A Limited Discovery Rule for Indiana: *Barnes v. A.H. Robins Company*

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I. INTRODUCTION

A. The Problem of Delay

There is nothing new about the "delay" problem in Indiana tort law. In *Barnes v. A.H. Robins Co.*,[1] the Indiana Supreme Court relied heavily on a nineteenth century case involving a collapsing bridge[2] to explain its decision henceforth to run the Indiana personal injury statute of limitations in delayed manifestations disease cases "from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another."[3]

The problem of delay arises when the defendant's wrongful act results in harm to the plaintiff only after a considerable passage of time. The question, then, is whether the claim should be permitted to go forward.[4] In recent years courts have increasingly confronted this issue in the context of delayed manifestation diseases contracted by plaintiffs who have been exposed to deleterious substances or harmful medical devices which only later produce symptoms of serious personal physical harm.[5] Yet Indiana courts have long wrestled with harmful

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[1]476 N.E.2d 84 (Ind. 1985). Following the Indiana Supreme Court's answering of the certified question and remand of the case to the Seventh Circuit, the final disposition of the case has been stayed pending bankruptcy proceedings. For an interpretation of the Indiana Supreme Court's holding in *Barnes*, *see* Miller v. A.H. Robins Co., 766 F.2d 1102 (7th Cir. 1985) and *infra* notes 91 and 249.

[2]476 N.E.2d at 86 (discussing Board of Comm'rs of Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1885)).

[3]476 N.E.2d at 87-88.

[4]*See generally* PROSSER, LAW OF TORTS 143-45 (4th ed. 1971) (discussing the delay problem in the context of negligence cases and noting various devices employed by courts to escape harsh consequences including the then (1971) emerging "discovery rule"); 54 C.J.S. *Limitations of Actions* § 168 (1948) (noting that the general rule at common law for tort actions is to begin the limitation period when "the act causing the injury is committed, which may or may not be the date on which actual damage is sustained"); McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579, 588-600 (1981) (discussing the delay problem in the context of a "Policy Analysis of Product Liability Statutes of Repose"); *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200-03 (1950) (discussing the choice of when to begin the statutory period "where considerable time intervenes") [hereinafter cited as *Statutes of Limitations*].

[5]*See, e.g.*, Braswell v. Flinkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) (asbestos);

delayed effects in tort cases involving collapsing structures,[6] professional malpractice,[7] conversion of personal property,[8] damage to personal property,[9] damage to real property,[10] damage to crops,[11] alienation of affections,[12] eminent domain proceedings,[13] and other situations in which the injury is either nonexistent or nonapparent[14] until long after the wrongful act has taken place. It is in these cases, most of them having nothing to do with products, that the precedents governing product-related injuries are to be found.

Fixing the length and starting point for a timing limitations statute is a legislative exercise in balancing conflicting interests. The injured plaintiff's access to the courts to secure a remedy for harm caused by

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Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980) (Mer/29); Barnes v. A.H. Robins Co., 476 N.E.2d 84 (Ind. 1985) (Dalkon Shield intrauterine device); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (catheter); Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 467 N.E.2d 517 (1984) (DES).

[6]*See, e.g.*, Board of Comm'rs v. Pearson, 120 Ind. 426, 22 N.E. 134 (1885) (discussed *infra*, notes 70-72 and accompanying text).

[7]*See, e.g.*, Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981) (discussed *infra*, notes 115-35 and accompanying text); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956) (*see infra* notes 204-13 and accompanying text); Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983) (discussed *infra*, notes 136-40 and accompanying text); Cordial v. Grim, 169 Ind. App. 58, 346 N.E.2d 266 (1976) (discussed *infra*, notes 105-12 and accompanying text); Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975) (discussed *infra,* notes 108-10 and accompanying text).

[8]*See, e.g.*, French v. Hickman Moving & Storage, 400 N.E.2d 1384 (Ind. Ct. App. 1980) (discussed *infra*, notes 97-104 and accompanying text).

[9]*See, e.g.*, Essex Wire v. M.H. Hilt Co., 263 F.2d 599 (7th Cir. 1959) (discussed *infra*, notes 83-84 and accompanying text).

[10]*See, e.g.*, Monsanto v. Miller, 455 N.E.2d 392 (Ind. Ct. App. 1983) (discussed *infra*, notes 141-48 and accompanying text).

[11]*See, e.g.*, Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957) (discussed *infra*, notes 77-82 and accompanying text).

[12]*See, e.g.*, Montgomery v. Crum, 191 Ind. 660, 161 N.E. 251 (1928) (discussed *infra*, notes 73-76 and accompanying text).

[13]*See, e.g.*, Scates v. State, 178 Ind. App. 624, 383 N.E.2d 491 (1978) (*see infra* note 193 and accompanying text).

[14]It is important to make the distinction between cases where — after the defendant has acted — the *injury itself* is delayed, from cases where the *manifestation of injury* is delayed. An example of the former type would be the case of a defectively designed punch press which has a designed-in tendency to "double-trip." The defendant manufacturer may have introduced the product into the stream of commerce many years ago, but no injury to a user will occur until the press actually amputates a user's hand or finger. Although it is well-settled that such an injured user will not be barred by an accrual-based statute of limitations, the new product liability repose statutes that are occurence-based could bar such claims. *See infra* notes 31-40 and accompanying text. The latter type of case, that involving delayed manifestation, poses the problem addressed by this Article. In these cases, harm has occurred, but the plaintiff is unaware of it. The question is whether such claims should be barred by *accrual-based* statutes of limitations until the plaintiff has had a reasonable opportunity to discover the harm, its nature, its causal nexus to the defendant's product, and possibly, whether the defendant has in fact acted wrongfully. This Article does not address the related question whether such claims should be barred by the occurrence-based repose statutes.

alleged wrongful conduct must be balanced with the defendant's need to have access to evidence fresh enough to mount an effective defense.[15] In addition, the societal interest in bringing private disputes promptly to rest must be served.[16]

In general, relief for serious injury will be pursued promptly; delayed claims are, therefore, properly suspect.[17] It is reasonable to presume that excessive delay by the plaintiff in bringing a claim is tantamount to an implied waiver of the claim.[18] Nonetheless, when delay in pressing a claim results from no fault of the plaintiff, the waiver presumption is properly rebutted.[19] In any case, delay — for any reason — prejudices the defendant's ability to marshall evidence.[20]

B. Economic Effects of Delay

There are also economic arguments against exposing business entities — so called "enterprise" defendants[21] — to liability for indefinite periods

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[15]*See* 51 AM. JUR. 2d *Limitations of Actions* § 18 (1970); *Statutes of Limitations*, *supra* note 4, at 1185-86.

[16]There are two primary societal interests to be served by prompt dispute resolution: a general peacekeeping interest, 51 AM. JUR. 2d § 18, *supra* note 15, and the commercial interest "in avoiding the disrupting effect that unsettled claims have on commercial intercourse." *Statutes of Limitations, supra* note 4, at 1185.

[17]51 AM. JUR. 2d *Limitations of Actions* § 17 (1970); 53 C.J.S. *Limitations of Actions* § 1 (1948).

[18]The justification for upholding the repose presumption of limitation statutes is said to be "based in part upon the proposition that persons who sleep upon their rights may lose them." 51 AM. JUR. 2d *Limitations of Actions* § 16 (1970). The broad sweep of such a proposition is probably better characterized by the concept of implied waiver rather than simply the presumed negligence of the plaintiff as is suggested in 53 C.J.S. § 1, *supra* note 17.

[19]*See Statutes of Limitations, supra* note 4, at 1203-05.

[20]Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnessess have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1943).

[21]The term "enterprise liability" in the product context was popularized in a well-known article by Fleming James, Jr.: James, *General Products—Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). The term, which he attributes to Ehrenzweig, refers to placing the burden for harm caused by defective products on manufacturers as a cost of doing business. The object of such a risk distribution scheme was to "cut down accidents" and administer the losses "in such a way as to minimize the individual and social burden of them." *Id.* at 923. James' paper echoed the principles stated by Justice Traynor several years before in Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring). In 1973, a prominent tort scholar authored a provocative article suggesting that no-fault enterprise liability statutes should be enacted along the lines of no-fault auto insurance and workers' com-

following their allegedly wrongful acts. These entities — product sellers, for example — bear the risks of product-related injury, then spread the costs to society at large through higher prices that can accommodate the cost of liability insurance. Such "pure" risk costs, however, make up only part of the seller's insurance premium dollar. A substantial balance of the premium covers administrative costs, legal defense costs, and contingency fees that the plantiff incurs in pursuing a successful but contested claim.[22] Additionally, there is an enhanced uncertainty cost that the prudent insurer attaches to risks that actuarially are relatively unpredictable.[23]

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pensation. These statutes would embrace a wide variety of tort claims (including product liability) for personal injury. O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973).

[22]There have been a number of estimates of the cost effectiveness of tort litigation, especially with respect to product liability claims. One study places product liability personal injury defense costs at 35 cents per dollar of claim payment, or 26% of the total cost. INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 11 (1977). Using the Insurance Services Office defense cost figures and typical contingency fee arrangements, it is reasonable to estimate that successful plaintiffs recover a net amount of about 40% of the total premium dollar. Another study places the plaintiff's total legal costs at 54% of recovery (77 cents for every 66 cents of recovery). Schwartz, "Historical Overview of Workplace Compensation & Evolution of Possible Solutions," in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 39, 43 (1981) (citing American Insurance Association study).

Still another figure was derived by dividing the $234 million in claims paid out in 1979 by the $1252 million taken in that year by the five top insurance companies. This results in an 18 3/4% net return to claimants. Bendorf, "Broadening the No-Fault Compensation Option," in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 284, 287 (1981) (citing Product Liability Supplements filed by insurance companies). Although revenue and disbursement figures for the single year 1979 demonstrate very little, they do raise the important and controversial question of investment income. Cost effectiveness calculations must include the time value of the premium dollar. Today's premium dollar should yield more coverage than for a dollar's worth of future claims. The interest earned on reserved funds represents a cost that should be assigned to the litigation system.

Another statistic on asbestos-related disease is illustrative. A Rand Corporation study shows that victims who litigated asbestos-related claims in the 1970's recovered an average of $35,000, but incurred an average of $60,000 for legal expenses. Miller, "Drawing Limits on Liability," Wall St. J., Apr. 4, 1984, at 26, col. 4.

In contrast, the workers' compensation system probably returns over 60% of the premium dollar. *See* Comments by M. Markman, Minnesota Insurance Commissioners, in FINAL EDITED PROCEEDINGS OF NATIONAL CONFERENCE ON WORKERS' COMPENSATION & WORKPLACE LIABILITY 112 (1981).

[23]*See* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT V-10 (1977) [hereinafter cited as FINAL REPORT]. The Task Force found that product liability rate making was highly subjective, that the "result is that most premiums, in the final analysis, amount to 'informed best guesses' of the individual underwriter." *Id.* When actual product liability losses began moving upward after 1976, there were "abrupt upward revisions" in premiums. *Id.* at V-27. The Task Force suggests that "it is reasonable to assume that the insurers, in their own estimates of potential losses, are acting very conservatively in order to avoid underestimating losses." *Id.*

It can be argued that the probability that a product will cause physical harm because of a defective condition *present in it at time of sale* will decrease the longer the product is used without causing injury.[24] Thus, over time, the pure risk of physical harm from original defects may decrease, but the administrative costs, defense costs, and enhanced uncertainty components of the insurance premium are not as likely to decrease as rapidly.[25] This is especially so because the often multiple causes of accidents and health impairments involving long-lived products are difficult to distinguish. A good deal of expense, it is argued, is involved in defending — successfully and unsuccessfully — nonmeritorious claims involving multiple causes and products used beyond their useful lives. Eventually, the ratio of these latter components to the pure risk (of original defects) component of the insurance premium may increase to the point at which sellers can argue persuasively that liability insurance for older products eventually becomes a highly inefficient risk spreader and that consumers and users generally will benefit if the actual costs of the rare instances of delayed harm that do occur are permitted to rest where they fall, despite the occasional injustice that may result.[26]

With the explosion of delayed manifestation cases in recent years,[27] the presumption has become less credible that product risks always

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[24]This argument rests on the proposition that an untested product poses safety and health risks no matter how carefully the product is designed, manufactured, and introduced with warnings. Testing prior to general release reduces the risks, and unrestricted use over time in the field is the ultimate extension of testing. Naturally, unforeseeable misuse, later modifications, poor maintenance, and normal wear and tear beyond the useful life of the product, as well as the normal *reasonable* risks associated with the product can all lead to personal injury, but these latter risks are independent of the risk of harm resulting from "original defects." As original defects show up with normal use they are presumably cured, or the product is withdrawn, or more effective warnings are issued. In any event, the argument holds that "original defects" risk should decline dramatically over time.

[25]*See* FINAL REPORT, *supra* note 23, at VII-23. "[S]ome underwriters have said that even if old products represent a relative 'handful of losses,' they have had an impact on underwriting judgments far out of proportion to their statistical significance." *Id.*

[26]The principal justifications for an insured enterprise liability regime are efficient risk distribution, protection of individuals from catastrophic costs which they are unable to bear, and the development of pressures on manufacturers to improve product safety and health performance. *See supra* note 21. In the case of products that behave as postulated in text — generally capital equipment — the argument for cutting off "long-tail" tort claims by repose statutes is persuasive. The argument would be even stronger if workers' compensation systems universally provided adequate benefits for the injured workers whose workplace product tort claims are barred by these repose statutes. This argument in favor of repose statutes is developed more fully in McGovern, *supra* note 4, at 592-600.

[27]Delayed manifestation injuries from asbestos are expected to number several million. Estimates vary from eight million, *National Cancer Institute and National Institute of Environmental Health Sciences, Estimates of the Fraction of Cancer Incidence in the United States Attributable to Occupational Factors* 1-2 (draft summary, Sept. 11, 1978), to around 20 million. The number of persons developing asbestos-related diseases each year is not expected to level off until the 1990's. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573,

diminish in time after initial introduction of the products into the stream of commerce.[28] Only now are severe illnesses caused by products introduced decades ago becoming manifest.[29] Yet this unexpected delayed-effects phenomenon leads to a perverse economic corollary to the earlier argument: because the magnitude and frequency of these delayed losses

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580 n.13 (1983).

Some other workplace substances which are having an increasing impact because of delayed manifestation of injuries are formaldehyde, polyvinylchloride (PVC), radiation, and microwaves. The impact of injuries from these substances on the compensation systems could be as great or greater than that from asbestos. Suits arising from exposure to microwaves, which has occurred almost exclusively in the workplace, have been predicted to become the broadest-based product liability litigation ever. Nat'l L.J., Sept. 14, 1981, at 24, col. 1. Formaldehyde, which has been described as ubiquitous, Nat'l L.J., May 10, 1982, at 1, col. 1, is used in a wide variety of ways in the workplace. Use has been especially heavy in the forest-products industry, which uses one-half of the formaldehyde produced, and the textile industry, which uses one-quarter. In all, about 1.4 million people come into contact with formaldehyde solutions in the workplace. Wall St. J., May 21, 1982, at 23, col. 1. The U.A.W., which along with 14 other unions sued OSHA to set stricter exposure standards in factories, claims that as many as one percent of workers exposed at current levels may die of formaldehyde-related cancers. Wall St. J., Mar. 15, 1983, at 1, col. 5. The AFL-CIO cited formaldehyde as a health hazard to workers in beauty salons and barber shops where it is used in sterilizing solutions and in some beauty products. Wall St. J., Feb. 8, 1983, at 1, col 5.

Almost monthly, new workplace carcinogens and suspected carcinogens are being identified. These include newspaper ink, *see, e.g.*, Hanna v. Sun Chem. Corp., No. C-81-1967 (N.D. Ohio 1981); Grady v. Sun Chem. Corp., No. C-81-1696 (N.D. Ohio 1981), asphalt fumes, Wall St. J., Apr. 27, 1983, at 1, col. 5, and fluorescent lights, Wall St. J., Apr. 12, 1983, at 26, col. 4. Recently it was disclosed that wood-model makers in the auto industry are 50% more likely to develop cancer, although the specific carcinogen has not been identified. Simison, "Cancer Peril Disturbs Wood-Model Makers in the Auto Industry," Wall St. J., Jan. 3, 1983, at 1, col. 6. Even VDT's (video display terminals) have become suspect, and at least nine states are considering legislation to regulate their use. Wall St. J., Mar. 6, 1984, at 1, col. 5.

[28]It would be disingenuous to claim that the toxicity of substances found in the workplace and the general environment comes as a complete surprise, yet it is fair to state that the toxicity of very low concentrations of many common substances, the harmfulness of relatively brief exposures, the number of substances that have turned out to be carcinogenic, and the great length of undetectable gestation periods have been both surprising and overwhelming.

[29]*See* Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981), *rev'd*, 441 N.E.2d 8 (Ind. 1982), *appeal dismissed*, 460 U.S. 1076 (1983). In *Bunker*, the Indiana Court of Appeals held that a three-year-from-date-of-last-exposure statute of limitations denied occupational disease (asbestosis) claimant Richard Bunker due process of law. The court was persuaded by medical evidence published by Dr. Irving Selikoff demonstrating the delayed manifestation characteristics of asbestosis and mesothelioma. The court noted that a study of "asbestosis insulation workers revealed chest x-ray abnormality in only 10% of those whose exposure began less than ten (10) years before the study . . . ." *Id.* at 424-25. Thus, in the case of asbestos-related disease, not only would symptoms of disease not manifest themselves for many years following exposure to asbestos, the onset of disease was in most cases totally undetectable. For an account of the *Bunker* case, see Leibman & Dworkin, *A Failure of Both Workers' Compensation and Tort*: Bunker v. National Gypsum Co., 18 VAL. U.L. REV. 941 (1984).

are proving to be both huge and unpredictable, the insurance system may not be up to the task of efficiently shifting these costs from users to sellers. That is, no reasonable premium may be sufficient to fund protection for the full range of uncertainties inherent in these toxic tort situations. Thus, it can again be argued that the insured tort system may be an inadequate vehicle for distributing these delayed-effect risks.[30]

C. Repose Provisions; "Occurrence-Based" versus "Accrual-Based" Limitation Legislation

The foregoing arguments provide the economic rationale for enacting repose statutes such as that embedded in the Indiana Product Liability Act of 1978.[31] A repose statute cuts off a defendant's exposure to liability a statutory number of years following the defendant's act.[32] If that act

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[30]Not only are manufacturers of hazardous materials facing insolvency because of product liability claims, the viability of their insurers is at risk as well. Legal Times, March 30, 1981, at 1, col. 3. It has been estimated that the insurance industry may be liable for $38.2 to $90 billion over the next 35 years because of asbestos-related diseases. Wall St. J., June 18, 1982, at 26, col. 3. A few experts have stated that some insurers may collapse because of the number of asbestos suits. Wall St. J., June 14, 1982, at 1, col. 6. The effects on the casualty insurance industry from the delayed manifestation aspects of the Bhopal disaster and related chemical leak incidents is still to be estimated. The newly discovered toxicities mentioned at *supra* note 27 add an additional dimension to the risk distribution problem.

Finally, there is a "snowball effect" at work in the delayed-effects, mass-tort context. A slowly developing situation permits a thorough dissemination of information. Victims are given the opportunity to appreciate and understand their injuries, while the plaintiffs' bar has time to develop expertise, specialization, and cooperative attorney/expert witness networks. The result is that a financial disaster which at first appears contained from the product seller's and defense bar's perspectives may move "out of control." Such a situation was the reason given by an A.H. Robins' spokesperson (Nat'l Public Radio, Aug. 22, 1985) for Robins' filing for Chapter 11 protection on Aug. 21, 1985.

As of June 30, 1985, about 5,100 Dalkon Shield claims were pending; Robins said it expected " 'a substantial number' of new cases to be filed." Wall St. J., Aug. 22, 1985, at 3, col. 1. As of June 30th, 9,230 claims had been settled, Aetna Insurance Co. had paid $378.3 million to settle them, and legal fees and other costs for the defendants had totaled $107.3 million. Sales of the Dalkon Shield were discontinued in the United States in 1974. *Id.*

[31]IND. CODE §§ 33-1-1.5-1 to -8 (1982 & Supp. 1985). Section 5 provides in part:

> [A]ny product liability action in which the theory of liability is negligence or strict liability in tort must be commenced writhin two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

[32]The 10-year period in IND. CODE § 3-1-1.5-5 was held to be such a repose provision (or outer-cutoff of liability) in Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981) (questions certified to the Indiana Supreme Court by the Seventh Circuit Court of Appeals pursuant to IND. R. APP. P. 15(0)).

causes injury occurring after the statutory period has run, no liability can attach to the defendant. Thus, the effect of the statute may be to leave a plaintiff, injured by the wrongful act of another, without a remedy. Such repose provisions covering product sales, medical malpractice, and architect and builder's liability have found favor in a substantial number of jurisdictions.[33]

Repose statutes represent a type of "occurrence-based" limitation legislation. Occurrence-based laws cut off liability a statutory number of years following the occurrence of a specific event. The specific event could, for example, be the coronation of a king[34] or a workers' compensation claimant's last exposure to asbestos dust.[35] Or, in the case of an occurrence-based repose provision, the limitation period would run from the completion of the defendant's act, an act such as the delivery of a defective product,[36] the negligent performance of a medical procedure,[37] or the erection of a negligently designed or constructed building.[38]

In contrast, a "true" statute of limitations is "accrual-based." It is generally set by the legislature to begin running when the plaintiff's cause of action accrues.[39] Such a concept would appear to protect all but slothful plaintiffs who fail to pursue their rights in a diligent and timely manner.[40] However, in tort law, determining the moment of accrual is a matter that can require judicial interpretation. It is this problem that provides the principal subject matter of this Article.

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[33]For a discussion of these state statutes and their constitutionality, see McGovern, *supra* note 4, at 600-20, 622-31; Leibman & Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS L. J. 289, 349-58 (1985). *See also* Martin, *A Statute of Repose for Product Liability Claims*, 50 FORDHAM L. REV. 745 (1982) (discussing the value of enacting such a statute in New York).

[34]As early as 1236, statutes were enacted barring real property claims based on seisin prior to the coronation of Henry II. *Statutes of Limitations*, *supra* note 4, at 1177 (citing 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 81 (2d ed. 1898)).

[35]*See, e.g.*, IND. CODE § 22-3-7-9(f)(4) (1982 & Supp. 1985). Section 9(f)(4) provides that no compensation shall be payable for disablement 20 years after the date of the last exposure to asbestos dust. For a discussion of occupational disease limitation statutes, see Leibman & Dworkin, *supra* note 33.

[36]*See, e.g.*, IND. CODE § 33-1-1.5-5 (1982 & Supp. 1985) (quoted at *supra* note 31); OR. REV. STAT. § 30.905 (1981).

[37]*See, e.g.*, IND. CODE § 16-9.5-3-1 (1982); IOWA CODE § 614.1 (1950 & Supp. 1985).

[38]*See, e.g.*, IND. CODE § 34-4-20-1 (1982 & Supp. 1985); TENN. CODE ANN. § 28-3-202 (1980).

[39]*Statutes of Limitations*, *supra* note 4, at 1200.

[40]*See* Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983). "There are two conflicting public policies raised by the statute of limitations: '(1) That of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained.' " *Id.* at 554, 335 N.W.2d at 580 (quoting Peterson v. Roloff, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 705 (1973)).

D. Determining the Moment of Accrual

Arguably, an action in tort will lie as soon as a plaintiff's protected interest has been invaded by the defendant's wrongful act.[41] Under this interpretation, an initial exposure by a user to a deleterious substance or defective device sold by the defendant might be sufficient to start the tort statute of limitations running. This analysis would hold even if no symptoms of harm were manifest or evidence of injury were discoverable during the limitations period. Such an accrual rule, however, produces harsh results when plaintiffs become aware that they have had causes of action only after the statute of limitations has run on them. For this reason, an increasing number of jurisdictions now hold that a tort cause of action accrues only when injury is discoverable.[42]

Prior to the 1981 case of *Shideler v. Dwyer*,[43] Indiana law was undecided on this point. *Shideler*, however, appeared to reject firmly the discovery rule in tort cases. Although *Shideler* was a legal malpractice case, its accrual rule was applied under Indiana law to bar the claims of plaintiffs in the delayed manifestation asbestosis case of *Braswell v. Flinkote Mines, Ltd.*[44] Subsequently deciding that the factual contexts of continuously developing personal injury and legal malpractice were sufficiently dissimilar to merit identical treatment, the Indiana Supreme Court adopted a liberal, but limited, discovery rule in *Barnes v. A.H. Robins Co.*,[45] to govern delayed manifestation personal injury cases.

This Article will first examine the *Barnes* case.[46] Next, the precedents leading up to *Shideler v. Dwyer* will be reviewed.[47] The *Shideler* case and the "impact rule" adopted in it will be discussed,[48] and the effect of *Shideler* on subsequent product liability cases prior to *Barnes* will be analyzed.[49] Several collateral developments relevant to Indiana tort stat-

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[41]This view is followed primarily in cases "where suit could be maintained regardless of damage—as with breach of contract and most intentional torts . . . . But if harm is deemed the gist of the action, the occurrence of harm marks the beginning of the period." *Statutes of Limitations*, *supra* note 4, at 1200-01. To apply the rule to negligence or strict liability cases where damages are an essential element of the plaintiff's case requires equating the "invasion" or "impact" with "harm," "injury," or "damage." One way to justify such a position is to suggest that plaintiffs are free to sue upon impact for damages that they can prove *will* occur. The problem with such a position is that it can work only by hindsight. If harm never develops from the impact, no cause of action matures, and, therefore, no accrual statute of limitations commences to run.

[42]*See* cases cited in Barnes v. A.H. Robins Co., 476 N.E.2d at 87.

[43]275 Ind. 270, 417 N.E.2d 281 (1981), *vacating and remanding*, 386 N.E.2d 1211 (Ind. Ct. App. 1979).

[44]723 F.2d 527 (7th Cir. 1983).

[45]476 N.E.2d 84 (Ind. 1985).

[46]*See infra* notes 51-68 and accompanying text.

[47]*See infra* notes 69-114 and accompanying text.

[48]*See infra* notes 115-35 and accompanying text.

[49]*See infra* notes 136-84 and accompanying text.

utes of limitations will then be reviewed briefly.[50] Without taking a position on the virtue of repose statutes, this Article will conclude that, because the controlling case, *Shideler v. Dwyer*, is conceptually flawed with respect to accrual-based statutes of limitations, the limited accrual exception adopted in *Barnes* is likely to be expanded in Indiana to cover the accrual of tort claims generally.

II. The *Barnes* Case

Barnes v. A.H. Robins Co.[51] was a consolidation of two cases that reached the Supreme Court of Indiana by certification of a question of state law from the United States Seventh Circuit Court of Appeals.[52] This was the procedure used when, in *Dague v. Piper Aircraft Corp.*,[53] the constitutionality of the repose section of the Indiana Product Liability Act of 1978 was upheld.[54]

In *Barnes*, the federal courts were required to rule on the accrual date of a personal injury tort case under Indiana law "when the injury to the plaintiff is caused by a disease which may have been contracted as a result of protracted exposure to a foreign substance."[55] The answer to the question would establish when two Indiana statutes of limitations would begin running in protracted exposure, delayed manifestation cases.[56]

At the trial level, the federal district court provided its answer to the question at issue in both consolidated cases by granting summary judgment to the defendant, A.H. Robins Co.[57] The trial court rejected plaintiff's arguments that accrual of their actions did not occur until they discovered the causal connection between their injuries and alleged defects in the Dalkon Shield intrauterine device that was manufactured by the defendant and used by the plaintiffs.

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[50]*See infra* notes 185-232 and accompanying text.

[51]476 N.E.2d 84 (Ind. 1985). For an explanation of the subsequent history of the *Barnes*, case, *see supra* note 1.

[52]*See* Ind. R. App. P. 15(0).

[53]275 Ind. 520, 418 N.E.2d 207 (1981) (answering four questions certified to the Indiana Supreme Court by the Seventh Circuit Court of Appeals under Ind. R. App. P. 15(0)). For discussions of the *Dague* case, see Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 Ind. L. Rev. 1, 22-23 n.133; Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 289, 290-93 (1982).

[54]Ind. Code §§ 33-1-1.5-1 to -8 (1982).

[55]476 N.E.2d at 85.

[56]A protracted disease tort case can be governed either by the Indiana Product Liability Act limitations provision, Ind. Code § 33-1-1.5-5 (1982 & Supp. 1985), or by the general personal injury statute of limitations, *id.* § 34-1-2-2. The certified question from the Seventh Circuit referred specifically to both of these statutes. 476 N.E.2d at 85.

[57]476 N.E.2d at 85.

One of the plaintiffs, Lahna Barnes, had her Dalkon Shield inserted on July 18, 1972.[58] She suffered pelvic inflammatory disease within two weeks of insertion. The device was removed a few weeks later. Thereafter she suffered a series of injuries, but it was not until 1981 that she learned from the TV program, "60 Minutes," the "dangers and defective nature of the Dalkon Shield." She filed her complaint against Robins on August 21, 1981, over two years, but less than ten years, following delivery of the product to her.

Sharon Neuhauser, the other plaintiff, had a Dalkon Shield inserted on May 19, 1972. She became pregnant, suffered a miscarriage in June of 1974, and learned she had cervical cancer in 1975. As a result of the disease, Neuhauser was forced to undergo a series of severe operations. She also learned of the toxic nature of the Dalkon Shield from the "60 Minutes" program and filed suit August 6, 1981.

At the outset, it should be noted that the two cases present legally distinguishable facts. Barnes clearly suffered noticeable physical injury within two years of the insertion of her Dalkon Shield. Her theory for tolling the statutes of limitations was that she was unaware of a causal connection between the defectiveness of the shield and her inflammatory disease until much later. On the other hand, if Neuhauser suffered injury during the two-year period following the insertion of her shield, there was probably no reasonable way for her to have discovered that fact prior to the manifestation of her symptoms which occurred after the limitations period had run.[59] While it is true that she became pregnant before the two years were over, no contraceptive method currently can be relied on to be one hundred percent effective. An atypical pregnancy without complications would probably not have been considered actionable. The cases of both plaintiffs apparently rested on the issue of safety, rather than effectiveness.[60]

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[58]The facts of the two consolidated cases, brought by plaintiffs, Lahna Barnes and Sharon Neuhauser, are set out at 476 N.E.2d at 84-85.

[59]Presumably, the *first symptom* of physical harm to Neuhauser attributable to the Dalkon Shield occurred when she suffered a miscarriage in June, 1974, more than two years after insertion. The harm itself, *i.e.,* physical changes in her body, may possibly have commenced, undetected, immediately following insertion of the shield.

[60]Whether a patient has a "wrongful pregnancy" claim against a manufacturer of a birth control device which fails to prevent pregnancy generally is a separate issue from that of the device's safety. But if the plaintiff does bring a wrongful pregnancy claim, a discovery-based statute of limitations would presumably run from actual or constructive notice of the pregnancy. *See* discussion of the *Tolen* case, *infra* notes 149-60 and accompanying text. Health impairments, however, would presumably represent a separate claim, and a discovery-based statute of limitations to govern it would presumably run from notice of the physical injury and its causal nexus to the product defect. A plaintiff bringing both claims in the same action should not be bound to a single statute of limitations on the ground that to do otherwise is "action-splitting." *See infra* notes 89-91 and accompanying text.

Because of the liberality of the supreme court's discovery rule, both plaintiffs were given the chance to recover, but the court's decision might have been otherwise. The court could have precluded recovery for plaintiff Barnes on the ground that she had suffered ascertainable damages within the two-year statutory period while Neuhauser had not. Instead, the court ruled that, in protracted exposure situations, damages are not ascertainable until the plaintiff discovers, or through due diligence should discover, the cause of the injury. In these situations, the plaintiff's action does not accrue, and the statute of limitations does not begin to run, until the causal nexus to the product is reasonably discoverable.[61]

The court reaffirmed its deference to the legislature's power to set a starting point and period of duration for any statute of limitations, but it held that when the legislature provides that the starting point of the limitation period is when the "cause of action accrues," it is within the power of the courts to determine the time of accrual.[62] Thus, when the Indiana Supreme Court was specifically asked in *Barnes* to set the time of accrual for protracted exposure cases, the majority — unlike the Wisconsin Supreme Court which was presented with the identical question by the Seventh Circuit Court of Appeals[63] — decided to limit its discovery rule to claims "where the misconduct is of a continuing nature and is concealed,"[64] rather than to "all tort claims."[65]

The Indiana court rationalized its restriction by stating that going beyond the certified question would be "issuing an advisory opinion."[66] The court also suggested that it was currently unwilling to overrule its decision in *Shideler v. Dwyer*[67] where personal property rather than personal injury was involved, the action complained of was unconcealed, and the harmful act was a single rather than a continuing occurrence. Also, in *Shideler*, the plaintiff was a beneficiary rather than the client in privity with the defendant lawyer being charged with legal malpractice.[68]

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[61]476 N.E.2d at 87-88. The supreme court stated that it could make no determination as to the merits of the two causes of action; that was left to the federal courts. *Id.* at 88. Yet, given the undisputed facts of the two cases, the court could easily have narrowed its answer to the certified question so as to have effectively barred Barnes on the ground that she failed to file her claim within two years of suffering "ascertainable damages."

[62]*Id.* at 85.

[63]*See* Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

[64]476 N.E.2d at 87 (quoting Shideler v. Dwyer, 275 Ind. 270, 417 N.E.2d 281 (1981)).

[65]476 N.E.2d at 87.

[66]*Id.*

[67]275 Ind. 270, 417 N.E.2d 281 (1981).

[68]It has been suggested that Shideler's heightened duty to her client, as compared to that owed her client's beneficiary, rests on the fiduciary relationship between lawyer and client. *See* Tolen v. A.H. Robins Co., 570 F. Supp. 1146, 1150 n.2 (N.D. Ind. 1983). However, the existence, or lack, of privity between the parties would alone appear to provide sufficient justification for disparate treatment. For a discussion of *Shideler, see infra* notes 115-35 and accompanying text.

Although the reluctance of the court to provide relief to the remote third party in the *Shideler* context is understandable, the broad holding of the case rests on shaky ground and will continue to produce mischievous results if allowed to stand as judicial interpretation. The "ascertainable damages" rule from the line of cases relied upon in *Barnes* for tort accruals is simple and reasonable. Deviations from it probably should be left to the legislature.

III. Early Precedents

The *Barnes* court set forth the Indiana position on accrual as follows: "[T]he rule in Indiana has been generally understood to be that a cause of action accrues when the resulting damage of a negligent act is ascertainable or by due diligence could be ascertained," the court acknowledging that it remained to be settled "how ascertainable a particular injury was and what standard would be applied as to what is reasonably ascertainable."[69] The "most notable case," the court stated, "is that of the *Board of Commissioners of Wabash County v. Pearson*."[70]

The *Pearson* opinion said nothing about damages being ascertainable, but the *Pearson* court did hold that a cause of action does not accrue until the plaintiff is injured.[71] *Pearson* involved a bridge that was negligently built in 1871, but which did not collapse until 1884. The plaintiff was physically injured in the collapse. The defendants argued that the statute of limitations began to run when the bridge was completed, a result which would have been true of a pure repose statute. The court pointed out, however, that "[t]he two elements of the appellee's cause of action are the legal injury and the resulting damages," and the personal injury statute of limitations begins running only when "the right of action accrue[s]."[72]

A. Cases Supporting the "Ascertainable Damages" Rule

The requirement that damages must be ascertainable first appeared in an Indiana Supreme Court case in *Montgomery v. Crum*[73] as a parenthetical dictum. This case involved the tortious alienation of a daughter's affections by the plaintiff's divorced husband and the husband's family. The defendants had spirited the child away and hidden her for over nine years. They argued that the mother's action for damages was barred by the two-year statute of limitations " 'for injuries to person or character.' "[74] The court held that the defendants' acts constituted

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[69]476 N.E.2d at 86.

[70]*Id.* (citing 120 Ind. 426, 22 N.E. 134 (1889)).

[71]120 Ind. at 428, 22 N.E. at 135.

[72]*Id.*

[73]199 Ind. 660, 161 N.E. 251 (1928).

[74]*Id.* at 675, 161 N.E. at 257 (quoting the statute of limitations).

a continuing wrong so that "the statute of limitations will not begin to run until there is a cessation of the overt acts constituting the wrong."[75] The court also stated:

> The two-year statute of limitations will not begin to run as a shield against the consequences of wrongful acts until the wrongdoer thereby accomplishes an injury to the person of another, for which the law allows indemnity in the form of damages (that is to say, *damages susceptible of ascertainment*), for not until then would the cause of action accrue.[76]

In the *Montgomery* case, however, damages to the plaintiff were readily ascertainable by the plaintiff from the very beginning of her attempts to recover her daughter.

The interesting point made by this case is that mere notice of injury is not enough to trigger the running of a statute of limitations that will act to bar the plaintiff's cause of action. Even the plaintiff's knowledge of the cause of injury may be insufficient. For the relevant statute to run under the *Montgomery* holding, the wrongful acts of the defendant must be *completed*, despite the obvious fact that the plaintiff could have maintained a lawsuit as soon as initial injury was suffered. For that reason, it is probably better to consider a series of wrongful acts as a multiple, repeating tort rather than as a single, continuing one. Thus each succeeding act will trigger the statute of limitations, but only the final act in the series of wrongful acts will begin the limitations period that might effectively bar the plaintiff's action.

The "ascertainable damages" rule was applied in the diversity case of *Gahimer v. Virginia-Carolina Chemical Corp.*[77] Allegedly defective fertilizer was delivered to the plaintiffs on April 5, 1952. Crops were planted prior to May 24, 1952. Sometime after May 25th, the plaintiff discovered that his crops were damaged. He filed suit May 24, 1954. The defendants argued that the two-year statute of limitations had begun running upon the delivery of the fertilizer on April 5, 1952; the plaintiff countered that no cause of action accrued until his discovery of injury after May 24, 1952. The defendants cited cases which acknowledged that, while injury to the plaintiff was necessary for an action's accrual, the plaintiff's discovery of the injury was not.[78] The plaintiff relied primarily on the *Montgomery v. Crum* language requiring that damages must be " 'susceptible of ascertainment.' "[79] The court held for the plaintiff on this issue, stating that "[t]his date can not and need not

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[75] *Id.* at 679, 161 N.E. at 259.

[76] *Id.* (emphasis added).

[77] 241 F.2d 836 (7th Cir. 1957).

[78] *Id.* at 839 (citing Fidelity v. Jasper Furniture Co., 186 Ind. 566, 177 N.E. 258 (1917); Craven v. Craven, 181 Ind. 553, 103 N.E. 333 (1913)).

[79] *Id.* at 840 (quoting 199 Ind. 660, 161 N.E. 251).

be determined with certainty. It is sufficient for our purpose that it was after the corn came up and was within the two-year limitation period."[80]

There is one additional fact of significance to be noted from the *Gahimer* case. At one point, more than two years earlier than the filing of his claim, the plaintiff noticed that the corn in one of his fields "was coming up but not 'naturally and normally.' "[81] Presumably plaintiff was then on notice that injury had occurred. Yet "[t]here [was] no proof that Gahimer had knowledge or any reason to think that the corn in any of the fields had been damaged by use of defendant's fertilizer."[82] The court of appeals evidently believed that "damages susceptible of ascertainment" meant that plaintiff must have some reasonable opportunity to acquire knowledge of a causal nexus between his injury and the defendants' product.

Gahimer and *Montgomery* were relied upon in *Essex Wire Corp. v. Hilt Co.*[83] In that case, the defendant permitted a piece of canvas to be drawn into a motor owned by the plaintiffs. The canvas was immediately withdrawn, and no apparent harm to the motor was noted at the time. Fifteen months later, the motor failed because some of the canvas had in fact been left inside. The court held that the statute of limitations ran from the date the motor failed, because only then were the damages susceptible of ascertainment.[84] It was clear, however, that *undiscovered* injury to the motor was occurring steadily during the entire fifteen months following the defendant's negligent act.

In *Withers v. Sterling Drug, Inc.*,[85] the federal district court acknowledged the ascertainable damages rule applied in the *Gahimer* case,[86] but held that once the plaintiff has ascertained that some damages exist, the cause of action accrues and the statute of limitations begins to run, even though the plaintiff is not aware, nor can reasonably be made aware, that far greater damages will later be forthcoming from the defendant's act.[87] *Withers* involved the drug Aralen. The plaintiff suffered what she thought was reversible eye damage and, therefore, filed no claim. Several years later she learned that the damage was permanent. The court held that she was barred by the two-year statute of limitations

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[80] *Id.* at 840.

[81] *Id.* at 839.

[82] *Id.*

[83] 263 F.2d 599 (7th Cir. 1959).

[84] *Id.* at 602.

[85] 319 F. Supp. 878 (N.D. Ind. 1970).

[86] *Id.* at 880.

[87] *Id.* at 881. Note that the defendant's conduct described here is a single act: the delivery of the defective product. While the *harm* that resulted may be characterized as continuing or repeating, the defendant's *act* is not. Thus, this situation is distinguishable from the defendant's conduct in Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928) (discussed *supra,* notes 73-76 and accompanying text), which involved a series of acts.

which began to run when she first learned that the drug had adversely affected her.[88]

The *Withers* holding, which is supported by substantial authority,[89] can lead to anomolous results. Once a plaintiff suffers mild symptoms, the claim must be filed within the limitations period or be barred. If the claim is filed and the plaintiff recovers, any subsequent damages flowing from the same act will not be actionable.[90] Thus, a plaintiff

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[88]319 F. Supp. at 881.

[89]The prohibition against action-splitting derives from principles of res judicata. If the plaintiff receives a judgment of damages resulting from the wrongful act of the defendant, an attempt later to reassert the same cause of action for additional damages will be said to have been *merged* in the prior judgment. Rush v. City of Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599 (1958), *cert. denied*, 358 U.S. 814 (1958); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 824 (1952). The plaintiff may argue that the defendant's act gave rise to two distinct causes of action requiring different evidence in each case. Such is the position of the plaintiff in cases like *Withers*, in which a drug, substance, or device is found to produce *temporary* damage followed unexpectedly some substantial time later by *permanent* damage. Upon occurrence of the temporary injury — or in discovery rule states, upon *discovery* of the temporary injury — the plaintiff must bring suit within the statutory limitation period or be thereafter barred. While it is true that the plaintiff can theoretically recover for any prospective damages that can be proved, those damages are likely to be at best "speculative." Or, as in *Withers*, they may be unanticipated. Given this situation, the plaintiff may assert that justice requires treating the action for permanent injury as distinct from the earlier one for temporary damage.

In Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (1980), the plaintiff suffered what he believed to be reversible eye damage in 1960. There was some reason to believe at the time that MER/29, a drug manufactured by the defendant, was responsible. There was also some evidence that the plaintiff may have known or should have suspected the link. Because plaintiff believed his injury was temporary, he filed no action in 1960. In 1976, the plaintiff suffered severe permanent eye damage. The defendant's motion for summary judgment on the ground that the plaintiff's later suit was barred by the statute of limitations was granted. In reversing, the California Court of Appeals recognized the authority of the rule against action-splitting, *id.* at 323-24, 164 Cal. Rptr. at 595, but it held that advances in science and technology required the fashioning of new remedies to meet changing needs. With defective products, the court noted that the plaintiffs' needs in delay cases could be accommodated without excessively prejudicing the defendants' opportunity to marshall evidence. The court pointed out that "[t]he cataract-causing potential of MER/29 became known to defendants in 1960 or 1961. They obviously have had an opportunity to gather evidence on the subject while the facts were as fresh as they could be. In addition, they have had two decades to refine the result of their researches." *Id.* at 325, 164 Cal. Rptr. at 596. In addition, the court observed, exceptions have been recognized to the rule of merger in nuisance cases, progressive occupational disease cases, and in the RESTATEMENT (SECOND) OF JUDGMENTS 61.2 (Tent. Draft no. 5 (1982)), where an exception is permitted when "it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome *for an extraordinary reason . . . .*" *Id.* at 327, 164 Cal. Rptr. at 597 (quoting the Restatement). *See generally Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 828-31 (1952) (for "Countervailing Policies" supporting exceptions to the principles of merger).

[90]*See generally Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818 (1952).

who remains completely ignorant of latent injury until it erupts into severe symptoms is in a better position to recover complete compensation than the party who receives notice of a slow-developing disease early in its development. Yet, it is the cases in which the parties are completely taken by surprise, long after severe undiscovered damage has taken place, that are most troublesome for defendants and the courts.[91]

B. Cases Denying the "Ascertainable Damages" Rule

There is early Indiana authority rejecting the rule that damages must be susceptible of ascertainment before a statute of limitations will begin to run. In *Craven v. Craven*,[92] the Indiana Supreme Court stated that "[t]he fact that a person entitled to an action has no knowledge of his right to sue, *or the facts out of which his right arises*, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns of his rights there-

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[91]The *Withers* and *Martinez-Ferrer* cases illustrate the interworkings of limitation and res judicata principles to bar meritorious cases. In situations where the defendant receives reasonably prompt notice that its products may be causing harm, one or the other of these principles should probably give way to accomodate the plaintiffs' legitimate right to relief. Either the statute of limitations should be tolled until the *extent* of damages is ascertainable, or additional causes of action should be permitted where justice requires. Such an exception to the preclusion rules is permitted in cases involving "continuing or recurrent wrong." RESTATEMENT (SECOND) OF JUDGMENTS § 26(e) (1982). The same reasoning would seem to apply when the *wrong* is a single act, but the *harm* is recurrent or continuing. These options are of course irrelevant when the late manifestation of harm takes both parties by surprise.

Following the Survey Period, Miller v. A.H. Robins Co., 766 F.2d 1102 (7th Cir. 1985), was decided. In *Miller*, the plaintiff suffered a pelvic inflammation which she was told *might* have been caused (among other things) by her Dalkon Shield. Presumably, because she expected the temporary inflammation to be the full extent of her damages, and because the causation possibilites were presented to her as being highly uncertain, she neither brought suit nor launched an investigation as to the definite source of her inflammation. Six years later she discovered that she was infertile, and she was then advised by her physician that her inflammation and infertility were caused by the shield. In Miller's subsequent lawsuit against Robins, the district court granted the defendant's summary judgment motion. The court of appeals affirmed, ruling that Miller was barred two years after she was told of the possible link of her inflammation to the Dalkon Shield. (It is not unlikely that Robins may also have been placed on notice during Miller's earlier inflammation that their product was involved.) Yet, if there had been no early warning, *i.e.*, no pelvic inflammation, Miller, under the *Barnes* discovery rule, would not have been barred. Such a policy encourages a plaintiff to avoid obtaining *all* knowledge of the causal nexus of a product to the illness (or at least to claim such ignorance) until a lawsuit is definitely contemplated. Rather than encouraging due diligence in obtaining information while it is fresh, the practical effect of the rule against action-splitting in a discovery jurisdiction could be either the encouragement of dissembling or the deliberate avoidance of knowledge. *See* Martinez-Ferrer v. Richardson-Merrell, Inc., 105 Cal. App. 3d at 319 n.4, 164 Cal. Rptr. at 592 n.4.

[92]181 Ind. 553, 103 N.E. 333 (1913).

under."[93] In *Fidelity & Casualty Co. v. Jasper Furniture Co.*,[94] the court ruled that "[a] cause of action accrues, so that limitations begin to run, at the moment its owner has a legal right to sue on it . . . ."[95] In both of these cases involving property loss, the limitation periods were substantial (twenty and ten years, respectively), and the failure of the plaintiffs to acquire the requisite knowledge of their claims was due either to their own lack of vigor or to the carelessness of third parties. Because neither claim was in tort, policy issues and interests relevant to property and contract law also had to be accommodated in both actions.[96]

In *French v. Hickman Moving & Storage*,[97] the plaintiff alleged the defendants had converted her personal property that she had bailed to them for storage. Plaintiff filed suit for conversion two and a half years after the sale [conversion] of her goods by the defendants. The Indiana Court of Appeals ruled "that the statute [of limitations] commences to run when the injurious action occurs though the plaintiff may not learn of the act until later."[98] In the case of conversion, "the injury to her property occurred when the property was converted and the statute of limitations started to run at that time. . . . Notice to the plaintiff was therefore immaterial."[99]

The intentional torts for the most part have their roots in trespass.[100] Historically, trespass involved direct, forcible invasion of protected interests, whether to the person or to property of the plaintiff.[101] Delayed injurious effects resulting from a defendant's act were not actionable until the later development of trespass on the case.[102] It is not surprising, therefore, that statutes of limitations applied to intentional conduct, even today, should not provide for notice, discovery, or ascertainable damages with the sole exception for overt acts of fraudulent concealment by the defendant.[103] The rationale is that a plaintiff generally will, or should, be promptly aware of the kinds of harm to person or property that

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[93] *Id.* at 559, 103 N.E. at 335 (quoting State v. Walters, 31 Ind. App. 77, 66 N.E. 182 (1903) (emphasis supplied by the *Craven* court).

[94] 186 Ind. 566, 117 N.E. 258 (1917).

[95] *Id.* at 568, 117 N.E. at 258.

[96] "If the defendant's conduct in itself invades the plaintiff's rights, so that suit could be maintained regardless of damage—as with a breach of contract and most intentional torts—the statute commences upon completion of the conduct." *Statutes of Limitations, supra* note 4, at 1200-01. The same observation would apply to cases of adverse possession and other invasions of property rights.

[97] 400 N.E.2d 1384 (Ind. Ct. App. 1980).

[98] *Id.* at 1388.

[99] *Id.*

[100] PROSSER & KEETON, THE LAW OF TORTS 30 (5th ed. 1984).

[101] *Id.* at 29.

[102] *Id.*

[103] *See Statutes of Limitations, supra* note 4, at 1217-19.

occur under the rubric of the intentional, generally trespass-based torts.[104]

In *Cordial v. Grim*,[105] the plaintiff alleged that he had lost his workers' compensation claim as a result of his attorneys' malpractice. His pro se complaint against his lawyers, however, was brought more than two years after the workers' compensation claim was denied for the first time and also more than two years after his relationship with his attorneys had terminated. In opposing the attorneys' motion for summary judgment which was based on the ground that the statute of limitations had run, the plaintiff presented two closely related arguments. First, he contended "that the statutes of limitation considered hereinabove should commence to run only upon the actual discovery of a right of action by the injured party."[106] Second, he contended "that his causes of action did not accrue until he suffered both an injury to his property and damages, and that he did not suffer damages until his second appeal to the [Industrial] Board was denied . . . ."[107]

The court rejected the plaintiff's first argument which asked for application of a discovery rule. The court cited *Toth v. Lenk*,[108] a medical malpractice case governed by the Indiana malpractice statute which requires the claim to be " 'filed within two [2] years from the date of the act, omission or neglect complained of.' "[109]

The *Toth* court distinguished the malpractice limitation statute from the general personal injury limitations statute as follows:

> The statute thus differs from the general statute governing personal injuries . . . which requires that such actions be commenced within two years "after the cause of action has accrued." Clearly the choice of terminology in the malpractice statute is more restrictive. It is intended to avoid, in medical malpractice cases, the impact of that line of case law holding that "accrual of the action" phraseology extends the time for commencing an action where either the injury or damage (essential elements of

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[104]*See supra* note 96. Historically, conversion evolved from the common law action of trover which was originally an action on the case. Trover developed as a substitute action for trespass to chattels. In trover, the plaintiff could refuse the tendering back of the chattel, because the gist of the tort was the defendant's intentional assertion of dominion and control over the goods. The modern tort of conversion requires a serious interference with, and denial of, the rights of the true owner. Although conversion has its origin in case, it is definitely an intentional tort clearly distinct from negligence. PROSSER & KEETON, *supra* note 100, at 88-93.

[105]169 Ind. App. 58, 346 N.E.2d 266 (1976).

[106]*Id.* at 69, 346 N.E.2d at 273.

[107]*Id.* at 70, 346 N.E.2d at 273.

[108]164 Ind. App. 618, 330 N.E.2d 336 (1975).

[109]*Id.* at 620, 330 N.E.2d at 338 (quoting IND. CODE ANN. § 34-4-19-1 (Burns 1971)).

the tort) do not occur until long after the act or omission which gave rise to them.[110]

In any event, the general personal injury statute of limitations was not at issue in *Toth v. Lenk*, nor was it in *Cordial v. Grim*. The *Cordial* court decided that the occurrence-based malpractice statute of limitations, heretofore applied only in medical malpractice cases, would be applicable to legal malpractice cases as well.[111]

With respect to Cordial's second argument — that he had suffered no damages until the Industrial Board's denial of his claim — the court ruled that Cordial had suffered damages sufficient to maintain an action for malpractice when his original workers' compensation benefit "was terminated adversely to him with prejudice to his ability to maintain any further proceedings thereon."[112]

These, then, were the Indiana authorities when, in 1981, another legal malpractice case, *Shideler v. Dwyer*,[113] was presented to the Indiana Supreme Court. *Shideler* required construction of the accrual-based, general tort statute of limitations for injury to person or property.[114] The cases to that point were uniform in requiring that there be damages in order for a cause of action to accrue and for limitation statutes based on accrual dates to commence running. While there were a few non-physical injury cases to the contrary, the weight of Indiana authority also held that damages suffered by a plaintiff must be "susceptible of ascertainment."

IV. *Shideler v. Dwyer*

The plaintiff Dwyer was a disappointed beneficiary under Moore's will.[115] Shideler, Moore's lawyer, had drafted a will provision which directed an officer of a corporation of which Moore was a major stockholder, and Dwyer an employee, to pay Dwyer a monthly retirement benefit of $500. After Moore died, Dwyer retired, but the corporation denied her claim to the benefit promised her by the testator. After Dwyer's petition for construction of the will was decided adversely to her by the Marion County Probate Court, she filed suit against Shideler and Shideler's law firm for malpractice. Shideler's motion for summary judgment, on the ground that the relevant statute of limitations had

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[110] *Id.* at 620-21, 330 N.E.2d at 338.

[111] 169 Ind. App. at 67, 346 N.E.2d at 272.

[112] *Id.* at 70, 346 N.E.2d at 273.

[113] 417 N.E.2d 281 (Ind. 1981).

[114] IND. CODE § 34-1-2-2 (Supp. 1985).

[115] 417 N.E.2d at 284. For an analysis of the *Shideler* case, see MacGill, Shideler v. Dwyer: *The Beginning of Protective Legal Malpractice Actions*, 14 IND. L. REV. 927 (1981).

run, was denied.[116] Shideler appealed the order which was affirmed by the Indiana Court of Appeals. Subsequently, Shideler's petition for transfer was granted by the Indiana Supreme Court.[117]

The supreme court ruled that Dwyer's action was governed, not by the malpractice statute of limitations found applicable in *Cordial v. Grim*,[118] but rather by the general tort statute of limitations[119] for injury to person or personal property[120] which commences running when the plaintiff's cause of action accrues.[121] The primary issue remaining for the court was when Dwyer's action accrued.

The plaintiff contended that the statute commenced running when the probate court decreed that the gift to her was void.[122] The defendants argued "that any injury caused by them must have occurred no later than the date of Moore's death, after which time Moore's Will could not be changed; or the date the Will was admitted to probate, at which time the Will became an effective legal instrument."[123] Dwyer's argument was that until the probate court's decision, "she sustained no damage from the defendants' acts or omissions because the court conceivably could have declared the clause to be valid."[124] The gist of Dwyer's position was that until her claim under the will was denied, any damages she was later to suffer as a result of the malpractice were completely unascertainable.

The supreme court held for Shideler. It ruled that Dwyer's malpractice action accrued when the testator died.[125] The court could have rested this holding on the ground that Dwyer had sufficient facts at that time to ascertain that the then operative will provision would be declared void and, therefore, that Shideler could immediately be held culpable for malpractice. In other words, when the will became operative, Shideler's allegedly incompetent drafting of the gift provision could have been perceived by Dwyer as an actionable invasion of her property interest in the bequest.

Instead, the court adopted a much broader holding: "For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the

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[116]417 N.E.2d at 283.

[117]*Id.*

[118]169 Ind. App. 58, 346 N.E.2d 266 (1976). *See supra* notes 105-12 and accompanying text.

[119]IND. CODE ANN. § 34-4-19-1 (Burns 1971).

[120]IND. CODE ANN. § 34-1-2-2 (Burns 1971).

[121]417 N.E.2d at 288.

[122]*Id.*

[123]Shideler v. Dwyer, 386 N.E.2d 1211, 1215 (Ind. Ct. App. 1979), *rev'd*, 417 N.E.2d 281 (Ind. 1981).

[124]417 N.E.2d at 288.

[125]*Id.* at 290.

damage be known or ascertainable but only that damage has occurred."[126] This is a ruling that requires some scrutiny. The requirement for accrual would appear to be merely that there be an occurrence of damage, whether or not it is ascertained or is even ascertainable by the plaintiff. The court is also suggesting that very slight damage is sufficient for accrual.[127] To determine exactly what the court had in mind, it is necessary to consider the New York case of *Schmidt v. Merchants Dispatch Transport Co.*, on which the majority relied and from which it quoted extensively.[128]

In *Schmidt*, the defendants caused the plaintiffs to breathe in a deleterious dust from which the plaintiffs later developed respiratory disease. The *Schmidt* court held that there had been an actionable tortious invasion of the plaintiffs' persons the moment they inhaled the first speck of dust. Despite the fact that New York courts still adhere in ingestion cases to the "impact rule" embodied in the *Schmidt* reasoning,[129] that reasoning is conceptually flawed. Judge Fuchsberg, in his dissent to *Steinhardt v. Johns-Manville Corp.*,[130] in which the *Schmidt* rule was upheld in 1981, ably pointed out the problem:

> [W]hile the unwanted invasion of their lungs by environmental air which had been contaminated by asbestos dust are the wrongful acts to which they are subjected, the damages they sustained were in the form of diseases which did not come about until much later.
>
> . . . .
>
> The plaintiffs go on to assert that the properties of particles of asbestos are such that their inhalation will not necessarily result in the contraction of the disease; . . . that those who are exposed may never sustain any injury at all. . . .[131]

The *Schmidt* holding asserts that plaintiffs can obtain a remedy upon exposure to a deleterious substance whether or not they ultimately become diseased from the exposure. The *Shideler* court made the analogy that Dwyer could have proven damages upon death of the testator even if the will were later upheld by the probate court; she was entitled to a remedy "when Moore died leaving a testamentary provision in favor of the plaintiff of questionable validity."[132]

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[126]*Id.* at 289.

[127]The court refers not only to "damage" but also to "the extent of the damage." The implication is that the occurrence of any damage, no matter how slight, will be sufficient to begin the limitation period. *Id.*

[128]417 N.E.2d at 289-90 (quoting 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936)).

[129]*See* Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 467 N.E.2d 517 (1984).

[130]54 N.Y.2d 1008, 430 N.E.2d 1297 (1981).

[131]*Id.* at 1012-13, 430 N.E.2d at 1300 (Fuchsberg, J., dissenting).

[132]417 N.E.2d at 291.

If *Schmidt* is even theoretically correct, then any entity which releases virtually any substance into the environment is at once suable, because anything is capable of causing harm to someone under some circumstance. As the *Shideler* court pointed out, however, "the ultimate effect upon the plaintiff of the defendant's alleged negligence was *speculative* at the time the cause of action accrued, but it cannot be questioned that the *impact* occurred at the time of Moore's death."[133] Even so, if the effect of the negligence is "speculative," then the negligence is not actionable. "Impact" without actual, provable damages is clearly insufficient under negligence law to create a cause of action.

Although the *Shideler* court appeared to adopt the *Schmidt* impact rule, the court recognized that

> [t]here is authority supporting the proposition that statutes of limitation attach when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. . . . There may be special merit to that viewpoint where . . . the plaintiff was the client or the patient. . . .[134]

The court noted that the discovery rule has been applied where "the misconduct was of a continuing nature or concealed."[135] These observations might appear to limit the Indiana application of the "impact rule" to facts like those in *Shideler* in which the alleged misconduct was open and was a single rather than a protracted occurrence. Yet the court's substantial reliance on *Schmidt*, a protracted exposure case, and its express rejection of the "ascertainable damages" rule clearly suggest that a far wider scope to the "impact rule" was being mandated than simply legal malpractice. That the signals emanating from the *Shideler* opinion were mixed and confusing can be illustrated by a review of the cases in the four-year period after *Shideler* and before *Barnes*.

V. *Shideler's* Product Liability Progeny

Several product liability cases involving statutes of limitations based on accrual dates were decided subsequent to *Shideler*. In *Wojcik v. Almase*,[136] doctors had inserted a catheter in the chest of the plaintiff. While in place, part of the catheter broke off and remained lodged in the chest. This fact went undetected for a year. Within two years of discovery of the catheter fragment *in situ*, the plaintiff brought suit

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[133] *Id.* (emphasis added).

[134] *Id.*

[135] *Id.*

[136] 451 N.E.2d 336 (Ind. Ct. App. 1983).

against the doctors for malpractice and against the catheter manufacturer for damages resulting from its having manufactured a defective product.

The malpractice statute of limitations governing the claim against the doctors was held to be an "occurrence statute, not a discovery statute."[137] It ran from the date "of the alleged act, omission or neglect."[138] Therefore, the plaintiff's malpractice claim was time-barred.

The product liability claim against the manufacturer was governed by the Indiana Product Liability Act section which requires that a product liablity action must be commenced within two years after the cause of action accrues.[139] The court ruled that product liability claims accrue when the plaintiff is harmed, not when the harm is discovered.[140] The court made no reference to *Shideler* nor to the line of cases requiring that damages be susceptible of ascertainment.

In *Monsanto Co. v. Miller*,[141] the plaintiff dairy farmers sought recovery for the loss of a silo. The silo had become unusable because it was coated with a product manufactured by the defendants which contained PCB's. It was necessary in the case to establish when the plaintiff's cause of action accrued in order to determine which statute of limitations would govern the claim: the one dealing with injuries to real estate[142] or the one governing product liability claims.[143] Both statutes were accrual statutes so that the legal principles to be applied were the same although the relevant facts as found by the factfinder would dictate the choice of limitation periods.

The court cited many of the authorities already discussed in this Article, concluding that Indiana does not have a discovery rule,[144] but that for a cause to accrue there must be some "*ascertainable*" damages.[145] Even *Shideler* was cited (incorrectly) for that proposition.[146] The court ruled that the farmer's cause of action accrued only when the PCB level in the herd's milk reached a statutorily impermissible level.[147] A *Schmidt/Shideler* analysis, however, would appear to dictate that a cause of action would accrue as soon as the silage the cows ate exposed them to PCB's,

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[137] *Id.* at 338.

[138] *Id.* (quoting IND. CODE § 16-9.5-3-1 (1982)).

[139] *Id.* at 341 (quoting IND. CODE § 33-1-1.5-5 (1982)).

[140] *Id.* at 342.

[141] 455 N.E.2d 392 (Ind. Ct. App. 1983).

[142] IND. CODE § 34-1-2-1 (1982).

[143] IND. CODE § 33-1-1.5-5 (1982).

[144] *See* cases cited at 455 N.E.2d at 394.

[145] *Id.*

[146] 455 N.E.2d at 394. *See supra* text accompanying note 126. The *Shideler* court never acknowledged that *"ascertainable"* damages were necessary for accrual. That court's reliance on the New York "impact rule" cases leads to the conclusion that some slight damage, even if totally undiscoverable, would be sufficient to start the statute of limitations running.

[147] *Id.* at 396.

because, at that time, the PCB level (like the will provision drafted in *Shideler*) was such that it would ultimately be ruled illegal.[148]

In *Tolen v. A.H. Robins Co.*,[149] the district court was confronted with facts similar to those in the *Barnes* case. A Dalkon Shield was inserted in the plaintiff's uterus in February, 1972; she became pregnant in July, 1972, and learned in November, 1972, that an operation would be required to locate the shield. The shield was found in May, 1975, in her lower left stomach cavity. The plaintiff alleged that she discovered the causal connection between the shield and the various health problems she had suffered by reading a newspaper article on December 20, 1979. She brought suit on November 13, 1981.

In granting Robins' motion for summary judgment,[150] the district court held that Tolen's action was barred by the Indiana two-year statute of limitations.[151] The court stated that "[i]t is the well-established rule in Indiana that a cause of action accrues at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment."[152] The court then stated that the "Supreme Court of Indiana has recently reaffirmed this rule of law in *Shideler v. Dwyer*."[153] As has been emphasized, however, *Shideler* appears to reject the requirement that damages be ascertainable.[154] In any event, no Indiana case until *Barnes* specifically required actual or constructive knowledge of a causal nexus between injury and the defendant's product to start the statute of limitations running.[155]

Rejecting the *Barnes*-type discovery rule urged by the plaintiff,[156] which would have begun the limitation period in 1981, the *Tolen* court

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[148]Looking back through the facts, it is clear that the "impact" on the plaintiff occurred no later than the time his cows first ingested feed containing PCB's. The PCB level in the silage presumably did not change over time; only the governmental regulation of what constituted a permissible level changed. Therefore, the harm (under *Shideler*) occurred when the cows were first exposed to PCB's, but the manifestation of the harm occurred when the PCB level was ruled illegal for sale. One could even argue that the impact on the plaintiff's real property, based on hindsight analysis, occurred when the silo was first coated with cumar. The court specifically rejected that date on the ground that "no damages could [then] have been ascertained." *Id.* at 395. Under *Shideler*, however, the lack of ascertainable damages would have been no obstacle to the running of the statute of limitations.

[149]570 F. Supp. 1146 (N.D. Ind. 1983).

[150]*Id.* at 1148.

[151]IND. CODE § 34-1-2-2 (1982).

[152]570 F. Supp. at 1149.

[153]*Id.* (citing 417 N.E.2d 281 (Ind. 1981)).

[154]*See supra* notes 126-33 and accompanying text.

[155]The court rejected the plaintiff's argument that Withers v. Sterling Drug, Inc., 319 F. Supp 878 (S.D. Ind. 1970), stands for a *Barnes*-type discovery rule. 570 F. Supp. at 1150. The court's analysis is probably correct. *See supra* notes 85-91 and accompanying text. There is, however, language in an earlier case that does foreshadow the *Barnes* rule. *See supra* notes 77-82 and accompanying text.

[156]570 F. Supp. 1150-51.

considered several other key dates. The court observed that legal injury first occurred when the shield was inserted; beginning the statutory period on that date would comport with the *Shideler* rule.[157] Actual knowledge of the device's *ineffectiveness* occurred in July of 1972, which constituted knowledge of legal damage, at least with respect to Tolen's wrongful pregnancy claim.[158] With respect to her other damages involving health impairment, the plaintiff had knowledge of injury in November, 1972, and May, 1975. The court ruled that there was sufficient evidence of damages susceptible of ascertainment no later than May of 1975, and, therefore, her claim filed in 1981 must be barred.[159] The *Tolen* court's accrual analysis illustrates the liberality of the *Barnes* rule under which a plaintiff like Tolen might recover.[160]

That the *Shideler* holding provided uncertain guidance for governing the accrual of delayed manifestation disease cases was amply demonstrated in *Braswell v. Flinkote Mines, Ltd.*[161] The plaintiffs in *Braswell* were asbestos workers who discovered that they had asbestos-related diseases after more than two years had passed following their last exposure to asbestos dust. The court of appeals felt bound to follow *Shideler* as controlling precedent and affirmed the district court's grant of the defendants' motion for summary judgment.[162] The appellate court read *Shideler* to require the setting of accrual dates in ingestion cases no later than the date of the plaintiffs' most recent exposure to the deleterious substance.[163] The court stated that, in light of *Shideler*, the plaintiffs would have been permitted to maintain their actions for damages prior to the manifestations of any symptoms of disease. Although the federal court conceded that neither the *Shideler* court nor any other Indiana court had explicitly adopted the " 'wrongful act' or 'impact' rule of accrual," the reliance in *Shideler* on New York cases based upon the impact rule seemed to indicate that such would be the result if the last exposure problem were ever presented directly to the Indiana Supreme Court.[164]

Judge Swygert, in a strong dissent, vehemently disagreed.[165] He predicted that the Indiana Supreme Court would recognize that the

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[157] *Id.* at 1150.

[158] *Id.*

[159] *Id.* at 1151.

[160] For a discussion of other issues raised in the *Tolen* case, see Leibman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 320-22 (1985).

[161] 723 F.2d 527 (7th Cir. 1983).

[162] *Id.* at 531-33.

[163] *Id.* at 532.

[164] *Id.*

[165] *Id.* at 533 (Swygert, J., dissenting).

impact rule produces a "mockery of justice,"[166] and he urged that the accrual question be certified to the Indiana high tribunal:

> To state the obvious, if an asbestosis claimant brought an action against manufacturers of asbestos before any manifestation of the disease, the claimant would be " 'laughed out of court' ". . . . On the other hand, if the claimant waits for the disease to manifest itself, the claimant, under the court's holding today, may be barred from bringing a claim by Indiana's statute of limitations.[167]

The dissent found three reasons to distinguish *Shideler* from *Braswell*. First, in *Shideler*, the "negligence was capable of discovery any time after the contents of the will were disclosed;" in *Braswell*, the injury was "not even capable of discovery in many instances on the date of last exposure."[168] Second, the relationship of a will-drafting lawyer to a beneficiary calls for different policies than those between a product manufacturer and user. Manufacturers are in most instances better able to bear the costs related to defective products than are professionals and "are more likely to anticipate long-delayed injuries."[169] Third, Indiana has enacted a ten-year repose provision for product liability claims that is not available in professional malpractice cases. Product manufacturers, therefore, do not require the same measure of protection from a strict accrual rule that professionals do.[170] For these reasons, the Indiana Supreme Court might be persuaded to adopt a discovery rule in the delayed manifestation cases that only recently have become recognized as a serious consequence of modern industrial development. "The Indiana Supreme Court should be given an opportunity to follow the equitable lead of other state courts and to construe its state statutes to meet the changing needs of a modern, technologically advanced society."[171]

In addition, the dissent argued that the majority had been misled by dicta in *Shideler*. While citing and quoting cases calling for accrual on the date of the defendant's wrongful act, the actual holding in *Shideler* stated that there must be an injury to the plaintiff for the statute of limitations to commence running. Thus, in *Shideler*, the negligent drafting of the will provision was the defendant's wrongful act, but the court found that no injury or impact occurred until the will became operative following the testator's death. According to the *Braswell*

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[166] *Id.*

[167] *Id.* (quoting, in part, from Martinez-Ferrer v. Richardson-Merrell Inc., 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980)).

[168] *Id.* at 534.

[169] *Id.*

[170] *Id.* at 534-35.

[171] *Id.* at 535.

dissent, an accurate analogy of the *Shideler* rule applied to asbestos cases would have the statute of limitations begin with the onset of asbestos-related disease, rather than with the mere exposure to the asbestos dust.[172]

After a careful reading of *Shideler*, this writer believes that the *Braswell* majority interpreted the *Shideler* dicta correctly.[173] *Shideler* equates exposure with impact and impact with injury (or "damage"); such injury, impact, or damage is sufficient for accrual.[174] The dissent is correct, however, that such reasoning is a mockery of justice — not only in disease cases — but also in legal malpractice cases and tort actions generally. Until damages are *reasonably* ascertainable there is really no cause of action. This is certainly what the ordinary person would contemplate to be a basic tenet of fundamental fairness.[175]

When the Indiana Supreme Court first introduced the requirement of ascertainable damages in *Montgomery v. Crum*,[176] it cited the case of *Jones v. Texas & P. Ry.*[177] In *Jones*, the plaintiff brought suit against the defendant railroad for the value of two mules allegedly run over and killed by a locomotive. One mule died immediately; the other lived for a while. The serious nature of his injuries was not apparent until he died. The Louisiana statute of limitations ran one year " 'from the day the injuries were sustained.' "[178] The plaintiff brought suit more than one year after the accident, but less than one year after the second mule died. The court held that the suit to recover for the second mule was timely because not until his death were damages susceptible of ascertainment. "Until then, it was at best uncertain, contingent, speculative; and nothing is better settled in the law of damages than that a damage of that character does not give rise to a cause of action."[179]

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[172]*Id.* at 534.

[173]It is true that the *Shideler* holding specifically covers only legal malpractice. However, despite recognition that a discovery rule might have merit in other situations, 417 N.E.2d at 291, the court did not caution that its reasoning was to be limited to the legal malpractice area. Indeed, the analogies chosen by the court and the general thrust of its discussion of statutes of limitations, while dicta, strongly suggest that the principles espoused were to have general applicability.

[174]The *Shideler* court distinguishes the term "damage" from the term "damages." 417 N.E.2d at 289. The court states that damage is "a requisite element of any tort," and damages is "a measure of compensation." Under the theory of negligence (and presumably strict liability as well), "[a]ctual loss or damage . . . is an essential part of a plaintiff's case." PROSSER, LAW OF TORTS 143 (4th ed. 1971). "Actual damage," however, is compensable and measurable. Where there is "actual damage," therefore, there are "damages," even if they are difficult to calculate.

[175]*See supra* notes 126-33 and accompanying text.

[176]199 Ind. 660, 161 N.E. 251 (1928).

[177]*Id.* at 679, 161 N.E. at 259 (citing 125 La. 542, 51 So. 582 (1910)).

[178]125 La. at 542, 51 So. at 582.

[179]*Id.* at 543, 51 So. at 583.

The *Jones* court made clear that "[i]n law, things which are not susceptible of ascertainment are considered as not existing."[180] In *Jones*, the defendant performed a single, unconcealed act. The *possibility* of internal injuries that *might* lead to serious complications was almost certainly an event within the contemplation of the plaintiff at the time of the collision, yet the court did not charge him with damages susceptible of ascertainment until the possibility was confirmed as a reality. It should not be necessary to distinguish *Shideler* as a case in which an astute beneficiary might have foreseen the coming injury by predicting how a probate court would construe a will provision. That clairvoyance was no more possible than Jones' ability to predict his mule would suffer a relapse. In neither case were damages reasonably susceptible of ascertainment. In addition, neither plaintiff should have been barred by the statute of limitations.

That tort defendants are entitled to differing accrual dates based on their relationship to the plaintiff is also a dubious proposition. The liability of manufacturers to users for defective products may be held to be independent of proof of negligence, yet such an adoption of strict liability theory has no connection with the time at which a cause of action accrues. The timing requirement for any tort action would appear to call for a single rule based upon either a policy of realistic reasonableness or a policy of strict construction. There is no principled way to apply a "reasonable ascertainment" rule in delayed manifestation product liability cases, and a strict "impact" or "slight injury" rule in other tort cases. Moreover, it is questionable whether product manufacturers are in fact better positioned to bear the costs of defective products than professionals are to bear the cost of defective services.[181] In both instances the costs are allocable to the respective enterprises, and those costs will be spread to users in the form of higher prices. If there is consensus that not all of these costs should be externalized, then there are legislative devices to prevent externalization. Awards can be legislatively capped[182] and "occurrence-based," rather than "accrual-based," statutes of limitations can be drafted.[183]

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[180] *Id.*

[181] The question is not whether the small practioner can "afford" malpractice insurance. Rather, it is whether the small fellow has to pay substantially more than the big fellow. If the malpractice insurance is priced roughly the same for all practioners (given some adjustment for economies of scale), the question becomes whether the public that purchases the professional services is prepared to externalize and redistribute the full cost of malpractice by paying generally higher fees, or whether the public would rather leave at least some of the cost to rest with the injured client, patient, or customer.

[182] *See, e.g.*, IND. CODE § 16-9.5-2-2(a) (1982) ("The total amount recoverable for any injury or death of a patient may not exceed five hundred thousand dollars ($500,000).").

[183] *See, e.g.*, IND. CODE § 34-4-19-1 (1982) (claim for medical malpractice must be filed "within two (2) years from the date of the act . . . .").

That professionals are less prepared than manufacturers to anticipate long delayed effects may be true, but that propostion is, for the most part, somewhat irrelevant to the *Shideler* facts. When *Shideler* drafted Moore's will, she became exposed to eventual malpractice liability at least for such time until Moore died, plus two years thereafter. In most instances, the time period from the wrongful act (the drafting of the will) to the point in time two years after the testator's death will only be marginally shorter than if that period were extended to include the time necessary for the beneficiary to discover the lawyer's negligence. A discovery rule, in will-drafting cases at least, would not appreciably increase the professional's temporal exposure to liability.

What then of the legitimate repose interests of tort defendants? The *Braswell* dissent observed that these are now protected in Indiana product liability cases by a ten-year outer-cutoff of liability (following initial delivery of the product to a user).[184] There is, therefore, no reason to tighten up and distort the meaning of cause of action accrual in order to provide equity to product liability defendants. It is questionable, however, whether the absence of such repose legislation justifies the judicial retention of an impact rule of accrual simply for those classes of tort defendants not protected by a repose statute. If repose protection is called for, the Indiana General Assembly is better positioned than the courts to provide that relief. It is reasonable, therefore, that the limited discovery rule adopted in *Barnes* should soon be extended to tort claims generally and, ultimately perhaps, to all statutes of limitations that are based on accrual.

VI. Collateral Attacks on the Statute of Limitations Defense

In addition to the argument that statutes of limitations should not begin running until the plaintiffs discover their injuries (or suffer damages susceptible of ascertainment), plaintiffs have advanced a number of other grounds for postponing, or disqualifying entirely, the date their causes of action accrue. One such ground discussed earlier that has met with acceptance in Indiana is that the defendant's wrongful acts must be completed for the plaintiff's cause of action to accrue and for the limitations statute to begin to run.[185] There are three other arguments that have surfaced frequently in the Indiana cases that bear brief mention because they relate to the concept of a discovery rule.

A. Arguing for a Longer Running Limitations Alternative

Plaintiffs faced with a short-running or early-starting statute of limitations which threatens to bar their claims may plead additional or

[184] 723 F.2d at 535 (discussing Ind. Code § 33-1-1.5-5 (1982)).

[185] *See supra* notes 73-76 and accompanying text (discussing Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928)).

alternative legal theories which are governed by more favorable limitation periods. For example, Indiana plaintiffs barred by the relatively short two-year tort statute of limitations[186] might plead that their cases sound in contract rather than tort,[187] or that their facts should be read as raising both contract and tort claims.[188] Similarly, a plaintiff might argue that the cause of action is based upon injury to real property[189] or is an action for relief against fraud,[190] as opposed to basing his argument upon a theory of product liability. The plaintiff may also take the position that an accrual-based personal injury statute should be applied rather than an occurrence-based malpractice statute[191] or an Occupational Diseases Act limitation provision.[192] Finally, plaintiffs might argue that none of the specific statutes of limitations properly applies to their actions; therefore, their claims should be governed by Indiana's fifteen-year catch-all provision.[193]

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[186]IND. CODE § 34-1-2-2 (1982) ("For injuries to person or character, for injuries to personal property . . . .").

[187]*See, e.g.*, Scott v. Union Tank Car Co., 402 N.E.2d 992, 993 (Ind. Ct. App. 1980) (holding that plaintiff's claim for retaliatory discharge following plaintiff-employee's filing of a workers' compensation claim sounds in tort); French v. Hickman Moving and Storage, 400 N.E.2d 1384, 1388 (Ind. Ct. App. 1980) (holding that claim was for conversion, not breach of a contract of bailment); Cordial v. Grim, 169 Ind. App. 58, 61-62, 346 N.E.2d 266, 269 (1976) (holding that plaintiff's claim was for malpractice rather than breach of an implied contract of employment).

[188]*See, e.g.*, Tolen v. A.H. Robins Inc., 570 F. Supp. 1146 (N.D. Ind. 1983) (plaintiff brings, in addition to claims for negligence, strict liability, and fraud, claims under implied and express warranty governed by four-year-from-tender-of-delivery Uniform Commercial Code limitation statute found at IND. CODE § 26-1-2-725 (1982)).

[189]*See, e.g.*, Monsanto Co. v. Miller, 455 N.E.2d 392 (Ind. Ct. App. 1983) (plaintiff's claim for property damage caused by silo coating containing PCB's held to be governed by either the two-year product liability limitation statute, IND. CODE. § 33-1-1.5-5 (1982), or six-year statute for injury to property other than personal property, IND. CODE § 34-1-2-1 (1982), depending upon a finding of whether the cause of action accrued before or after the effective date of the Product Liability Act (June 1, 1978)).

[190]*See, e.g.*, Tolen v. A.H. Robins, 570 F. Supp. at 1155-66.

[191]*See, e.g.*, Cordial v. Grim, 169 Ind. App. 58, 346 N.E.2d 266 (1976) (applying professional malpractice statute, IND. CODE § 34-4-19-1 (1982), which runs two years "from the date of the act . . . complained of," rather than IND. CODE § 34-1-2-2 (1982) which runs two years "after the cause of action has accrued").

[192]*See, e.g.*, Bunker v. National Gypsum Co., 406 N.E.2d 1239 (Ind. Ct. App. 1980) (statute of limitations in Indiana Occupational Diseases Act, IND. CODE § 22-3-7-9(f) (1982), based on claimants' last exposure to asbestos dust, held applicable to claim rather than tort personal injury statute).

[193]*See, e.g.*, Shideler v. Dwyer, 417 N.E.2d 281, 287-88 (Ind. 1981) (discussing the possible application to the case of IND. CODE § 34-1-2-3 (1976) ("All actions not limited by any other statute shall be brought within fifteen (15) years.")); Scates v. State, 190 Ind. App. 624, 383 N.E.2d 491 (1978) (noting that the 15-year catchall, IND. CODE § 34-1-2-3 (1976), has been held to apply to all eminent domain proceedings despite that, "on its face, IC 1971, 34-1-2-1 reflects the pertinent time period").

Faced with these conflicting legal theories, courts can take one of four approaches. To advance plaintiffs' interests, the court can adopt in each case the longest running statute reasonably applicable to the claim. Alternatively, to accommodate the repose interests of defendants, a court can consistently opt for the shortest applicable statute. Under a third approach, the court may choose to follow the form of the pleadings. If the plaintiff brought the claim *ex contractu*, the appropriate contract statute of limitations would be applied. The fourth approach, which dominates the recent Indiana decisions, permits a court to select the statute of limitations based upon the substance of the complaint.[194] Thus, even if the defendant has breached a contract made with the plaintiff, a court will apply a tort statute of limitations if the injury suffered was the result of a breach of duty imposed by law. For example, in *Cordial v. Grim*,[195] the plaintiff who alleged a breach of contract by his lawyer was held, for statute of limitations purposes, to have brought a tort claim sounding in negligence (malpractice).[196]

The issue is compounded by the problem of changing laws. Generally, the statute of limitations in force when the cause of action accrues is applicable to the claim. Determining the accrual date may determine the applicable statute, which, in turn, may either bar the claim or permit it to go forward. In *Monsanto Co. v. Miller*,[197] the plaintiff alleged that his property had been injured by a defective silo coating manufactured by the defendant. If the cause of action was found to have accrued after June 1, 1978, the two-year accrual statute of limitations (and the ten-year repose provision) of the Indiana Product Liability Act[198] would apply. If accrual was established prior to that date, "the six-year statute of limitations governing injuries to real property would apply."[199] Only in the latter instance, however, could the plaintiff possibly have a currently viable tort claim. The case was remanded for further fact-finding to establish the moment of accrual.

There is an artificial rigidity to the Indiana approach that operates to cut off what otherwise might be meritorious claims. Frequently, the issue whether a claim is substantively contractual or tortious in nature is a close question. It seems unreasonable to rest the applicable statute of limitations choice on what is generally an unrelated issue.[200] This

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[194]*See, e.g.*, Tolen v. A.H. Robins Co., 570 F. Supp. at 1155; Monsanto v. Miller, 455 N.E.2d at 394; French v. Hickman Moving and Storage, 400 N.E.2d at 1390-91; Cordial v. Grim, 169 Ind. App. at 63, 346 N.E.2d at 269. *But see* Amermac, Inc. v. Gordon, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979).

[195]169 Ind. App. 58, 346 N.E.2d 266 (1976).

[196]*Id.* at 61-68, 346 N.E.2d at 268-72.

[197]455 N.E.2d 392 (Ind. Ct. App. 1983).

[198]IND. CODE § 33-1-1.5-5 (1982).

[199]455 N.E.2d at 394.

[200]Presumably there should be some relationship between the equities presented by a

problem was highlighted in *Scott v. Union Tank Car Co.*,[201] in which Judge Staton dissented to the majority's characterization of the plaintiff's retaliatory discharge claim as sounding in tort.[202] While arguing that retaliatory discharge was substantively contractual, the dissent pointed out that the policy followed in other jurisdictions "with apparent unanimity" is "that when a question arises with respect to which of two applicable statutes of limitations should govern a particular cause of action, the doubt should be resolved in favor of the theory containing the longer period of limitations."[203]

The rationale for the policy articulated by Judge Staton is that accrual-based statutes of limitations should not be viewed as primary dispute-settling mechanisms or as means to effectuate economic policy. They exist as incentives for plaintiffs to bring their claims promptly and as devices to protect defendants from having to defend presumptively nonmeritorious claims. When they operate to deny legitimate plaintiffs their day in court, their application should be rethought.

B. Fraudulent Concealment

Plaintiffs who learn of their injuries too late to bring their claims within the relevant limitation period frequently seek to have the statutes tolled on the ground that the defendants wrongly withheld information from them, which, if it had been communicated, would have enabled them to file their claims timely. The issue, then, is whether the defendants had a duty to disclose the relevant information to the plaintiffs.[204]

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particular fact situation and the length and starting time of the controlling limitations period. The fact that a written contract in Indiana is governed by a ten-year statute and an oral one by a six-year statute is supposedly related to the presumed freshness of the evidence generally available in the two classes of cases. Similarly, a two-year tort personal injury statute represents an appropriate average balancing point for plaintiff and defendant interests in this type of case. But if a given set of facts could reasonably be characterized as either a tort claim or a contract claim, it seems unreasonable that the final categorization of the action, as either tort or contract, should be permitted to extend or diminish the limitation period by several years. Where there is a choice of limitation periods, it would seem more equitable to make the choice on the basis of policies that shape limitation legislation: policies of repose consistent with providing plaintiffs broad access to the legal process. Choosing the limitation period by following such a policy-based approach must be recognized, however, as a fact sensitive exercise. *See infra* notes 201-03 and accompanying text.

[201] 402 N.E.2d 992 (Ind. Ct. App. 1980).

[202] *Id.* at 993 (Staton, J., dissenting).

[203] *Id.* at 997. *See also* Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 463-66, for a discussion of the *Scott* case.

[204] *See, e.g.*, Miller v. A.H. Robins Co., 766 F.2d 1102, 1106-07 (7th Cir. 1985); Pitts v. Unarco Indus., 712 F.2d 276, 278-79 (7th Cir. 1983); Tolen v. A.H. Robins Co., 570 F. Supp. 1146, 1151-52 (N.D. Ind. 1983); Withers v. Sterling Drugs Inc., 319 F. Supp.

When there is a confidential or fiduciary relationship between plaintiff and defendant the duty of full disclosure certainly exists.[205] But when the relationship is that of product manufacturer and user, or bailor and bailee, or the like, Indiana requires some affirmative act amounting to more than passive silence in order to remove the case from the operation of the statute of limitations.[206] Even when there is a confidential relationship between the parties, the termination of that relationship ends the duty to disclose, and the statute of limitations may commence to run from the time of termination.[207] "In addition, Indiana law requires a showing of reasonable care and due diligence on the part of the plaintiff. . . . He must have been ignorant of the fraud and have been unable to have discovered it by reasonable diligence."[208]

In the product liability context, the passive concealment rule probably operates too strictly in Indiana. In cases where product sellers would be held liable to users under a failure-to-warn theory,[209] they should not be able to take advantage of the users' ignorance of product dangers that ought to have been disclosed to them. A rule holding that a failure to warn tolls the statute of limitations would provide a powerful incentive

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878, 881 (S.D. Ind. 1970) (citing IND. CODE ANN. § 2-609 (Burns Repl. 1967), which called for tolling the statute until "after the discovery of the cause of action" when the person liable conceals the facts "from the knowledge of the person entitled thereto"); Guy v. Schuldt, 236 Ind. 101, 106-12, 138 N.E.2d 891, 894-97 (1956); Wojcik v.Almase, 451 N.E.2d 336, 338-41 (Ind. Ct. App. 1983); French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1389 (Ind. Ct. App. 1980); Cordial v. Grim, 169 Ind. App. 58, 68-70, 346 N.E.2d 266, 272-73 (1976).

[205]Guy v. Schuldt, 236 Ind. at 109, 138 N.E.2d at 895; French v. Hickman Moving & Storage, 400 N.E.2d at 1389.

[206]*See, e.g.*, *Miller*, 766 F.2d at 1106-07 (manufacturer); *Pitts*, 712 F.2d at 279 (manufacturer); *Tolen*, 570 F. Supp. at 1151 (manufacturer); *French*, 400 N.E.2d at 1389 (bailor). *See also* Philpott v. A.H. Robins Co., 710 F.2d 1422, 1425-26 (9th Cir. 1983) (reaching the same conclusion under Oregon law).

[207]*See, e.g.*, *Cordial*, 169 Ind. App. at 69, 346 N.E.2d at 272; *Toth*, 164 Ind. App. at 623, 330 N.E.2d at 339 (citing Guy v. Schuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956)).

[208]*Tolen*, 570 F. Supp. at 1152. *See also Miller*, 766 F. Supp. at 1106-07. Other jurisdictions have taken a more liberal position on this issue. *See* Allen v. A.H. Robins Co., 752 F.2d 1365, 1370-76 (9th Cir. 1985) (Idaho law).

[209]Under strict liability, generally three classes of defects are recognized: production or manufacturing defects; design defects; and defective condition as a result of the seller's failure to provide adequate warnings and directions. *See* NOEL & PHILLIPS, PRODUCTS LIABILITY 359-524 (1976). Failure to warn of unreasonably dangerous defects is recognized as a ground for imposing liability. RESTATEMENT (SECOND) OF TORTS § 402A, comments h, j, & i (1965). Section 402A was adopted by the Indiana Supreme Court in Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973). The failure to warn has been expressly recognized as a basis for imposing liability in a number of Indiana cases. *See, e.g.*, Nissen Trampoline Co. v. Terre Haute First Bank, 332 N.E.2d 820 (1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1974); Dudley Sports Co., Inc. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

for product sellers to increase the dissemination of safety information.[210] Although injured users should have to allege that they relied to their detriment on the inadequate information provided by the sellers, the sellers should be assigned the task of rebutting the allegations of reliance in order to invoke a limitations shield.[211] This tolling rule should apply to repose provisions as well as ordinary statutes of limitations.[212] On the other hand, no duty to warn should attach prior to the defendant's

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[210]It is generally acknowledged that market forces operate more efficiently in a regime in which buyers and sellers can make free and fully informed choices, as opposed to one that is highly regulated.

[211]In Indiana, statutes of limitations are an affirmative defense. IND. R. TR. P. 8(C). The suggestion in the text would preclude granting a defendant's summary judgment motion on statute of limitation grounds if the plaintiff has alleged a failure to warn on the defendant's part and has also alleged detrimental reliance on the inadequate information provided by the defendant-seller. Normally a plaintiff's reliance is not an element of a strict tort case, although reliance does play a major role in establishing causation where failure to warn is the theory of recovery: "As a part of the plaintiff's prima facie case, the plaintiff bears the burden of demonstrating that the absence of warnings was a producing cause of the accident." Horak v. Pullman, Inc., PROD. LIAB. REP. (CCH) ¶ 10,585 (5th Cir. July 5, 1985) (Texas law); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 605 (Tex. 1972) (applying Oklahoma law). Nonetheless, justifiable reliance is an essential element that must be proved in a fraud case. For a failure to warn allegation to trigger the fraudulent concealment doctrine, it seems reasonable that the elements of reliance and due diligence should be coupled with the allegation of inadequate warning.

[212]Where a discovery rule applies to accrual-based statutes of limitations, the fraudulent concealment doctrine has little bite because, absent discovery, the statute does not begin to run, whether or not the discovery was delayed by concealment. However, if a jurisdiction takes the position that mere failure to discover an injury provides no basis for tolling the state's product liability repose statute — as appears to be the case in Indiana, Pitts v. Unarco Indus., 712 F.2d 276 (7th Cir. 1983); *cf.* Bunker v. National Gypsum Co., 441 N.E.2d 8 (Ind. 1982) (lack of the claimant's discovery of his asbestosis held to be insufficient to toll three-year-from-last-exposure-occurrence-based Occupational Diseases Act statute of limitations) — the suggested extension of the fraudulent concealment doctrine to failure-to-warn cases should provide a compromise between a total "discovery" regime and one in which only the affirmative act of withholding information would suspend operation of statutes of limitations and repose.

See also MacMillen v. A.H. Robins Co., 217 Neb. 338, 348 N.W.2d 869 (1984) (holding that summary judgment was inappropriate for invoking Nebraska's ten-year repose statute after the plaintiff's petition alleged that the defendant had intentionally withheld information regarding dangers inherent in the use of the Dalkon Shield). The *MacMillen* court held that if the plaintiff could prove due diligence in pursuing the cause of her injury, the defendant would be equitably estopped from raising the repose statute as a defense. The court followed Knaysi v. A.H. Robins Co., 679 F.2d 1366 (11th Cir. 1982), in which similar reasoning was invoked to toll New York's accrual-based statute of limitations. The proposal in the text would permit a similar result even if the withholding of information were unintentional. In other words, a repose statute would continue to be effective, but only in cases where warnings are found to be adequate, or where the plaintiff failed to exercise due diligence or did not rely on the incomplete or inaccurate information provided by the defendant.

having a feasible opportunity to acquire the relevant knowledge of the danger.[213]

C. Constitutionality of Statutes of Limitations and Repose

Absent discovery rules, statutes of limitations and repose provisions which operate to bar plaintiffs who are unable to discover the existence of their injuries, the nature of those injuries, or their causes are sometimes subjected to attack on equal protection[214] and due process grounds.[215] Equal protection arguments are generally based on the proposition that the limitations provision has created classes of potential claimants with varying privileges and immunities that have no rational basis for existing.[216] Due process arguments are grounded on the theory that claimants who become time-barred because of ignorance resulting from no fault of their own have been effectively and wrongfully denied access to the legal process.[217]

Equal protection attacks on statutes of limitations have made little headway in Indiana. Where no fundamental right or suspect class has been identified,[218] virtually any classification established by the Indiana legislature is generally found to have a rational basis.[219] This approach

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[213]*See* Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 447 A.2d 539 (1982) (holding that the manufacturer had a duty to warn (or compensate) victims of exposure to asbestos end-products, even though knowledge of the harmful nature of asbestos in end-products may not have been within the state of the art scientifically available to the manufacturer). This author criticizes the *Beshada* rule in Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM. BUS. L.J. 403 (1984). Other articles that discuss the *Beshada* case are listed in Leibman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 330 n.213 (1985). The Indiana Product Liability Act specifically provides for a state-of-the-art defense. IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1985).

[214]*See* U.S. CONST. amend. XIV, § 1; IND. CONST art. 23. These two constitutional

712 F.2d 276, 280 (7th Cir. 1983); Huff v. White Motor Corp., 609 F.2d 286, 298 (7th Cir. 1979).

[215]*See* U.S. CONST. amend. V & XIV, § 1; IND. CONST. art. 1, § 12. Article 1, § 12 provides in part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."

[216]*See, e.g., Pitts*, 712 F.2d at 280; Dague v. Piper Aircraft Corp., 513 F. Supp. 19, 25 (N.D. Ind. 1980); Scalf v. Berkel, 448 N.E.2d 1201, 1205-06 (Ind. Ct. App. 1983).

[217]*See, e.g., Pitts*, 712 F.2d at 279; Bunker v. National Gypsum Co., 426 N.E.2d 422, 423-25 (Ind. Ct. App. 1980), *rev'd*, 426 N.E.2d 9 (Ind. 1982); *Scalf*, 448 N.E.2d at 1202-05.

[218]*See Scalf*, 448 N.E.2d at 1205 (quoting Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976)).

[219]*See Pitts*, 712 F.2d at 281 (holding that the Indiana repose statute "must be sustained as reflecting the legislative twin goals of (a) repose (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence"); *Dague*, 513 F. Supp. at 25 ("The Supreme Court of Indiana . . . has already clearly recognized that the protection of liability insurance companies is a legitimate legislative concern."); *Bunker*,

is generally a practical one, because most legislation can be found to confer advantages to some and not to others. As long as the legislature does not act corruptly, it should be free to experiment by taking one remedial step at a time.

The due process attacks in Indiana are more compelling. Despite the presumption of constitutionality to which the legislature's acts are entitled,[220] there is Indiana authority requiring the courts to act when limitation periods are found to be too short to provide reasonable relief.[221] The Indiana Court of Appeals invoked this authority in *Bunker v. National Gypsum Co.*,[222] holding unconstitutional the three-year-from-date-of-last-exposure statute governing asbestos claims under the Indiana Occupational Diseases Act.[223] The supreme court accepted transfer of *Bunker* and reversed.[224] The court took the position that determining the length of limitation periods is strictly a legislative task.[225]

It seems clear that the supreme court shirked a duty in *Bunker*. Although the court is not a drafter of legislation, it has a responsibility to monitor the constitutionality of legislation challenged on due process grounds. The accumulated evidence indicated that a three-year time period was far too short for substantial numbers of asbestos claimants to detect symptoms of disease. The court should have mandated new legislation adequate to pass minimal constitutional muster. This is not to say that a discovery rule is required by the due process clause, but some change in the three-year-last-exposure rule was appropriate.[226]

The strict treatment of limitation statutes might have been viewed by the court as conducive to preserving the viability of Indiana manufacturers and their insurers. However, timing limitations should be used with great care as instruments to effectuate economic policy. As noted in the introduction to this Article, repose provisions perhaps can be justified on the ground that risks are less efficiently shifted from users

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441 N.E.2d at 13 (holding that the last exposure rule for asbestos must be sustained because otherwise "the statutory scheme providing for the application of a 'discovery' rule only in radiation exposure cases, would be subverted").

[220]*Bunker*, 441 N.E.2d at 11; Sidle v. Majors, 264 Ind. 206, 208, 341 N.E.2d 763, 766 (1976).

[221]Wright-Bachman, Inc. v. Hoodlet, 235 Ind. 307, 133 N.E.2d 713 (1956). "[T]he courts will not inquire into the wisdom of the legislative decision in establishing the period of legal bar, unless the time allowed is so short that the statute amounts to a practical denial of the right itself and becomes a denial of justice." *Id.* at 323, 133 N.E.2d at 720.

[222]426 N.E.2d 422, 423 (Ind. Ct. App. 1981).

[223]*Id.* at 425.

[224]441 N.E.2d 9 (Ind. 1982).

[225]*Id.* at 12.

[226]*See* Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973). In *Roloff*, the Wisconsin Supreme Court decided that adoption of a discovery rule was "a matter peculiarly for legislative determination." *Id.* at 5, 203 N.E.2d at 702. The court noted, however,

to sellers as the end of the useful life of products approaches.[227] On the other hand, repose provisions cannot be economically justified merely on the ground that business requires relief from production costs. Subsidizing an enterprise invariably leads to the inefficient allocation of economic resources.[228] Business enterprises, to the greatest extent possible, should be assigned the task of bearing and distributing the full costs of production, which would include the costs of defect-related accidents and health impairments.

Subsequent to *Bunker*, the constitutionality of the ten-year repose provision of the Indiana Product Liability Act was upheld on due process grounds in *Scalf v. Berkel*,[229] *Pitts v. Unarco Industries*,[230] and *Braswell v. Flinkote Mines, Ltd.*[231] In *Braswell*, the two-year accrual statute of limitations, held to run from date of last exposure to asbestos, was similarly upheld as not being denial of due process.[232]

VII. Summary and Conclusion

Almost a century ago, the Indiana Supreme Court held that causes of action accrue, and statutes of limitations based on accrual begin to run, only when the plaintiff suffers injury.[233] Subsequently, the court ruled in two non-tort cases that causes accrue upon the happening of

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that "the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short . . . ." *Id.* The court strongly recommended that the three-year rule be amended by the legislature (which it did by enacting a discovery rule a few years later). In *Roloff*, the court could have found the existing three-year period from date of undiscoverable injury to be a denial of due process, and it could have done so without adopting a discovery rule. Also, the court simply could have assumed the existence of a discovery rule in the particular fact situation without discussion of the issue, which it did several years later in Wisconsin Natural Gas v. Ford, Bacon & Davis Const. Corp., 96 Wis. 2d 314, 291 N.W.2d 825 (1980). Later, the court decided that the time was ripe for a general tort discovery rule, and this time, without deferring to, or even urging the legislature, the court explicitly adopted a sweeping rule of discovery in Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

[227] *See supra* notes 21-30 and accompanying text.

[228] If unhindered market forces lead to maximum economic efficiency, then intervention, *e.g.*, subsidization, will affect and distort the conduct of the economic actors. For example, if the true cost of producing toxic substances and dangerous medical devices is subsidized by shielding the manufacturers from liability, the price of those products will be reduced, demand will be increased, and more of the products will be produced than if the producers were required to absorb and/or pass on the costs as part of the product price. Without subsidization, the efficient market would direct some of the resources expended on subsidized production to other activities.

[229] 448 N.E.2d 1201.

[230] 712 F.2d 276.

[231] 723 F.2d 527.

[232] *Id.* at 529-31.

[233] Board of Commr's of Wabash County v. Pearson, 120 Ind. 426, 22 N.E. 134 (1889). *See supra* notes 68-72 and accompanying text.

injury, whether or not the plaintiff is aware of the injury.[234] But in 1928, the court in *Montgomery v. Crum*[235] stated that, for an action to accrue, damages must be susceptible of ascertainment. In addition, the court held that the plaintiff's cause will not accrue until the defendant has completed the wrongful act or acts. In support of its ascertainable damages dictum, the court cited a case in which it was made clear that accrual requires damages that are based on discoverable and observable fact, not mere suspicion or possibility of future damages.[236]

In the several decades following *Montgomery*, a number of courts either acknowledged the existence of the ascertainable damages rule as a principle of Indiana law or actually rested their holdings on the rule.[237] One court, in upholding the res judicata principle against "action-splitting," held that the ascertainment of even slight damages would be sufficient for a cause of action to accrue.[238] Even so, this case acknowledged that some ascertainable injury sufficient to maintain a lawsuit would be required to start an accrual-based statute of limitations running.[239] Only in one case involving an accrual statute during this period — a personal property conversion case — did the court hold that "[n]otice to the plaintiff was . . . immaterial."[240]

In 1981, against the weight of Indiana authority, the supreme court, in *Shideler v. Dwyer*,[241] held that "it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."[242] The court cited no Indiana cases in support of this proposition. By embracing the New York "impact" rule in support of its holding, it was clear that the words, "the extent of," in the previous quotation could be omitted from the holding. A tort plaintiff's knowledge of the extent of health impairment, or even the existence in fact of health impairment, would be totally immaterial to the accrual of the action. Under the New York rule, the exposure (or impact) *is the injury*. The fallacy here is that a single exposure to most deleterious substances simply is not actionable. It is not that damages are speculative at this point; they simply do not yet exist. Even a symbolic action calling

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[234]*See supra* notes 92-96 and accompanying text.

[235]199 Ind. 660, 161 N.E. 251 (1928). *See supra* notes 73-76 and accompanying text.

[236]Jones v. Texas and P. Ry., 125 La. 542, 51 So. 582 (1910). *See supra* notes 176-80 and accompanying text.

[237]*See supra* notes 77-90 and accompanying text.

[238]Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 881 (N.D. Ind. 1970).

[239]*Id.* at 880-81.

[240]French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1388 (1980). *See supra* notes 97-104 and accompanying text.

[241]417 N.E.2d 281 (Ind. 1981). *See supra* notes 115-35 and accompanying text for the discussion of *Shideler*.

[242]417 N.E.2d at 289.

for nominal damages could not be maintained without some evidence of disease.

Despite recognition by the *Shideler* court of authority supporting a discovery rule in cases where "the misconduct was of a continuing nature or concealed,"[243] the court's heavy reliance on the dust and ingestion cases from New York made it inevitable that in subsequent delayed manifestation cases, courts would be heavily influenced to follow the impact rule. It is not surprising, therefore, that the majority in *Braswell v. Flinkote Mines, Ltd.*[244] saw no reason to certify this issue to the Indiana Supreme Court.[245]

Given a second chance in *Barnes v. A.H. Robins Co.*,[246] the Seventh Circuit Court of Appeals — apparently persuaded after reflecting on Judge Swygert's powerful dissent in *Braswell* — certified the statute of limitations discovery rule question to the Indiana high court. Relying on the "ascertainable damages" precedents, the supreme court adopted for protracted exposure, concealed harm cases a discovery rule which suspends operation of an accrual-based statute of limitations until the plaintiff can reasonably ascertain that the injury or impingement was caused by the defendant's product.

Although the court adopted a liberal rule by requiring the plaintiff's actual or constructive knowledge of a causal connection to the product for the action to accrue, the court did reiterate that the ten-year repose provision of the Indiana Product Liability Act still exists as an outer-cutoff of liability.[247] Absent this provision, it is doubtful whether such a liberal holding would have been forthcoming.

As noted earlier, if the "ascertainable damages" rule is necessary in order to be fair to some tort claimants, it would appear to be required in tort cases generally. Accrual-based, as opposed to occurrence-based, statutes of limitations implicitly seek to accommodate plaintiffs' interests. These accrual statutes provide a "temporal window" within which the plaintiff is privileged to sue. Undiscoverable privileges are illusions, however. If the law grants a right and privilege, the grant should not be illusory. If additional steps are necessary to accommodate defendants' repose interests, it is probably better to enact repose statutes or other occurrence-based limitation legislation.

Perhaps Indiana needs a legal malpractice statute of limitations. The supreme court undoubtedly was correct in *Shideler* that the legislature

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[243] *Id.* at 291.

[244] 723 F.2d 527 (7th Cir. 1984). *See supra* 161-84 and accompanying text for the discussion of *Braswell*.

[245] 723 F.2d at 531-33.

[246] 476 N.E.2d 84 (Ind. 1985). *See supra* notes 51-68 and accompanying text for the discussion of *Barnes*.

[247] 476 N.E.2d at 85.

was thinking only of health care providers when it enacted the [medical] malpractice statute.[248] Nevertheless, the *Shideler* court's attempt to accommodate the legitimate interests of the legal profession by manipulating the general rules governing accrual-based statutes of limitations led to a confusing episode in Indiana law. It is hoped that the "ascertainable damages" rule now fully recognized as a discovery rule in *Barnes* will be applied generally as a fundamental tenet of Indiana tort law. In the absence of repose provisions in many tort law areas, however, it may be necessary to give plaintiffs in these cases somewhat less latitude in discovering the nature of their injuries than seems to be promised delayed manifestation plaintiffs by the *Barnes* case.[249]

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[248]417 N.E.2d at 283. ("[T]he doctrine of ejusdem generis limits the application to the term 'or others' as used in said statute, to others of the medical care community.").

[249]As noted *supra*, notes 59-61 and accompanying text, the *Barnes* opinion appears to leave a good deal of room for finding that injured "protracted-exposure" victims have not had reasonable opportunities to discover the causal nexus between their diseases and the defendant's products. Within the context of Lahna Barnes' case, the court could have stressed far more forcefully the due diligence responsibility of victims who are aware that they are physically injured to seek out the exact causes of the harm. The supreme court's reticence to emphasize this point may prove to be an invitation for later courts to give plaintiffs in delay cases a large measure of the benefit of the doubt with respect to the accrual dates of their actions. *See, e.g.*, Anthony v. Abbott Labs., 490 A.2d 43 (R.I. 1985). In *Anthony*, the Rhode Island Supreme Court was asked by the federal district court, through certification, whether Rhode Island's discovery rule for delayed manifestation cases begins the statute of limitations when the plaintiff knew or should have known of a causal connection between product and injury, or whether it begins later when the plaintiff also knew or should have known of the manufacturer's wrongful conduct. The court ruled in favor of the later-starting limitation period, holding that knowledge of some wrongdoing is necessary, because a victim of a drug-related health impairment might very well believe that the injury suffered was unavoidable. The court noted that defendants are unlikely, under this rule, to be prejudiced by having to defend stale claims, because the relevant evidence is likely to be documentary in nature. Such evidence is unlikely to become unreliable with the passage of time. *Anthony*, a DES case, was recently followed in California v. Kensinger v. Abbot Laboratories, 217 Cal. Rptr. 313 (Cal. Ct. App. 1985).

The *Barnes* opinion, in this author's view, leaves the door open to similar holdings in Indiana (even though the first post-*Barnes* decision under Indiana law suggests otherwise). *See* Miller v. A.H. Robins, Co., 766 F.2d 1102 (7th Cir. 1985) (discussed *supra* note 91). In *Barnes*, the court's holding states: "[T]he statute of limitations in such causes commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product *or act of another*." 476 N.E.2d at 87-88 (emphasis added). The emphasized language might suggest that discovery of *wrongful acts* should play some part in determining the accrual date of statutes of limitations. More importantly, both plaintiffs in the *Barnes* consolidation experienced early medical problems in which the Dalkon Shield played a known part. Lahna Barnes' shield was removed following the onset of her pelvic infection, and Sharon Neuhauser was correctly advised that the shield was likely to create physical injury (a miscarriage) during her unwanted pregnancy. Severe medical problems over the next several years followed for both women, but it was not until nine years after ascertainable injury in Barnes' case, and seven years in Neuhauser's that it was claimed that the women knew or could with

due diligence have known of the relationship of the shield to their impingements. In accepting the possibility of liability under such a scenario—without comment—the supreme court lends indirect support to the *Anthony* view that, until victims have reasonable opportunity to learn that their injuries are actionable, they have not truly "discovered the harm" for statute of limitations purposes.

Athough such an extension of the *Barnes* rule might have relatively modest effects upon the liability exposure of Indiana product sellers—given the ten-year outer-cutoff of liability under the Product Liability Act—other tort defendants under a universal discovery rule would have less protection. Whether a review of the kinds of tort claims that are likely to arise under a universal tort discovery rule would reveal that this added exposure for some classes of Indiana defendants (non-sellers) would present for them a significant problem is a matter beyond the scope of this Article.