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TOWARD A TIME-OF-DISCOVERY RULE FOR THE STATUTE OF LIMITATIONS IN LATENT INJURY CASES IN NEW YORK STATE

I. Introduction

The large number of personal injury suits filed by persons exposed to substances identified as known or suspected cancer-causing agents in humans requires a reevaluation of the statutes of limitations governing such suits in New York State. Traditional statutes of limitations begin to run when a cause of action first could have been maintained by the plaintiff. Normally, the wrongful act and injury occur simultaneously. For example, if a defendant negligently slams a door on a plaintiff’s hand, the plaintiff has a cause of action at the moment the door was slammed. However, when the wrongful act and injury do not occur simultaneously, as in the case

1. Asbestos companies such as Eagle-Picher, Owens-Illinois and Owens-Corning Fiberglas are named defendants in approximately 500 suits per month. Lewin, Business and the Law: Burdensome Asbestos Cases, N.Y. Times, Jan. 10, 1984, at D2, col. 1. 1983 and 1984 studies by the Rand Corporation estimated that there may be 74,000 to 265,000 asbestos related deaths over the next thirty years. Riley, Asbestos: New Approaches, Nat'l L.J., May 7, 1984, at 25, col. 1. At the time of the Rand studies, 20,000 to 24,000 claims were pending as most states had decided only twenty percent of their asbestos cases. Id.

Numerous claims also have been filed against manufacturers of certain hazardous medical devices. A.H. Robins Company, for example, has already spent $101 million in litigation expenses arising from the sale of 4.6 million Dalkon Shield intrauterine contraception devices sold between 1970 and 1974. Kleinfield, Ongoing Problem for Robins, N.Y. Times, Aug. 1, 1984, at D1, col. 2. Robins' insurer has paid out an additional $132 million, and Robins receives approximately thirty new claims each week. Id. Robins recently settled two hundred such claims for $38 million with an average settlement per plaintiff of approximately $192,000. Accord Cited in Dalkon Cases, N.Y. Times, Nov. 15, 1984, at A18, col. 5.


3. W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 165-68 (5th ed. 1984); see infra notes 41-45 and accompanying text.
of injury from inhalation of asbestos fibers, ingestion of carcinogenic drugs or absorption of a toxic substance into the body, an injured plaintiff is faced with a complex problem: if the toxic substance produces injury which manifests itself several years after plaintiff's initial exposure to the substance, when does the cause of action accrue? The various judicial and legislative responses include decisions that the statute of limitations accrues when the wrongful act occurs, when the plaintiff is actually injured, when the plaintiff discovers the injury, and when the plaintiff discovers the causal connection between the injury and the defendant's conduct.

In a jurisdiction where the cause of action accrues upon discovery of the injury, a toxic tort victim usually will be able to file a timely claim. However, a plaintiff with a latent disease who commences an action in a jurisdiction which has adopted either a "strict

4. See infra notes 194-204 for discussion of cases involving asbestos inhalation.
5. See infra notes 205-21 for discussion of cases involving DES ingestion.
6. See infra notes 172-83 for discussion of a case involving absorption of a toxic substance into the body.
7. A latent disease is a disease which does not manifest itself for a period of years following first exposure to the disease-causing agent. N. Sax, Cancer Causing Chemicals 23 (1981) [hereinafter cited as Cancer Chemicals]. Exposure to toxic substances may result in diseases which have latency periods between twenty and thirty years. B. Ames, Environmental Chemicals Causing Cancer and Genetic Birth Defects 1 (1978). For a discussion of statute of limitations problems regarding asbestos exposure, as well as other asbestos litigation problems, see generally Comment, An Examination of Recurring Issues in Asbestos Litigation, 46 Alb. L. Rev. 1307 (1982).
8. A "strict accrual" approach requires that the statute begin running at the plaintiff's first contact with the harmful substance whether or not injury had, in fact, occurred or had been discovered at that time. Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases, 13 Forum 279, 281 (1977) [hereinafter cited as First Breath]. See infra notes 163-71 and accompanying text.
9. Plaintiff's cause of action begins when the inhaled, ingested or absorbed substance actually causes harm to body tissue. See infra notes 104-54 and accompanying text.
10. Plaintiff's cause of action begins after the disease manifests itself. See infra notes 53-63 and accompanying text for a discussion of the initial development of the time-of-discovery rule.
11. See Raymond v. Eli Lilly & Co., 117 N.H. 164, 171, 371 A.2d 170, 174 (1977) (plaintiff's claim against drug company for damages from oral contraceptive does not accrue until plaintiff discovers, or, in exercise of reasonable diligence, should have discovered both injury and that injury was caused by defendant's conduct); Note, Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?, 43 U. Pitt. L. Rev. 501, 503 (1982).
12. See infra note 41 for a list of such jurisdictions.
accrual”13 or “time-of-injury accrual”14 theory, is often faced with the insurmountable hurdle of having to file his claim several years before he even knows he has been injured.15

New York State has adhered to a strict accrual rule16 in latent injury cases, finding that an injured plaintiff’s cause of action begins when the wrongful act occurs.17 The New York State Court of Appeals, in Martin v. Edwards Laboratories18 and Fleishman v. Eli Lilly & Co.,19 recently affirmed the strict accrual statute of limitations rule for latent disease caused by inhalation, ingestion or injection of toxic substances.20 Additionally, legislation introduced

13. See infra notes 163-71 and accompanying text for discussion of strict accrual in New York State.
14. The time-of-injury accrual theory recognizes the accrual period as beginning when injury has in fact occurred, not when it has in fact been discovered. See infra notes 43-44 and accompanying text for those states which have either strict accrual or time-of-injury statutes of limitations which bar a claimant with a latent disease.
15. One judge commented:
Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built or miss a train running on a non-existent railroad. . . . [I]t has always heretofore been accepted, . . . that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff. . . . [T]he policy behind a limitations statute is that of penalizing one who “‘sleep[s] upon his rights’”. But no student of legal somnolence has ever explained how a man can sleep on a right he does not have.

16. See supra note 8 and accompanying text.
17. See infra notes 155-226 and accompanying text. See also First Breath, supra note 8, at 281. A corollary issue which will not be discussed in this Note is whether a defendant's coverage under a liability insurance policy is triggered upon exposure to a toxic substance or after there has been manifestation of disease. See, e.g., American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1498 (S.D.N.Y. 1983) (coverage triggered upon initial exposure).
20. See infra notes 123-54, 205-26 and accompanying text for discussion of Martin and Fleishman.
in the New York State Senate\textsuperscript{21} which would extend the time-of-discovery rule to all toxic tort victims has thus far been rejected.\textsuperscript{22}

This Note analyzes the development of the statute of limitations for toxic exposure injuries in various jurisdictions and the policy arguments for adopting different theories of accrual.\textsuperscript{23} This Note then analyzes the development of the statute of limitations in latent injury actions in New York State and examines the consequences of the \textit{Martin} and \textit{Fleishman} decisions.\textsuperscript{24} Finally, this Note argues that judicial or legislative adoption of a time-of-discovery theory of accrual is essential in the area of toxic tort suits in New York State.\textsuperscript{25}

\section*{II. Current State Product Liability Statutes of Limitations}

Early English common law courts recognized perpetual rights of action in contract and tort.\textsuperscript{26} English courts did not restrict perpetual actions until the Limitation Acts of 1540\textsuperscript{27} and 1623.\textsuperscript{28} In the English courts before the passage of the Limitation Act, any undue burdening of defendants which may have resulted from perpetual actions was offset by complex procedural requirements which discouraged assertion of stale claims.\textsuperscript{29} However, as access to the courts became less restricted, the judiciary sought ways to eliminate inconsequential

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\item 21. \textit{See infra} notes 261-89 and accompanying text.
\item 22. \textit{Id.}; see also \textit{infra} notes 227-45 and accompanying text for a discussion of the present time-of-discovery statute of limitations rule which applies exclusively to Vietnam veterans exposed to Agent Orange.
\item 23. \textit{See infra} notes 26-88 and accompanying text.
\item 24. \textit{See infra} notes 89-260 and accompanying text.
\item 25. \textit{See infra} notes 261-310 and accompanying text.
\item 27. 32 Hen. 8, ch. 2 (1540). This Act applied to real property actions only: "[A]ll formedons in reverter \[or\] in remainder \ldots shall be sued, used and taken within fifty years next after that the title and cause of action fallen, and at no time after the said fifty years passed." \textit{Id.}; see \textit{Comment, Judicial Encroachment on Statutes of Limitation}, \textit{34 Yale L.J.} 432, 433-34 (1925) [hereinafter cited as \textit{Judicial Encroachment}].
\item 28. Jac. 1, ch. 16 (1623). This Act extended the statute of limitations to personal actions: "[A]ctions of trespass, of assault, battery, wounding, imprisonment \ldots within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suits." \textit{Id.} Subsequent early Limitation Acts included 4 Anne, ch. 16 (1705) (extended statute to writs of mandamus); 16 & 17 Vict., ch. 113, § 20 (1853) (amended personal action limitations) and 19 & 20 Vict., ch. 97 (1856) (limitations pertaining to joint debtors). \textit{See Judicial Encroachment, supra note 27, at 434.}
\item 29. \textit{See Developments, supra} note 26, at 1177-78. "[A]ctions in tort did not survive either the plaintiff or the defendant, and the formalities of the covenant

claims and to protect indigent defendants.\textsuperscript{30} Thus, the Limitation Acts of 1540 and 1623 were promulgated, establishing time periods for various forms of action.\textsuperscript{31} Most of the early United States colonial legislatures subsequently adopted the English Acts with little alteration.\textsuperscript{12}

Modern statutes of limitations in the United States generally begin to run, in personal injury actions, when an individual’s right of action first accrues,\textsuperscript{33} but only a few of the state statutes define “accrual.”\textsuperscript{34} The question of when a cause of action begins to accrue has been determined judicially due to the absence of legislative designation.\textsuperscript{35} Thus, the New York State Court of Appeals has held\textsuperscript{16} that a plaintiff’s cause of action accrues in toxic substance cases upon a person’s initial exposure to the substance.\textsuperscript{37} However, as the need

\textsuperscript{12} Development, supra note 26, at 1178. The statute of limitations for actions of trespass \textit{quare clausum fregit} was six years; for assault and battery—four years; for actions on the case for words (defamation)—two years. Note, Wilson v. Johns-Manville Sales Corp. \textit{and Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule, 32 CATH. U.L. REV. 471, 474, n.15 (1983) [hereinafter cited as Latent Injury Litigation]; see also Kelley, The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience, 24 WAYNE L. REV. 1641 (1978), in which Professor Kelley notes that the shorter statutes of limitations reflected general disapproval of personal injury actions filed many years after the injury occurred. \textit{Id.} at 1646.

\textsuperscript{33} For further analysis of the history of the statute of limitations through the present, see \textit{Latent Injury Litigation, supra note 31, at 473-83.}

\textsuperscript{34} See infra notes 41-45 and accompanying text.

\textsuperscript{35} The states defining accrual statutorily in time-of-discovery terms are: Alabama, Connecticut, Florida, Idaho, Kansas, Missouri, North Carolina, South Carolina and Vermont. See infra note 41 for citations to these statutes.


\textsuperscript{37} \textit{Id.} at 302, 200 N.E. at 827-28. See infra notes 163-71 and accompanying text for further discussion of Schmidt.
to protect indigent defendants\(^3\) has decreased and the need to balance the equities in favor of plaintiffs has increased,\(^4\) legislatures and courts have begun to carve exceptions into the time-of-injury accrual rule which define accrual in time-of-discovery terms.\(^4^0\)

Thirty-five jurisdictions, including Puerto Rico, have adopted time-of-discovery rules applicable in personal injury and products liability actions for latent disease injury as well as in medical malpractice actions.\(^4^1\) Another six jurisdictions have adopted time-of-discovery

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38. See infra notes 220-21 and accompanying text.
39. Id.
40. One early commentator noted that while courts professed to adhere strictly to the statutory exceptions to limitations of actions, "[T]he equitable influence had seemed to prevail in extending relief to claimants who would otherwise be barred." Judicial Encroachment, supra note 27, at 435; see, e.g., Bacon v. Bacon, 150 Cal. 477, 493-94, 89 P. 317, 323-24 (1907) (in case of mistake, statute does not begin to run until actual discovery of mistake or time when such discovery should have been discovered with reasonable diligence); Howard v. Carter, 71 Kan. 85, 90-91, 80 P. 61, 63 (1905) (statute does not begin to run until duress ceases); Gillette v. Tucker, 67 Ohio St. 106, 127, 65 N.E. 865, 872 (1902) (in medical malpractice action statute runs only after the professional relationship terminated and negligence discovered).

For a discussion of the viability of a statute of repose, see Martin, A Statute of Repose for Product Liability Claims, 50 FORDHAM L. REV. 745 (1982). A statute of repose differs from a statute of limitations in that the statute of repose puts an outer limit on the existence of the obligation itself; a statute of limitations merely puts a time limit on plaintiff's right to seek a remedy. A statute of limitations bars the remedy but not the right. See Hulbert v. Clark, 128 N.Y. 295, 297, 28 N.E. 638, 638 (1891) (lien on property not impaired because remedy at law for recovery of debt is barred by statute). However, a time-of-discovery statute of limitations with a short statute of repose may still bar latent injury plaintiffs from obtaining a remedy. A statute of repose, if enacted by an omnibus product liability statute, should have a latent injury exception to avoid this consequence. The proposed National Product Liability Act contains such an exception. See infra note 84 and accompanying text. See infra notes 41 and 43-45 for those states which have promulgated statutes of repose.

rules limited to latent diseases caused by specific toxic substances.\textsuperscript{42} Of the remaining jurisdictions with no time-of-discovery rule applicable to latent injury, six have a time-of-discovery rule limited to medical malpractice actions.\textsuperscript{43} Thus, forty-seven jurisdictions have some form of time-of-discovery statute of limitations rule.\textsuperscript{44}

Though the vast majority of these jurisdictions have adopted such rules by judicial decision, the New York State Court of Appeals has refused to adopt a more liberal statute of limitations rule arguing

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that such a change should be the prerogative of the legislature.\footnote{46}

Three types of time-of-discovery rules have generally been acknowledged by the courts: (1) cause of action accrues when plaintiff discovers the injury;\footnote{47} (2) cause of action accrues when plaintiff discovers the injury and its cause;\footnote{48} (3) cause of action accrues when plaintiff discovers the injury, the cause of the injury and that the injury was wrongfully inflicted by another.\footnote{49} Judicial adoption of a time-of-discovery rule in New York State is likely to take one of these forms.\footnote{50}

At the present time, only sixteen states, including New York,\footnote{51} have neither legislatively nor judicially formulated time-of-discovery accrual rules which apply to all latent injury actions.\footnote{52}

\section*{III. Current Federal Statutes of Limitations}

The United States Supreme Court, in \textit{Urie v. Thompson},\footnote{53} initiated

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  \item In \textit{Raymond v. Lilly}, for example, the supreme court stated that in the absence of a statutory designation the definition of the word "accrued" should be decided by the judiciary. 117 N.H. 164, 167, 371 A.2d 170, 172 (1977). The \textit{Raymond} court held that a time-of-discovery rule in which plaintiff must discover injury and causation before the statute of limitations begins to run must apply. \textit{Id.} at 171, 371 A.2d at 174; see also Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497, 501 (Ky. 1979) (overturning 1954 precedent to adopt time-of-discovery rule) (infra notes 299-306); Fernandi v. Strully, 35 N.J. 434, 450, 173 A.2d 277, 286 (1961) (overturning 30 years of precedent to adopt time-of-discovery rule in medical malpractice cases).
  \item \textit{See supra} notes 155-226 and accompanying text.
  \item Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1102 (5th Cir. 1973) (action against manufacturer of asbestos insulation accrued only after doctor had performed surgery and diagnosed plaintiff's condition as asbestosis), \textit{cert. denied}, 419 U.S. 869 (1974).
  \item Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 160 (8th Cir. 1975) (plaintiff's action for damage from asbestosis accrued only when harm was shown to have been caused by an act for which defendant would be liable); see also \textit{Latent Injury Litigation, supra} note 31, at 477-79.
  \item \textit{See infra} notes 261-89 for a proposed time-of-discovery rule for New York State.
  \item \textit{See infra} notes 155-226 and accompanying text.
  \item \textit{See supra} notes 38-41 and accompanying text. For further analysis of statutes of limitations of the fifty states, see Bartlett, \textit{The Legal Development of a Viable Remedy for Toxic Pollution Victims}, \textit{BARRISTER} Fall 1983, at 41, 44 n.7; Note,
development of the time-of-discovery rule. The *Urie* Court interpreted the Federal Employees’ Liability Act (FELA) holding that the FELA implicitly included a time-of-discovery rule of accrual. In *Urie*, the plaintiff, an employee of the Missouri Pacific Railroad, had worked as a fireman on steam locomotives for thirty years. In 1940, Urie was diagnosed as suffering from silicosis, a disease caused by inhalation of the silica dust which was blown into the cabs of the locomotives upon which he worked. The trustee of the railroad argued that the plaintiff’s cause of action must have accrued more than three years before the institution of the action since Urie had been inhaling dust since he had begun working in 1910. Thus, the plaintiff’s claim could be dismissed justifiably. The trustee also argued, in the alternative, that damages should be limited to the three-year period immediately prior to the commencement of the suit since each inhalation gave rise to a new cause of action. The Court rejected both of the trustee’s contentions.

Relying on an analysis of congressional intent and on fairness arguments and without “judicial legislation” qualms, the Court, in an opinion authored by Justice Rutledge, stated:

“If Urie were held barred from prosecuting this action . . . it would be clear that the federal legislation afforded Urie only a

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53. 337 U.S. 163 (1949).
55. See 337 U.S. at 169. The FELA, which does not have an express time-of-discovery rule of accrual, states that “[n]o action shall be maintained . . . unless commenced within three years from the day the cause of action accrued.” 45 U.S.C. § 56 (1982).
56. 337 U.S. at 165.
57. *Id.* at 165-66.
58. *Id.* at 169.
59. *Id.*
60. *Id.*
61. *Id.* The Court stated that it assumed Congress had intended occupational diseases to be included in the list of injuries compensable under FELA. The application of the strict accrual doctrine would serve to exclude this category of injuries and, in effect, would “thwart the congressional purpose.” *Id.*
delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie’s failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery. . . .

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance.62

Thus, the Court, in holding that a plaintiff’s knowledge of his injury is essential to the accrual of a cause of action in latent disease litigation, adopted a time-of-discovery statute of limitations approach to FELA actions.63

Similar decisions have been rendered under other federal statutes. For example, under the Federal Tort Claims Act (FTCA),64 the general rule is that the claim accrues at the time-of-injury.65 However, the Supreme Court, in United States v. Kubrick,66 held that accrual in a medical malpractice action begins when the plaintiff knows of the existence as well as the cause of his injury.67 Lower federal

62. Id. at 169-70.
63. Id.; see also Emmons v. Southern Pac. Transp. Co., 701 F.2d 1112, 1122 (5th Cir. 1983) (plaintiff knew his ankle injury was work-related more than three years before he filed claim and was, therefore, barred from stating such claim even though physician had not formally told him his injury was work-related); Fletcher v. Union Pac. R.R., 621 F.2d 902, 906 (8th Cir. 1980) (cause of action for industrial disease accrues when employee becomes aware of his condition, but plaintiff’s back injury from shoveling crushed rock was merely a worsened condition, not a latent injury), cert. denied, 449 U.S. 1110 (1981).
64. 28 U.S.C. §§ 1346(b), 2401(b), 2671-80 (1978). The Federal Tort Claims Act is a statute under which personal injury claims may be brought against the United States. Section 1346(b) provides, in part, that “the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .” 28 U.S.C. § 1346(b).

Section 2401(b) provides, in part, that “[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . .” 28 U.S.C. § 2401(b).
65. See supra note 9 and accompanying text.
67. Id. at 117-25. In Kubrick, the plaintiff was administered neomycin by an employee of a Veterans’ Administration Hospital in 1968 which led to his loss of hearing. Since the plaintiff was denied benefits in 1969 for the loss, he sued under the FTCA in 1972. Id. at 113-15; accord Waits v. United States, 611 F.2d 550 (5th Cir. 1980) (claimant must be aware of act or omission which caused injury in medical malpractice action); Quinton v. United States, 304 F.2d 234 (5th Cir.
courts promptly applied the *Kubrick* definitions of accrual to latent injury claims in addition to medical malpractice claims.68

In *Stoleson v. United States*,69 the plaintiff had been processing munitions and rocket propellants containing nitroglycerin for approximately one year when she began experiencing angina of the chest and suffered a myocardial infarction. The plaintiff returned to the same work area for three more years during which time she suffered weekend angina attacks at progressively shorter intervals.70 From the time of her heart attack, the plaintiff suspected a causal link between her work and her health.71 At one point, she was denied a requested transfer. At the time of denial, the in-house doctor felt that the nitroglycerin would actually do her good. Additionally, the plaintiff read in the union newspaper that sudden withdrawal from nitroglycerin could cause angina of the chest. Two years later, a doctor finally linked her health problem with the exposure to nitroglycerin72 and more than one year after the connection had been scientifically documented,73 the plaintiff brought suit against the United States under the FTCA.74

The court of appeals reversed the district court’s holding75 that the plaintiff’s claim was barred by the statute of limitations.76 Although she had suspected the causal connection between her attacks and her exposure to nitroglycerin more than two years before she had filed her claim, the claim had been rendered incapable of proof since medical science had not recognized the causal connection.77

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1962) (malpractice action accrues when claimant discovers, or in exercise of reasonable diligence, should have discovered existence of acts of malpractice upon which claim is based). The *Kubrick* Court, however, refused to liberalize the rule to include claimant’s knowledge of a right to bring a medical malpractice action as a prerequisite to commence the statute running. 444 U.S. at 123; see Note, *Kubrick v. United States: Accrual of a Medical Malpractice Claim Under the Federal Tort Claims Act*, 18 CAL. W.L. REV. 123 (1981) for a discussion of *Kubrick.*

68. Sheehan v. United States, 542 F. Supp. 18, 21 (S.D. Miss. 1982) (veteran’s action brought in 1981 for damages caused by exposure to radiation in 1952 and 1953 while in Army was barred by statute of limitations since his injuries had manifested themselves more than two years before he had filed his claim), aff’d, 713 F.2d 1097, cert. denied, 104 S. Ct. 2354 (1984); see also infra note 78.

69. 629 F.2d 1265 (7th Cir. 1980).

70. *Id.* at 1266.

71. *Id.* at 1267.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1271.

76. *Id.* at 1267.

77. *Id.* at 1270-71.
Only when the causal connection had been scientifically documented did the statute of limitations begin to run. The court recognized that the defendants might be burdened by what appeared to be stale claims but decided nonetheless that dismissal would be unjust when the defendants already had breached their preexisting duties to plaintiffs. 78

On an administrative level, the United States Department of Commerce adhered to the time-of-discovery rule of accrual in adopting the Uniform Product Liability Act (UPLA). 79 In the statute of limitations portion of the UPLA, the drafters noted that the two year period from when plaintiff discovers or should have discovered his injury “extends the limitation period beyond the time of harm in situations where the claimant would have no reason to know about the harm or the causal connection to a defective product . . . This reflects a general trend in both statutory and case law.” 80 The UPLA also contains a ten-year statute of repose which does not apply to latent injuries. 81 Thus far, the UPLA has not been fully

78. Id. at 1271. For other examples of the time-of-discovery rule as applied under the FTCA, see Steele v. United States, 599 F.2d 823, 828 (7th Cir. 1979) (claimant must know last essential element of tort, i.e., the damage); Sweet v. United States, 528 F. Supp. 1068, 1071-72 (D.S.D. 1981) (serviceman’s claim barred two years after obtaining knowledge that drug administered as experiment in 1957 had been L.S.D.), aff’d, 687 F.2d 246 (8th Cir. 1982); Schnurman v. United States, 490 F. Supp. 429, 435 (E.D. Va. 1980) (claimant barred two years after his physician suggested causal link between his infirmities and 1944 mustard gas experiment). One pre-Kubrick case applied a time-of-discovery rule to a latent injury claim. Kuhne v. United States, 250 F. Supp. 523, 526 (E.D. Tenn. 1965) (claim not barred where radiation exposure during World War II which caused bone cancer not diagnosed until 1965). See Note, Stoelson v. United States: FTCA—Expanding the Discovery Rule in Occupational Disease Cases, 14 J. MAR. L. REV. 873 (1981) for a discussion of Stoelson.

79. 44 Fed. Reg. 62,714, 62,732 (1979). Section 110(C) states that “[n]o claim under this Act may be brought more than two (2) years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and the cause thereof.” Id. at 62,732. The UPLA was originally drafted in 1978 by the Federal Interagency Task Force on Product Liability chaired by the Department of Commerce. 43 Fed. Reg. 14,612 (1978).


81. Section 110(B)(2)(d) reads:

The ten- (10-) year period of repose . . . shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within ten (10) years after the time of delivery, did not manifest itself until after that time.

Id. at 62,732; see supra note 40 for a discussion of statutes of repose.
adopted by any state.\textsuperscript{82}

One year after the UPLA was adopted, the House of Representatives began working on a Product Liability Act (Act) which would preempt all existing state product liability statutes.\textsuperscript{83} The proposed Senate version of the Act, which is presently under consideration, includes a time-of-discovery provision.\textsuperscript{84} It also contains a twenty-five year statute of repose which is inapplicable if the harm does not manifest itself until after the expiration of the twenty-five years.\textsuperscript{85} The Act was recently approved by the Senate Commerce Committee\textsuperscript{86} with the time-of-discovery provision intact, but it has yet to be voted upon by the full Senate.\textsuperscript{87} Thus, time-of-discovery statute of limitations provisions have been adopted by administrative agencies, the

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\textsuperscript{82} S. REP. No. 476, 98th Cong., 2d Sess. 6 (1984) [hereinafter cited as S. 44 REPORT].
\textsuperscript{83} Id. at 10. The Act does not broaden federal court jurisdiction, and will not expand the caseload of the federal courts. \textit{Id.} at 23. The Senate Report on the Act states:

Almost every product manufactured and sold today is a product in interstate commerce. The current climate of uncertainty in product liability law adversely affects and burdens interstate commerce. Under the Commerce Clause of the [United States] Constitution, Congress has the power to enact a uniform Federal product liability act. The Supremacy Clause of the United States Constitution also gives Congress the power to enact a Federal Law that replaces State law in the area of product liability. The fact that tort law is traditionally a matter of State law does not alter this rule. Congress has enacted a number of statutes that preempt State tort law. . . . Where the act does not establish a rule of law, State law will apply. As a result of the uniform standards, the act will resolve many of the problems and ambiguities currently associated with product liability law.
\textit{Id.} at 24 (footnotes omitted).
\textsuperscript{84} S. 44 REPORT, supra note 82, at 63-64. The statute of limitations provision provides:

12(a)(1) If a product is a capital good, no claim alleging unsafe design or formulation . . . may be brought for harm caused by such a product more than 25 years from the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product . . . . (b) Subsection (a) is not applicable if . . . (2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product; or (3) the harm caused within the period referred to in subsection (a), did not manifest itself until the expiration of that period.

S. 44, 98th Cong., 1st Sess. § 12(a), (b) (1983).
\textsuperscript{85} S. 44 REPORT, supra note 82, at 13.
\textsuperscript{86} Id. at 68. The vote was 11-5 with one abstention.
\textsuperscript{87} While insiders predicted 60% chance of passage, consumer groups led by Ralph Nader opposed the Act claiming that it would shrink plaintiffs' awards. Wall St. J., May 17, 1984, at 1, col. 5. Other consumer groups supported the bill
courts and the legislature at the federal level. 88

IV. New York State Statutes of Limitations

Despite state89 and federal trends90 towards a time-of-discovery rule, New York continues to adhere to a strict accrual rule in latent injury cases.91 The New York State Court of Appeals and the New York State Legislature must reevaluate this rule in light of these trends.92 Time is literally running out for many toxic tort victims.

primarily because of its liberal statute of limitations provision. Id. By the time the second session of the 98th Congress had adjourned on October 12, 1984, the Act had not been passed. Tolchin, Congress in Its 98th Session Slowed President's Program, N.Y. Times, Oct. 14, 1984, at A1, col. 5. It should be noted that 34 states already have some form of time-of-discovery rule applicable to all latent disease cases. See supra note 41 and accompanying text. Allowing the plaintiff lobby a time-of-discovery rule is therefore much less meaningful than would first appear. See S. 44 REPORT, supra note 82, at 102-03 (Hollings, minority view).

88. See supra notes 53-88 and accompanying text.
89. See supra notes 33-52 and accompanying text.
90. See supra notes 53-88 and accompanying text. Plaintiffs who were exposed to asbestos in ship yards have also successfully invoked independent federal jurisdiction to apply the more liberal time-of-discovery statute of limitations rule and laches theory of admiralty law. See, e.g., White v. Johns-Manville Corp., 662 F.2d 234, 240 (4th Cir. 1981) (shipyard workers installed asbestos insulation materials in drydock and aboard ships on navigable waters, therefore admiralty jurisdiction and laches theory applies), cert. denied, 454 U.S. 1163 (1982). But see Austin v. Unarco Indus., Inc., 705 F.2d 1, 6-14 (1st Cir. 1983) (asbestos installation not traditional concern of admiralty and therefore laches theory does not apply), cert. dismissed, 104 S. Ct. 34 (1983); Owens-Illinois, Inc. v. United States Dist. Court, 698 F.2d 967, 969 (9th Cir. 1983) (tort lacked maritime flavor necessary to invoke maritime jurisdiction); Volpe v. Johns-Manville Corp., —Pa. Super.— 470 A.2d 164, 169 (1983) (plaintiff not performing traditional seaman's role). See also supra note 45 for federal courts sitting in diversity which have applied state time-of-discovery common law.
91. See infra notes 155-226 and accompanying text.
92. This is not to suggest that the adoption of a time-of-discovery rule in New York State, while arguably essential to the equitable disposition of plaintiffs' claims in toxic substance cases, would be a panacea. Judge Cavanaugh of the Pennsylvania Superior Court, in commenting upon the burden placed on the court system by asbestos litigation, quoted from an opinion written by Judge Klein of the Pennsylvania Court of Common Pleas, a trial judge who was experiencing this burden first hand:
The civil court calendar in Philadelphia cannot cope with this volume of over 3,000 asbestos cases that have been filed. . . . Sick people and people who have died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries . . . are being awarded hundreds of thousands of dollars. . . . The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure. And just as the casinos are the winners in Atlantic City, the lawyers are the winners in asbestos litigation since the costs of litigation far exceed benefits paid to claimants.
While both the New York State Legislature and New York Court of Appeals have failed to adopt the time-of-discover rule in latent


In Doe, the plaintiff discovered calcified tissue on his lungs which was directly linked to his employment as an asbestos worker. Plaintiff, however, suffered no immediate disability from his condition, but suspected that severe disability would ultimately result as the disease matured into asbestosis. Plaintiff therefore sought relief in the form of a declaratory judgment that the Pennsylvania statute of limitations does not accrue until the injured person actually becomes disabled. Judge Cavanaugh's majority opinion denied declaratory relief to the plaintiff, stating that such relief is designed to determine fixed legal rights rather than to "enhance his legal rights which are fixed by decisional law." Id. at 1255.

Another issue which affects judicial economy is whether the statute of limitations commences running on a second disease which manifests itself after the original disease has been discovered. Allowing separate accrual on the second injury could conceivably exacerbate the court calendar problem. Nonetheless, the United States Court of Appeals for the District of Columbia Circuit held in Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982), that discovery of a disease did not commence the statute of limitations on all claims of separate, distinct and later-manifested disease that might be caused by the same exposure. 684 F.2d at 120-21. In Wilson, plaintiff, an insulation installer who was regularly exposed to asbestos, was told he had asbestosis in 1973 but in 1978 was diagnosed as having mesothelioma, a cancer of the lining of the lung, from which he died that year. Id. at 112-13. In 1979, the plaintiff's widow brought a wrongful death and survival action against Johns-Manville but the district court granted the defendant's motion for summary judgment that the 1979 claim was time-barred. Id. at 115. The court of appeals reversed the district court concluding that judicial economy and the interest of the plaintiff's relief outweighed the defendant's interest in repose. Id. at 120-21. Implicit in this decision was the notion that if the statute of limitations commences at the initial diagnosis, the plaintiffs who ordinarily would be compensated adequately by workers' compensation insurance would sue in anticipation of a second disease. These suits would be unnecessary and judicial economy would not be served. Id.; see Latent Injury Litigation, supra note 31, at 483-93 for a discussion of Wilson.

On balance, it appears that barring plaintiffs' suits completely and placing the entire cost of their disease on them is far less equitable than requiring courts, legislatures and defendants to apply creative solutions to the problem. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) would spread costs throughout a society which has reaped benefits from the production of various toxic substances. See DiNal & Kovall, The Superfund Blues: CERCLA Reauthorization and a New Proposal for Funding, 13 The Brief 29 (1984) (trust fund for Environmental Protection Agency to clean up abandoned toxic waste sites funded by excise tax levied on petrochemical industry and producers of certain inorganic materials); see also Maker of Intrauterine Device Starting Drive to Halt Its Use, N.Y. Times, Oct. 30, 1984, at A15, col. 4 (A.H. Robins Company has begun recall of 2.5 million Dalkon Shield intrauterine birth control devices sold in United States); Flaherty, Second Wave of Litigation Hits Asbestos, Nat'l L.J., Oct. 29, 1984, at 23, col. 1 (federal judge in Philadelphia certified nationwide class action for up to 14,000 school districts with property damage claims for asbestos clean-up); Sullivan, More Control On Asbestos is Sought, N.Y. Times, Oct. 14, 1984, § 11, at 1, col. 3 (concern over asbestos in public schools has prompted New Jersey to develop its own asbestos clean-up program);
injury cases, both have recognized exceptions to the strict accrual rule in other types of product liability cases. In Martin v. Edwards Laboratories and a companion case, Lindsey v. A.H. Robins Co., the New York State Court of Appeals applied a time-of-injury statute of limitations accrual period to medical implant cases. The Victorson v. Bock Laundry Machine Co. decision applied the same "time-of-injury" exception to cases involving injuries from defective products outside the body. Additionally, the New York State Legislature has created a narrow time-of-discovery exception to the general statute of limitations accrual period for cases involving Agent Orange assimilation in Vietnam veterans. Moreover, the legislature has codified an exception to the three-year statute of limitations accrual period originally recognized by the court in medical malpractice actions. Thus, there is precedent in both the judicial and legislative arenas for altering the rule of strict accrual in toxic tort cases.

Shabecoff, E.P.A. Seeks No Money for School Asbestos Plan, N.Y. Times, Sept. 27, 1984, at A18, col. 1 (Congress authorized program to help school systems remove asbestos but the E.P.A. will not ask Congress to appropriate funds for 1985 or 1986); cf. Lewin, Judge Aids Claims on Asbestos, N.Y. Times, Nov. 8, 1984, at D10, col. 4 (claims against asbestos producer not allowed to be heard in bankruptcy court where damages awards are generally thought to be lower). Circumventing the toxic substance injury problem by barring plaintiffs' suits will not obviate a problem which affects more people as the number of identified cancer causing agents increases. See supra note 2.

The issue thus becomes not whether a plaintiff can file a claim at all but rather how many and what types of claims may be entertained by the court. This issue must be considered by courts and state legislatures in determining the scope of a time-of-discovery rule. See supra notes 47-49 and accompanying text for a discussion of various types of time-of-discovery rules.

93. See infra notes 155-226, 261-90 and accompanying text.
94. See infra notes 104-54, 227-260 and accompanying text for these exceptions.
95. The statute of limitations is codified in N.Y. CIV. PRAC. LAW § 214: "The following actions must be commenced within three years: ... 5 an action to recover damages for a personal injury except as provided in sections 214-b and 215." N.Y. CIV. PRAC. LAW § 214 (McKinney Supp. 1983-1984).
97. Id.; see infra notes 123-54 and accompanying text for a discussion of Martin and Lindsey.
98. 60 N.Y.2d at 428, 457 N.E.2d at 1155-56, 469 N.Y.S.2d at 928-29.
99. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975); see infra notes 104-12 and accompanying text.
100. See infra notes 104-12 and accompanying text.
101. Id.
102. N.Y. CIV. PRAC. LAW § 214-b (McKinney Supp. 1983-1984); see infra notes 227-45 and accompanying text for a discussion of this exception.
103. For medical malpractice cases, New York courts have developed a "continuing treatment" theory, whereby accrual of a plaintiff's cause of action is tolled
A. Time of Injury Accrual: The Rule in Victorson and Martin

The New York State time-of-injury exception to the three-year statute of limitations for personal injury cases originated in the court of appeals decision in Victorson v. Bock Laundry Machine Co., which involved products that remained entirely outside the body. The court held that the accrual period begins to run at the date of injury in a strict products liability action, rather than at the date of the sale of the product alleged to have caused the injury. In so holding, the court overruled prior erroneous decisional law. Significantly, the present court of appeals refuses to apply the same reasoning used in Victorson to change the strict accrual rule in toxic substance cases.


105. For purposes of this Note, products which remain outside the body are defined as products which remain unassimilated either by ingestion, inhalation or absorption and include such products as household appliances, industrial machinery and automobiles. See also infra note 109 and accompanying text.
106. 37 N.Y.2d at 399, 335 N.E.2d at 276, 373 N.Y.S.2d at 40; see infra notes 109-12 and accompanying text.
107. See infra note 113 and accompanying text.
108. See infra notes 205-21 and accompanying text.
110. Id. at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43; see J. Calamari & J. Perillo, The Law of Contracts 424-25 (2d ed. 1977) [hereinafter cited as Calamari
stated that the accrual-at-injury statute of limitations period it had adopted in other tort actions must therefore operate instead of the “from the date-of-sale” or “tender-on-delivery” accrual period applied in contract actions under CPLR section 213(2) or the Uniform Commercial Code, section 2-725(2). The latter statute of limitations approaches are strict accrual approaches since the plaintiff’s cause of action begins to run when the plaintiff purchases the product, regardless of when the actual injury occurs.

In adopting the time-of-injury rule in Victorson, the court of appeals overruled its decision in Mendel v. Pittsburgh Plate Glass Co. In Mendel, the court had dismissed a plaintiff’s action for injuries suffered in October, 1965, when the defendant’s door struck the plaintiff thereby causing her to fall. The door had been delivered and installed in October, 1958, and, therefore, plaintiff’s cause of action had expired in 1964. In so ruling, the Mendel court applied the contract “accrual at date-of-sale” rule as narrowly as the Fleishman v. Eli Lilly & Co. court has recently applied the strict accrual rule to latent disease cases:

We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it has been manufactured . . . is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after a product is manufactured, we must . . . [hold] the contract Statute of Limitations applicable . . .

Judge Breitel’s dissent in Mendel echoes other strong dissents in

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111. CPLR § 213 states that “the following actions must be commenced within six years: . . . 2. an action upon a contractual obligation or liability express or implied . . .” N.Y. Civ. Prac. Law § 213 (McKinney 1972 & Supp. 1983-1984).
112. 37 N.Y.2d at 403, 335 N.E.2d at 278-79, 373 N.Y.S.2d at 43-44. Section 2-725(1) provides that: “[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.” U.C.C. § 2-725(1) (1978); see also Calamari & Perillo, supra note 110, at 185-88.
114. Id. at 342, 253 N.E.2d at 208, 305 N.Y.S.2d at 492.
115. Id.
117. See infra notes 205-21 and accompanying text.
118. 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.
the toxic substances cases:¹¹⁹ "[f]or most torts, there is no cause of action until injury occurs. . . . Hence, it is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one."¹¹² Six years later, the New York State Court of Appeals heeded Judge Breitel's words and overruled the Mendel decision in Victorson.¹¹¹ This progression suggests that if the court can alter decisional law regarding statute of limitations accrual periods for one type of product liability case, it can do so for other types of product liability cases.¹¹² The court of appeals also accepted a more liberal accrual rule in Martin v. Edwards Laboratories¹¹³ where it applied the Victorson time-of-injury rule to cases involving malfunctioning medical implants. In Martin, the plaintiff's decedent died on May 15, 1979 after Teflon particles from an artificial aortic valve which had been implanted on June 7, 1976, broke away and caused cerebral infarction and hemorrhaging.¹¹⁴ The suit was commenced on June 1, 1981.¹¹⁵

¹¹⁹. See infra notes 188-93, 199-204, 220-21 and accompanying text.
¹¹². 25 N.Y.2d at 346, 253 N.E.2d at 211, 305 N.Y.S.2d at 495 (Breitel, J., dissenting).
¹¹¹. 37 N.Y.2d at 403-04, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

[The limitations period] depends on a nice balancing of policy considerations. "Any Statute of Limitations reflects a policy that there must come a time after which fairness demands that a defendant should not be harried; the duration . . . is chosen with a balancing sense of fairness to the claimant that he shall not unreasonably be deprived of his right to assert his claim." . . . [W]hile passage of time may work a deterioration of the manufacturer's capability to defend, by similar token it can be expected to complicate the plaintiff's problem at proving . . . that the alleged defect existed at the time the product left the manufacturer's plant . . . [T]he authorities are now in general agreement that Statute of Limitations governing injuries to persons or property are those properly applicable to strict products liability claims.

¹¹². Evidently the Victorson court must have been as concerned as the present court about a flood of new, possibly spurious, suits stemming from liberalization of the accrual rule. Indeed, the Mendel court in dealing with the same issue as the Victorson court noted that it was willing to sacrifice the small percentage of worthy claims "in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum." 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495. Surely, court calendar congestion and the loss of business in New York State was no less a concern then. However, today, most states have more liberal accrual rules and there would in effect be nowhere for business to relocate solely to avoid a liberalized New York State accrual rule. See supra note 41 and accompanying text for those states with more liberal accrual rules for all latent injury cases.

¹¹⁴. Id. at 422, 457 N.E.2d at 1152, 469 N.Y.S.2d at 925.
The trial court granted the defendant's motion to dismiss the complaint as time-barred since more than three years had passed since the valve had been implanted. The plaintiff moved for reargument and offered the pre-trial testimony of a pathologist who stated that the breakdown of the valve had begun within months of decedent's death. The trial court then reinstated the complaint. The appellate division, however, dismissed the personal injury cause of action in the complaint, adhering to the strict accrual rule that the plaintiff's cause of action began when the valve was initially implanted.

The court of appeals decided the companion case of Lindsey v. A.H. Robins Co. at the same time it considered Martin. In Lindsey, the defendant, Dr. Joel Ullman, inserted a Dalkon Shield manufactured by defendant A.H. Robins Company, Inc. into the plaintiff's uterus on March 29, 1971. In March, 1973, the plaintiff developed a pelvic infection allegedly caused by the Dalkon Shield. This infection eventually caused her sterility. In October, 1975, Lindsey began an action in federal court but voluntarily discontinued it since there was no diversity of citizenship to sustain the action.

The pathologist, who had performed the autopsy on decedent, based his conclusion on the fact that Teflon material found in decedent's brain was identical to Teflon material used in the heart valve. He then estimated that the accumulation of Teflon material in decedent's brain had begun only a few months before decedent's death. It should be noted that plaintiff's personal injury cause of action would have been barred even under the time-of-injury statute of limitations had accumulation and, thus, injury, begun more than one year before decedent's death in this particular case. Accrual would have begun on May 15, 1978, manifestation would have occurred on May 15, 1979 and the statute of limitations would have run on May 15, 1981. Suit was filed on June 1, 1981 more than two weeks after the statute of limitations period had run. At best, a plaintiff's suit in this instance revolves around the speculative testimony of a medical expert.
She subsequently began an action against Ullman and Robins in state court on February 5, 1976, which was within three years of the diagnosis of her pelvic disease. She moved to dismiss the complaint in April, 1981 on the grounds that it was barred by the three year statute of limitations. In opposition to the motion, the plaintiff submitted an affidavit from a physician who opined that the design of the shield had allowed bacteria to enter the uterus and injure her only a few days or weeks before the pelvic infection was diagnosed. The court granted the defendants' motions to dismiss as to Robins, but, as to Ullman, the dismissal was restricted to his actions which were taken more than three years before service of the federal complaint. The appellate division reversed the lower court ruling on the motion to dismiss on the basis of evidence which suggested that injury had occurred in the proximity of the March, 1973 diagnosis rather than upon insertion.

The court of appeals ultimately adopted the Victorson time-of-injury statute of limitations rule for both the Martin and Lindsey cases since the time of injury with respect to products implanted or inserted in the human body "will most often be the date when the product malfunctions." Both plaintiffs had set forth sufficient

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134. Id. at 152, 458 N.Y.S.2d at 603.
135. Id.; see supra note 95 for the text of the New York State personal injury statute of limitations.
136. 91 A.D.2d at 152, 458 N.Y.S.2d at 603. Again, the plaintiff's suit revolved around testimony of a medical expert who could have found infection to have begun upon insertion. Had this been the expert's conclusion, the time-of-injury accrual rule would have barred plaintiff's action. See also supra note 127 and accompanying text. However, plaintiff's expert found that this particular type of infection, sub-acute salpingitis, had a two- to three-week incubation period which allowed plaintiff to discover her disease within the three-year statute of limitations. 91 A.D.2d at 152, 458 N.Y.S.2d at 603.
137. Id. at 152, 458 N.Y.S.2d at 603.
138. Id. at 159-60, 458 N.Y.S.2d at 607. The court also stated that:

The cause of action comes into being only when the product causes damage or injury. . . . [The injury] here would be at the point at which the shield's tail conducted infectious bacteria up into the uterus.

. . . The cause of action accrued when that injury occurred, not at some earlier date when the shield had been inserted.

Id.; see also Reyes v. Bertocchi, 92 A.D.2d 863, 864, 459 N.Y.S.2d 834, 835 (2d Dep't 1983) (plaintiff's injury occurred in 1978 when she experienced abdominal pain, rather than in 1973 when "Majzlin Spring" intrauterine device was inserted).
140. 60 N.Y.2d 417, 428, 457 N.E.2d 1150, 1155-56, 469 N.Y.S.2d 923, 928-29.
141. Id.
142. 60 N.Y.2d at 428, 457 N.E.2d at 1155-56, 469 N.Y.S.2d at 928-29.
evidence showing that the date of injury had occurred less than three years before the action was instituted. In Martin, the artificial heart valve had begun to disintegrate a few months before the plaintiff's death, and in Lindsey, the bacteria first entered the plaintiff's uterus a few weeks before the pelvic examination revealed the infection. Thus, the court of appeals reversed the appellate division's dismissal of the plaintiff's personal injury cause of action in Martin and affirmed the appellate division's denial of the defendant's motion to dismiss in Lindsey. In essence, the court extended the time-of-injury rule to include implants in order to avoid what might otherwise have been an unjust decision had a strict accrual rule been applied. Arguably, further judicial adjustment of the accrual rule in New York State to avoid unjust decisions in latent injury cases would be quite consistent with the Martin and Victorson decisions.

The Martin decision, however, creates the potential for future injustice in medical implantation and insertion cases by assuming that breakdown, injury and discovery will occur simultaneously to give the plaintiff the notice necessary to commence an action within three years. Further, the court of appeals deliberately restricted the issue in Martin and Lindsey to the proper accrual period of a cause of action in insert or implant product liability cases rather than expanding it to accrual periods in all types of products liability cases. The plaintiff in Martin, for example, urged the court to adopt the rationale of cases involving products not implanted or taken into the body in which a cause of action occurs when the product breaks down and causes injury. Defendant, on the other hand, urged adoption of the rule in cases involving substances ingested or inhaled, where the plaintiff's cause of action accrues upon the first inhalation or ingestion. The court's decision reflected

143. Id. at 428-29, 457 N.E.2d at 1156, 469 N.Y.S.2d at 929.
144. See supra notes 127 and 136 and accompanying text.
145. 60 N.Y.2d at 429, 457 N.E.2d at 1156-57, 469 N.Y.S.2d at 930.
146. See infra notes 227-45 and accompanying text for discussion of legislative adjustment of the accrual rule in New York State to avoid unjust results in Agent Orange cases.
147. 60 N.Y.2d at 428, 457 N.E.2d at 1155-56, 469 N.Y.S.2d at 928-29.
148. 60 N.Y.2d at 424, 457 N.E.2d at 1153, 469 N.Y.S.2d at 926. "The two cases thus present a common question: on what date does the three-year period of limitations applicable to product liability actions... begin to run with respect to a product inserted or implanted in but not assimilated by the body and intended to have a continuing function?" Id.
149. Id. at 424, 457 N.E.2d at 1153, 469 N.Y.S.2d at 927; see supra notes 104-22 and accompanying text for a discussion of the Victorson time-of-injury rule.
150. Id. at 424, 457 N.E.2d at 1153, 469 N.Y.S.2d at 926; see infra notes 163-
its unwillingness to adopt a more liberal accrual rule for all products liability cases, as well as its adherence to distinctions among the various types of product liability cases.

The inadequacy of the time-of-injury accrual rule in medical implant and insertion cases is illustrated in the following hypothetical. It is conceivable that a person with an artificial heart valve could suffer a stroke four years after the valve had begun to malfunction. Quite possibly, the causal factors which culminated in the stroke were set into motion when the valve first malfunctioned. Such forces, however, may have produced an injury which would not manifest itself until four years later. If, upon expert medical testimony, it is determined that the injury-in-fact occurred when the valve malfunctioned four years before the stroke, then the plaintiff would be barred from stating a cause of action. Only if expert medical testimony showed that injury had occurred less than three years before the stroke would the plaintiff’s claim be allowed. Thus, the time-of-injury rule could still result in unjust decisions in implant and insertion cases where a plaintiff who has no knowledge of the injury when it occurs is deprived of a cause of action merely because of the three year statute of limitations.


The New York Court of Appeals originally adopted a strict accrual statute of limitations instead of a time-of-discovery statute of limitations in toxic substance cases to avoid, among other things, 226 and accompanying text for a discussion of the application of the strict accrual rule in New York State; see also Birnbaum, New York Practice: Statute of Limitations in Products Liability, N.Y.L.J., Feb. 29, 1984, at 1, col. 1 [hereinafter cited as New York Practice].

151. See supra note 41 and accompanying text for a discussion of jurisdictions which have adopted more liberal rules in latent injury cases.

152. 60 N.Y.2d at 425-27, 457 N.E.2d at 1154-55, 469 N.Y.S.2d at 927-28.

153. The problem of proving when the breakdown and injury occur may be formidable. See, e.g., Weinreich v. A.H. Robins Co., 96 A.D.2d 860, 465 N.Y.S.2d 765 (2d Dep’t 1983) (plaintiff failed to tender evidentiary proof as to date of injury and court assumed injury had occurred at time of insert).

154. One commentator used another hypothetical to illustrate the problem: Assume . . . that plaintiff was continually exposed to a harmful substance from 1970 to 1982 and commenced an action in 1984. . . . Will plaintiff’s claim be limited to recovery of damages caused by the exposure in 1981 and 1982? What if competent medical evidence indicates that the effect of the exposures was cumulative and that no methodology exists for pinpointing which exposure(s) caused an identifiable amount of injury? Does the court’s formulation of the strict accrual rule require plaintiff
undue reliance upon expert medical testimony.\textsuperscript{155} The \textit{Martin}\textsuperscript{156} decision runs contrary to the original intention of the court in this respect since medical testimony will still be required to determine the time-of-injury. The court of appeals should resolve the present ambiguities in the law which it has itself created in order to adjudicate toxic tort claims more equitably.\textsuperscript{157}

In the case of a toxic substance which has been inhaled, ingested or injected, the court in \textit{Martin} "reaffirmed the rule that the time to sue for injuries . . . runs from the last exposure to the substance, not from the discovery of the injury."\textsuperscript{158} The court, thereby, explicitly affirmed prior court of appeals toxic substance decisions in which the court deferred to the legislature.\textsuperscript{159} The \textit{Martin} court, however, refused to apply the same strict accrual statute of limitations to medical implant and insertion cases stating that implants and insertions cause injury only when they malfunction and not upon first exposure.\textsuperscript{160} The court of appeals stated that implant and insertion cases are different from toxic tort cases because the product's continued existence eliminates the likelihood of fraud.\textsuperscript{161} This view, however, ignores the fact that even in toxic tort cases the chances for fraud are slim and the harm done to plaintiff is great.\textsuperscript{162}

The seminal toxic substance assimilation case is \textit{Schmidt v. Merchants Despatch Transp. Co.}\textsuperscript{163} In \textit{Schmidt}, the court of appeals, in an opinion written by Judge Lehman, applied the statute of limitations strict accrual rule to three separate actions\textsuperscript{164} where the
plaintiffs had contracted pneumoconiosis\textsuperscript{165} as a consequence of inhaling dust while working. The court concluded that “the statutory period begins to run from the time when liability for [the] wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury . . . .”\textsuperscript{166} The plaintiffs' causes of action in tort had thus expired.\textsuperscript{167} They had sued in tort, contract and for breach of statutory duty more than three years after their employment with defendants had ended but before the six year statute of limitations for breach of contract and breach of statutory duty had run.\textsuperscript{168}

While the \textit{Schmidt} court recognized that the plaintiff was without a remedy, it found that policy considerations favored strict interpretation of the statute of limitations, noting that “[t]he Statute of Limitations is a statute of repose. At times, it may bar the assertion of a just claim. Then its application causes hardship. The legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims.”\textsuperscript{169}

In essence, the court read into the statute a theory of strict accrual to which it adhered. Interestingly, potential hardship was avoided in this precedent-setting case, as the court of appeals held that the plaintiffs still had a cause of action for defendants' breach of a statutory duty which had a six year limitation period.\textsuperscript{170} In subsequent toxic substance decisions, the court of appeals applied this strict accrual rule which neither had been expressly adopted by the legislature nor caused hardship to the specific plaintiffs involved in this case.\textsuperscript{171}

In \textit{Schwartz v. Heyden Newport Chem. Corp.},\textsuperscript{172} the New York Court of Appeals again acknowledged that a plaintiff could experience extreme hardship if courts did not apply a time-of-discovery

\begin{footnotesize}
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\item \textsuperscript{165} Pneumoconiosis is a chronic fibrous reaction in the lungs due to inhalation of dust. \textit{Stedman's Med. Dictionary} 1108 (24th ed. 1982).
\item \textsuperscript{166} 270 N.Y. at 300, 200 N.E. at 827.
\item \textsuperscript{167} \textit{Id.} at 301, 200 N.E. at 827. “[I]t cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the disease. . . . In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom.” \textit{Id.}
\item \textsuperscript{168} \textit{Id.} at 302-03, 200 N.E. at 828.
\item \textsuperscript{169} \textit{Id.} at 302, 200 N.E. at 827-28.
\item \textsuperscript{170} \textit{Id.} at 306, 200 N.E. at 830 (N.Y. \textit{Civ. Prac. Act} § 48(2) (1921)). The present limitation period for breach of statutory duty is three years. Plaintiffs, therefore, could not have utilized this cause of action to escape the hardship imposed by the statute of limitations had the action been brought today. N.Y. \textit{Civ. Prac. Law} § 214(2) (McKinney 1972 & Supp. 1983-1984).
\item \textsuperscript{171} See infra notes 172-226 and accompanying text.
\item \textsuperscript{172} 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).
\end{itemize}
\end{footnotesize}
rule for personal injury actions,\textsuperscript{173} but it decided that the legislature had found that the detriment to defendants created by such a rule would outweigh the concern for a plaintiff's lost cause of action.\textsuperscript{174} The court suggested as legislative rationale for this outcome such factors as "feigned cases"\textsuperscript{173} and "difficulties of proof."\textsuperscript{176} The court, therefore, upheld the defendant's motion to dismiss the plaintiff's action commenced in 1959 for damages from cancer caused by the defendant's failure to remove an x-ray detection substance from the

\textsuperscript{173} Id. at 218, 188 N.E.2d at 145, 237 N.Y.S.2d at 718.

We should put aside the contention . . . that social change or advancement in the sciences has so altered the subject matter upon which the law operates that a different result is called for. The insidious and 'inherently unknowable' nature of cancer and similar diseases was common knowledge in 1936 when \textit{Schmidt} was decided . . . [t]he adoption of and adherence to the accrual rule by the Judges of our court from 1930 onward renders the simple assertion 'it is unjust' inadequate.

\textit{Id.}

\textsuperscript{174} Id. at 218, 188 N.E.2d at 145, 237 N.Y.S.2d at 718-19.

While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place. The existence of a discovery provision in the fraud statute bespeaks a legislative judgment that only in fraud cases . . . were there a sufficient number of unknown wrongs to justify a departure from the general rule. Apparently the rarity of such unfortunate cases in other types of actions did not outweigh the disadvantages of imposing a possible exception to the grant of repose to every person . . . who could be a potential defendant. . . . [P]erhaps the possibility of feigned cases against unprepared defendants and the difficulties of proof in meritorious cases led to a decision that society is best served by complete repose . . . even at the sacrifice of a few unfortunate cases.

\textit{Id.}

\textsuperscript{175} Id. at 218, 188 N.E.2d at 145, 237 N.Y.S.2d at 719. However, Chief Judge Cooke in his dissent in \textit{Fleishman v. Eli Lilly & Co.}, noted that it is "quite impossible to feign the medically certifiable presence of cancer." 62 N.Y.2d 888, 893, 467 N.E.2d 517, 520, 478 N.Y.S.2d 853, 856 (1984) (Cooke, C.J., dissenting); see \textit{infra} notes 205-21 for a discussion of \textit{Fleishman}.

\textsuperscript{176} Chief Judge Cooke also noted that the passage of time seems to handicap the plaintiff who attempts to determine which company manufactured the product which allegedly caused his or her injuries. Contrastingly, the defendant will not be at a disadvantage in litigation which involves a product of known chemical composition. Moreover, the chemical composition of a product is known at ingestion and determination of when the product "breaks" is not necessary as it is in other product liability cases. The equities would thus appear to favor the plaintiff. 62 N.Y.2d at 893, 467 N.E.2d at 520, 478 N.Y.S.2d at 856; \textit{see also} Drill & Hambleton, \textit{Applying Statutes of Limitations and Statutes of Repose}, TRIAL, NOV. 1983, at 106, 112 (best-reasoned opinions note that plaintiff has no right to file lawsuit without evidence of injury).
plaintiff's sinuses in 1944. Ultimately, the court of appeals con-
cluded that since the legislature had affirmatively added a time-of-
discovery provision to the statute of limitations in fraud cases, it
could have done so in the area of products liability as well. Since
the legislature had considered general time-of-discovery statute of
limitations provisions in the past but had rejected them, it had
apparently determined that society did not require such provisions.
Therefore, the Schwartz court refused to challenge this legislative
decision, and did not adopt a time-of-discovery rule. The court
has never waivered from this position in toxic substance cases since
the Schwartz decision.

There has been a compelling minority view expressed in recent
courts of appeals' decisions which rejects the strict accrual rule in
toxic tort cases. In Thornton v. Roosevelt Hospital, for example,
the plaintiff's decedent developed cancer in late 1972 or early 1973
after receiving an injection of thorium dioxide manufactured by
defendant Testagar, Inc. and administered by an employee of de-
fendant Roosevelt Hospital in 1954. In dismissing the action as
time-barred, the court of appeals concluded on the basis of Schwartz
that the injury had occurred when the drug was injected into the
body rather than when the cancer had formed and that the statute

177. 12 N.Y.2d at 219, 188 N.E.2d at 145-46, 237 N.Y.S.2d at 719.
178. 12 N.Y.2d at 218-19, 188 N.E.2d at 145, 237 N.Y.S.2d at 718-19. The
statute of limitations for an action based on fraud is codified in CPLR § 213:
"The following actions must be commenced within six years: .... 8. an action
based upon fraud; the time within which the action must be commenced shall be
computed from the time the plaintiff or person under whom he claims discovered
the fraud, or could with reasonable diligence have discovered it." N.Y. Civ. Prac.
179. 12 N.Y.2d at 218, 188 N.E.2d at 145, 237 N.Y.S.2d at 718-19; see supra
note 174 and accompanying text.
181. Id. at 218-19, 188 N.E.2d at 145, 237 N.Y.S.2d at 719.
Judge Desmond, joined by Judge Fuld, dissented arguing that a change of the
statute of limitations was required and that it was "perhaps unconstitutional to
hold that his time to sue expired before it was possible for him to learn of the
wrong." Id. at 219-20, 188 N.E.2d at 146, 237 N.Y.S.2d at 719-20 (Desmond,
C.J., dissenting) (citations omitted); see also Note, The Fairness and Constitutionality
of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1683, 1702
(1983) (statutes of limitations applied to toxic torts "destroy the only means available
for vindicating the victim's constitutionally protected right of personal security").
183. See infra notes 184-226 and accompanying text.
184. See infra notes 185-226 and accompanying text.
186. Id. at 782, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922.
of limitations should, therefore, accrue from the time of the injection.\textsuperscript{187}

Judge Fuchsberg, in a strong dissent, noted that the plaintiff’s injury did not necessarily occur when the drug was injected but that it also could have occurred when the process resulting in injury first began regardless of whether the plaintiff was aware of it, or when the injury manifested itself sufficiently to put the plaintiff on notice that an injury had occurred.\textsuperscript{188} Judge Fuchsberg stated that “[g]ood sense and good law therefore require . . . that the injured user not be foreclosed from having his day in court before he even has knowledge of any injury and certainly not before any injury has occurred.”\textsuperscript{189} Moreover:

\begin{quote}
[w]hat is Judge-made can be and, in appropriate cases, should be Judge-unmade. Stare decisis is a malleable rule, not one bound by bands of steel. As Roscoe Pound put it, “the law would break if it could not bend”. Indeed in recent years, we have given recognition to the fact that the dynamic nature of personal injury law calls upon us to “readily reexamine established precedent to achieve the ends of justice in a more modern context.”\textsuperscript{190}
\end{quote}

The judge noted that New York State “bucked the trend of products law across the country” by not adopting a time-of-discovery rule as a majority of jurisdictions had already done.\textsuperscript{191} Judge Fuchsberg drew an analogy between the accepted practice of excepting children from statutes of limitations and the proposed practice of excepting ignorant adult plaintiffs in toxic injury cases noting that both involve similar policy considerations.\textsuperscript{192} Judge Fuchsberg concluded by crit-

\textsuperscript{187} Id. at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922. The court also ruled that injection of the drug did not fall under the “foreign object” discovery exception as codified in CPLR § 214-a. Id. See infra note 248 for the text of CPLR § 214-a. See infra notes 246-60 for a discussion of the common law development of this exception.

\textsuperscript{188} 47 N.Y.2d at 783, 391 N.E.2d at 1004, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting). Judge Fuchsberg carried this reasoning to its logical conclusion in his dissent in Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 1013, 430 N.E.2d 1297, 1300-01, 446 N.Y.S.2d 244, 247-48 (1981), where he concluded that the question of when the toxic injury occurred, at inhalation or when the disease in fact arose, is a question of fact for the jury and a complaint should not therefore be summarily dismissed. See infra notes 194-204 for discussion of Steinhardt.

\textsuperscript{189} 47 N.Y.2d at 783-84, 391 N.E.2d at 1004, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting) (footnote omitted).

\textsuperscript{190} Id. at 784, 391 N.E.2d at 1004-05, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting) (citations omitted).

\textsuperscript{191} Id. at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting); see supra note 41 and accompanying text for these majority jurisdictions.

\textsuperscript{192} 47 N.Y.2d at 785, 391 N.E.2d at 1005, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

We all recognize that it is wrong for a child too immature or too unaware
icizing the court for its exercise of judicial restraint in the ingested toxic substance situation.\textsuperscript{193}

Similarly, in \textit{Steinhardt v. Johns-Manville Corp.}, the court of appeals reaffirmed the \textit{Schmidt} last exposure rule of accrual for latent disease cases.\textsuperscript{194} The plaintiffs in \textit{Steinhardt} had contracted a disease caused by inhalation of asbestos at their place of employment.\textsuperscript{195} The court affirmed the dismissal of the plaintiffs’ actions noting that they had commenced their actions more than four years after their last employment-related exposure to asbestos.\textsuperscript{196} The court reasoned that it was constrained by precedent and that alteration of the strict accrual rule was reserved for the legislature.\textsuperscript{197} Indeed, the court noted that the legislature has acted to alter the accrual rule only in Agent Orange cases.\textsuperscript{198}

Judge Fuchsberg again dissented sharply. The judge attacked the notion that disease and hence, accrual, always begin when a toxic substance is first ingested.\textsuperscript{199} He noted plaintiffs’ assertions that toxic substances lay dormant for years without causing harm to the body and concluded that the date of accrual should, therefore, be a question for the triers of fact in these instances.\textsuperscript{200} Judge Fuchsberg also noted that the legislature had already made policy decisions in

\begin{itemize}
  \item of his or her right to act to be barred on that account. The adult victim of a drug whose injurious effect, like that of a time bomb, is either delayed or unknowable, is clearly as helpless to act as an infant. To the extent that there very well may be some awareness in the case of the infant, but none in the case of an adult . . . there may be even more reason for the law to extend its protection to the adult.
\end{itemize}

\textit{Id.}

\textsuperscript{193} \textit{Id.} at 785, 391 N.E.2d at 1005-06, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting).

\text{[T]his is hardly an appropriate matter on which to await legislative action. That a right to recover should run from the time it is discoverable is a matter of fundamental justice. It is an abdication of our own role in the scheme of government to defer to the Legislature for rescue from an [sic] unconscionable decisional law.}

\textit{Id.}

\textsuperscript{194} 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981).

\textsuperscript{195} \textit{Id.} at 1010, 430 N.E.2d at 1298, 446 N.Y.S.2d at 245.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.} at 1010-11, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246. “We believe it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny.” \textit{Id.}

\textsuperscript{198} \textit{Id.} at 1011 n.1, 430 N.E.2d at 1299 n.1, 446 N.Y.S.2d at 246 n.1; see \textit{infra} notes 227-45 and accompanying text for discussion of the Agent Orange statute of limitations legislative exception.

\textsuperscript{199} 54 N.Y.2d at 1012-13, 430 N.E.2d at 1300, 446 N.Y.S.2d at 247 (Fuchsberg, J., dissenting).

\textsuperscript{200} \textit{Id.} at 1013, 430 N.E.2d at 1300-01, 446 N.Y.S.2d at 247-48; see \textit{also} \textit{CANCER CHEMICALS}, supra note 7, at 23.
situations where toxic tort claimants were unjustly foreclosed from suit in Agent Orange cases. The fact that such policy had been set forth by the legislature, the judge reasoned, should compel the court to apply the rationale to all toxic substance cases to correct judge-made law. The restriction of the exception to Agent Orange claimants was merely the product of the legislative system of compromise, according to the judge, rather than an express edict not to extend time-of-discovery to other toxic tort victims. Arguably, the court should be required to carry the legislature’s pronouncement to its equitable conclusion. In essence, the court should not allow the slow-moving legislative bargaining process to deprive a particular toxic tort victim of his day in court simply because the lobbyist for “his disease” does not have bargaining strength in Albany.

The court of appeals recently confirmed its strict accrual approach for assimilated substances in Fleishman v. Eli Lilly & Co. In Fleishman, the court affirmed two consolidated appellate division decisions in a memorandum opinion. The first lower court decision, Fleishman v. Eli Lilly & Co., involved a plaintiff whose mother had ingested diethylstilbestrol (DES) while she was pregnant with the plaintiff. In March, 1978, the plaintiff discovered that she had

201. 54 N.Y.2d at 1011, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246 (Fuchsberg, J., dissenting); see infra notes 227-45 and accompanying text for a discussion of the Agent Orange statute of limitations exceptions.

202. 54 N.Y.2d at 1011-12, 430 N.E.2d at 1299-1300, 446 N.Y.S.2d at 246-47 (Fuchsberg, J., dissenting). But see id. at 1010-11 n.1, 430 N.E.2d at 1299 n.1, 446 N.Y.S.2d at 246 n.1 (“As the dissent recognizes, the Legislature has acted but has gone no further than ‘Agent Orange’ cases”).

203. Id. at 1011-12 n.2, 430 N.E.2d at 1299-1300 n.2, 446 N.Y.S.2d at 246-47 n.2 (Fuchsberg, J., dissenting). “True, in the compromising fashion of legislative bodies . . . , these declarations were made applicable to ‘Agent Orange’ cases alone. But, as with other social catalysts, what it accelerated was a return in this area to the mainstream of legal thought.” Id. But see id. at 1010-11, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246 (“Further extension of the limited discovery provision . . . was a matter best reserved for the Legislature, and not for the courts”).

204. See infra notes 239-45 and accompanying text for a discussion of the inability of the DES lobby to obtain legislative relief.


206. Id. at 890, 467 N.E.2d at 518, 478 N.Y.S.2d at 854.

207. 96 A.D.2d 825, 465 N.Y.S.2d 735 (2d Dep't 1983).

208. Id. at 825, 465 N.Y.S.2d at 736 (Gibbons, J., concurring in part and dissenting in part). DES (Diethylstilbestrol) is a synthetic estrogen which was administered to pregnant women who had histories of miscarriages. Both pregnant women and the female offspring of such women have a greater chance of contracting clear-cell adenocarcinoma. Herbst, Ulfelder & Poskanzer, Adenocarcinoma of the Vagina, 284 New Eng. J. Med. 878-79 (1971); see also Note, Application of the Pennsylvania Statute of Limitations Discovery Rule in DES Cases, 55 Temp. L. Q. 1149, 1151 (1982); Shields, Delayed Manifestation Injuries: The Statute of Limitations as a Bar to DES Suits, 11 Colum. Hum. Rts. L. Rev. 127, 127-28
cervical and vaginal cancer which required a complete hysterectomy.\textsuperscript{209} In January and February, 1980, the plaintiff commenced suit against four defendant drug companies, but the trial court dismissed the actions as time-barred by the three year statute of limitations,\textsuperscript{210} and the dismissal was affirmed by the appellate division.\textsuperscript{211}

The second lower court decision, \textit{Manno v. Levi},\textsuperscript{212} involved a plaintiff who in 1969 had ingested DES prescribed by defendant Dr. Levi and manufactured by defendant Lilly.\textsuperscript{213} In 1981, the plaintiff brought suit against the defendants after undergoing a mastectomy to remove a cancerous breast in 1978, removal of fallopian tubes and ovaries in 1980 and treatment for estrogen-related metastatic bone disease which had spread through her vertebrae to her right ribs and the right side of her skull by 1981.\textsuperscript{214} The trial court granted the defendants’ motions to dismiss\textsuperscript{215} and the appellate division reluctantly affirmed the dismissals in an opinion by Justice Brown who concluded that “[t]he law as it now stands . . . mandates that we decide this case against the weight of our profound sympathy.”\textsuperscript{216}

The court of appeals affirmed dismissal of the plaintiffs' actions stating that since there was no showing in the record to depart from precedent, any such departure “is a matter for the Legislature and not the courts.”\textsuperscript{217} Chief Judge Cooke who had concurred with the majority in \textit{Steinhardt}\textsuperscript{218} and in \textit{Thornton}\textsuperscript{219} vigorously dissented

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\item \textsuperscript{209} 96 A.D.2d at 825, 465 N.Y.S.2d at 736.
\item \textsuperscript{210} \textit{Id.} at 825, 465 N.Y.S.2d at 735.
\item \textsuperscript{211} \textit{Id.} Justice Gibbons in a partial dissent, however, noted that “[w]hile the stale claim rationale of Statutes of Limitations is a sound one, in this case, it is inapplicable. It is sought here to declare the bread stale before it is baked.” 96 A.D.2d at 826, 465 N.Y.S.2d at 737 (Gibbons, J., concurring in part and dissenting in part). Another consideration relevant to this case was the amendment of CPLR § 208 changing the age of majority from 21 to 18. (L. 1974, ch. 924). This amendment, however, worked to deprive this plaintiff of her rights. Had the age of majority still been twenty-one years, plaintiff would have had a cause of action until age twenty-four since a disability such as minority tolls the statute of limitations. N.Y. CIV. PRAC. LAW § 208 (McKinney Supp. 1983-1984). However, since the age of majority was eighteen, this plaintiff's cause of action expired when she was twenty-one. As the plaintiff was age twenty-three when she discovered her cancer, she had no cause of action at the time she filed her claim. 96 A.D.2d at 825, 465 N.Y.S.2d at 736 (Gibbons, J., concurring in part and dissenting in part).
\item \textsuperscript{212} 94 A.D.2d 556, 465 N.Y.S.2d 219 (2d Dep’t 1983).
\item \textsuperscript{213} \textit{Id.} at 557, 465 N.Y.S.2d at 220.
\item \textsuperscript{214} \textit{Id.} at 557-58, 465 N.Y.S.2d at 220.
\item \textsuperscript{215} \textit{Id.} at 559, 465 N.Y.S.2d at 221.
\item \textsuperscript{216} \textit{Id.} at 575, 465 N.Y.S.2d at 230.
\item \textsuperscript{217} 62 N.Y.2d at 890, 467 N.E.2d at 518, 478 N.Y.S.2d at 854.
\item \textsuperscript{218} See supra notes 194-204 and accompanying text.
\item \textsuperscript{219} See supra notes 185-93 and accompanying text.
\end{itemize}
in Fleishman noting that while stare decisis is necessary to maintain the stability of law, it should not be "a shield behind which a court may hide as reason for perpetuating unnecessary and profound unfairness, which subjects the law to ridicule." Chief Judge Cooke further argued that fixing the date of accrual is not solely within the province of the legislature, and that the policy considerations such as feigned cases and fading memories no longer favor the manufacturers of toxic chemicals.

Notwithstanding these vigorous dissents, the New York Court of Appeals in the Schwartz, Thornton, Steinhardt and Fleishman cases deferred to the legislature while adhering to the rule of law that accrual in toxic substances cases occurs at the time of ingestion, inhalation or injection of the toxic substance.

C. Agent Orange Legislative Exception to the Strict Accrual Rule

The New York State legislature has promulgated a time-of-discovery statute of limitations exception for armed forces veterans


221. 62 N.Y.2d at 891-93, 467 N.E.2d at 519-20, 478 N.Y.S.2d at 855-56; see also supra notes 175-76 and accompanying text for discussion of policy considerations.

222. See supra notes 172-83 and accompanying text.

223. See supra notes 185-93 and accompanying text.

224. See supra notes 194-204 and accompanying text.

225. See supra notes 205-21 and accompanying text.

226. See also Reis v. Pfizer, Inc., 48 N.Y.2d 664, 397 N.E.2d 390, 421 N.Y.S.2d 879 (1979) (plaintiff’s action, filed in 1974, dismissed where plaintiff claimed he was unaware he had contracted polio from son in 1967 when son given vaccine).


Three states have passed special statutes of limitations for Agent Orange. See infra notes 229-30 and accompanying text; see also Kulewicz, Agent Orange: The States Fight Back, 44 Ohio St. L. J. 691, 694, 696 (1983) [hereinafter cited as Agent Orange]; New York State Senate Research Service, Temporary State Commission on Dioxin Exposure, No. 84-9, at 5 (1984).
exposed to Agent Orange while serving in Indo-China from January 1, 1962 through May 7, 1975. Rhode Island and Ohio also have statutes of limitations which apply exclusively to Agent Orange claims and which serve to offset time-of-injury accrual periods in

228. Agent Orange is a phenoxy herbicide used during the Vietnam War to defoliate Viet Cong guerrilla bases. *Agent Orange*, supra note 227, at 692. Agent Orange contains 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (TCDD) which may be one of the most toxic chemicals known to man. *Id.* at 691-92. Agent Orange, so-called because of the orange-striped drums in which it was shipped, was sprayed in Indo-China between 1962 and 1972. *Id.* at 692. Approximately ten million gallons were sprayed in Indo-China, exposing over 2 million Americans to the toxin. *Id.; see also* Lacey and Lacey, *Agent Orange: Government Responsibility for the Military Use of Phenoxy Herbicides*, 3 J. LEGAL MED. 137, 140-41 (1982). See generally *OCCUPATIONAL MEDICINE*, supra note 2, at 559-60. Exposure to Agent Orange has been alleged to cause impaired liver function, chloracne, nephropathy, gastrointestinal irritation, depression and even cancer and genetic mutation. *Agent Orange*, supra note 227, at 692.

229. CPLR § 214-b states:

Notwithstanding any provision of law to the contrary, an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through May seventh, nineteen hundred seventy-five, may be commenced within two years from the date of discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.

N.Y. CIV. PRACT. LAW § 214-b (McKinney Supp. 1983-1984). As originally promulgated, the statute applied to veterans serving in Indo-China through March 29, 1973 only. 1981 N.Y. Laws 266, § 3. This was subsequently amended to include servicemen in Indo-China through May 7, 1975. 1982 N.Y. Laws 153, § 1; see 1 WEINSTEIN-KORN-MILLER, NEW YORK CIVIL PRACTICE § 214-b (Supp. 1983) [hereinafter cited as WEINSTEIN-KORN-MILLER].

230. R.I. GEN. LAWS § 9-1-14.2 (Supp. 1984); OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1982). The Rhode Island statute imposes a duty of reasonable diligence on plaintiffs in the same manner as the New York State statute. *Agent Orange*, supra note 227, at 712. The Rhode Island statute allows a plaintiff to sue three years from discovery of injury rather than the two years that New York State allows although it does not contain a revival provision for time-barred claims. The Rhode Island statute states that:

Notwithstanding any provision of law to the contrary, an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen hundred sixty-two through March twenty-ninth, nineteen hundred seventy-three, may be commenced within three (3) years from the date of the discovery of such injury or within three (3) years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.


The Ohio statute is more favorable to toxic tort plaintiffs than either the Rhode Island or New York statutes. In Ohio, a cause of action will not accrue until a physician advises an individual that his injuries are Agent Orange-related. See *Agent
these states.231 The New York State statute, unlike the Rhode Island and Ohio statutes, provides for the revival of time-barred claims provided such claims are commenced no later than June 16, 1985.232

The legislative findings, however, are the most important aspect of the statute as they provide a framework upon which future time-of-discovery legislative proposals and judicial decisions could be based.233 First, the legislature concluded that there was “credible

Orange, supra note 227, at 711-12. Thus, even if a veteran reasonably knows that he has suffered damages from Agent Orange exposure, his cause of action will not accrue until a physician informs him of that fact. Id. The Ohio statute reads in relevant part: “For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.” Ohio Rev. Code Ann. § 2305.10 (Page Supp. 1982).


232. 1983 N.Y. Laws 358, § 4. This section provides that:

Every cause of action for an injury or death caused by contact with or exposure to phenoxy herbicides while serving as a member of the armed forces of the United States in Indo-China from January first, nineteen sixty-two through May seventh, nineteen seventy-five, which is or would be barred . . . prior to June sixteenth, nineteen eighty-five, because the applicable period of limitation has expired is hereby revived or extended as the case may be, and an action thereon may be commenced and prosecuted provided such action is commenced . . . not later than June sixteenth, nineteen eighty-five.

Id. (underlines in statute indicating amended text omitted). As originally promulgated, the legislation provided for revival of any action commenced one year from the effective date of the Act, or, through June 16, 1982. 1981 N.Y. Laws 266, § 4. However, 1982 legislation extended the revival period to June 16, 1983. 1982 N.Y. Laws 153, § 2. The 1983 amendment extended the period to the present June 16, 1985. 1983 N.Y. Laws 358, § 4; see Weinstein-Korn-Miller, supra note 229, at § 214-b.01. This provision was consistent with a court of appeals decision in which the court held that the legislature may revive a personal cause of action where circumstances are exceptional and serious injustice would result to innocent plaintiffs. Gallewski v. Hentz & Co., 301 N.Y. 164, 93 N.E.2d 620 (1950) (broker sold decedent’s securities in 1940 in violation of agreement while decedent was in concentration camp; administrator sued in 1948 after statute of limitations had expired but action held not time-barred and action revived).

233. 1981 N.Y. Laws 266, § 1. The New York State exception was promulgated
scientific evidence" that exposure to Agent Orange caused "serious physical disabilities." It continued with a description of its motivations in enacting CPLR section 214-b and its justification for so doing:

[T]he legislature ha[s] been principally motivated by the desire to discourage "belated litigation." Belated litigation [does] not serve the interests of justice since protracted delays in litigating issues result[s] in the failing memory of witnesses and the disappearance of evidence that [is] relevant and germane to such issues. It was never the intent of the legislature in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued. An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without


While recovery against the government has been barred by the doctrine of sovereign immunity, 506 F. Supp. at 769-82, seven manufacturers have agreed to create a $180 million fund for Vietnam veterans and their families who were allegedly harmed by Agent Orange. Fried, Judge Tentatively Approves Pact on Agent Orange, N.Y. Times, Sept. 26, 1984, at B3, col. 1. Judge Weinstein of the United States District Court for the Eastern District of New York tentatively approved the settlement pending the outcome of hearings in March, 1985 for distribution of the settlement. Id.; see also Blumenthal, Veterans Accept $180 Million Pact on Agent Orange, N.Y. Times, May 8, 1984, at 1, col. 6. One impetus for passage of an Agent Orange exception in 1981 may have been the fact that state statutes of limitation applied in the class action. 635 F.2d at 995 (plaintiffs’ claims not governed by federal common law); see also Yates, Atomic Fallout and Agent Orange, 13 THE BRIEF 5 (1984) (thousands of plaintiffs were dismissed because state statutes of limitations had expired).

234. 1981 N.Y. Laws 266, § 1. One commentator has noted that such presumptions may ultimately discredit the results of state-supported research programs. Agent Orange, supra note 227, at 694. The actual adverse health effects of Agent Orange are still largely unknown. Lyons, U.S. Embarks on $100 Million Study of Agent Orange, N.Y. Times, Sept. 25, 1984, at C3, col. 1. Only recently has a federally sponsored program to study the health consequences of exposure to Agent Orange commenced. Id. The study entitled, The Veterans Health Programs Extension and Improvement Act of 1979, set forth at 38 U.S.C. § 219(a)(1)(A) (Supp. 1984), was embroiled for several years in "bureaucratic bickering" before being transferred to the Federal Center for Disease Control in Atlanta. Id. The medical studies have since been commenced there under the direction of Dr. Peter M. Layde. Id.
perceptible trauma, and the victim is blamelessly ignorant of the cause of the injury.\textsuperscript{235}

The legislature went on to find that a time-of-discovery statute of limitations rule should be applicable to claims by Vietnam veterans exposed to phenoxy herbicides who had suffered latent disabilities.\textsuperscript{236} The legislature further found that the state had a "strong moral obligation to revive time-barred causes of action" in such cases.\textsuperscript{237} From these legislative findings, it would appear that New York State should have an even greater moral obligation to provide relief to individuals suffering from latent disabilities caused by other toxic substances where the causal relation to disease has been more substantially confirmed than has the Agent Orange causal relation.\textsuperscript{238}

For example, in enacting a 1978 public health law to study the DES problem in New York State,\textsuperscript{239} the New York State Legislature found that approximately 100,000 New York State residents had been exposed to DES prenatally.\textsuperscript{240} Additionally, the legislature stated that a causal connection had been found between DES and a type of cancer in the female offspring of those who had ingested the drug while pregnant.\textsuperscript{241} Arguably, the State has a greater obligation to DES claimants who, according to the legislature itself, have more than "credible scientific evidence" supporting their claims.\textsuperscript{242} This legislative inconsistency tends to support Judge Fuchsberg's contention in \textit{Steinhardt}\textsuperscript{243} that the failure to extend the time-of-discovery exception to all toxic tort victims was merely a product of the legislative system of compromise rather than an express directive by the legislature to exclude toxic tort claimants from the time-of-discovery rule.\textsuperscript{244} Therefore, the legislature must resolve the incon-

\begin{thebibliography}{99}
\bibitem{235} 1981 N.Y. Laws 266, § 1.
\bibitem{236} Id.
\bibitem{237} Id.
\bibitem{240} 1978 N.Y. Laws 715, § 1.
\bibitem{241} Id.; see \textit{supra} note 208 for a discussion of the physical consequences of DES ingestion.
\bibitem{242} See \textit{supra} note 234 and accompanying text.
\bibitem{243} 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981).
\bibitem{244} See \textit{supra} note 203 and accompanying text.
\end{thebibliography}
sistencies which it has created. Should it fail to do so, the court of appeals should act on the findings of the legislature that "[a]n exception . . . is required . . . when the victim is blamelessly ignorant of the cause of the injury."245

D. The Foreign Object Legislative Exception to the Strict Accrual Rule

The New York Court of Appeals liberalized the accrual rule governing medical malpractice cases involving a foreign object which had been left in the patient's body during an operation when it adopted the time-of-discovery statute of limitations rule in Flanagan v. Mount Eden General Hospital.246 It is important to note that the state legislature did not attempt to reverse the Flanagan decision, which was considered by the Flanagan dissent to be an example of judicial legislation,247 by adopting a strict accrual or time-of-injury accrual rule in the CPLR. In fact, the Flanagan decision was subsequently codified by the legislature.248

In Flanagan, the court distinguished a foreign object case from the toxic substance case by noting that a patient's claim could not be feigned or frivolous in the foreign object case since the object

246. 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969) ("Statute of Limitations will not begin to run until the patient could have reasonably discovered the malpractice").
247. 24 N.Y.2d at 441, 248 N.E.2d at 880, 301 N.Y.S.2d at 35 ("Such a . . . system does not lend itself, properly, to judicial gloss, so extensive as to be tantamount to substantial amendment") (Breitel, J., dissenting).
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retains its identity in the patient’s body.\textsuperscript{249} Since the object retains its identity, no professional diagnostic judgment is required and “defendant’s ability to defend a ‘stale’ claim is not unduly impaired.”\textsuperscript{250} Yet, it has also been pointed out that it is equally difficult to feign the medically verifiable signs of cancer that are present in toxic tort cases.\textsuperscript{251}

The dissenting opinion of Judge Breitel, joined by Judges Scileppi and Jasen, argued that the majority had wrongfully engaged in judicial legislation in adopting the time-of-discovery rule.\textsuperscript{252} Judge Keating, the author of the \textit{Flanagan} opinion, addressed the dissent’s contention that the legislature’s failure to pass a time-of-discovery rule indicated disapproval of such a rule. Judge Keating stated that since various medical malpractice time-of-discovery bills were never discussed in the legislature, it would be unwise to assume legislative disapproval, particularly since the assembly and the senate had always passed time-of-discovery measures when given the opportunity to deliberate and vote upon such bills.\textsuperscript{253} Until 1975, when the legislature passed CPLR section 214-a, no such rule had been passed by the two bodies simultaneously.\textsuperscript{254} Judge Keating concluded that the strict accrual rule was a judge-made rule from the outset and a judge-

\textsuperscript{249} 24 N.Y.2d at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 26-27.
\textsuperscript{250} \textit{Id.} at 431, 248 N.E.2d at 873, 301 N.Y.S.2d at 27.
\textsuperscript{251} \textit{See supra} note 175.
\textsuperscript{252} 24 N.Y.2d at 441, 248 N.E.2d at 879, 301 N.Y.S.2d at 35 (Breitel, J., dissenting).
\textsuperscript{253} \textit{Id.} at 433 n.5, 248 N.E.2d at 874 n.5, 301 N.Y.S.2d at 28-29 n.5.
\textsuperscript{254} 24 N.Y.2d at 433 n.5, 248 N.E.2d at 874-75 n.5, 301 N.Y.S.2d at 28-29 n.5.
made time-of-discovery rule merely served to update the common law.\textsuperscript{255}

While the \textit{Flanagan} decision seemed to foreshadow a general revamping of the statute of limitations accrual period for all types of products liability cases, the court of appeals has since construed the decision rather narrowly.\textsuperscript{256} However, several lower court decisions have broadened the definition of foreign object.\textsuperscript{257} Nonetheless, the court of appeals construed the \textit{Flanagan} decision narrowly in \textit{Martin} by choosing not to adopt the foreign object time-of-discovery rule in medical implant cases.\textsuperscript{258} The court reasoned that implantation or

\begin{itemize}
\item\textsuperscript{255} \textit{Id.} at 434, 248 N.E.2d at 875, 301 N.Y.S.2d at 29.
\item The Legislature did not provide that the Statute of Limitations should run from the time of the medical malpractice. This court did. Therefore, a determination that the time of accrual is the time of discovery is no more judicial legislation than was the original determination. Granted, the Legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the Legislature has not seen fit to act. . . . Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it.
\end{itemize}

\begin{itemize}
\item\textsuperscript{256} See Beary v. City of Rye, 44 N.Y.2d 398, 414-15, 377 N.E.2d 453, 459, 406 N.Y.S.2d 9, 15 (1978) (legislature expressly prohibited inclusion of chemical compounds, fixation devices and prosthetic aids from term foreign object; thus, \textit{Flanagan} could not be broadened beyond its existing confines). Lower courts have also failed to broaden the \textit{Flanagan} decision. See, e.g., Famulare v. Huntington Hosp., 78 A.D.2d 547, 547, 432 N.Y.S.2d 33, 33-34 (2d Dep't 1980) (foreign object must be something doctor introduced and, therefore, fragment of broken tooth left in patient's lip did not constitute foreign object); Soto v. Greenpoint, 76 A.D.2d 928, 929, 429 N.Y.S.2d 723, 724 (2d Dep't 1980) (failure to find toy lodged in throat constituted misdiagnosis and therefore did not come under foreign objects exception); Florio v. Cook, 65 A.D.2d 548, 549, 408 N.Y.S.2d 949, 951 (2d Dep't 1978) (leaving part of tumor in body not tantamount to leaving foreign object in body), aff'd, 48 N.Y.2d 792, 399 N.E.2d 947, 423 N.Y.S.2d 917 (1979).
\item\textsuperscript{257} See Ooft v. City of New York, 80 A.D.2d 888, 888, 437 N.Y.S.2d 30, 31 (2d Dep't 1981) (time-of-discovery rule applies when doctor fails to remove I.U.D. before inserting new one); Dobbins v. Clifford, 39 A.D.2d 1, 3-4, 330 N.Y.S.2d 743, 746-47 (4th Dep't 1972) (time-of-discovery rule applies when doctor injures plaintiff's pancreas while removing plaintiff's spleen and injury discovered four years later; real evidence in form of hospital records available; no involvement of professional diagnostic judgment and no danger of false claims); LeVine v. Isoserve, Inc., 70 Misc. 2d 747, 751-52, 334 N.Y.S.2d 796, 801 (Sup. Ct. Albany County 1972) (time-of-discovery rule applied in ordinary negligence suit when plaintiff was exposed to radioactive isotope); see also Note, Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York's Statute of Limitations, 8 COLUM. J. ENVTL. L. 161, 168-69 (1982).
\item\textsuperscript{258} 60 N.Y.2d at 427, 457 N.E.2d at 1155-56, 469 N.Y.S.2d at 928-29.
insertion occurs with the patient's knowledge, and the patient can provide this information to a doctor who subsequently may be diagnosing body ailments. The Martin decision, however, did create a time-of-injury exception to the general strict accrual rule. This action indicates that the court of appeals will resort to interpreting the meaning of "accrual" in the general statute of limitations where the legislature has failed to act and where the interests of justice and equity so demand.

V. Alternative Proposals for Time-of-Discovery Accrual

On March 12, 1984, the New York State Assembly unanimously passed Assembly Bill A. 3547-A which would have added a two year time-of-discovery provision to CPLR section 214. This provision would have provided for accrual, not only upon plaintiff's discovery of injury, but also upon plaintiff's discovery that injury had been
caused by exposure to a toxic substance. The bill also would have revived for one year plaintiffs' toxic tort claims which had expired as of the effective date of the legislation. Though the state assembly has passed similar bills in four consecutive legislative sessions, the proposal has never appeared on a senate committee agenda nor been voted upon by the full senate.

In May, 1984, however, a senate version of the time-of-discovery

the result of the defendant's reckless disregard for the safety of product users, consumers, or any other persons who might be harmed by the product. Such damages may not be awarded in the absence of an award for compensatory damages.

(c) In this section:

1. "Disability" means the inability to perform a person's regular work or occupation or the inability to perform regular daily activities as a result of exposure.

2. "Exposure" means contact, absorption, injection, ingestion or inhalation.


263. See supra note 262 and accompanying text.

264. Section 4 of A. 3547-A provides:

Every cause of action for personal injury, illness or death, or injury to property caused by the latent effects of contact, absorption, injection, exposure, ingestion, or inhalation, direct or indirect, to a substance, material, element or particle upon or within the body or upon or within property, which is barred as of the effective date of this act because the applicable period of limitation has expired, is hereby revived and an action thereon may be commenced within one year from the effective date hereof; provided, however, that this section shall not apply to any claim or action for damages, including third party claims, whether made or brought directly or indirectly against the state, or political subdivision thereof, any public corporation, department, board, bureau, division, agency, commission, authority, or officer or employee of any of the foregoing.


265. See Fact Sheet, supra note 261, at 1; Gargan, Panel in Albany Urged to Extend Toxic Suit Time, N.Y. Times, May 9, 1984, at B2, col. 1 [hereinafter cited as Albany Panel]. The time-of-discovery legislation has consistently been blocked from a full senate vote by Senate Majority Leader Warren Anderson (R-Binghamton). Charles Dumas, a spokesman for Anderson, stated that "[N]o one would want to do business in New York State [if a time-of-discovery rule were enacted]. And New York is in a sticky situation with business right now." Mitchell, Cancer Victims Caught in Middle of NY Debate, Newsday, May 2, 1984, at 15, col. 1 [hereinafter cited as N.Y. Debate].

The State Health Commissioner, David Axelrod, however, has estimated that only twenty-seven cases of DES-related cancer may now exist in New York State. See N.Y. Debate, supra note 265, at 15, col. 2. It is questionable whether passage of a time-of-discovery measure would harm business enough to warrant blocking these plaintiffs' claims. Moreover, it is doubtful that business could flee anywhere else given the trend towards time-of-discovery toxic tort statutes of limitations in the other states. See supra note 41 and accompanying text.
bill was considered by a state senate committee for the first time.\textsuperscript{266} The bill, S. 9158, was drafted by the chairman of the Senate Codes Committee, Republican Ronald B. Stafford.\textsuperscript{267} Senate bill S. 9158 was more restrictive than the assembly version, however, as it required a plaintiff to exercise reasonable diligence in discovering his injury.\textsuperscript{268} Moreover, the senate proposal did not require discovery of causation before the statute of limitations would begin to run.\textsuperscript{269} Thus, under A. 3547-A, a plaintiff would have to discover his injury as well as the cause of his injury before the statute of limitations would begin to run, while under S. 9158, a plaintiff would only have to discover the injury itself before the statute of limitations accrued.\textsuperscript{270} In spite of these flaws, assembly and senate proponents of a time-of-discovery accrual rule supported the senate bill.\textsuperscript{271}

The senate proposal ultimately died in committee without coming to a full vote in the senate as a number of senators, including Senator Stafford, chose to support a proposed comprehensive prod-

\textsuperscript{266} See Albany Panel, supra note 265, at B2.

\textsuperscript{267} N.Y. S. 9158, 207 Reg. Sess. (1984). S. 9158, titled, "AN ACT to amend the civil practice law and rules, in relation to time limitations to commence an action to recover damages for injury caused by exposure to toxic or harmful substances," was introduced on May 3, 1984. The bill provided, in pertinent part:

§ 2. Such law and rules is amended by adding a new section two hundred fourteen-c to read as follows: § 214-c. Actions to recover damages for personal injury or injury to property caused by the latent effects of exposure to a toxic or harmful substance.

(a) Notwithstanding any provision of law to the contrary (except for section two hundred fourteen-a of this article) where the time to commence an action has otherwise expired, an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to a toxic or harmful substance may be commenced within two years from the date of discovery of the injury or within two years from the date when through the exercise of reasonable diligence such injury should have been discovered, whichever is earlier.

(b) In this section "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation or injection. . . .

§ 4. Every cause of action for personal injury or injury to property caused by a toxic or harmful substance . . . which is barred as of the effective date of this act because the applicable period of limitation has expired, is hereby revived and an action thereon may be commenced within one year from the effective date hereof . . . .

\textit{Id.} at 2 (underlines indicating new matter omitted).

\textsuperscript{268} See supra note 267.

\textsuperscript{269} \textit{Id.}; see also supra notes 64-78 for discussion of the federal courts' approach under the Federal Tort Claims Act which requires discovery of causation before the statute of limitations commences to run.

\textsuperscript{270} See supra notes 47-49 and accompanying text for different types of time-of-discovery rules.

\textsuperscript{271} See Fact Sheet, supra note 261, at 1-2.
products liability bill.\textsuperscript{272} Senate bill S. 10051, while containing a time-of-discovery provision,\textsuperscript{273} also included several onerous provisions which offset the possible benefits of the time-of-discovery provision contained therein.\textsuperscript{274}

One of the failings of S. 10051 was its exclusion of the broad revival clause which constituted section four of A. 3547-A.\textsuperscript{275} The senate bill instead limited the revival of time-barred claims to injured plaintiffs with clear-cell adenocarcinoma who had ingested DES or whose mothers had ingested DES during their pregnancies while they were domiciliaries of New York State.\textsuperscript{276} The limited revival period

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\textsuperscript{274} Section 2 of S. 10051 contains a reasonable diligence clause but does not require discovery of causation before the statute of limitations accrues. N.Y. S. 10051, 207 Reg. Sess. 2, § 2 (1984).
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\textsuperscript{275} See supra note 264; News: From Assemblyman Melvin Miller, Assembly Denounces Senate “Compromise” Tort Bill (June 26, 1984) (available in Fordham University School of Law Library) [hereinafter cited as Assembly News].
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\textsuperscript{276} Section 6 grants DES claimants an additional year in which to file a claim and states:
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§ 6. a. Pursuant to the provisions of chapter seven hundred fifteen of the laws of nineteen hundred seventy-eight, the legislature recognized the public importance of identifying, screening, diagnosing, caring for and treating persons exposed to diethylstilbestrol and other synthetic estrogens, commonly known as “DES.” After approximately thirty years of prescription of DES by physicians to pregnant women to alleviate certain complications of pregnancy, a statistical association between prenatal exposure to DES and clear-cell adenocarcinoma of the vagina or cervix was discovered and reported on in the medical literature in nineteen hundred seventy-one.

Such compelling circumstances impose a strong moral obligation on the state to provide additional time in which to sue for causes of action that have accrued in favor of such citizens of this state. Therefore, the legislature by the enactment of this act provides an additional year within which to commence an action for damages to individuals who can demonstrate (1) exposure in utero to DES, and (2) diagnosis of clear-cell adenocarcinoma of the vagina or cervix.

b. Notwithstanding any other provisions of law, an action to recover damages for injury or death resulting from clear-cell adenocarcinoma of the vagina or cervix caused by in utero exposure to DES which is barred as of the effective date of this act because the applicable period of limitation expired is hereby revived for any person, or the personal representatives of any person, whose mother was prescribed and who
also was extended to certain employees of the tungsten carbide industry.\textsuperscript{277} This narrow revival effectively foreclosed those time-barred claimants who were unable to garner the lobbying strength needed to have "their diseases" included in the bill.\textsuperscript{278} Additionally,

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used DES during the term of her pregnancy provided such person's: (i) mother, at any time during the term of her pregnancy, had a residence in this state or was domiciled in this state or (ii) such person had a residence in this state or was domiciled in this state at the time the condition was diagnosed. Such an action may be commenced and prosecuted provided such action is commenced within one year of the effective date of this act. The provision of this act shall not apply nor be deemed to revive any cause of action against a licensed physician or pharmacist. N.Y. S. 10051, 207 Reg. Sess. 4-5 (1984).

It should be noted that under this provision, plaintiffs would still have no claim against doctors. See also \textit{supra} notes 239-42 for discussion of Public Health Law § 2500-C which originally linked DES with cancer nearly six years ago. There is still no relief to DES plaintiffs from the statute of limitations to date. See \textit{supra} note 208 for a discussion of the physical consequences of DES ingestion.

\textsuperscript{277} Section 7 of the senate proposal provides:

\begin{quote}
Notwithstanding any other provision of law to the contrary, every cause of action for personal injury or death caused by the latent effects of exposure to tungsten or cobalt through contact, ingestion or inhalation, direct or indirect, upon or within the body, to employees of any company engaged in the cemented tungsten carbide industry in New York State during the years nineteen hundred fifty through nineteen hundred eighty-two inclusive, and which company is no longer engaged in said business in this state, and which cause of action is or would be barred prior to the effective date of this act because the applicable statute of limitation has run is hereby revived or extended, as the case may be, and an action thereon may be commenced not later than one year from the effective date of this act.
\end{quote}

N.Y. S. 10051, 207 Reg. Sess. 5 (1984). Tungsten carbide, which is the hardest substance next to the diamond, consists of between three and twenty-five percent cobalt particles. \textit{Ex-Workers Contend Cobalt Dust in Factory Caused Lung Ailment}, N.Y. Times, June 3, 1984, § 1, at 55, col. 1. Tungsten carbide is used in the manufacture of industrial-tool parts and when cobalt particles are inhaled by employees, their lungs may become permanently scarred. \textit{Id}. Section 7 will provide a one year revival period for approximately seventy claimants in New York State who were employed by a tungsten-carbide factory in Syracuse, New York which closed in 1982. \textit{Id}.

\textsuperscript{278} See \textit{supra} notes 203-04 and accompanying text for a discussion of the legislative bargaining system. In a 1978 case, Judge Fuchsberg in his majority opinion stated that:

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[a legislator] may not only be expected to bring his knowledge and opinions to bear on the proposals before him, but to share them with his legislative confreres as well. After all, as a legislator he is a member of a body which has been tellingly described as "a bargaining institution . . . a means by which society settles its accounts among various groups." O'Malley v. Macejka, 44 N.Y.2d 530, 533-34, 378 N.E.2d 88, 90, 406 N.Y.S.2d 725, 726 (1978) (offices of town assessor and county board members not incompatible so that one person may hold both offices) (quoting Prendergast, \textit{Professional Approach to Advocacy in a Legislature}, 34 ALBANY L. REV. 69, 70, 75 (1969)).
\end{quote}
S. 10051 eliminated, to the detriment of injured plaintiffs, collateral estoppel and joint and several liability in certain situations.

While early indications, including support from Governor Mario Cuomo, pointed towards passage of some type of time-of-discovery provision, none of the assembly or senate proposals had been considered by the full senate by the end of the regular session on July 1, 1984. Presumably, objections to a broad time-of-discovery provision by defendant interests and to the narrow revival clause in

279. The collateral estoppel doctrine provides that "when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation." 

280. Joint and several liability attaches when tortfeasors may be sued by a plaintiff either separately or together at plaintiff's discretion. 

281. Section 4 of S. 10051 adds a new article 14-B to the CPLR. N.Y. S. 10051, 207 Reg. Sess. 2-4 (1984). The article effectively eliminates the concept of joint and several liability by providing that a party shall be liable only "for that portion . . . awarded as damages to any plaintiff in the proportion that the amount of . . . culpable conduct bears to the amount of the culpable conduct attributable to all persons subject to liability, whether or not an action has been brought or a judgment rendered against such person." Id. at 3; see also Epidemiologic Proof, supra note 238, at 782-84 for a discussion of proportional recovery in toxic tort litigation.

Section 6 of the senate proposal forbids the use of collateral estoppel in claims which have been revived. "(I)It would be manifestly unfair to permit either a claimant or defendant in any action to establish any fact necessary to make the determinations . . . by showing that an identical or similar issue of fact was determined adversely to the claimant or the defendant in another action brought by another claimant . . .," N.Y. S. 10051, 207 Reg. Sess. 5 (1984). The use of collateral estoppel in asbestos litigation has been analyzed by several commentators. See, e.g., Baldwin, Asbestos Litigation and Collateral Estoppel, 17 FORUM 772 (1982); Note, Applying Offensive Collateral Estoppel to Asbestos Cases: A Viable Alternative, 16 SUFFOLK U.L. REV. 687 (1982).

282. See Albany Panel, supra note 265, at B2, col. 3.

283. Id. Oreskes, Albany Pas de Deux, N.Y. Times, July 6, 1984, at B2, col 1. Liberal members of the state senate attributed the failure of several legislative measures during 1984 to Governor Cuomo's reluctance to fight hard for them. Governor Cuomo, in reply, stated that the thirty-five member Republican majority in the senate was a much too formidable obstacle to overcome. Id. There was no 1984 election-year shift in the current 35-to-26 Republican majority in the state senate while Republicans gained four seats in the assembly, thereby reducing the Democratic majority in that body to 94-to-56. Peterson, Republicans Gain in State Legislatures, N.Y. Times, Nov. 11, 1984, § 1, at 18, col. 6; see also The Returns Across New York in Campaigns for Seats in State Legislature, N.Y. Times, Nov. 8, 1984, at B11, col. 1 (tabulations of New York State senate and assembly races).

284. Opponents of the legislation who allege that a time-of-discovery rule would increase the cost of insurance premiums and ultimately drive out business, could be characterized as alarmist at best. Assemblyman Melvin H. Miller, by letter dated December 6, 1983, polled the Commissioners of Insurance for the fifty states about the effect a time-of-discovery statute of limitations has had on insurance premiums
S. 10051 by plaintiff interests led to the demise of any proposed time-of-discovery legislation.

Any future New York State time-of-discovery legislative proposal should adopt the broad revival clause and discovery-of-causation requirement proposed in the assembly bill A. 3547-A. Indeed, there is precedent for such legislation in CPLR section 214-b, the Agent Orange exception. An amendment to the general strict accrual and business in their states. The letter asked:

1) If your state has adopted either a discovery statute . . . or a revival statute, what has been your state's experience in insurance premiums for drug companies, asbestos manufacturers, etc. . . . Have insurance premiums increased since adoption of a discovery rule or a revival statute? By what percent? 2) Has any such company moved out of your state as an apparent result of enactment of a discovery rule or revival statute or been driven out of business as a result thereof? Eighteen insurance departments in states with time-of-discovery rules replied with the following results: seven states reported that they had "no knowledge of loss of business or increase in premium" (Alabama, Delaware, Kansas, Minnesota, Nebraska, New Hampshire, Texas); one state reported "no loss of business or increase in premiums" (Pennsylvania); six stated that they "don't know answers to these questions" (Arizona, California, Maine, New Jersey, Tennessee, Wisconsin); and four states were "not responsive to questions" (Arkansas, Maryland, Michigan, Missouri). Fact Sheet, supra note 261, at 3; see also supra notes 41-42 and accompanying text for the statutes of limitations of these states.

Additionally, confirmed cases of asbestosis in New York State do not necessarily indicate enormous potential legal liability for New York corporations. Between March 1982 and March 1983, fifty-eight suspected and confirmed cases of asbestosis were reported in Jefferson and St. Lawrence counties. State To Investigate Asbestosis in 2 Counties, N.Y. Times, Mar. 25, 1984, at A38, col. 1. However, only thirty-five cases were reported in the rest of the state in 1983, including one in Manhattan. Id. It seems illogical to argue that a business would leave a newly converted time-of-discovery state in order to move to one of the few remaining minority time-of-injury jurisdictions. Too many other factors would appear to govern a corporate move. For example, a report prepared by a panel appointed by Governor Cuomo stated that New York business executives surveyed believed that the personal income tax was the "greatest single burden imposed by the state" primarily because labor expenses constitute a large portion of business costs. Carroll, A Cuomo Panel Plans to Suggest Income-Tax Cut, N.Y. Times, Nov. 15, 1984, at B7, col. 4. Arguably a corporation would weigh the benefits of proposed New York State income tax changes quite heavily before planning to relocate. Id. at B7, col. 1. In light of the trend towards the time-of-discovery rule, it is doubtful that a corporation would risk relocation anyway, since any minority state could readily become part of the time-of-discovery majority.

See supra notes 275-78 and accompanying text. Members of the Assembly Codes Committee promptly reported their own compromise bill designed to afford time-of-discovery and revival relief to asbestos, chlordane, diethy stilbestrol, polyvinylchloride and tungsten-carbide claimants only. N.Y. A. 3593-B, 207 Reg. Sess. (1983-1984); see also Assembly News, supra note 275, at 2. However, no action was taken on any of the proposals. See supra note 283 and accompanying text.

See supra notes 261-64 and accompanying text.

See supra notes 227-45 and accompanying text for a discussion of the Agent
TIME-OF-DISCOVERY RULE

1985]

The statute of limitations currently existing in CPLR section 214 should include a broad one-year revival clause for plaintiffs whose claims have been barred under the three year statute of limitations, as well as by a requirement of actual injury and discovery of causation by the plaintiff before the statute of limitations has begun to run.288 Both provisions are essential to insure the most equitable legislative solution to the problem posed by latent toxic injuries. Assembly bill A. 3547-A contains these provisions and should be supported by the full New York State Legislature in the future.289 In light of the New York State Legislature's failure to enact a time-of-discovery rule for toxic tort plaintiffs in this session, the New York Court of Appeals retains the power and bears the responsibility to exercise its equitable discretion to provide judicial relief to time-barred toxic tort plaintiffs. Such judicial relief has been provided in a majority of states which have adopted a time-of-discovery statute of limitations for all toxic tort cases.290

For example, the Appellate Court of Illinois adopted a time-of-discovery rule in latent disease cases in *Nolan v. Johns-Manville Asbestos & Magnesia Materials Co.*291 In *Nolan*, an asbestos insulator, who had installed asbestos products from 1941 to 1973, brought suit in 1973 against the defendant for asbestosis contracted by the insulator during this period.292 Under the Illinois two-year personal injury statute of limitations, the plaintiff's claim would have been time-barred.293 The defendant moved for summary judgment contending that the time-of-discovery rule did not apply and, in the alternative, that

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288. See *supra* notes 261-64 and accompanying text.
289. *Id.*
290. See *supra* note 41 and accompanying text.
292. *Id.* at 780, 392 N.E.2d at 1354.
the plaintiff had not exercised due diligence to discover his injury and its cause.294

The Nolan court held, however, that a time-of-discovery accrual rule must be applied in latent disease cases.295 In so holding, the court avoided judicial legislative problems by adopting the language of an Illinois Supreme Court decision involving a worker’s compensation claim: “To say that the plaintiff must have filed suit at the time of the first inhalation . . . means that an injury could not . . . be proved. Such argument is unsound and does violence to the manifest intent of the Legislature . . . .”296 The court also held that the question of whether a plaintiff had exercised reasonable diligence to discover that he had contracted asbestosis due to the defendant’s negligence, was a question for the trier of fact.297 The defendant’s motion for summary judgment, therefore, could not be granted.298

A second example of a court adopting a time-of-discovery accrual rule is found in Louisville Trust Co. v. Johns-Manville Prods. Corp.299 In Louisville, a decedent asbestos worker had worked from 1957-1967 in a factory which processed asbestos boards manufactured by the defendant.300 The decedent had died in 1972 from malignant mesothelioma diagnosed in 1971, which allegedly had been caused by exposure to asbestos dust in the factory.301 The administrator of the decedent’s estate brought an action for personal injuries and wrongful death against the defendant soon after the decedent’s death.302 The estate’s action would have been time-barred by Kentucky’s one-year personal injury statute of limitations.303 The Supreme

294. 74 Ill. App. 3d at 779, 392 N.E.2d at 1354.
295. Id. at 788, 392 N.E.2d at 1360.
   [I]t is clear that the statute of limitations in a case such as this, involving a physical condition characteristically developing slowly and insidiously over a long period of time . . . necessitates more than a mere computation or accrual of calendar days. Requiring the filing of a lawsuit before the potentially serious consequences of exposure to a dangerous and defective product can possibly be known or become known for a period . . . of . . . years, could destroy a just and meaningful claim for injuries simply for want of knowledge or proof and thereby nullify any realistic redress available to an injured party.
   Id.
296. Id. at 788, 392 N.E.2d at 1360 (quoting Madison v. Wedron Silica Co., 352 Ill. 60, 184 N.E. 901 (1933)).
297. 74 Ill. App. 3d at 794, 392 N.E.2d at 1364.
298. Id.
299. 580 S.W.2d 497 (Ky. 1979).
300. Id. at 498.
301. Id.
302. Id.
Court of Kentucky, however, expressly overruled nearly twenty-five years of judge-made law\textsuperscript{304} to extend Kentucky's medical malpractice time-of-discovery rule to tort actions for latent disease injuries.\textsuperscript{305} The estate's action, therefore, was held to have been timely filed.\textsuperscript{306}

Such holdings protect toxic tort plaintiffs from the harsh effects of a time-of-injury statute of limitations rule. Proposed New York State Assembly Bill A. 3547-A would have a similar effect.\textsuperscript{307} Arguably, the New York State Court of Appeals should apply such a standard judicially in the absence of legislative initiative to obtain more equitable results.\textsuperscript{308} The court of appeals has already applied a more equitable accrual rule in the related areas of medical malpractice in \textit{Flanagan}\textsuperscript{309} and medical implants in \textit{Martin}.\textsuperscript{310} Now, it is time to extend judicial protection to all plaintiffs suffering from latent injuries.

\section*{VI. Conclusion}

While the \textit{Martin} decision liberalizes the statute of limitations accrual rule in the case of malfunctioning medical implants it also affirms New York's strict accrual rule for latent injury cases.\textsuperscript{311} In order to provide plaintiffs suffering from latent disease an opportunity to file a timely claim, it is imperative that New York State adopt a comprehensive time-of-discovery rule of accrual. The limited legislative exception to the strict accrual rule provided for in Agent Orange cases by CPLR section 214-b is not sufficient, particularly since even the legislature has acknowledged the strong link between other toxic substances and plaintiffs' injuries.\textsuperscript{312} Yet, this limited exception demonstrates that the legislature is aware of the problems latent-injury plaintiffs face.

In light of the fact that a majority of jurisdictions accepts the time-of-discovery rule at state\textsuperscript{313} and federal\textsuperscript{314} levels, New York State should adopt such a rule. Despite the New York Court of Appeals'
continued reluctance, this adoption could come from a judicial decision since the court has already recognized a number of exceptions to the strict accrual statute of limitations rule in related areas. This "judge-made law" of strict accrual would then be "judge-unmade" to afford victims of latent disease an opportunity to obtain just compensation by providing for the running of the statute of limitations from the time latent injury and the cause of the injury are discovered by the toxic tort plaintiff.

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315. See supra notes 104-54, 246-60 and accompanying text.