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Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule

Statutes of limitations bar tardy lawsuits. The California legislature has been precise in establishing different time periods after which redress for different types of legal injuries is prohibited.[1] But it has generally left the question of when these limitation periods begin, or *accrue*, for determination by the courts.[2] This determination has great practical significance since statutes of limitations are frequently invoked and, once applied, have the drastic consequence of completely blocking a plaintiff's access to legal relief. This result is particularly harsh in the case of the plaintiff who, despite reasonable diligence, fails to discover the fact of injury within the limitations period.

This Comment examines the development of limitation accrual in California and demonstrates that current doctrine as stated is seriously at odds with current doctrine as applied. After exploring the reasons for this tension, the Comment concludes that change in the rhetoric of accrual law is warranted to align description with reality. Finally, the Comment considers the possibility of legislative reaction and suggests that this contingency supports rather than opposes restatement of accrual doctrine.

I

Evolution of California Accrual Law

The basic principle governing the accrual of limitation periods states that they run from the date of injury.[3] This date is not only rela-

1. Limitation periods range from the 30 days allowed for commencement of challenge to certain municipal taxes, Cal. Civ. Proc. Code § 349 (West 1954), to the 10 years permitted for the initiation of suit against real property developers. *Id.* § 337.15 (West Supp. 1979). *See* note 63 *infra*. Commonly invoked limitations are the four years permitted for actions on written contracts, *id.* § 337, two years upon oral contracts, *id.* § 339, and one year for tort actions, *id.* § 340.1.

2. Code of Civil Procedure § 312 states that "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." The section does not define that point at which the cause of action acerues. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 192 n.30, 491 P.2d 421, 430 n.30, 98 Cal. Rptr. 837, 846 n.30 (1971). The legislature has specified accrual times for certain legal injuries. *See* notes 61-65 and accompanying text *infra*.

3. It is the date of the act and fact which fixes the time for the running of the statute. Cases of hardship may arise, and do arise, under this rule, as they arise under every statute of limitations; but this, of course, presents no reason for the modification of a

tively easy to determine but also advances considerations of fairness that underlie the statutes of limitations—concern, that is, that suits be tried on fresh evidence and that defendants be guaranteed repose after lapse of the limitations period. A corollary of the date-of-injury rule is that commencement of the limitation period will not be delayed by the plaintiff's ignorance of the fact of harm, even if this ignorance is excusable because it occurred in the face of the plaintiff's reasonable diligence.[4] California courts have thus been faced with applying a rule grounded in fairness but resulting in injustice. Perhaps as a consequence of this dilemma, the rule, while once strictly applied, has become riddled with exceptions. Recent expansion of these exceptions suggests that they have swallowed the rule.

As early as 1872, the California Legislature codified an exception to the date-of-injury rule for actions for relief on the grounds of fraud or mistake. In its current form, this rule states that "[t]he cause of action in such a case [is] not to be deemed to have accrued until the discovery, by the aggrieved party or his agent, of the facts constituting the fraud or mistake."[5] This section has been broadly construed to defer accrual where the plaintiff's ignorance of injury was due to any misrepresentations by the injurer.[6] It is not surprising that such an exception

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> principle and policy which, upon the whole, have been found to make largely for good. . . . If a searcher of records, in his report upon a title, by negligence omits an important instrument, the purchaser, upon the strength of the searcher's report, has no cause of action, unless he brings it within two years, not from the date when he may be ousted of his possession, and thus first discover the defect, but within two years from the date of the searcher's report. And so throughout the law, except in cases of fraud, it is the time of the act, and not the time of the discovery, which sets the statute in motion.

Lambert v. McKenzie, 135 Cal. 100, 103, 67 P. 6, 7 (1901). *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177 (1950); Case-Comment, *The Time of Discovery Rule and the Qualified Privilege Defense for Credit Reporting Agencies in Illinois After* World of Fashion v. Dun & Bradstreet, Inc., 10 J. MAR. J. PRAC. PROC. 359 (1977); Note, Kelley v. Rinkle: *Texas Embraces the Discovery Rule in Credit Libel*, 30 SW. L.J. 950 (1976).

4. Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 214, 30 P.2d 39, 44 (1934) ("Of course, the rule is well settled that in a malpractice case the statute starts to run from the date of the injury and that mere ignorance of injury on the part of the plaintiff is not sufficient to toll the statute."). *See* notes 24-25 and accompanying text *infra*. Strict accrual by injury bars *all* claims of justifiable excuse for delayed suit, not just those resulting from lack of notice of injury. Other arguably reasonable excuses can include lack of knowledge of defendant's identity, *see, e.g.*, Calabrese v. County of Monterey, 251 Cal. App. 2d 131, 59 Cal. Rptr. 224 (1st Dist. 1967), or lack of knowledge of the extent of injury. *See* Priola v. Paulino, 72 Cal. App. 3d 380, 140 Cal. Rptr. 186 (1st Dist. 1977). This Comment is exclusively concerned with the justifiability of excuse based on the plaintiff's complete lack of notice of legal injury despite reasonable diligence.

5. CAL. CIV. PROC. CODE § 338(4) (West Supp. 1979).

6. Although the § 338(4) discovery rule is available only when fraud is the gravamen of the original action, Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39 (1934), the equitable doctrine of estoppel provides for similar discovery-based accrual when a defendant makes misrepresentations that prevent the plaintiff from bringing a timely action. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 180, 491 P.2d 421, 422, 98 Cal. Rptr. 837, 838 (1971). In Carruth v. Fritch, 36 Cal. 2d 426, 224 P.2d 702, 24 A.L.R.2d 1403 (1950), the plaintiff was injured while riding in the defendant's car. The defendant procured a release of liability from the plaintiff

would accompany the date-of-injury rule almost from its inception,[7] since strict adherence to that principle would sanction unfairness of the most egregious sort and would create an incentive for injurers to mislead their victims to the maximum possible extent.

Courts adopted procedural requirements to facilitate the meshing of this equitable exception with the operation of an otherwise largely self-executing rule. Plaintiffs who claimed that their delayed law suit was justified on this basis were required to so allege in their complaint,[8] thus alerting the court and defendants of the plea of justifiable delay at the earliest possible date. The common law also placed the burden of proving such pleas upon the plaintiff.[9] Allegations that would not present a compelling case even if proved were dismissed at the pleading stage.[10] In this manner the demands of fairness were accommodated with the need for an efficient administration of the limitation policy.

California courts early began to add their own exceptions to the date-of-injury rule. The first such exception appeared in 1920 in the indirect form of the doctrine of prospective warranty. In *Firth v. Richter*,[11] the plaintiff sued for violation of a warranty that seedlings he had purchased would bear Valencia oranges. He discovered the violation when the trees instead bore navel oranges, but this occurred after the statutory period had run as calculated from the date of sale. Al-

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in exchange for a promise to pay the plaintiff's medical bills. The defendant later refused to make good the promise and asserted that the plaintiff's personal injury action was barred by the statute of limitations. The California Supreme Court quoted the principle that "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." *Id.* at 433, 224 P.2d at 706, 24 A.L.R.2d at 1410. Following this reasoning, the court held that the defendant was estopped from using the statute of limitations as a bar to the plaintiff's suit.

As with other devices for altering the date-of-injury accrual bar, a plaintiff seeking to invoke the estoppel doctrine both must plead, Roam v. Kopp, 41 Cal. App. 3d 1035, 116 Cal. Rptr. 539 (4th Dist. 1974), and prove, Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, 45 Cal. App. 3d 519, 119 Cal. Rptr. 559 (1st Dist. 1975), facts showing the plaintiff's "justifiable ignorance." Kiernan v. Union Bank, 55 Cal. App. 3d 111, 117, 127 Cal. Rptr. 441, 445 (1st Dist. 1976).

7. This provision was first codified in California in 1872. CAL. CIV. PROC. CODE § 338(4) (West Supp. 1979).

The English statute of limitation enacted in 1623 prevented the statute from running whenever the cause of action had otherwise accrued when the plaintiff was under 21, a married woman, mentally ill, in prison, or beyond the seas. An Act for Limitation of Actions, and for Avoiding of Suits in Law, 21 Jac. I, c. 16, §§ 2, 7 (1623). In the 17th century, such individuals would have been either unable to bring an action or unlikely to know of their injury. By preventing their deprivation of remedy before realistic opportunity for redress, Parliament addressed the same question of fairness that motivated the statutory fraud exception.

8. Lady Washington C. Co. v. Wood, 113 Cal. 482, 486-87, 45 P. 809, 810 (1896).

9. Faulkner v. Burton, 126 Cal. App. 2d 210, 271 P.2d 948 (3d Dist. 1954); Shapiro v. Equitable Life Assurance Soc'y, 76 Cal. App. 2d 75, 172 P.2d 725 (2d Dist. 1946).

10. *See* notes 50, 51, and 54 *infra*.

11. 49 Cal. App. 545, 196 P. 277 (2d Dist. 1920).

though the buyer obviously would have been able to bring a breach of warranty action before fruition had he known of the problem, the court redefined the "date of injury" by saying that "since the warranty related to a future event by which its truth could not be ascertained, the warranty was not broken until the happening of such future event."[12] By means of this prospective warranty device, the court moved forward the date of injury, thus accommodating the plaintiff's justifiable ignorance of injury with at least nominal obedience to the date-of-injury rule.[13]

A decade later, a California court again manipulated the definition of "date of injury" to permit a suit otherwise barred by the statute of limitations.[14] In that case, a worker who cleaned rock-grinding machines breathed dust, eventually contracting silicosis. He had noticed a shortening of breath about three years before filing for compensation, and the relevant statute of limitations barred claims after six months from the "date of injury." The court, however, was satisfied that "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves,"[15] which in this case was found to be when physical incapacity and inability to work occurred. In the following year, the California Supreme Court ruled in another occupational disease case that the date of injury should "be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment."[16] Later cases have extended this approach to other occupational disability settings.[17]

This manipulation of the date of injury subsequently expanded to other categories of cases. In a 1968 decision, *Oakes v. McCarthy Co.*,[18] a California appellate court allowed delayed suit by locating the ac-

12. *Id.* at 551, 196 P. at 279.

13. Other courts have been more explicit about this accommodation: "The doctrine of prospective warranty was adopted in the interests of justice and to prevent the statute from being a protection for fraud so that the bar of the statute would not run before the existence of the cause of action was ascertained." Ackerman v. A. Levy & J. Zentner Co., 7 Cal. App. 2d 23, 27, 45 P.2d 386, 388 (3d Dist. 1935). *See also* Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 583-85, 360 P.2d 897, 902-03, 12 Cal. Rptr. 257, 262-63 (1961); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281 (1961).

14. Associated Indem. Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 12 P.2d 1075 (2d Dist. 1932).

15. *Id.* at 381, 12 P.2d at 1076. *Accord*, Urie v. Thompson, 337 U.S. 163 (1949) (construing "accrual" in the Federal Employers' Liability Act).

16. Marsh v. Industrial Accident Comm'n, 217 Cal. 338, 351, 18 P.2d 933, 938 (1933).

17. *See, e.g.*, Arndt v. Workers' Compensation Appeals Bd., 56 Cal. App. 3d 139, 128 Cal. Rptr. 250 (1st Dist. 1976).

18. 267 Cal. App. 2d 231, 73 Cal. Rptr. 127 (2d Dist. 1968).

crual of liability at the point where injury became reasonably apparent rather than the date on which it actually occurred. Specifically, the court held that "[a] *cause of action* for consequential damages resulting from an underground trespass *does not arise* until there is surface damage which would put a reasonable man on notice."[19] The plaintiff in *Oakes* sued his property developer and others after purchasing a hillside house and discovering years later that its filled foundation was moving and might "develop into a sizable and catastrophic slide."[20] The court ruled it proper to submit to the jury the fact question of when damages became sufficiently appreciable to a reasonable person to hold an owner to a duty of expeditiously pursuing his remedies, thus commencing the statute of limitations.[21] The California Supreme Court in 1975 expanded *Oakes* beyond this redefinition of the date of injury by citing it for the proposition that "[t]he date the taking [of property without just compensation] occurred is not necessarily the date on which the period of limitation and of claims started to run. . . . Rather, the period begins to run when the damage is sufficiently appreciable to a reasonable man."[22] In applying discovery-based accrual, however, courts have continually demanded that the plaintiff's complaint "state the circumstances under which the discovery was made or any facts from which it could be concluded that plaintiff could not with reasonable diligence have made the discovery sooner."[23]

Direct exceptions to accrual on the date of injury have also been created in the area of professional malpractice. In 1936, California became the first state to adopt a date-of-discovery exception for medical malpractice suits. In *Huysman v. Kirsch*,[24] a doctor inadvertently left a

19. *Id.* at 255, 73 Cal. Rptr. at 141 (emphasis added). The decision relied on a Pennsylvania coal mining trespass case from the last century, Lewey v. H.C. Frick Coke Co., 166 Pa. 536, 31 A. 261 (1895).

20. 267 Cal. App. 2d at 246, 73 Cal. Rptr. at 136.

21. *Id.* at 254-55, 73 Cal. Rptr. at 141-42.

22. Mehl v. People *ex rel.* Dep't of Pub. Works, 13 Cal. 3d 710, 717, 532 P.2d 489, 493, 119 Cal. Rptr. 625, 629 (1975). In a footnote, the court distinguished other cases cited for the proposition "that a cause of action for a taking of property arises upon completion of the project causing injury" by stating that "[i]n those cases there was a direct physical invasion of the landowner's property when the project was built, and the fact of taking was immediately apparent." *Id.* at 717 n.2, 532 P.2d at 493 n.2, 119 Cal. Rptr. at 629 n.2.

23. Weinstock v. Eissler, 224 Cal. App. 2d 212, 228, 36 Cal. Rptr. 537, 548 (1st Dist. 1964) (emphasis deleted). *Accord*, Bradler v. Craig, 274 Cal. App. 2d 466, 471-72, 79 Cal. Rptr. 401, 404-05 (2d Dist. 1969).

24. 6 Cal. 2d 302, 57 P.2d 908 (1936).

The most recent development in discovery-based acerual as applied to medical malpractice actions is found in the recent United States Supreme Court case, United States v. Kubrick, 100 S. Ct. 352 (1979), where the Court drew a distinction between plaintiff's knowledge of the factual predicates of injury and plaintiff's knowledge of the legal implications of injury. In reversing a Third Circuit decision, the Court held that the two year statute of limitations imposed by the Federal Tort Claims Act began to run when plaintiff discovered that his deafness had been caused

nine-inch tube in a patient's body after surgery. He was not allowed to escape liability even though the plaintiff had not discovered the error until after the statutory period. The court ruled that the statutory period for medical malpractice claims instead was to accrue at the time that the plaintiff actually discovered or reasonably should have discovered the injury. In effect, the opinion permitted a plea of justifiable ignorance of injury to delay the commencement of the limitation period. Subsequent opinions overtly applied this discovery rule to medical malpractice actions. They also made clear, however, that the expansion of the rule carried with it extension of the requirement that plaintiff plead and prove facts showing that plaintiff was not at fault for failing to make earlier discovery.[25]

The medical malpractice exception has reached to other professions in the last twenty years. Individual decisions gradually extended it to escrowholders,[26] accountants,[27] stockbrokers,[28] title companies,[29] and insurance agents.[30] Attorneys remained notably exempt from this trend of expanding liability[31] until 1971. In that year, the California Supreme Court concluded in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*[32] that the rule of discovery should govern the statute of limitation for attorney malpractice suits.

In *Neel*, a lawyer failed to arrange for service of summons in litigation and thereby lost the right to pursue the claim, but his client did not learn of this oversight until after the limitation period had run from the date of injury. The court first noted the conspicuous difference in treatment that resulted from barring the discovery rule for lawyers when, as the court significantly generalized, the rule was applied to "all other professional malpractice."[33] The court then tested the logic of the

by treatment received at a Veterans Administration hospital rather than when plaintiff discovered that the treatment was negligently given.

25. Dujardin v. Ventura County Gen. Hosp., 69 Cal. App. 3d 350, 356, 138 Cal. Rptr. 20, 22 (2d Dist. 1977); Mock v. Santa Monica Hosp., 187 Cal. App. 2d 57, 64-65, 9 Cal. Rptr. 555, 560-61 (2d Dist. 1960).

26. Amen v. Merced County Title Co., 58 Cal. 2d 528, 375 P.2d 33, 25 Cal. Rptr. 65 (1962).

27. Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1st Dist. 1967).

28. Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1st Dist. 1968).

29. Cook v. Redwood Empire Title Co., 275 Cal. App. 2d 452, 79 Cal. Rptr. 888 (1st Dist. 1969).

30. United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 463 P.2d 770, 83 Cal. Rptr. 418 (1970).

31. *See* Yandell v. Baker, 258 Cal. App. 2d 308, 65 Cal. Rptr. 606 (1st Dist. 1968), in which a lawyer and several accountants jointly prepared a tax program for a client. While the statute of limitations barred subsequent suit by the client against the lawyer, presumably an action was still possible against the accountants. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187 n.19, 491 P.2d 421, 427 n.19, 98 Cal. Rptr. 837, 843 n.19 (1971).

32. 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

33. *Id.* at 187, 491 P.2d at 427, 98 Cal. Rptr. at 843.

special treatment for attorney malpractice by means of three factors. First, the court stated that clients may not recognize professional malpractice when they see it because professional expertise is needed to detect legal errors. Second, the client may have no opportunity to observe professional malpractice: "In the legal field, the injury may lie concealed within the obtuse terminology of a will or contract; in the medical field the injury may lie hidden within the patient's body; in the accounting field, the injury may lie buried in the figures of the ledger."[34] Finally, the court thought that postponing limitations accrual until discovery "vindicated" the fiduciary duty of full disclosure that lawyers owe their clients since such postponement prevents the lawyer "from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure."[35]

This reasoning undoubtedly leads to the court's conclusion that attorney malpractice suits should accrue by the rule of discovery. However, the court did not point out that this analysis has broad implications for cases beyond the professional malpractice context. *Neel*'s first factor is illustrative; *all* victims claiming justifiable ignorance of injury by definition assert that for some reason they did not recognize their injury when it occurred. This factor may be viewed as applicable only to injuries that require specialized expertise for discovery, as would have been the case in *Firth* if only a trained biologist could have distinguished Valencia from navel orange trees before fruition. But the factor also can be understood as applying to any injury that simply may not become obvious to a reasonable lay person until a later date. This occurred in *Neel* when the attorney's client finally found that the lawsuit could not be pursued due to a previous legal blunder, a discovery that any reasonably prudent person eventually would have made.

Neel's second factor, the lack of opportunity to witness the tort, similarly contains nothing to confine it to a professional context. Many everyday legal injuries can occur where the victim has no chance to observe the acts that accomplish the harm. For example, a libelous letter can be published to third parties beyond the victim's presence.[36]

Neel's third factor, "vindication" of the fiduciary duty to disclose, is more problematic since its relevance even to the professional malpractice context is unclear. Professionals who are negligent (as opposed to willfully wrong) do not know of their malpractice beforehand; they may discover their neglect shortly after the negligent conduct or perhaps only when the unhappy client returns bearing its now-evident consequences. Failure to disclose only becomes literally possible at the

34. *Id.* at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.

35. *Id.* at 189, 491 P.2d at 429, 98 Cal. Rptr. at 845.

36. *See* text accompanying notes 46-47 *infra*.

time the professional learns that he or she has inflicted an injury, yet *Neel*'s rule attributes no significance to this date. In light of this omission, the disclosure factor is of questionable relevance to the decision on whether or where to apply the discovery rule.

Alternatively, the disclosure factor might be thought pertinent as a device to single out professionals for application of the discovery rule on the grounds that their higher standard of care merits extended periods of liability. This concern may have been rhetorically persuasive for a court seeking to justify its decision to treat lawyers on the same basis as other professionals. However, limiting the discovery rule to the professional context on the basis of the professional's higher standard of care would be both a clumsy means of holding the professional accountable and an inequitable approach to protecting innocent plaintiffs. The approach would be clumsy because it would effectuate a higher professional standard of care indirectly—by lengthening the time available for recovery—when this goal can be more directly and precisely accomplished by lowering professional liability standards. The approach would be inequitable because it would dictate drastically different access to compensation for equally harmed and diligent plaintiffs on the unrelated basis of whether the injurer is a professional. In this light, it is more reasonable to regard *Neel*'s mention of the fiduciary duty to disclose as a marshalling of arguments in support of a desired result rather than as the elaboration of a principle useful to the guidance of future decisions. Perhaps more important than the specific logic of the disclosure factor is its general goal of preventing tort immunity gained by means of the victim's justifiable ignorance. Underlying the factor is an equitable concern closely akin to the general dissatisfaction with the injury accrual rule, one that is not easily confined to *Neel*'s professional setting.

Although the logic of the *Neel* decision may have been implicitly sweeping, its language was restricted to the professional malpractice context[37] and its holding further limited to aligning the treatment of malpractice claims against lawyers with that given to suits against other professionals. Nevertheless, the decision's expansive nature has not been lost on lower courts, which have since extended its reasoning beyond its already broad "all professions" dicta.[38] In holding that the

37. "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute." 6 Cal. 3d at 187, 491 P.2d at 428, 98 Cal. Rptr. at 844.

38. The 1969 case of Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (2d Dist. 1969), can be viewed as adopting a significant pre-*Neel* expansion of the discovery rule. That decision applied the rule of discovery outside of a professional context in a case where a consumer sued a drug manufacturer for ill effects arising from drug consumption that only later

statutory period should accrue upon discovery of a termite inspector's negligence rather than upon the date of the negligent inspection itself, *Seelenfreund v. Terminix of Northern California*[39] reasoned that termite inspectors were like professionals because state laws regulated their conduct and required that inspection results be reported to the customer in writing. In 1975, *Allred v. Bekins World Wide Services, Inc.*[40] applied the discovery rule to a suit against a moving company. The plaintiffs claimed that they did not discover until after the statutory period ran from the date of their move that severe skin rashes they were experiencing were caused by "microscopic vermin"[41] found in the defendant Bekins' contaminated packing straw. Citing *Neel*, the court applied the discovery rule because Bekins had "held itself out as qualified and equipped to pack and ship articles of personal property around the world."[42]

Two other recent court of appeals decisions completely departed from any attempted justification for applying the discovery rule that is based on professional analogy. In the 1976 case of *Cain v. State Farm Mutual Auto Insurance Co.*,[43] the plaintiff sued for invasion of privacy, claiming that State Farm had conducted surveillance against her in order to gain information for the defense of a lawsuit. After simply noting a "definite trend toward the discovery rule,"[44] the court held that "the rule of discovery attends . . . actions for damages for violation of the right to privacy."[45] *Cain* is of interest beyond its holding for two reasons. First, the defendant bore no significant relationship to the plaintiff. Second, the plaintiff had not yet offered *any* justification for her tardy suit beyond her plain assertion of delayed discovery even though the basis of the suit was an apparently intrusive injury. Notwithstanding these facts, the court was willing to sanction use of the discovery rule not only in this case but also in all suits for invasion of privacy.

Cain was cited as authority in the 1979 decision of *Manguso v. Oceanside Unified School District*,[46] which held that the discovery rule

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were discovered to be drug induced, despite the express finding that there was no fiduciary duty or privity of contract between the parties. *Id.* at 572, 80 Cal. Rptr. at 135. However, the case could be read as merely expressing traditional misrepresentation or estoppel logic, *compare id.* and note 6 *supra*, although the court did not confine its discussion to this theory. *See* note 49 *infra*.

39. 84 Cal. App. 3d 133, 148 Cal. Rptr. 307 (1st Dist. 1978).
40. 45 Cal. App. 3d 984, 120 Cal. Rptr. 312 (1st Dist. 1975).
41. *Id.* at 987, 120 Cal. Rptr. at 313.
42. *Id.* at 991, 120 Cal. Rptr. at 316.
43. 62 Cal. App. 3d 310, 132 Cal. Rptr. 860 (1st Dist. 1976).
44. *Id.* at 314, 132 Cal. Rptr. at 862.
45. *Id.* at 315, 132 Cal. Rptr. at 863.
46. 88 Cal. App. 3d 725, 152 Cal. Rptr. 27 (4th Dist. 1979).

"attends . . . actions for libel."[47] There, a schoolteacher sued her former school district employer for allegedly circulating a defaming letter about her in secret. Although this allegation made its holding less of a leap beyond precedent than *Cain*, the *Manguso* court was similarly willing to invoke the discovery rule for a generally notorious class of injury with little reasoning beyond citation of cases applying the discovery rule in other contexts. The *Manguso* court also gave no indication that it regarded the former employment relationship between the parties as of any moment whatsoever.

This progression of cases poses the question of whether the discovery rule—with its accompanying pleading and proof burdens on the plaintiff[48]—in fact has supplanted the older injury accrual rule as the fundamental statute of limitation principle in California.[49] Although many cases repeat that ignorance of injury will not delay the statutory period, most do so in situations where the choice of rules makes no difference, *viz.*, where the plaintiff's asserted ignorance, even if actual, is not reasonable.[50] The statutory bar applied in these cases is consistent with the discovery rule since here the victim actually knew or reasonably should have known of the injury at a time that still would make the statute bar the action. In fact, examination of modern reported California cases reveals no decision since at least *Neel* applying a limitation bar against a plaintiff tardy because of ignorance of injury where the allegations or facts indicate that the ignorance was reason-

47. *Id.* at 731, 152 Cal. Rptr. at 31.

48. *See* G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218, 220 (3d Dist. 1975).

49. After conducting an extensive review of the cases, one 1969 court of appeal decision (dealing with the delayed effects of drug ingestion) did seek to generalize the discovery rule to a considerable degree:

> Analysis of the cited cases indicates to us that when personal injury is suffered without perceptible trauma and by silent and insidious impregnation as a consequence of the act or omission of another, who knows, or is charged with the responsibility of knowing that such act or omission may result in personal injury, and the injured person is unaware of the cause of his injury, and as a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause, no action for a tort resulting from such cause begins to accrue until the injured person knows or by the exercise of reasonable diligence should have discovered the cause of such injury.

Warrington v. Charles Pfizer & Co., 274 Cal. App. 2d 564, 569-70, 80 Cal. Rptr. 130, 133 (2d Dist. 1969). The California Supreme Court did not refer to or adopt this statement in *Neel*, although the result reached there is consistent with the *Warrington* statement.

50. *E.g.*, Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1st Dist. 1954) (statute to run from date of injury despite plaintiff's asserted 16-month delay in discovery that violent illness occurring after eating can of peas was caused by the peas); Easton v. Geller, 116 Cal. App. 577, 580, 3 P.2d 74, 75 (1st Dist. 1931) ("This rule [that a general allegation of ignorance of injury is of no effect] is particularly applicable to a case such as this, where from all the facts alleged the court must presume that with reasonable diligence the plaintiff might have ascertained the matters of which he now complains.").

able.[51]

The contrast of language and behavior in these cases deserves explanation and clarification. The next section undertakes these efforts.

II

PERCEIVED PROBLEMS WITH DISCOVERY ACCRUAL: MANAGEABILITY AND INCENTIVES

When a contradiction is found between the statement of a doctrine and its application, it is reasonable to look for some explanation. In the case of the nominal rule that ignorance will not delay the statute of limitation, the contradiction is most likely caused by judicial fear that blanket application of a discovery rule will cripple the effectiveness of statutes of limitations as efficient devices to identify and block the litigation of delinquent claims. Since the date of injury typically is a matter of little controversy, a court usually can calculate the statutory period from the face of a complaint and swiftly dismiss belated suits as a matter of law. This rigid procedure creates a strong incentive for timely action by plaintiffs, thus furthering the policy concerns central to the statutes of limitations. By contrast, the alternative approach of a discovery rule might be criticized as both burdensome to manage and corrosive to any incentive to sue. This section will examine the validity of these criticisms and weigh their merits against the added benefit of fairness that is gained by assuring reasonably diligent plaintiffs their day in court.

Criticism of the discovery rule as unmanageable is grounded on the assumption that determining when a plaintiff *actually* learned of an injury is a factual issue inherently more cumbersome than determining as a matter of law if the time since the date of injury exceeds the statutory period. The fact issue is further complicated since the party with the best knowledge of and access to evidence about this subjective event is the plaintiff, who has a systemic interest often conflicting with accurate resolution of the question. And even though the discovery rule contains an objective "reasonableness" test that guards against abuses of this incentive, such "reasonableness" determinations are troublesome because they require judges and juries to adopt moral judgments about the operative meaning of "reasonable diligence" in an array of different and often complicated factual settings. Since the matter by definition will arise only after the statutory period has run

51. Collins v. County of Los Angeles, 241 Cal. App. 2d 451, 50 Cal. Rptr. 586 (2d Dist. 1966), is typical of many cases. After repeating that "it is the time of the act, and not the time of the discovery, which sets the statute [of limitations] in motion," *id.* at 454-55, 50 Cal. Rptr. at 588, the court went on to review the allegations to determine that "there was no valid reason for plaintiffs to wait" for the period that they did before filing their suit. *Id.* at 456, 50 Cal. Rptr. at 589.

from the date of injury, there is the additional criticism that such determinations usually will have to be made on old evidence.

When placed in perspective, however, these concerns about procedural efficiency pale. The discovery rule need not be difficult to manage if the procedural rules that have attended its application as an exception also guide its administration as a general rule. Central is the presumption of plaintiff's notice by injury, a presumption that must be rebutted for the plaintiff to establish a later accrual date. Where the presumption is judged true, as it will be in the preponderance of cases, the discovery rule will bar the same claims as the injury accrual rule.[52] Pleading requirements[53] that the tardy plaintiff allege the time, manner, and circumstances justifying the delayed discovery allow the court to evaluate the asserted excuse at the earliest possible time. This gives the trial judge the opportunity at the pleading stage to sift out claims that would not constitute reasonable justifications even if the plaintiff were allowed to support them with proof.[54] If the allegations do present a meritorious claim and are permitted to proceed to proof, the plaintiff still has the burden of adducing sufficient evidence to overcome the contrary presumption. This is a fair means of dealing with an issue about which one party has more information.[55] Motions for summary judgment and directed verdict remain available to challenge purported justifications that flounder at intermediate stages.[56] Excuses for delay that survive all of these hurdles still must pass jury inspection unless the story has been so compelling and the proof so convincing that the judge is able to direct the jury to find in the plaintiff's favor on this particular issue. Regardless of the procedural stage at which the question arises, judges and juries excel in deciding whether a plaintiff is justifiably ignorant of injury by reason of the exercise of reasonable diligence.

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52. In this sense, the injury accrual rule simply is a species of the more general discovery rule.

53. *See* notes 8-10, 25, 48 and accompanying text *supra*.

54. Many claimed excuses can be dismissed as a matter of law. *E.g.*, Saliter v. Pierce Bros. Mortuaries, 81 Cal. App. 3d 292, 146 Cal. Rptr. 217 (2d Dist. 1977) (delayed discovery unreasonable as a matter of law when plaintiff alleges more than 14 months was necessary for him to perceive "the causal link" between the defendant's four-day failure to inform him of his father's death and his subsequent mental depression and withdrawal. *Cf.* Dujardin v. Ventura County General Hosp., 69 Cal. App. 3d 350, 138 Cal. Rptr. 20 (2d Dist. 1977) (incorrect to hold delay unreasonable as a matter of law when plaintiff parents allege that they did not suspect that their child's birth defects were caused by a particular brand of intrauterine device until government report announced that brand unsafe).

55. *See* Cleary, *Pleading and Presuming: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959).

56. Consideration of statute of limitations claims also can be accelerated by means of a special trial confined to such special defenses, granted on the motion of either party. CAL. CIV. PROC. CODE § 597 (West 1976).

Admittedly, in deciding whether to lift the bar of the statute of limitations under a discovery rule regime, some thorny dilemmas will arise where the countervailing considerations stand near equipoise. Yet such questions remain essentially matters of common experience and common sense. As such, they are susceptible to highly competent resolutions by the finders of law and fact. And if some situations do pose trying deliberations, it is only because the plaintiff's asserted justification is compelling at least to a degree. A policy of barring such tardy suits out of hand because their justification for delay is credible enough to make the question difficult would be an elevation of procedural efficiency over substantive justice. Finally, while it is true that reasonableness-of-discovery issues may have to be tried on stale evidence, this concern with accuracy is not dispositive when the only alternative to a decision on such imperfect information is a decision to completely reject consideration of proffered justifications.

The second potential criticism of the rule of discovery accrual concerns its corrosive effect on the plaintiff's incentive to bring suit in a timely fashion. Although the rule of accrual at the time of injury must be acknowledged to produce harsh results sometimes, some may count this as among its virtues. Establishment of a deadline that has been demonstrated to be unyielding creates a sanction deserving high regard. In place of this inflexible rule, the discovery principle may be claimed to give plaintiffs an incentive to manufacture justifications instead of pursue remedies.

Two policy concerns underlie society's interest in providing plaintiffs with a strong incentive to present legal claims promptly. First, timely adjudication aids the factfinding process by ensuring that questions of fact will be decided on the basis of fresh evidence. Second, the statutory bar relieves potential defendants from the threat of liability for deeds in the distant past. The injury accrual principle guarantees this repose by setting a concrete date past which claims are barred. In contrast, the discovery rule establishes an open-ended threat of suits, an evil against which the limitation policy was specifically designed to guard.

Like the manageability concern, criticism of the discovery rule for its impact on the incentive to timely suit does not fare well on closer analysis. An initial point is that statutes of limitations are not the sole or even the primary source of this incentive. Probably few plaintiffs would significantly alter their behavior even in the complete absence of any limitations since a victim's basic interest is in timely compensation, not dilatory conduct. And the added incentive generated by a strict date-of-injury accrual may be particularly slight when victims do not yet know they have been injured.

Even assuming, however, that a harsh rule might succeed in creating added awareness and diligence in the population at large, it is doubtful that the policy benefits of this disquietude are worth the high cost in fairness when the approach denies relief to blameless victims. The issue boils down to a question of balancing. Is the first policy basis for having an incentive—avoidance of stale evidence—more important than the opportunity for a reasonably diligent plaintiff to seek redress for his injury at all? Both are concerns of justice. But, on any scale, the barrier to any hearing at all seems a more drastic imposition on justice than potential harm to the quality of the factfinding process once in court.

A similar balancing process may be applied to the policy of guaranteeing defendants repose from continued liability. If the policy is based on an absolute value in ensuring potential defendants eventual peace of mind, that value must be weighed against the plaintiff's lost right to a remedy for his injury. While there is an element of fairness in the notion that defendants should not be burdened forever by potential liability, this concern for psychological well-being weakens when compared to the basic principle of justice that a remedy exists for every legal wrong diligently pursued. A statute of limitations barring relief to blameless victims without means to avoid their predicament violates this guarantee of justice. This guarantee deserves attention at least equal to that accorded to the guarantee that wrongs of the distant past will not be permitted to trouble the present.

Furthermore, the policy of guaranteed defendant repose may *not* be based on an absolute value. The defendant's interest in the guarantee of repose by itself is lame since this repose simply represents the freedom of not having to answer for the consequences of one's actions; the guarantee gains its real thrust from the plaintiff's failure to take diligent action. The logic of this conceptualization is that inactive victims acquiesce in the status quo at some point and that it is unfair for an unreasonably slow victim to upset this understanding after this date. If this fairness consideration is the basis of the guarantee of defendant repose, the policy is clearly not applicable where a worthy plaintiff, exercising due diligence, could not discover a cause of action within the limitations period. In that case no "acquiescence" may be implied from the plaintiff's delay that could impute to the defendant a reasonable expectation of repose.

Taken together, these considerations suggest that courts should adopt the discovery rule as the basic acerual principle for all actions.[57] So long as the traditional procedural rules surrounding the discovery

57. Of course, such a judicial rule would only apply where the question of accrual has been left for judicial determination. *See* notes 59-68 and accompanying text *infra*.

rule continue to govern its application, the fairness advantage that it offers need not be offset by loss of effective and efficient administration of the limitations policy. Adoption of the discovery principle across the board would align judicial statements of accrual law with its actual application, thus permitting the clear and candid statement of an important legal principle.

III

THE POSSIBILITY OF LEGISLATIVE REACTION: AN OPPORTUNITY FOR POLICY DIALOGUE

Some may find a frank judicial announcement of a rule of discovery for all lawsuits objectionable on the grounds that a policy change of this dimension ought to be made by the legislature. An explicit declaration of what may already be the actual practice of courts, however, does nothing to strain the judicial role. Indeed, a clear and candid statement of ruling law is a prerequisite rather than a barrier to possible legislative reaction. Should such a reaction materialize, it ought to be viewed as a welcomed stage in the development of a vital and responsive limitations policy rather than as confirmation that the judiciary has strayed beyond its ken.

California's scheme for the limitation of actions presently is structured from an amalgam of legislative and judicial policy decisions. Both branches of government have contributed to the system in their areas of relative competence; the legislature has defined reasonable times for the pursuit of redress for different types of legal injuries but has generally left decisions on matters about the accrual, running, and tolling of the statutory periods to the courts.[58] In this pattern of interaction, the legislature essentially has established a policy framework while committing the system's functioning to the branch that must apply it on a day-to-day basis.

Despite general legislative deference to judicial operation of the limitation system,[59] there have been particular areas in which the legislature has interceded. The Uniform Commercial Code requires accrual at the time of a contract breach, "regardless of the aggrieved party's

58. Statutes of limitation, moreover, involve technical legal procedure. Problems of the commencement, running, and tolling of limitation periods come frequently and regularly to the appellate courts, and the judiciary develops a kind of expertise in this area. On the other hand, many legislators are not attorneys, and even those who are, do not encounter problems of limitations and accruals of actions in their daily legislative duties. Legislative silence in the present case may indicate that the Legislature has chosen to defer to judicial experience and to repose with the judiciary the rendition of rules for the accrual of causes of action.

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 192, 491 P.2d 421, 431, 98 Cal. Rptr. 837, 847 (1971).

59. *See* note 2 *supra*.

lack of knowledge of the breach."[60] Another provision, enacted in 1967, specifies an absolute four-year limit for filing suit against property developers or contractors that are based on "patent deficiencies" in building design or construction.[61] This time limit is to be calculated from the date of "substantial completion" of the property improvement.[62] In 1971, a similar provision setting forth a ten-year absolute limit was enacted for property suits brought on the basis of "latent deficiencies" in the design or construction of property improvements.[63]

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60. U.C.C. § 2725 (1978 version). California did not adopt this provision of the U.C.C. until 1967, when it enacted California Commercial Code § 2725, which provides in pertinent part:

(1) An 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.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

CAL. COM. CODE § 2725 (West Supp. 1979).

61. (a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency; or

(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completiou, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

. . . .

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

. . . .

CAL. CIV. PROC. CODE § 337.1 (West Supp. 1979).

62. *Id.*

63. (a) No action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of such development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of coustruction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.

. . . .

(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

Similarly specific provisions have been enacted to govern medical[64] and legal[65] malpractice claims. The medical malpractice law bars actions three years after the date of injury or one year after discovery of

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CAL. CIV. PROC. CODE § 337.15 (West Supp. 1979).

64. In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

CAL. CIV. PROC. CODE § 340.5 (West Supp. 1979).

The California Supreme Court reviewed the history of this section in Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d at 192 n.32, 491 P.2d at 431 n.32, 98 Cal. Rptr. at 847 n.32:

In 1931, the Court of Appeal held that the period of limitation ran from the negligent act despite the plaintiff's justifiable ignorance of her cause of action. (Gum v. Allen (1931) 119 Cal. App. 293, 295, [6 P.2d 311].) The Legislature took no action to overturn this rule. In 1936, we adopted the rule that the cause of action does not accrue until discovery. (Huysman v. Kirsch (1936) 6 Cal. 2d 302, 312, [57 P.2d 908].) Legislative inaction continued for 34 years, until 1970 when the Legislature enacted section 340.5. That enactment adopted a compromise position, approving the discovery rule but imposing a four-year maximum limit.

This history demonstrates the difficulties of inferring intent from legislative inaction. If the court in 1936 had reasoned that legislative inaction demonstrated legislative approval of Gum v. Allen, we might still be following the rule against delayed accrual in medical malpractice cases.

65. (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omis-

injury, whichever is first, with an absolute bar on actions after three[66] years from the date of injury. Exceptions to this three-year cap are provided for cases of fraud, concealment, and "foreign bodies . . . in the person of the injured person."[67] An analogous provision passed in 1977 establishes a similarly detailed design for accrual and limitation of legal malpractice claims.[68]

These laws represent complicated policy conclusions about the appropriate treatment of specific legal actions. Their complexity and choice of specific time periods denote a character fit for legislative action but probably beyond typical notions of the bounds of judicial competence. Yet in each case preexisting common law rules provided a backdrop against which these intricate legislative compromises could be formed. In this sense, clear common law rules facilitated the adoption of sophisticated legislative responses; comprehensible judicial standards provided not only analytical starting points but also a body of experience with the operation of at least one policy regime. In light of this pattern, the possibility of legislative reaction should not relieve the judiciary of the task of formulating lucid, sensible, and principled rules to the extent of its competence.[69] Instead, the existence of the possibility should encourage such judicial efforts as part of the policy dynamic central to our system of coordinate branches of government.

The ambiguity of present California common law rules about accrual hobbles this policy dynamic. To the extent that the injury accrual principle retains real vitality, it is subject to ad hoc exceptions like *Cain* and *Manguso*. The absence in those cases of an articulated or imaginable rationale renders current law unpredictable, unstable, and unprincipled. And if the discovery rule exceptions have indeed swallowed the older rule in reality, identification of this situation is hampered by the lack of any authoritative statement to that effect. This uncertainty does not even permit a legislature to decide if the current judicial practice needs change, let alone to determine what incremental amendments might be appropriate. A true regard for the division of power in our

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sion when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event.

CAL. CIV. PROC. CODE § 340.6 (West Supp. 1979).

66. The prior four-year limit was reduced to three years in 1975. 1975 Cal. Stats. § 25.

67. CAL. CIV. PROC. CODE § 340.5 (West Supp. 1979).

68. *See* note 65 *supra*; Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-evaluation:* Eckert v. Schaal, 15 U.C.L.A. L. REV. 230 (1967).

69. *See* Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d at 190-93, 491 P.2d at 430-32, 98 Cal. Rptr. at 846-48.

government consequently requires an alignment of judicial rhetoric with judicial practice rather than a perpetuation of confused doctrine in the name of legislative deference.

Two principled options are available to the courts. On the one hand, they may return to a regime of strict date-of-injury accrual by overturning discovery rule exceptions that now riddle the law with random variations. Alternatively, they may announce as a general principle that justifiable ignorance *does* affect limitation accrual because statutory periods for all actions are to commence when victims first discover or should have discovered their injury. The difficulty with the former course is that it is unfair to deprive justifiably unaware victims of opportunity for redress. The latter course cures this defect. When adopted in conjunction with a presumption of notice by injury that places the burden of producing a contrary conclusion upon the plaintiff, the discovery rule provides a procedurally efficient means of administering a fair limitations policy.

CONCLUSION

Although once commanding general adherence, the rule that limitation periods begin to run on the date of injury irrespective of the victim's knowledge of harm has been marked with exceptions since its inception. In recent years, California courts have continued to repeat the general rule. They have, however, applied a discovery exception—commencing the limitation period only from the time the plaintiff first knew or should have known of injury—in most instances where the choice between the alternative rules would dictate a difference in accrual dates. The curious patchwork of discovery rule exceptions that resulted probably is motivated by the court's distaste for barring a diligent but justifiably unaware plaintiff from suit. The courts' reluctance to completely abandon the general rule is doubtless due to judicial fear that general application of discovery accrual to all actions would debilitate the effectiveness of statutes of limitations. This fear proves groundless, however, when examined in light of the pleading and proof burdens—establishing a presumption of notice by injury—that have always rested upon plaintiffs who seek relief from a strict application of the statute of limitations on grounds of delayed injury discovery. The fact that the California Legislature has in some instances reacted to common law rules of accrual with detailed formulations of its own is not an adequate excuse for inaction on the part of the courts. On the contrary, it suggests that courts should adopt a consistent and comprehensible position to facilitate any forthcoming legislative reaction. In sum, general espousal of discovery accrual for all actions provides a fair means of efficient limitations administration, one that California

courts are competent to adopt. The courts therefore should announce that statutory periods for all law suits commence on the date that the plaintiff first actually did discover or reasonably should have discovered the fact of injury.

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