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The Time of Discovery Rule and the Qualified Privilege Defense for Credit Reporting Agencies in Illinois after World of Fashion v. Dun & (and) Bradstreet, Inc., 10 J. Marshall J. of Prac. & Proc. 359 (1977)

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CASE-COMMENT

THE TIME OF DISCOVERY RULE AND THE QUALIFIED PRIVILEGE DEFENSE FOR CREDIT REPORTING AGENCIES IN ILLINOIS AFTER WORLD OF FASHION v. DUN & BRADSTREET, INC.

The self-contradictory concept in the law that "justice"[1] can only be achieved by occasionally allowing a manifestly unjust decision to stand[2] has troubled courts, scholars, philosophers and the public for centuries. These decisions, forced perhaps by a technical rule of precedent, call into question the use of law as an appropriate tool for placing order and certainty into the behavioral patterns of society.

Over six hundred years ago two conflicting and often competing purposes of the law, fairness to injured parties and the certainty of eventual relief from stale claims, were set out in *Langbridge's Case.* It was there suggested that the law must provide certainty through precedent by treating everyone alike and thus intermittently allowing an apparently unfair result. Alternatively, it was argued that the law must always do that which is morally right.[3]

A primary example of this dilemma in practice is the puzzling case where certainty exists that: (1) the plaintiff has been injured without fault of his own; (2) the defendant is responsible for that injury and should pay some sort of damages; (3) every

1. "Justice" is defined as the "constant and perpetual disposition to render every man his due." BLACK'S LAW DICTIONARY 1002 (4th ed. 1968).

2. A leading Illinois case on this problem—the necessity of unjust decision—is Wall v. Pfanschmidt, 265 Ill. 180, 193, 106 N.E. 785, 790 (1914), where a murderer inherited from his victim because the statute did not explicitly forbid the inheritance. The court stated that, "Whether this accords with natural right and justice is not for the courts to decide. The laws of descent do not depend upon the ideas of court or counsel as to natural right but depend entirely upon the provisions of the statute."

For a modern example of this type of case see Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964) (refusing to apply the "discovery rule" in medical malpractice case). The clearest statement of the reasons for such decisions is found in Pietsch v. Milbrath, 123 Wis. 647, 670, 102 N.W. 342, 346 (1905) (regarding fraud): "The Legislature is the judge, and the sole judge in such matters, subject to no judicial review whatsoever, so long as it acts within the boundaries of reason. It is far better that occasionally one should suffer severely from the enforcement of the law, as the court finds it, than that they should endeavor to bend the law out of its manifest scope to avoid that result."

3. 91 PROC. AM. PHILO. SOC'Y 405 (1947), where the conflicting purposes of the law were set out when a lawyer argued to the court, "I think you will do as others have done in the same case, or else we do not know what the law is," and Chief Justice Stonore broke in: "No; law is that which is right."

"just-minded" person would agree that the defendant should be liable; but, (4) the law must deny liability because of established precedent favoring the defendant. The hapless plaintiff is presented with "justice" rather than damages.

Fortunately the situations which force this type of choice are rare. But when they do arise, and when a conscientious judge bases his ruling on precedent (dismissing the plaintiff perhaps), that judge has decided that ultimate justice is provided by certainty and not by fairness. When a court cannot distinguish earlier cases or cannot interpret statutes to obtain a fair result, it must decide whether "justice" requires that traditional concepts of "fairness" should be subservient to the certainty provided by precedent.

In *Tom Olesker's Exciting World of Fashion v. Dun & Bradstreet, Inc.*,[4] the Illinois Supreme Court faced the problem of a potentially unfair result, mandated by both precedent and statute. The plaintiff was confronted with two seemingly insurmountable obstacles to his recovery for an injury caused by the defendant, a national credit reporting agency. The decision in *World of Fashion*, although deceptively simple on its face, involves issues and legal considerations far more broad than the individual facts of the case indicate. The resolution of such issues, and the conflict between certainty and fairness implicit in that resolution, suggests the processes of judicial analysis presently operating within the Supreme Court of Illinois and suggests the significance of the *World of Fashion* decision.

The plaintiff in *World of Fashion*, a retail commercial business establishment, was libeled by a large national credit reporting agency[5] that published a false financial statement about the plaintiff to a group of private subscribers. Because of the extremely strict confidentiality requirements imposed upon the subscribers, the plaintiff did not discover that it had been libeled until after the one year statute of limitations for defamation had expired.[6]

The limitations bar to recovery was reinforced by another

4. 61 Ill. 2d 129, 334 N.E.2d 160 (1975).

5. 36 AM. JUR. *Mercantile Agencies* § 2 at 177 (1941) where an early and still precise definition of credit reporting agencies is set out:

> Mercantile agencies [now generally referred to as credit reporting agencies] are establishments which make a business of collecting information relating to the credit, character, responsibility, general reputation, and other matters affecting persons, firms, and corporations engaged in business and furnishing this information to subscribers thereto for a consideration.

6. The text of the statute of limitations for defamation, ILL. REV. STAT. ch. 83, § 14 (1975) reads "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued."

legal obstacle. The vast majority of American courts give credit reporting agencies the defense of a qualified privilege[7] in actions brought against them by the subjects of credit reports. A defamatory statement is qualifiedly privileged when the interest the defendant is seeking to protect is of intermediate importance; that is, the law recognizes that the defendant may make some statements defamatory in nature if his interest in making the statements outweighs the plaintiff's interest in not having them made. However, the qualified privilege is conditioned on a publication of the material in a proper manner for a proper purpose and to a proper group or individual. When the defendant raises a qualified privilege defense, an additional element is added to the plaintiff's case. The plaintiff must allege and prove actual malice on the part of the defendant.[8]

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One month after the one-year statute of limitations for libel expired, the plaintiff in *World of Fashion* filed a three-count complaint in tort. Counts I and II alleged commercial libel and count III claimed malicious interference with plaintiff's opportunity to obtain credit and ability to form contracts. The trial court dismissed all counts, reasoning that each stated the same cause of action and that the one year statute of limitations governed all three. The appellate court reversed the lower court's dismissal of the malicious interference count, holding that this count indicated a separate and distinct tort and as such was governed by a separate and longer time limitation.[9] The appellate court went on, however, to affirm the dismissal of the libel counts, concluding that the Illinois "time of discovery rule" in which an action

7. For the best discussion of the qualified privilege defense in Illinois, see Judge v. Rockford Memorial Hosp., 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958). The elements to be considered in determining whether the privilege exists are: (1) good faith, (2) the importance of the defendant's intent or interest, (3) publication limited in scope, (4) a proper occasion for the publication, (5) proper manner of publication to proper parties.

8. *See* W. PROSSER, THE LAW OF TORTS 785-96 (4th ed. 1971) (hereinafter cited PROSSER, TORTS).

9. The appellate court stated:

> Defamatory statements may in themselves give rise to a cause of action for libel and slander and, at the same time, become the means by which the torts of interference with contractual relationships or prospective advantage are committed. In the latter, the means by which the tortious interference is committed does not change the nature of the cause of action. Moreover, the means by which the tortious interference is committed does not subject the action to a limited period imposed upon the prosecution of an entirely separate and distinct cause of action.

16 Ill. App. 3d 707, 714, 306 N.E.2d 549, 553 (1974). *See also* Colucci v. Chicago Crime Comm'n, 31 Ill. App. 3d 802, 334 N.E.2d 461 (1975) following the analysis of the preceding quotation. *Accord*, Reliable Mfg. Co. v. Vaughn Novelty Mfg. Co., 294 Ill. App. 601, 13 N.E.2d 518 (1938) (slander of title has different limitation period than libel).

accrues when the plaintiff knows or reasonably should have known of the right to sue, was not broad enough to cover this commercial injury and thus to avoid operation of the statute of limitations.[10]

On appeal, however, the Illinois Supreme Court reversed the appellate court's holding on the libel counts. Applying the previously limited time of discovery rule the supreme court stated that denying recovery "would be to follow an abstract and mechanical reasoning in deciding when the cause of action accrued."[11]

Then, in three paragraphs of dicta, the court dealt with the second obstacle faced by the plaintiff. Although the qualified privilege defense was not at issue in the case at this point, the court implied that the privilege might well be rejected.[12] The court suggested that credit reporting agencies cause excessive injury to the subjects of such reports when the reports contain misstatements. Although the qualified privilege is given only when the interest the defendant is seeking to protect is of sufficient importance to warrant the protection, the court implied that the credit agencies' interest may not be important enough.[13] This dicta suggest that it was the combination of the two obstacles to recovery, the statute of limitations and the qualified privilege defense, and not either individually, which lead the Supreme Court of Illinois to the decision it made. By using the time of discovery rule as a gauge to determine when the plaintiff's cause of action had accrued, the court held that the cause of action was not barred by the statute of limitations. The holding on the statute of limitations issue became the foundation upon which to rest the qualified privilege dicta, for without the decision to implement the time of discovery rule the court would have had no basis for commenting on the qualified privilege defense.

Equity and Surrounding Circumstances Changed

Crucial to an understanding of how the supreme court justified its result in *World of Fashion* is an analysis of two methods modern courts have used to avoid judicial results which are perceived to be unfair. The fair and equitable holding of a case involving the *World of Fashion* facts would allow the plaintiff

10. The appellate court with little sympathy dismissed the plaintiff's "time of discovery rule" theory in one paragraph, stating that it had no authority to "engraft an exception upon a statute of limitation by judicial fiat." 16 Ill. App. 3d 709, 712, 306 N.E.2d 549, 552 (1974).
11. 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (1975).
12. *Id.*
13. *Id.* at 137-38, 334 N.E.2d at 164.

to recover.[14] The two defenses, however, the statute of limitations and the qualified privilege, stand in the way of that fair result and apparently shield the defendant. The certainty provided by the statute of limitations particularly conflicts with the fairness of allowing the plaintiff to recover.[15]

The first method often used by courts to elude the control of precedent is the application of equitable principles. This approach simply denies a result dictated by statutes and precedent where such a result is unfair or appears to be morally wrong.[16] Equity, once available only when no appropriate remedy was available at law, now pervades legal issues. Although theoretically inappropriate in law actions,[17] equitable principles have become even more influential since the consolidation of the law and equity courts.[18]

A special problem arises, however, when legislative action, or inaction seems to indicate a legislative intent opposite in effect to the equitable leanings of the court. If, for example, a statute or precedent seems to be yielding unfair results in the courts and the legislature has had the opportunity to correct the problem but has not done so, it may be inferred that the legislature has weighed the unfairness apparently caused by the law against the certainty and finality provided by the same law and has opted for certainty. Of course, legislative inaction may be nothing more than inertia. The restrictions the Illinois Legislature placed upon the time of discovery rule and its application in pre-

14. The *World of Fashion* court summarizes this: "[W]e have no hesitation in saying the ends of justice in this case will be served . . . ." *Id.* at 136, 334 N.E.2d at 164.

15. For a lengthy discussion of the tension created between the results of certainty provided by precedent and the judicial inclination to achieve fairness through the use of equitable principles, see Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

16. *See generally* Trainor, *Some Open Questions on Appellate Courts*, 24 U. CHI. L. REV. 211 (1956) (favoring judicial action to revise old rules and formulate new ones based on changes in society); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966) (advocating a creative role for courts).

17. Beginning over three hundred years ago, courts have ruled that "equity" should not be used to avoid the intention of the limitations statutes. The court said in Benyon v. Evelyn, 124 Eng. Rep. 614, 636 (C.P. 1664) that, "[I]t is better to suffer from particular mischief than a general inconvenience; and such a one must happen if way be given to equitable constructions against the letter of the act . . . ." (referring to statutes of limitations); Cholmondeley v. Clinton, 4 Eng. Rep. 721, 762 (H.L. 1821) (the chancellor suggests that had the legislature wished equitable constructions to be placed upon the statute of limitations it would have expressed that desire); Sloan v. Graham, 85 Ill. 26 (1877); First National Bank of Jonesboro v. Road Dist. No. 8, Union County, 328 Ill. App. 122, 65 N.E.2d 396 (abstract opinion, 1946) (stating that the statutes of limitation are purely legal, and equitable approaches are improper); Graham v. Kaap, 213 Ill. App 576 (1919) (court of equity should not create a remedy when the statute barred a right).

18. *See* J. ULLMAN, *Law and Equity*, in A JUDGE TAKES THE STAND 154 (1933), for a detailed analysis of the law and equity consolidation.

vious Illinois decisions thus should, at least, serve as a restraint upon the court's equitable response to the *World of Fashion* facts.[19]

The second approach used by courts to avoid unfair results is the application of a more subtle principle. This principle, sometimes referred to as "changed circumstances," provides the courts with a method of avoiding precedent or a statutory mandate when the precedent, viewed in light of the circumstances surrounding both its decision and the conditions currently prevailing, seems unsupportable.[20] If circumstances of the surrounding times have so changed as to make the original decision a presently inequitable result given the changes, then such precedent is no longer of any value. The rule of precedent, and its value of providing certainty, should apply only if the facts and circumstances of the cases themselves are similar, *and* if the facts and circumstances of the surrounding world are similar.

A 1920 decision for example, could reasonably hold that a statute of limitations of two years governing actions against a doctor who leaves an object in a patient's body after surgery, is long enough. However, in 1920 medical knowledge had not perfected the methods of sterilization currently in use; consequently, discovery of a foreign object in the body was often rapidly facilitated by growing infection and other complications. But, in 1976, because of advances in sterilization techniques and other medical improvements, an instrument can remain in the

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19. For a long discussion of the philosophical attitude of courts when they are acting in place of the legislature, see Janisch v. Mullen, 1 Wash. App. 393, 461 P.2d 895 (1970), a case which adopted the time of discovery rule for medical malpractice actions. The time of discovery rule states that the statute of limitations begins to run when the patient discovers that he has been injured. In Helvering v. Hallock, 309 U.S. 106, 121 (1939) (tax case) ("but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."), the United States Supreme Court sets out the general rule concerning the courts' interpretation of legislative inaction. In Morgan v. People, 16 Ill. 2d 374, 379, 158 N.E.2d 24, 27, *cert. denied*, 361 U.S. 852 (1959), the Illinois Supreme Court discusses the relief from judgment statute, ILL. REV. STAT. ch. 110, § 72 (1975), and states that "[i]t is the established rule that exceptions to a statute of limitations will not be implied and if the legislature has not seen fit to except a class of persons from the operation of a statute, courts will not assume a right to do so." *See also* Fisher v. Rhodes, 22 Ill. App. 3d 978, 317 N.E.2d 604 (1974) (same statute).

20. For several early examples of the courts' attempts to modify the impact of the statute when the statute apparently demands an outrageous decision, see Bedell v. Janney, 9 Ill. 193, 209 (1847) ("cases within the reason, but not within the words of the statute are not barred, but may be considered as omitted cases, which the legislature have [*sic*] not deemed proper to limit."); Chicago & N.W. Ry. Co. v. Jenkins, 103 Ill. 588, 595-96 (1882) (bankruptcy action barred by statute of limitation: "The ancient rule was to construe them strictly, so as to exclude all cases not expressly named in the statute, but this rule has been modified by the more modern decisions.").

body undetected for a much longer period of time.[21] It may therefore become necessary to extend the period during which recovery may be allowed. Consequently, while the facts of the cases themselves might be similar, a case decided in 1976, relying on cases decided under a statute of limitations approved of in 1920, would be questionable.

Avoiding precedent by using the "surrounding circumstances changed" method enables modern judges to deal honestly with the earlier cases. Rather than suggesting that the older cases were wrongly decided, this approach recognizes that the earlier decisions were just *when decided* but inapplicable now because of the change in surrounding circumstances subsequent to the original holding.[22] Thus, courts can distinguish cases not only on the facts of the cases themselves, but also on the basis of relevant changes in societal conditions.

However effective the "changed circumstances" method may be in dealing with judicial precedent it, like the equitable approach to precedent, faces increased problems when courts must discern legislative intent. Although courts regularly look to legislative action to determine intent, the inferences of intent from legislative *inaction* are much more difficult to draw.[23] What inferences may be drawn from the legislature's failure to amend the statute in question? Does the legislature's inaction signify that it does not feel the surrounding circumstances have changed sufficiently to warrant a change in the law? Since the courts in this situation have no legislative action upon which to base presumed legislative intent, they must examine the changed circumstances in light of an anticipated legislative *reaction* to a judicial change. Would the legislative body, within a reasonably short time, react to a judicial change, or failure to change, and make the judicial interpretation inapplicable as precedent?

The operation of the "legislative reaction" test can be seen by examining an Illinois Appellate Court decision regarding the time of discovery rule in medical malpractice. In *Mosby v.*

21. Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969) (action concerned a sponge left in the body twenty-three years earlier).

22. For a particularly interesting discussion of the changes brought about in modern society by the impact of a modern credit economy, see Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROB. 641, 649 (1968). In *World of Fashion*, the court apparently analogized the changes in medical techniques which have made the early malpractice cases inapplicable to the changes brought about by the dramatic increase in the impact of credit and credit reporting. 61 Ill. 2d 129, 134, 334 N.E.2d 160, 162-63.

23. "Legislative inaction is a weak reed upon which to lean in determining legislative intent." Berry v. Branner, 245 Or. 307, 311, 421 P.2d 996, 998 (1966). *Berry* has come to be a very influential case on the time of discovery rule.

Michael Reese Hospital[24] the appellate court followed precedent based on a previous statutory construction and did not allow the plaintiff to use the "time of discovery rule" when he discovered a foreign object in his body after the statute of limitation had expired. The court explicitly stated that it felt compelled to render an unfortunate and unfair decision because any changes in the statutory period should be implemented by the legislature.[25] The legislature reacted immediately and nullified *Mosby*.[26] If, however, the *Mosby* court had used the test of "anticipated legislative reaction"—suggested above and implicit in the supreme court's *World of Fashion* decision[27]—it would have been justified in changing the law on its own initiative and the plaintiff in *Mosby* would have recovered.

The *World of Fashion* facts, however, do not present as clear cut an injustice as that attendant in *Mosby*. Arguably, *Mosby* presented a much clearer case for defendant liability; there is very little ambiguity involved as regards a physician's liability for malpractice when an object has been left in a patient's body following surgery. In *Mosby*, only the statute of limitations frustrated the plaintiff's recovery. But, in *World of Fashion*, liability was not clear even if the effect of the statute of limitations had been avoided. The qualified privilege defense presented a second, and equally effective method for denying the defendant's liability.

Thus, two crucial questions were raised by the defenses in *World of Fashion*. Would the Illinois court have ruled the way it did on either defense had not the other defense been present? Would the anticipated legislative reaction to the court's decision on either issue alone have been enough to justify the court's change in the law? The answer to both of these questions appears to be no. Neither defense alone presents enough of an injustice to the plaintiff to allow the court to implement an equitable interpretation and negate the statutory language. And neither defense alone is based solely on precedent which can be modified by a "changed circumstances" test. The combination of the two defenses in *World of Fashion* underlies the Illinois court's decision to abrogate both.

Development of the Statute of Limitations and the Time of Discovery Rule

The principal problem faced by the Illinois Supreme Court in *World of Fashion*, and the only issue upon which the court

24. 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).
25. *Id.* at 342, 199 N.E.2d at 636.
26. Ill. Rev. Stat. ch. 83, § 22.1 (1975).
27. 61 Ill. 2d 129, 134, 334 N.E.2d 160, 160-63.

actually ruled, was whether the statute of limitations applied to bar the plaintiff's cause of action in libel.[28] In deciding that the action was not barred, the court implemented a "time of discovery rule" interpretation of the statute of limitations. The time of discovery rule states that the statutory period of limitations begins to run when the plaintiff knows, or reasonably should know, of the injury. Although this rule is often thought to be a modern judicial invention created by the courts to deal with medical malpractices cases, the time of discovery interpretation has grown out of the historical development of the statute of limitations.

Historically, society had felt little need for legislative statutes of limitation until 1623.[29] The law of the ancients and of Europe in the middle ages gave plaintiffs a perpetual cause of action, trusting the plaintiff's inability to prove a case after many years as a sufficient defense for the defendant.[30] In time, however, such protection for the defendant was supplemented by the equitable doctrine of laches which allowed the defendant to preclude the maintenance of the plaintiff's claim by asserting that through inaction the plaintiff had acquiesced in the status quo.[31] At this early date the defense of laches could be used even in law actions. But because of the vagueness of laches and the difficulty of weighing old evidence, early in the seventeenth century Parliament enacted statutes of limitation which created an irrebutable presumption[32] that, after a certain number of years, the evidence was, *ipso facto*, insufficient.[33] The new statutes af-

28. *Id.* at 138, 334 N.E.2d at 165.

29. The basis of all modern statutes of limitation is Limitation of Action, and Avoidance of Suits at Law Act, 1623, 21 Jac. 1, c. 16. There is some indication that the legislatures had acted earlier, possibly as early as 1275, to set some limits, but the effect of such statutes has been insignificant. *See generally* J. ANGEL, LIMITATIONS OF ACTIONS AT LAW 11-12 (4th ed. 1861); 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 300 (4th ed. 1936).

30. *See* 34 AM. JUR. *Limitations of Actions* § 2 (1941).

31. *See* 2 J. POMERY, EQUITY JURISPRUDENCE 169 (5th ed. 1941).

32. *See* Phoebe, *a woman of color*, v. Jay, 1 Ill. 268, 273 (1828):

> The statute of limitations was made for the purpose of quieting parties after so much time has elapsed, as affords a presumption that the evidence might be lost by death or forgetfulness. That this statute is a wise law, all who are conversant with trials in courts and the frailty and forgetfulness of mankind will readily concede. The law, therefore, discharges law suits, after so much time has intervened as to create presumptions that witnesses have died or forgotten the transactions; or, in other words, the law favors the diligent and not the slothful.

For an early scholarly discussion of this, see J. ANGEL, LIMITATIONS OF ACTIONS AT LAW 5 (4th ed. 1891).

33. This clearly is an attempt by the legislature to impose an "abstract and mechanical" method of determining matters of evidence and laches and proof. Early decisions have accepted the necessity of this legislation. Clementson v. Williams, 12 U.S. 72, 74 (1814) ("The statute of limitations was not enacted to protect persons from claims fictitious in their origins, but from ancient claims, whether well or ill founded, which

fected both legal and equitable actions while the doctrine of laches was confined to those actions in which no specific statutory period applied.[34]

Modern statutes of limitation rest upon the same foundation. These statutes are often viewed as bifurcated in nature:[35] (1) a codification of the time after which the plaintiff is presumed unable to produce sufficient evidence;[36] and (2) an arbitrary time limit after which the defendant can be certain that no action against him is possible.[37] The fundamental emphasis of the statutes is the protection of defendants from uncertain, distant, or unknown liabilities. This is referred to as the defendant's right of repose. It is important to contrast this legislative protection against the potential liabilities of defendants, with the traditional judicial attitude toward a plaintiff's causes of action which remain undiscovered until after the statute of limitation expires.

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may have been discharged, but the evidence of which may be lost."); Davis v. Munie, 235 Ill. 620, 621, 85 N.E. 943, 944 (1908) ("a definite limit of time within which the remedies included within this provision must be prosecuted."). *But see* 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 764 (1927), which suggests that the bar is good only if the party has had a full opportunity to press his claim.

Although the courts put great stress in the decisions concerning the statutes of limitation upon the problems of evidence, the limitations are directed primarily at a final, clear and definite period of liability. The legislature has balanced the plaintiff's competing interests against the defendant's and has decided that the specified number of years is the answer to the problem. It is specious to think that the evidence is any more stale, or the plaintiff any more hard-pressed, one day after the statute has run than one day before; courts, however, do not hesitate to let the statutes control in these situations.

The Illinois cases which suggest that loss of evidence is the primary thrust of the statute of limitations include: Helbig v. Citizens Ins. Co., 234 Ill. 251, 84 N.E. 897 (1907); Phoebe, *a woman of color*, v. Jay, 1 Ill. 268 (1828) (presumption that evidence is lost by death or forgetfulness); Trainor v. Koskey, 243 Ill. App. 24 (1926) (evidence presumed lost); Speich v. Atchison, T. & S.F. Ry. Co., 178 Ill. App. 266 (1913) (failure of memory); Hayward v. Gunn, 4 Ill. App. 161 (1879) (presumption of payment based on failure to remember facts). *But see* Neustacher v. Schmidt, 25 Ill. App. 626 (1887) where the statute of limitations regarding payment of a debt is said to be based on public policy.

34. *See* 2 J. STORY, EQUITY JURISPRUDENCE 735-36 (1826); Cross v. James, 327 Ill. 538, 158 N.E. 694 (1927) (court discusses the basing of the statutes on the principle of laches).

35. In Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975), Justice John Paul Stevens places great emphasis on this bifurcated nature and in discussing the Illinois time of discovery rule, distinguishes cases involving personal injury from the cases involving property damages by relying on the bifurcated nature of the statutes.

36. *See* the Illinois cases, *supra* note 33.

37. Although courts must allow recovery to an injured party as a necessary part of a "just" legal system, they must also protect potential defendants from ancient claims. The courts' reason that even a party responsible for an injury has the right to peace of mind after the expiration of a sufficient number of years:

> [Y]et the court cannot act upon such circumstances. If it did, there would be an end of limitation of actions in the cases of distressed persons; for if relief might be given after twenty years, on the grounds of distress, so might it after thirty, forty, or fifty; there would be no limitation whatever, and property would be in confusion.

Bowman v. Wathen, 42 U.S. 189, 194 (1843) (adverse possession).

Generally, the early courts held that an undiscovered action expires with the statute. The courts balanced the defendant's need for certainty and finality against the plaintiff's right to recovery and the defendant usually prevailed.[38] Courts have shifted back and forth in their acceptance of the legislative boundaries to bringing actions. Eighteenth century English courts opposed the whole idea of statutory limitations on moral and equitable grounds.[39] The arbitrary nature of the limitations periods did not accord with the early courts' desires to provide at the least the opportunity to prove a case. These courts favored the retention of the judge's discretionary power to determine the sufficiency of the proof.

This opposition, however, gradually shifted to the recognition of the necessity of arbitrary time limits. The certainty provided by the limitations replaced the unfettered equitable discretion of the earlier judges. By the early nineteenth century the courts generally accepted the statutes. The eighteenth century idea that justice was equated with fairness had been replaced by the nineteenth century idea that justice was certainty and finality.[40]

To ameliorate the often harsh results of the arbitrary time limits, however, the early legislative bodies created certain limited exceptions to the statutes apparently based upon a presumption that even with the utmost diligence some classes of plaintiffs could not discover or act upon their causes of action.[41] These

38. This attitude of judicial protection for the defendant began to change in the middle of the twentieth century. Statutory limitations seemed to produce unfair results in medical malpractice cases. The Colorado court, commenting on a statute which apparently barred recovery, used these stunning words and said, "What a mockery to say to one, grievously wronged, 'Certainly you *had* a remedy, but while your debtor concealed from you the fact that you had a right the law stripped you of your remedy.'" Rosane v. Senger, 112 Colo. 363, 370, 149 P.2d 372, 375-76 (1944).

39. Trueman v. Fenton, 98 Eng. Rep. 1232 (K.B. 1777) and Quantocks and Others, 98 Eng. Rep. 382 (K.B. 1770), two early decisions by Lord Mansfield, suggest that the statute of limitations was something to be slipped around if at all possible. "And, in honesty, [the defendant] ought not to defend himself by such a plea." *Id.* at 382-83.

40. The nineteenth century idea of fairness is reflected in Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 340-41, 199 N.E.2d 633, 636 (1964):

> A statute of limitations is designed to prevent recovery on stale demands. It is a statute of repose which gives a defendant a reasonable opportunity to investigate a claim and to prepare his defense. . . . Although such a statute serves a laudable purpose in preventing old and vexatious demands, it also arrests meritorious claims. Such is the situation here.

This decision has subsequently been repudiated by several Illinois Supreme Court decisions discussed in this paper.

41. Generally, a mental, physical, or legal inability to act has been the articulated reason advanced for exceptions regarding disabilities. At common law, people under disabilities had no legal standing to sue. A careful analysis, however, suggests another principle at work in the modern cases. It is settled that a subsequently arising disability does not toll the statute once it has started running, even though the plaintiff may

legislative exceptions, retained in the modern statutes, toll the statute in a number of situations.[42] For example, the statutes do not run against a person under a disability such as minority, insanity, or imprisonment. Nor do they run against one from whom a cause of action has been fraudulently concealed.[43] In

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be completely unable to act. Berman v. Palatine Ins. Co., 379 F.2d 371 (7th Cir. 1967). Furthermore, a person under a disability can act through a guardian or conservator to bring suit; a person in prison certainly is not restrained from having an action brought by his attorney.

Rather than simply saying that a person under a disability cannot act, the law actually has created an irrebutable presumption that someone under a disability does not know of or understand his right to sue. In Peach v. Peach, 73 Ill. App. 2d 72, 83, 218 N.E.2d 504, 509 (1966), the court refused to toll the statute for a mentally retarded man who could read, vote, and play pinochle, because, the court reasoned, the statute is tolled only if the plaintiff "could not comprehend the nature of the act giving rise to the cause of action or his rights."

In a bizarre case indicating the presumption of lack of knowledge, an Illinois appellate court allowed recovery, based on the statute being tolled, thirteen years after the death of a tortfeasor, to a plaintiff who had been a foetus when the tort occurred. *In re* Kent's Estate, 12 Ill. App. 3d 475, 299 N.E.2d 516 (1973).

Even more unusual is a recent case which did not even discuss the statute of limitations but indicated that the lack of knowledge presumption could be extended quite far. In Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976) (currently in the Illinois Supreme Court on a certificate of importance) the court allowed a cause of action in medical malpractice to a child who was born and injured by a birth defect eight years after his mother originally had been injured by the doctor.

The general rule is that disabilities cannot be tacked together. J. ANGEL, LIMITATIONS OF ACTIONS AT LAW 197 (1861); 25 I.L. & P. *Limitation* § 85 (1956). Apparently, the only Illinois case available on this point is Keil v. Healey, 84 Ill. 104 (1876) which actually decides that a brief period free from a disability before another commences is enough to start the statute running. Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972), *cert. denied, sub nom.* 409 U.S. 894 (1972), allows the disability of imprisonment to be tacked onto one of minority.

42. These exceptions are presently codified in ILL. REV. STAT. ch. 83, § 22 (1975) (disabilities).

43. ILL. REV. STAT. ch. 83, § 22 (1975). Parmlee v. Price, 105 Ill. App. 271 (1902) (an early case rejecting the time of discovery rule, which suggested that had the legislature intended a general application of the time of discovery rule the specific exception for a cause of action fraudulently concealed would be redundant). Although the holding of this case has been repudiated, *sub silentio*, by the modern cases, its reasoning is still powerful. Had the legislature intended a full implementation of the time of discovery rule a fraudulently concealed action would be only as unknown as any other undiscovered injury.

Fraudulent concealment of a cause of action is quite difficult to establish in Illinois. There must be an affirmative act intended to deceive the plaintiff which in fact succeeds in deceiving him. Skrodzki v. Sherman State Bank, 348 Ill. 403, 181 N.E. 325 (1932) (sale of mortgage bonds); Wilson v. LeFevour, 22 Ill. App. 3d 608, 317 N.E.2d 772 (1974) (affirmative fraud needed in a divorce action which required 12 consecutive attorneys); Solt v. McDowell, 132 Ill. App. 2d 864, 272 N.E.2d 53 (1971) (plaintiff discovered fraud eight months before statute expired); Nogle v. Nogle, 53 Ill. App. 2d 457, 202 N.E.2d 683 (1964) (affirmative fraud needed to set aside divorce decree); Proctor v. Wells Bros., 181 Ill. App. 468, *aff'd in* 262 Ill. 77, 104 N.E. 186 (1914) (affirmative fraud needed to allow refiling of action). See also the very stringent requirements for fraud set out in Keithley v. Mutual Life Ins. Co., 271 Ill. 584, 111 N.E. 503 (1916), where the defendant made false representations about policy assets but the statute was still not tolled. *Contra*,

fraud and disability situations, courts which have stated that the reason for the limitations rests upon considerations of producing evidence—the first of the two reasons—often completely ignore evidentiary problems.[44]

Judicial Exceptions to the Statute of Limitations: The "Time of Discovery Rule"

Although legislatures had modified the arbitrariness of the statute of limitations in a few limited areas, in effect instituting a legislative "time of discovery rule," the judicial change in attitude taking place in the early nineteenth century as the courts moved from opposition to acceptance created a new problem. Although the courts wished to implement the statutes of limitations they were unable to determine when the "injury" itself actually occurred and thus when the statute began to run. Three separate, and completely distinct points in time were suggested: (1) the time the technical legal "trespass" occurred even though no concurrent damage may have arisen;[45] (2) the time of the actual

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Gunn v. Minnesota Life Ins. Co., 322 Ill. App. 313, 54 N.E.2d 596 (1944) (*semble*) (no affirmative fraud needed).

An approach not pursued by the plaintiff in *World of Fashion* was an attack on Dun & Bradstreet for fraudulently concealing the cause of action because of the extremely strict confidentiality requirements extracted from subscribers. Certainly part of the reason for the secrecy is protection of the credit reporting agency from the discovery of its mistakes, although this may be less important than the need for a competitive advantage in a fast growing field. Inasmuch as modern courts have moved dramatically to a requirement of disclosure of important information in misrepresentation actions and away from the early cases holding that passive non-disclosure was not actionable, a passive fraud theory might have worked against Dun & Bradstreet. See Prosser's famous termite cases, Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960) (recovery allowed); Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 42 N.E.2d 808 (1942) (no recovery allowed); and *see* Fuller v. De Paul University, 293 Ill. App. 261, 12 N.E.2d 213 (1938) (married apostate priest barred by non-disclosure of facts in contract action against his employer, a Catholic university); Comment, *Judicial Encroachment on Statutes of Limitation*, 34 YALE L.J. 432 (1925).

The Illinois Supreme Court might have been inclined to look at the secrecy as a type of quasi-fraud. *See* Duncan v. Dazey, 318 Ill. 500, 149 N.E. 495 (1925) where there was no active fraud needed when a confidential relationship existed between the parties. *Accord*, Gunn v. Minnesota Life Ins. Co., 322 Ill. App. 313, 54 N.E.2d 596 (1944).

44. Not only does fraudulent concealment toll the statute of limitations, but the same courts which state that the statute rests upon considerations of evidence ignore evidentiary problems in disability and fraud situations. The legislature clearly feels that there is no need to balance increase in difficulty of proof against hardship to the plaintiff here.

Disability cases can all involve very long periods of time. Often the defendant is dead but his estate may still be liable years later when the plaintiff's disability ends. If disabilities can be tacked together in Illinois, as suggested in the two Illinois cases on the subject, Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972) and Keil v. Healey, 84 Ill. 104 (1876), the period could easily extend for eighty or ninety years. See the horrors of such a result suggested by Orlando Bridgmen in Benyon v. Evelyn, 124 Eng. Rep. 614, 634 (C.P. 1664).

45. This is discussed in an underground trespass case, Treece v. Southern Gem Coal Co., 245 Ill. App. 113 (1923). In *Treece*, however,

damage even though the plaintiff might not have known of the damage;[46] and (3) the time the plaintiff discovered the injury.[47]

Unable to arrive at a consistent answer to this problem (and coincidentally, looking for an escape mechanism from the inflexible time limits of the statutes) the early courts gradually forged two classes of exceptions to the running of the statutory period[48] in addition to the legislative exceptions discussed above. The courts determined that the statute would not run until the discovery of the injury in situations involving a disparity of knowledge between the plaintiff and defendant where the plaintiff had had a relationship of confidence or expertise with the defendant and where the plaintiff had relied upon the defendant's superior knowledge, skill or expertise. This exception encompassed, but was not limited to, professional malpractice situations.

The second judicial exception tolled the statute of limitations in situations involving cumulative injuries, that is, injuries which built up over a long period of time. This exception included, for example, underground mining invasions[49] and illnesses or dis-

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the Illinois court rejected the contention that the "trespass" itself was the injury and determined that the limitation period began to run when the land collapsed.

46. *See, e.g.*, Calumet Elec. St. R.R. v. Mabie, 66 Ill. App. 235 (1896) (statute runs from infliction of injuries regardless of knowledge of injuries).

47. The earliest American case found suggesting the time of discovery rule, Taylor v. Rowland, 26 Tex. 293 (1862), implemented the rule in an action concerning a discovery that good title could not be conveyed. Illinois did not squarely accept the time of discovery rule, by judicial decision, until 107 years later. Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

48. The following cases are the nineteenth century exceptions to the statute of limitations. It was not until the middle of the twentieth century that the courts and writers realized that these cases, and the later cases which followed, fit into a pattern of exceptions similar to that discussed in the text. Bement v. Ohio Valley Banking & Trust Co., 99 Ky. 109, 35 S.W. 139 (1886) (statute ran from discovery of signature on release); Blake v. Traders Nat'l Bank, 145 Mass. 13, 12 N.E. 414 (1887) (discovery of sale bank stock); Brush v. Manhattan R.R., 13 N.Y.S. 908 (1890) (railroad company's illegal construction); Christ v. Chetwood, 20 N.Y.S. 841, *aff'd in* 22 N.Y.S. 1133 (1892) (lawyer collected money for minor); Lewey v. H.C. Frick Coal Co., 166 Pa. 536, 31 A. 261 (1895) (underground trespass); Hancock County v. Hawkins County, 83 Tenn. 266 (1885) (adverse possession); Leach v. Wilson County, 68 Tex. 353, 4 S.W. 613 (1887) (actions of an agent); Yeary v. Cummins, 28 Tex. 91 (1866) (patent bond); Taylor v. Rowland, 26 Tex. 293 (1862) (inability to convey title); Lightfoot's Adm'r v. Green's Ex'r, 91 Va. 509, 22 S.E. 242 (1895) (old man did not realize his land was sold); Hutchinson v. Sheyboygan County Supervisors, 26 Wis. 402 (1870) (bad tax sale). There are almost five times as many cases which do not allow recovery even though the plaintiff knew nothing of his cause of action until too late. Clearly the rule is no recovery, and the cited cases are carefully controlled exceptions.

An early analysis of these cases is in Note, 21 CENT. L.J. 153 (1885). This article should be compared to more recent treatments. Comment, *Judicial Encroachment on Statutes of Limitation*, 34 YALE L.J. 432 (1925); Note, *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185 (1950).

49. Wanless v. Peabody Coal Co., 294 Ill. App. 401, 13 N.E.2d 996 (1938); Treece v. Southern Gem Coal Co., 245 Ill. App. 113 (1923).

eases which developed after long exposure to chemicals, dust, or radiation.[50] As with the situations presented by relationships of expertise or confidence, the facts of cases involving cumulative injuries indicate that the plaintiffs could not have been expected to know of their injuries within short statutory periods.[51]

The clarity provided by analyzing the judicial evasions of the statute of limitations in terms of these two exceptions has been blurred somewhat by several modern courts' denomination of a distinct problem as a "time of discovery" controversy, a controversy which grew out of the expanding concept of strict liability in the products liability field. While prior to judicial acceptance of strict liability all causes of action in products liability accrued when the product was purchased, subsequent to the de-

50. The leading occupational disease case is Urie v. Thompson, 337 U.S. 163 (1949). *See also* Madison v. Wedron Silica Corp., 352 Ill. 60, 184 N.E. 901 (1933); McDonald v. Reichold Chemicals, Inc., 133 Ill. App. 2d 780, 274 N.E.2d 121 (1971); Wigginton v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971) (parallel case).

Illinois has a statute which now deals with the time of discovery rule in one area of occupational injury situations. ILL. REV. STAT. ch. 48, § 138.6(c)(2) (1975) states that a claim for workmen's compensation must be made within 90 days subsequent to when the employee knows or suspects that he has received an excessive dose of radiation.

51. Some modern developments concerning the rule can be seen in Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970) (time of discovery rule applies to negligent diagnosis) in which the Illinois Supreme Court discusses at some length the problem involving a patient who could not possibly realize that a cause of action existed. *Lipsey* repudiates an earlier appellate decision, Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964) (court felt powerless to act absent legislative enactment regarding foreign object left in body) and Gangloff v. Apfelbach, 319 Ill. App. 596, 49 N.E.2d 795 (1943) (no recovery after negligent treatment by doctor).

The time of discovery rule was also applied in Mathis v. Hejna, 109 Ill. App. 2d 356, 248 N.E.2d 767 (1970) (dye injected into spine). *But cf.* Hundt v. Burhans, 13 Ill. App. 3d 415, 300 N.E.2d 318 (1973) (where no mention was made of the time of discovery rule and a patient's action was barred because the statute of limitations had run on a contract with the doctor); Stein v. Baum, 89 Ill. App. 2d 142, 232 N.E.2d 96 (1967) (doctor won by establishing no fraudulent concealment; time of discovery rule not mentioned).

For a discussion of the application of the time of discovery rule in non-medical professional malpractice cases see the principal Illinois case on the discovery rule, Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (rule applied against surveyor); Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973) (time of discovery rule applied to lawyer who had lost a case after missing a statute of limitations deadline) which repudiates Toft v. Acacia Mausoleum Co., 322 Ill. App. 514, 54 N.E.2d 616 (1944) and Maloney v. Graham, 171 Ill. App. 409 (1912).

An Annot., 18 A.L.R.3d 978 (1968) (when statute of limitations begins to run upon action against attorney for malpractice), suggests that the majority does not apply the time of discovery rule to attorneys. The Illinois Appellate Court for the Second District has handled four architect cases: Board of Educ. v. Perkins & Will, 119 Ill. App. 2d 196, 255 N.E.2d 496 (1970), and Board of Educ. v. Joseph J. Duffy Co., 97 Ill. App. 2d 158, 240 N.E.2d 5 (1968) denied recovery; but, following the *Rozny* decision, this same court reversed itself and allowed recovery based on the time of discovery rule. Society of Mt. Carmel v. Fox, 31 Ill. App. 3d 1060, 335 N.E.2d 588 (1975); Auster v. Keck, 31 Ill. App. 3d 61, 333 N.E.2d 65 (1975).

velopment of strict liability, the courts have determined that the statutory period of limitations for a personal injury action in products liability begins when the plaintiff is injured. Some courts have called this new rule an example of the time of discovery rule, but more precisely, because the time of discovery and injury are not always coterminous, the rule is simply an abrogation of the traditional contractual idea that the statute runs from the time of purchase.[52]

Underlying both the doctrine of strict liability and the change in the computation of the statutory period, however, is a fundamental new judicial concept, a concept which the *World of Fashion* court would implement in a completely different con-

52. The Illinois position on the accrual of a cause of action for personal injury caused by a defective product is that the action accrues when the injury occurs, not when the product is sold. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970) (trenching machine); Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (birth control pills).

In Klondike Ltd. v. Fairchild Hiller Corp., 334 F. Supp. 890 (N.D. Ill. 1971) the plaintiff's recovery for property damage was based on when the accident happened, not when the product was sold. Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975), suggests that this is incorrect. The *Gates* case did not allow recovery for property damage based on the time of discovery rule, reasoning that the property damage limitation period should begin when the product is sold even though the personal injury period starts when the injury occurs. This interpretation is supported by Coumoulas v. Service Gas, Inc., 10 Ill. App. 3d 273, 293 N.E.2d 187 (1973) where a plaintiff could not recover for property damage resulting from a negligently installed gas boiler, the accrual of the cause of action being calculated from the time of installation and not the injury. *Accord*, Leroy v. City of Springfield, 81 Ill. 114 (1876) (sidewalk collapsed; action accrued when act was committed, not when extent of property damage was discovered); Wilson v. White Motor Co., 118 Ill. App. 2d 436, 254 N.E.2d 277 (1969) (personal property damage from collapse of truck); Austin v. House of Vision, 101 Ill. App. 2d 251, 243 N.E.2d 297 (1968) (anti-trust action, time of act); Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 243 N.E.2d 723 (1968) (failure to obtain driveway permit); *contra*, and presumably overruled, Reat v. Ill. Cent. R.R., 47 Ill. App. 2d 267, 197 N.E.2d 860 (1967) (action runs from time of injury, not time of amputation three years later); Calumet Elec. St. R.R. v. Mabie, 66 Ill. App. 235 (1896) (time of act, not six months later when plaintiff became paralyzed).

Simoniz Co. v. Anderson & Sons, Inc., 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967), though based on a decision since repudiated by the legislature and the supreme court, Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964), has not been expressly overruled and continues to exert a strong countervailing force upon the discovery rule. The *Simoniz* decision concerned an action for property damage brought against a contractor and material suppliers, significantly not "professionals." Recovery was denied because the cause of action accrued when the work was done, not when the building collapsed. This case straddles the line dividing the property damage cases from the malpractice cases. *See generally* Comment, *The Last Vestige of the Citadel*, 2 HOFSTRA L. REV. 721 (1974); Annot., 4 A.L.R.3d 821 (1965) (statute of limitations: when cause of action arises on action against manufacturer or seller of product causing injury or death).

For general discussions of the strict liability problem from a different point of view see Plant, *Strict Liability of Manufacturers for Injuries Caused by Defective Products—An Opposing View*, 24 TENN. L. REV. 938 (1957); Note, *Damages—Personal Injury—Reasonable Certainty and the Statute of Limitations: A Re-evaluation*, 14 WAYNE L. REV. 652 (1968).

text. The strict liability cases apparently realize that modern consumers and businesses *must* deal with manufacturers of numerous products. Modern society has replaced the individualism of earlier times with a necessary interdependence. It is impossible to function in the modern world without a great deal of reliance on complex and sophisticated machinery. The necessity of certain types of relationships, relationships between products and their users, is often unavoidable. The recognition of these "unavoidable relationships" underlies, at least in part, the computation of the statutory time period. The *World of Fashion* court seems to have viewed credit reporting agencies, at least partially, in terms of an unavoidable relationship and extended the period accordingly.[53]

Out of the two judicial exceptions applied to the running of the statute of limitations—the relationships of confidence or expertise and the situations involving cumulative injuries—and possibly from an undefined and vague uneasiness about unavoidable relationships, the modern courts created the "time of discovery rule." The rule, which states that the statutory period of limitation is computed from the time the plaintiff knew, or reasonably should have known, of his injury and the right to sue, has gained widespread acceptance in American courts when used in professional malpractice actions.[54] What appeared to have

53. At 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164, the *World of Fashion* court uses the phrase "an increasing awareness of the importance and sensitivity of credit reporting" in questioning the need to allow credit reporting agencies a great latitude in what they publish about businesses. Implicit in this is the awareness of the dramatic and pervasive effect of such reports. Five years earlier, in Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 432, 261 N.E.2d 305, 313, Justice Underwood, who also wrote the *World of Fashion* opinion, suggested that the limitations bar "would emasculate much of the consumer protection afforded by *Suvada* [32 Ill. 2d 612, 210 N.E.2d 182 (1965) (the leading Illinois case on products liability)]."

Justice Underwood's connection of *Williams* with the facts of *World of Fashion* appears to indicate that more is at issue than consumer protection; consumer protection is not at issue in *World of Fashion* at all. The *World of Fashion* court, however, does seem to see a direct connection between consumer credit and commercial credit reports. *See* note 119 *infra*. If the Illinois court views commercial and consumer credit reports as closely similar, the "unavoidable relationships" test, discussed in the text, possibly will apply only in consumer protection areas.

54. *See* PROSSER, TORTS 144 (4th ed. 1971):

> Quite recently there have [*sic*] been a wave a decisions meeting the issue head-on, and holding that the statute will no longer be construed as intended to run until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it.

If there has been a "wave" of decisions, there has been a tidal wave of law review articles. The INDEX TO LEGAL PERIODICALS, *Limitation of Actions*, lists well over a hundred articles, comments, and case notes in the last fifteen years. Almost all of the law review material voices approval of the time of discovery rule. *But see* Comment, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795 (1973), suggesting it may become too easy to sue lawyers. *See also* Annot., 18

been an unwritten but important limitation of the rule, that it was to be used only in professional malpractice cases, no longer applies. The *World of Fashion* court applied the time of discovery rule in an action for commercial libel.

Before a profitable analysis can be made of the Illinois Supreme Court's use of the time of discovery rule in *World of Fashion*, the other defense presented by the defendant must be explored. As suggested earlier, it appears that neither aspect of the *World of Fashion* case, the statute of limitations or the qualified privilege defense for credit reporting agencies, can be separated from the other. The combination of the two defenses, rather than either defense alone, apparently was the precipitating factor in the court's decision allowing the plaintiff to recover. It is highly questionable whether the Illinois court would have implemented the time of discovery rule for a commercial libel injury had the court not also faced the credit reporting agency's defense of qualified privilege.

Credit Reporting Agencies and the Qualified Privilege Defense

The second obstacle to recovery placed before the plaintiff in *World of Fashion* was the qualified privilege defense given to credit reporting agencies.[55] The qualified privilege defense to defamation recognizes that the person who publishes a defamatory statement may have some legitimate reason for doing so, for example, to protect his own interests or the interests of another. The defense may be defeated by the plaintiff, however, by showing malice or ill will on the part of the defendant or by demonstrating that there was an improper publication of the defamation, perhaps to too large a group or to persons who did not have a legitimate interest in the material.[56]

A.L.R. 3d 978 (1968) (when statute of limitations begins to run upon action against an attorney for malpractice).

Excellent discussions of the time of discovery rule in medical malpractice are found in Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961), *noted* in 64 W. Va. L. Rev. 193 (1961), 41 B.U.L. Rev. 569 (1961), 15 Vand. L. Rev. 657 (1962), and Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871 (1969). Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) is significant for the analogy it draws between the underground mining trespass cases and cases involving foreign objects left inside bodies.

55. *See* Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965) favoring the expansion of business' right of free expression and Comment, *Defamation and the Mercantile Agency*, 2 De Paul L. Rev. 69 (1952).

56. *See* Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 Ill. L. Rev. 865 (1931); Note, *Liability for Misstatements by Credit-Rating Agencies*, 43 Va. L. Rev. 561 (1957); 15 Am. Jur. 2d *Collection and Credit Agencies* § 22 (1964); and an extensive Annotation at 30 A.L.R.2d 776 (Supp. 1974) (libel and slander: report of mercantile agency as privileged).

Historical Perspective

Beginning in the late nineteenth century the vast majority of American courts have given the qualified privilege defense to credit reporting agencies, reasoning that the defendant's right to report the credit information and the subscribers' right to receive the information are more important than the injury caused the plaintiff by a mistaken statement.[57] Because modern commercial society needs credit information to function effectively, the cost of an injury caused by a credit reporting agency's mistake must be borne by the injured party rather than by the credit agency which made the mistake, or by the credit agency's subscribers in the form of higher prices.

A second reason set forth for allowing credit reporting agencies to plead a qualified privilege defense involves an analogy to private parties who might disseminate the same type of information. Courts have reasoned that a private individual has a qualified privilege defense to an action for publication of defamatory material if the individual has an interest of his own to protect or promote, an interest of sufficient importance when weighed against the injury caused by the possibility of defamation. The individual's qualified privilege defense is predicated upon a limited publication to a limited group. By analogy, because a private individual could publish defamatory credit information and defeat a libel action for that defamation by raising the qualified privilege defense, a credit reporting agency should be allowed the same defense.[58]

57. *See* Diamond, *The Rule of Law Versus the Order of Custom*, in 38 Soc. Research 1 (1971) for an anthropologist's analysis of the effects of the business community on the law, and the effect of the law on other cultural institutions not as subject to business influence.

58. The analogy between the privilege given to an individual and the one given to a credit reporting agency appears strained in the modern commercial world. The privilege for an individual is predicated upon a limited publication; a credit agency generally will send the report to any subscriber who wishes to pay for it.

A second area of discontinuity between individuals and the credit reporting agencies involves the interest sought to be protected by the party making the defamatory statement. Generally the qualified privilege defense has been given, in commercial settings, to individuals (or businesses) who provide credit, employment, or financial information in an attempt to protect their own commercial interests. The interest being protected is that of the publisher himself. *See* Prosser, Torts 785 (4th ed. 1971). However, it would seem that a credit reporting agency has no interest *of its own* to protect by the publication of the information. The credit agency reports the information solely for the generation of a profit, not to protect either itself or the community.

Although the argument is forcefully made that the credit agencies actually serve the better interests of society—and this argument has strong validity—the fact that the greater interests of society are advanced because of the reports does not affect the fact that the credit agency itself has no interest to protect. In fact, if the argument is that the agencies serve the public interest, and if that is their prime function, the agencies should possibly be given an absolute privilege. Of course,

In the United States, only Georgia[59] and Idaho[60] refuse the privilege defense to credit reporting agencies. Based on old but revitalized cases these states apply a standard of strict liability for defamation.[61] In addition to these jurisdictions, the principle

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no one seriously advances that option. (No one other than the credit agencies.) Apparently the theory behind the defendant's attempt, in *World of Fashion*, to obtain "mass-media protection" and the benefits of the many defenses offered to the media, was this public interest approach. As discussed in note 61 *infra*, the *World of Fashion* court was unpersuaded.

The leading English case, MacIntosh v. Dun, 18 A.C. 390, 2 B.R.C. 203, 12 Am. Cas. 146 (1908) rejects the qualified privilege defense for credit reporting agencies at least partly on the grounds tht the credit agency has no interest of its own to protect.

59. Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975) (commercial Goliath); Johnson v. Bradstreet Co., 77 Ga. 172 (1886) (because the defendant had no public or moral duty to publish there can be no qualified privilege).

60. Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 704, 139 P. 1007, 1010 (1914). The court reasons:

> The only safe and just rule, either in law or morals, is the one that exacts truthfulness in business as well as elsewhere and places a penalty upon falsehood, making it dangerous for a mercantile, commercial or any other agency to sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations.

61. At 61 Ill. 2d 129, 138, 334 N.E.2d 160, 164, the court briefly mentions a subtle collateral issue in *World of Fashion*. This issue involves the question of applying strict liability in defamation. The defendant credit reporting agency suggested that credit reports should have mass-media protection. Although a sophisticated argument was made on this point—that reports serve the public interest therefore they are public media—the Illinois court was not convinced. The court held that the agency does not have the constitutional protections given mass-media. As support for this point, the court cited Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3rd Cir. 1971), *cert. denied*, 404 U.S. 898 (1971).

Grove is significant in at least two respects: first, it shows the legal strategy of the large national credit reporting agencies to be one of an aggressive and expansive scope. Apparently the credit reporting agencies are not satisfied with only the qualified privilege, either because they wish to protect themselves against situations involving fairly clear negligence, or more speculatively, because the agencies realize that the qualified privilege is under a general attack and may succumb completely. This might explain why the qualified privilege was not even mentioned in the *Grove* case. Secondly, the courts will not extend mass-media protection to highly confidential publications. *See also* Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972); Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc., 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1971).

An interesting sidelight on these cases is supplied by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), *noted in* 8 J. MAR. J. 531 (1975) which determined that states could not impose strict liability on defamation. Where a private individual is libeled by mass-media, he must show either actual malice (ill will) or prove his own damages. Although the cases cited in *World of Fashion* indicate mass-media protection will not be applied to credit reports, the instability of the law regarding libel following *Gertz* cannot be ignored, particularly when examining the minority position of Georgia and Idaho. Georgia and Idaho apply strict liability to credit reports circulated by credit reporting agencies.

Although the case cited in *World of Fashion* as support for denying mass-media protection, Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3rd Cir. 1971) was decided before *Gertz*, a recent Georgia case which re-emphasizes Georgia's commitment to the minority position of strict liability, Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975) cites *Gertz* and says that it does not apply to credit reporting agencies. *See* RESTATEMENT (SECOND) OF TORTS § 580B, Comment e (Tent. Draft No. 21, 1975).

minority case decided in England in 1908, *MacIntosh v. Dun*,[62] rejects the privilege defense on three grounds: (1) the subscription group is not limited enough because basically anyone can subscribe; (2) the credit reporting agency prepares the report solely for its own profit motive and not for the general benefit of society; and (3) social policy should require the party causing an injury to pay for that injury. The British court summarized its position by asking:

> Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defense, or from a bona fide sense of duty, should be extended to communications made from motives of self interest by persons who traffic for profit in the characters of other people?[63]

Whatever sympathy *MacIntosh* might have generated in the United States was eliminated in 1914 when Professor Jeremiah Smith published a devastating rebuttal to that case in the *Columbia Law Review*.[64] Professor Smith's argument focused on the need for the credit reports by the business community. A second reason stressed by Professor Smith for allowing the qualified privilege defense was that the agencies did not cause enough damage with their occasional mistakes. Although the principal case and the article are over fifty years old, they contain all the essential elements of both positions still put forward in the modern cases. However, it becomes necessary to reevaluate these positions. Has a dramatic change in modern society, brought about in large part because of a shift to a credit society, taken

62. 18 A.C. 390, 2 B.R.C. 203, 12 Am. Cas. 146 (1908).

63. 2 B.R.C. 203, 213-14. The court continues with a concise statement of the problems involved with credit reports and credit reporting agencies:

> The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question, through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

It is interesting to note that Congress, when enacting the Fair Credit Reporting Act, 15 U.S.C. §§ 1601-81 (1970), felt compelled to spend hundreds of pages protecting the consumer, creating immense problems of administration for the Federal Trade Commission, when a very simple remedy—denial of the qualified privilege defense for credit reporting agencies—would have been much more comprehensive. The remedy suggested in *MacIntosh* is, of course, far more sweeping than that of the F.C.R.A.

64. *See* Smith, *Conditional Privilege for Mercantile Agencies*, 14 COLUM. L. REV. 187 (1914).

place? Has the central thesis of Professor Smith's article been eviscerated by the dramatic changes in the modern business and consumer world? If so, the circumstances surrounding the commercial world in 1976 have so changed from the circumstances in 1914, and an argument which was perfectly valid and just in 1914 may no longer be tenable. Modern cases giving the qualified privilege defense to credit reporting agencies generally have not analyzed the dramatic change in circumstances since the precedent was established fifty years ago. Basically, there have been few developments in this area of the law. The courts which have ruled subsequent to 1914 upholding the qualified privilege defense have based their decisions on Professor Smith's article and the precedent it cites. The minority position of Idaho and Georgia pre-dated this development.[65]

Another problem presented by the modern cases which give credit reporting agencies the qualified privilege defense involves the central premise of those cases: the innocent injured party who has been defamed by a credit reporting agency must absorb the cost of the injury and the defendant escapes liability not because it did not cause the injury but because it has a defense. But this premise, that the plaintiff must absorb the cost of the defendant's tort, seems directly opposite to the rationale given by these same courts when they implement the time of discovery rule in statute of limitations cases. In time of discovery rule cases the defendant is made to bear the cost of his own tort even though he may have a technical statute of limitations defense. The two lines of cases appear to be directly contradictory.

Although the *World of Fashion* court did not explicitly deal with the contradiction between the two types of cases—the time of discovery rule, and the qualified privilege defense—the court apparently recognized the contradiction and decided not to accept it. Implicit in the plaintiff's recovery is the refusal by the Illinois Supreme Court to decide one way in time of discovery rule cases and the opposite way in qualified privilege defense cases. Consequently, although the overwhelming majority of American courts have moved in one direction by providing a technical defense for credit reporting agencies, and in the opposite direction by vitiating a technical defense in time of discovery rule cases, *World of Fashion* indicates that the Illinois trend will be toward consistency in both areas. Opting for a position defending the innocent injured plaintiff regardless of the defendant's technical defenses, the Illinois court implemented the time of discovery rule in a commercial context and suggested, by dicta, that the

65. *See* 15 AM. JUR. 2d *Collection and Credit Agencies* § 22 (1964).

qualified privilege would be of no assistance to a credit reporting agency.

The attempt by the Illinois Supreme Court to achieve consistency regarding the two facets of the *World of Fashion* facts, however, was not accompanied by the same degree of consistency in dealing with other Illinois developments concerning statute of limitations litigation. In 1975, the year *World of Fashion* was decided, the Seventh Circuit Court of Appeals and the Illinois General Assembly also dealt with Illinois' time of discovery rule. The two courts and the legislative body all had a rather different interpretation of the time of discovery rule.

ILLINOIS, 1975: THREE DIFFERENT APPROACHES TO THE STATUTE OF LIMITATIONS

Faced with dramatic pressure from the medical community, pressure reinforced by the general outcry against rising professional costs and insurance rates,[66] the Illinois General Assembly enacted in the summer of 1975 a comprehensive medical malpractice statute which included a section on the time of discovery rule.[67] The legislature stepped back from the judicial expansion of its earlier position (in *Lipsey v. Michael Reese Hospital*[68] the supreme court determined that negligent diagnosis or treatment was included in the 1965 statute which was written to deal with situations in which a foreign object had been left in a patient's body[69]) and legislatively determined that there would be a sig-

66. *See* Henahan, *Malpractice*, 237 ATLANTIC MONTHLY 11 (1976), for a comprehensive discussion of the modern crisis in medical malpractice, with a special concentration on factors of insurance and the interplay between doctors and lawyers.

See also Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 1976 ILL. B.J. 326, for a comprehensive discussion of the time of discovery rule in Illinois and its effect on professional costs. It appears that Judge Scott disregarded a provision of the new medical malpractice statute by stating that the outside limit for a malpractice suit is only five years. The new law set an outside limit of five years from the act for negligent treatment and diagnosis but ten years from the act for foreign objects left in the body.

67. ILL. REV. STAT. ch. 83, § 22.1 (1975).

68. 46 Ill. 2d 32, 262 N.E.2d 450 (1970). *See* Comment, *Statute of Limitations in an Action of Malpractice*, 64 DICK. L. REV. 173 (1959).

69. Berry v. Branner, 245 Or. 307, 421 P.2d 996 (1966) (decision implements time of discovery rule in medical malpractice cases) was cited as the principle authority for this interpretation of the time of discovery rule. However, *Berry* does not involve statutory construction at all. Oregon did not have a statute allowing the time of discovery even for foreign objects. The Oregon court said:

> The contention is made that a decision of this kind amounts to judicial legislation. The legislature, however, did not provide that the time of accrual was when the physician performed the negligent act. This court did. The legislature left the matter undetermined. A determination that the time of accrual is the time of discovery is no more judicial legislation than a determination that it is the time of the commission of the act.

Id. at 313, 421 P.2d at 999. One year after the *Berry* decision the Oregon

nificant difference between the negligent diagnosis and treatment cases and the foreign objects cases. The 1975 statutory amendment recognizes the time of discovery rule but puts an outside limit on the time from the original act of malpractice within which a suit must be brought. The current Illinois law thus states that the plaintiff has two years to bring a suit from the time of discovering the injury but in no case may a suit be maintained later than five years from the negligent conduct itself if that act is one of diagnosis or treatment. If, however, the malpractice involves a foreign object left in the patient's body, the outside limit is extended to ten years. The legislative intention is clear.[70] *Lipsey* had gone too far in equating diagnosis and treatment with foreign objects. While, however, the legislature in 1975 was deciding that the time of discovery rule had to be more limited than the supreme court's interpretation of it in *Lipsey*, the supreme court, in *World of Fashion*, was expanding the use of the rule and inferring legislative intent from *Lipsey*.

In *Gates Rubber Co. v. USM Corp.*,[71] decided in 1975 several months before *World of Fashion*, Judge John Paul Stevens, writing for the seventh circuit, refused to extend the scope of the time of discovery rule in a case concerning damage to commercial property. Judge Stevens, in a vigorous and detailed analysis of the Illinois precedent, decided that the time of discovery rule in Illinois was limited to situations involving relationships of expertise or confidence (the malpractice cases) and to situations where a defective product caused a personal injury. In *Gates* the plaintiff did not know that its commercial property had been injured until after the statute of limitations had run. The *Gates* view thus limits the judicial exceptions to the statutory period to cases of personal injury.[72]

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court extended its decision, not a statute, to include a negligent diagnosis or treatment. Frohs v. Greene, 253 Or. 1, 452 P.2d 564 (1967).

70. Referring to ILL. REV. STAT. ch. 83, § 22.1 (1975) (medical malpractice statute of limitations) Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) discusses legislative intent:

> If we are to consider only the interests of a specific litigant, the case for a discovery rule after ten years would be just as strong as after only two years have passed. Presumably, however, the statute reflects a judgment that such cases will be sufficiently infrequent to make it appropriate to subordinate the interests of these plaintiffs to the general interest in permitting physicians to limit the scope of their contingent liabilities, and thus their need to pay insurances costs which ultimately become a part of society's medical expense.

Id. at 612.

71. 508 F.2d 603 (7th Cir. 1975). This case was followed in Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265 (7th Cir. 1975) (no time of discovery rule in commercial transaction).

72. Judge Stevens places great emphasis in *Gates* on the repose aspect of the statute of limitations and implies that the *Rozny* "balancing test" may be substantially less important than the Illinois court would like to believe. In *Gates*, Judge Stevens said:

A few months after the *Gates* decision, however, the Illinois Supreme Court in *World of Fashion*[73] analogized the facts of a commercial injury arising from a libelous credit report to the facts of the personal injury cases involving professional malpractice and defective products and implemented the time of discovery rule in a commercial defamation action. *Gates* can be reconciled with *World of Fashion* only if a commercial defamation is considered to be a personal injury.

World of Fashion: The Process of Judicial Analysis

Two factors of the *World of Fashion* decision, brevity and unanimity, may speak more decisively to the significance of that decision than the straight-forward holding of the case itself. Both the brevity and the unanimity suggest that the supreme court had a definite idea about where it wished to go. Although the decision probably can be justified on its individual facts, the supreme court apparently did not consider the potential ramifications of its holding and the tremendous expansion of the time of discovery rule which can be inferred from *World of Fashion*. Either that, or, the supreme court was only too well aware of the ramifications and intended a dramatic broadening of the statute of limitations exceptions.

The *World of Fashion* decision can be read to stand for any of the following rules starting from the broadest possible holding:

1. No cause of action will accrue until the plaintiff knows or reasonably should have known of the injury. (This would be total implementation of the time of discovery rule.)[74]

2. No cause of action will accrue until the plaintiff knows or reasonably should have known of the injury, but only if the injury is severe enough to warrant equitable outrage if the plaintiff does not recover.[75]

> [E]ntirely apart from the merits of the particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time. . . . The separate interest in finality outweighs the interests in affording every plaintiff a remedy for his wrong. . . .

Id. at 611-12. *Accord*, Albert v. Sherman, 167 Tenn. 133, 67 S.W.2d 140 (1934) (a now repudiated decision denying the use of the time of discovery rule). In *Albert*, the court said, "While hardships may arise in particular cases by reason of this ruling, a contrary ruling would be inimical to the repose of society and promote litigation of a character too uncertain and speculative to be encouraged." *Id.* at 139, 67 S.W.2d at 142.

73. 61 Ill. 2d 129, 334 N.E.2d 160 (1975).

74. *Id.* at 137, 334 N.E.2d at 164 ("The purpose of a statute of limitations is certainly not to shield a wrongdoer. . . ."). *Id.*

75. *Id.* at 134, 334 N.E.2d at 162-63 ("Such a construction often brings 'obvious and flagrant injustice'.").

3. No cause of action will accrue until the plaintiff knows or reasonably should have known of the injury, but only if the recovery and consequent liability of the defendant does not seem equitably untenable.[76]

4. No cause of action will accrue until the plaintiff discovers the injury in situations where the statute of limitations is very short (libel for example, at one year) and where the plaintiff could not reasonably be expected to know of the injury within the short time allowed to bring an action.[77]

5. No cause of action will accrue in personal injury or quasi-personal injury cases (defamation)[78] until the injury is discovered.[79]

6. The time of discovery rule will apply in defamation actions against credit reporting agencies.[80]

The Illinois Supreme Court based its reasoning in *World of Fashion*, implementing the time of discovery rule for commercial libel by a credit reporting agency, on four carefully circumscribed modern Illinois Supreme Court cases and on three equally limited Illinois Appellate Court decisions.

In *Rozny v. Marnul*,[81] the principle Illinois case on the time of discovery rule, the supreme court used the "relationship of confidence or expertise" exception in an action against a surveyor. The plaintiff discovered, after the statute had expired, that part of his driveway and garage were on his neighbor's property. The *Rozny* court drew its authority from different jurisdictions throughout the United States, authority all focusing on the modern formulation of the time of discovery rule. But, the *Rozny* decision is limited in two important ways. The court explicitly drew authority for extending a surveyor's liability for

76. *Id.* at 133, 334 N.E.2d at 162 ("passage of time . . . so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs. . . .").

77. One sentence in the *Gates* opinion suggests this subtle possibility for interpreting *World of Fashion*. The court implies that the discovery rule should apply only where the statute of limitations is very short. Libel, at one year, is the shortest period in the law. 508 F.2d 603, 612.

78. *See* Campbell v. Holt, 115 U.S. 620 (1885) determining that reputation is not a property right protected by the due process clause of the 14th amendment. If the reasoning in *Campbell* is followed, an argument can be made that an injury caused by a defamatory statement must be some type of personal injury. And, if defamation is a personal injury, there appears to be a definite connection between the personal injury cases cited as authority in *World of Fashion* and the facts of the defamatory damage to a commercial business's reputation at issue in *World of Fashion*.

79. 61 Ill. 2d 129, 134-35, 334 N.E.2d 160, 163 ("an action to recover for personal injuries. . . .").

80. *Id.* at 136, 334 N.E.2d at 164 ("action accrued at the time [the plaintiff] knew or should have known of the existence of the allegedly defamatory report.").

81. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

negligence from a recently enacted statute which also had extended that liability.[82] The *Rozny* decision also limited itself to its own facts.[83]

The other strong authority cited in *World of Fashion* was *Lipsey v. Michael Reese Hospital*[84] which extended Illinois' codified, albeit limited, time of discovery rule.[85] Although the statute allowed a plaintiff to use the rule when a foreign object had been left in the body, the *Lipsey* court determined that the statute also covered actions for negligent diagnosis or treatment.[86] The *Lipsey* decision rests entirely on presumed legislative intent. Ironically, five years later when the *World of Fashion* court was relying on *Lipsey* and upon its analysis of legislative intent to expand the time of discovery rule, the Illinois General Assembly was limiting the *Lipsey* decision.

Additional support for the plaintiff in *World of Fashion* was supplied by two supreme court products liability cases and three appellate cases[87] which had applied the rule using a traditional exception. *Williams v. Brown Manufacturing Co.*[88] and *Berry v. G.D. Searle & Co.*[89] determined that a plaintiff's personal injury cause of action in products liability accrued when the plaintiff was injured and not when the product was purchased. As suggested earlier, these cases deal with a somewhat different proposition than the time of discovery rule, namely, the extension

82. ILL. REV. STAT. ch. 83, § 24g (1975).

83. 43 Ill. 2d 54, 72, 250 N.E.2d 656, 665 ("under the facts and circumstances as presented. . . .").

84. 46 Ill. 2d 32, 262 N.E.2d 450 (1970).

85. ILL. REV. STAT. ch. 83, § 22.1 (1975).

86. 46 Ill. 2d 32, 41, 262 N.E.2d 450, 455. *Frohs v. Greene*, is the leading decision discussing the relation of foreign objects cases to negligent diagnosis or treatment cases. 253 Or. 1, 452 P.2d 564 (1967). The *Frohs* case, cited with great approval in *Lipsey*, did not involve a statutory construction problem at all. It merely extended a previous court decision implementing the time of discovery rule for foreign objects left inside bodies, Berry v. Branner, 245 Or. 307, 421 P.2d 996 (1966). In addition, ironically, the *Frohs* plaintiff would have been barred by the Illinois statute of limitations in any case because the claim arose from acts occurring 16 years before the suit was filed, and the Illinois absolute limitation is ten years. ILL. REV. STAT. ch. 83, § 22.1 (1975). See also Note, *Tort Law, Statute of Limitations in Medical Malpractice Actions*, 70 WIS. L. REV. 915 (1970) for an analysis equating foreign objects cases with negligent treatment and mis-diagnosis cases.

87. The Illinois appellate cases relied upon in *World of Fashion* applied the time of discovery rule by implementing two traditional judicial exceptions to the running of the statute of limitations. Kohler v. Woolen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973) (relationship of confidence or expertise) was a successful action against an attorney. McDonald v. Reichold Chemicals, Inc., 133 Ill. App. 2d 780, 274 N.E. 2d 121 (1971) (cumulative injury) and Wiggington v. Reichold Chemicals, Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971) (companion case) were occupational disease actions.

88. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

89. 56 Ill. 2d 548, 309 N.E.2d 550 (1974). The discussion of the time of discovery rule in *Berry* is dicta; the plaintiff did not recover damages even with the advantage of the rule.

of a manufacturer's liability beyond the traditional limits of warranty and privity of contract.[90] Although such products liability cases lend vague support to a developing judicial concern with "unavoidable relationships," and can be related to the time of discovery rule in that manner, the interconnection is, at best, undefined.

The *World of Fashion* court did not cite numerous older Illinois decisions which did not allow a time of discovery rule, apparently concluding that these decisions had been overruled, *sub silentio*, by *Rozny*.[91] Following the recitation of Illinois prece-

90. It is stretching the use of the term "time of discovery rule" to apply it to products liability/personal injury cases. Although the plaintiffs in these cases did not know that the product was defective until it injured them, they, of course, did not have a cause of action in strict liability until they were injured.

Until the advent of strict liability in products liability, *e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), and Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), the earlier cases held that the cause of action accrued when the product was sold. A necessary concomitant of the increased liability of products liability was an extention of the time to sue. At one point, *Williams v. Brown Mfg. Co.* suggests that the whole purpose of strict liability in products liability would be vitiated if the time of action did not run from the time of injury. 45 Ill. 2d 418, 432, 261 N.E.2d 305, 313,

An important distinction is drawn in some of the underground trespass mining cases, particularly Treece v. Southern Gem Coal Co., 245 Ill. App. 113 (1923), notably that the cause of action accrues not when the trespass occurs but when the injury—such as the land collapsing—occurs. This is the same situation as in products liability cases.

91. 61 Ill. 2d 129, 134-35, 334 N.E.2d 160, 162-63. The *World of Fashion* court cited cases which have implemented the time of discovery rule in Illinois. Uncited, however, are numerous Illinois cases which have not allowed recovery and have refused to accept the time of discovery rule exception. Jackson v. Anderson, 355 Ill. 550, 189 N.E. 924 (1934) (unknown claim barred regarding issuance of stock); Lancaster v. Springer, 239 Ill. 472, 481, 88 N.E. 272, 275 (1909) (land deed; "the failure of the complainants to learn of their cause of action does not prevent the operation of the statute of limitations,"); Steele v. Steele, 220 Ill. 318, 77 N.E. 232 (1906) (an adverse possession situation; dicta says unknown claim may be barred); Conner v. Goodman, 104 Ill. 365 (1882) (unknown claim barred in adverse possession situation); Leroy v. City of Springfield, 81 Ill. 114 (1876) (extent of personal injury not discovered after sidewalk collapsed); Antczak v. Antczak, 61 Ill. App. 2d 404, 209 N.E.2d 838 (1965) (inability to prove cause of action will not toll statute); Nogle v. Nogle, 53 Ill. App. 457, 202 N.E.2d 683 (1964) (unknown divorce decree claim not set aside); Toft v. Acacia Mausoleum Corp., 322 Ill. App. 514, 54 N.E.2d 616 (1944) (purchaser of note unknown); Proctor v. Wells Bros., 181 Ill. App. 468 (1914) (new claim not allowed when plaintiff sued the wrong party); Calumet Elec. St. R.R. v. Mabie, 66 Ill. App. 235 (1896) (statute runs from infliction of personal injuries and not from time full extent of the damages has been ascertained); Carr v. Bennett, 21 Ill. App. 137 (1886) (claim barred even though plaintiff did not know his horse had been taken); Means v. Jenkins, 18 Ill. App. 41 (1885) (money collected by agent); Mattison-Greenlee Serv. Corp. v. Cullhane, 103 F.2d 608 (7th Cir. 1939) (applying Illinois law; time of discovery rule not applicable against unknown embezzler).

Illinois has a few early cases which apparently support the time of discovery rule. Madison v. Wedron Silica Corp., 352 Ill. 60, 184 N.E. 901 (1933) (cumulative disease); Gunn v. Minnesota Mutual Life Ins. Co., 322 Ill. App. 313, 54 N.E.2d 596 (1944) (cause of action accrued when policy holder discovered his insurance had lapsed even though the agent

dent, the *World of Fashion* court cited numerous cases from other jurisdictions which implemented the time of discovery rule.[92]

In conclusion, the court set out one of the most explicit sentences of any modern Illinois case defining its view of the statute of limitations. The court said, "The purpose of a statute of limitations is certainly not to shield a wrongdoer; rather it is to discourage the presentation of stale claims and to encourage diligence in the bringing of actions."[93] This sentence must be compared to that of the same court twenty-one years earlier in *Geneva Construction Co. v. Martin Transfer & Storage Co.*[94] where the court said, "The basic purpose for such statutes of limitations is to afford the defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible."[95]

In 1954, the basic purpose of the statute was directed toward protecting the defendant. Current judicial emphasis has moved away from interpreting the statutes as aids to hapless defendants, an interpretation which was the foundation of the nineteenth and twentieth century courts' acceptance of the limitations periods. Rotating in a great arc, the current courts have shifted back to the seventeenth and eighteenth century position which considered the arbitrary limitation periods inequitable. In 1770, Lord Mansfield created "moral consideration" for the promise to pay a barred debt in order to avoid a statutory limitation which he felt unfairly discriminated against plaintiffs. In the mid-twentieth century the courts have given wide implementation to a time of discovery rule in order to avoid similar unfairness.

The Time of Discovery Rule: An Unlimited Application?

Before concluding prematurely, however, that the time of discovery rule will be greatly expanded in Illinois following *World of Fashion* (although this conclusion seems justified on the face of the decision),[96] it should be pointed out that there are several areas of Illinois law where the time of discovery rule

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and insurance company were keeping his premiums); Wanless v. Peabody Coal Co., 294 Ill. App. 401, 13 N.E.2d 996 (1938) (time of discovery rule used in mining trespass). The *Rozny* court cited only the *Wanless* case as support for the time of discovery rule, and Eichelberger v. Homerding, 317 Ill. App. 125, 45 N.E.2d 493 (1942) (decision decides when a statute of limitations runs for encumbrances on land) (*semble*), as authority for implementing the rule. *Eichelberger* seems to be questionable support.

92. 61 Ill. 2d 129, 134-35, 334 N.E.2d 160, 163-64 (1975).

93. *Id.* at 137, 334 N.E.2d at 164.

94. 4 Ill. 2d 273, 122 N.E.2d 540 (1954).

95. *Id.* at 289-90, 122 N.E.2d at 549.

96. *See* Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 1976 ILL. B.J. 326, 332. This article suggests that a broad expansion of the rule will follow *World of Fashion*.

traditionally has not been applied. In an ordinary negligence action, suit must be filed within a period calculated from the occurrence of the act which caused the injury. A failure to discover the resulting injury does not toll the statute.[97] When suit is filed as a result of an injury, the plaintiff's compensation must be based upon observable and probable consequences arising from the injury and not upon speculative claims of unknown damage.[98] And a subsequent complication, undiscovered before the final judgment is rendered, cannot be remedied later.[99] Related cases in another area of the law indicate that the statute runs against the plaintiff for adverse possession even though the plaintiff may be unaware of his claim to the property in question.[100] In Dram Shop Act cases the statute begins to run when the liquor is served, not when the plaintiff discovers that the defendant's actions caused an injury or death.[101] But, most explicitly—and importantly in light of *World of Fashion*—the Uniform Commercial Code states that "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."[102] This statement demonstrates that the legislature clearly recognized the problem of undiscov-

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97. *See* 25 I.L. & P. *Limitations* § 54 (1956).

98. *See* 15 I.L. & P *Damages* §§ 14, 32, 34 (1968).

99. *See* the colorful English case of Fetter v. Beal, 1 Salk. 11, 91 Eng. Rep. 11 (K.B. 1795) (where the defendant "beateth" the plaintiff's head upon the ground, and the plaintiff recovered damages for the beating. Subsequently a piece of plaintiff's skull "was come out" and he was barred from further recovery by the previous judgment); 15 I.L. & P. *Damages* §§ 14, 32, 34 (1968).

100. *See generally* Annot., 156 A.L.R. 253 (1945) (when statute of limitations commences to run on action for wrongful seizure of property of third persons under process or court order) for a detailed discussion of adverse possession and the statute of limitations. *See also* Waterman Hall v. Waterman, 220 Ill. 569, 77 N.E. 142 (1906) (true owners did not realize they had title); Dugan v. Follett, 100 Ill. 581 (1881) (barred claim even though plaintiff did not know of a title transfer); Isham v. Cudlip, 33 Ill. App. 2d 254, 179 N.E.2d 25 (1962) (house was determined to be personal property and owners were unaware of their claim). In one sense the adverse possession cases are quite similar to medical malpractice cases: often neither party knows that there is a cause of action because neither knows that an injury occurred.

101. ILL. REV. STAT. ch. 43, § 135 (1975). Lowery v. Malkowski, 20 Ill. 2d 280, 170 N.E.2d 147, *cert. denied*, 365 U.S. 879 (1961) (since disabilities are not specifically mentioned in the statute the court will not toll it for a minor); Myers v. Green, 5 Ill. App. 3d 816, 284 N.E.2d 349 (1972) (action accrues when person was arrested outside of bar, not when wife discovered her loss of support due to husband's jailing); Super Valu Stores, Inc. v. Stompanato, 128 Ill. App. 2d 243, 261 N.E.2d 830 (1970) (action accrued at time of accident, not when workman's compensation insurer found out about the dram shop claim); Dabney v. Marvin, 155 Ill. App. 238 (1911) (when the liquor was served, not when the injury occurred).

102. ILL. REV. STAT. ch. 26, § 2-725 (1975). The code comment to subsection (2) states that the sentence quoted in the text "is in accord with prior Illinois decisions in other areas of law that ignorance of a cause of action in no way affects the running of the statute of limitations." ILL. ANN. STAT. ch. 26, § 2-725 (Smith-Hurd 1974).

ered injuries in commercial contexts. The time of discovery rule was consciously excluded.

The Statute of Limitations and the Qualified Privilege Defense

Crucial to understanding *World of Fashion* and predicting its impact is an understanding of why the court analogized the facts in this case to the facts of cases where the time of discovery rule had been applied rather than to the facts of cases, particularly commercial cases, where the rule had not been applied. The interrelationship of certain vague aspects of the statute of limitations for defamation and the recognition by the court of the quasi-personal injury nature of false credit reports apparently is the key to the analogy.

Traditionally slander has had one of the shortest limitation periods of any legal remedy, the limited time presumably necessary to balance the somewhat ephemeral nature of the evidence.[103] The period of time ran from the publication of the slander.[104] Libel, however, had received separate, and longer, statutory treatment until the middle of the nineteenth century. This separation, apparently based on the greater damages caused by libel and the greater ease of preserving evidence of libel gave that tort a much longer statute of limitation.[105] Slander originally was two years; libel, six years.

In 1861 the Illinois legislature eliminated the separation and gave both torts a one-year period of limitations. Ten years later the legislature dropped from the statute three words—"and not after"—traditionally used by legislative bodies to limit absolutely the judicial ability to interpret or extend the statutes. Consequently, the deletion of these words from the defamation statute

103. *See* E. SEELMAN, THE LAW OF SLANDER AND LIBEL OF NEW YORK 4 (1933).

104. Colby v. McGee, 48 Ill. App. 294 (1897). *But see* H. FOLKARD STARKIE ON LIBEL AND SLANDER 521 (1877), which indicates that a plaintiff may plead that the action did not accrue until the special damage occurred, even though publication had been earlier. Additional cases from other jurisdictions support the text's statement. Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971) (blameless ignorance doctrine not applied in copyright action and statute determined to run from publication regardless of fact that plaintiff was unaware of publication); Grist v. Upjohn, 1 Mich. App. 72, 134 N.W.2d 358 (1965) (time runs from speaking, not discovery); Brown v. Chicago, R.I. & P.R. Co., 212 F. Supp. 832 (D.C. Mo. 1963) (from date letter stamped "received", not when plaintiff had knowledge of receipt); Barnard and Wife v. Boulware, 5 Mo. 454 (1838) (the court suggested that the reason for the running of the statute from time of publication and not from time of discovery is that the plaintiff has an obligation to find out if he has been libeled); Gordon v. Fredle, 206 N.C. 734, 175 S.E. 126 (1934) (*semble*) (time not tolled when plaintiff had defamatory letter but had not discovered who had written it).

105. *See generally* E. SEELMAN, THE LAW OF SLANDER AND LIBEL OF NEW YORK ch. 1 (1933).

soon after the shortening of the time period should not be viewed as inadvertent.[106] The words are retained in certain sections of the modern Illinois limitations statute.[107]

A second reason advanced for the shorter time limitation applicable to defamation actions is the assumption that a person could not be injured too seriously if that person did not choose to bring suit within a short period of time. The assumption that defamation often causes dramatic but short-lived injury, also accounts for the traditional distinction between libel and slander *per se* and slander *per quod*. Libel and slander *per se* were presumed to cause serious damages. But even the presumed damages of libel evaporated after a short period of time and certainly were lost when the plaintiff did not even know of the defama-

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106. A brief historical analysis of the defamation limitations in Illinois is helpful for understanding the subtle shifts in legislative intent. Based on the English model, 1623, 21 Jac. 1, c. 16, § 3, the earliest legislative position (Laws of the Northwest Territory, 1788-1800, ch. 10, at 25), sets out Illinois' original limitation period for defamation. An "action on the case for slander, [must be brought] within two years next after the cause of action." Libel had a six year statute.

The legislature, in 1827, changed the law slightly reducing the length of time for slander to one year and libel to five years. 1827 Ill. Laws § 3 at 285. No changes were made in the statute in 1833 or 1845. See Hazell v. Shelly, 11 Ill. 9 (1849) ("words spoken" statute does not include libel which had a longer time allowance).

But, in 1861, a distinct change, combining slander and libel, was made. "Every action on the case, for slander and libel, shall be commenced within one year next after the cause of action accrued, and not after." 1861 Ill. Laws § 2 at 142. And, in 1972, another significant change took place when the legislature dropped the words of absolute limitation, "and not after." 1872 Ill. Laws § 12-13 at 559. *See* Benyon v. Evelyn, 124 Eng. Rep. 614, 636 (C.P. 1664): "But it rests not there, but adds, 'and not after', which negative words are the strongest words that can be in law."

107. The words "and not after" are retained in the following sections of the limitations statutes: actions by railroads to recover costs of services, ILL. REV. STAT. ch. 83, § 24c (1975); actions based on the extended time period allowed following the discovery of a fraudulently concealed claim ("within five years after the person entitled to bring the same [action] discovers that he has such a cause of action, and not afterwards."), ILL. REV. STAT. ch. 83, § 23 (1975). The words were dropped from the refiling statute ILL. REV. STAT. ch. 83, § 24a (1975), in the 1967 amendments. 1967 Ill. Laws § 1 at 615.

In 1959 the legislature added a privacy clause to the defamation statute "or for publication of matter violating the right to privacy." 1959 Ill. Laws § 1 at 1770. This addition poses another question. Since the statute explicitly says "publication of matter" it appears to set a limit only on three of the four traditional areas of right of privacy: appropriation, public disclosure of private facts, and placing the plaintiff in a false light in the public eye. See PROSSER, TORTS 802 (4th ed. 1971). "Intrusion" apparently is not covered by the statute. It would seem from this that a plaintiff could be barred from an action against a peeping Tom who published a surreptitiously obtained photograph a year after the taking, but could maintain the right to sue for the taking of the picture for a period longer than a year. Thus, the far more serious tort seems to have a shorter limitation period. One explanation is that the legislature may not have considered the problem of an unknown publication or defamation; without a publication, the injured party needed longer to discover the occurrence of the tort.

tion.[108] The reasonableness of this interpretation in the older cases is unquestioned. However, the modern implementation of such old rules must be viewed in light of the tremendous changes which have occurred since those decisions were made.

The modern commercial world is far more complex than it was years ago. Modern businesses are forced into many unavoidable relationships simply because of the complexity of the commercial world. One such relationship, unavoidable today, involves credit reporting agencies. The plaintiff in *World of Fashion* did not choose to have the defendant disseminate a credit report about it. The complexities of modern business, however, dictated such a procedure. As has been demonstrated earlier, the presence of these unavoidable relationships aided the Supreme Court of Illinois in determining that a cause of action for personal injury in products liability accrued when the plaintiff was injured and not when the product was purchased. In the products cases, the court reasoned that a purchaser could not be expected to know that a hidden defect would eventually cause a personal injury. In *World of Fashion*, the court apparently reasoned along similar lines regarding injuries caused by credit reporting agencies. The court recognized the "manifest injustice of permitting persons investigated to be silently wronged through inaccurate reporting."[109]

By analyzing the products liability cases in relation to the *World of Fashion* facts, a vague inference can be gathered that the Illinois Supreme Court is fashioning a new exception to the running of the statute of limitations to correspond with the recognized exceptions of relationships of expertise or confidence and cumulative injuries.[110] This new exception, justified by the changes brought about in the modern commercial world, seemingly tolls the statute of limitation where the plaintiff has an "unavoidable relationship" with the defendant, a relationship essential to functioning in the modern business world. An unavoidable relationship apparently involves the necessary conjunction of a consumer with products or services necessary to a modern and efficient existence.

After resolving the statute of limitations problem, the Illinois Supreme Court dealt with the qualified privilege defense given

108. In Barnard and Wife v. Boulware, 5 Mo. 454, 456 (1838), the court states:

> It is an abuse of language to pretend that the cause of action did not accrue until the plaintiffs were informed that words had been spoken. . . . [I]t does not seem probable that the law making power should intend to strain language so far as to intend that the time when the right of action accrued was the time when the plaintiff might come to knowledge of the speaking of slanderous words.

109. 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164.

110. *Id.* at 129, 137, 334 N.E.2d at 164.

to credit reporting agencies.[111] Because the qualified privilege was not actually at issue in the case at this point (the libel counts having been dismissed below because of the statute of limitations) the court's statements about the qualified privilege defense are dicta. But the dicta implies that the court will rule against the qualified privilege defense for credit reporting agencies if that issue subsequently comes before it. The court cited as its principal influence the 1973 fifth circuit decision, *Hood v. Dun & Bradstreet, Inc.*,[112] a long and carefully reasoned defense of Georgia's minority position denying the qualified privilege defense to credit reporting agencies. The *World of Fashion* court said, "In recent years there has been an increasing awareness of the importance and sensitivity of credit reporting from the standpoint of the persons investigated. There has been an increased recognition of the manifest injustice of permitting persons investigated to be silently wronged through inaccurate reporting."[113]

After setting forth its position,[114] the Illinois court quickly distinguished two federal court cases which had held that the time of discovery rule could not be applied in credit reporting agency actions.[115] The *World of Fashion* court reasoned that

111. One of the most complete modern discussions of the entire credit reporting area of law, with special emphasis on the credit reporting agencies' qualified privilege defense, is Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035 (1970).

112. 486 F.2d 25 (5th Cir. 1973). For a detailed analysis of *Hood* and the qualified privilege defense in Texas, see Wortham v. Dun & Bradstreet, Inc., 399 F. Supp. 633 (S.D. Tex. 1975) (court agreed with *Hood* reasoning but felt bound by Texas law).

113. 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (1975).

114. *Id.* In addition to *Hood*, the *World of Fashion* court cited another federal case as support for the time of discovery rule, Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972). In *Parrent* the statute of limitations did not run because the cause of action had been fraudulently concealed from the plaintiff. Fraudulent concealment is one of the traditional legislative exceptions to the statute of limitations. Two other federal cases, uncited in *World of Fashion*, refused to implement the time of discovery rule in commercial transactions. Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) (unawareness of stock transfer did not toll the statute); Saunders v. Nat'l Basketball Ass'n, 348 F. Supp. 649 (N.D. Ill. 1972) (court would not apply time of discovery rule in an action charging a Clayton Act violation).

115. 61 Ill. 2d 129, 137-38, 334 N.E.2d 160, 164-65. The cases cited in this footnote appear directly to contradict the holding in *World of Fashion*: Wilson v. Retail Credit Co., 438 F.2d 1043 (5th Cir. 1971) was said by the *World of Fashion* court to be "simply" based upon an old Mississippi decision. It is salutary to compare the old Mississippi decision cited in *Wilson*, McCarlie v. Atkinson, 77 Miss. 594, 27 So. 641 (1900) (statute of limitation starts when letter was opened and read by third party, not when plaintiff discovered the libel) *with* a slightly older Illinois decision, Colby v. McGee, 48 Ill. App. 294 (*semble*) (1894) (action accrues when words spoken, not when discovered). The old Illinois case seems to agree with the Mississippi decision that the cause of action accrues when the defamation is published, not when the plaintiff discovers the defamation. One possibly significant fact, however, should not be overlooked. The Mississippi statute, MISS. CODE ANN., § 732 (1942), referred to in

"each [case] involves a simply mechanical application by a Federal court of an earlier holding by a State court."[116] It is significant to note that this sentence strangely echoes an earlier statement in the *World of Fashion* opinion which justified using the time of discovery rule and established the court's unwillingness "to follow an abstract and mechanical reasoning in deciding when the cause of action accrued."[117]

The Illinois Supreme Court buttressed its case favoring recovery against the credit reporting agency with a reference to the Fair Credit Reporting Act.[118] The FCRA provides significant defense for consumers against errors of credit agencies and implicitly refutes Professor Smith's 1914 article which had argued that the credit reporting agencies really did not do enough damage to warrant stripping them of the qualified privilege defense. The Illinois court's reference to the FCRA as "legislation . . . enacted to protect individuals from abuses in this type of reporting" is weakened somewhat, however, by the fact that the FCRA consciously and explicitly excluded from its provisions the type of *commercial* credit report at issue in *World of Fashion*.[119]

McCarlie contains the words of absolute limitation, "and not after." In 1894, when *Colby* was decided, Illinois had already dropped the words.

Atwell v. Retail Credit Co., 431 F.2d 1008 (4th Cir. 1970), was said by the *World of Fashion* court to be mechanically following a state court holding under Maryland law. This Maryland federal case refused to apply the time of discovery rule in a defamation action even though Maryland has allowed limited "discovery" exceptions as far back as 1914. Maryland now has a statute on the discovery rule, MD. ANN. CODE art. 57, § 1 (1957), which is quite similar to the Illinois statute.

Not cited in *World of Fashion* but also denying recovery against credit agencies, based on time of discovery rule: Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), *affirmed* in a short, but very complimentary decision, 419 F.2d 31 (5th Cir. 1970).

A Texas decision, also directly on point, Bratcher v. Pecos Motors, Inc., 408 S.W.2d 722 (Tex. 1966), states that the action accrued when the report went to the subscribers and not when the plaintiff discovered the defamation. The significance of this decision to the *World of Fashion* case should not be underestimated. At about the same time Texas was denying the plaintiff's right to use the time of discovery rule in a credit reporting agency situation, the Texas courts shifted position on the application of the rule in malpractice cases. Carroll v. Denton, 138 Tex. 145, 157 S.W.2d 878 (1942) (an earlier Texas case refusing the time of discovery rule's application in malpractice which was overruled just after the Texas court decided *Bratcher*). The state now accepts the discovery rule in malpractice actions. Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). *See also* Annot., 42 A.L.R.3d 807 (1972) (what constitutes "publication" of libel in order to start the running of the period of limitation).

A distinct problem arises at this point in the *World of Fashion* opinion. It is impossible to tell from the decision which aspect of the federal cases—*Wilson* and *Atwell*—the Illinois court disapproved. Both federal cases refused to apply the time of discovery rule and both cases gave the credit reporting agencies a qualified privilege defense.

116. 61 Ill. 2d 129, 138, 334 N.E.2d 160, 164 (1975).

117. *Id.* at 137, 334 N.E.2d at 164.

118. 15 U.S.C. §§ 1601-681 (1970). *See* Comment, *Libel Suits Against Credit Reporting Agencies*, 2 U.S.F.V.L. REV. 179 (1973). 61 Ill. 2d at 137, 334 N.E.2d at 164.

119. 15 U.S.C. §§ 1601-681 (1970) applies only to consumer credit reports. The courts have clearly indicated that no application is appropri-

The cursory method with which the court dismissed cases from other jurisdictions indicates that it is prepared to make new law in this area. Surprisingly, for such a large commercial state, Illinois has no direct authority on the qualified privilege defense for credit reporting agencies. Only two Illinois cases briefly touch upon the qualified privilege and credit reports. *Zeinfield v. Hayes Freight Lines*,[120] a supreme court case, involved a letter of reference sent by the plaintiff's former employer to a building corporation. The letter contained some credit information. The defendant employer (not a credit reporting agency) was allowed to plead the traditional qualified privilege defense based on the fact that he had a legitimate interest of his own to protect.[121]

Bloomfield v. Retail Credit Co.,[122] a 1973 appellate decision, simply *assumes* that the defendant credit reporting agency had the qualified privilege defense. The plaintiff apparently stipulated the defense. In *Bloomfield*, the case was remanded to the lower court for a determination of whether there was actual malice involved in the publication which would destroy the qualified privilege.[123]

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ate in commercial settings. Wrigley v. Dun & Bradstreet, Inc., 375 F. Supp. 969 (N.D. Ga. 1974), *aff'd, no opinion*, 500 F.2d 1183 (5th Cir. 1974); Sizemore v. Bambi Leasing Co., 360 F. Supp. 252 (N.D. Ga. 1973); Beresch v. Retail Credit Co., 358 F. Supp. 260 (C.D. Calif. 1973); Fernandez v. Retail Credit Co., 349 F. Supp. 652 (E.D. La. 1972); Note, *The Fair Credit Reporting Act: Credit Reports Regulated?*, 71 DUKE L.J. 1229 (1971).

120. 41 Ill. 2d 345, 243 N.E.2d 217 (1969).

121. *Id.* *Zeinfield* has been cited in relation to credit reporting agencies only once. Counsel for plaintiff in Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972), however, missed the distinction in *Zeinfield* and *stipulated*, based on *Zeinfield*, that Dun & Bradstreet had a qualified privilege in Illinois.

122. 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973).

123. The *Bloomfield* decision appears to be a shift back to the reasoning of the older cases. The modern trend in the decisions eases somewhat, the proof of malice and ill will generally necessary to break the qualified privilege defense. Many courts are moving to the acceptance of "implied malice" or even mere negligence to revoke the privilege. *See generally* Note, *The Mercantile Agency and the Qualified Privilege in Defamation*, 11 S.C.L.Q. 256 (1959); Note, *Torts, Massachusetts Finds Abuse of Qualified Privilege Without Proof of Malice in Slander Case*, 10 DE PAUL L. REV. 222 (1960); Note, *Libel, Qualified Privilege: Does a Mercantile Agency Enjoy a Qualified Privilege?*, 36 N.D.L. REV. 201 (1960).

Illinois, however, has a case which seems to go against this trend. In Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973), the existence of the qualified privilege defense was not in issue because the plaintiff stipulated to the defense. The appellate court remanded to determine the existence of malice. *See* Comment, *The Consumer v. The Credit Bureau: Whom Does the Law Protect?*, 7 CAL. W.L. REV. 216 (1970). *Contra*, Comment, *Libel and The Corporate Plaintiff*, 69 COLUM. L. REV. 1496 (1969) (favoring the requirement of actual malice for all corporate statement libel actions).

If credit reporting agencies are given the qualified privilege defense in Illinois it will be very difficult to recover from them. John v. Tribune Co., 28 Ill. App. 2d 300, 316, 171 N.E.2d 432, 441 (1961) sets out Illinois' abuse of the qualified privilege: "a positive desire and intention to an-

The *World of Fashion* court cited neither of the Illinois cases. It did, however, quote with approval from the *Hood v. Dun & Bradstreet, Inc.* federal decision suggesting " 'that in recent years there has been an apparent shift in emphasis from the protection of the credit reporting agency to the protection of the individual or business being investigated.' "[124] This "shift in emphasis," from protection of the defendant to protection for the plaintiff, is, of course, exactly the same realignment that is taking place in the time of discovery rule cases. The courts are now seemingly deciding that fairness and equity for plaintiffs outweigh certainty and finality for defendants.

The Transferring of Costs and the Return of Equity

If the Illinois Supreme Court ultimately follows its *World of Fashion* dicta and places the cost of a credit reporting agency's mistake on the responsible party it will have attempted to shift the cost of an injury to the defendant in much the same way it is shifting the cost in time of discovery rule cases. However, a crucial element in this transferring of costs is rarely discussed. As defendants' potential liabilities increase so will their purchases of insurance to cover the cost of these liabilities.[125] But the cost of this increased insurance protection is not borne by the defendants alone. It, in turn, is transferred to the purchaser of the defendants' services in the form of higher prices. Thus, although the courts state that they are shifting the cost of the injury from the plaintiff to the defendant, in reality they are shifting the cost of the injury from the plaintiff to the defendants' customers. The costs are not so much shifted as dissipated. The astronomical size of modern malpractice damage awards seems to be a reflection of the courts' implicit recognition of this dissipation of costs.

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noy or injure another person. . . ." *See also* H.E. Crawford Co. v. Dun & Bradstreet, Inc., 241 F.2d 387 (4th Cir. 1957) (actual malice needed); Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968) (report not sufficiently libelous). But, in Dun & Bradstreet, Inc. v. Nicklaus, 340 F.2d 882 (8th Cir. 1965) (privilege destroyed), no actual malice was required.

124. 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (quoting Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 32).

125. *See* James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); Comment, *The Last Vestige of the Citadel*, 2 HOFSTRA L. REV. 721 (1974) (discussing the interplay of insurance and products liability). The most extensive discussion of this problem is found in G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) directly tied the cost of injuries to insurance when the court said, "Certainly the risk that any item will fail after the expiration of contract warranties but before anticipated useful life has ended is foreseeable; that risk may be covered by insurance or by a specific contractual provision." *Id.* at 613.

With the increased implementation of the time of discovery rule following *World of Fashion*, if that decision can be read to broaden the rule, the courts will be faced with the return of equitable vagueness such as the balancing test suggested in *Rozny*.[126] This test determines the outcome of the litigation by weighing the difficulty the defendant is faced with in obtaining proof to establish his defense against the hardship caused a plaintiff who did not know of his injury.[127] The balancing test substitutes the court's idea of fairness for the legislative body's idea of certainty. A concomitant development of the move toward equity will be the increasing dissipation of the value of earlier cases as precedent in this area of the law; the balancing test suggests that a case by case analysis should replace strict statutory construction in statute of limitations controversies.

But the balancing test is not the only area of vagueness opened up by the return of equity to the statute of limitations. Other equitable problems have already begun to reappear in law actions concerning limitations periods.

In *Hayes v. Weyrens*,[128] a nurse was denied recovery despite the application of the time of discovery rule because the court reasoned that she should have realized sooner that she had been injured. It is difficult to determine whether the case turns on

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126. The *Rozny* court sets the balancing test:

> The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue. There are some actions in which the passage of time, from the instance when the facts giving rise to liability occurred, so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs who had not become aware of their rights of action within the statutory period as measured from the time such facts occurred. . . . But where the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue.

43 Ill. 2d 54, 70, 250 N.E.2d 656, 664-65.

In *Rozny*, the court places great emphasis on the potential problems of widespread application of the rule. Quoting Cardozo's well-known opinion, Ultramares v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931) the court warns about "potential 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'" *Id.* at 63, 250 N.E.2d at 661.

127. The difficulty of proof for the defendant seems extraordinary in two particular cases regarding issues not involving personal injury. Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) where a city bought parking meters in 1942, installed one in 1950 which broke in 1964 causing property damage. The city collected damages in a suit filed 22 years after the product was sold. *See also* Quimby v. Blackey, 63 N.H. 77 (1884) where plaintiff lost his wallet in 1871, discovered that the defendant had the wallet in 1883, sued, and won. The use of the time of discovery rule in these cases seems unsupportable.

128. 15 Ill. App. 3d 365, 304 N.E.2d 502 (1973). *See generally* 2 J. POMEROY, EQUITY JURISPRUDENCE 169 (5th ed 1941) for a discussion of laches and the statutes of limitation. Generally, laches will not bar a suit filed within the statutory period, with a few exceptions.

the question of knowledge or laches. In *Quirino v. Chicago Tribune-New York News Syndicate*[129] the plaintiff was not allowed to refile his libel action after his first attempted suit had been dismissed for want of prosecution. Despite the fact that the plaintiff was within the one year statutory period allowed for refiling following this kind of dismissal the appellate court dismissed the new action on the grounds of laches. Furthermore, the point in the balancing test at which an action will not be allowed because of the loss of evidence seems evanescent at most. No case has been found which implements the time of discovery rule's balancing test to deny the plaintiff recovery.[130]

The lack of authority implementing the negative side of the balancing test is readily understandable however. Prior to the holding in *World of Fashion*, and to a certain extent in *Rozny*, the time of discovery rule had only been used in situations where the defendant's liability was clear *but for* the statute of limitations defense. There seldom are evidentiary problems in time of discovery rule cases.[131] In fact, *Rozny* and *World of Fashion* are quite unique in American law in that there are issues in the cases other than the time of discovery rule. Although the holdings in the Illinois cases certainly are not dicta, their impact is diluted somewhat by the interconnection between the statute of limitations aspects and the other important issues of law involved.

Conclusion

The decision in *World of Fashion* apparently has pointed the Illinois Supreme Court in either of two directions. If the court ultimately follows its *World of Fashion* dicta and denies the defendant credit reporting agency the qualified privilege defense, thereby adopting the minority position, the court's use of what appears to be a vague new statute of limitations exception, an

129. 10 Ill. App. 3d 148, 294 N.E.2d 29 (1973). *See also* Aranda v. Hobart Mfg. Corp., 35 Ill. App. 3d 902, 342 N.E.2d 830 (1976).

130. 61 Ill. 2d 129, 133, 334 N.E.2d 160, 162 (1975). The *Rozny* court said that occasionally a plaintiff may not be allowed recovery because of evidentiary inadequacies. The court cites Skinner v. Anderson, 38 Ill. 2d 455, 458, 231 N.E.2d 588, 590 (1967) and New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1967). The only reference in *Skinner* to the time of discovery rule is to Ill. Rev. Stat. ch. 26, § 2-725 (1975) which refers to the discovery rule in commercial contexts and refuses to apply the rule. Ironically, *Skinner* held that a statute extending the liability period against architects and contractors was unconstitutional. *New Market* applies the discovery rule against a surveyor 11 years after the survey was completed.

131. In Henahan, *Malpractice*, 237 Atlantic Monthly 12 (1976), an incident was reported where a surgical towel was discovered in a soldier several months after his discharge. The Army surgeons denied all liability until plaintiff's attorney pointed out that the towel was plainly marked "U.S. Army."

exception based on the presence of an unavoidable relationship, will not be considered unusual. The precedent value of the instant decision could then easily be confined to its facts; the true emphasis of the case will be seen to revolve around the privilege defense. However, if the court rejects its *World of Fashion* dicta and eventually decides that credit reporting agencies should be allowed to plead the qualified privilege defense, the statute of limitations exception set forth in *World of Fashion* must be read as a significant expansion of the time of discovery rule.

While considering the qualified privilege defense, the Illinois court apparently recognized the contradictory positions being taken by many American courts which rule for the defendant in credit reporting agency situations and for the plaintiff in time of discovery rule situations. The courts, in statute of limitations cases, are shifting the cost of a plaintiff's injury from the plaintiff to the defendant (and thus to society). This is the "fairness" approach to justice. But these same courts, at the same time, are insisting in the credit reporting situations that the plaintiff must bear the cost of the defendant's tort for the good of society, that is, the plaintiff may not recover even though the defendant is clearly at fault. And this is a variation of the "certainty" approach to justice, "certainty" realistically seen as a euphemism for protecting defendants. The *World of Fashion* court's implied rejection of the qualified privilege defense suggests that the Illinois court may be moving to a consistent "fairness" approach.[132]

However, any expansion in the fairness approach will be limited somewhat by the supreme court's realistic expectation of a negative legislative reaction if the court moves too far too fast. The Illinois Supreme Court certainly must realize, in light of the 1975 malpractice legislation limiting the court's time of discovery rule freedom, that the legislature has a different idea about justice. The legislature, always more susceptible than the courts to pressure from defendants and the institutional forces of society favoring certainty and finality, could easily restrict the equitable inclinations of the judges. The legislature appears to favor certainty, thus, defendant's rights; the courts favor fairness, thus plaintiff's rights.

There is no legislative limitation on the courts' regarding the qualified privilege defense for credit agencies. Here judicial inclination matches legislative intention. The current trend in leg-

132. Both Georgia and Idaho have already achieved the consistency suggested by accepting the time of discovery rule and denying the qualified privilege defense to credit reporting agencies. In Parker v. Vaughn, 124 Ga. App. 300, 183 S.E.2d 605 (1971), Georgia overruled a strong line of precedent and accepted the time of discovery rule in medical malpractice. Idaho accepted the time of discovery rule in 1972. Johnson v. Gorton, 94 Idaho 595, 495 P.2d 1 (1972).

islation is clearly toward controlling credit reporting agencies. The unique position of the Illinois Supreme Court, never having ruled on the issue of credit reporting agencies' qualified privilege defense, presents the court with a dramatic opportunity to influence American law if the privilege defense is rejected. Although authority from other jurisdictions clearly favors the privilege, the *World of Fashion* dicta implies disagreement.

In two ways, therefore, the decision in *World of Fashion* reflects a judicial trend toward shifting the cost of an injury from the innocent plaintiff to the party responsible for the injury and thus ultimately dissipating that cost throughout society. The judicial exceptions to the statute of limitations allowing a time of discovery rule and the implied rejection of a credit reporting agency's qualified privilege defense in defamation express the court's inclination to view justice as "fairness." Those who view justice as "certainty" apparently will not find much support in the Illinois Supreme Court.

Paul Wangerin