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Comments: Admiralty Jurisdiction: The New Wave in Asbestos Litigation

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ADMIRALTY JURISDICTION: THE NEW WAVE IN ASBESTOS LITIGATION

Various jurisdictions have developed conflicting tests to determine the limitations period for bringing an asbestos action. Since Congress has enacted a new statute of limitations for admiralty actions, a controversy is raging over which of the various tests should apply. This comment discusses the development of each of the tests, analyzes them in relation to admiralty law, and concludes that the discovery rule should be applied in all asbestos claims in admiralty.

I. INTRODUCTION

Ten years ago in *Borel v. Fibreboard Paper Products Corp.*,[1] the United States Court of Appeals for the Fifth Circuit held that an insulation worker who contracted asbestosis and mesothelioma[2] from working with asbestos products could recover damages from the manufacturer of those products. That landmark decision triggered a great deal of asbestos litigation that currently exceeds 16,000 suits.[3] While the employee's claim in *Borel* related to asbestos exposure on land, the Fourth Circuit, under the aegis of admiralty jurisdiction, extended the right to recover damages to shipyard workers who contracted asbestos related diseases from exposure occurring on navigable waters.[4]

This comment focuses on the use of admiralty law in asbestos litigation and the effect of admiralty law on the application of a statute of limitations.[5] Beginning with a survey of the general development of asbestos litigation, this comment analyzes the use of the statute of limitations in asbestos litigation in two Fourth Circuit jurisdictions and the effect of admiralty jurisdiction on the limitations period for tort claims. This comment concludes by examining the recently enacted Uniform Statute of Limitations for Maritime Torts[6] and arguing for the adoption of the discovery rule in applying the new statute of limitations in admiralty.

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1. 493 F.2d 1076 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974).
2. For a discussion of these diseases, see *infra* notes 17-18.
3. 68 A.B.A.J. 397 (1982); *see also* The Washington Post, Aug. 27, 1982, at F12 (Johns-Manville Corporation, the nation's leading asbestos producer, presently faces over 16,000 lawsuits resulting from asbestos exposure); 5 LEGAL TIMES 2, at col.1 (Apr. 18, 1983) (2,700 asbestos cases pending before Philadelphia courts).
4. White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).
5. For a more detailed analysis of the background of asbestos litigation, see Comment, *An Explanation of Recurring Issues in Asbestos Litigation,* 46 ALB. L. REV. 1307 (1982) [hereinafter cited as Comment, *An Explanation of Recurring Issues*]; Comment, *Asbestos Litigation: The Dust Has Yet to Settle,* 7 FORDHAM URB. L.J. 55 (1978).
6. 46 U.S.C. § 763a (1976 & Supp. IV 1980).

II. BACKGROUND

The growth of asbestos litigation is due in large part to industry-wide use of asbestos. Asbestos, with its great ability to withstand heat,[7] is highly regarded by manufacturers because of its tensile strength, flexibility, and resistance to chemicals, corrosion, and decay.[8] Since its commercial development in the late 1800's, asbestos has been used in textiles, shingles, cement, brake linings, insulation, shipbuilding materials, and in numerous other products.[9] Indeed, asbestos has become such an integral part of today's society that virtually all urban dwellers have asbestos fibers in their lungs.[10]

Shipbuilders have been particularly vulnerable to asbestos related diseases since asbestos products have long played an important role in shipbuilding,[11] serving as insulation for boilers, pipes, and other equipment. By the end of World War II the growth of the Navy had led to the employment of over four and one-half million persons in the shipyards, and exposure to asbestos was a part of each worker's employment.[12] As a consequence of this exposure, shipyard workers as well as other asbestos workers suffer from asbestos related diseases which result from the inhalation of airborne asbestos fibers or dust.[13] Once inhaled and swallowed, the fibers are deposited and retained in the lungs,[14] the digestive system,[15] or in other parts of the body.[16] Asbestosis[17] and mesothelioma,[18] the two most widely known asbestos related

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7. U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN. PUB. NO. 3040, HEALTH HAZARDS OF ASBESTOS 4 (1979) [hereinafter cited as OSHA]; P. BRODEUR, THE ASBESTOS HAZARD 4 (1980); 4A R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 205C.03 (3d ed. Supp. 1982).
8. BRODEUR, *supra* note 7, at 5; STEDMAN'S MEDICAL DICTIONARY 128 (24th ed. 1982).
9. OSHA, *supra* note 7, at 2-3; BRODEUR, *supra* note 7, at 5-7; GRAY, *supra* note 7, at ¶ 205C.10. One treatise lists over 75 occupations in which workers are exposed to asbestos. *See id.* ¶ 205C.11(1).
10. U.S. DEP'T OF LABOR, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASES IN THE UNITED STATES 24 (1981) [hereinafter cited as DISABILITY COMPENSATION].
11. *See* White v. Johns-Manville Corp., 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982) (installation of asbestos on ships essential to maritime industry).
12. Selikoff, Lilis & Nicholson, *Asbestos Disease in United States Shipyards,* 330 ANNALS N.Y. ACAD. SCI. 295, 297-98 (1979).
13. OSHA, *supra* note 7, at 4; BRODEUR, *supra* note 7, at 8; GRAY, *supra* note 7, at ¶ 205C.20.
14. GRAY, *supra* note 7, at ¶ 205C.20.
15. OSHA, *supra* note 7, at 4.
16. BRODEUR, *supra* note 7, at 8.
17. Asbestosis is a chronic lung disease evidenced by scarred lung tissue and shortness of breath. *Id.* at 9; U.S. DEP'T OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES 15 (1980) [hereinafter cited as INTERIM REPORT].
18. Mesothelioma is a pleural (lungs) or peritoneal (abdomen) form of cancer which is generally fatal. DISABILITY COMPENSATION, *supra* note 10, at 3; BRODEUR, *supra* note 7, at 10-11. Mesothelioma is associated exclusively with asbestos exposure. DISABILITY COMPENSATION, *supra* note 7, at 4. *But see* GRAY, *supra* note 7,

diseases,[19] are characterized by long periods of latency, *i.e.,* the period of time between the exposure to the asbestos product and the manifestation of the asbestos related disease.[20] Asbestosis usually manifests ten to twenty years after the initial exposure,[21] while mesothelioma manifests twenty to fifty years after such exposure.[22] Because of the long latency periods, asbestos related diseases are expected to appear into the twenty-first century.[23]

As the number of asbestos related disease cases began to increase, the medical field recognized a causal connection between the victim's work and his injury.[24] Once the disease was tied to the worker's occupation, the worker's compensation systems adapted the statutory coverage to include these insidious diseases, although recovery was infrequently awarded.[25] Accordingly, the development of product liability law led workers to seek recovery from their employers under the worker's compensation system and from the asbestos manufacturers under a third party action.[26]

The first third party attempt failed. In a 1971 case, *Bassham v.*

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at ¶ 205C.72 ("In about eighty-five percent of all cases of mesothelioma, asbestos exposure can be found."); Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?*, 15 IND. L. REV. 679, 694 n.77 (1982) (according to 1972 studies, mesothelioma may be caused by insulation material other than asbestos).

19. Cancers associated with asbestos exposure include cancer of the esophagus, larnyx, oropharynx, stomach, colon, rectum, and kidney. *See* DISABILITY COMPENSATION, *supra* note 10, at 4; INTERIM REPORT, *supra* note 17, at 15; *see also* GRAY, *supra* note 7, at ¶¶ 205C.71-.74 (lung cancer, gastro-intestinal cancers, and other cancers may result from asbestos exposure).
20. *See generally* STEDMAN'S MEDICAL DICTIONARY 768 (24th ed. 1982).
21. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); BRODEUR, *supra* note 7, at 9; *see also* Mansfield, *Asbestos: The Cases and the Insurance Problem,* 15 FORUM 860, 862 (1980) (average manifestation period for asbestosis is 17 years, although the disease has been detected in 10 years or less after exposure).
22. BRODEUR, *supra* note 7, at 10; *see also* Mansfield, *supra* note 21, at 864 (25 to 40 year latency). *But see* The Washington Post, Aug. 27, 1982, at A4, col.1 (lawyer exposed to asbestos in 1967 died of mesothelioma 11 years later).
23. DISABILITY COMPENSATION, *supra* note 10, at 5. As to the continued manifestation of asbestos related diseases, see Motley, *The Lid Comes Off,* 14 TRIAL 20 (Apr. 1980), for the view that asbestos manufacturers have actively aided the growth of asbestos disease cases by their failure to publicize the harmful effects of asbestos exposure when they were aware of the effects as early as the 1930's.
24. Sweeney & Castleman, *Asbestos Diseases and Compensation,* 330 ANNALS N.Y. ACAD. SCI. 272, 273 (1979). Both workers and founders of the asbestos industry suffered from exposure to the product. For instance, Henry Ward Johns, the founder of Johns-Manville Corp., died of asbestosis in 1898. *Id.*
25. *Id.* at 275-77. Even today, workers with occupational diseases replace only five percent of their lost income with worker's compensation benefits. INTERIM REPORT, *supra* note 17, at 3.
26. Note, *Compensating Victims of Occupational Disease,* 93 HARV. L. REV. 916, 917-18 (1980). Recovery under the worker's compensation system is still pursued by asbestos workers. *E.g.,* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1100 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); Shifflett v. Powhatten Mining Co., 293 Md. 198, 442 A.2d 980 (1982).

Owens-Corning Fiber Glass Corp.,[27] an insulation worker sued the manufacturers of various asbestos products under the strict products liability theory set forth in section 402A of the *Restatement (Second) of Torts*.[28] The *Bassham* court narrowly construed section 402A and held that it would not apply to a disease like asbestosis, which is contracted over a long period of time.[29]

Two years later, the *Borel*[30] court adopted a position contrary to that of the *Bassham* court and applied section 402A to an asbestos insulation worker's claim. In addition, the *Borel* court noted that under Texas law, the employee could pursue his worker's compensation claim and then file his third party action without fear of the statute of limitations bar.[31] In adhering to the Supreme Court's decision in *Urie v. Thompson*,[32] the court noted that the cause of action for an asbestos related disease would not arise until the plaintiff discovered his disease.[33] Again, the *Borel* holding directly contradicts the *Bassham* court's holding that "any exposure which occurred more than three years before the filing of the action . . . would be barred by the statute of limitations."[34]

In the next major asbestos decision, *Karjala v. Johns-Manville Products Corp.*,[35] the Eighth Circuit elaborated upon the *Borel* court's discussion of the statute of limitations issue.[36] The *Karjala* court held that the cause of action arises when the disease manifests itself in such a way that the causal relationship to the product can be established.[37] The statute of limitations thus does not begin to run until the plaintiff knows he is suffering from a disease caused by asbestos.

Since the *Borel* and *Karjala* decisions, many of those courts dealing with asbestos litigation often cite the "discovery rule,"[38] but some jurisdictions refuse to adopt this rule short of legislative intervention.[39]

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27. 327 F. Supp. 1007 (D.N.M. 1971).
28. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
29. Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007, 1009 (D.N.M. 1971).
30. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1088-89 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). For a discussion of the opinion shortly after it was decided, see 59 A.B.A.J. 1454 (1973).
31. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1101 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974).
32. 337 U.S. 163 (1949).
33. *Borel,* 493 F.2d at 1102.
34. Bassham v. Owens-Corning Fiber Glass Corp., 327 F. Supp. 1007, 1009 (D.N.M. 1971).
35. 523 F.2d 155 (8th Cir. 1975).
36. *Id.* at 160.
37. *Id.* at 161.
38. *See, e.g.,* Fusco v. Johns-Manville Products Corp., 643 F.2d 1181, 1183 (5th Cir. 1981); Pauley v. Constr. Eng'g, Inc., 528 F. Supp. 759, 764 (S.D. W. Va. 1981); Strickland v. Johns-Manville Int'l, Corp., 461 F. Supp. 215, 217 (S.D. Tex. 1978).
39. *See, e.g.,* Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151, 1153 (6th Cir. 1981); Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905-06

Until recently, a litigant had a greater likelihood of recovery under admiralty law because of the nearly total absence of a statute of limitations;[40] instead, the doctrine of laches applied requiring a case-by-case determination of the limitations period.[41] The laches doctrine recently was replaced by the enactment of the Uniform Statute of Limitations for Maritime Torts,[42] which mandates a three year limitation on any admiralty tort action.

III. THE STATUTE OF LIMITATIONS ISSUE

A. Determining the Limitations Period

In contrast to the doctrine of laches, the statute of limitations serves as an absolute bar to an otherwise meritorious claim. The underlying purpose of the bar is to protect the defendant from liability for stale claims.[43] From a practical standpoint, the claim may be unfair because "evidence is lost, memories have faded, and witnesses have disappeared."[44] Lacking the necessary proof, defendants are precluded from establishing a proper defense.

Although the limitations period is generally prescribed by statute, the judge must determine when the cause of action arose.[45] Traditionally, the limitations period began when the negligent act occurred.[46] This interpretation, however, may charge the plaintiff with knowledge of his injury before it manifests.[47] Judicially created doctrines have evolved to avoid the harsh consequences of the statute of limitations.[48]

(1981); *see also* Comment, *Alabama's Limitation Statute for Asbestos Victims: A Legislative Response to Judicial Inaction,* 12 CUM. L. REV. 667 (1982).

40. For exceptions to the rule, see *infra* note 106.
41. See the analysis contained in Giddens v. Isbrandtsen Co., 355 F.2d 125, 127 (4th Cir. 1966), which states that "the presence of laches is ascertained by a balancing of the claimant's delay with the proffered excuse, if any, against the defendant's consequent detriment. The determination demands a weighing of the equities. These in turn depend upon an assay of the circumstances."
42. 46 U.S.C. § 763a (1976 & Supp. IV 1980).
43. *See generally* W. PROSSER, THE LAW OF TORTS § 30, at 144 (4th ed. 1971); Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases,* 13 FORUM 279, 279 (1979); *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1179, 1185 (1950) [hereinafter cited as *Developments in the Law*]. Although recent studies of the discovery rule and the limitations period have appeared, *see, e.g.,* Note, *Wilson v. Johns-Manville Sales Corp. and Statutes of Limitation in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule,* 32 CATH. U.L. REV. 471 (1983), probably the most exhaustive study is contained in *Developments in the Law, supra*. *See generally* Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?,* 43 U. PITT. L. REV. 501 (1982).
44. Order of R.R. Telegraphers v. Express Agency, 321 U.S. 342, 349 (1944).
45. *Developments in the Law, supra* note 43, at 1203-05.
46. *Id.*
47. Urie v. Thompson, 337 U.S. 163, 169 (1949); Birnbaum, *supra* note 43, at 290; *see also Developments in the Law, supra* note 43, at 1201.
48. W. PROSSER, *supra* note 43, § 30, at 144.

These doctrines, theoretically based on continuing treatment[49] and fraudulent concealment or constructive fraud theories,[50] are usually applied in medical malpractice cases[51] and are similar to the discovery rule.[52] The discovery rule states that a cause of action shall not arise until the plaintiff knows or should have known through reasonable diligence that he has suffered an injury.[53]

The Supreme Court first employed the discovery rule in *Urie v. Thompson*,[54] a latent disease case. The employee in *Urie* suffered from silicosis, a pulmonary disease resulting from the inhalation of coal dust.[55] He brought suit against his employer, the Missouri Pacific Railroad, under the Federal Employers' Liability Act (FELA),[56] the equivalent of a state worker's compensation program.[57] The employer contended that the employee was barred by the statute of limitations.[58] Recognizing that a mechanical application of the statute of limitations according to the employee's last exposure to coal dust would bar him from recovery, the Court instead adopted the discovery rule.[59] By utilizing the discovery rule, the *Urie* Court protected the statute's "humane legislative plan," which acknowledges the hazardous work performed by railroad employees such as the plaintiff.[60]

Over thirty years prior to *Urie,* the Court of Appeals of Maryland adopted the discovery rule[61] in the 1917 case of *Hahn v. Clay-*

49. *See, e.g.,* Samuelson v. Freeman, 75 Wash. 2d 894, 900, 454 P.2d 406, 410 (1969) ("[I]f malpractice is claimed during a continuous and substantially uninterrupted course of treatment for a particular illness or condition the statute does not begin to run until the treatment for that particular illness or condition has been terminated."); Ballenger v. Crewell, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978).
50. *See, e.g.,* Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590 (1948) (constructive fraud, like fraudulent concealment, suspends the statute until plaintiff learns of the fraud); Lakeman v. LaFrance, 102 N.H. 300, 156 A.2d 123 (1959) (fraudulent concealment of facts essential to the cause of action suspends the running of the statute).
51. W. PROSSER, *supra* note 43, § 30, at 144; Birnbaum, *supra* note 43, at 282.
52. The language of the "fraudulent concealment" or "constructive fraud" theory is remarkably similar to that of the discovery rule because the suspension of the limitations period is lifted when the plaintiff "discovers" the negligent act. *See, e.g.,* Morrison v. Acton, 68 Ariz. 27, 35, 198 P.2d 590, 595 (1948); Lakeman v. LaFrance, 102 N.H. 300, 303, 156 A.2d 123, 126 (1959).
53. *See, e.g.,* Waldman v. Rohrbaugh, 241 Md. 137, 145, 215 A.2d 825, 830 (1966). *See generally* W. PROSSER, *supra* note 43, § 30, at 144.
54. 337 U.S. 163 (1949); *see* Harig v. Johns-Manville Products Corp., 284 Md. 70, 81, 394 A.2d 299, 305 (1978); Note, *Stoleson v. United States: FTCA Expanding the Discovery Rule in Occupational Disease Cases,* 14 J. MAR. L. REV. 873, 881-82 (1981).
55. Urie v. Thompson, 337 U.S. 163, 165-66 (1949).
56. 45 U.S.C. § 51 (1946).
57. Urie v. Thompson, 337 U.S. 163, 165 (1949).
58. *Id.* at 168.
59. *Id.* at 169.
60. *Id.* at 170. FELA is viewed as having a "humane legislative plan" because it expanded the remedies available to railway workers. *See* Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 62 (1943); Note, *supra* note 54, at 884-85.
61. Note, *Poffenberger v. Risser—The Discovery Principle is the Rule, Not the Excep-*

brook.[62] The court of appeals later reinforced the *Hahn* decision in *Waldman v. Rohrbaugh*,[63] holding that a malpractice action accrues "from the moment of discovery, the moment he [injured party] knows or should know he has a cause of action within which to sue."[64]

In 1977, the court of appeals in *Harig v. Johns-Manville Products Corp.*[65] further expanded the discovery rule to include latent disease cases. In *Harig*, an employee brought suit in the United States District Court for the District of Maryland alleging that she suffered from mesothelioma which developed as a result of her exposure to the manufacturer's asbestos products twenty-two years prior to her bringing the suit.[66] The district court certified two questions of law to the Court of Appeals of Maryland.[67] These questions concerned the application of the statute of limitations to a claim filed twenty-two years after the plaintiff's last injurious exposure to asbestos.[68] In holding that the discovery rule applies in latent disease cases, the court of appeals recognized the employee's cause of action.[69]

The *Harig* decision was based upon the rationale underlying the statute of limitations.[70] The court determined that the possible injustice to the employee far outweighed the need to protect the manufac-

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tion, 41 MD. L. REV. 451, 457 n.43 (1982) [hereinafter cited as Note, *Poffenberger v. Risser*]; Note, *The Statute of Limitations in Actions for Undiscovered Malpractice,* 12 WYO. L.J. 30, 34 (1957) ("[t]he discovery rule was probably first advocated in *Hahn v. Claybrook* . . . .").

62. 130 Md. 179, 100 A. 83 (1917). In *Hahn,* the patient suffered a skin discoloration from a drug prescribed by her physician. *Id.* at 187, 100 A. at 86. Since the court determined that the patient's medical malpractice action was filed seven years after she knew of her injury, not even the discovery rule could revive her claim. *Id.*
63. 241 Md. 137, 215 A.2d 825 (1966).
64. *Id.* at 145, 215 A.2d at 830. In 1981, the Court of Appeals of Maryland held that the discovery rule applies to all civil actions. Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981). *See* Note, *Poffenberger v. Risser, supra* note 61, at 451.
65. 284 Md. 70, 394 A.2d 299 (1978).
66. *Id.* at 72, 394 A.2d at 300. The plaintiff was a secretary who worked for a Baltimore firm that purchased asbestos products from Johns-Manville; she was exposed to asbestos because of her occasional visits to the manufacturing area and from handling files which were exposed to asbestos dust. *Id.*
67. The certification was made under MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1974).
68. The certified questions of law were:

    1. At what time does a plaintiff's cause of action for negligence accrue when plaintiff developed a disease in late 1975 or early 1976, allegedly as a result of exposure during the period 1940-55 to a deleterious substance allegedly occasioned by defendant's negligence?
    2. At what time does a plaintiff's cause of action for strict liability accrue when plaintiff developed a disease in late 1975 or early 1976, allegedly as a result of exposure during the period 1940-55 to a deleterious substance emanating from defendant's products?

    Harig v. Johns-Manville Products Corp., 284 Md. 70, 71, 394 A.2d 299, 300 (1978).
69. *Id.* The employee settled out of court for approximately $500,000. The Evening Sun (Baltimore), Dec. 30, 1980, at 4, col. 3.
70. Harig v. Johns-Manville Products Corp., 284 Md. 70, 71-72, 394 A.2d 299, 300

turer from stale claims, since in the case of a latent disease the injured party is unaware of the cause of action until the disease manifests itself.[71] Due to the lengthy latency period of a disease like mesothelioma, the plaintiff is "blamelessly ignorant" of his claim.[72] According to the *Harig* court, a plaintiff cannot be charged with sleeping on his rights when he cannot determine them.[73]

The Supreme Court of Virginia has taken an approach contrary to that of the *Harig* court, and has repeatedly ignored the opportunity to adopt the discovery rule in latent disease cases.[74] The Virginia court views this action as a legislative function.[75] In *Locke v. Johns-Manville Corp.*,[76] however, the Supreme Court of Virginia articulated what appears to be a unique approach to the problem of determining when a cause of action accrues in a latent disease case. The *Locke* court determined that the statutorily prescribed limitations period[77] begins to run when the claimant is "hurt."[78] Medical experts for both sides must testify as to when they could have determined the plaintiff was injured, and the limitations period begins to run from that date, regardless of whether the plaintiff has experienced the symptoms of his disease.[79] Applying this novel theory, the *Locke* court found that the cause of action was filed within the statutory limit since medical testimony showed no clinical evidence of mesothelioma before late 1977 or early 1978, and either date would fall within the limitations period.[80]

In a similar case decided in the federal district court of Virginia that year, the injured party was not so fortunate. In *Large v. Bucyrus-*

(1978). For a discussion of this rationale, see *supra* notes 41-42 and accompanying text.

71. *Harig,* 284 Md. at 80, 394 A.2d at 305.
72. *Id.* at 83, 394 A.2d at 306.
73. *Id.*
74. *See, e.g.,* Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905-06 (1981); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946). *See generally* Note, *Statutes of Limitations in Occupational Disease Cases: Is Locke v. Johns-Manville Corp. an Alternative to the Discovery Rule?,* 39 WASH. & LEE L. REV. 263, 273 (1982) (Virginia courts have repeatedly refused to adopt a discovery rule in the absence of legislative action).
75. Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905-06 (1981); Street v. Consumers Mining Corp., 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946). For a discussion of the legislative prerogative rule, see Note, *Preserving Causes of Action in Latent Disease Cases: The Locke v. Johns-Manville Corp. Date-of-the-Injury Accrual Rule,* 68 VA. L. REV. 615, 621-22 (1982).
76. 221 Va. 951, 275 S.E.2d 900 (1981). For a detailed examination of the *Locke* decision, *see* Note, *supra* note 75; Note, *supra* note 74.
77. In Virginia, the statutorily prescribed limitations period is attained by a combined reading of two statutes. Locke v. Johns-Manville Corp., 221 Va. 951, 955, 275 S.E.2d 900, 903 (1981). The two year limitations is mandated by VA. CODE § 8.01-243(A) (1977), and the accrual point is defined as "the date the injury is sustained" under *id.* § 8.01-230.
78. Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981).
79. *Id.*
80. *Id.*

Erie Co.,[81] the plaintiff suffered from a number of respiratory diseases that he claimed resulted from exposure to silica, stone, and asbestos dust.[82] An affidavit from the defendant's medical expert established that the disease could have been diagnosed more than two years before the suit was filed.[83] Thus, under the *Locke* rule, the cause of action was barred since medical testimony showed that the plaintiff was "hurt" more than two years before suit was filed.[84]

The *Large* court reasoned that the plaintiff incurred harm when he first contracted respiratory ailments;[85] it was irrelevant that the disease was not diagnosed until after the limitations period had run since the disease could have been diagnosed within that period.[86] In contrast, under the Maryland rule set forth in *Harig*,[87] the plaintiff could have successfully argued that his cause of action accrued when he was informed of the respiratory illnesses, for that is when he ascertained the nature of his disease.

The *Locke* rule is inherently unfair to latent disease victims because the disease can often be diagnosed before the plaintiff realizes he has been injured.[88] Plaintiffs like Large are left with the limited remedy of an inadequate[89] worker's compensation system. While the *Locke* rule is more equitable than the last negligent act rule,[90] it stops short of providing recovery for many asbestos victims with worthy

81. 524 F. Supp. 285 (E.D. Va. 1981).
82. *Id.* at 286. Those diseases included "silicosis, industrial bronchitis, shortness of breath, shortening of lifespan and increased probability of cancer." *Id.*
83. *Id.* at 288-89.
84. *Id.*
85. *Id.*
86. *Id.* at 288.
87. Harig v. Johns-Manville Products Corp., 284 Md. 70, 83, 394 A.2d 299, 306 (1978).
88. As the *Locke* court stated, "it is conceivable that when the disease manifests itself by symptoms, such as pain, discomfort or impairment of function, expert medical testimony will demonstrate the injury occurred weeks, months or even years before the onset of the symptoms." Locke v. Johns-Manville Corp., 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981).
89. Although occupational diseases are now included in the worker's compensation systems of every state, *see* Larsen, *Occupational Diseases under Workmen's Compensation Laws,* 9 U. RICH. L. REV. 87, 88 (1974), severely disabled occupational disease workers replace only five percent of their lost income with worker's compensation benefits. INTERIM REPORT, *supra* note 17, at 3. This is largely due to the difficulty of establishing that the disease is work related. *Id.* The difference in recovery under the worker's compensation system for a totally disabling accidental injury as compared to a totally disabling occupational disease is striking: accidental injury claimants receive an average of $23,400, while occupational disease claimants average $9,700. Kutchens, *The Most Exclusive Remedy is No Remedy at All: Worker's Compensation Coverage for Occupational Diseases,* 32 LAB. L.J. 212, 221 (1981).
90. For an explanation of the last negligent act rule, see *supra* notes 44-45 & 53 and accompanying text. In Virginia, the negligent or wrongful act doctrine was first applied in a latent disease case in 1946. *See* Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946). *Locke* was viewed as an attempt to circumvent this rule. *See* Note, *supra* note 75, at 626 n.85 and accompanying text.

claims, and commentators are in agreement that action by the Virginia legislature,[91] preferably in the form of a statutory discovery rule,[92] is necessary.

B. Admiralty Jurisdiction and the Uniform Statute of Limitations for Maritime Torts

The assertion of admiralty jurisdiction for shipyard workers suffering from asbestos related diseases may partially relieve the inequity of the individual state laws. Admiralty jurisdiction for these claims, however, is a relatively new theory that was not, at least initially, well received. For example, in *Bailey v. Johns-Manville Corp.*,[93] and *Van Harville v. Johns-Manville Sales Corp.*,[94] the courts denied admiralty jurisdiction for asbestos claims on different grounds.[95] The Fourth Circuit's decision in *White v. Johns-Manville Corp.*, reversed the trend of the lower courts and allowed the plaintiffs to recover under admiralty law.[96]

1. Admiralty Jurisdiction and the Doctrine of Laches

Admiralty jurisdiction is derived from the Constitution and the Judiciary Act of 1789.[97] The scope of admiralty jurisdiction has generally included "all maritime contracts, torts, and injuries."[98] Until re-

91. *See* Note, *supra* note 75, at 629; Note, *supra* note 74, at 283.
92. *See, e.g.,* Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad,* 16 U. RICH. L. REV. 323 (1982).
93. 1978 Am. Mar. Cas. 1460 (E.D. Va. 1978).
94. ASB. LIT. REP. (ANDREWS) 3,136 (S.D. Ala. Mar. 27, 1981).
95. In *Bailey,* the court held there was no significant relationship to a traditional maritime activity. Bailey v. Johns-Manville Corp., 1978 Am. Mar. Cas. 1460, 1465 (E.D. Va. 1978). In *Van Harville,* the court stated, "[t]he decision of the *Bailey* court that ship insulation has no maritime nexus is simply not correct." Van Harville v. Johns-Manville Corp., ASB. LIT. REP. (ANDREWS) 3,136, 3,147 (S.D. Ala. Mar. 27, 1981). However, the *Van Harville* court determined that admiralty law did not apply because a latent disease like asbestosis is the result of multiple exposures, and admiralty jurisdictional tests are designed for single event cases. *Van Harville,* ASB. LIT. REP. (ANDREWS) at 3,149.
96. The rationale of *White* has been adopted by the Second Circuit as well. *See* Jacobowitz v. Johns-Manville Sales Corp., ASB. LIT. REP. (ANDREWS) 5,718 (E.D. N.Y. Sept. 28, 1982). *But see* Austin v. Unarco Ind., Inc., 705 F.2d 1 (1st Cir. 1983); Owens-Illinois, Inc. v. United States Dist. Court, 698 F.2d 967 (9th Cir. 1983).
97. The original grant of jurisdiction contained in the Constitution states: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2. The Judiciary Act of 1789 established that "the district courts . . . shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases, the right of a common law remedy where the common law is competent to give it." For a general discussion of admiralty jurisdiction, see G. GILMORE & C. BLACK, LAW OF ADMIRALTY JURISDICTION §§ 1-9, at 18-19 (2d ed. 1975); 2 I. HALL, A. SANN & S. BELLMAN, BENEDICT ON ADMIRALTY §§ 1-12 (7th ed. 1980 & Supp. 1982) [hereinafter cited as BENEDICT].
98. De Lovio v. Boit, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776). *De Lovio* is

cently, this required both the wrongful act and the damages to occur on navigable waters.[99] Thus, when the origin of a wrong was located on water, but the damages were suffered on land, there was no admiralty jurisdiction.[100]

The Supreme Court in 1972 redefined the jurisdictional test for admiralty.[101] In *Executive Jet Aviation, Inc. v. Cleveland*,[102] the Court held that admiralty jurisdiction now requires that the cause of action have a significant relationship to a traditional maritime activity and a maritime locality. This two-pronged[103] test emerged as a response to criticisms of the old test[104] and as a recognition of the fortuitous results which accompanied the strict locality standard.[105]

Once admiralty jurisdiction was established, the doctrine of laches generally applied.[106] Laches is an affirmative defense[107] which bars the

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often cited for the following rationale: "[N]ational policy, as well as jurisdictional logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes which originally and inherently belonged to the admiralty before any statuable restriction." *Id.*

99. *See* Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902). ("In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependant upon the locality of the tort.").
100. The Plymouth, 70 U.S. (3 Wall.) 20 (1866).
101. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972).
102. *Id.* In *Executive Jet,* an airplane carrying the crew took off from Burke Lakefront Airport in Cleveland, Ohio, and immediately ingested seagulls into its engines. *Id.* at 250. This caused the engines to lose power, and the plane crashed into Lake Erie. Although the crew was uninjured, the plane was declared a total loss. *Id.* The owners of the airplane sued the air traffic controller, the airport manager, and the city of Cleveland in its capacity as operator of the airport. The suit was brought under admiralty jurisdiction, but jurisdiction was denied because the Court could not find a significant relationship to a traditional maritime activity. *Id.* at 268.
103. While *Executive Jet* has generally been interpreted to require a two-pronged test of locality and nexus, *see, e.g.,* Whittington v. Sewer Constr. Co., 541 F.2d 427 (4th Cir. 1976); Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973), at least one student commentator has advocated sole reliance upon the nexus prong. *See* Note, *Determination of Admiralty Jurisdiction for Products Liability Actions,* 22 B.C.L. REV. 1133 (1981); *cf.* 7A J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE ¶ 325[3], at 209 (2d ed. 1948 & Supp. 1982-83) (courts should concentrate on historical purposes of admiralty jurisdiction to determine the maritime nexus).
104. *See* Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 257 (1972). The criticism cited by the Court dates back to 1850 and relates to the example of bathers in the ocean: by simply swimming in the water a strict application of the locality test would invoke admiralty jurisdiction. *Id.*
105. *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) (no admiralty jurisdiction when longshoreman standing on a pier is knocked into the water) *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (admiralty jurisdiction exists when longshoreman standing on vessel is knocked onto pier).
106. M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 123, at 222 (3d ed. 1975). Exceptions to this rule include salvage suits, 46 U.S.C. § 730 (1976), and petitions for limitations of liability. *Id.* § 1303(6); *see* M. NORRIS, *supra,* § 123, at 222 n.42.
107. FED. R. CIV. P. 8(c).

plaintiff's recovery when two elements are proven: undue delay by the plaintiff in filing suit, and resulting prejudice to the defendant from the delay.[108] In determining the prejudice suffered by the defendant, the court considers the "dispersal and inaccessibility of the witnesses, the dimming of the recollections, and other disadvantages inherent to the lapse of time."[109] These considerations mirror the rationale underlying the statute of limitations.[110] To determine whether the laches doctrine is proper, courts have generally applied the analogous state statute of limitations, but the state statute of limitations should serve as a guide and not a rigid rule.[111]

2. The *White v. Johns-Manville* Decision

In *White v. Johns-Manville Corp.*,[112] the Fourth Circuit adopted admiralty jurisdiction and instructed the trial court on remand to apply the laches doctrine.[113] Admiralty jurisdiction was adopted because the two-prong test of *Executive Jet* was met. First, the court recognized the admiralty locality of the shipbuilder's work. The locality prong was satisfied because the plaintiffs worked "aboard the vessels . . . on navigable waters."[114] Second, the court acknowledged the significant relationship of the work to a traditional maritime activity.[115] This test was fulfilled because the nature of the plaintiff's work was essential to the manufacture of the ships.[116] Without the asbestos products and the work performed by the plaintiffs on board the ships, these vessels could never have functioned.[117] Thus, the court determined that admiralty jurisdiction existed and applied the laches doctrine.

The court of appeals in *White* did not reach the merits of the laches issue, but it did indicate that the lower court should not mechanically apply the analogous state statute of limitations to determine the relevant periods of exposure to asbestos for each shipyard worker.[118] Rather, emphasis should be placed upon the insidious nature of the

108. Costello v. United States, 365 U.S. 265, 282 (1961); *see also* M. NORRIS, *supra* note 106, § 123, at 225 ("Laches consists of two elements: inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay") (footnote omitted).

109. Giddens v. Isbrandtsen Co., 355 F.2d 125, 127 (4th Cir. 1966).

110. See *supra* notes 51-52 and accompanying text.

111. Benedict, *supra* note 97, § 62; 2 M. NORRIS, LAW OF SEAMAN § 580, at 108-09 (3d ed. 1970); *see also* Giddens v. Isbrandtsen Co., 355 F.2d 125, 127 (4th Cir. 1966) (recognizing the three year limitations period of the Jones Act, 46 U.S.C. § 688 (1976), as "a more logical and acceptable polestar" for analogy than the state statute of limitations).

112. 662 F.2d 234 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).

113. *White,* 662 F.2d at 240.

114. *Id.* at 239.

115. *Id.* (citing Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 268 (1972)).

116. *White,* 662 F.2d at 239.

117. *Id.*

118. *Id.* at 240.

asbestos related diseases.[119] Furthermore, the burden of proving an affirmative defense such as laches rests with the defendant.[120]

The *White* court implied that some extension of the two year Virginia statutory limitations period would be welcomed, and this signaled a broader area of recovery for the plaintiffs. The court, however, failed to clarify exactly how much of an extension would be welcomed. Consequently, while *White* makes clear that a mechanical application of the analogous state statute of limitations will not work under admiralty law, the lower courts are given no clear standard of how to determine the limitations period.

3. The Uniform Statute of Limitations for Maritime Torts (46 U.S.C. § 763a)

The confusion created by the laches doctrine[121] may well be solved by the Uniform Statute of Limitations for Maritime Torts, which is codified at 46 U.S.C. § 763a.[122] The statute was enacted by Congress on October 6, 1980,[123] to achieve uniformity in maritime tort decisions.[124] It effectively overrules the laches doctrine in maritime torts by applying a specific three year limitations period to these torts.[125]

Since section 763a is applied prospectively,[126] cases pending before the enactment of the statute remain subject to the laches doctrine.[127] The three year statutory limitations period set forth in section 763a, however, will apply to a maritime tort cause of action arising after the date of enactment.[128] Of primary concern is determining when the cause of action arises under the new statute.[129]

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119. *Id.*

120. The court of appeals stated: "We do not reach the merits of how far back the applicable exposure period for each employee should be extended" past the two year limitations applied by the district court. *Id.*

121. 1B BENEDICT, *supra* note 97, § 5, at 6.

122. 46 U.S.C. § 763a (1976 & Supp. IV 1980).

123. Pub. L. No. 96-382, § 1, 94 Stat. 1525 (1980) (codified at 46 U.S.C. § 763a (Supp. IV 1980)).

124. Uniform Statute of Limitations for Maritime Torts, Pub. L. No. 96-382, 94 Stat. 1525 (1980) (prefatory statement).

125. Nealy v. Fluor Drilling Servs., Inc., 524 F. Supp. 789, 794 n.1 (W.D. La. 1981).

126. Ponce v. Graceous Navigation, Inc., 126 Cal. App. 3d 823, 827, 179 Cal. Rptr. 164, 166 (1981); *see also* Grimshaw v. Ohio Barge Lines, 532 F. Supp. 866 (W.D. Pa. 1981) (statute shall not be applied retroactively).

127. Ponce v. Graceous Navigation, Inc., 126 Cal. App. 3d 823, 827, 179 Cal. Rptr. 164, 167 (1981). This policy has been followed by at least two other courts. *See* Belmonte v. Scindia Steam Navigation Co., 523 F. Supp. 530, 531 n.1 (S.D.N.Y. 1981); Bush v. Sumitomo Bank & Trust Co., 513 F. Supp. 1051, 1054-55 (E.D. Tex. 1981).

128. *See* Bush v. Sumitomo Bank & Trust Co., 513 F. Supp. 1051, 1055 (E.D. Tex. 1981).

129. *See* Comment, *An Explanation of Recurring Issues, supra* note 5, at 1319 n.53.

IV. ANALYSIS: APPLYING THE DISCOVERY RULE TO SECTION 763a

The Uniform Statute of Limitations for Maritime Torts states: "[U]nless otherwise specified by law, a suit for recovery of damages for personal injury or death or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued."[130] Since the statute does not define the time at which a cause of action accrues, a strong argument can be advanced for applying the discovery rule in maritime latent disease cases such as asbestosis. This argument is based upon an extension of the Supreme Court's decision in *Urie v. Thompson*[131] and is supported by decisional law from the Fourth Circuit. Furthermore, the legislative intent underlying the uniform statutory limitations period provision sustains the application of this rule in admiralty cases.

A. Congressional Intent

Congress sought uniformity in admiralty decisions in enacting the three year limitations period for maritime torts.[132] Uniformity would be further promoted by applying the discovery rule to latent disease cases under admiralty jurisdiction;[133] application of the rule by means of a federal statute would grant the same protection to latent disease plaintiffs throughout the nation.[134]

The discovery rule has been applied to a particular class of workers nationwide; the railway workers, under *Urie*,[135] have had its protection since 1949. The *Urie* rule was adopted to protect railway workers who suffered from silicosis, a latent disease similar to asbestosis.[136] The protection extended to railway workers should also be provided to shipyard workers, especially because of the similarity of their occupational diseases. In addition, since railway workers may develop the same asbestos related disease as found in shipyard workers,[137] railway workers in federal court would benefit from the *Urie* rule. At least two cases involving railroad carpenters and asbestosis have been filed in

130. 46 U.S.C. § 763a (1976 & Supp. IV 1980).
131. 337 U.S. 163 (1949).
132. See *supra* text accompanying notes 121-25.
133. *See generally* Annot., 1 A.L.R. 4th 107 (1980).
134. This in turn would discourage forum shopping, which occurs "when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." BLACK'S LAW DICTIONARY 590 (5th ed. 1979). For example, a plaintiff would seek a jurisdiction with a discovery rule, such as Maryland, rather than a jurisdiction in which the law is at best unclear and at worst unfair to a diligent plaintiff, such as Virginia.
135. Urie v. Thompson, 337 U.S. 163 (1949).
136. Asbestosis and silicosis are both forms of pneumoconiosis. *See* STEDMAN'S MEDICAL DICTIONARY 128-29 (24th ed. 1982).
137. Motley & Middleton, *The Legacy of the Railroad: The Laggin' Wagon,* 17 TRIAL 38 (Dec. 1981).

federal court.[138] The uniformity sought by Congress in enacting section 763a[139] would be defeated by allowing a railroad worker suffering from asbestosis the benefit of the *Urie* rule while denying that benefit to a shipyard worker suffering from the same disease.

B. An Extension of Urie

The similarity of asbestosis and silicosis, both occupational diseases, was remarked upon in *Borel v. Fibreboard Paper Products Corp.*[140] and *Karjala v. Johns-Manville Products Corp.*[141] In both cases the courts advocated extension of the *Urie* rule.[142] The similarity of the statutory language interpreted in *Urie* and the language of the Maritime Torts statute constitutes another reason for adoption of the discovery rule in interpreting section 763a.

The *Urie* decision was based upon an interpretation of the limitations period contained in the Federal Employers' Liability Act (FELA), a federal statute aimed at protecting railway workers from the hazards inherent to railroad work.[143] FELA states that "[n]o action shall be maintained . . . unless commenced within three years from the day the cause of action accrued."[144] Similarly, section 763a states "that a cause of action . . . shall not be maintained unless commenced within three years from the date the cause of action accrued."[145] The language is virtually identical and offers strong support for the proposition that Congress intended the discovery rule to apply to section 763a.

A similar argument has been made for applying *Urie* to the Federal Tort Claims Act (FTCA)[146] on the belief that a diligent plaintiff

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138. *Id.* at 40 n.19. At least one case, Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183 (S.D. Ga. 1982), has proceeded to judgment on the threshold issues of marketshare liability and implied warranty.

139. See *supra* text accompanying notes 121 and 125.

140. 493 F.2d 1076, 1101 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974).

141. 523 F.2d 155, 160 (8th Cir. 1975).

142. Urie v. Thompson, 337 U.S. 163 (1949). In *Borel,* the Fifth Circuit cited the *Urie* rationale for adopting the discovery rule:

> [Any other rule] would mean that at some past moment in time, unknown and unknowable even in retrospect the plaintiff Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974) (quoting Urie v. Thompson, 337 U.S. 163, 169 (1949)). The *Karjala* court noted that "[a]s in silicosis cases [such as *Urie*] there is rarely a magic moment when one exposed to asbestos can be said to have contracted asbestosis . . . ." Karjala v. Johns-Manville Products Corp., 523 F.2d 155, 160 (8th Cir. 1975).

143. *See* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 65 n.21 (1943).

144. 45 U.S.C. § 56 (1976).

145. 46 U.S.C. § 763a (1976 & Supp. IV 1980).

146. 28 U.S.C. §§ 1346(c), 2671-2680 (1976). The FTCA is "scattered throughout the

deserves the benefit of a more liberal discovery rule.[147] The claims of asbestos plaintiffs are clearly supported by this analogous rationale because of the long periods of latency which characterize an asbestos related disease.[148] Regardless of the plaintiff's diligence in an asbestos case, the injury often cannot be discovered until at least ten years after exposure to the product.

C. Fourth Circuit Law

Fourth Circuit decisional law further supports extension of the *Urie* decision to latent disease cases under admiralty law. First, *Urie* has been expressly adopted by the Fourth Circuit.[149] Second, *Banks v. United States Lines Co.*,[150] another Fourth Circuit decision, states that a limitations period should not commence until the injury has manifested itself. *White v. Johns-Manville Products Corp.*[151] adds further support to the propriety of adopting the discovery rule because, in that case, the court was displeased with a mechanical application of the two year limitations period. The *White* court, however, left the lower courts with no clear indication of the proper limitations period.[152]

The Fourth Circuit adopted the *Urie* rule in *Young v. Clinchfield R.R. Co.*,[153] when a plaintiff brought his FELA action four years after his last exposure to coal dust. The court relied on *Urie* to uphold the plaintiff's claim and cited the "insidious nature" of the plaintiff's silicosis as further support for its holding.[154] As in *Urie*, the plaintiff had a cognizable cause of action as long as he filed within three years of the diagnosis, *i.e.*, discovery of the disease.[155]

In *Banks v. United States Lines Co.*,[156] the plaintiff was injured during a fire drill on board ship. Although he had initial symptoms of pain and swelling, he did not file suit until after the condition had worsened.[157] By the time he filed, the three year limitations of the Jones Act[158] had expired, and the court barred the action.[159] The *Banks* court distinguished between a cause of action arising at the time

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Code," and serves as a judicial remedy for the tortious conduct of federal employees. 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 1 (1982).

147. See Note, *supra* note 54, at 887.
148. For a discussion of the latency characteristics of asbestos diseases, see *supra* text accompanying notes 20-22.
149. Young v. Clinchfield R.R. Co., 288 F.2d 499 (4th Cir. 1961).
150. 293 F. Supp. 62, 63 (E.D. Va. 1968).
151. 662 F.2d 234 (5th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).
152. The *White* court instructed the district court to extend the limitations period for the plaintiffs, and listed certain factors to consider, *e.g.,* the insidious nature of the disease and the doctrine of laches. *White,* 662 F.2d at 240.
153. 288 F.2d 499, 502 (4th Cir. 1961).
154. *Id.*
155. *Id.* at 503.
156. 293 F. Supp. 62 (E.D. Va. 1968).
157. *Id.* at 63.
158. 46 U.S.C. § 688 (1976).
159. Banks v. United States Lines Co., 293 F. Supp. 62, 68 (E.D. Va. 1968).

of the accident and a latent disease case.[160] Relying on *Young*,[161] the court noted that had the injury not appeared until several years after the accident, the analogous statute would not have begun to run until the injury was discovered.[162]

The decision in *White v. Johns-Manville Corp.*[163] adds to Fourth Circuit law by exemplifying the circuit's desire to avoid a mechanical application of the limitations period.[164] Although limited by the Virginia state court's refusal to adopt the discovery rule absent legislative action,[165] it is clear from the tone of the *White* decision that the Fourth Circuit is willing to utilize admiralty law so as to benefit a diligent plaintiff. The court of appeals proposed to do this by enlarging the relevant periods of exposure as determined by the lower court. The Fourth Circuit considered several factors, such as the insidious nature of the plaintiff's disease and the allocation of the burden of proof in an affirmative defense,[166] but the court failed to establish to what degree the factors are intended to determine the relevant exposure periods. In the wake of *White* it remains unclear how far the limitations period should extend. However, use of the discovery rule could avoid this confusion. A case-by-case determination, as advocated by the *White* court, would still prevail, but the decision would be based upon a clear standard of when the plaintiff learned of his disease.

The discovery rule has been adopted by a growing number of state courts, and the application of the discovery rule to federal cases filed under the FTCA has been advocated as well.[167] The uniform application of the discovery rule would eliminate the possibility of forum shopping by the plaintiff;[168] in turn, inconsistent decisions among admiralty courts would be avoided.[169] Thus, the congressional intent[170] motivating the enactment of the Uniform Statute of Limitations for Maritime Torts would best be served by applying the discovery rule to latent disease cases.

V. CONCLUSION

Because the Uniform Statute of Limitations for Maritime Torts is a relatively new statute, courts have had little opportunity to apply its provisions. Applying the discovery rule to future cases within this stat-

160. *Id.* at 63.
161. Young v. Clinchfield R.R. Co., 288 F.2d 499 (4th Cir. 1961).
162. Banks v. United States Lines Co., 293 F. Supp. 62, 63 (E.D. Va. 1968).
163. 662 F.2d 234 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).
164. See *supra* text accompanying note 114.
165. See *supra* text accompanying notes 71-72.
166. White v. Johns-Manville Corp., 662 F.2d 234, 240 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982).
167. See *supra* text accompanying notes 133, 146.
168. See *supra* text accompanying note 134.
169. See *supra* text accompanying note 121.
170. See *supra* text accompanying note 124.

ute would best achieve the congressional policies underlying the statute because the rule would avoid inconsistent results and confusion in the lower courts and would bring about the fair and equitable results accomplished by a similarly worded statute, the FELA. The inequity of applying any rule other than the discovery rule to asbestos litigation under admiralty jurisdiction is illustrated by a comparison of the decisional law in Virginia and Maryland; moreover, at the federal level, the decisional law of the Fourth Circuit clearly supports this rule. The Supreme Court's decision in *Urie v. Thompson*, in which the Court applied the discovery rule to an insidious disease analogous to asbestos diseases, also supports the use of the discovery rule. The discovery rule does not always grant a plaintiff a cause of action, but it does result in a fair and equitable solution to the limitations problem for latent disease cases since the limitations period does not begin to run until the plaintiff knows he is suffering from the disease.

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