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1988]

CIVIL PROCEDURE—STATUTE OF LIMITATIONS—FEDERAL
APPLICATION OF STATE LAW—FRAUDULENT CONCEALMENT AND ITS
EFFECT ON THE STATUTE OF LIMITATIONS

Urland v. Merrell-Dow Pharmaceuticals, Inc. (1987)

In Pennsylvania, an action to recover damages for personal injury must be commenced within two years.¹ The Pennsylvania Supreme Court, however, has recognized an exception to the statutory limitation which delays the running of the statute until the plaintiff knew, or reasonably should have known, of the injury and its cause.² This exception has come to be called the “discovery rule.”³ In addition to its acceptance in the Pennsylvania courts, the discovery rule has likewise been applied in decisions of the United States Court of Appeals for the Third Circuit.⁴ The recent case of *Urland v. Merrell-Dow Pharmaceuticals, Inc.*⁵

1. See 42 PA. CONS. STAT. ANN. § 5524 (Purdon 1981 & Supp. 1987). Section 5524 provides in pertinent part:

The following actions and proceedings must be commenced within two years:

...
(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
...

Id.

2. See *Ayers v. Morgan*, 397 Pa. 282, 292, 154 A.2d 788, 793 (1959). In *Ayers*, the plaintiff underwent an operation for an ulcer in 1948. *Id.* at 283, 154 A.2d at 788. Despite the operation, his discomfort continued. *Id.* He returned to the hospital in 1957 and the cause of his discomfort was determined: the surgeon who had performed the ulcer operation had neglected to remove a sponge. *Id.*, 154 A.2d at 789. The court declared, “[t]his failure [to remove the sponge] constituted a blameworthiness which continued until such time as Ayers learned, or, by the exercise of reasonable diligence, could have learned of the presence of the foreign substance within his body.” *Id.* at 292, 154 A.2d at 793.

3. For a discussion of the development of the discovery rule in Pennsylvania, see *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 425 A.2d 428 (1980), *rev'd*, 496 Pa. 119, 436 A.2d 181 (1981) (noting that application of the discovery rule is not based upon wording of statute of limitations but rather on notion that if party cannot, with the exercise of reasonable diligence, ascertain injury, the statute should not run against him); see also Note, *Application of the Pennsylvania Statute of Limitations Discovery Rule in DES Cases*, 55 TEMP. L.Q. 1149 (1982).

4. *Urland v. Merrell-Dow Pharmaceuticals, Inc.*, 822 F.2d 1268, 1271 (3d Cir. 1987) (citing *Cowgill v. Raymark Indus.*, 780 F.2d 324, 330 (3d Cir. 1986)). In *Cowgill*, the plaintiff-executrix brought wrongful death and survival actions against asbestos manufacturers for the death of her husband from asbestos-related illnesses. 780 F.2d at 326. One of the defendants raised the two year statute of limitations as a defense. *Id.* In reversing the decision in favor of the defendant’s motion for summary judgment, the court of appeals held: (1) that the Pennsylvania statute of limitations was applicable, and (2) that a genuine issue of material fact existed as to whether the decedent should have reasonably

presented the Third Circuit with the question of whether there is a difference in effect on the statute of limitations between the discovery rule and fraudulent concealment. The court held that the same standard, "knew or reasonably should have known," (also called the "reasonable diligence" standard) applies whether the delay in bringing the suit within the statutory period was due to failure to discover the injury or whether it was due to the fraudulent concealment of the cause of the injury by the defendant.⁶

The *Urland* case involved a suit by Julie Beth Urland and her parents (Urlands) against Merrell-Dow Pharmaceuticals, Inc., the manufacturer of Bendectin.⁷ The Urlands alleged that Julie's birth defect was caused by her mother's ingestion of Bendectin while pregnant.⁸ The diversity action was filed on October 7, 1981, in the United States District Court for the Eastern District of Pennsylvania.⁹ Merrell-Dow invoked Pennsylvania's two year statute of limitations as a defense.¹⁰ The statute of limitations issue was presented to the jury as a threshold matter.¹¹

Following Julie's birth on February 8, 1972, the Urlands suspected that Julie's birth defect may have resulted from Mrs. Urland's ingestion of Bendectin while pregnant.¹² Shortly thereafter, Mrs. Urland contacted Merrell-Dow to express her concerns about her previous use of Bendectin.¹³ The Director of the Product Development Clinical Research Group for Merrell-Dow, Richard H. O'Dillon, M.D., responded to Mrs. Urland's inquiry by letter.¹⁴ Dr. O'Dillon stated that his letter was written for the purpose of "reliev[ing] [Mrs. Urland's] mind about [her] use of Bendectin during pregnancy" and remarked that it was his

known that he had asbestos-related illnesses more than two years prior to the filing of suit. *Id.* at 332.

5. 822 F.2d 1268 (3d Cir. 1987).

6. *Id.* at 1274.

7. *Id.* at 1270. Bendectin is a drug taken by pregnant women which provides both anti-nauseant and anti-emetic activity. C.E. BAKER, PHYSICIANS DESK REFERENCE 1205 (34th ed. 1980).

8. 822 F.2d at 1270. Julie was born with part of her left arm missing. *Id.*

9. *Id.*

10. *Id.* For the text of the applicable Pennsylvania statute of limitations, see *supra* note 1.

11. *Id.* The court bifurcated the statute of limitations issue because it controlled the outcome of the entire litigation. *Id.*

12. *Id.*

13. *Id.* Mrs. Urland also wrote to several of her physicians, the March of Dimes and the Food and Drug Administration. *Id.* Her letter to the FDA (the same as the letter sent to Merrell-Dow) stated that she had taken Bendectin "at the approximate time when the limb buds [were] being formed" and mentioned "the questions and doubts" she had concerning Bendectin. *Id.* (quoting App. at 394). The FDA responded to the letter by stating that it would refer it to the physicians who monitor adverse drug experiences. *Id.* The FDA requested that Mrs. Urland's physicians fill out the Drug Experience Report which was enclosed with the letter. *Id.* This was never done. *Id.*

14. *Id.*

“belief, that [her] child’s malformation is unrelated to Bendectin ingestion.”¹⁵ The Urlands claimed that as a result of this letter they did not sue Merrell-Dow at that time.¹⁶

In early September 1979, a reporter for the *National Enquirer* contacted the Urlands and informed them that Mrs. Urland’s letters had come to the attention of a Florida court which was trying a case involving Bendectin and birth defects.¹⁷ Mrs. Urland met with the reporter and told him that she suspected that Bendectin had caused Julie’s birth defect.¹⁸ She also allowed a picture of herself and Julie to be used in an article concerning Bendectin which was to be published in the *Enquirer*.¹⁹ The article appeared on the front page of the October 9, 1979, edition of the newspaper.²⁰

The Urlands testified before the district court that they were uncertain of the date when they purchased a copy of the *National Enquirer* edition containing the Bendectin story.²¹ However, Mr. Urland testified that he believed he had purchased a copy on October 9, 1979, which was less than two years prior to the filing of their suit.²² The edition dated October 9, 1979, appeared on the newsstands on October 2, 1979, and was removed from the newsstands on October 9, 1979.²³

At trial the Urlands asserted the equitable rule that a defendant will be estopped from asserting the statute of limitations defense if by his own acts of fraud or concealment he causes the plaintiff to delay in bringing the action.²⁴ Under this rule, the plaintiff is entitled to a tolling

15. *Id.* (quoting App. at 394). Dr. O’Dillon’s letter also described various animal and human tests which purported to demonstrate that Bendectin did not have the potential to cause birth defects in humans. *Id.*

16. *Id.* The Urlands admitted, however, that they still suspected that Bendectin had caused Julie’s birth defect and consequently considered bringing a suit against Merrell-Dow. *Id.*

17. *Id.* Subsequent to her telephone conversation with the reporter, Mrs. Urland informed her husband about the trial in Florida and the allegation by the plaintiffs that Bendectin caused birth defects. *Id.*

18. *Id.*

19. *Id.* at 1270-71.

20. *Id.* at 1271. The front page headline of the newspaper read, “New Thalidomide-Type Scandal [sic]—Experts reveal . . . COMMON DRUG CAUSING DEFORMED BABIES.” *Id.* (quoting *National Enquirer*, Oct. 9, 1979). The article cited different medical sources as stating that Bendectin could cause birth defects, and also mentioned various cases of deformed babies born to mothers who had ingested Bendectin during pregnancy. *Id.* The article also discussed an alleged cover-up by Merrell-Dow of the test results indicating that Bendectin could potentially cause birth defects. *Id.*

21. *Id.*

22. *Id.* Mr. Urland admitted, however, that he may have used that date because that is the date appearing on the newspaper. *Id.*

23. *Id.* This date is relevant because the Urlands filed their action against Merrell-Dow on October 7, 1981. *Id.* at 1270.

24. *Id.* (citing *Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 92, 204 A.2d 473, 475 (1964)). In *Nesbitt*, the plaintiff-appellant was injured while riding as a passenger on a bus owned by the defendant company. 416 Pa. at 92, 204 A.2d at 474.

of the statute if he can establish that he was either intentionally or unintentionally deceived by the defendant.²⁵ For purposes of the statute of limitations, the district court assumed the fact that the Urlands were misled by Dr. O'Dillon's letter in 1972, and the court instructed the jury to do the same.²⁶ By making this assumption, the district court concluded that the question of whether the suit was barred by the statute depended on whether the Urlands knew or should have known prior to October 7, 1979, that Bendectin was the cause of Julie's birth defect.²⁷ The question was put to the jury.²⁸ The jury determined that the Urlands knew or should have known prior to October 7, 1979, that Bendectin was the operative cause of Julie's birth defect.²⁹ Accordingly, judgment was en-

After the accident, the plaintiff promptly notified the defendant of her injury. *Id.* at 93, 204 A.2d at 475. Between July 17, 1959 (six days after the accident) and July 6, 1961, three different claims adjusters contacted the plaintiff. *Id.* There was evidence to indicate that the adjusters had misled the plaintiff into believing that a settlement would be reached once all of the facts had been gathered. *Id.* at 93-95, 204 A.2d at 475-76. In fact, the adjusters had been told by their employer that no liability existed and that they should offer a small sum as a nuisance settlement. *Id.* at 93-94, 204 A.2d at 475. The court held that the facts, if true, supported the conclusion that the defendant's agents misled the plaintiff into believing that her suit would be settled and "thus lulled her into a sense of false security as to timely institution of her action." *Id.* at 96-97, 204 A.2d at 477. The court stated the rule that "if through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of limitation of action." *Id.* at 92, 204 A.2d at 475 (citations omitted).

25. *Urland*, 822 F.2d at 1271 (citing *Nesbitt*, 416 Pa. at 96, 204 A.2d at 475-76).

26. *Id.* at 1271. The district court instructed the jury as follows:

I am asking you to assume in this first phase of the case that the Dr. O'Dillon letter is inaccurate and misleading.

...

The reason it's important for you to assume that the O'Dillon letter is inaccurate and misleading is that that bears to some extent, it seems to me, and I so instruct you, on the state of mind of Mr. and Mrs. Urland in 1979, which is the crucial issue before the case at this point, in September and October of 1979.

Id. at 1271, n.1 (quoting App. at 351-52).

27. *Id.* at 1271-72.

28. *Id.* at 1272. The jury was presented with the following interrogatory:

Have Mr. and Mrs. Urland proved by a preponderance of the evidence that neither of them knew, or exercising reasonable diligence should have known, before October 7, 1979, that Bendectin was an operative cause of Julie Beth Urland's birth defect as alleged in their complaint?

()
 YES

()
 NO

(A "Yes" answer is in favor of Mr. and Mrs. Urland. A "No" answer is in favor of Merrell-Dow Pharmaceuticals, Inc., and will terminate the case.)

Id.

29. *Id.* The jury responded "no" to the interrogatory presented *supra* in note 28. *Id.*

tered in favor of Merrell-Dow and the Urlands appealed.³⁰

On appeal to the United States Court of Appeals for the Third Circuit, the Urlands' principal claim was that the district court erred in failing to "appreciate the differences in the effect on the statute of limitations between the discovery rule and fraudulent concealment."³¹ The Urlands accepted the district court's conclusion that under the discovery rule, the statute begins to run when the plaintiff knew or should have known of the claim.³² However, they asserted that, under the doctrine of fraudulent concealment, the statute did not begin to run until such time as they had "actual knowledge" of the fraud and the cause of the injury.³³

In response to the Urlands' assertion, the Third Circuit pointed out that there are no Pennsylvania cases which have held that the "knew or reasonably should have known" standard of the discovery rule is not also applicable under the doctrine of fraudulent concealment.³⁴ The court did concede, however, that language appears in Pennsylvania cases which supports the Urlands' view but stated that such language was used without reference to the distinction between the discovery rule and fraudulent concealment.³⁵

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The court rejected the Urlands' extreme claim that Merrell-Dow was not entitled to assert the statute of limitations defense at all because of its fraudulent activity. *Id.* In support of that contention, the Urlands pointed to a previous Third Circuit decision in which the court stated, "if through fraud or concealment the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry, the defendant is estopped from invoking the bar of limitation of action." *Id.* at 1272-73 (quoting *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985)). The court stated that in *Ciccarelli*, it was concentrating on what constituted fraudulent concealment and because of that perhaps was a bit careless with its dictum. *Id.* at 1273. In any event, the court pointed out that in *Ciccarelli*, it did not intend to suggest that a defendant would never be able to raise the statute of limitations defense if the defendant had engaged in fraudulent concealment. *Id.*

34. *Id.* at 1273. While it may be true that no Pennsylvania cases have specifically held the "knew or should have known" standard inapplicable for cases of fraudulent concealment, there are cases which imply such a result by applying the "actual knowledge" standard. For a discussion of such cases, see *supra* note 24 and *infra* note 35.

35. *Urland*, 822 F.2d at 1273. The court specifically cited *Schwab v. Cornell*, 306 Pa. 536, 160 A. 449 (1932), as an example of where the "actual knowledge" language was used by the Pennsylvania court. *Urland*, 822 F.2d at 1273. In *Schwab*, the plaintiff employed a conveyancer to represent him in the purchase of certain property. 306 Pa. at 538, 160 A. at 449. In a letter to the plaintiff the conveyancer inaccurately informed the plaintiff that the property was free of all liens with the exception of the telephone and electric companies. *Id.* However, enclosed with the letter was the title policy which showed taxes as a lien against which the title was not insured. *Id.* Plaintiff did not become aware of the problem until five years later when his property was sold because of the unpaid taxes. *Id.* At the time the plaintiff discovered the conveyancer's negligence, he brought

In any event, the court concluded from other cases that the Pennsylvania Supreme Court intended the same standard, "knew or should have known," to apply regardless of whether the discovery rule or the doctrine of fraudulent concealment was applicable to the case.³⁶ The court first pointed to *Smith v. Blachley*³⁷ in which the Pennsylvania Supreme Court stated, "in general . . . in cases of fraud the statute runs only from discovery, or from when, with reasonable diligence, there ought to have been discovery."³⁸ The court noted that similar language was employed by the court in *Deemer v. Weaver*³⁹ and *Schaffer v. Larzelere*.⁴⁰

suit. *Id.* The court stated, "but if by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectively obscures the view of what has happened, the statute remains quiescent until actual knowledge arises." *Id.* at 540, 160 A. at 450 (emphasis added).

The *Urland* court also cited *Nesbitt v. Erie Coach Co.*, as a Pennsylvania case using the "actual knowledge" language. 822 F.2d at 1273 (citing *Nesbitt*, 415 Pa. at 96, 204 A.2d at 477 (1964)). For a discussion of *Nesbitt*, see *supra* note 24.

36. *Urland*, 822 F.2d at 1273. For a discussion of these cases, see *infra* notes 37-48 and accompanying text.

37. 198 Pa. 173, 47 A. 985 (1901). The facts were stated in the previous report of the case. *Smith v. Blachley*, 188 Pa. 550, 41 A. 619 (1898). In *Smith*, the defendant, a physician, was called upon to attend to the daughter of one of plaintiffs for an illness which the defendant claimed was brought about by a criminal abortion. *Id.* at 552, 41 A. at 620. After the daughter had recovered, the defendant called upon the plaintiffs and represented to them that a criminal prosecution was about to be instituted against the plaintiffs. *Id.* The defendant told the plaintiffs that he could stop further inquiries by those in charge of the prosecution if the plaintiffs would pay him \$3,000 hush money. *Id.* The plaintiffs then procured the money and paid the defendant. *Id.* Thereafter, the plaintiffs discovered that no criminal prosecution had been contemplated and that the defendant had pocketed the money. *Id.* The plaintiffs brought suit to recover the \$3,000, and the defendant claimed that the action was barred by the statute of limitations. *Id.* There was a verdict for the plaintiff which was reversed on appeal. 198 Pa. at 180, 47 A. at 987.

38. *Urland*, 822 F.2d at 1273 (quoting *Smith*, 198 Pa. at 175, 47 A. at 985).

39. 324 Pa. 85, 187 A. 215 (1936). In *Deemer*, the holder of a life estate in a piece of property wished to sell it. *Id.* at 86, 187 A. at 215. She sought the approval of the remaindermen for the sale, representing to them that the property was losing value due to its proximity to a steel company. *Id.* Approval was granted under an agreement whereby the holder of the life estate was to sell the property for \$5,000 (the best offer she said she could get) and place that money in trust. *Id.* The holder of the life estate was to collect the interest until her death at which time the remaindermen would collect the principal. *Id.* Upon her death many years later, the remaindermen discovered that the decedent had actually sold the property for \$9,000. *Id.* at 87, 187 A. at 215. The remaindermen instituted an action against the decedent's executor alleging that the decedent had fraudulently concealed a portion of the sales price. *Id.*, 187 A. at 216. In holding for the remaindermen, the court stated: "If by any act of concealment or deceit, whether before, or at the same time or after the act is committed, the wrongdoer hides from the innocent party the facts which would put him upon inquiry, the statute does not begin to run." *Id.* at 88, 187 A. at 216 (emphasis added) (citations omitted).

40. 410 Pa. 402, 189 A.2d 267 (1963). In *Schaffer* the plaintiff alleged that the decedent had been admitted to the defendant hospital, for treatment of inju-

The court also pointed out that it had previously considered the applicable rule under Pennsylvania law. Specifically, the court cited *Swietlowich v. County of Bucks*⁴¹ in which it had stated: "Pennsylvania courts hold that the limitation period does not commence in cases of fraudulent concealment until the time of discovery or the date *when with reasonable diligence* one would have been led to discovery."⁴² The court cited *Williams v. Pittsburgh Terminal Coal Corp.*⁴³ as well for its statement of the Pennsylvania rule which reads as follows:

But the statute does not begin to run where the facts are sup-

ries sustained during a beating. *Id.* at 404, 189 A.2d at 269. The plaintiff further alleged that the decedent was under the care of defendant doctor, and the death was due to defendant's careless, premature discharge of the decedent from the hospital. *Id.* The defendants raised the statute of limitations as a defense. *Id.* In reply, the plaintiff alleged that the statute did not bar the action because the defendants' negligence did not come to his knowledge until after the one year limitations period had passed. *Id.* The defendant doctor filed a motion for judgment on the pleadings. *Id.* The plaintiff then filed a motion to amend the reply alleging that the defendants had fraudulently concealed the circumstances surrounding the decedent's death. *Id.* The lower court denied the motion to amend the reply and entered a verdict in favor of the defendants. *Id.* at 405, 189 A.2d at 269. On appeal, the Pennsylvania Supreme Court in reversing the lower court stated, "if it is true . . . that the defendants deliberately concealed the facts incident to the cause of decedent's death and that the plaintiff *could not through the use of reasonable diligence* have ascertained these facts, this would bar the defendants from invoking the defense of the statute." *Id.* at 406, 189 A.2d at 276 (emphasis added).

41. 610 F.2d 1157 (3d Cir. 1979). In *Swietlowich*, the plaintiff's husband was arrested for operating a motor vehicle while intoxicated and then placed in a detention cell. *Id.* at 1161. About three hours later, he was found hanged in his cell, a victim of an apparent suicide. *Id.* The plaintiff took no legal action until four years later when she read a newspaper article which alleged that the police had falsified records of the decedent's confinement. *Id.* The plaintiff brought suit alleging that rights guaranteed by the civil rights statutes and Constitution had been violated by decedent's false arrest and wrongful death. *Id.* The defendant county claimed that the actions were barred by the statute of limitations. *Id.* The plaintiff claimed that the defendants were estopped from asserting the statute of limitations because they had misled the plaintiff regarding the circumstances of her husband's suicide. *Id.* at 1161-63. Although the case was remanded, the court concluded that, "[t]o establish her case, plaintiff had to prove that she delayed bringing her suit because she reasonably believed that the police officers' conduct was not actionable based on their false statements of adequate inspections and having done all that they could." *Id.* at 1163.

42. *Urland*, 822 F.2d at 1274 (quoting *Swietlowich*, 610 F.2d at 1162) (emphasis added by the *Urland* court).

43. 62 F.2d 924 (3d Cir.), *cert. denied*, 289 U.S. 749 (1933). In *Williams*, the plaintiff entered into a contract with the agent of an undisclosed principal for the sale of certain coal lands. *Id.* at 924. After the agent breached and the plaintiff learned of the principal, suit was filed against the principal for damages. *Id.* The lower court held that the action was barred by the statute of limitations. *Id.* On appeal, the Third Circuit held the action was not barred by the statute because the defendant had concealed the fact that it was the principal; the plaintiff had been diligent in trying to establish and collect his claim, and it had not been shown that by reasonable diligence, the plaintiff could have discovered the facts before he did. *Id.* at 925-26.

pressed and deliberately concealed from the plaintiff. Such conduct tolls the statute, and in that case it does not begin to run until the plaintiff has knowledge of the facts constituting the cause of action or by *reasonable diligence should have had such knowledge*.⁴⁴

The court also reviewed Pennsylvania cases subsequent to *Swietlowich* which reinforce the interpretation of Pennsylvania law as stated in that case.⁴⁵ Specifically, the court cited *Rothman v. Fillette*⁴⁶ for the Pennsylvania Supreme Court's conclusion that "the law is clear that fraud or deceit tolls the statute of limitations until such time as the fraud has been discovered by the exercise of due diligence."⁴⁷ Additionally, the Third Circuit cited *Dudley v. Workmen's Compensation Appeal Board*⁴⁸ in which the Pennsylvania Commonwealth Court stated:

When an employer, through its acts or statements, lulls a claimant into a false sense of security regarding the filing of a workmen's compensation claim, those actions, whether intentional or unintentional, toll the running of the limitations period . . . [and] [t]hat period reasonably should not begin until the claimant knows, or with reasonable diligence could know, of his deception.⁴⁹

44. *Urland*, 822 F.2d at 1274 (quoting *Williams*, 62 F.2d at 925 (emphasis added by the *Urland* court)).

45. For a discussion of these cases, see *infra* notes 46-48.

46. 503 Pa. 259, 469 A.2d 543 (1983). In *Rothman*, the plaintiff was injured in an automobile accident and retained an attorney to institute a suit to recover damages. *Id.* at 263, 469 A.2d 544. The attorney entered into negotiations with the defendant's insurance company and agreed to settle for \$7,000. *Id.* The attorney was not authorized by the plaintiff to settle, but he forged the plaintiff's signature on both the release form and the check which the insurance company had forwarded to him. *Id.*, 469 A.2d 545. In a subsequent action to remove the order marking the case settled, the court, in holding for the defendant, stated that "where one of two innocent persons must suffer because of the fraud of a third, the one who has accredited him must bear the loss." *Id.* at 265 (citations omitted).

47. 822 F.2d at 1274 (quoting *Rothman*, 503 Pa. at 266 n.3, 469 A.2d at 546 n.3).

48. 80 Pa. Commw. 233, 471 A.2d 169 (1984), *aff'd*, 510 Pa. 283, 507 A.2d 388 (1986). In *Dudley*, the plaintiff, a police officer, was injured from a fall which occurred in the course of his duties. 80 Pa. Commw. at 235, 471 A.2d at 170. After the fall, the plaintiff's supervisor told him to report to the superintendent's office and complete the workmen's compensation form. *Id.* at 236, 471 A.2d at 171. He did report to the officer and aided the police secretary in filling out some forms. *Id.* The plaintiff testified that he believed the employer had filed his workmen's compensation claim. *Id.* In fact the employer had not filed the claim, and the three year limitations period passed. *Id.* at 235-36, 471 A.2d at 170-71. The court held that, because the plaintiff reasonably believed that his employer had filed the claim, the statute had tolled. *Id.* at 241, 471 A.2d at 173.

49. *Urland*, 822 F.2d at 1274 (quoting *Dudley*, 80 Pa. Commw. at 241, 471 A.2d at 173) (footnotes omitted by the court).

In view of these prior cases, the Third Circuit rejected the Urlands' contention that Pennsylvania would not apply the "knew or should have known" standard in fraudulent concealment cases.⁵⁰

Judge Becker dissented from the majority's opinion because he felt that Pennsylvania would apply the actual knowledge standard to the facts of this case to "account for the plaintiffs' higher burden of discovering the operative cause of Julie Beth Urland's birth defects after defendant's presumptively fraudulent concealment"⁵¹ In support of this view, Judge Becker pointed out that Pennsylvania had long recognized the distinction between the discovery rule and the estoppel doctrine.⁵² He cited *Ciccarelli v. Carey Canadian Mines, Ltd.*⁵³ as a recent case in which the distinction between the discovery rule and the doctrine of fraudulent concealment was noted.⁵⁴

50. *Id.* at 1274. In addition to their principal contention, the Urlands also put forth three other arguments. First, they argued that the district court erroneously refused to admit evidence purporting to show that Merrell-Dow fraudulently concealed test results showing that Bendectin caused birth defects. *Id.* The Third Circuit rejected this argument stating that, "because the district court had instructed the jury to assume that the O'Dillon letter was false and misleading, it did not abuse its discretion in rejecting any further evidence on the concealment issue." *Id.* at 1275. In support of this conclusion, the court cited Federal Rule of Evidence 403 which reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

The Urlands' next argument was that the district court improperly charged the jury when it told it to determine whether the Urlands knew or should have known that Bendectin was an operative cause of Julie's birth defect. 822 F.2d at 1275. The Urlands claimed that knowledge that Bendectin caused Julie's birth defect was not sufficient to start the statute running, but that knowledge of the causal connection between the birth defect and Merrell-Dow's conduct was necessary. *Id.* The Third Circuit rejected this argument as well, stating, "[i]n Pennsylvania, the relevant inquiry for purposes of the statute of limitations is whether plaintiffs knew or reasonably should have known of the causal relationship between the injury and conduct causing that injury." *Id.* (citing *Cathcart v. Keene Indus. Insulation*, 324 Pa. Super. 123, 136-37, 471 A.2d 493, 500 (1984)). The court concluded that the Urlands were aware of Merrell-Dow's identity and its connection with the Bendectin, and it found, therefore, that the district court's charge was not in error. *Id.*

The Urlands' final argument was that even if their action was barred by the operation of the Pennsylvania discovery rule, Julie's claim was revived by the fact that the statute of limitations cannot run against a minor. *Id.* at 1276 (citing 42 PA. CONS. STAT. ANN. § 5533(b) (Purdon Supp. 1987)). The court rejected this argument as well, because § 5533(b) was not enacted until after Julie's claim had been time barred and the statute could not revive her claim. *Id.*

51. 822 F.2d at 1277 (Becker, J., dissenting).

52. *Id.* (Becker, J., dissenting) (citations omitted). For a discussion of *Smith*, see *supra* note 37 and accompanying text. For a discussion of *Schaffer*, see *supra* note 40 and accompanying text.

53. 757 F.2d 548 (3d Cir. 1985). For a discussion of *Ciccarelli*, see *supra* note 33.

54. 822 F.2d at 1277 (Becker, J., dissenting). Judge Becker noted the fol-

Judge Becker stated that the critical issue involved in the case was the level of knowledge necessary before the statute of limitations began to run against the Urlands, in view of the alleged fraudulent concealment by the defendant.⁵⁵ He criticized the majority's effort to distinguish *Nesbitt v. Erie Coach Co.*⁵⁶ from the Urlands' case, believing that such a distinction was "too narrow."⁵⁷ He pointed out that in *Nesbitt* the court stated:

If the circumstances are such that a man's eyes should have been open to what is occurring, then the statute begins to run from the time when he could have seen, but if by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises.⁵⁸

Judge Becker concluded that because the case in *Nesbitt* was remanded with directions to make complete findings of fact, the above language represented instructions to the trial court to determine whether the plaintiffs had "actual knowledge" before the limitation period.⁵⁹ Judge Becker believed that these instructions, in the face of objections by the dissent in that case, reflected "a reasoned choice for the higher standard of actual knowledge."⁶⁰

Judge Becker also disagreed with the majority's reliance on *Schwab v. Cornell*⁶¹ in which he believed the Pennsylvania Supreme Court specifically avoided the "should have known" standard when it adopted the "actual knowledge" standard.⁶² Because the plaintiff in *Schwab* had in his possession the title policy which showed taxes exempted from title insurance coverage, Judge Becker concluded that a reasonable diligence standard would have fit the facts.⁶³ However, he pointed out that the

following statement: "[t]he doctrine of estoppel is recognized under Pennsylvania law as a wholly distinct theory for tolling the statute of limitations." *Id.* (Becker, J., dissenting) (quoting *Ciccarelli*, 757 F.2d at 556-57).

55. *Id.* (Becker, J., dissenting).

56. 416 Pa. 89, 204 A.2d 473 (1964). For a discussion of *Nesbitt*, see *supra* note 24.

57. *Urland*, 822 F.2d at 1277-78 (Becker, J., dissenting). Specifically, Judge Becker was referring to the majority's distinction that in the earlier cases there was no factual basis prompting a discussion of the reasonable diligence standard. *Id.* at 1278 (Becker, J., dissenting).

58. *Id.* (Becker, J., dissenting) (quoting *Nesbitt*, 416 Pa. at 96, 204 A.2d at 477 (quoting *Schwab v. Cornell*, 306 Pa. 536, 539, 160 A. 449, 450 (1932)) (emphasis added by Judge Becker).

59. *Id.* (Becker, J., dissenting).

60. *Id.* (Becker, J., dissenting) (footnote omitted).

61. 306 Pa. 536, 160 A. 449 (1932). For a discussion of *Schwab*, see *supra* note 35.

62. 822 F.2d at 1278 (Becker, J., dissenting).

63. *Id.* at 1279 (Becker, J., dissenting).

court in *Schwab* specifically found the proper standard to be actual knowledge.⁶⁴

Judge Becker also argued that the majority placed too much emphasis on those cases which support its view.⁶⁵ He pointed out that *Smith*, one of the principal cases upon which the majority relied, did not even involve fraudulent concealment but rather dealt with fraud as the underlying tort.⁶⁶ In view of this difference, he rejected the majority's reliance on *Smith* stating that, in that case, "the discovery rule was implicated, not the rule for cases of fraudulent estoppel."⁶⁷

Judge Becker's next criticism with respect to the fraudulent concealment issue dealt with the majority's interpretation of the *Deemer* decision.⁶⁸ He noted that in *Deemer*, the Pennsylvania Supreme Court spoke of "reasonable diligence," but that it did so in order to point out "that [the] decedent's fraud relieved the plaintiffs of their obligation to investigate"⁶⁹ He also pointed out that, in that case, the plaintiffs were not chargeable with what an investigation would have disclosed and that, therefore, the case "deal[t] chiefly with the depth of fraud necessary to toll the statute of limitations."⁷⁰ Judge Becker finally concluded that *Deemer* only dealt with fraudulent concealment as a collateral issue and that, to the extent that it did, it applied the "actual knowledge" standard set forth in *Nesbitt* and *Schwab*.⁷¹ Therefore, he noted contrary to the majority's belief, that *Deemer* actually lent support to the Urlands' argument.⁷²

Finally, Judge Becker attacked the majority's decision on policy grounds.⁷³ He pointed out that in a discovery rule case, the plaintiff must use due diligence to determine the cause of his injury, whereas, in a case involving fraudulent concealment, the plaintiff must not only use due diligence to discover the cause of his injury, but must also discover the defendant's fraud.⁷⁴ He argued that by adopting the same standard

64. *Id.* (Becker, J., dissenting) (citing *Schwab*, 306 Pa. at 539-40, 160 A. at 450).

65. *Id.* (Becker, J., dissenting). Judge Becker stated that none of the cases cited by the majority were decided after *Nesbitt* in which the Pennsylvania Supreme Court adopted the actual knowledge standard. *Id.* n.5 (Becker, J., dissenting).

66. *Id.* (Becker, J., dissenting). For a discussion of *Smith*, see *supra* note 37 and accompanying text.

67. *Id.* (Becker, J., dissenting) (footnote omitted).

68. *Id.* at 1279-80 (Becker, J., dissenting). For a discussion of *Deemer*, see *supra* note 39 and accompanying text.

69. *Id.* at 1280 (Becker, J., dissenting).

70. *Id.* (Becker, J., dissenting).

71. *Id.* (Becker, J., dissenting). For a discussion of *Nesbitt*, see *supra* note 24 and accompanying text. For a discussion of *Schwab*, see *supra* note 35 and accompanying text.

72. *Id.* (Becker, J., dissenting).

73. *Id.* at 1280-81 (Becker, J., dissenting).

74. *Id.* at 1281 (Becker, J., dissenting). Judge Becker stated that "Penn-

for fraudulent concealment as for the discovery of the underlying tort, the majority has encouraged fraudulent concealment because the defendant faces no additional penalty for concealing the wrongful act.⁷⁵ As a result, Judge Becker concluded that “[a] higher knowledge standard than ‘should have known’ is necessary both to account for plaintiff’s extra burden of overcoming defendant’s fraud and to discourage fraud.”⁷⁶

Even the most insensitive of jurists ought to be disturbed by the outcome of the *Urland* case. Not only was a young child denied the opportunity to prove the cause of her injury, but the corporate defendant, which was presumed to have fraudulently concealed the cause of her injury, was permitted to avoid liability without defending itself on the merits. Such a result could only be justified by a narrow reading of Pennsylvania law.

A federal court sitting in diversity must apply state law unless the matter before the court concerns the federal constitution or acts of Congress.⁷⁷ In order to apply the state law, however, the district court must first establish what the law is by examining the decisions of the appellate courts of the state.⁷⁸ Presumably, the district court followed that proce-

sylvania appears to have accounted for this extra burden . . . by insisting on a higher threshold of knowledge on the part of the plaintiff before the claim will be barred—the ‘actual knowledge’ standard . . .” *Id.* (Becker, J., dissenting).

75. *Id.* (Becker, J., dissenting).

76. *Id.* (Becker, J., dissenting). Judge Becker stated his belief that under Pennsylvania law the statute only begins to run when the plaintiff “actually knows that she has a reasonable basis for a claim against the defendant.” *Id.*

Judge Becker also disagreed with the majority on two other grounds. First, he pointed out that even if the applicable standard is “knew or should have known,” the inquiry should focus on the post-fraud period. *Id.* He stated that “the existence of effective fraud by the defendant should toll the statute, and the plaintiff should have two years to file suit after learning of the operative cause of injury.” *Id.* He reasoned that because the fraudulent concealment excused the failure to bring suit in the period prior to Dr. O’Dillon’s letter to Mrs. Urland, the instructions given to the jury should have reflected that fact. *Id.* Judge Becker concluded that, because the instructions did not distinguish between the post and pre-fraud periods, the district court committed reversible error. *Id.* at 1281-82. For the text of the jury instruction, see *supra* note 26.

Second, Judge Becker indicated that if the “knew or should have known” standard is to be applied, then it was improper for the trial court to exclude the evidence offered by the Urlands to show the extent of the fraud. *Id.* at 1282 (Becker, J., dissenting). He pointed out that the Urlands had offered evidence which demonstrated not only that they had been misled by Merrell-Dow, but that the FDA had likewise been misled. *Id.* He noted, therefore, that the FDA could not have informed the Urlands of the teratogenicity of Bendectin. *Id.* Thus, Judge Becker concluded that if the applicable standard is “knew or should have known” then the jury needed the evidence of the extent of the fraud to determine what the Urlands with reasonable diligence could have known. *Id.*

77. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[t]here is no federal general common law”).

78. See J. FRIEDENTHAL, M. KANE, A. MILLER, *CIVIL PROCEDURE* § 4.6 (1985); see also C. WRIGHT, A. MILLER, E. COOPER, *19 FEDERAL PRACTICE AND PROCEDURE*

ture at the trial level of the *Urland* case and determined that Pennsylvania would apply the “knew or should have known” standard in a case involving fraudulent concealment. Upon review, the United States Court of Appeals for the Third Circuit affirmed that decision and, thus, Julie Beth Urland’s cause of action was barred by the statute of limitations.⁷⁹

An examination of the principal Pennsylvania cases relied upon by the majority and the dissent indicates that the dissent’s argument favoring the “actual knowledge” standard should have prevailed. Although the conclusions of those cases were not entirely lucid, they embraced the “actual knowledge” standard where fraudulent concealment was involved. The few decisions cited by the majority, where the “knew or should have known” standard was applied, dealt with factually dissimilar situations.

The majority placed primary emphasis on the Pennsylvania Supreme Court’s decision in *Smith v. Blachley*.⁸⁰ In that case, the court stated that, “in general . . . in cases of fraud the statute runs only from discovery, or from when, with reasonable diligence, there ought to have been discovery.”⁸¹ Judge Becker, in his dissent, argued that the majority’s reliance on *Smith* was misplaced.⁸² *Smith* dealt with fraud as the underlying tort, whereas, *Urland* dealt with the fraudulent concealment of the defective nature of the drug.⁸³ While the distinction is an important one, *Smith* is nevertheless relevant to the issue at hand, because it lends support to the argument favoring the “actual knowledge” standard.

Although in *Smith*, the court dealt specifically with fraud as the underlying tort, it addressed a situation analogous to that in *Urland*. The court distinguished the facts of simple fraud, as seen in *Smith*, from a case in which the defendant takes subsequent actions to prevent discovery of that underlying fraud. The court stated: “[b]ut if the wrongdoer adds to his original fraud, affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character by virtue of which he deprives it of the protection of the statute until discovery.”⁸⁴ Thus, when the underlying tort is fraud, and the defendant fraudulently conceals that earlier fraud, the statute will be tolled until the plaintiff has

§ 4507 at 82 (1982); Note, *The Ascertainment of State Law in a Federal Diversity Case*, 40 IND. L.J. 541, 542-43 (1965).

79. *Urland*, 822 F.2d at 1270.

80. *Id.* at 1279 (Becker, J., dissenting). For a discussion of *Smith*, see *supra* note 37 and accompanying text.

81. *Id.* at 1273 (quoting *Smith*, 198 Pa. at 175, 47 A. at 985).

82. *Id.* at 1279 (Becker, J., dissenting).

83. *Id.* (Becker, J., dissenting). Fraud, as opposed to fraudulent concealment, was also the issue in *Rothman v. Fillette*, 503 Pa. 259, 469 A.2d 543 (1983). For a discussion of *Rothman*, see *supra* note 46 and accompanying text.

84. *Smith*, 198 Pa. at 179, 47 A. at 987 (emphasis added).

“actual knowledge” of the underlying fraud. *Urland* presented the court with an analogous situation, though rather than fraud, the underlying tort involved the manufacture and distribution of a defective drug. Since the Pennsylvania Supreme Court adopted the “actual knowledge” standard in *Smith*, it is reasonable to assert that the Third Circuit should have applied the same standard in *Urland*.

The majority also relied on *Deemer v. Weaver*⁸⁵ to support its finding that the “knew or should have known” standard was applicable. However, this reliance appears to have been misplaced since language in *Deemer* indicates that “actual knowledge” is the appropriate standard.⁸⁶ The *Deemer* court adopted the principle set forth in *Schwab v. Cornell*:

If the circumstances are such that a man's eyes should have been open to what is occurring, then the statute begins to run from the time when he could have seen, but if by concealment, through fraud or otherwise, a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises.⁸⁷

Finally, in another case cited by the majority, *Schaffer v. Larzelere*,⁸⁸ the Pennsylvania Supreme Court appeared confused with regard to which standard to apply in cases involving fraudulent concealment. On the one hand the court stated, “[i]f, however, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the limitation of action”⁸⁹ While on the other hand, the *Schaffer* court subsequently stated that, “if it is true . . . that the defendants deliberately concealed the facts incident to the cause of decedent's death and that the plaintiff could not through the use of reasonable diligence have ascertained these facts, this would bar the defendants from invoking the defense of the statute.”⁹⁰ The court's latter statement supports the “knew or should have known” standard; its former statement supports a standard of permanent estoppel which is even more generous to the plaintiff than the “actual knowledge” standard. Therefore, rather than buttressing the majority's position, *Schaffer* appears to further confuse the Pennsylvania law on fraudulent concealment.

The principal case cited by Judge Becker in his dissent was *Nesbitt v.*

85. 324 Pa. 85, 187 A. 215 (1936). For a discussion of *Deemer*, see *supra* note 39 and accompanying text.

86. 822 F.2d at 1280 (Becker, J., dissenting).

87. 324 Pa. at 88-89, 187 A. at 216 (quoting *Schwab v. Cornell*, 306 Pa. 536, 539, 160 A. 449, 450 (1932) (emphasis added).

88. 410 Pa. 402, 189 A.2d 267 (1963). For a discussion of *Schaffer*, see *supra* note 40.

89. *Id.* at 405, 189 A.2d at 269 (citations omitted) (emphasis added).

90. *Id.* at 406, 187 A.2d at 270 (emphasis added).

Erie Coach Co.,⁹¹ in which the plaintiff was injured while a passenger on the defendant's bus.⁹² Thereafter, the defendant's agents misled the plaintiff, causing her to believe that a settlement would be reached as soon as all the facts had been gathered.⁹³ After the statute of limitations had run, the plaintiff became apprised of the situation, and she sought to bring an action to recover for her injuries. The *Nesbitt* court determined that the defendant had "lulled [the plaintiff] into a sense of false security as to the timely institution of her action."⁹⁴ Under such circumstances, the court decided that the principle set forth in *Schwab* requiring "actual knowledge" was applicable.⁹⁵ Thus, the *Nesbitt* court felt that the defendant should pay a price for misleading the plaintiff as to her cause of action—that price being the application of the "actual knowledge" standard. That same principle ought to have been applied in *Urland* where the court presumed that Merrel-Dow had misled the Urlands regarding the probability that Benedictin had played a role in Julie Beth's birth defect. Furthermore, the *Nesbitt* decision should have been accorded greater weight by the *Urland* court since it was a more recent decision than all of the principal cases cited by the majority.⁹⁶

Aside from the above mentioned statement excerpted from the *Schwab* case, which embraces the "actual knowledge" standard in fraudulent concealment cases, the *Schwab* decision also indirectly supports the application of that standard in *Urland*. Because the plaintiff in *Schwab* had in his possession the title policy which stated that taxes were a lien against which the title was not insured, it would have been appropriate for the court, on those facts, to apply the "knew or should have known" standard.⁹⁷ The plaintiff could have discovered the conveyancer's mistake by simply reading the title policy. The Pennsylvania Supreme Court, however, specifically found that "actual knowledge" was the proper standard.⁹⁸

As the discussion above indicates, there is ample precedent in Pennsylvania caselaw for application of the "actual knowledge" standard in fraudulent concealment cases such as *Urland*. Although the principal cases are not entirely in accord on this point, those which appear to support a "knew or should have known" standard are generally older cases or ones involving fraud as opposed to fraudulent concealment. Additionally, public policy clamors for the application of the "actual knowl-

91. 416 Pa. 89, 204 A.2d 473 (1964). For a discussion of *Nesbitt*, see *supra* note 24.

92. *Id.* at 92, 204 A.2d at 474.

93. *Id.* at 93-95, 204 A.2d at 475-76.

94. *Id.* at 97, 204 A.2d at 477.

95. For a statement of that principle, see *supra* note 87 and accompanying text.

96. 822 F.2d at 1279, n.5 (Becker, J., dissenting).

97. *Id.* at 1279 (Becker, J., dissenting).

98. *Id.* (Becker, J., dissenting).

edge" standard against the "knew or should have known" standard.⁹⁹ Although a federal court sitting in diversity is not free to substitute its policy for that of the state,¹⁰⁰ it is worth noting that application of the "knew or should have known" standard carries with it a rather undesirable effect. Because a defendant is not faced with an additional penalty for engaging in fraudulent concealment, he is encouraged to do so in an attempt to avoid liability.¹⁰¹ Consequently, the extra burden created by the defendant's act of fraudulent concealment falls upon the plaintiff. Not only must the plaintiff discover the underlying tort, but he also must uncover the defendant's efforts to conceal that tort without the benefit of the more equitable "actual knowledge" standard.¹⁰² The application of the "actual knowledge" standard would avoid those evils by shifting the burden of engaging in fraudulent concealment to the defendant and thereby discouraging him from engaging in it.¹⁰³

In view of the case law favoring the application of the "actual knowledge" standard, it would appear that if *Urland* had arisen in the Pennsylvania state courts, the "actual knowledge" standard would have been applied. This is particularly true in light of the strong public policy of discouraging parties from engaging in fraudulent concealment. Although Pennsylvania may not share this policy concern, there is nothing in the cases indicating this to be true. In addition, the cases examined have not revealed any inconsistent policy concern. Therefore, even though a federal court is not free to substitute its policy for that of the state's, the *Urland* court may have chosen the more appropriate standard if it had reviewed the Pennsylvania cases in light of the above policy. In any event, if the court had analyzed the caselaw with closer scrutiny, it would have concluded that "actual knowledge" is the appropriate standard in cases of fraudulent concealment. Had this conclusion been reached, not only would justice have been done between Merrell-Dow and Julie Beth Urland, but a sounder policy would have prevailed.

Michael F. Brown

99. *Id.* at 1280 (Becker, J., dissenting).

100. *Erie R.R. Co. v. Tompkins*, 304 U.S. 69, 78 (1938). The *Erie* court stated that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state." *Id.*

101. 822 F.2d at 1281 (Becker, J., dissenting).

102. *Id.* at 1280 (Becker, J., dissenting).

103. *Id.* at 1281 (Becker, J., dissenting).