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Kensinger v. Abbott Laboratores: DES and the Statute of Limitations

John M. Felder

Kensinger v. Abbott Laboratores: DES and the Statute of Limitations

In *Kensinger v. Abbott Laboratories*,[1] the California Court of Appeal for the First District considered the question of when the statute of limitations begins to run in products liability cases involving diethylstilbestrol. Diethylstilbestrol, commonly known as DES, is a synthetic estrogen that between 1947 and 1971 was prescribed to pregnant women to prevent pregnancy complications.[2] The trial court in *Kensinger* granted a summary judgment in favor of the defendant manufacturers based upon the applicable one year statute of limitations for personal injury actions and application of the "rule of discovery."[3] The rule of discovery suspends the running of the statute of limitations until the plaintiff is aware of both the harm suffered and the cause of the injury.[4] In reversing the lower court, the court of appeal held that the statute of limitations does not begin to run until the plaintiff discovers, or with reasonable diligence should have discovered, wrongful conduct by the manufacturer.[5] In reaching this conclusion, the court has expanded the rule of discovery involved in DES cases.

Part I of this note summarizes the facts of *Kensinger* and reviews the opinion of the Court of Appeal for the First District.[6] Part II examines the legal background of statutes of limitations.[7] Finally, Part III discusses the legal ramifications of the opinion in *Kensinger*.[8]

I. The Case

A. The Facts

DES is a synthetic estrogen that was prescribed to women to prevent miscarriages and other pregnancy complications.[9] As a result of

1. 171 Cal. App. 3d 376, 217 Cal. Rptr. 313 (1985), *modified* 172 Cal. App. 3d 210b (1985).
2. Note, *Delayed Manifestation Injuries: The Statute of Limitations as a Bar to DES Suits*, 11 Colum. Hum. Rts. L. Rev. 127, 127 (1979/1980) [hereinafter cited as Note, *Delayed Manifestation Injuries*]; Scott, *Products Liability*, 1982 Ann. Surv. Am. L. 709, 709 (1982); Note, *Statutes of Limitations: The Special Problem of DES Suits*, 7 Am. J.L. & Med. 91, 91-92 (1981) [hereinafter cited as Note, *The Special Problem*].
3. *See Kensinger*, 171 Cal. App. 3d at 380, 217 Cal. Rptr. at 314-15.
4. *Id.* at 383, 217 Cal. Rptr. at 316; Leaf v. City of San Mateo, 104 Cal. App. 3d 398, 407, 163 Cal. Rptr. 711, 716 (1980).
5. *Kensinger*, 171 Cal. App. 3d at 386, 217 Cal. Rptr. at 319.
6. *See infra* notes 9-54 and accompanying text.
7. *See infra* notes 55-91 and accompanying text.
8. *See infra* notes 92-119 and accompanying text.
9. Note, *Delayed Manifestation Injuries*, *supra* note 2, at 127; Scott, *supra* note 2, at

the high incidence of cancer found among daughters of women who used DES while pregnant, manufacturers ceased to market DES for pregnancy complications after 1971.[10] Georgiann Kensinger was exposed to DES *in utero*.[11] In August 1974, she was diagnosed as having clear cell adenocarcinoma of the vagina and cervix, a cancer linked to DES.[12] Subsequently, Kensinger underwent surgery and was given a radium implant. She was informed by doctors, at the time of surgery, that her cancer was caused by her exposure to DES *in utero*.[13]

Plaintiff reached the age of majority in 1977 and by this time had overheard a conversation between her parents that Eli Lilly and Company was the probable manufacturer of the DES taken by her mother.[14] In 1977 Kensinger also believed that both the discomfort she felt during sexual relations and her inability to bear children were related to the DES and her subsequent surgery.[15] When Kensinger's father consulted an attorney in 1977, however, he was informed that his daughter could not bring a successful lawsuit against the manufacturer.[16]

In 1980, however, Kensinger did file suit after learning of *Sindell v. Abbott Laboratories*,[17] a successful action against DES manufacturers in which the plaintiff recovered without identifying a specific manufacturer.[18] Kensinger also claimed that prior to 1980 she was unaware of tortious conduct on the part of DES manufacturers.[19] In her suit against several manufacturers, Kensinger set forth causes of action for negligence, strict products liability, breach of implied

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709; Note, *The Special Problem, supra* note 2, at 91-92. The facts are taken from the opinion of the court of appeal.

10. *See Kensinger*, 171 Cal. App. 3d at 380, 217 Cal. Rptr. at 315, *modified* 172 Cal. App. 3d 210b (1985). *See also* Note, *The Special Problem, supra* note 2, at 91-94.

11. *Kensinger*, 171 Cal. App. 3d at 380, 217 Cal. Rptr. at 315.

12. *Id.* Clear cell adenocarcinoma of the vagina is extremely rare. Before clear cell adenocarcinoma developed in daughters of DES users, the cancer had never been diagnosed in women under the age of 30. Note, *The Special Problem, supra* note 2, at 93 n.14; Note, *Delayed Manifestation Injuries, supra* note 2, at 135. The increase of this rare cancer in teenage girls led to a statistical link between the use of DES and cancer. Note, *Delayed Manifestation Injuries, supra* note 2, at 128 n.4. Besides adenocarcinoma, DES has also been linked to dysplasia, adenosis, cervical erosion, and cervical ridges. *See* Biebel, *DES Litigation and the Problem of Causation*, 51 INS. COUNS. J. 223, 225 (1984).

13. *Kensinger*, 171 Cal. App. 3d at 380, 217 Cal. Rptr. at 315.

14. *Id.* at 380-81, 217 Cal. Rptr. at 315.

15. *Id.*

16. *Id.* at 381, 217 Cal. Rptr. at 315.

17. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980).

18. *See Kensinger*, 171 Cal. App. 3d at 381, 382, 217 Cal. Rptr. at 315, 316. *See Sindell*, 26 Cal. 3d at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46.

19. *Kensinger*, 171 Cal. App. 3d at 382, 217 Cal. Rptr. at 316. Failure to adequately test the effects of DES upon the offspring of DES users and failure to adequately warn of the known risks of DES, constituted the tortious conduct by DES manufacturers. *Id.*

warranty, breach of express warranty, and fraud.[20] After a full hearing on defendant's motion for summary judgment, the trial court granted the motion, concluding that the statute of limitations had run on Kensinger's claim.[21]

B. The Opinion

The only question before the court of appeal was whether or not the statute of limitations barred the cause of action as a matter of law.[22] For personal injury actions the statute of limitations period is one year.[23] The statute of limitations begins to run when all essential elements of the cause of action have taken place.[24] Generally, the limitations period commences even though the plaintiff is unaware of the existence of the action or the identity of the responsible party.[25]

In some situations, however, the rule of discovery is applied preventing the commencement of the limitations period until the plaintiff has discovered, or should have discovered through reasonable diligence, the injury and the cause of the injury.[26] This rule is applied only in cases when a plaintiff suffers a harm "without perceptible trauma" and is "blamelessly ignorant" of the cause of injury.[27] In *Kensinger* both parties agreed that the rule of discovery applied to the case.[28]

Kensinger claimed that the limitations period did not commence until 1980 when she learned of the California Supreme Court decision in *Sindell*.[29] She further claimed that until 1980 she did not know

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20. *Id.* at 379, 217 Cal. Rptr. at 314.

21. *Id.* at 380, 217 Cal. Rptr. at 315.

22. *See id.* at 381-82, 217 Cal. Rptr. at 315-16.

23. CAL. CIV. PROC. CODE §340. The code section states: "Within one year . . . (3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another. . . ." *Id.*

24. *Kensinger*, 171 Cal. App. 3d at 381, 217 Cal. Rptr. at 315; Leaf v. City of San Mateo, 104 Cal. App. 3d 398, 407, 163 Cal. Rptr. 711, 716 (1980); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 187, 491 P.2d 421, 428, 98 Cal. Rptr. 837, 844 (1971).

25. *Kensinger*, 171 Cal. App. 3d at 381, 217 Cal. Rptr. at 316; *Neel*, 6 Cal. 3d at 187, 491 P.2d at 428, 98 Cal. Rptr. at 844; Howe v. Pioneer Mfg. Co., 262 Cal. App. 2d 330, 340, 68 Cal. Rptr. 617, 623 (1968).

26. *Kensinger*, 171 Cal. App. 3d at 381, 217 Cal. Rptr. at 316; *Leaf*, 104 Cal. App. 3d at 407, 163 Cal. Rptr. at 716.

27. *Kensinger*, 171 Cal. App. 3d at 381, 217 Cal. Rptr. at 316; Frederick v. Cabio Pharmaceuticals, 89 Cal. App. 3d 49, 58-59, 152 Cal. Rptr. 292, 297-98 (1979).

28. *Kensinger*, 171 Cal. App. 3d at 382, 217 Cal. Rptr. at 316.

29. *Id. Sindell* allowed a cause of action against several manufacturers of DES even though the plaintiff did not know which manufacturer produced the DES that caused her injury. The court in *Sindell* shifted the burden of proof, requiring the defendants to show that they did not produce the harmful DES. A failure on the part of the defendants to meet this burden

of any tortious conduct on the part of the defendants.[30] The defendants claimed that the limitations period began in 1977 when Kensinger reached the age of majority.[31] The defendants contended that by this time Kensinger had reached the age of majority and was aware of the injury and the negligent cause.[32]

After outlining the contentions of the parties, the court of appeal next examined the rule of discovery in California. The court noted that the rule is objective in nature because the limitations period will run even though a plaintiff has no actual knowledge of the cause or the injury. Possession of presumptive knowledge of injury and the cause of the injury will begin the limitations period.[33] A plaintiff will have presumptive knowledge when the plaintiff has notice or information of circumstances which would put a reasonable person on inquiry, or when the plaintiff has an opportunity to obtain knowledge from sources available to the plaintiff.[34]

The justices noted that the statute of limitations may be tolled only for a belated discovery of *facts*, not for a belated discovery of a *legal theory*.[35] The court acknowledged, however, that the distinction between legal theories and operative facts is not easy to draw.[36] In products liability cases for example, a plaintiff may be aware of the cause and the injury and not have any knowledge of wrongdoing by a particular defendant.[37] The court felt that barring a plaintiff's cause of action when the plaintiff knew of the cause and the injury but did not know of wrongdoing on the part of a defendant would be unreasonable.[38] The court further said that Kensinger had stated that

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subjects them to liability according to their respective market shares. *See Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

30. *Kensinger*, 171 Cal. App. 3d at 382, 217 Cal. Rptr. at 316.

31. *Id.* The age of majority in California is 18. CAL. CIV. CODE §25. The statute of limitations is tolled if the cause of action accrued before the injured person reached the age of majority. CAL. CIV. PROC. CODE §352.

32. *Kensinger*, 171 Cal. App. 3d at 382, 217 Cal. Rptr. at 316.

33. *See id.* at 383, 217 Cal. Rptr. at 317. The court in *Kensinger* quoted Sanchez v. South Hoover Hosp., 18 Cal. 3d 93, 553 P.2d 1129, 132 Cal. Rptr. 657 (1976), which stated: "[W]hen the plaintiff has notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation . . . the statute commences to run." *Kensinger*, 171 Cal. App. 3d at 383, 217 Cal. Rptr. at 317 (citing *Sanchez*, 18 Cal. 3d at 101, 553 P.2d at 1135, 132 Cal. Rptr. at 663) (emphasis in original).

34. Call v. Kezirian, 135 Cal. App. 3d 189, 195-96, 185 Cal. Rptr. 103, 107 (1982); McGee v. Weinberg, 97 Cal. App. 3d 798, 803, 159 Cal. Rptr. 86, 89-90 (1979).

35. *Kensinger*, 171 Cal. App. 3d at 383-84, 217 Cal. Rptr. at 317; *McGee*, 97 Cal. App. 3d at 803, 159 Cal. Rptr. at 89.

36. *Kensinger*, 171 Cal. App. 3d at 384, 217 Cal. Rptr. at 317.

37. *Id.* The court stated: "Knowledge of the occurence and origin of harm cannot necessarily be equated with knowledge of the factual basis for a legal remedy." *Id.*

38. *See id.* at 384, 217 Cal. Rptr. at 317-18. The court noted that the reason for the

she was unaware of a factual basis for a remedy until 1980, which was about three years later than the time she became aware of her injury and the cause of that injury.[39] The court found that Kensinger's contention that she did not know of wrongdoing on the part of the manufacturer raised a question of fact for the jury to decide.[40] The court found, therefore, that the summary judgment was inappropriate because the record was devoid of evidence that established that Kensinger should have been aware of wrongful conduct by the manufacturer *as a matter of law*.[41]

To reinforce the decision the court examined the trend in cases outside of California, finding the Rhode Island case of *Anthony v. Abbott Laboratories*[42] especially persuasive.[43] *Anthony* was a DES case in which the Rhode Island Supreme Court found that the statute of limitations did not run until the plaintiff had discovered, or should have discovered, wrongdoing on the part of the manufacturer.[44] The *Anthony* court noted that one purpose of statutes of limitations was to prevent stale claims. The court reasoned that this purpose would not be furthered when a plaintiff has not unreasonably delayed in

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statute of limitations was to block claims that had become stale due to a plaintiff's neglect or inattentiveness. When the plaintiff is not aware that rights have been violated, however, the application of the statute of limitations would be unjust. *Id.*

39. *See id.* at 384, 217 Cal. Rptr. at 318. The decision may seem initially to rest partly on the timing of the decision in *Sindell* and partly on plaintiff's discovery of wrongdoing by the manufacturer. The court, however, noted that prior to *Sindell* the statute of limitations was operative and that *Sindell* only represented a policy statement by the California Supreme Court easing the way for DES victims. This suggests that 1980 is the applicable time of commencement of the statute of limitations because Kensinger claimed that she heard of wrongdoing by the manufacturer in 1980, not because of the decision in *Sindell. See id.* at 385 n.2, 217 Cal. Rptr. at 318 n.2.

40. *Id.* at 384, 217 Cal. Rptr. at 318.

41. *Id.* at 386, 217 Cal. Rptr. at 319.

42. 490 A.2d 43 (R.I. 1985).

43. *Id.* at 384-85, 217 Cal. Rptr. at 318. The court stated: "We perceive in the recent case law on the subject of drug product liability torts an emerging trend to commence the period of limitations only when a plaintiff knows or should have known of some *wrongdoing* by a drug manufacturer." *Id.* (emphasis in original). The court cited Goodman v. Mead Johnson & Co., 534 F.2d 566 (3rd Cir. 1976); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970); Dawson v. Eli Lilly & Co., 543 F. Supp. 1330 (D.C. Cir. 1982); Anthony v. Abbott Laboratories, 490 A.2d 43 (R.I. 1985); and Raymond v. Eli Lilly & Co., 371 A.2d 170 (N.H. 1977). *Kensinger*, 171 Cal. App. 3d at 385, 217 Cal. Rptr. at 318.

44. *Anthony*, 490 A.2d at 46. The court stated:

> [I]n a drug products-liability action where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered the wrongful conduct of the manufacturer.

Id.

bringing an action.[45] The court noted that a plaintiff who has suffered an adverse effect due to a particular drug may not have any reason to know that there was wrongful conduct on the part of a particular manufacturer.[46]

The Rhode Island Supreme Court also found that extending the rule of discovery would not unduly prejudice manufacturers.[47] The court said that part of the reasoning behind statutes of limitations was to prevent unfairness to defendants who have to defend their conduct with "faded memories."[48] In drug product liability cases the evidence is documentary in nature so that a delay in presentation of evidence would not be a major concern.[49] The *Anthony* court concluded by finding that adoption of the expanded rule of discovery would motivate manufacturers to improve testing, marketing, and public disclosure of potential danger.[50]

In *Kensinger*, the California Court of Appeal for the First District adopted the reasoning of *Anthony*.[51] The court felt that the reasoning of *Anthony* paralleled the reasoning of the California Supreme Court in *Sindell*.[52] The court in *Sindell* found that the negligent defendant, rather than the innocent plaintiff, should bear the costs of injury because defendants are better able to bear the costs of injury. The *Sindell* court also reasoned that the manufacturer is in the best position to guard against defects, and that the manufacturer is in the better position to warn against defects.[53] The *Kensinger* court followed the reasoning of *Anthony* and *Sindell* and concluded that the statute of limitations does not begin to run in DES cases until "plaintiff discovers or with reasonable diligence should have discovered the drug manufacturer's wrongful conduct."[54]

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45. *Id.* at 47.

46. *Id.* The court did acknowledge that there will be occasions when an adverse reaction to a drug will alert any reasonable person of wrongful conduct. This, however, would be a question of fact. *Id.* at 47 n.2.

47. *Id.* at 47.

48. *Id.*

49. *Id.* The court reasoned that in product liability drug cases the unfair prejudice due to faded memories would fall more on plaintiffs than defendants. The court further noted that the plaintiff still has the burden of proof in these cases and lost evidence will make meeting the burden of proof that much harder. *Id.* at 47-48.

50. *Id.* at 48.

51. *Kensinger*, 171 Cal. App. 3d at 385, 217 Cal. Rptr. at 318.

52. *Id.*

53. *Sindell*, 26 Cal. 3d at 610-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

54. *Kensinger*, 171 Cal. App. 3d at 386, 217 Cal. Rptr. at 319.

II. LEGAL BACKGROUND

A. Statutes of Limitations

Statutes of limitations are enacted to prevent assertion of a claim after varying periods of time depending on the particular cause of action.[55] Several reasons have been put forward to justify creation and application of statutes of limitations. First, statutes of limitations insure fairness to defendants by relieving them of liability when a plaintiff has knowingly and unreasonably delayed action on a claim.[56] Second, statutes of limitations insure prompt assertion of claims, reducing the chance that evidence will be lost.[57] Third, statutes of limitations prohibit assertion of stale claims which would otherwise result in nearly unlimited liability in the commercial world.[58]

Early California cases held that statutes of limitations began to run at the time the act causing harm was committed, even though the harm was not apparent until much later.[59] The courts, however, were willing to toll the statute of limitations when a defendant had intentionally misled a plaintiff.[60] Overly strict application of statutes of limitations has been attacked by both judges and commentators as harsh.[61] The California Court of Appeal for the First District stated: "It is not the policy of the law to unjustly deprive one of his remedy."[62] In contrast to this view, other writers have suggested that

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55. *See, e.g.*, CAL. CIV. PROC. CODE §§340 (one year statute of limitations for causes of action including personal injury and negligence); 340.5 (three year statute of limitations for medical malpractice with a one year rule of discovery); 340.6 (four year statue of limitations for legal malpractice with a one year rule of discovery).

56. Note, *The Special Problem, supra* note 2, at 99.

57. *Id.* at 99-100.

58. *Id.* at 100.

59. *See, e.g.*, Gum v. Allen, 119 Cal. App. 293, 295, 6 P.2d 311, 312 (1931) (this case was overruled in Huysman v. Kirsch, 6 Cal. 2d 302, 311, 57 P.2d 908, 912 (1936)). Plaintiff filed a negligence cause of action against a doctor who inadvertently left a gauze patch in plaintiff during surgery. The California Court of Appeal for the Second District held that the action was barred by the statute of limitations because the original operation occured more than one year before the filing of the lawsuit even though plaintiff was not aware of the gauze until a second surgery one month prior to the legal action. *Gum*, 119 Cal. App. at 295, 6 P.2d at 312.

60. *Id.* at 296, 6 P.2d at 312-13. *See* 3 B. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Actions* §414 (3d ed. 1985).

61. *See* Leaf v. City of San Mateo, 104 Cal. App. 3d 398, 406, 163 Cal. Rptr. 711, 715 (1980); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 192, 491 P.2d 421, 431, 98 Cal. Rptr. 837, 847 (1971); Note, *The Special Problem, supra* note 2, at 96; 3 B. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Actions* §414 (3d ed. 1985). *But see* McGee v. Weinberg, 97 Cal. App. 3d 798, 804, 159 Cal. Rptr. 86, 90 (1979). The California Court of Appeal for the Second District stated: "Statutes of limitations are not disfavored in the law. To the contrary they are favored in the law because they promote desirable social ends and give security and stability to human affairs." *Id.*

62. Howe v. Pioneer Mfg. Co., 262 Cal. App. 2d 330, 346, 68 Cal. Rptr. 617, 627 (1968).

some limitation on recovery must be present to achieve practicality and justice.[63]

B. Rule of Discovery

The rule of discovery is a judicial creation intended to reduce the impact of strict application of statutes of limitations.[64] If a plaintiff suffers an injury "without perceptible trauma" and is "blamelessly ignorant" of the cause of the injury, the statute of limitations is tolled.[65] When these factors are present the rule of discovery provides that the statute of limitations is tolled until the plaintiff knows or through reasonable diligence should know of an injury and the cause of that injury.[66]

In *Marsh v. Industrial Accident Commission*,[67] the California Supreme Court found that when an injury is a progressive disease, the statute of limitations does not run until the disease culminates in disability.[68] *Marsh* was extended by the California Supreme Court in *Huysman v. Kirsch*[69] to include actions for medical malpractice.[70] The *Huysman* court concluded that the statute of limitations should not run while a plaintiff is ignorant of the cause of the injury and while the plaintiff could not through reasonable diligence and care ascertain the cause.[71]

Since *Huysman*, the rule of discovery has been extended to several more causes of action, including products liability.[72] In addition to products liability, the rule of discovery has been extended to actions

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63. Dworkin, *Product Liability of the 1980s: "Repose is not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33, 36 (1982). The author stated: "Stability and predictability are considered crucial in the business context if commerce is to thrive." *Id.* at 37-38. *See* Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1651 (1981) (noting that excessive liability on manufacturers will inhibit the production that led to a greater standard of living for America).

64. *Leaf*, 104 Cal. App. 3d at 406-07, 163 Cal. Rptr. at 715; Note, *The Special Problem*, *supra* note 2, at 96.

65. Pereira v. Dow Chemical Co., 129 Cal. App. 3d 865, 873-74, 181 Cal. Rptr. 364, 369 (1982); *Leaf*, 104 Cal. App. 3d at 408, 163 Cal. Rptr. at 716; Frederick v. Cabio Pharmaceuticals, 89 Cal. App. 3d 49, 58-59, 152 Cal. Rptr. 292, 297-98 (1979); G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218, 220 (1975).

66. *Leaf*, 104 Cal. App. 3d at 407, 163 Cal. Rptr. at 716; *G.D. Searle & Co.*, 49 Cal. App. 3d at 25, 122 Cal. Rptr. at 220.

67. 217 Cal. 338, 18 P.2d 933 (1933).

68. *Id.* at 351, 18 P.2d at 938. The problem involved in *Marsh* was pneumonoconiosis silicosis which was caused by exposure to silica dust over a long period of time. *Id.* at 340, 18 P.2d at 934. *See* 3 B. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Actions* §410 (3d ed. 1985).

69. 6 Cal. 2d 302, 57 P.2d 908 (1936).

70. *Id.* at 312-13, 57 P.2d at 913.

71. *Id.* at 312, 57 P.2d at 913.

72. *G.D. Searle & Co.*, 49 Cal. App. 3d at 25-26, 122 Cal. Rptr. at 220.

against accountants,[73] stockbrokers,[74] title companies,[75] insurance agents,[76] and attorneys.[77] The legislature has applied the rule of discovery to medical malpractice,[78] legal malpractice,[79] and in cases involving exposure to asbestos.[80] While the legislature has codified the rule of discovery for some causes of action, the legislature has not modified or adopted the judicially created rule of discovery for products liability.[81]

C. Expanding the Rule of Discovery

Prior to *Kensinger*, the rule of discovery in California drug products liability cases had only two elements. A plaintiff had to know, or with reasonable diligence be able to discover, the injury and the cause of that injury.[82] This rule has been stated as delaying the accrual of the cause of action until the plaintiff knows, or should know, of *all essential facts* of the cause of action.[83]

In *Leaf v. City of San Mateo*,[84] the California Court of Appeal for the First District suggested addition of a third tier to the rule of discovery in an inverse condemnation case against a city for defective drainage systems.[85] The court found that the cause of action accrued from the time when the plaintiffs became aware, or should have become aware, of the negligent conduct of the city as the cause of the damage.[86]

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73. Moonie v. Lynch, 256 Cal. App. 2d 361, 365-66, 64 Cal. Rptr. 55, 58 (1967).
74. Twomey v. Mitchem, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 725-27, 69 Cal. Rptr. 222, 246-47 (1968).
75. Cook v. Redwood Empire Title Co., 275 Cal. App. 2d 452, 454-55, 79 Cal. Rptr. 888, 889-90 (1969).
76. United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 597-98, 463 P.2d 770, 776-77, 83 Cal. Rptr. 418, 424-25 (1970).
77. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 190, 491 P.2d 421, 430, 98 Cal. Rptr. 837, 846 (1971).
78. CAL. CIV. PROC. CODE §340.5.
79. *Id.* §340.6.
80. *Id.* §340.2.
81. *Compare* CAL. CIV. PROC. CODE §340 (statute of limitations for products liability actions without a rule of discovery) *with* CAL. CIV. PROC. CODE §340.5 (statute of limitations for medical malpractice including a rule of discovery).
82. *Pereira*, 129 Cal. App. 3d at 873, 181 Cal. Rptr at 369; *G.D. Searle & Co.*, 49 Cal. App. 3d at 25, 122 Cal. Rptr. at 220 (1975).
83. *Pereira*, 129 Cal. App. 3d at 873, 181 Cal. Rptr at 369; *Neel*, 6 Cal. 3d at 190, 491 P.2d at 430, 98 Cal. Rptr. at 846.
84. 104 Cal. App. 3d 398, 163 Cal. Rptr. 711 (1980).
85. *Id.* at 408, 163 Cal. Rptr. at 716.
86. *Id.* at 408, 163 Cal. Rptr. at 716.

Relying mainly on *Anthony v. Abbott Laboratories*,[87] the court in *Kensinger* added a third tier to the rule of discovery for use in DES cases, finding that the statute of limitations is tolled until the plaintiff discovers, or should have have discovered, wrongful conduct.[88] The *Kensinger* court adopted the reasoning of *Anthony* that delaying accrual of a cause of action until a plaintiff discovers or should have discovered wrongdoing on the part of a manufacturer will not undermine the purposes of statutes of limitations.[89] Further, the court noted that the adoption of this rule would encourage manufacturers to test their products thoroughly and to warn the public concerning the potential dangers of their products.[90] This outcome was consistent with the reasoning of the California Supreme Court in *Sindell*, that a manufacturer was better able to bear the costs of injury, to discover possible defects in a product, and to guard against those defects causing harm.[91]

III. Legal Ramifications

The total number of DES lawsuits could be staggering. Estimates have indicated that more than 500,000 women in the United States are DES daughters.[92] While only a small percentage of these women have contracted cancer because of DES,[93] the final number of DES cancer victims presently remains unknown.[94] One estimate, however, places the potential monetary damages to DES daughters in the billions of dollars.[95]

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87. 490 A.2d 43 (R.I. 1985). *See supra* notes 41-49 and accompanying text.
88. *Kensinger*, 171 Cal. App. 3d at 384-86, 217 Cal. Rptr. at 318-19.
89. *Id.* at 385-86, 217 Cal. Rptr. at 318-19.
90. *Id.* at 385, 217 Cal. Rptr. at 318.
91. *Id.*
92. Note, *The Special Problem, supra* note 2, at 94. *See* Biebel, *supra* note 12, at 225 (estimating that between 1.5 and 3 million offspring were born to DES mothers); Note, *Tort Law—Emotional Distress and Wrongful Life Claims in DES Litigation*, 6 W. New Eng. L. Rev. 1037, 1037 (1984) (estimating that as many as 3 million women took DES while pregnant).
93. Note, *The Special Problem, supra* note 2, at 94. Estimates of the number of DES daughters that will develop adenocarcinoma range from 1 in 1,000 to 4 in 1,000. *See* Biebel, *supra* note 12, at 225.
94. *Id.*; Note, *Delayed Manifestation Injuries, supra* note 2, at 128. The injuries caused by DES are not manifested for at least 10 to 12 years. *Sindell*, 26 Cal. 3d at 594, 607 P.2d at 925, 163 Cal. Rptr. at 133. DES daughters generally develop cancer from age 7 to 29 with the peak at age 19 and a moderate frequency into the twenties. Biebel, *supra* note 12, at 225. As DES was prescribed through 1971 for pregnancy complications, a probability exists of increased numbers of DES cancer victims in the years ahead. *See* Note, *Delayed Manifestation Injuries, supra* note 2, at 128-30. If the number of DES daughters ranges from .5 to 3 million women, and the frequency of cancer is between .001 and .004, then the number of potential DES cancer victims ranges from 500 to 12,000.
95. Fischer, *supra* note 62, at 1624.

The decision in *Kensinger* applies specifically to DES lawsuits.[96] Since the statute of limitations defense is raised by an increasing number of DES manufacturers,[97] *Kensinger* clearly will have an impact on DES cases. The addition of a third tier to the rule of discovery enables DES daughters who eventually discover the existence of DES related cancer to overcome the potential bar of the statute of limitations by pleading and proving that they were justifiably unaware of wrongful conduct by the manufacturer.[98]

The ultimate impact of *Kensinger* in DES cases, however, is going to be greatest on cases already in the judicial system. The test applied in *Kensinger* is not *whether the plaintiff knew* of wrongdoing, but *whether the plaintiff should have known.*[99] If information is available to plaintiffs that DES was administered to pregnant women because of negligent actions on the part of manufacturers, and if manufacturers are able to show that the information was available, then the statute of limitations may not be tolled.[100] The more time that passes and the greater the dissemination of information, the greater the likelihood that manufacturers will meet this burden, and the greater the likelihood that plaintiffs will not be able to toll the statute of limitations.[101]

The decision in *Kensinger* applies expressly to DES cases, but whether the third tier of the rule of discovery applies beyond DES cases is uncertain. Several aspects of the DES cases, however, are similar to other factual situations. The most closely analogous situation would be product liability actions based on defects of other drugs. Other drugs present potentially the same possibility of delayed manifestation as DES.[102] Additionally, market share liability under

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96. *Kensinger*, 171 Cal. App. 3d at 386, 217 Cal. Rptr. at 319.

97. *See* Note, *The Special Problem, supra* note 2, at 95.

98. *See Kensinger*, 171 Cal. App. 3d at 386, 217 Cal. Rptr. at 319. The court in *Kensinger* interpreted *Sindell* as a policy statement by the California Supreme Court that the procedural obstacles to cases involving DES should be reduced. *Id.* at 385 n.2, 217 Cal. Rptr. at 318 n.2.

99. *Id.* at 386, 217 Cal. Rptr. at 319.

100. *See supra* note 34 and accompanying text. The objective portion of the discovery rule is not meant to create an insurmountable burden to manufacturers. Rather, "[t]he phrase 'should have discovered' is meant to bar non-diligent plaintiffs who ignore symptoms or do not seek medical advise in time to file suit against possible wrongdoers." Comment, *Statutes of Limitations in Occupational Disease Cases: Is* Locke v. Johns-Manvile *A Viable Alternative to the Discovery Rule?*, 39 WASH. & LEE L. REV. 263, 281 (1982).

101. DES cases have been widely publicized over the last several years in major newspapers. *See, e.g.*, N.Y. Times, Dec. 9, 1984, §A, at 61, col. 1 (article about New Jersey Supreme Court reviving a suit involving DES); *Id.*, Oct. 16, 1984, §D, at 2, col. 1 (article about apportioning of liability in DES suits); *Id.*, Feb. 3, 1984, §C, at 13, col. 1 (article about Michigan Supreme Court allowing a suit against DES manufacturers).

102. Note, *The Special Problem, supra* note 2, at 100 (noting that delayed manifestation

Sindell may apply to other drug manufacturers.[103] For these cases, when a plaintiff suffers an injury without "perceptible trauma" and is "blamelessly ignorant" of the cause of the injury, the statute of limitations should not run until the plaintiff discovers or should have discovered wrongdoing on the part of the manufacturer.

Commentators have suggested that, as applied to drug products liability, the rule of discovery does not conflict with the underlying purposes of the statutes of limitations.[104] First, a plaintiff suffering from adverse reactions to drugs has not unreasonably delayed the assertion of the action. Rather, the suit is delayed because the onset of the injury was delayed.[105] Second, the evidence used in a drug products liability case is usually documentary in nature so that the potential for lost evidence is less than might be possible with other causes of action.[106] Third, the disruption of business due to delayed causes of action is outweighed by the injustice of depriving an injured plaintiff of a remedy when the delay is due to the drug, not the plaintiff's inattentiveness.[107] In drug products liability cases especially, the drug companies are probably aware that the adverse effects of their drugs will not be apparent for years and they should be able to plan for these delayed claims.[108] In contrast to this view is the notion that increasing liability for drug manufacturers will adversely impact the production of drugs.[109] While safe drugs are a necessary goal, research and innovation also are important.[110]

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injuries may become more common as science develops further); Comment, *DES: Alternative Theories of Liability,* 59 U. DET. J. URB. L. 387, 411 (1982) (finding that as science, technology, and medicine advance so does the likelihood of injuries).

103. *See Sindell,* 26 Cal. 3d at 610-13, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. The California Supreme Court in *Sindell* did not limit market share liability to DES but instead made note of the increasing complexity of modern society and the need for new methods to deal with problems caused by modern society for which the common law did not provide answers. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. *Sindell* could be applied to products such as cigarettes, food additives, generic drugs, abestos, pesticides, aluminum wire, industrial waste, and products causing enviromental pollution. Fischer, *supra* note 62, at 1652.

104. Note, *The Special Problem, supra* note 2, at 100. *See supra* notes 55-58 and accompanying text.

105. Note, *The Special Problem, supra* note 2, at 100.

106. *Id.*

107. *Id.*

108. *Id.* at 100 n.57.

109. *See* Fern & Sichel, *Evolving Tort Liability Theories; Are They Taking the Pharmaceutical Industry into an Era of Absolute Liability?,* 29 ST. LOUIS U.L.J. 763, 783 (1985). The authors state that: "Strict liability would be a disincentive to the development, production, and distribution of vital new medicines, and would adversely affect the availability of existing medicines. . . ." *Id.* Furthermore, if strict liability is applied to the pharmaceutical industry, then the ultimate loser will be the general public. *Id.* at 785.

110. *See* Fischer, *supra* note 62, at 1651-52 (finding that a balance must be struck between producing safe products and inhibiting production).

Drug cases are not the only example of delayed manifestation injuries involving products liability.[111] Injuries attributable to other products also may cause delayed manifestation injuries "without perceptible trauma" when a plaintiff is "blamelessly ignorant" of the cause of the injury. Additionally, the market share liability formulated in *Sindell* could apply well beyond drug cases.[112] In these situations, the rationale of *Kensinger* would seem to be analogous, and the expanded rule of discovery may apply.

When faced with problems of delayed manifestation injuries, other jurisdictions have sought to reduce increased liability of manufacturers with statutes of repose that cut off liability after a set period of time.[113] Statutes of repose were enacted in an effort to stop the increase in the number of products liability cases.[114] Statutes of repose are based on the premise that a certain degree of stability and predictability must exist in order for commerce to thrive.[115] Without a statute of repose, the fear is that manufacturers will be subjected to unlimited liability.[116] The contrary position is that statutes of repose unjustly cut off liability before an injured plaintiff is aware of the existence of a cause of action.[117] At present, however, the California Legislature has not decided to modify or abrogate the judicially created rule of discovery in products liability.[118] Since other states have enacted statutes of repose when products liability has been judicially increased, *Kensinger* could incite legislative action to create a statute of repose, giving manufacturers a time after which they need not fear liability.[119]

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111. *See* Dworkin, *supra* note 62, at 35 n.11-12, 47 n.89. Delayed manifestation injuries have been caused by asbestos, "agent orange," beryllium, toxic waste, microwaves, and formaldehyde. *Id.* Presently, the number of products liability cases involving delayed manifestation injuries is approaching 100,000 per year. *See id.* at 47.

112. *See* Fischer, *supra* note 62, at 1652. Market share liability under *Sindell* could apply to cigarettes, food additives, generic drugs, abestos, pesticides, aluminium wire, industrial waste, and products causing environmental pollution. *Id.*

113. *See* Note, *Product Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs are Winning,* 26 ARIZ. L. REV. 363, 364-66 (1984).

114. Dworkin, *supra* note 62, at 33-35. In 1960 the number of products liability cases was 50,000. By 1976 the number of cases had increased to 1 million. *Id.* at 34.

115. *See id.* at 37-38.

116. Note, *Constitutional Law—Limitation of Actions—Application of the Products Liability Statute of Repose,* 52 TENN. L. REV. 97, 121 (1984).

117. *Id.*

118. *See supra* note 81 and accompanying text.

119. For a view holding that the rule of discovery should not be rejected see Note, *Delayed Manifestation Injuries, supra* note 2, at 134.

CONCLUSION

In *Kensinger v. Abbott Laboratories*, the California Court of Appeal for the First District reversed a lower court dismissal of a DES suit. The trial court in *Kensinger* concluded that the cause of action was barred by the statute of limitations. The trial court found that because Kensinger had known of her injury and the cause of the injury more than one year prior to filing the lawsuit, the elements of the rule of discovery had been met and that the cause of action was barred. The court of appeal disagreed, concluding that the statute of limitations was tolled until Kensinger knew of, or reasonably could have discovered her injury, the cause of the injury, *and* the wrongdoing on the part of the manufacturer. By adding a third level to the rule of discovery, the court in *Kensinger* has increased the likelihood that DES victims will get a day in court.

John M. Felder