CONFERENCE REPORT
BOYD-GRAVES 2012 COMMITTEE –
DISCOVERY RULE FOR STATUTE OF LIMITATIONS

Committee Members: M. Bryan Slaughter; D. Alan Rudlin; Howard C. McElroy; John M. Oakey, Jr.; J. Lee Osborne; Roger T. Creager; Tom W. Williamson, Jr.; The Hon. William H. Ledbetter, Jr.

Summary:
This committee was continued from 2011. We were originally tasked with examining whether Virginia should adopt a broader “discovery rule” for its statute of limitations. Under a discovery rule, the limitations period accrues when an injury is, or reasonably should have been, discovered. Virginia primarily uses an “occurrence rule,” which begins to run when an injury or breach of contract first occurs, but there are a number of exceptions where some form of a discovery statute has been adopted. A discovery rule exists by statute for cases involving or arising out of a foreign body left after surgery, fraud, failure to diagnose cancer, asbestos exposure, child sexual abuse, and defective breast implants (products liability only).

Please see last year’s report, attached as Exhibit A, for a review of the issue in general, a nationwide survey of other states’ statute of limitations, and specific examples of statutory language taken from other jurisdictions.

Last year, our committee took an incremental approach in our presentation to the conference. We sought to determine whether there was consensus for some type of broader discovery rule, without posing the question of what form a new rule should take. There was consensus within the conference for some type of new rule. The committee was then asked to continue for another year in order to propose a recommendation for a specific rule.

There was consensus within this year’s committee to broaden Virginia’s existing discovery rule for three areas: 1) implanted medical devices, 2) injury resulting from toxic exposure, and 3) injury resulting from prescribed or over-the-counter medications. The committee believes this proposal strikes the best balance between addressing identified areas where injured Virginians are known to be left without a remedy and the danger of unforeseen consequences potentially created by a global change to the accrual statute.
Options Considered by the Committee:

The committee initially determined that there are two viable options to broaden the discovery rule. The first option is to add discovery language into Virginia's accrual statute § 8.01-230. The full text of § 8.01-230 states:

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

A “global” discovery rule could be created by adding language such as “or when the injury is discovered or by the exercise of due diligence reasonably should have been discovered” to this statute. The committee also considered limiting the change only to personal injury cases.

The other viable option identified by the committee is to add additional paragraphs to the enumerated list contained in § 8.01-249 for those areas where there have been demonstrated problems for injured Virginians due to a lack of a discovery rule. In these cases, the injury can be “sustained” without any noticeable symptoms, and thus the statute of limitations can run before the plaintiff has any idea he might be injured. The three areas the committee identified as being in need of a discovery rule were:

1) Implanted medical devices
   -- artificial hips, knees, valves, etc.

2) Toxic exposures
   -- e.g. Benzene, PERC, etc.

3) Pharmaceutical cases

§ 8.01-249 already contains discovery rule carve-outs for particular types of cases or products. Indeed, that is the sole reason for the code section. The section states:

§ 8.01-249. When cause of action shall be deemed to accrue in certain personal actions. — The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any
misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence, when such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order, or otherwise;

3. In for malicious prosecution or abuse of process, when the relevant criminal or civil action is terminated;

4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

5. In actions for contribution or for indemnification, when the contributee or the indemnitee has paid or discharged the obligation. A third-party claim permitted by subsection A of § 8.01-281 and the Rules of Court may be asserted before such cause of action is deemed to accrue hereunder;

6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

7. In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician;

8. In actions on an open account, from the later of the last payment or last charge for goods or services rendered on the account.
Committee’s Findings and Recommendations:

The committee did not reach consensus on a broad discovery rule emanating out of § 8.01-230 (the accrual statute). In a nutshell, it was thought that such a change could produce unforeseen and unintended consequences. Additionally, there was concern about the reception that a broad rule would receive in the legislature.

The committee reached consensus on creating a discovery rule for cases involving implanted medical devices, toxic exposure, and pharmaceuticals. The proposed changes would be added to the enumerated lists already contained in § 8.01-249. The committee felt that these changes were appropriate and fair because of the demonstrated need in these types of cases.

The committee’s proposed language for each change is on the following page. They are listed separately, and it is intended by the committee that each proposal be voted on separately. As much as possible, the proposed language has been derived from existing enumerated paragraphs of § 8.01-249, as that language has already been vetted and passed by the General Assembly.

For the prosthetic devices (proposal 1), we used the existing paragraph 7 regarding breast augmentation cases and removed that limiting language.

For the toxic exposure (proposal 2), we used the language from the existing asbestos provision (existing paragraph 4), and replaced asbestos with toxic substances.

For pharmaceutical cases (proposal 3), we again used the existing paragraph regarding breast augmentation cases (paragraph 7). Please note that the proposed section also would not apply to cases against doctors.
All Proposals Would Be Additions to the Enumerated Paragraphs of § 8.01-249:

Proposal 1 – Discovery Rule for Implanted Medical Devices:

In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any medical device, when the fact of the injury and its causal connection to the device is first communicated to the person by a physician;

Proposal 2 – Discovery Rule for Exposure to Toxic Substances:

In actions for injury to the person resulting from exposure to any toxic substance or combination of toxic substances, when the fact of the injury and its causal connection to the exposure is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

Proposal 3 – Discovery Rule for Prescribed and Over-the-Counter Medications:

In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising from the use of prescribed or over-the-counter medications, when the fact of the injury and its causal connection to the medication is first communicated to the person by a physician;
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BOYD-GRAVES 2011 COMMITTEE –
DISCOVERY RULE FOR STATUTE OF LIMITATIONS

Committee Members: M. Bryan Slaughter; D. Alan Rudlin; Howard C. McElroy; John M. Oakey, Jr.; J. Lee Osborne; Roger T. Creager; Tom W. Williamson, Jr.; The Hon. William H. Ledbetter, Jr.

Issue:
Should Virginia adopt a broader “discovery rule” for its statute of limitations? Under a discovery rule, the limitations period accrues when an injury is, or reasonably should have been, discovered. Virginia primarily uses an “occurrence rule,” which begins to run when an injury or breach of contract first occurs, but there are a number of exceptions where some form of a discovery statute has been adopted. A discovery rule exists by statute for cases involving or arising out of a foreign body left after surgery, fraud, failure to diagnose cancer, asbestos exposure, child sexual abuse, and defective breast implants (products liability only).

A broader discovery statute would address those situations where a plaintiff’s statute of limitations runs before he first becomes aware of his injury or that the device is potentially defective.

Types of cases where a plaintiff’s statute of limitations can run before that person is even aware of a problem include:

- **Implanted medical devices**
  -- artificial hips, knees, valves, etc.

- **Pharmaceutical cases**

- **Autobody repairs**

- **Toxic exposures**
  -- e.g. Benzene, PERC, etc.

- **Breach of contract (5 yr sol)**
  -- Home inspectors
  -- Title cases
  -- Contractor claims
  -- Plumbers

Committee’s Finding:
There was consensus that some type of discovery rule should be explored, but not as to the form and breadth of any proposed rule. There appear to be four options:

1) Continue to add enumerated, specific types of actions.

2) Adopt a discovery rule for specific areas of the law, such as products liability or toxic exposure.

3) Amend § 8.01-230 (the accrual statute) to include “knew or should have known” language, thereby expanding the discovery rule to include all types of actions. If yes, should there also be a repose time provision beyond which an action could not be brought under any circumstances?

4) Do nothing.

Rather than presenting these four options to the conference and seeking consensus for any particular one, the committee would first like to determine if there is consensus for an expanded discovery rule in any form. Thus, the committee respectfully requests that the Chairman place this matter on the agenda for discussion at this year’s meeting to include:

1) whether the current discovery rules in place should be expanded to any degree; and, if so,

2) what type of rule is most likely to gain consensus in a conference vote.

If there is consensus in favor of the first question, the committee would like to continue its work next year and draft proposed language in accordance with the type of rule the conference would most likely support.

**Relevant Virginia Statutes and Current Extent of Discovery Rule in Virginia**

**§ 8-01-230** (accrual statute):

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

**§ 8.01-243:**

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient’s body, for a period of one year from the date the object is discovered or reasonably should have been discovered;
2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered; and

3. In a claim for the negligent failure to diagnose a malignant tumor or cancer, for a period of one year from the date the diagnosis of a malignant tumor or cancer is communicated to the patient by a health care provider, provided the health care provider's underlying act or omission was on or after July 1, 2008. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider's underlying act or omission occurred prior to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008.

§ 8.01-249:

1. In actions for fraud or mistake, in actions for violations of the Consumer Protection Act (§ 59.1-196 et seq.) based upon any misrepresentation, deception, or fraud, and in actions for rescission of contract for undue influence, when such fraud, mistake, misrepresentation, deception, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2; and

7. In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician;

Use of Discovery Rule in Other Jurisdictions

Below is a (likely imperfect) compilation of what other jurisdictions do:

<table>
<thead>
<tr>
<th>States with a General Discovery Rule</th>
<th>States with Limited Discovery Rule</th>
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<table>
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<tr>
<th>State</th>
<th>Rule Description</th>
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<tbody>
<tr>
<td>Alaska (case law)</td>
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<td>Arizona (case law)</td>
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<td>California (case law)</td>
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<td>Colorado</td>
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<td>Connecticut (two year sol but no more than three years from date of act)</td>
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<tr>
<td>Delaware (two year SOL but no more than three years from date of act - there is a discovery rule, but it appears to have to be inherently unknowable)</td>
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<td>District of Columbia</td>
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<td>Florida</td>
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<td>Georgia (not for wrongful death)</td>
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<td>Hawaii</td>
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<td>Illinois (PL and MedMal and other actions-but not 100% clear on general negligence)</td>
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<td>Indiana</td>
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<td>Iowa (case law)</td>
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<td>Kansas</td>
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<td>Kentucky</td>
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<td>Mississippi</td>
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<tr>
<td>Missouri</td>
<td>(statute accrues when damage is sustained AND capable of ascertainment)</td>
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<td>Montana</td>
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<td>Nebraska</td>
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<tr>
<td>Alabama (occurrence rule for regular PI, but discovery rule for medmal and product liability (if after 2 years, then 6 months from discovery), discovery rule for asbestos)</td>
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<tr>
<td>Arkansas (no discovery absent a concealment, or if foreign body in medmal)</td>
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<td>Idaho (except foreign object, active concealment or fraud)</td>
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<td>Maine (but 6 yr SOL)</td>
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<tr>
<td>Louisiana (yes for medmal)</td>
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<td>Michigan (6 month discovery for medmal).</td>
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<td>Minnesota</td>
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<td>New Mexico (some exceptions).</td>
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<td>New York (except foreign objects, exposures to substances)</td>
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<tr>
<td>Ohio (unless harm is caused by drug, medical device or exposure to hazardous chemicals, and also fraud)</td>
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<td>South Dakota (except products liability and concealment)</td>
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<td>Texas (generally the occurrence, but some exceptions)</td>
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Specific Examples From Other Jurisdictions

Many states have adopted the discovery rule through case law, and other states are like Virginia and have adopted various rules over time. For states that have enacted a discovery rule legislatively, I provide examples of:

1) general, across-the-board discovery rules;

2) states with time limitations on their discovery rules; and
3) states with a discovery rule for specific causes of action – products liability, medical malpractice and toxic exposure. These examples should give the committee a good sense of the different ways and to what extent a discovery rule can be implemented.

Below is the relevant language of the statutes:

**New Hampshire: (General, broad discovery rule – keyed to injury and causal relationship to negligence) --**

Section 508:4 Personal actions:

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

**Missouri (General discovery rule, but tied to “last item” of damage) --**

Section 516.100 Period of limitation prescribed:

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting there from is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

**Montana: (General discovery – but with a twist) --**

Section 27-2-102 When action commenced:

(1) For the purposes of statutes relating to the time within which an action must be commenced:
   (a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;
   (b) an action is commenced when the complaint is filed.
(2) Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the
period of limitation.
(3) The period of limitation does not begin on any claim or cause of action for an injury
to person or property until the facts constituting the claim have been discovered or, in the
exercise of due diligence, should have been discovered by the injured party if:
(a) the facts constituting the claim are by their nature concealed or self-concealing; or
(b) before, during, or after the act causing the injury, the defendant has taken action
which prevents the injured party from discovering the injury or its cause.

Connecticut: (Discovery statute, but can never be more than 3 years) --

Sec. 52-584 Limitation of action for injury to person or property caused by negligence,
misconduct or malpractice:

No action to recover damages for injury to the person, or to real or personal property, caused by
negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon,
dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years
from the date when the injury is first sustained or discovered or in the exercise of reasonable care
should have been discovered, and except that no such action may be brought more than three
years from the date of the act or omission complained of, except that a counterclaim may be
interposed in any such action any time before the pleadings in such action are finally closed.

South Dakota: (Discovery rule for products liability) --

15-2-12.2 Product liability actions--Prospective application:

An action against a manufacturer, lessor, or seller of a product, regardless of the substantive legal
theory 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, formula, installation,
inspection, preparation, assembly, testing, packaging, labeling, or sale of any product or failure
to warn or protect against a danger or hazard in the use, misuse, or unintended use of any
product, or the failure to provide proper instructions for the use of any product may be
commenced only within three years of the date when the personal injury, death, or property
damage occurred, became known or should have become known to the injured party.

Alabama: (Discovery rule for medical malpractice -- with a four year repose) --

Section 6-5-482 Limitation on time for commencement of action:

(a) All actions against physicians, surgeons, dentists, medical institutions, or other health care
providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must
be commenced within two years next after the act, or omission, or failure giving rise to the claim,
and not afterwards; provided, that if the cause of action is not discovered and could not
reasonably have been discovered within such period, then the action may be commenced within
six months from the date of such discovery or the date of discovery of facts which would
reasonably lead to such discovery, whichever is earlier; provided further, that in no event may

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the action be commenced more than four years after such act; except, that an error, mistake, act, omission, or failure to cure giving rise to a claim which occurred before September 23, 1975, shall not in any event be barred until the expiration of one year from such date.

New York: (Discovery rule for toxic exposure) --

Sec. 214-c Certain actions to be commenced within three years of discovery:

1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.
2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.