued upon in an action labeled debt.95 Typically, the defendant would respond “nil debet,” swear he owed nothing, and present eleven men who swore that they believed him.96 This was known as the wager of law and its practice made a statute of limitations unnecessary.97 This evidentiary procedure was combined with a presumption that overdue debts had been paid.98 This presumption was hard to overcome, because of the wager of law method of proof.99 The decision in Slade’s Case,100 however, allowed the wager of law to be successfully
outmaneuvered. Plaintiffs were then allowed to bring their past due simple contract suits in *assumpsit*, which did not permit the *wager of law*. This was a major tactical loss for defendants. It appeared that one would have to keep records indefinitely. No time limit existed as to when suit was barred, and without the *wager of law*, the presumption of payment was severely weakened.

This may be why the Limitation Act so clearly laid out the statutory periods for each cause of action, in order to prevent another flanking of defendant's possible pleadings.

A similar concern is shown for the defendant in a concurrent Act: "An Act for avoiding of vexatious Delays caused by removing Actions and Suits out of inferior Courts." This Act provided relief by preventing the removal of certain cases to royal courts, easing the time and financial burden such removal placed upon defendants. Additionally, the pleading of the statute was made an affirmative defense, giving the defendant the option to raise it.

Early case law in England and the United States expressed the opinion that statutes of limitations were passed for the repose of the defendant, removing the plaintiff's right to recovery. However, courts later held that statutes of limitations affected the remedy and not the right to recovery. Thus, the courts removed much of defendant's


103. W. *Ferguson*, *supra* note 31, at 43. A defendant's only protection against loss of evidence was the statute of limitations. *Id.*

104. *See* id. at 11. The commentator explained: "Whether it is appropriate to blame *Slade's Case* for the Statute of Limitations is speculative but there seems to be no other development which points to the necessity for the statute which was adopted some twenty-one years later." *Id.*

105. 21 Jac., ch. 23 (1623).

106. *See* Comment, *supra* note 9, at 1178.

107. *Fed. R. Civ. P.* 8; W. *Ferguson*, *supra* note 31, at 42. *But see* Williams v. Elias, 140 Neb. 656, 656, 1 N.W.2d 121, 121 (1941) (Nebraska allowed the pleading of the statute by *demurrer*).


109. Willcox v. Huggins, 94 Eng. Rep. 705, 706 (K.B. 1731). The court stated: "[T]he statute [of limitations] was made for the benefit of defendants' for their witnesses, after a length of time, are presumed to be dead, and their vouchers lost." *Id.* *See* notes 29, 93 supra. *See also* Bonney v. Ridgard, 29 Eng. Rep. 1101, 1103 (Ch. 1784) (wherein an equity court analogously applied the statute to a trust).

110. This theory apparently was first applied to a personal action in *Spears* v. Hartley, 170 Eng. Rep. 545, 546 (C.P. 1800). The *Spears* court cited to Naylor v. Mangles, 170 Eng. Rep. 295, 296 (C.P. 1794). *Naylor* had dealt with commercial rights of warehousemen. No relevant citation concerning the right-remedy theory is given in *Spears*. The court explained: "[I]f the debt is discharged by operation of the Statute of Limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only. . . ." *Spears*, 170 Eng. Rep. at 546.
These same courts which held that only the remedy was affected, eventually created the discovery rule method of accrual. However, these courts missed a significant point. Statutes of repose are considered substantive because they either destroy a right to sue before it exists, or cut off such a right to sue. Originally, so did statutes of limitations. This is demonstrated by the presence of the tolling provisions in the English Limitation Act. In enacting tolling provisions, Parliament protected the rights of those who could not bring suit in their own names. Since no member of the classes protected by tolling provisions could be charged with having legal knowledge of a cause of action, the passage of the provisions shows that Parliament realized that without protection these disabled classes might lose valid causes of action. The statute could run before they had gained their ability to sue. If the discovery rule method was the intent of Parliament, the tolling provisions would seem redundant.

113. Kline v. J.I. Case Co., 520 F. Supp. 564, 566 (N.D. Ill. 1981). The court stated: The challenged statute, as its name indicates, is not truly a statute of limitations. Statutes of limitations extinguish, after a period of time, the right to prosecute an accrued cause of action. [A statute of repose], by way of contrast, limits a manufacturer's potential liability by limiting the time during which a cause of action can arise. As plaintiffs contend, the statute serves to bar causes of action before they accrue. Id See also McMacken v. State, 320 N.W.2d 131, 136-37 (S.D.) (discussing the effect of statutes of repose), aff'd on rehearing, 325 N.W.2d 60 (1982).
114. Cf. Harnett v. Fisher, 16 B.R.C. 238, 240 (1927) (discussing how insane persons cannot sue except by their "next friend"). The term "disability" is defined as follows: "The want of legal capacity to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus, persons under age, insane persons, and convicts are said to be under disability." BLACK'S LAW DICTIONARY 414 (5th ed. 1979).
115. Sacchi v. Blodig, 215 Neb. 817, 822, 341 N.W.2d 326, 330 (1983). The court stated: "[I]t would be a legal paradox to state that the insane are required to learn and comprehend facts which would put persons of ordinary intelligence and prudence on inquiry for discovery of malpractice." Id, See also Harnett, 16 B.R.C. at 240.
116. See Harnett, 16 B.R.C. at 240. The disabled person's right to sue would have been abolished before accrual, unless the discovery rule method's standard of requiring knowledge was being used. Historically, knowledge of a cause of action is irrelevant to the action's accrual. Granger v. George, 16 E.R.C. 203, 207 (K.B. 1826) (action in trover); Short v. M'Carthy, 106 Eng. Rep. 789, 791 (K.B. 1857) (action in assumpsit). Thus, without the tolling provisions, the English Limitation Act would then have had the same effect on legally disabled persons that statutes of repose presently have on all. See note 112 supra. As the effects of both are the same, both are substantive.
117. See notes 112-16 and accompanying text supra. The discovery rule requires knowledge for accrual. Legally disabled persons cannot be charged with such knowledge. The statute of limitations would not run until that knowledge was acquired. Thus, under the discovery rule method, the tolling provisions would have the effect of preventing a statute from running though the cause had yet to accrue. As such it would have been redundant.
Modern statutes of repose again recognize the right of the defendant to repose and provide adequate substantive protection to ensure it.\textsuperscript{118} A plaintiff's right to recovery is only offset by a defendant's equal right to repose.\textsuperscript{119} This compromise appears to be a fair one in Nebraska, where the repose period is ten years.\textsuperscript{120} Also, special legislative solutions are available in those situations where this period seems unjust.\textsuperscript{121}

In summary, repose statutes were passed to reassert the substantive protection originally granted by the English Limitation Act and its American adaptations. Repose statutes do so by regranting the right of repose to defendants, just as the Limitation Act granted similar relief to defendants after the judicial undermining of the \textit{wager of law}. This right of repose had been substantially weakened by the judiciary's application of the Act to the remedy and not the right. This eventually led to the adoption of the discovery rule method of accrual. This series of events occurred despite the presence of disability tolling and early case law which discouraged modification of statutes of limitations.

\textbf{ASCERTAINING THE ACCRUAL DATE IN NEBRASKA PROFESSIONAL NEGLIGENCE ACTIONS}

In Nebraska, the general rule is that a cause of action for professional negligence accrues at the time the plaintiff has the right to institute and maintain suit.\textsuperscript{122} In various jurisdictions in the United States, this has been taken to be the date of the actual mistake or omission by the professional.\textsuperscript{123} The language in section 25-222, Nebraska's professional negligence statute, seems to indicate this same accrual date with the phrase: "after the date of rendering or failure to render such professional service."\textsuperscript{124} Two major "exceptions" have

\begin{itemize}
  \item \textsuperscript{118} See note 113 supra.
  \item \textsuperscript{119} See Kline, 520 F. Supp. at 566; Note, supra note 73, at 153-54.
  \item \textsuperscript{120} Cf. \textit{Hearings, Before Subcomm. I of the House Comm. on the District of Columbia}, 90th Cong., 1st Sess, 28 (1967) (showing a sampling of claims against architects in which 84.3\% were brought within four years, 98.7\% within eight years, and 99.6\% within ten years). Consequently, Nebraska's ten-year statute of repose would bar only four-tenths of one percent of such claims against architects.
  \item \textsuperscript{122} Spath v. Morrow, 174 Neb. 38, 41, 115 N.W.2d 581, 583 (1962).
  \item \textsuperscript{123} See Wilcox v. Plummer, 29 U.S. (4 Pet.) 172, 179 (1830) (applying North Carolina law); Clark v. Gulisian, 429 F.2d 405, 406 (1st Cir. 1970) (applying Maine law); Tessier v. United States, 269 F.2d 305, 310 (1st Cir. 1959) (applying federal law); Pickett v. Aginsky, 110 F.2d 628, 629 (4th Cir. 1940) (applying West Virginia law); M'Alexander v. Montgomery, 31 Va. (4 Leigh) 61, 67 (1832) (cause of action against surveying engineer accrues at date of mistake).
  \item \textsuperscript{124} NEB. REV. STAT. § 25-222 (Reissue 1981).
\end{itemize}
been adopted in Nebraska to determine when the potential plaintiff may bring suit.

The first is known as the "continuous treatment" exception, adopted by Nebraska in the medical malpractice case of Williams v. Elias. The defendant physician had pleaded the statute of limitations, a two year period under section 25-207, the then tort statute of limitations. The court, in holding that the suit was not time barred, developed a method by which diagnosis was combined within the period of treatment creating one overall "continuous treatment." In Lincoln Grain, Inc. v. Coopers & Lybrand, an accountant's malpractice case, the court gave a clear test for application of this exception: first, the relationship must be continuous; and second the relationship must be for the same or a related purpose during its entire length.

A side effect of this exception is that during the continuous relationship, the potential plaintiff may not bring suit until its cessation. Lincoln Grain was an attempt to apply this exception outside the medical area in Nebraska. While this attempt was not successful, as the defendant's conduct did not meet the above test, it is clear that this exception could be applied outside the medical malpractice area. Other states have done so. As this exception affects accrual, the passage of the statute of repose should not affect its application, for the statute of repose does not start running until after accrual.

The discovery rule method, as adopted by Nebraska, operates as an exception, and originated in a medical malpractice case, Spath

125. 140 Neb. 656, 662, 1 N.W.2d 121, 123 (1941).
126. Id. at 657, 1 N.W.2d at 122.
127. Id. at 656, 1 N.W.2d at 122 (applying NEB. COMP. STAT. § 20-208 (Cum. Supp. 1939)) (allowed a two-year statutory period).
128. Williams, 140 Neb. at 661-62, 1 N.W.2d at 123-34.
130. Id. at 294-95, 338 N.W.2d at 598.
131. Spath, 174 Neb. at 41, 115 N.W.2d at 584; Williams, 140 Neb. at 662-63, 1 N.W.2d at 124. The Spath court stated "that the physician should have a reasonable opportunity to correct mistakes incident to even skilled surgery; and that the physician should not be harrassed by premature litigation..." Spath, 174 Neb. at 43, 115 N.W.2d at 584.
132. See Lincoln Grain, 215 Neb. at 295-96, 338 N.W.2d at 598.
133. Id. The court did not reject this attempt ab initio. Id.
135. See notes 32-36 and accompanying text supra.
136. See notes 62-71 and accompanying text supra.
v. Morrow.\textsuperscript{137} In \textit{Spath}, part of a surgical needle was left inside the plaintiff for ten years before its discovery.\textsuperscript{138} The defendant physician pleaded the two year statute of limitations.\textsuperscript{139} The court, in allowing suit and adopting the discovery rule method, stated that the purpose of statutes of limitations is to prevent recovery on stale demands.\textsuperscript{140} As such, the court held the cause of action “did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, [the injury].”\textsuperscript{141}

Because the professional negligence section contains an explicit discovery provision, its passage has been held to limit the long-reaching effects of the discovery rule method.\textsuperscript{142} In \textit{Colton v. Dewey},\textsuperscript{143} the supreme court explicitly examined the section’s effect on the discovery rule method. X-ray treatments which had ended in 1965, purportedly were the proximate cause of breast cancer discovered by the plaintiff in 1979.\textsuperscript{144} In finding that the suit was time barred, the court stated that “injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery.”\textsuperscript{145}

Section 25-222 has also been applied to lawyers,\textsuperscript{146} accountants,\textsuperscript{147} medical technicians,\textsuperscript{148} and investment counselors.\textsuperscript{149} The test which determines applicability is directed towards the services performed, and not towards the title or position of the defendant.\textsuperscript{150} The test as provided by the court is whether “the service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.”\textsuperscript{151} The Eighth Circuit has applied this section to architects and engineers in \textit{Horn v. Burns & Roe},\textsuperscript{152} where the design and installa-

\textsuperscript{138} \textit{Id.} at 39, 115 N.W.2d at 583.
\textsuperscript{139} \textit{Id.} at 40, 115 N.W.2d at 583.
\textsuperscript{140} \textit{Id.} at 41, 115 N.W.2d at 583-84.
\textsuperscript{141} \textit{Id.} at 43, 115 N.W.2d at 585.
\textsuperscript{142} \textit{See} Colton v. Dewey, 212 Neb. 126, 130, 321 N.W.2d 913, 916 (1982).
\textsuperscript{143} 212 Neb. 126, 321 N.W.2d 913 (1982).
\textsuperscript{144} \textit{Id.} at 127, 321 N.W.2d at 913.
\textsuperscript{145} \textit{Id.} at 130, 321 N.W.2d at 916.
\textsuperscript{146} Rosnick v. Marks, 218 Neb. 499, 500, 357 N.W.2d 186, 188 (1984).
\textsuperscript{149} Education Serv. Unit No. 3 v. Mammel, Olsen, Schropp, Horn & Swartzbaugh, Inc., 192 Neb. 431, 433, 222 N.W.2d 125, 127 (1974).
\textsuperscript{150} \textit{Swassing}, 195 Neb. at 656, 240 N.W.2d at 27.
\textsuperscript{151} Marx v. Hartford Accident & Indem. Co., 183 Neb. 12, 14, 157 N.W.2d 870, 872 (1968).
\textsuperscript{152} 536 F.2d 251, 253 (8th Cir. 1976).
tion of fixtures by an architect and engineer in a factory were alleged to have been negligent.\textsuperscript{153} In \textit{Grand Island School District No. 2 v. Celotex Corp.},\textsuperscript{154} however, the Nebraska Supreme Court applied section 25-223, the improvement to real property statute of repose to architects and engineers.\textsuperscript{155} In \textit{Celotex Corp.}, an architect and engineer were alleged to have been negligent in supervising the installation of a roof.\textsuperscript{156} It would seem that both the continuous treatment exception and the limited discovery rule of section 25-222 would apply to all professionals covered by this section.

\section*{ASCERTAINING THE ACCRUAL DATE IN NEBRASKA IMPROVEMENT-TO-REAL-PROPERTY NEGLIGENCE ACTIONS}

Before the passage of section 25-223, the improvement to real property statute of repose, similar actions were governed by section 25-207(3), as in \textit{Omaha Paper Stock Co. v. Martin K. Eby Construction Co.}\textsuperscript{157} That court set the accrual date for such actions as the date of injury, not the date of discovery.\textsuperscript{158}

It appears that the first case decided under section 25-223 was \textit{Celotex Corp.}\textsuperscript{159} In \textit{Celotex Corp.}, the suit was based upon a faulty roof, completed in 1967, which began leaking in 1968, and severely leaked in 1969.\textsuperscript{160} The suit was not instituted, however, until 1976.\textsuperscript{161} Because the suit had been brought long after the initial leaks had begun and thus their discovery had occurred during the running of the initial limitations period, the court refused to apply the limited discovery provision explicitly provided for in the improvement to real property section.\textsuperscript{162} The focus of the court for accrual purposes seemed to be at the date that the latent injury was, or should have been, discovered.\textsuperscript{163} It should be noted that \textit{Celotex Corp.} dealt only with the statute of limitations portion of section 25-223; perhaps this is why the court emphasized discovery.\textsuperscript{164}

More recently, the court examined the accrual date issue in

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{153} \textit{Id.}
\item\textsuperscript{154} 203 Neb. 559, 564, 279 N.W.2d 603, 607 (1979).
\item\textsuperscript{155} \textit{Id.}
\item\textsuperscript{156} \textit{Id.} at 561, 279 N.W.2d at 605.
\item\textsuperscript{157} \textit{Id.} at 851, 230 N.W.2d at 90. The court held: “An action for an injury to the rights of plaintiff accrues under \textsection{25-207}, R.R.S. 1943, when the damage occurs, and not when the plaintiff discovers the damage.” \textit{Id.}
\item\textsuperscript{158} \textit{See Celotex Corp.}, 203 Neb. at 565-67, 279 N.W.2d at 606-07.
\item\textsuperscript{159} \textit{Id.} at 561-62, 279 N.W.2d at 606.
\item\textsuperscript{160} \textit{Id.} at 562, 279 N.W.2d 606.
\item\textsuperscript{161} \textit{Id.} at 563-65, 279 N.W.2d 606-08.
\item\textsuperscript{162} \textit{Id.}
\item\textsuperscript{163} \textit{Id.}
\item\textsuperscript{164} \textit{Id.}
\end{enumerate}
\end{footnotesize}
Kearney Clinic Building Corp. v. Weaver. In Weaver, the basis of the suit was again a faulty roof. After the initial complaints concerning leakage, the contractor began some repair attempts. The date of substantial completion for the building was April, 1975, but these leakage problems had already begun by the fall of 1974. The court ignored the substantial completion date as the accrual date per se and stated that "[substantial completion is not the issue under § 25-223] when the plaintiff is aware of the problem before substantial completion." Substantial completion is important, however, as a plaintiff cannot bring suit until completion, as the cause of action has not accrued. Weaver also dealt only with the statute of limitations portion of section 25-223.

From these cases, it appears that the court's determination of the accrual date for the limitations portion of the improvement to real property section has been influenced more by discovery than substantial completion. The accrual date for the statute of repose portion of section 25-223 has remained unaddressed.

An attempt to apply the continuous treatment exception was rejected in Weaver because that issue had not been raised and preserved at the district court level. The merits and applicability of that argument were therefore not discussed. Other states apply the continuous treatment exception in these cases, provided that both continuing attempts to repair, and reliance on those attempts, are present. At least one state, however, will not apply this exception to improvement to real property situations.

The presence of fraud may also postpone or toll accrual under section 25-223 in Nebraska. Historically, fraud has postponed accrual. Some modern jurisdictions and commentaries follow this
These jurisdictions generally require knowledge of the fraud on the part of the contractor.

**ASCERTAINING THE ACCRUAL DATE IN NEBRASKA PRODUCTS LIABILITY ACTIONS**

Apparently, no cases exist, which determine the accrual date for the repose portion of the products liability section in Nebraska, and one appellee pleaded this accrual issue as one of first impression. In 1955, due to Massachusetts' conflict of laws statutes, the First Circuit Court of Appeals applied Nebraska law in *Sylvania Electric Products, Inc. v. Barker* a products liability case. In *Barker*, the decedent was a "tube blower," a job necessary to the manufacture of neon signs. The decedent's employer began using tubes manufactured by Sylvania, the insides of which were coated with beryllium. It appears that the blowing of these tubes had resulted in the ingestion of some of this substance, causing berylliosis. This led to the decedent's early retirement and death. The court, in determining when the cause of action had accrued, looked to a workmen's compensation decision. The circuit court declared that Nebraska "has repeatedly held in workmen's compensation cases that the statutory period within which such actions must be brought does not begin to run until the employee acquires knowledge of a compensable disability and . . . would apply the same liberal rule in actions of tort like the present." Thus, the accrual date was determined to be the date when the decedent acquired knowledge of a compensable injury.

This adoption of the discovery rule method as interpreted by the First Circuit has been recently approved by the Nebraska Supreme Court in *Condon v. A.H. Robins Co.* The Nebraska Supreme Court

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178. Id. at 878.
179. Brief for Appellee (McWane) at 13, *Witherspoon*.
180. 228 F.2d 842 (1st Cir. 1955).
181. Id. at 847.
182. Id. at 845.
183. Id.
184. Id. at 845-46.
185. Id. at 846.
186. Id. at 848 (citing Dryden v. Omaha Steel Works, 148 Neb. 1, 5, 26 N.W.2d 293, 295 (1947)).
187. *Barker*, 228 F.2d at 848.
188. Id. at 850.
certified, in answer to the United States District Court of Nebraska, when accrual for the limitations portion of the products liability section occurs. The court held that a cause of action under the provisions of section 25-224(1) begins to run "from the time 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." Condon dealt with injury received from an intrauterine device. Because the case arose through the certification process, the facts were not on record before the court, and did not greatly influence the decision.

After Condon, section 25-224 was legislatively modified to add a products liability statute of repose, which expressly limits the discovery rule; similarly, sections 25-222, the professional negligence statute of repose, and 25-223, the real property negligence statute of repose, limit the discovery rule method of accrual. This repose period is set at ten years after the product was first sold for use. Although section 25-224 does not define "first sold for use," other states have interpreted the word "sold" in construing the liability of suppliers of chattels under the Restatement (Second) of Torts. Generally, "sold" in the Restatement "indicates the time at which defendant relinquished control or possession of the product."

The applicability of this section appears to extend to the component parts of a product. However, the component part is not "used" for purposes of the section until its sale or lease to an ultimate consumer. Hence, accrual for the repose portion of the products liability section would be on the sale or lease date.

The legislative history of section 25-224 limits the scope of this section to products which are considered "goods" under the Uniform

190. Condon, 217 Neb. at 60, 349 N.W.2d at 623.
191. Id. at 61, 349 N.W.2d at 623.
192. Id. at 60, 349 N.W.2d at 623.
193. Id. at 61, 349 N.W.2d at 623.
195. See notes 142, 162 and accompanying text supra.
197. Winters v. Sears, Roebuck & Co., 554 S.W.2d 555, 572 (Mo. Ct. App. 1977); Shoppers World v. Villarreal, 518 S.W.2d 913, 917 (Tex. Civ. App. 1975). Both of these cases discuss the application of Restatement (Second) of Torts § 402A (1965). For a discussion of "user" and "consumer," see comment 3 to § 402A.
198. Winters, 554 S.W.2d at 572. The term "first sold for use" also has been defined for purposes of a consumer protection act. See South Texas Irrigation Sys., Inc. v. Lockwood Corp., 489 F. Supp. 256, 259 (W.D. Tex. 1980).
199. See notes 306-15 and accompanying text infra.
200. See notes 308-13 and accompanying text infra.
LIMITATIONS AND REPOSE

Commercial Code.  The legislative history defines the word "product" as used in the section to coincide with the meaning of "goods" under the Uniform Commercial Code.  Items which do not meet this definition would be covered under some other limitations or re-pose section.

In a products liability action, another significant barrier to recovery occurs when suit is based upon strict liability. Some states, to avoid conflict with the Uniform Commercial Code, do not allow suit for economic loss or destruction of property. Until recently, Nebraska was such a state. Suits for property damage are now allowed in Nebraska. Since the MacPherson v. Buick Motor Co. decision, and its adoption by all American jurisdictions, privity is no longer needed for recovery by third party victims.

FACTS AND HOLDING

In 1968 or 1969, D.J. Witherspoon retained the architecture firm of Stanley J. How & Associates, Inc. to design and supervise the construction of a home. How selected Raymond J. Alvine & Associates, Inc. as the engineering firm for the project. Witherspoon also contracted with the Sides Construction Company to serve as the general contractor. Sides subcontracted with J.H. Martig, Inc. for the plumbing work. The plans and specifications, as submitted by How and Alvine, specified a three-inch pipe made of cast iron to serve as the water main for the home. However, the water utility company and general architecture and engineering practices required the use of a similar pipe made of ductile iron. Martig followed the

201. *Hearings on L.B. 665 Before the Committee on Banking, Commerce and Insurance*, NEB. UNICAMERAL, 85th Leg., 2d Sess. 6855-56 (Feb. 27, 1978).
202. *Id.*
204. *See* NEBRASKA CONTINUING LEGAL EDUC., NO. 6, RECENT DEVELOPMENTS IN THE LAW OF PRODUCTS LIABILITY IN NEBRASKA 9-10 (Feb. 1984).
207. 217 N.Y. 382, 111 N.E. 1050 (1916).
210. *Id.*
211. *Id.*
212. *Id.* The plumbing work would form the basis of the suit. *Id.*
213. For clarity’s sake, this Note refers to “plans” as the work prepared by an architect, and “specifications” as the work prepared by an engineer.
214. Witherspoon, 219 Neb. at 125-27, 362 N.W.2d at 41-42.
215. *Id.* at 120, 362 N.W.2d at 39.
plans and specifications, using a pipe manufactured by the McWane Cast Iron Pipe Company, Inc. This pipe was installed in September, 1969 and brought water to the construction site. The house was completed near Christmas, 1970, when Witherspoon took possession.

All seemed well until December 31, 1979, when the pipe broke through the foundation, flooding the basement. The resulting damages were in excess of $350,000. The cause of the break was shown to be a lack of thrust restraints at the breakage point. Witherspoon filed suit against How, Alvine, Sides, Martig, and McWane on December 9, 1980. The suit was based upon strict liability against McWane, and on negligence against the other defendants. All of the defendants except Martig (who was in bankruptcy) filed motions for summary judgment because the suit was timebarred.

The Nebraska district court granted these motions, and Witherspoon appealed. After examining Nebraska's statutes of repose, the Nebraska Supreme Court affirmed the judgment on the motion of Alvine, the engineering firm, but reversed the judgment on the motions of the other defendants.

On the motion of How, the architectural firm, the court found that section 25-222 was applicable according to the professional activities test of *Lincoln Grain* to How's supervisory duties. The appellant, Witherspoon, contended that the continuous treatment exception should apply to How, as its duties were all directed toward the ultimate goal of building the home. How argued that the date of "rendering or failure to render professional services" was the installment of the pipe into the ground, and its subsequent use. The court did not state whether it agreed with appellant's reasoning, but an application of the continuous treatment exception would have placed the accrual date at substantial completion of the structure.

216. *Id.*
217. *Id.* Water was first run through the pipe on October 1, 1968. *Id.*
218. *Id.* This date would serve as the date of "substantial completion." *Id.*
219. *Id.* The flooding caused a foundation wall to collapse. *Id.*
220. *Id.* The exact amount was $353,753.84. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* For the significance of pleading contract or tort with regards to Sides, see note 297 infra.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 125, 362 N.W.2d at 42-43.
228. Brief for Appellant at 14, *Witherspoon.*
229. Brief for Appellee (How) at 4, *Witherspoon.*
230. See notes 125-35 and accompanying text *supra.*
The court stated that the cause of action against How was based on its failure to properly supervise construction. In reversing the district court, the Nebraska Supreme Court held that substantial completion was the accrual date.\textsuperscript{231}

The supreme court affirmed the district court's summary judgment for Alvine, the engineering firm.\textsuperscript{232} Alvine had been employed to "provide engineering design services."\textsuperscript{233} The court again applied the professional activities test.\textsuperscript{234} The court rejected the appellant's attempt to apply the continuous treatment exception and found instead that the accrual date was at the completion of the specifications, and their tender.\textsuperscript{235} The basis for this holding was that Alvine had no continuing duty to Witherspoon; the "date of rendering or failure to render professional services" was the date the plans were tendered.\textsuperscript{236} As the date of tender had not been plead, the court implied that tender had occurred before construction began, and found that suit against Alvine was therefore timebarred.\textsuperscript{237}

In considering the motion of Sides, the general contractor, the court held that under the improvement to real property section, section 25-223, accrual also occurred at substantial completion.\textsuperscript{238} In doing so, the court stated that the "act [of Sides] giving rise to the cause of action" was the failure to "construct in a workmanlike manner."\textsuperscript{239} Appellant, as before, argued that the continuous treatment exception should be applied to Sides.\textsuperscript{240} Sides argued that the "act giving rise to the cause of action" was the installation of the pipe.\textsuperscript{241} As in its application of section 25-222 to How, the architectural firm, the court did not explicitly agree with appellant's reasoning, although it held in Witherspoon's favor.\textsuperscript{242}

In considering the summary judgment for McWane, the pipe manufacturer, the court determined the accrual date for the repose portion of the products liability section, section 25-224.\textsuperscript{243} The court needed to define the phrase, "first sold for use," as it was undefined

\begin{itemize}
\item \textsuperscript{231} Witherspoon, 219 Neb. at 126, 362 N.W.2d at 43.
\item \textsuperscript{232} Id. at 127, 362 N.W.2d at 43.
\item \textsuperscript{233} Id. No supervisory duties were plead or found. Id.
\item \textsuperscript{234} Id. It did not do so explicitly, but mentioned "professional period of repose."
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id. See note 232 supra. The court stated: "[T]here is no claim that the alleged acts and omissions of Alvine occurred beyond whatever date it delivered . . . ." Id.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id. at 124-25, 362 N.W.2d at 42.
\item \textsuperscript{239} Id. at 124, 362 N.W.2d at 42.
\item \textsuperscript{240} Brief for Appellant at 14, Witherspoon.
\item \textsuperscript{241} Brief for Appellee (Sides) at 67, Witherspoon.
\item \textsuperscript{242} Witherspoon, 219 Neb. at 125, 362 N.W.2d at 42.
\item \textsuperscript{243} Id. at 123, 362 N.W.2d at 41.
\end{itemize}
in the section itself.244 After examining the section's legislative history, the court held that "first sold for use" was the date of possession in real property sales, and the date of sale for personal property.245 The court reached this definition after examining the case law from other jurisdictions, the Restatement (Second) of Torts, and applying their findings to the section's legislative history.246 Dissenting from the court's decision, Judge Boslaugh stated that he believed the pipe was "used" when it was placed in the ground and used to deliver water to the construction site.247

ANALYSIS

At first glance, the district court appears to have been correct in granting the defendants' motions, since the pipe had been installed in September, 1969 and suit was not filed until early December, 1980. This period exceeded eleven years. Since a statute of repose does not run until the cause of action accrues, and the statute itself often states the accrual date, the Nebraska Supreme Court properly turned to the statutes of repose to determine those dates.248

THE ARCHITECT'S MOTION

Section 25-222, the professional negligence section, sets the accrual date for the statute of repose at "the date of rendering or failure to render such professional service which provides the basis for the cause of action."249 Witherspoon argued that this date should be substantial completion of the construction, based upon the continuous treatment exception.250 In his argument, the appellant asked the court to combine the duties of design and supervision, or at least to combine all the inherent subduties which occur in supervision.251 How, the architectural firm, argued that the accrual date was the actual date of the pipe's installation, which was the "act giving rise to the cause of action."252 The court, in holding that the accrual date

244. Id. at 121, 362 N.W.2d at 39.
245. Id. at 122-23, 362 N.W.2d at 41. See also notes 197-99 and accompanying text supra (other interpretations of the term "first sold for use").
246. Witherspoon, 219 Neb. at 121-22, 362 N.W.2d at 40-41.
247. Id. at 127-28, 362 N.W.2d at 43 (Boslaugh, J., dissenting in part). Judge Boslaugh reasoned: "[T]he pipe had been devoted to its ultimate use or consumption when it was placed in the ground. . . ." Id.
248. See note 74 and accompanying text supra.
250. Brief for Appellant at 14, Witherspoon.
251. See id. The court noted that "all the acts or omissions about which complaint is made are related to [the architect's] alleged duty to inspect." Witherspoon, 219 Neb. at 124, 362 N.W.2d at 43.
252. Brief for Appellee (How) at 5-6, Witherspoon.
was the date of substantial completion, did not explicitly accept the
appellant’s application of the continuous treatment exception, but it
may have implicitly applied it.\textsuperscript{253} The court did, however, place upon
supervising architects an additional burden; it found that faulty work
now violates two duties, actual faulty performance and also general
supervision.\textsuperscript{254} In essence, the architect may be negligent in the
initial performance and in failing to discover the initial negligence as
well.\textsuperscript{255}

Effectively, the accrual date for designing and supervising archi-
tects will be substantial completion. It appears that the continuous
treatment exception could apply to a merging of the designing and
supervising duties, which would meet the continuous treatment test
of \textit{Lincoln Grain}. This test would also be met by merging all of the
lesser duties inherent in supervision. Alternatively, the court may
have found that the overall duty to inspect is the same as any other
duty an architect has.

\textbf{THE ENGINEER’S MOTION}

Alvine, the engineering firm, provided the specifications for the
structure.\textsuperscript{256} As the practice of engineering is statutorily defined as a
profession, and is “intellectual, rather than physical or manual,”\textsuperscript{257}
the professional negligence statute was applied.\textsuperscript{258} In \textit{Horn v. Burns & Roe},\textsuperscript{259} the Eighth Circuit had applied the professional section to
architects.\textsuperscript{260} Subsequent to \textit{Horn}, the Nebraska Supreme Court had
applied the improvement to real property section to engineers.\textsuperscript{261}
The date of “rendering or failure to render professional services,”\textsuperscript{262}
at which point the statute would begin to run, was not found by the
\textit{Witherspoon} court to be substantial completion of the structure, but
instead the tender of the specifications.\textsuperscript{263}

The appellant in \textit{Witherspoon} had argued that the continuous
treatment exception should apply to all the defendants, including Al-
vine, the engineering firm,\textsuperscript{264} but the court did not agree.\textsuperscript{265} The

\begin{verbatim}
253. \textit{Witherspoon}, 219 Neb. at 127, 362 N.W.2d at 43.
254. Id.
255. Id.
256. \textit{Id}. See also note 213 supra.
(1968).
258. \textit{Witherspoon}, 219 Neb. at 125, 362 N.W.2d at 42.
259. 536 F.2d 251 (8th Cir. 1976).
260. \textit{Id}. at 254.
261. Celotex Corp., 203 Neb. at 564, 279 N.W.2d at 607. \textit{See} also notes 155-60 and
accompanying text supra.
263. \textit{Witherspoon}, 219 Neb. at 127, 362 N.W.2d at 43.
264. Brief for Appellant at 14, \textit{Witherspoon}.
\end{verbatim}
court determined Alvine’s engineering duties to have ended with the completion of his services. As the court assumed the specifications were completed on or before September, 1969, the suit against Alvine was held to be time-barred.

The court’s decision appears to follow Nebraska’s traditional accrual for professional services, subject only to the discovery provision of *Spath*, which is itself limited by section 25-222 and *Colton*. As discussed in the background, *Spath* and *Williams* both describe the accrual date as the date when the potential plaintiff could successfully bring suit. *Colton* demonstrates how the language in section 25-222 limits the discovery rule with the phrase, “no action may be brought ten years after,” thus destroying any cause of action which might have existed. Obviously, Witherspoon could not have brought suit against the engineering firm until the specifications were deemed complete and tendered. Without a showing of a continuing duty, or an applicable tolling provision, the court’s ruling followed a well-settled rule for determining the accrual date of a professional negligence action.

The Nebraska Supreme Court’s affirmation of the district court’s summary judgment shows the distinction between statutes of limitation and statutes of repose. Statutes of limitation, which are currently viewed as procedural, are applied to the remedy of a cause of action, but not to the ability of the aggrieved party to collect on the claim in another manner. It has been stated that the purpose of statutes of limitation is “to prevent recovery on stale demands.” Statutes of repose are currently viewed as substantive, and are applied to the ability or right of an aggrieved party to recover, without consideration of discovery or the case’s equities. The language of the *Witherspoon* court showed this when it stated, We recognize that in so holding, the result may at times be that one whose design is alleged to have caused or contributed to the failure of the structure becomes, by the passage of time, insulated from liability, while others involved in the

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266. *Id.*
267. *Id.*
268. See notes 137-45 and accompanying text supra.
269. *Id.*
270. *Id.*
271. See notes 122-24 and accompanying text supra. Witherspoon would not have suffered any damage until he had received specifications which were negligently drawn.
272. See notes 122-23 and accompanying text supra.
273. See notes 110-11 and accompanying text supra.
275. Comment, supra note 34, at 501-02.
construction process may remain subject to liability. Such however, is the nature of statutes of repose.\textsuperscript{276}

The effect of the decision on Alvine's motion is that engineers or architects who are retained only to draw up specifications or plans will have the repose section accrue on the date the designs are tendered.

\textbf{MISAPPLICATION OF SECTION 25-222?}

Whether the proper repose statute was pleaded and applied is another question. The appellees pleaded, and the court applied, section 25-222, the professional negligence section.\textsuperscript{277} The section was pleaded and applied in the Eighth Circuit case, \textit{Horn v. Burns & Roe}.\textsuperscript{278} Perhaps section 25-223, the improvement to real property statute of repose, should have been pleaded and applied instead. This section reads in part:

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based upon any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such a breach. . . .\textsuperscript{279}

Clearly, architects and engineers are professionals, by statutory definition.\textsuperscript{280} Also, absent a more applicable section, section 25-222 is readily applicable to them.\textsuperscript{281} If there is a more applicable section, however, it should be applied.\textsuperscript{282} The Nebraska Supreme Court applied section 25-223 to architects and engineers in \textit{Grand Island School District No. 2 v. Celotex Corp.}\textsuperscript{283} A Nebraska Association of Trial Attorneys' seminar listed both sections 25-222 and 25-223 in a discussion of architect and engineer malpractice.\textsuperscript{284} Commentators have classified statutes similar to section 25-223 as "architects and

\begin{thebibliography}{99}
\bibitem{276} Witherspoon, 219 Neb. at 127, 362 N.W.2d at 43.
\bibitem{277} \textit{Id.} at 175, 362 N.W.2d at 42-43; Brief for Appellee (How) at 5-6, Witherspoon; Brief for Appellee (Alvine) at 4-5, Witherspoon.
\bibitem{278} 536 F.2d 251, 254 (8th Cir. 1976).
\bibitem{279} \textit{Id.} at 175, 362 N.W.2d at 42-43; Brief for Appellee (How) at 5-6, Witherspoon; Brief for Appellee (Alvine) at 4-5, Witherspoon.
\bibitem{280} \textit{Id.} at 175, 362 N.W.2d at 42-43; Brief for Appellee (How) at 5-6, Witherspoon; Brief for Appellee (Alvine) at 4-5, Witherspoon.
\bibitem{281} Marx, 183 Neb. at 14, 157 N.W.2d at 872 (finding the "intellectual, rather than physical or manual" nature of the work as the test for a profession).
\bibitem{282} \textit{See} Stacey v. Pantano, 177 Neb. 694, 698, 131 N.W.2d 163, 165 (1964). The court stated: "The special statute . . . controls over the general limitation statute . . . because the special statute is the one that expresses the legislative will providing the acts complained of come within the meaning therein expressed." \textit{Id.}
\bibitem{283} 203 Neb. 559, 564, 279 N.W.2d 603, 607 (1979).
\bibitem{284} \textit{See} L. Johnson, Liability of Design Professionals/Preparing and Presenting the Plaintiff's Case, Nebraska Ass'n of Trial Attorneys Seminar on Professional Malpractice 9 (Nov. 18, 1983) (unpublished manuscript).
\end{thebibliography}
contractors statutes of repose.”

States which have provisions similar to section 25-223 apply them to architects and engineers. The matching language in section 81-840, which defines architecture as “planning, designing, or supervision of the construction of . . . any building,” is further proof of this contention. The outcome of this case would not have been affected by applying either section 25-222 or section 25-223, as the statute of repose portion was being applied. Perhaps in the future, section 25-223 should be pleaded and applied to architects and engineers, because section 25-222 has a two-year statute of limitations period, while section 25-223 has a four-year statute of limitations period. To do otherwise would be to eliminate half of the running time of the statute in favor of the design professional and against the aggrieved party. The historical background shows that statutes of limitations were considered substantive at their origin, just as statutes of repose are now considered substantive. These statutes are substantive not only to defendants, but also to plaintiffs. To override the legislature and reduce the statutory period for suit by one-half would have the effect of denying plaintiffs their substantive rights as well.

THE CONTRACTOR’S MOTION

As do the other statute of repose sections, the improvement to real property section, section 25-223, has its accrual date, or at least a starting point to determine it, incorporated in the section. This date is set as “the act giving rise to the cause of action.” Wetherspoon was the first time accrual for the repose portion of section 25-223 had been determined. In Kearney Clinic Building Corp. v. 285. See McGovern, supra note 5, at 442; Comment, supra note 62, at 361.


289. See notes 93-94, 109-17 and accompanying text supra.

290. Cf. Plessy v. Ferguson, 163 U.S. 537, 559 (1895) (Harlan, J., dissenting). Justice Harlan stated: “In respect of civil rights all citizens are equal before the law.” Id.

291. See note 74 and accompanying text supra.

Weaver, in which accrual for the limitations portion of 25-223 was determined, the court initially considered discovery as the accrual date, but rejected it. It did so because discovery of the injury actually antedated substantial completion of the structure. The court in Celotex Corp. also initially looked towards discovery as the accrual date, but discovery had occurred during the regular limitations period. Because the repose portion of section 25-223 was being applied, the Witherspoon court was not persuaded by Weaver's and Celotex Corp.'s logic, and did not initially look towards discovery. Instead, the court determined the accrual date, as described within section 25-223, to be substantial completion of the structure. Different methodologies for determining the accrual dates of the limitations and repose portions are warranted by the language of section 25-223. Section 25-223 distinguishes between discoverable and non-discoverable injuries, and permits causes of action not only for the obvious or visible injury but for the hidden and latent injury during the repose period as well. To balance the rights of each party, the improvement to real property section limits the discovery rule, and makes latent injuries, which are undiscovered beyond the repose period, injuries for which no relief can be granted.

As stated, the court neither explicitly accepted appellant's contention that the continuous treatment exception should be applied, nor did it accept Sides', the contractor's, argument that installation *per se* should be the "act giving rise to the cause of action." Rather, the court treated the contractor under section 25-223 as it treated How, the architectural firm, under section 25-222. The Witherspoon court found a possible cause of action against How

293. 211 Neb. 499, 319 N.W.2d 95 (1982).
294. *Id.* at 503, 319 N.W.2d at 98.
295. *Id.*
296. Celotex Corp., 203 Neb. at 564, 279 N.W.2d at 607.
297. Witherspoon, 219 Neb. at 124-25, 362 N.W.2d at 42. The Witherspoon court noted that the action against Sides was in breach of contract, not in tort. *Id.* at 123, 362 N.W.2d at 41. The current English rule holds that contract actions accrue at the date of breach while tort actions accrue at the date of injury. See Bagot v. Stevens Scanlan & Co., [1964] 3 All E.R. 577, 579 (Q.B.) (holding that suit for faulty installation and supervision of underground drainage system accrues at time of installation, if breach of contract, but accrues at time of damages if a tort).
298. See NEB. REV. STAT. § 25-223 (Reissue 1981). The Witherspoon court read the statute as allowing a cause of action based upon discovery. Witherspoon 219 Neb. at 124, 362 N.W.2d at 41. On the other hand, the Celotex Corp. court did not because knowledge of the damage was acquired during the limitations period. Celotex Corp., 203 Neb. at 563-65, 279 N.W.2d at 98.
300. Brief for Appellant at 14, Witherspoon.
301. Brief for Appellee (Sides) at 6, Witherspoon.
based upon the architect's overall duty to inspect and supervise. Similarly, Sides was found to have potentially violated the contractor's duty to "construct in a workmanlike manner." The contractor's overall duty can be violated when the contractor fails to notice and correct its own or a subcontractor's negligent act. Actionable negligence occurs both at the time of the mistake, and at substantial completion, when the contractor has not corrected it. The later negligence does not accrue until completion of the structure. Alternatively, this ruling could have been founded upon an implicit application of the continuous treatment exception. Apparently, the Witherspoon decision has established substantial completion as the accrual date for the repose section in improvement to real property cases.

THE MANUFACTURER'S MOTION

Appellant's suit against McWane, the manufacturer, was based on strict liability. Specifically, appellant alleged that the pipe was defective. Before the passage of section 25-224, the products liability statute of repose, accrual had been the date of the discovery of the injury. Sylvania Electric Products, Inc. v. Barker illustrates this method of accrual. The Condon decision also followed this accrual determination.

Section 25-224 sets the accrual date for the repose portion of the section at "the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption." No previous Nebraska case law deals with accrual under the repose portion of the statute, and this issue is seemingly one of first impression. Furthermore, section 25-224 does not define "first sold or leased for use or consumption"; nor does Nebraska's Uniform Commercial Code. The court, because of this ambiguity, looked to the legislative history. This history clearly

302. See notes 253-255 and accompanying text supra.
303. Witherspoon, 219 Neb. at 124, 362 N.W.2d at 42.
304. See notes 125-35, 173-83 and accompanying text supra.
305. Witherspoon, 219 Neb. at 120, 362 N.W.2d at 39.
306. Id.
308. 228 F.2d 842 (1st Cir. 1955).
309. Id. at 845.
312. Brief for Appellee (McWane) at 14-17, Witherspoon.
313. Witherspoon, 219 Neb. at 121, 362 N.W.2d at 40.
314. Id. See also Worley v. City of Omaha, 217 Neb. 77, 79, 348 N.W.2d 123, 124 (1984) (holding that, when a statute is ambiguous, courts are to look at the legislative history).
demonstrates that when a retailer or wholesaler uses a product for resale, it is not "used" for purposes of the statute until the ultimate consumer receives the product.\textsuperscript{315} This is true even when the product complained of is a component part of the final product.\textsuperscript{316}

Other jurisdictions' interpretations of the Restatement (Second) of Torts appear to coincide with this view.\textsuperscript{317} The emphasis which is placed upon the "user" or "consumer" in the Restatement, especially section 402A, is the basis for this view.\textsuperscript{318}

In holding that the first sold issue is determined by sale to an ultimate consumer, or in real property cases, possession, the court did not rely upon appellant's contention that the definition of "use" should be taken from tax code decisions.\textsuperscript{319} Though the tax statute definition provides that component parts are not "used" in real property situations, the tax provision cited was not controlling.\textsuperscript{320} The court also rejected appellee's argument that the "ordinary" (i.e., "dictionary") meaning of the word "use" should control.\textsuperscript{321}

Products liability actions under section 25-224 will accrue when the ultimate consumer purchases the product. The legislative history indicates that resale from an ultimate consumer to another will not restart the statutory period.\textsuperscript{322}

**MISAPPLICATION OF SECTION 25-224?**

Despite the appearance that the court properly followed the legislative history and the Restatement, the court may have erred in applying section 25-224 to the action against the manufacturer McWane. Perhaps section 25-223 should have been applied. In the Restatement,

\textsuperscript{315} Floor Debate on L.B. 665, Neb. Unicameral 85th Leg., 2d Sess. 6861 (Feb. 27, 1978) (statement of Senator Bereuter). Senator Bereuter said:

I think that when a bulldozer is sold . . . the statute of repose does not begin unless they were using it as part of their own operation . . . not as a wholesaler, or not as a retailer. However, when that bulldozer is sold to an ultimate consumer . . . then the statute of repose begins.

\textit{Id.}

\textsuperscript{316} Id.

\textsuperscript{317} See notes 177-81 and accompanying text \textit{supra}.

\textsuperscript{318} See notes 177-81 and accompanying text \textit{supra}.

\textsuperscript{319} See Brief for Appellant at 13-17, Witherspoon.

\textsuperscript{320} Id. Appellant pleaded that a tax case, American Stores Packing Co. v. Peters, 203 Neb. 76, 277 N.W.2d 544 (1979), was controlling. Brief for Appellant at 13-17, Witherspoon. However, § 77-2702 of the Nebraska Revised Statutes, as applied in that case, contravenes appellant's point. Section 77-2702 reads, in relevant part: "Use specifically includes the incorporation of tangible personal property into real estate or into improvements upon real estate without regard to the fact that such real estate and improvements may subsequently be sold as such." Neb. Rev. Stat. § 77-2702 (Reissue 1983).

\textsuperscript{321} Brief for Appellee (McWane) at 14-17, Witherspoon.

\textsuperscript{322} Floor Debate on L.B. 665, Neb. Unicameral, 85th Leg., 2d Sess. 6860-62 (Feb. 27, 1978).
the cases and comments deal with personalty, or in cases of component parts, personalty incorporated into personalty. In WITHERSPOON, a different situation is presented, personalty incorporated into realty.

The legislative history of section 25-224 defines the word “product” as used in the section. “Product” is “the same as the word ‘goods’ as defined in Section 2-105 of the Uniform Commercial Code.” Furthermore, during the debate, the bill’s sponsor stated that he wanted the definition to be “what it is in the code,” and have its definition expand with the Uniform Commercial Code as its definition expands.

Sections 2-105 and 2-107 of the Uniform Commercial Code seem not to include personalty incorporated into realty, when severance of the personalty cannot be done without major damage to the realty. Other jurisdictions also hold that certain types of personalty incorporated into realty are not affected by the Uniform Commercial Code, but become realty.

An application of section 25-224 to component parts incorporated into realty used in construction opens a Pandora’s box of potential problems. Since in a realty situation, the sale is not complete until possession of a structure, the ten-year period of repose may be constantly overridden.

324. WITHERSPOON, 219 Neb. at 119, 362 N.W.2d at 39.
325. See notes 202-03 and accompanying text supra.
326. Floor Debate on L.B. 665, NEB. UNICAMERAL, 85th Leg., 2d Sess. 6855 (Feb. 27, 1978) (statement of Senator DeCamp). Senator DeCamp stated: “I said the word ‘product’ as used in LB 665, is intended to mean the same as the word ‘goods’ as defined in Section 2-105 of the Uniform Commercial Code. I wanted to include everything there.”
327. Id. at 6855-56.
328. See NEB. REV. STAT. §§ 91-2-105 to -107 (Reissue 1980).
330. Problems will arise in the granting of the statutory period of repose because of the time which will pass between the sale by the manufacturer and use in the construction. A further delay may occur between the completion of the construction and the sale or lease of the property. During this time, the manufacturer is in a limbo, being responsible for the product but gaining no advantage from the statute of repose.
331. WITHERSPOON, 219 Neb. at 121, 362 N.W.2d at 41.
CONCLUSION

The historical analysis demonstrates the concern for the substantive rights of defendants in the original English Limitation Act and its American adaptations. Modern statutes of repose have a similar concern. This substantive protection is shown by the limiting effect which the repose sections have upon the discovery rule method of accrual.

In a cause of action for the professional negligence of an architect, the Nebraska Supreme Court has delayed the running of section 25-222. In effect, the court has extended the liability of architects beyond the original submission of the design to the substantial completion of the structure, whenever the architects both design and supervise. Repose is still granted ten years after the substantial completion date. However, the court's affirmance of the summary judgment for the engineer demonstrated that when no continuing duty (e.g., supervision) exists, one will not be created to extend liability beyond the tender of the specifications.

In a cause of action under section 25-223, the improvement to real property section, the Witherspoon court properly determined the repose accrual for contractors. Since the repose language of section 25-223 is separate and distinct from the discovery language, the court's choice of substantial completion rather than discovery best follows the legislative intent and language. The substantial completion date, fixed forever at the end of construction, provides a clear point at which contractors and insurance companies can ascertain their liability.

The court's determination of the accrual date for section 25-224, the products liability section, followed the legislative intent and history for personal property. By postponing accrual until sale to an ultimate consumer, the consumer is protected. By enacting the repose portion of the section, the manufacturer is also given protection; and once sale or use has begun, repose is slowly granted.

The court's application of section 25-222, the professional negligence section, to architects and engineers should be re-examined. The matching language of sections 25-223 and 81-840 show the Unicameral's intent to include architects and engineers within this statute, as other states do. The consequences to a potential plaintiff are so great because of the varying limitations periods, should the improper section be applied, that the court must examine the legislative intent of section 25-223 and clearly determine its applicability.

The court should also reexamine the application of section 25-224 to personalty incorporated into realty. Addressing this issue directly
will permit manufacturers to more clearly understand their potential liability and its time constraints.

Understanding one's liability, and enjoying the security of repose once the statutory period has past and suit cannot be brought, will grant the substantive protection originally promised by the English Limitation Act. In granting true repose, these statutes fulfill both the historical purpose of statutes of limitations and their own modern purpose.

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