1999

From a Whimper to a Bang: The Trend Toward Finding Occurrence Based Statutes of Limitations Governing Negligent Misdiagnosis of Diseases with Long Latency Periods Unconstitutional

Peter Zablotsky
Touro Law Center

Articles

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Peter Zablotsky*

I. Introduction

During the 1970s, most state legislatures began codifying limits on causes of action for medical malpractice.[1] One of the limits imposed concerned the statutes of limitations or repose used to determine the time period within which medical malpractice actions could be brought.[2] Ultimately, virtually all states decided on

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* Professor of Law, Touro College Jacob D. Fuchsberg Law Center, B.A. Pennsylvania State University, 1977; J.D., Columbia University School of Law, 1980. The author wishes to thank Michael Bergman, Esq., for his help in conceiving and analyzing this article, and Lillian M. Spiess for her invaluable assistance with research, analysis, and writing.

1. *See infra* notes 13, 14, 17 and accompanying text.

2. *See infra* note 17 and accompanying text. BLACK'S LAW DICTIONARY explains the distinction as follows:

> *Statute of repose.* "Statutes of limitations" extinguish, after period of time, right to prosecute accrued cause of action; "statute of repose," by contrast, limits potential liability by limiting time during which cause of action can

statutory schemes that were occurrence based, in whole or in part, or otherwise limited to something short of a pure discovery based statute of limitations.[3]

Shortly after being enacted, most of the significant provisions of these schemes were subjected to constitutional challenges. Initially, the courts were divided as to whether, and to what extent, these scheme were constitutional.[4]

This situation began to change in the mid-1980s. At that time, medical malpractice victims who could not have discovered the injuries caused by the medical malpractice within the statutorily proscribed period began bringing another round of constitutional challenges. These actions usually involved the misdiagnosis of a medical condition with a latency period longer than the term of years specified by the statute of limitations. Building on a case decided in 1980 by the Supreme Court of New Hampshire,[5] other state courts began holding that occurrence or limited discovery statutes of limitations governing medical malpractice actions violated the equal protection and due process clauses found in the United States and individual state constitutions, and several other clauses found uniquely in state constitutions.[6]

> arise . . . . It is distinguishable from statute of limitations, in that statute of repose cuts off right of action after specified time measured from delivery of product or completion of work, regardless of time of accrual . . . .

BLACK'S LAW DICTIONARY 1411 (6th ed. 1990) (citations omitted). This distinction, however, is sometimes difficult to maintain. The same statute can be classified as either a statute of limitations or statute of repose depending upon when the cause of action is said to accrue and against when the statute runs. For the sake of consistency, this Article uses the term "statute of limitations" in all contexts.

3. *See infra* notes 21-24, 28 and accompanying text. Many states, using the occurrence based standard, start the statute of limitations running on the date of the initial injury. States triggering the statute of limitations in a discovery based context do so when the plaintiff discovers the injury, not the negligence. For a general discussion of both occurrence and discovery based standards, *see* 2 J. DOOLEY, MODERN TORT LAW §§ 25.78-.83 (B. Lindahl ed. 1988); 1 DAVID LOUISELL & HAROLD WILLIAMS, MEDICAL MALPRACTICE 13.06-.10 1984); *see also* Estate of Makos v. Wisconsin Masons Health Care Fund 564 N.W.2d 662, 666 (Wis. 1997) (holding that five-year statute of repose violated due process as applied to patient who did not discover misdiagnosis until after statutory limitation had expired); Martin v. Richey, 674 N.E.2d 1015, 1019-23 (Ind. Ct. App. 1997) (holding that occurrence-based medical malpractice statute of limitations violates both the equal protection and the privileges and immunities clauses of the state constitution because other tort victims enjoy discovery-based statute of limitations).

4. *See infra* note 29 and accompanying text.

5. *See* Carson v. Maurer, 424 A.2d 825 (N.H. 1980) (per curiam).

6. *See infra* notes 35-36, 95, 143 and accompanying text.

This trend has continued into the late-1990s, to the point that nearly one-third of the states have either found their statutes of limitations governing medical malpractice to be unconstitutional as applied to victims of medical malpractice who could not have discovered their injuries until well after the statutory period had expired, or have interpreted their statutes to provide for open discovery.[7] In many instances, it was the first time a court had ever found a statute of limitations to be unconstitutional.[8]

This Article examines the phenomenon of state courts finding their statutes of limitations governing misdiagnosis of diseases with long latency periods to be unconstitutional because they are not discovery based. This Article first discusses the context for the enactment of the statutes in the 1970s and catalogues the results on a state by state basis. Then, the Article analyzes the equal protection, due process, and other state constitutional doctrines that have been relied upon to invalidate these statutes. The Article concludes by discussing that, pursuant to these holdings, virtually every state medical malpractice statute of limitations is unconstitutional as applied in the latent disease context.

II. Historical Background

A. The Political Dimension

Prior to 1970, most medical malpractice actions were governed by the rules and procedures applicable to state torts generally.[9] This changed significantly during the 1970s because of a perceived crisis in medical care caused by malpractice actions. The crisis had several facets, including the claim that the cost of providing medical services had increased drastically while their availability had

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7. *See supra* note 3 and accompanying text; *see also infra* note 29 and accompanying text.

8. *See, e.g., Martin*, 674 N.E.2d at 1018. ("[T]he [trial] court can find no case in Indiana finding any statute of limitation to be unconstitutional".).

9. For example, courts seeking to rectify injustices suffered by plaintiffs without an adequate statutory remedy extended the continuous tort doctrine, which was generally applied in nuisance and trespass cases prior to its incorporation into medical malpractice statutes, to cover medical malpractice. *See* Susan S. Septimus, *The Concept of Continuous Tort as Applied to Medical Malpractice: Sleeping Beauty for Plaintiff, Slumbering Beast for Defendant*, 22 TORT & INS. L.J. 71, 72 (1986); for additional discussions of pre-1970 tort reform, *see* G. Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1296 (1987); Robert W. George, Comment, *Prognosis Questionable: An Examination of the Constitutional Health of the Arkansas Medical Malpractice Statute of Repose*, 50 ARK. L. REV. 691, 696 (1998).

decreased, and the claim that medical malpractice insurance rates were increasing rapidly.[10] The proffered causes of the crisis directly related to the legal profession included the increased numbers of medical malpractice claims filed, large and erratic damage awards, and excessive attorneys fees.[11] Attempts to deal with the perceived crisis featured "a titanic battle" among the medical profession, the plaintiffs' bar, the insurance industry, and state legislatures over whether, and how, to respond. In the words of one commentator, "many rational considerations fell by the wayside as a politically expedient solution acceptable to everyone caught up in the malpractice maelstrom evolved."[12] Nevertheless,

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10. Between 1960 and 1970, medical malpractice insurance premium rates rose 942.2% for surgeons and 540.8% for non-surgeons. *See* Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1220 (1987); *see also* Austin v. Litvak, M.D., 682 P.2d 41, 44-45 (Colo. 1984). For discussions on the rising cost of medical malpractice insurance as a backlash to the medical malpractice "crisis of the 1970s," *see generally* W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 TEMP. L. REV. 459 (1992); Thomas P. Hagen, Note, *"This May Sting a Little"-A Solution to the Medical Malpractice Crisis Requires Insurers, Doctors, Patients, and Lawyers to Take Their Medicine*, 26 SUFFOLK U. L. REV 147 (1992); Mary Ann Willis, Comment, *Limitation on Recovery of Damages Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1329 (1986).

11. *See Austin*, 682 P.2d at 44-45; *see also* George, *supra* note 9, at 697 (noting that the skyrocketing malpractice insurance costs that prompted this litigation reform movement were due in part to a drastic increase in the number of lawsuits filed against physicians); F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of 'Tort Reform'*, 23 GA. L. REV. 295, 324 (1989) (recognizing that contingency fees have been a special target of those concerned about administrative costs); Thomas, *supra* note 10, at 466-468 (discussing the tension between the ABA and AMA).

In response to the malpractice insurance crisis, 18 states enacted limits on contingent fees. Five states prescribed a sliding scale, with the maximum percentage decreasing with the size of the award, and the remaining 12 states granted the court discretion to determine a reasonable fee, either on its own motion or at the request of the plaintiff or plaintiff's attorney. *See* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 197 (1985).

12. N.Y.C.P.L.R. § 214(a), Practice Commentary (McKinney 1990) (indicating that CPLR § 214(a) was the result of a compromise to limit both the number and size in medical malpractice judgments, and that "virtually every sentence contained therein is troublesome"); *see also* Hubbard, *supra* note 11, at 329-330 (noting that tort reform has become a symbol to physicians to "enlist social reaffirmation of physicians' position in and unique contribution to society"); Hagen, *supra* note 10, at 158, 165 (discussing the perception that a pro-plaintiff tort system precipitated the crisis of the 1970s led to reforms that reduced plaintiffs' success rates; a poll of over 1000 individuals taken by the National Law Journal indicated that the public spreads the blame for the medical malpractice crisis: 32% blamed patient-plaintiffs, 25% faulted lawyers, 23% blamed physicians, and 15% charged the insurance companies); Betsy A. Rosen, Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis with a Prescription for Comprehensive*

many states ultimately adopted statutory schemes designed to limit the liability of medical practitioners. Typical components of these schemes included limitations on the types of damages that could be recovered, limitations on attorneys fees, specified penalties for bringing frivolous cases, heightened standards of proof for making out a *prima facie* case, shortened notice requirements, elimination of the collateral source rule and more stringent qualifications regarding expert testimony.[13]

Reform, 52 BROOK. L. REV 135, 143 ("The public outcry from physicians, who were frustrated by the high cost of malpractice insurance, was a significant factor in persuading the legislature to enact the Reform Act. . . . [P]hysicians [ ] angered by what they perceive to be exorbitant insurance premiums, [blame attorneys].) (citation omitted).

For examples of judicial acknowledgment of legislative attempts to balance the competing forces within the medical malpractice insurance fray, *see* Kenyon v. Hammer, 688 P.2d 961, 976 (Ariz. 1984) (holding that medical malpractice statute of limitations was unconstitutional as violative of equal protection despite the legislature's attempt to reduce the cost of medical care by lowering malpractice premiums or increase the availability of medical services); Steketee v. Linz, 694 P.2d 1153, 1158 (Cal. 1985) (en banc) (holding that attorneys were not guilty of legal malpractice by failing to file medical malpractice action on client's behalf before statutory period had run out because the primary goal of the medical malpractice statute was the reduction of the cost of medical malpractice insurance); *Austin*, 682 P.2d at 44-45; Carson v. Maurer, 424 A.2d 825, 829 (N.H. 1980) (per curiam) (holding medical malpractice statute unconstitutional, but acknowledging that the statute was a legislative attempt to address the problems of the medical injury reparations system); Hardy v. Vermeulen, 512 N.E.2d 626, 629 (Ohio 1987) (holding medical malpractice right to remedy provision unconstitutional even though its enactment was in response to a "perceived crisis in the area of malpractice insurance"); Edmonds v. Cytology Servs. of Md., 681 A.2d 546, 557-558 (Md. Ct. Spec. App. 1996), *aff'd sub. nom.* Rivera v. Edmonds, 699 A.2d 1194 (Md. 1997) (holding that summary judgment was precluded because genuine issues of material fact remained as to discovery of injury and thus claim was not time barred by statute).

13. *See Austin*, 682 P.2d at 44 (enumerating representative reform provisions in malpractice legislation); *Carson*, 424 A.2d at 839 (invalidating medical malpractice statute that incorporated provisions concerning the limitation of expert testimony, unavailability of discovery rule in cases involving injury other than foreign object, disparate treatment of individuals under a disability, additional notice of intent to sue requirements, elimination of collateral source rule, elimination of damages for "pain and suffering or other non economic loss in excess of $250,000," periodic payout schedules for awarded damages, and establishment of contingent fee scale for medical malpractice actions); *see also* Martin H. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 761 n.14 (1977) (by "October 1975, at least 39 states had commissioned studies of the medical malpractice problem, and 22 states had revised civil practice laws or rules to remedy the malpractice problem."); David R. Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws,* 38 OKLA. L. REV. 195, 200-01 (1985) (discussing states attempts to mitigate the crisis by some combination of the following typical provisions: (1) limiting the amount of recovery for plaintiffs or the total liability of the health-care provider, (2) abolishing the collateral source rule in medical malpractice actions, (3) permitting periodic payment of damage judgments in lieu of traditional lump-sum award, (4) establishing mandatory pretrial review or screening panels, (5) requiring plaintiffs to submit written notice of claim to the health-care provider

Statutes of limitations were also specifically affected. Here again, prior to the perceived crisis most states dealt with limitation periods for medical malpractice actions through their general statutes of limitations for tort actions.[14] Many of these general tort statutes of limitations were discovery based.[15] During the crisis, it was claimed that these statutes created a long tail problem[16] that forced insurance companies to impose artificially high

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as a precondition to bringing suit, (6) permitting voluntary arbitration agreements, and (7) placing limits upon the amount of attorney fees recoverable).

14. *See Edmonds,* 681 A.2d at 551 (discussing that prior to the enactment of present medical malpractice statute, tort claims were governed by the general statute of limitations); *see also* Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 VILL. L. REV. 1299, 1300 (1987) (noting that many states altered the traditional common law action for personal injuries caused by the negligence of a physician in response to the supposed "crisis"); White, *supra* note 9, at 1267 (despite reform movements, "a basic philosophical problem of the tort system will remain: the problem of retaining moral answerability for injury, as exemplified by the ritual of compensation from a lawsuit."); George, *supra* note 9, at 697 (noting that prior to the 1970s most medical malpractice actions were subject to the same rules and procedures as other general tort actions).

15. *See Austin*, 682 P.2d at 45 (before 1971, two year statute of limitations was judicially interpreted to run when the patient discovered or should have discovered with reasonable diligence the physician's negligence); Johnson v. Mullee, 385 So. 2d 1038, 1040 (Fla. 1980) (prior to 1975, discovery based statute of limitations governed medical malpractice claims); *Edmonds*, 681 A.2d at 551 (prior to 1974, medical malpractice cause of action was governed by the general statute of limitations that provided that a medical malpractice cause of action was deemed to "accrue" when the claim was "discovered"); DANZON, *supra* note 11, at 174 (discussing the early development of the discovery rule); Redish, *supra* note 13, at 760 (explaining that the purpose of the discovery rule is to prevent the statute of limitations from depriving injured patients their causes of action before the harmful effects arising from treatment become apparent); Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 21 (explaining that the discovery rule was adopted by courts in most states prior to the 1970s); Christopher J. Trombetta, Note, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience Versus Legislative Will*, 34 VILL. L. REV. 397, 403 (1989) (noting that many states adopted the discovery rule in response to the unfairness that early medical malpractice statutes of limitations produced).

16. "Long Tail" is a form of indemnity that applies to claims relating to injuries that may not immediately become apparent or mature for a period of years. The problem for the insurance carrier arises when the slowness of claim development makes projection of claim experience, losses, and payouts uncertain. Inflation-adjusted claim severity is typically included in actuarial analyses of the long tail effect on claim exposure. *See* Hubbard, *supra* note 11, at 314 (noting that both physicians and insurers are concerned about the long tail problem and have advocated the shortening of statutes of limitation); Robinson, *supra* note 15, at 10; *see also* MICHAEL A. HATCH, COMM'R OF INSURANCE, MINN. DEP'T OF COMMERCE, MEDICAL MALPRACTICE CLAIMS STUDY 1982-1987 3 (1989) (study of medical malpractice claims filed against providers of medical care in South Dakota, North Dakota, and Minnesota; commenting that the "long tail" problem has contributed to insurers'

present premiums to protect against increased future damage awards and failed to foreclose the prosecution of stale or frivolous claims.[17] Consistent with the general reform movement for medical malpractice claims, the perceived problem with statutes of limitations likewise generated many proposals. Advocates for medical practitioners urged extremely short occurrence based statutes and extremely restrictive notice requirements.[18] Consumer rights supporters and attorneys for plaintiffs urged pure discovery based statutes of limitations.[19] Even the American Bar Association entered the fray, proposing what was essentially a compromise model statute of limitations that was discovery based but capped at eight years.[20]

B. The Resulting Statutes

Ultimately, every state adopted a statute of limitations that restricted the time during which a cause of action for medical malpractice could be brought. These statutes can be separated into four categories. The first group of statutes is occurrence based with no discovery exceptions whatever. Typically, these periods are

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difficulties in making accurate actuarial evaluations of malpractice loss experience).

17. *See* Kenyon v. Hammer, 688 P.2d 961, 978 (Ariz. 1984) ("If prompt actuarial certainty is required, reduction of the statute of limitations would have been a much more rational method of achieving the compelling state interest than abolition of the discovery rule and consequent abrogation of the few and unusual claims where, because of lack of knowledge or disability, the claimant was unable to bring the action within the flat time limits."); *Austin*, 682 P.2d at 45 (explaining that the Colorado legislature reacted to the medical malpractice crisis by shortening the statute of limitations); DANZON, *supra* note 11, at 175-185 (discussing on shortening statutes of limitations); Redish, *supra* note 13, at 791 (reducing statutes of limitations while abrogating the discovery rule could conceptually result in due process challenges, however, the discovery rule is inconsistent with the policies that statutes of limitations are designed to encourage—repose and avoidance of stale claims—and thus may impose severe hardship on the health care provider); Scott A. DeVries, Note, *Medical Malpractice Acts' Statutes of Limitations as They Apply to Minors: Are They Proper?*, 28 IND. L. REV. 413, 418 (1995) (explaining that the purpose of a shortened statute of limitations is to cut off the long-tail liability of insurance companies and thus reduce medical malpractice insurance costs); Hagen, *supra* note 10, at 188 (arguing that shortened statutes of limitations proposals "ignore equity in favor of draconian quick-fix").

18. *See* Sylvia A. Law, *A Consumer Perspective on Medical Malpractice*, 49 LAW & CONTEMP. PROBS. 305, 315 (1986) (discussing that most medical malpractice reforms are "hostile to consumers" and "few even pretend to address the problems of unreasonably dangerous medical care or injured patients' medical and financial needs").

19. *See id.* For a recent discussion of mid-90s legislative tort "reform" activities in the medical malpractice arena and their effect on health care consumers, *see* Annette Wencl & Margaret Brizzolara, *Survey of the States: Medical Negligence*, TRIAL, May 1, 1996, *available in* 1996 WL 13323204.

20. *See* 1977 A.B.A. COMMISSION ON MEDICAL PROFESSIONAL LIABILITY.

quite short—between two and three years, although one statute actually provides for a ten-year period.[21]

The second group is occurrence based with limited discovery exceptions for malpractice actions involving either minors, fraudulent concealment, continuous treatment, or foreign objects. The discovery period for these exceptions, however, is capped at a stated number of years, typically four to six.[22]

The third group of statutes is also occurrence based with discovery exceptions for minors, fraudulent concealment, continuous treatment or foreign objects, but the period applicable to the exceptions is not capped. Instead, injured persons qualifying for an exception have from one to two years to commence an action after they should have realized the cause of action existed, regardless of how far into the future the events that trigger discovery occur.[23]

The fourth group of statutes is discovery based for all medical malpractice causes of action, but the discovery period is capped. Here, the victim of malpractice typically has between two and three years to bring an action after the events that trigger discovery

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21. *See* ALASKA STAT. § 09.10.070(b) (Michie 1999); CONN. GEN. STAT. ANN. § 52-584 (West 1991); MINN. STAT. ANN. § 541.07(1) (West 1998); NEB. REV. STAT. § 25-222 (1995); N.J. STAT. ANN. § 2A:14-2 (West 1987); 42 PA. CONS. STAT. ANN. § 5524 (2) (West Supp. 1998); S.D. CODIFIED LAWS § 15-2-14.1 (Michie 1998).

22. *See* ALA. CODE § 6-5-482(b) (1993) (infancy); ARIZ. REV. STAT. ANN. § 12-542 (1992) (foreign object); ARK. CODE ANN. § 16-114-203(b)-(d) (Michie 1997) (foreign object, infancy, and incompetency); CAL. CIV. PROC. CODE § 340.5 (West 1982) (fraud, intentional concealment, foreign object, and infancy); COLO. Rev. STAT. § 13-80-102.5(3)(b) (1987) (foreign object); FLA. STAT. ANN. ch. 95.11(4)(b) (West Supp. 1999) (fraudulent concealment); ILL. COMP. STAT. 5/13-212 (West 1998) (fraudulent concealment, infancy); IND. CODE ANN. § 34-18-7-1(b) (West 1998) (infancy); MO. ANN. STAT. § 516.105 (West Supp. 1999) (infancy, foreign object); N.M. STAT. ANN. § 41-5-313 (West 1998) (infancy); N.C. GEN. STAT. § 1-15 (1996)(c) (foreign object); N.D. CENT. CODE § 28-01-18(4) (1991) (fraudulent concealment); TEX. REV. STAT. ANN. art. 4950i; (West 1998) (infancy); VT. STAT. ANN. tit. 12, § 521 (Cumulative Supp. 1998) (fraudulent concealment, foreign object); VA. CODE ANN. § 8.01-243(c) (Michie 1992) (fraudulent concealment, foreign object); WASH. REV. CODE ANN. § 4.16.350(3) (West Supp. 1997) (fraudulent concealment, foreign object); WIS. STAT. ANN. § 893.55(2)-(3) (West 1997) (fraudulent concealment, foreign object); WYO. STAT. ANN. § 1-3-107(a)(ii)-(iii) (Michie 1977) (infancy, legal disability).

23. *See* DEL. CODE ANN. tit. 18, § 6856 (1989) (infancy); IDAHO CODE § 5-219(4) (1998) (fraudulent concealment, foreign object); IOWA CODE § 614.1(9) (West 1997) (foreign object); ME. REV. STAT. ANN. tit. 24, § 2902 (West 1990) (foreign object); MASS. GEN. LAWS ANN. ch. 260, § 4 (West 1992) (foreign object); MISS. CODE ANN. § 15-1-36(1)(a)-(b) 23.12 (West Supp. 1999) (foreign object, fraudulent concealment); *id.* § 15-1 49(2) (West 1995) (latent disease); N.Y. C.P.L.R. 214-a (McKinney Cumulative Supp. 1999) (continuous treatment, foreign object); W. VA. CODE § 55-7B-4(b)-(c) (1998) (infancy, fraudulent concealment).

occur, but in no event longer than a specified period, generally four to six years.[24]

A review of these categories indicates that advocates for medical practitioners prevailed in their efforts to impose restrictive statutes of limitations in the medical malpractice context. No state adopted a pure discovery based statute of limitations to govern medical malpractice. This is so despite the fact that pure discovery based statutes of limitations have become common place for most other negligence based torts.[25]

In addition, the discovery exceptions that are contained in some of the statutes in categories two and three have been construed extremely narrowly. For example, the continuous treatment exception has been limited to a situation in which a patient is actively receiving treatment for the specified condition.[26] Courts have held that the exception does not cover situations such as a follow-up appointment that was not specifically scheduled,[27] a

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24. *See* GA. CODE ANN. § 9-3-71(b) (Harrison 1998); HAW. REV. STAT. § 657-7.3 (Michie 1993) (fraudulent concealment, infancy); KAN. STAT. ANN. § 60-513(7)(b) (1994); KY. REV. STAT. ANN. § 413.140(2) (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 9:5628(A) (West Supp. 1999); MD. CODE ANN. CTS. & JUD. PROC. § 5-109(b) (Michie 1998) (infancy); MICH. COMP. LAWS ANN. § 600.5838(a) (West 1998) (fraudulent concealment, infancy, reproductive organs); MONT. CODE ANN. § 27-2-205(2) (1997) (infancy); NEV. REV. STAT. ANN. § 41A.097(2)-(3) (Michie 1986) (fraudulent concealment, infancy, brain damage, birth defect, sterility in minor); N.H. REV. STAT. ANN. § 508:4 (1998); OKLA. STAT. ANN. tit. 76, § 18 (West 1995) (infancy, incompetency); OR. REV. STAT. § 12.110(4) (1997); R.I. GEN. LAWS 9-1-14.1(1) (1997) (infancy, incompetency); S.C. CODE ANN. § 15-3-345(B)(D) (West Supp. 1998) (foreign object, infancy); TENN. CODE ANN. § 29-26-116(3) (1980) (fraudulent concealment); UTAH CODE ANN. § 78-14-4(1) (fraudulent concealment, foreign object). The Utah Supreme Court found § 78-14-4(2) unconstitutional. Consequently, § 78-12-36 operates to toll both two year statute of limitations and four year statute of repose found in § 78-14-4(1). *See* Lee *ex rel.* Lee v. Gaufin, 867 P.2d. 572 (Utah 1993).

Only the District of Columbia adopted a pure discovery based statute. *See* D.C. CODE ANN. § 12.301(8) (1995).

For an additional compilation of statutes of limitations, *see* David W. Feeder, II, Comment, *When Your Doctor Says, "You Have Nothing to Worry About," Don't Be So Sure: The Effect of Fabio v. Bellomo on Medical Malpractice Actions in Minnesota*, 78 MINN. L. REV. 943, 974-976; *see also* Edmonds v. Cytology Servs. of Md., 681 A.2d 546, 565-67 (Md. Ct. Spec. App. 1996) (Appendix A - statutes of limitations whose discoverability clauses use the health care provider's act or omission as a reference point; Appendix B - statutes of limitations that begin to run on the date of health provider's act or omission without regard to date of the injury or its discoverability).

25. *See generally* Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) (providing an extensive discussion of the historical evolution of statutes of limitations).

26. *See infra* notes 27-29.

27. *See* McDermott v. Torre, 437 N.E.2d 1108 (N.Y. 1982).

physician only inquiring about the condition after having "concluded" negligent treatment,[28] and a physician having diagnosed the condition but negligently failing to inform the patient about the results so that treatment could begin.[29] The foreign object exception has been limited to situations in which a surgeon unintentionally left something in the body. Courts have held that the exception does not cover situations such as a surgeon intending to leave a stint in the body temporarily but negligently failing to remove it during a subsequent procedure.[30] Even the fraudulent concealment exception, which applies when the medical practitioner has intentionally concealed his negligence from the patient, is capped without regard to whether the patient has actually discovered the fraud.[31]

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28. *See* Cizek v. Mary Imogene Bassett Hosp., 574 N.Y.S.2d 877 (N.Y. App. Div. 1991).

29. *See* Young v. New York City Health & Hosps. Corp., 693 N.E.2d 196, 200 (N.Y. 1998) (holding that patient whose mammogram results had been misdiagnosed and who subsequently made visits to a clinic for treatment unrelated to misdiagnosis did not fall under the continuous treatment exception necessary to toll statute of limitations and was thus barred from filing malpractice claim); *see also* Jewson v. Mayo Clinic, 691 F.2d 405, 410-11 (8th Cir. 1982) (holding that patient's claim for misdiagnosis against health care provider was barred by statute of limitations when original diagnosis was made in 1942, treatment continued until 1961, and action was not brought until 1978, one year subsequent to plaintiff's discovery of amended diagnosis which occurred in 1969); Septimus, *supra* note 9, at 71 ("[J]udiciary faces formidable challenge in seeking to do justice—engaging the continuous tort concept, while reasonably limiting the time period for bringing a medical malpractice claim.").

30. *See* LaBarbera v. New York Eye & Ear Infirmary 691 N.E.2d 619, 620 (N.Y. 1998) (holding that a device temporarily (ten days) placed in plaintiff's nasal cavity subsequent to surgery did not meet foreign object exception, even though it was negligently left inside plaintiff's nasal cavity for six years, because it was intentionally placed in nasal cavity for purposes of postoperative healing).

31. *See, e.g.*, COLO. REV. STAT. § 13-80-102.5(3)(a) (1987) (capped at two years); FLA. STAT. ch. 95.11(4)(b) (West Supp. 1999) (capped at two years, seven years statute of repose); HAW. REV. STAT. ANN. § 657-7.3 (Michie 1993); MD. CODE ANN. CTS. & JUD. PROC. § 5-109(a)(1) (Michie 1998); MICH. STAT. ANN. § 27A.5855 (Law Co-op. 1986) (capped at two years); OR. REV. STAT. § 12.110(4) (1997) (capped at two years); TENN. CODE ANN. § 29-26-116(3) (1980) (capped at one year); UTAH CODE ANN. § 78-14-4(1)(b) (1996) (capped at one year), VA. CODE ANN. § 8.01-243(c)(2) (Michie 1992) (capped at one year, ten year statute of repose); WIS. STAT. ANN. § 893.55(a) (West 1997) (capped at one year); *see also* Truitt v. Beebe Hosp. of Sussex County, 514 A.2d 1128, 1130-31 (Del. 1986) (holding that the doctrine of fraudulent concealment was inapplicable and thus did not toll the statute of limitations because physician used no "actual artifice" or made no misrepresentation that prevented the plaintiff from gaining true knowledge of his condition).

C. *The Early Constitutional Challenges*

Given the harshness of these statutes and the extreme vulnerability of the malpractice victims to whom they were applied, it is not surprising that constitutional challenges were mounted against these statutes shortly after they were enacted. The challenges were not limited to the statutes of limitations discussed above. Instead, collectively, the cases challenged all the significant aspects of the malpractice reform statutory schemes, including the applicability of the schemes to minor plaintiffs, rigorous standards for qualifying expert witnesses, notice requirements regarding intent to sue a medical practitioner, abolition of the collateral source rule, limitations on the amount of damages recoverable in medical malpractice actions, the establishment of a contingency fee scale for attorneys in medical malpractice actions, and the relatively short accrual based nature of the statutes of limitations.[32]

Initially, the courts were divided as to the constitutionality of the malpractice statutory schemes, and no clear trends emerged. This began to change with *Carson v. Maurer*,[33] a seminal case decided by the Supreme Court of New Hampshire in 1980. *Carson* was unique for two reasons. First, the court addressed virtually every aspect of the state statutory scheme applicable to medical malpractice. Second, while stating that it was obligated to show great deference to the legislature and not to second guess it as to

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32. Redish, *supra* note 13, at 762 ("The presence of serious constitutional questions as well as the tremendous societal impact that will result from their answers necessitate an examination of these issues."); Turkington, *supra* note 14, at 1317-19, n.52 (surveying state cases in which there were successful constitutional challenges to medical malpractice legislation); *see also* DeVries, *supra* note 17, at 422-442 (discussing statutes of limitations as applied to minors and challenges to equal protection and due process guarantees); Gail Eiesland, Note, *Miller v. Gilmore: The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, 38 S.D. L. REV. 672 (1993) (examining South Dakota's medical malpractice statute of limitations as violative of that state's constitutional open courts provision); Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 632-35 (1985) (discussing the challenges to statutes of repose frequently alleged by plaintiffs that include violations to open courts, due process, and equal protection provisions); Trombetta, *supra* note 15, at 397-398 n.4-5 (surveying states finding medical malpractice statutes of repose unconstitutional). *See generally* Willis, *supra* note 10 (extensive discussion of equal protection challenges on state and federal levels to medical malpractice recovery of damages provisions).

33. 424 A.2d 825 (N.H. 1980) (per curiam).

the wisdom or necessity for the legislation, the court, unequivocally, found the key reform provisions to be unconstitutional.[34]

Specifically, the *Carson* court found that many of the significant aspects of the medical malpractice statute were unreasonable, arbitrary, and not substantially related to the object of the legislation. For example, the *Carson* court found that requiring a plaintiff's expert witness to be an expert in the specific medical field at the time of the negligent treatment was too burdensome for victims of medical malpractice who required experts to prove their case.[35] The court also found that restricting the rights of minors to bring causes of action for medical malpractice did not further the legislative objective of containing the costs of medical malpractice recoveries because the number of claims brought by or on behalf of minors was comparatively small,[36] and that notice requirements unjustly placed numerous pitfalls in the path of unsuspecting plaintiffs.[37] Furthermore, the court found that eliminating the collateral source rule in malpractice actions unreasonably imposed too high a cost on the general public and malpractice plaintiffs despite the fact that the provision would help contain health care costs;[38] that limiting damages for pain and suffering arbitrarily precluded only the most seriously injured victims of medical malpractice from receiving full compensation for their injuries;[39] that limiting attorneys' fees had a questionable relationship to the goal of containing damage awards in medical malpractice cases.[40] Most significantly, the court held that requiring a medical malpractice plaintiff to bring his action within two years of the alleged negligence was "premised on the manifest unfairness of foreclosing an injured person's cause of action before he has had even a reasonable opportunity to discover its existence."[41]

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34. *See id.* at 839.
35. *See id.* at 832-33.
36. *See id.* at 835-36.
37. *See id.* at 834-35.
38. *See Carson*, 424 A.2d at 835-36.
39. *See id.* at 836-37.
40. *See id.* at 838-39.
41. *Id.* at 833 (quoting Brown v. Mary Hitchcock Mem. Hosp., 378 A.2d 1138, 1139-40 (N.H. 1977)). The importance of *Carson* cannot be underestimated as it has been cited, followed, criticized, explained, and distinguished 235 times since it was decided in 1980. *See, e.g.*, Brannigan v. Usitalo, 587 A.2d 1232, 1236 (N.H. 1991) (applying "*Carson* standard" to all types of personal injury actions and thus holding that statutory cap for noneconomic injury violated plaintiff's due process rights); Martin v. Richards, 531 N.W.2d 70, 90 (Wis. 1995) (holding that retroactive cap on medical malpractice damage award violated patient's

The court in *Carson* made its point, at least in the context of diseases with long latency periods. After *Carson*, the vast majority of courts that addressed the constitutionality of the occurrence based statutes of limitations applicable to causes of action for misdiagnosis of diseases with long latency periods found the statutes to be unconstitutional for want of a discovery rule, or strained their interpretation of these statutes so as to find a discovery rule and thus avoid the constitutional challenges all together.[42]

The challenges to the statutes of limitations governing medical malpractice were based on the equal protection and due process guarantees of the United States and state constitutions, and the guarantees found in the access to court, open court, and right to remedy provisions of various state constitutions. It is to a discussion of these constitutional challenges that this article now turns.

III. The Equal Protection Analysis

The Fourteenth Amendment to the United States Constitution declares that no state shall deny any person equal protection of the law.[43] Additionally, state constitutions make this guarantee.[44]

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due process rights); Wyoming Workers' Compensation Div. v. Halstead, 795 P.2d 760, 767 (Wyo. 1990) (holding that a discriminatory classification existed as to when the legitimacy of a minor's paternity could be established thus barring access to death benefits under the workers' compensation statute.); *see also* Hicks, *supra* note 29, at 649 (recognizing that the New Hampshire court set a precedent by applying a heightened scrutiny equal protection analysis to statute of repose); Turkington, *supra* note 14, at 1299 n.9 (citing *Carson* as example of successful equal protection and due process challenges); DeVries, *supra* note 17, at 434 n.184 (noting the violation of equal protection guarantee found in New Hampshire state constitution); Rosen, *supra* note 12, at 170 n.221 (noting that the periodic payout of a damages award is unconstitutional under the *Carson* ruling); Trombetta, *supra* note 15, at 401 n.37 (noting that a New Hampshire medical malpractice statute was statute of repose that incorporated limited use of the discovery rule); Willis, *supra* note 10, at 1331 nn.82-88 (discussing the *Carson* holding and its relationship to damage limitations).

42. *See supra* note 3 and accompanying text; *see also infra* note 50 and accompanying text.

43. *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

44. For example, the New Mexico equal protection clause provides in part: "[N]or shall any person be denied equal protection of the laws." N.M. CONST. art. II, § 18. The South Dakota equal protection provision states: "No law shall be passed granting to any citizens

In the context of legislation, the equal protection guarantee means that a state may not create a legislative classification that arbitrarily deprives the class members of rights enjoyed by those not so classified. Generally, one of three standards is applied in determining whether a legislative classification results in a denial of equal protection: a strict scrutiny standard for fundamental rights, an intermediate standard for important substantive rights, and a rational basis standard for all other rights.[45]

The minimal standard, the one that is easiest for the state to satisfy, is the "rational basis" standard. Pursuant to the rational basis standard, different classes of persons may be treated differently without violating equal protection guarantees only if the statutory classification bears a rational relationship to a legitimate government objective.[46]

Applying the rational basis standard to statutes of limitations or repose, the Supreme Court of the United States has held that the period for obtaining relief has to be long enough to provide a reasonable opportunity for those with an interest to bring suit, and that any time limit on that opportunity has to be rationally related to the State's interest in preventing the litigation of stale or

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or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. CONST. art VI, § 18. The Mississippi equal protection provision states that "all persons are created equal and are entitled to equal rights and opportunity under the law." MISS. CONST. art. II, § 4.

45. *See* Bakke v. Board of Regents, 438 U.S. 265, 357 (1978). In *Bakke,* the Court reiterated:

> [W]e have held that a government practice or statute which restricts "fundamental rights" or contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. . . . [T]he "traditional indicia of suspectness [is that] the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. (citations omitted). In contrast, the rational relationship standard is loosely measured by the legislature's attempt to reach its "legitimate" social goal through its "reasonable" classification of persons effected by the statute. The intermediate standard, usually reserved for cases involving (possibly) gender, illegitimacy, or children of illegal aliens, means that using such a classification is necessary to serve important social goals, but does not demand the highest level of justification in cases involving strict scrutiny. Instead governmental action need only be "substantially" related to an "important" government interest. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 257 (Kermit L. Hall et al. eds., 1992) (hereinafter OXFORD).

46. *See id.*

fraudulent claims.[47] Further, an unrealistically short time limitation is not rationally related to the State's interest in avoiding the prosecution of stale or fraudulent claims.[48] Finally, the State's interest cannot be used to form an impenetrable barrier that works to shield otherwise invidious discrimination.[49] One court has used the intermediate standard to review its statute of repose, holding that the statute must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object legislation.[50]

The issue of equal protection is raised by state statutes of limitations covering medical malpractice causes of action for negligent misdiagnosis in two ways. First, there is a question as to whether the state statutes can single out victims of medical negligence generally, as distinct from victims of other kinds of negligence, for different and harsher treatment regarding the availability of a discovery based statute of limitations.[51] Second, for those statutes that are occurrence based for negligent misdiagnosis but discovery based or otherwise tolled regarding "exceptions" involving foreign objects, continuous treatment, or fraudulent concealment, there is a question as to whether the state can validly distinguish between different types of medical malpractice victims.[52] This latter category of statutes is the most vulnerable to

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47. *See* Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982); Stanton v. Stanton, 421 U.S. 7 (1975).

48. *See Mills*, 456 U.S. at 101; *Pickett*, 426 U.S. at 18.

49. *See Mills*, 456 U.S. at 97; *Pickett*, 426 U.S. at 18; *Stanton*, 421 U.S. at 17.

50. *See* Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) (per curiam) ("[I]n determining whether [the statute of limitations] denies medical malpractice victims equal protection of the laws, the rest is whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation.").

51. *See id.* at 833; *see also* Kenyon v Hammer, 688 P.2d 961, 976 (Ariz. 1984) (holding that the abolition of the discovery rule was unnecessary in achieving a compelling state interest, and therefore statute found unconstitutional); Shessel v. Stroup, 316 S.E.2d 155 (Ga. 1984) (holding that medical malpractice statute of limitations running from date of negligent act or omission of injury violated equal protection); Hardy v. Vermuelen, 512 N.E.2d 626, 630 (Ohio 1987) (holding that restrictions on statute of limitations by abolishing discovery rule violates equal protection provision); Edmonds v. Cytology Servs. of Md., 681 A.2d 546, 562 (Md. Ct. Spec. App. 1996) (holding that an injury occurs when legally compensable damages first occur, regardless of whether they are discoverable or undiscoverable); Meredith E. Mays, *Application of the Discovery Rule to Cancer Misdiagnosis Cases,* 10 MED. MALPRACTICE L. & STRATEGY 1, 2 (1997) (discussing the equal protection challenge to the elimination or restriction of the discovery rule in cases stemming from the failure to diagnose a latent disease within the statutory period); George, *supra* note 9, at 712 (discussing the equal protection challenge to Arkansas medical malpractice statute of repose).

52. *See supra* notes 3, 50 and accompanying text.

an equal protection challenge. In any event, all of the courts that have considered the issue in the context of diseases with long latency periods have found that these statutes violate the equal protection guarantees of the United States and state constitutions.[53]

As stated previously, the *Carson* court was the first to analyze its statute of limitations and find an equal protection violation. Specifically, the New Hampshire statute of limitations before the court was a two year occurrence based statute with a discovery exception for foreign objects.[54] The stated goal of the statute was to contain the costs of the medical injury reparations system and to improve the availability of adequate liability insurance for health care providers.[55] The plaintiffs challenged the statute on the grounds that it unconstitutionally distinguished between victims of different types of medical malpractice.[56]

The court began its analysis with statements of deference to the legislature.[57] The court explained that it would not consider whether the court would have come to the same conclusions as to whether legislation was required,[58] and would limit its inquiry to "whether the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based."[59] Nonetheless, the court held that the legislature could not abolish the discovery rule with respect to any one class of medical malpractice plaintiffs, and that the provision of the medical malpractice statutory scheme that did so was invalid because it did not extend the discovery rule to all medical malpractice patients.[60]

Initially, it appeared that the *Carson* reasoning might not be followed; the Eighth Circuit Court of Appeals, in *Jewson v. Mayo Clinic*,[61] harkened back to a pre-*Carson* analysis in finding that the Minnesota statute of limitations was constitutional. *Jewson* involved a patient who was diagnosed with cancer and underwent

53. *See supra* notes 3, 50 and accompanying text.
54. *See Carson*, 424 A.2d at 832.
55. *See id.* at 829-30.
56. *See id.* at 830.
57. *See id.* at 831 ("In the absence of a suspect 'classification' on a 'fundamental right,' courts will not second-guess the legislature as to the wisdom of necessity for legislation.").
58. *See id.* at 831.
59. *Carson*, 424 A.2d at 831.
60. *See id.* at 833.
61. 691 F.2d 405 (8th Cir. 1982).

radiation treatment.[62] Thirty-six years later, the patient brought a malpractice action, alleging that the diagnosis was negligent, the treatment inappropriate, and the result damaging in that it caused the development of later ailments.[63]

The Minnesota statute of limitations applicable to malpractice actions was a two year occurrence based statute with no discovery exceptions.[64] In holding that the statute of limitations did not violate equal protection (or due process), the court held that the state could rationally and reasonably bar a claim that was so stale that all of the physicians who administered the radiation had died, and the methods used were now obsolete.[65] Although *Jewson* was not, strictly speaking, a latent disease case, and involved a statute that did not differentiate between categories of malpractice victims, the holding of the court nonetheless cast doubt on the seminal standing of *Carson*.

Any doubts about the viability of *Carson* were put to rest in 1986, when the Supreme Court of Colorado decided *Austin v Litvak*,[66] and presented one of the most cogent equal protection analysis to date. *Austin* involved a plaintiff who underwent invasive surgical procedures during the course of treating what had been diagnosed as a brain tumor.[67] Sixteen years later, the plaintiff was examined after sustaining a head injury in an automobile accident.[68] This subsequent examination revealed that the plaintiff did not have a brain tumor and, as a brain tumor cannot disappear by remission, that the plaintiff never had a brain tumor.[69] The plaintiff filed suit eleven months after learning of the earlier misdiagnosis.[70]

The defendant argued that the Colorado medical malpractice statute barred the plaintiff's claim.[71] The Colorado statute stated, among other things, that actions for malpractice must be commenced within thirty-six months of the act or omission constituting the malpractice, except in cases involving foreign objects or

62. *See id.* at 831.
63. *See id.* at 406-407.
64. *See id.* at 406.
65. *See id.* at 410-11.
66. 682 P.2d 41 (Colo. 1984).
67. *See id.* at 44.
68. *See id.*
69. *See id.*
70. *See id.*
71. *See Austin,* 682 P.2d at 47-48.

knowing concealment.[72] The plaintiff argued that the application of the statute to his claim of negligent misdiagnosis was a denial of equal protection.[73]

The Colorado Supreme Court agreed with the plaintiff, stating:

> Whether the legislature could constitutionally enact a three year statute of limitations or a statute of repose for all classes of medical malpractice claims is not before us. What is before us is the narrow issue of whether the legislative scheme governing medical malpractice claims which grants an exception from the three year statute of repose to a foreign object and knowing concealment claimants, but not negligently misdiagnosed claimants is constitutional. We hold that it is not.[74]

The Colorado Supreme Court did not reach its finding of a denial of equal protection easily. Indeed, the court, as it should, gave significant consideration to the scope of the problem facing the legislature. Thus, the court noted that during the 1970s the costs of medical services increased drastically while the availability of services decreased, and that increased medical malpractice insurance rates raised concerns about higher medical costs to patients.[75] The court additionally noted that proffered causes for these problems included the increased number of medical malpractice claims filed, large and erratic damage awards, and the claim that some insurance companies were forced to impose artificially high present premiums to protect against increased future damage awards.[76] The court also recognized that there was a legitimate interest in foreclosing the prosecution of stale or frivolous claims.[77]

The court concluded, however, that even these avowed significant state interests do not permit the State to create an arbitrary classification that does not relate to these interests.[78] The court stated that "[e]ven though there may be a legitimate state interest in foreclosing the prosecution of stale or frivolous claims,"[79] the claims could not be constitutionally barred because

72. *See id.* at 45-46.
73. *See id.* at 48.
74. *Id.* at 53.
75. *See id.* at 44.
76. *See Austin*, 682 P.2d at 44.
77. *See id.* at 53.
78. *See id.* at 50.
79. *Id.*

"the treatment given a patient in a negligent misdiagnosis case is capable of being proved by objective facts."[80] After this extensive rational basis analysis, the Colorado Court concluded that "[t]he classification which results in the denial of the discovery rule to patients whose conditions are negligently misdiagnosed does not further this legitimate government interest and, therefore, lacks a rational relationship to that goal."[81]

The final case in the equal protection line is the Louisiana case of *Whitnell v. Silverman*.[82] *Whitnell* involved a plaintiff who received a negligent misdiagnosis with respect to her cancer.[83] The relevant statute stated that, except for cases involving fraudulent concealment, the cause of action had to be brought within thirty-six months of the offending act or omission.[84] The trial court framed the issue as whether the statute was a denial of equal protection when applied to a victim of malpractice who received a negligent misdiagnosis regarding a disease with a latency period longer than the running time of the statute.[85] Relying on expert testimony, the court constructed a list of nineteen diseases that had latency periods longer than thirty-six months, and concluded that the statute was an unconstitutional denial of equal protection when applied to plaintiffs with these diseases.[86] The Louisiana Court of Appeals, based on language in the equal protection clause of the Louisiana Constitution, expanded the trial court's holding to include diseases with latency periods of both greater and less than thirty-six months.[87]

Beyond this, as part of a rational basis analysis, the appellate court delivered a scathing indictment of the legislation. The court stated that while the quantity of medical negligence cases being filed and the amount of reparations being paid out by medical malpractice insurance companies were increasing, this was a normal actuarial aberration that did not warrant substantive action by the legislature, because:

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80. *Id.*

81. *Austin*, 684 P.2d at 50.

82. 646 So. 2d 989 (La. Ct. App. 1994), *rev'd on other grounds*, 686 So. 2d 23 (La. 1996); *see infra* note 89.

83. *See id.* at 990.

84. *See id.*

85. *See id.*

86. *See id.* at 993.

87. *See Whitnell*, 646 So. 2d at 993.

> The insurance "crisis" is never a crisis to the insurance companies, who are in fact raising their rates rapidly. It is a crisis to consumers who suddenly must pay rapidly increasing premiums to the insurance companies. . . . [T]he insurance industry likes to use the term "crisis" because "they like to get the sympathy of the consumer to support their efforts."[88]

Ultimately, the appellate court in *Whitnell* was reversed; but in reversing, the Supreme Court of Louisiana bolstered the equal protection analytical framework.[89] The Louisiana Supreme Court found that the issue was appropriately conceptualized as to whether individuals with latency periods longer than the statute of limitations period were denied equal protection.[90] The court also used the list of diseases with long latency periods compiled by the trial court.[91] The court concluded, however, that the plaintiff was not suffering from such a disease—indeed, her disease was not on the list—and that she therefore lacked standing to assert the equal protection claim.[92] The court made it clear that the decision was based purely on standing, as opposed to constitutional considerations.[93]

To date, again, all of the jurisdictions that have had the opportunity to rule on the issue have held that a statute that treats medical malpractice victims who suffer injuries from foreign objects or active concealment differently than malpractice victims who suffer injuries from negligent diagnosis of diseases with latency periods longer than the statute is an unconstitutional violation of equal protection because, at a minimum, the statutes are not rationally related to the legitimate state interest involved. The ramifications of this are significant. If these courts are correct, fully twenty state statutes of limitations—all of those in categories three and four—are unconstitutional because they are not discovery based with respect to negligent misdiagnosis of the relevant diseases.[94]

In critiquing the analysis employed by these courts, one must ask whether, despite the judicial statements to the contrary, these

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88. *Id.* at 994.
89. *See* Whithell v. Silverman, 686 So. 2d 23 (La. 1996).
90. *See id.* at 28.
91. *See id.*
92. *See id.* at 28-29.
93. *See id.* at 29-30.
94. *See supra* notes 23-24 and accompanying text.

courts are simply substituting their judgments for those of the legislature. This is especially true for the aspect of these holdings that relies on the conclusion that there never was a medical malpractice problem to begin with, and thus no need for the reform legislation. To be sure, this has always been a subject of much debate.[95] In defense of the court in *Whitnell*, there is a growing body of impressive, impartial authorities that are finding, at the very least, that limiting statutes of limitation and imposing other restrictions on medical malpractice plaintiffs bear no relationship to the cost of medical malpractice insurance.[96] Nevertheless, to

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95. *See* Hubbard, *supra* note 11, at 295 (explaining that the medical malpractice crisis of the early 1970s was caused by a seemingly unjustified increase in tort liability against physicians coupled with improper fiscal conduct by insurance companies); *see also* Hagen, *supra* note 10, at 150 (explaining that a souring economy and the first oil crisis depressed insurers' investment income as artificially low insurance premiums soared when no longer cushioned by this investment income). For discussions questioning the existence of the medical malpractice insurance crisis, *see* DeVries, *supra* note 17, at 416 (perceived "crisis" in the cost and availability of malpractice insurance); Eiseland, *supra* note 32, at 687 & n.128 ("The validity and severity of the medical malpractice crisis of the 1970s has been seriously questioned by some, and solid explanations for the varying rates of medical malpractice insurance claim frequency over the last twenty-five years are not available."); Feeder, *supra* note 24, at 947 (discussing legislative and judicial efforts to alleviate "crisis" by restricting its perceived cause-medical malpractice claims); McKay, *supra* note 10, at 1220 (discussing that during the "crisis" the insurance companies were receiving low returns on their investments while payments for medical malpractice were increasing); *see also* Sean F. Mooney, *The Liability Crisis - A Perspective*, 32 VILL. L. REV. 1235, 1244 n.38 (noting that interest rates alone would have caused wide fluctuations in the price of liability insurance, absent other considerations of excessive competition and changes in tort law); Thomas, *supra* note 10, at 482 (citing data indicating that "cries of 'medical malpractice' . . . have been exaggerated or, at least, have been based on erroneous projections of pre-1980 evidence . . . [t]here is no evidence to suggest that there is a litigation crisis in this country."); Turkington, *supra* note 14, at 1299-1300 & n.3 (pointing out that congressional reports and other sources questioned the genuine nature of the "alleged" crisis); Lisa T. Meeks, Note, *Ohio Blows the Lid Off the Medical Malpractice Damage Cap: Morris v. Savoy,* 20 N. KY. L. REV. 569, 574 (arguing that insurance companies precipitated the "crisis" because medical malpractice reflected a small portion of the insurance industry and thus little attention was given to the risk and loss evaluations); Rosen, *supra* note 12, at 144 (recognizing that the cause and extent of "crisis" remains a matter of debate); Trombetta, *supra* note 15, at 406 (disputing the validity and severity of the medical malpractice insurance crisis).

96. *See* Estate of Makos v. Wisconsin Masons Health Care Fund, 564 N.W.2d 662, 671 (Wis. 1997) (Crooks, J., concurring) (stating that the medical malpractice crisis had already been addressed by other means and that the statute of limitations challenged in this case denied the plaintiff due process rights in bringing action and was, therefore, unconstitutional); *see also* Kenyon v. Hammer, 688 P.2d 961, 978 (Ariz. 1984) (citing statistics indicating that medical malpractice statutes of repose have little impact in alleviating "long tail" effect and reducing medical malpractice premiums); HATCH, *supra* note 16, at 31 ("Despite unchanging claim frequency and declining loss payments and loss expense, on average, physicians paid approximately triple the amount of premiums for malpractice in 1987 than

hold that a legislature is irrational for reaching the contrary conclusion is to engage in a very difficult case of line drawing.

By contrast, the equal protection analysis that has as its premise the proposition that there is no distinction between foreign object plaintiffs, continuous treatment plaintiffs, fraudulent concealment plaintiffs, and negligent misdiagnosis plaintiffs generally appears to be on very solid ground. This is because the negligent misdiagnosis plaintiffs affected by the statutes all suffer from diseases or conditions that have long latency periods.[97] Framed in this way, these courts are really holding that a statute that treats victims of negligent misdiagnosis regarding diseases with long latency periods differently than victims of negligent misdiagnosis regarding diseases without long latency periods is an unconstitutional violation of equal protection, and that there is no rational basis for depriving victims of negligent misdiagnosis of diseases with latency periods longer than the statute of limitations the right to commence a cause of action that is available to every other victim of malpractice.

Such a conclusion would appear to be beyond reproach, because these victims of negligent misdiagnosis are uniquely and unconstitutionally disadvantaged by the statute in several ways. First, they are treated differently because they lose an opportunity to pursue a remedy that is not lost by those who suffer from acts of malpractice involving foreign objects or knowing concealment. This is so despite the fact that, in all three instances, the victims of the malpractice are utterly without culpability, and equally unlikely to present a stale or fraudulent claim. Second, victims of negligent misdiagnosis are treated differently because they lose the opportu-

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1982."); Wencl & Brizzolara, *supra* note 19 (noting that the National Association of Insurance Commissioners report indicated that medical malpractice insurance profitability for insurance companies between 1985 and 1992 had increased in almost every state, and that Citizen Action, a consumer advocacy group, found that per capita health care spending has not decreased despite tort reforms and increased profits by insurance companies.).

97. *See, e.g., Makos*, 564 N.W.2d at 663 (defendant failed to diagnose as malignant a growth on the plaintiff's left leg in February of 1985; nine years later plaintiff correctly diagnosed); Martin v. Richey, 674 N.E.2d 1015, 1017-18 (Ind. Ct. App. 1997) (defendant failed to diagnose plaintiff's breast cancer in March of 1991 leading to a modified radical mastectomy in April of 1994); Edmonds v. Cytology Servs. of Md., 681 A.2d 546, 548-49 (Md. Ct. Spec. App. 1996) (defendant pathologists failed to diagnose cervical cancer in November of 1983, cancer discovered in November of 1989); Helgans v. Plurad, 680 N.Y.S.2d 648, 649 (N.Y. Sup. Ct. 1998) (defendant incorrectly diagnosed a mole as benign in April of 1986; eight years later mole correctly diagnosed as malignant melanoma); Miller v. Gilmore, No. 90-196 (S.D. 1st Jud. Cir. July 23, 1992) (mem.) (on file with author).

nity to pursue a remedy that is not lost by those who suffer from acts of malpractice in connection with the treatment of diseases with latency periods less than the statute of limitations period; that is, those diseases that are discoverable within the period. Indeed, when these two factors are combined, the result is that these plaintiffs are more disadvantaged than any other malpractice victim.

Ultimately, the best support for this equal protection analysis may come from earlier common law cases that created the foreign object exception in the first place. These cases held that foreign object plaintiffs were entitled to a discovery rule because there could be no possibility of frivolous claim; there could be no possibility of a stale claim with respect to which evidence could be lost or credibility challenged; there could be no causal break between the foreign object forgotten and the injury suffered; and the possibility of negligence on the part of the medical practitioner was significant.

Each of these statements is equally compelling when applied to a plaintiff who is the victim of the negligent misdiagnosis with a long latency period. Certainly, the claim is not frivolous; diseases with long latency periods, when the opportunity for initial treatment is lost, are frequently fatal. The same cannot be said even for foreign object cases. Second, the claims are not stale. The evidence is the existence of the disease or condition currently affecting the plaintiff, just as the existence of the foreign object serves as evidence in foreign object cases. The credibility of the parties is not in issue; the existence of the disease is evidence of both the diagnosis proffered and the treatment forgone. Third, there is no possibility of a causal break between the misdiagnosis and the injury suffered; there is no question that the misdiagnosis caused the lost opportunity for treatment. Finally, the possibility that the misdiagnosis resulted from negligence—frequently the misreading of a biopsy, mammogram or other test, which are invariably preserved for the record—is significant and easily verified. With respect to this last point, it must be remembered that statutes of limitations do not seek to prevent the discretion of the medical practitioner from being subject to a negligence analysis. Constitutionally, this could not be the goal of the statute because the evaluation of discretion is part of every negligence case without regard to whether the action is brought within that statutory period. Rather, the statute of limitations seeks to prohibit the evaluation of discretion by means of stale evidence or evidence that depends

on judgments of credibility—again, problems that arise in neither the foreign object nor the latent disease case.[98]

Indeed, this analysis would render *Carson*, *Austin*, *Whitnell*, and *Jewson* consistent. *Carson*, *Austin,* and *Whitnell* found equal protection violations; *Jewson* did not, but it alone involved a claim that could not be verified and was governed by a statute that treated all victims of medical malpractice equally.

IV. The Due Process Challenge

The Fifth Amendment to the United States Constitution states in part that "[n]o person shall be . . . deprived of life, liberty or property without due process of law."[99] The Fourteenth Amendment imposes the due process prohibition on the states, reading in part that "nor shall any state deprive any person of life, liberty or property, without due process of law."[100] State constitutions extend to their citizens additional due process guarantees through due process provisions, access to court provisions, and right to remedy provisions.[101]

In theory, there are two types of due process rights—procedural and substantive. The right to procedural due process guarantees that an individual who has life, liberty, or property at stake will be afforded an opportunity to be heard at a meaningful

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98. *See generally* Flanagan v. Mount Eden Gen. Hosp., 248 N.E.2d 871 (N.Y. 1969). In *Flanagan*, the plaintiff had surgery in July 1958 to remove her gall bladder. *See id.* at 871. In the spring of 1966, the plaintiff experienced severe pain in her abdominal region, and X-rays taken on June 3, 1966 revealed surgical clamps had been left in her body. *See id.* The court noted:

> The policy of insulating defendants from the burden of defending stale claims brought by a party who, with reasonable diligence, could have instituted the action more expeditiously is not a convincing justification for the harsh consequences resulting from applying the same concept of accrual in foreign object cases as is applied in medical treatment cases. A [foreign object], though immersed within the patient's body and undiscovered for a long period of time, retains its identity so that a defendant's ability to defend a "stale" claim is not unduly impaired.

Id. at 873; *see also* Frohs v. Greene, 452 P.2d 564, 565 (Or. 1969) (extending the discovery rule beyond foreign object exception when patient could not have known injury was caused by the negligent use of penicillin until exploratory surgery was performed sixteen years later); *Makos*, 564 N.W.2d at 663 (specimen reexamined nine years after original misdiagnosis was made).

99. U.S. CONST. amend. V.

100. U.S. CONST. amend. XIV, § 1.

101. *See supra* note 41 and accompanying text; *see also infra* note 143 and accompanying text.

time and in a meaningful manner.[102] Substantive due process is very similar to equal protection. It requires, at a minimum, that a statute bear a rational relationship to the underlying legislative purpose.[103] When principles of due process are applied to statutes of limitations, however, the two types of due process that exist in theory become very difficult to distinguish. In the context of statutes of limitations governing negligent misdiagnosis medical malpractice claims, the distinctions have blurred completely.

This is not to say that the courts are applying different tests. Three state court decisions have evaluated their medical malpractice statutes of limitations for compliance with due process, and all have focused on whether the statutes are fundamentally fair, not arbitrary, or rational.[104] Though they all performed the same analysis, the labels varied. One court stated that it was performing a procedural due process analysis,[105] one court stated that it was

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102. The concept of procedural due process is derived from the Magna Carta (1215) whereby the nobles sought to limit the king's authority. The central purpose of the doctrine is to assure fair procedure when the state imposes a burden on an individual. Among its objectives, procedural due process seeks to prevent capricious and arbitrary governmental behavior, avoid mistaken deprivations, allow persons to know about and respond to charges against them, and promote a sense of legitimacy of official behavior. *See* OXFORD, *supra* note 45, at 236; *see also* Connecticut v. Doehr, 501 U.S. 1 (1991) (holding that due process forbids prejudgment attachment of real estate without notice and an opportunity to be heard); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that due process required a hearing before the termination of welfare benefits).

103. The original purpose of substantive due process was to bar states from interference with the right to contract and the right to free enterprise. *See* OXFORD, *supra* note 45, at 237. As later expanded by the Supreme Court, the doctrine required that legislation be a valid exercise of health, welfare, morals, or police power. *See* OXFORD, *supra* note 45, at 237. Justice Fields, dissenting in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), discerned inalienable liberties that included "[the] the equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States." *Id.* at 109-10.

104. *See* Cummings v. X-Ray Assoc. of New Mexico, 918 P.2d 1321 (N.M. 1996); Garcia v. LaFarge, 893 P.2d 428 (N.M. 1995); Estate of Makos v. Wisconsin Masons Healthcare Fund, 564 N.W.2d 662 (Wis. 1997).

105. *See Makos*, 564 N.W.2d at 662, 664. The *Makos* court focused specifically on the due process rights guaranteed in the United States and Wisconsin Constitutions and found that, beyond a reasonable doubt, the decedent plaintiff had been denied her opportunity to be heard and that the "doors of the courtroom were closed before she was even injured." *Id.* at 665. The court relied on *State ex rel. Strykowksi v. Wilkie*, 261 N.W.2d 434 (Wis. 1978), in support of its due process analysis by emphasizing that procedural due process is satisfied if the statutory procedures allow for judicial remedy in a meaningful time and manner. *See Makos*, 564 N.W.2d at 662. In contrast, the dissent argued that the plaintiff did not have a vested property right that had been denied by the statute because the cause of action had not yet accrued. *See id.* at 673 (Bradley, J., dissenting). The dissent also took issue with the majority's use of fundamental fairness to overcome the legislature's intention of insulating

performing a substantive due process analysis,[106] and one court avoided the use of the terms all together, simply referring to its discussion as a due process analysis.[107]

In any event, the highest courts in Colorado and New Mexico have found their statutes of limitations governing negligent misdiagnosis to be a violation of due process. To complicate matters, however, a subsequent decision in New Mexico has held the same statute to be constitutional. Let us attend to the straightforward analysis first.

Estate of Makos v. Wisconsin Masons Health Care Fund[108] is an instance in which a due process challenge was sustained because a statute operated to deny a cause of action to a victim of negligent diagnoses when the diagnosis concerned a disease for which no symptoms appeared until after the statutory period had expired. The Wisconsin statute at issue was in part discovery based, but was capped at five years.[109] The purpose of the statute was to alleviate the effects of the perceived medical malpractice crisis of the 1970s generally, and, by implication, the longtail problem.[110]

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health care providers from "long tail" liability without a supporting substantive due process analysis. *See id.* at 674. Specifically, Justice Bradley emphasized that statutes violate substantive due process when they bear no rational relationship to the underlying legislative goal. *See id.* at 675. Further, Justice Bradley found the legislative purpose satisfied because the statute gave finality to health care providers who would otherwise face prolonged and uncertain liability thus limiting "long tail" liability, which in turn heightens the insurability of health care providers and secures affordable health care for the people of Wisconsin. *See id.* at 674.

106. *See Garcia*, 893 P.2d at 435-36. In *Garcia* a unanimous court determined that the medical malpractice statute of limitations was unconstitutional because it violated the plaintiff's substantive due process rights by allowing the plaintiff an unreasonably short period of time to bring an action once the plaintiff discovered the injury. *See id.* at 437-38. In this case, the plaintiff could not know or have reason to know of his injury until it occurred close to the end of the filing period. *See id.* at 436.

107. *See Cummings*, 918 P.2d at 1331. In *Cummings* a unanimous court found that the New Mexico statute did not violate due process. *See id.* at 1332. The court rejected the argument that access to the courts in a civil context was a fundamental right and, therefore, did not apply the heightened strict scrutiny standard for its test of constitutionality. *See id.* Instead, the court viewed the medical malpractice claim as an attempt to obtain monetary compensation for an injury caused by a health care practitioner, and not an attempt to regain an accrued or vested interest that had been denied. *See id.* Consequently, the court applied the rational basis standard, and determined that a legitimate governmental interest was being served in preventing some claims from being litigated beyond the statutory period. *See id.*

108. 564 N.W.2d 662 (Wis. 1997).

109. *See id.* at 663.

110. *See id.* at 671 (Crooks, J., concurring).

The plaintiff in *Makos* was a woman who had a growth on her left leg biopsied in 1985.[111] The defendant examined the growth and diagnosed it as non-malignant.[112] Nine year later, the plaintiff was diagnosed with metastatic malignant melanoma, and at that time, the growth that was biopsied in 1985 was re-examined and found to be malignant.[113]

In analyzing the statute for compliance with due process, the court focused on the fact that the time limitation codified in the Wisconsin statute barred the plaintiff's action over four years before the plaintiff was injured by the alleged negligence—leaving an untreated malignancy in the plaintiff's system—or could have proven the injury.[114] The court also noted, apparently to emphasize that the statute was not rationally related to solving the medical malpractice crisis, that 98.9 percent of all adults alleging medical malpractice filed claims within five years of the occurrence of the event that triggered the running of the statute of limitations.[115] The court concluded:

> There is no basic fairness to eliminate [the plaintiff's] claim for injury before she knew or could have known that she was injured. The operation of the statute of repose effectively denied [plaintiff] her opportunity to be heard because the doors of the courtroom were closed before she was even injured.[116]

The analysis in *Makos* is consistent with an earlier due process case from New Mexico, *Garcia v. LaFarge*.[117] *Garcia* involved a nine-year-old boy who began experiencing fainting spells.[118] The defendant doctor conducted tests on the boy, concluded that the spells were not cardiac related, and prescribed no particular treatment.[119] Two years and nine months later, the boy fainted again, but this time went into cardiac arrest.[120] He was resuscitated approximately twenty minutes later.[121] Unfortunately, by the time he was resuscitated the boy had suffered irreversible brain

111. *See id.* at 644.
112. *See id.*
113. *See Makos*, 564 N.W.2d at 664.
114. *See id.* at 664-65.
115. *See id.* at 665 n.7.
116. *Id.* at 664-65.
117. 893 P.2d 428 (N.M. 1995).
118. *See id.* at 430.
119. *See id.*
120. *See id.* at 431.
121. *See id.*

damage.[122] The boy was admitted to the University of New Mexico Medical Center, and the cardiologists there immediately diagnosed the boy as suffering from Long QT Syndrome.[123] The syndrome is cardiac related and is characterized by exercise induced fainting that produces a heart arrhythmia that leads to cardiac arrest and resulting brain damage.[124] If discovered in time, the syndrome is treatable with oral medication.[125]

The New Mexico statute governing negligent misdiagnosis was a pure occurrence statute, which provided that an action for malpractice had to be brought within three years of the operative act.[126] Once again, the purpose of the statute was to eliminate the potential for malpractice suits being filed long after the acts of malpractice, and thus prevent insurance carriers from withdrawing from medical coverage.

Although the plaintiff in *Garcia* continued to faint after receiving the negligent diagnosis, and ultimately suffered damage within the statutory period, the plaintiff did not bring suit until one year after suffering the damage, which was nine months after the statutory period had expired.[127] The defendant claimed that the plaintiff's complaint was time barred by the statute.[128] In response, the plaintiff claimed that he could not know about the act of malpractice until he suffered his injury, and that the statute, in not giving him a reasonable time to bring the cause of action after having been injured, violated his due process rights.[129]

The Supreme Court of New Mexico agreed with the plaintiff. The court, drawing an analogy to existing claims that are subject to newly enacted statutes of limitations, concluded:

> We reaffirm the principle that considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought. It is no less arbitrary when an existing statute of

122. *See Garcia*, 893 P.2d at 431.
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.* at 432.
127. *See Garcia*, 893 P.2d at 432.
128. *See id.*
129. *See id.*

> repose is applied to bar a claim accruing near the end of the limitations period than when a newly enacted limitations period is applied to a cause of action existing at the time of the enactment. We thus hold that a statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clauses of the New Mexico Constitution.[130]

The plaintiff's position in the *Garcia* case seems weaker than those involving the misdiagnosis of diseases with long latency periods. In *Garcia*, the plaintiff experienced some symptoms after the negligent misdiagnoses;[131] victims of diseases with long latency periods experience none. In *Garcia*, the plaintiff was still eighty-five days within the statutory period when his injuries became manifest;[132] victims of diseases with long latency periods have zero days within the statutory period to bring their cause of action because their injuries do not become manifest until after the statutory period expires.

These decisions indicated an even greater expansion in the trend of finding these statutes of limitation unconstitutional until the baffling decision in a subsequent New Mexico case, *Cummings v. X-Ray Associates of New Mexico*.[133] In *Cummings*, the plaintiff underwent a chest x-ray in 1986 and was found to have a mass in her left lung, which was diagnosed as arteriovenous malformation.[134] In 1990, an unrelated procedure revealed that the original diagnosis was completely erroneous, and that the mass was, and had always been, cancer.[135] The plaintiff filed a malpractice suit against the lab, but the trial court dismissed it as time barred.[136]

Construing the same statute as the court in *Garcia*, the Supreme Court of New Mexico this time held that the statute had a rational basis and therefore did not violate due process.[137] Thus, the current law in New Mexico is, apparently, that the statute of limitations governing malpractice actions is unconstitutional as applied to a victim of negligent misdiagnosis who discovers the

130. *Id.* at 437-38.
131. *See id.* at 431.
132. *See Garcia*, 893 P.2d at 432.
133. 918 P.2d 1321 (N.M. 1996).
134. *See id.* at 1326.
135. *See id.*
136. *See id.*
137. *See id.* at 1331.

malpractice near the end of the statutory of period, but constitutional as applied to a victim of negligent misdiagnosis who cannot discover the malpractice until after the period has expired. To complicate matters further, all of the constitutional analysis is dicta, because the court ultimately concluded that the cancer was not latent, and that its symptoms were discovered within the statutory period.[138]

Where, then, does this leave the due process analysis and its impact on statutes of limitations governing misdiagnosis of diseases with long latency periods? Relative to other cases, *Cummings* is the aberration. The analysis in *Garcia* is consistent with *Makos*, as well as the equal protection cases discussed earlier, and with the cases involving state constitutional provisions and statutory interpretation that will be discussed in the next sections.

But the *Cummings* case once again raises the question of whether courts, in declaring these statutes unconstitutional, are simply substituting their judgments for those of the legislature. Given the legion of authority in support of the position that there was never a medical malpractice crises to begin with, and that these statutes of limitations have no effect on medical malpractice insurance premiums, it is, as is done in the equal protection context, tempting to say that the courts are correct and these statutes are irrational.[139]

This concern would emerge most acutely in the substantive due process analysis. Arguably, the logical extension of this reasoning would render every statute of repose a violation of due process.[140] Such a view is not without adherents, but it is certainly not universally held; the courts are deeply divided over whether statutes of repose are constitutional.[141] But substantive due process need not be read so broadly. Instead, the irrationality

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138. *See Cummings*, 918 P.2d at 1336.

139. *See supra* notes 11-17 and accompanying text.

140. *See supra* notes 32, 96, 105 and accompanying text.

141. *See* Hicks, *supra* note 29, at 657-664 (compiling medical malpractice statutes of repose with judicial disposition); *see also* Kenyon v. Hammer, 688 P.2d 961, 979 (Ariz. 1984) (holding statute of limitations unconstitutional because it violates equal protection); Austin v. Litvak, 682 P.2d 41, 50 (Colo. 1984) (holding that statute of limitations is unconstitutional because it violates equal protection); Choroszy v. Tso, 647 A.2d 803, 806-08 (Me. 1994) (statute of limitations did not violate open courts or equal protection provisions); Ross v. Kansas City Gen. Hosp. & Med. Ctr., 608 S.W.2d 397, 399-400 (Mo. 1980) (holding medical malpractice statute does not violate due process, equal protection, or state special legislation provisions); George, *supra* note 9, at 701-08; Trombetta, *supra* note 14, at 407.

analysis can be limited to those statutes of repose governing underlying conduct that the state has no interest in protecting, such as the misdiagnosis of diseases with latency periods longer than the statutorily proscribed period. Such utterly valueless conduct stands in contrast to, for example, the manufacture of a product that functions safely for a period of years, and would therefore justify the state's interest in protecting it with a statute of repose.[142]

A better approach is to ground the analysis squarely in procedural due process. The procedural due process analysis begins with the universally accepted premise that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause, and that Due Process Clauses protect civil litigants who seek recourse in the courts as plaintiffs attempting to redress grievances.[143] Once a legislature creates a remedy, that remedy receives the full panoply of procedural due process protection because the right to due process is conferred, not by legislative grace, but by constitutional guarantee. Therefore, a litigant cannot be deprived of a remedy except pursuant to constitutionally adequate procedures. While the legislature may elect not to create a remedy in the first instance, it may not constitutionally authorize the deprivation of such an interest once conferred without appropriate procedural safeguards.[144] Regarding these procedural safeguards, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. [145] To satisfy this requirement, the procedural due process analysis looks to strike the appropriate balance among competing policy considerations. On the one hand, statutes of limitations serve to bar stale claims, adding an element of certainty to human affairs. Against this important interest must be weighed the fairness of not unreasonably denying a claimant the right to assert a claim.[146]

Bolstered by this analytical framework, the compelling conclusion—as articulated in *Makos*—is that there is no basic fairness to eliminating this claim of the victim of a misdiagnosis of

142. *See* Hill v. Fitzgerald, 501 A.2d 27, 34 (Md. Ct. Spec. App. 1985) (holding that statute of repose did not violate state access to courts provision).

143. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982).

144. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-42 (1985).

145. *See Logan*, 455 U.S. at 437; Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

146. *See* Matthews v. Eldridge, 422 U.S. 319 (1976); *see also* Hernandez v. New York City Health & Hosp. Corp., 585 N.E.2d 822 (1991).

a disease with a long latency period before the victim knew or could have known of the injury.[147] A more compelling context for affording a claimant procedural due process protection—mandating a notice requirement—could not be imagined.

Whatever approach is followed, the ramifications of *Makos* and *Garcia* are once again significant. If these courts are correct, the provisions of the remaining twenty state statutes governing causes of action for misdiagnosis that survived the equal protection challenge would fall under the due process challenge, rendering every statute in all four categories unconstitutional as applied to victims of negligent misdiagnosis of diseases with long latency periods.

While this is a major, and perhaps startling, development, it appears to be exactly the case. Indeed, the conclusion is bolstered by those jurisdictions that have analyzed their statutes governing misdiagnosis with reference to provisions unique to state constitutions. This Article now turns to a discussion of those cases.

V. Challenges Based on State Constitutional Provisions

In addition to traditional equal protection and due process provisions, state constitutions often contain broader equal protection clauses, as well as open court and right to remedy provisions.[148] Whether these additional state provisions provide

147. *See* Garcia v. LaFarge, 893 P.2d 428, 435-38 (N.M. 1995); *see also* Estate of Makos v. Wisconsin Masons Health Care Fund, 564 N.W.2d 662, 664 (Wis. 1997).

148. *See supra* note 41 and accompanying text. Forty states also have "right to remedy" provisions in their constitutions. *See, e.g.,* ALA. CONST. art. 1, § 13; ARIZ. CONST. art. 18, § 6; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. 1, § 21; GA. CONST. art. 1, § 1, ¶ 12; IDAHO CONST. art. II, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST., Bill of Rights, § 18; KY. CONST., Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. 1, § 19; MD. CONST. art. 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. 1, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. 1, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. 1, § 11; VT. CONST. ch. I, art. 4, ch. II, § 28; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8. Additionally, the New Mexico Supreme Court has recognized a right to a remedy implicit in the state's constitution despite the lack of a specific textural source. *See* Richardson v. Carnegie Library Restaurant Inc., 763 P.2d 1153, 1161 (N.M. 1988). Typically, such language reads, "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." ILL. CONST. art.1, § 12; "All courts shall be open, and every person shall have

guarantees beyond those mandated by the federal Equal Protection and Due Process Clauses is a subject that has generated much interesting and sophisticated scholarly writing.[149] What is clear is that state courts have not hesitated to rely on their state constitutional provisions to protect their citizens. To that end, seven states have used these provisions to declare unconstitutional their occurrence based statues of limitations governing medical malpractice negligent misdiagnosis.[150]

A. Open Courts and Right to Remedy Provision

Open court and right to remedy provisions are, essentially, more specific provisions relating to due process. Typically, these clauses provide: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[151] These statutes have been

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an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights." LA. CONST. art. 1, § 22.

149. *See* John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237 (1991); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Gary D. Jensen, *Legislative Larceny: The Legislature Acts Unconstitutionally When It Arbitrarily Abolishes or Limits Common Law Redress for Injury*, 31 S.D. L. REV. 82 (1985); Donna B. Haas Powers, Comment, *State Constitutions' Remedy Guarantees Provide More Than "Lip Service" to Rendering Justice*, 16 TOLEDO L. REV. 585 (1985); Redish, *supra* note 13, at 769; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992); Smith, *supra* note 13, at 205; Turkington, *supra* note 14, at 1317; Note, *Constitutional Guarantees of a Certain Remedy,* 49 IOWA L. REV. 1202 (1964); W. A. Heindl, Note, *A Remedy for All Injuries?*, 25 CHI.-KENT L. REV. 90 (1946); Hicks, *supra* note 29, at 627; Patrick E. Sullivan, Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to Courts*, 63 NEB. L. REV. 150 (1984).

150. *See, e.g.*, Harris v. Raymond, 680 N.E.2d 551, 552 (Ind. 1997); Hardy v. VerMuelen, 512 N.E.2d 626, 630 (Ohio 1987); Nelson v. Krusen, 678 S.W.2d 918, 928 (Tex. 1984) (Robertson, J., concurring); *Makos*, 564 N.W.2d at 667; Martin v. Richey, 674 N.E.2d 1015, 1025 (Ind. Ct. App. 1997); Texas Med. Liability Trust v. Garza, 918 S.W.2d 113, (Tex. Ct. App. 1996); *see also* Whitnell v. Silverman, 646 So. 2d 989, 995 (La. Ct. App. 1994).

Only two state appellate court decisions, *Choroszy v. Tso,* 647 A.2d 803 (Me. 1994), and *Cummings v. X-Ray Associates of New Mexico*, 918 P.2d 1321 (N.M. 1996), have suggested that occurrence based statutes are constitutional as applied to victims of a disease with latent symptoms. The real issue in these cases, however, was whether the malpractice was discoverable within the statutory period. Answering this question in the affirmative, as both courts did, does not raise any constitutional issues. Several other courts have found their occurrence based statutes to be constitutional, but that the operative occurrence was the discovery of the injury. Thus, these courts are, in effect, simply holding that the discovery rule is constitutional. *See supra* notes 107, 141 and accompanying text.

151. TEX. CONST. art I, § 13.

interpreted as recognizing two independent rights: (1) the right of access to the courts and (2) the right to a complete remedy, including a complete tort remedy.[152]

The analysis used to evaluate a statute for a violation of these provisions is, essentially, a procedural due process test. State courts have held that, when their constitutions speak of a remedy and injury to person, property, or reputation, the constitution is requiring that aggrieved parties have the opportunity to pursue their claims at a meaningful time and in a meaningful manner.[153] Some courts have gone so far as to specifically distinguish this analysis from the equal protection and substantive due process analysis, holding that the right to remedy provision does not require the court to engage in a rational basis analysis, and that a legislature may not deny a legal remedy to an injured party even if it does act with a rational basis.[154]

Accordingly, the courts have held that statutes of limitations that bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries before the statutory period expired violate the right to remedy and access to courts provisions.[155] Here again, this amounts to a finding that occurrence based statutes of limitation are unconstitutional as applied to negligent misdiagnosis of diseases or conditions with

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152. *Martin*, 674 N.E.2d at 1024. These statutes require that a claim for liability resulting from a breach or tort must be filed within two years from the date the medical treatment or hospitalization is completed. It has been held that to deny a plaintiff a cause of action before the person has a reasonable opportunity to discover the wrong is to make a remedy by due course of law contingent upon an impossible condition. *See Nelson*, 678 S.W.2d at 921.

153. *See, e.g., Hardy*, 512 N.E.2d at 630; *Nelson*, 678 S.W.2d at 922; *Makos*, 564 N.W.2d at 666; *Martin*, 674 N.E.2d at 1026.

154. *See Hardy*, 512 N.E.2d at 629.

155. *See, e.g., Nelson*, 678 S.W.2d at 922; *Makos*, 564 N.W.2d at 667; *Martin*, 674 N.E.2d at 1025; *see also* D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 25, at 370 (rev. ed. 1988). The authors state:

> In situations . . . where no injury or damage becomes apparent contemporaneously with the negligent act, the application of the general rule that a cause of action exists from the time the negligent act was committed would lead to the unconscionable result that the injured party's right to recovery can be barred . . . before he is even aware of its existence.

Id.; Feeder, *supra* note 24, at 952 n.46 (noting that the strict application of statutes of limitations without regard to whether the patient has discovered the injury has been widely discussed).

long latency periods, and that a discovery based statute must apply to these victims.[156]

These courts have reasoned that, as applied to those who suffer bodily injury from medical malpractice but do not discover that injury until several years after the act of malpractice, the occurrence based statute accomplishes one purpose—to deny a remedy for the wrong.[157] This being the case, the statute forecloses redress by these victims of medical malpractice because it expires before they suffer, or know they are suffering from, any injury. As such, these statutes "unconstitutionally lock[ ] the courtroom door before the injured party has had an opportunity to open it."[158]

Here again, the ramification of these holdings is that any state with a right to remedy or open courts provision in its constitution would be compelled to find unconstitutional its occurrence based statute of limitations as applied to victims of diseases or conditions with long latency periods. Some of the language used in these opinions suggests why these courts are not shying away from this result. As one court stated:

> The limitation period of [the occurrence based statute of limitations], if applied as written, would require the [Plaintiffs] to do the impossible—to sue before they had any reason to know they should sue. Such a result is rightly described as 'shocking' and is so absurd and so unjust that it ought not be possible. Deferring to the legislative imposition of such an unreasonable condition would amount to an abdication of our judicial duty to protect the rights guaranteed by the [state] Constitution, the source of legislative as well as judicial power. This, we cannot do.[159]

B. State Equal Protection Provisions

The equal protection analysis performed pursuant to state constitutions can differ from the federal equal protection analysis in two ways. Some state constitutions, like Louisiana's, include language in their constitutions that prohibits discrimination based

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156. *See, e.g., Martin*, 674 N.E.2d at 1017.

157. *See Hardy*, 512 N.E.2d at 629.

158. *Id.* at 628, *see also Makos*, 564 N.W.2d at 666.

159. *Martin*, 674 N.E.2d at 1024 (citations omitted) (quoting Nelson v. Kruson, 678 S.W.2d 918, 923 (Tex. 1984)).

upon enumerated characteristics.[160] Constitutional language that prohibits discrimination based upon a physical condition is most relevant for present purposes.[161] Buttressing the more general equal protection arguments discussed earlier in this Article, the court in *Whitnell* relied on this specific constitutional language to expand its equal protection guarantees beyond situations involving the misdiagnosis of diseases with long latency periods. Specifically, the court found its occurrence based statute of limitations governing medical malpractice "unconstitutional both as to latency periods greater than and less than [the three year occurrence period], for to hold otherwise is an unreasonable discrimination on the basis of physical condition."[162]

Other state constitutions contain language that parallels the equal protection language of the constitution.[163] However, courts interpreting these similar provisions use a different analytical framework when evaluating state statutes pursuant to the equal protection clause in the state constitution. For example, if state legislation affects different classes of persons unequally, "the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes,"[164] and the preferential treatment afforded any class "must be uniformly applicable and equally available to all persons similarly situated."[165]

Pursuant to this state constitutional framework, state courts have once again found occurrence based statutes of limitations unconstitutional as applied to victims of negligent misdiagnosis of diseases with long latency periods, specifically breast cancer. These courts have reasoned that their constitutions require uniformity and equal availability of treatment for all persons similarly situated, and

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160. LA. CONST. art. I, § 3. That constitutional section provides in pertinent part:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

Id.

161. *See id.*

162. Whitnell v. Silverman, 646 So.2d 989, 993 (La. Ct. App. 1994).

163. *See, e.g.*, IND. CONST. art. 1, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."); *see also supra* note 34.

164. *Martin*, 674 N.E.2d at 1020.

165. *Id.*

that this requirement is not satisfied by occurrence based statutes of limitations because victims of medical malpractice for whom the statute of limitations expires before they become aware of or discover the malpractice are treated unequally. These victims lose the opportunity to prosecute a cause of action that is not lost to victims of medical malpractice who can discover their injury within the statutorily mandated period.[166]

In part, the state constitutional analytical framework used by these courts resembles intermediate level scrutiny, as applied in the *Carson* case. These state decisions also share the legislative deference expressed in *Carson*.[167] At the same time, these decisions also have elements of a rational basis test, and appear to find the occurrence based statues of limitations rational as applied in other contexts, and are thus narrower than *Carson* and closer to *Austin*.[168] Nonetheless, both the federal and state equal protection oriented cases share ultimate result, further reinforcing the trend toward finding occurrence based statutes of limitations unconstitutional in the negligent misdiagnosis context of diseases with long latency periods.

VI. Cases Discovering a Discovery Rule

Statutes of limitation governing medical malpractice can be divided between those for which the operative occurrence for commencing the running of the statute is an act, and those for which the operative occurrence for commencing the running of the statute is an injury. By their terms, some statutes begin to run at the moment of the act of malpractice; others begin to run at the moment an injury is caused by the malpractice.[169]

Both types of statutes are capped, however, so whether the triggering occurrence is an act or an injury would appear to be irrelevant as far as the statute surviving a constitutional challenge is concerned. One would expect that, regardless of the triggering occurrence, a victim of a negligent misdiagnosis of a disease with a latency period longer than the statutory period would discover neither the act nor the injury before the statutory period expired,

166. *See id.*

167. *See supra* note 11 and accompanying text.

168. *See supra* notes 45, 51 and accompanying text.

169. For a statutory compilation based on this distinction, *see Edmonds v. Cytology Services of Maryland*, 681 A.2d 546, 564-67 (Md. Ct. Spec. App. 1996).

and thereby be forced to bring an equal protection or due process challenge to the statute.[170]

However, this has not been the case. Rather, some jurisdictions have interpreted their occurrence based statutes to provide for something approaching a discovery rule.[171] Once a court interprets its occurrence based statute of limitations as allowing for a discovery exception for misdiagnosis, this statute would appear immune from constitutional challenge.

One jurisdiction that has had this experience is Georgia, as illustrated by *Walker v. Melton*.[172] *Walker* involved a plaintiff who brought an action three years after his broken back was misdiagnosed.[173] During that period the plaintiff's conditioned worsened because of treatment for a strained back that was counterproductive for a fractured vertebrate.[174] The applicable statute of limitations was a two year occurrence based statuted triggered by "the date on which an injury . . . arising from a negligent . . . wrongful omission occurred."[175] The defendant, based on the plain meaning of the statute, argued that the complaint was time barred.[176]

The *Walker* court ruled for the plaintiff, holding that when a misdiagnosis results in subsequent injury that is difficult or impossible to date precisely, the statute of limitations does not begin to run until the date symptoms attributable to the new injury are manifest to the plaintiff.[177] The court distinguished the plaintiff's condition from misdiagnosis cases in which "the injury begins immediately upon the misdiagnosis due to the pain, suffering or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated."[178] The court concluded by apparently creating a discovery exception, stating that "[w]hen an injury occurs subsequent to

170. *See supra* notes 21-24 and accompanying text

171. *See, e.g.*, Garcia v. LaFarge, 893 P.2d 428, 433 (N.M. 1995); Estate of Makos v. Wisconsin Masons Health Care Fund, 564 N.W.2d 662, 664 (Wis. 1997); Martin v. Richey, 674 N.E.2d 1015, 1019 (Ind. Ct. App. 1997).

172. 489 S.E.2d 63 (Ga. 1997).

173. *See id.* at 63-64.

174. *See id.* at 64.

175. *Id.*

176. *See id.* at 65.

177. *See Walker*, 489 S.E.2d at 64.

178. *Id.*

the date of medical treatment, the statute of limitation commences from the date the injury is discovered."[179]

Given the compelling facts of the case and harshness of the statute, a holding such as *Walker* is perhaps to be expected when the triggering event is the injury. More surprisingly, however, at least one court, *Hawley v. Green*,[180] has followed this approach when the triggering occurrence was the "act" of malpractice.

Hawley involved a patient who underwent a neck X-ray in an effort to determine if a tumor was present.[181] The results of the tests were reported as negative.[182] However, six years later, another X-ray and CT scan revealed that a large, malignant tumor was, and had been, present, and was in fact evident in the earlier X-ray.[183] The victim brought an action for medical malpractice, and the medical practitioners argued that the claim was time barred.[184] The controlling statute of limitations was clearly an occurrence based statute triggered by the act of malpractice, stating in part that "the cause of action shall be deemed to have accrued as of the time of the occurrence, act or omission complained of . . . ."[185]

Despite the statutory language, the court ruled for the plaintiff. The court reasoned that a cause of action does not accrue at the time of the act complained of unless some damage has occurred, and that this was one of the few malpractice cases in which the damage may not have occurred until some time after the negligent act.[186] The court further held that when the symptomology did not occur at all or until a later time, the statute of limitations had to be read flexibly to avoid an absurd result.[187] The court claimed that it was not creating a discovery rule, but instead putting the burden on the defendant, as the party asserting the affirmative defense of statute of limitations, to prove when the plaintiff had suffered damage so as to trigger the running of the statute.[188]

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179. *Id.* at 65.
180. 788 P.2d 1321 (Idaho 1990).
181. *See id.* at 1322.
182. *See id.* at 1323.
183. *See id.*
184. *See id.*
185. *Hawley*, 788 P.2d at 1325.
186. *See id.* at 1326.
187. *See id.*
188. *See id.*

This approach has the virtue of totally avoiding the constitutional challenge. As interpreted, the statutes clearly are constitutional because the malpractice victim suffers no equal protection or due process deprivation.

The approach is not without problems, however. First, this approach raises the very difficult factual question of when an "injury" actually occurs. The *Hawley* court, for example, instructed the trial court to determine whether the cancer victim suffered any damage before the malignant tumor manifested itself or the damage began at the time of misdiagnosis.[189] Second, the approach is burdened by the complex theoretical questions regarding the definition of injury and harm, and how these concepts relate to statutes of limitation.[190]

Despite these problems, courts in California[191] and Maryland[192] have read into their statutes a discovery exception—or something akin to one—for negligent misdiagnosis, despite the fact that the statutes are either occurrence based or capped. Perhaps these courts are recognizing that to conclude otherwise would force them to declare their statutes unconstitutional.

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189. *See id.* at 1327.

190. For example, in *Edmonds v. Cytology Services of Maryland*, 681 A.2d 546 (Md. Ct. Spec. App. 1996), the court defines "injury" as when the "patient sustains legally cognizable damages, even if the damages are hidden, undiscovered, and undiscoverable." *Id.* at 564. For its definition, the court expanded on *Hill v. Fitzgerald*, 501 A.2d 27, 32 (Md. 1985) (holding that "injury" "is committed on the date the allegedly negligent act was first coupled with harm."); *cf.* RESTATEMENT (SECOND) OF TORTS § 7(1) cmt. a (1965), which states that an injury is the "invasion of a legally protected interest" and could occur even in the absence of harm. "Harm" is denoted as "the existence of loss or detriment in fact of any kind to a person resulting from a cause." *Id.* § 7(2). Furthermore, "[h]arm implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing . . . . In so far as physical changes have a detrimental effect on a person, that person suffers harm." *Id.* § 7(2) cmt. b. BLACK'S LAW DICTIONARY defines "injury" as "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property." *Id.* at 785 (6th ed. 1990); *see also* Schuman, *supra* note 149, at 1224 (describing that most government action can be categorized as either "injury defining" and "process addressing."). "Injury defining" statutes, such as workers compensation statutes, use the historical event to delineate what constitutes "injury," whereas "process defining" statutes are statutes of limitations which close off access to judicial remedies for events that, absent the statute, would qualify as a remedial injury. Statutes of limitations can deny access to judicial remedy based on the time the litigation process begins not on the event that produced the cognizable claim.

191. *See* Steketee v. Lintz, Williams & Rothberg, 694 P.2d 1153, 1158 (Cal. 1985).

192. *See Edmonds*, 681 A.2d at 564.

VII. Conclusion

The 1970's were a time of uniform "reform" of statutes of limitations governing medical malpractice actions—every state in some way limited the right to bring a medical malpractice action, and no state adopted a pure discovery based scheme. The limitations imposed by the statutes have sparked scores of constitutional challenges, and these challenges have yielded conflicting results.

From the mass of challenges, however, at least one rather startling trend has emerged—every court that has spoken with any clarity on the issue has ultimately concluded that victims of misdiagnosis of diseases with long latency periods cannot be denied a discovery rule. In arriving at this conclusion, these courts have found statutes of limitations with periods shorter than the latency period of the misdiagnosed diseases to be an unconstitutional deprivation of equal protection, due process, and related state constitutional doctrines, or have interpreted their statutes of limitations as applying a discovery rule to these victims, and thus avoiding the need to find the statute constitutionally deficient.

The ramifications of these holdings are clear. With respect to misdiagnosis of disease with long latency periods, the limits of the 1970s are no longer acceptable. States can no longer deny these victims their day in court.