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THE DEMISE OF SUBSTANTIVE TIME LIMITATIONS IN ILLINOIS

INTRODUCTION

In Illinois, the time period within which most personal actions must be commenced is prescribed in the general statute of limitations.[1] If the plaintiff's complaint is not filed within the time period specified in the general statute, the complainant's action is barred although his right remains.[2] The general statute of limitations is not, however, all-inclusive. There are certain statutes that create causes of action unknown at common law which specify their own time limitations.[3] The time periods contained in these statutes have been construed by the Illinois courts as conditions precedent that must be satisfied before a cause of action arises.[4] Hence, the limitation period is an inte-

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1. ILL. REV. STAT. ch. 83, § 13 (1977) provides: "The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute." Following this section are §§ 14-27 which provide the specific time limitations for bringing various types of actions.

2. *See, e.g.*, Stenwall v. Bergstrom, 398 Ill. 377, 75 N.E.2d 864 (1947) (general statute of limitations is not always binding); Levine v. Unruh, 99 Ill. App. 2d 94, 20 N.E.2d 521 (1968) (a general statute of limitations is a limit on remedy only); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942) (statutes of limitations do not extinguish debt or property rights; they are merely statutes of repose).

3. *See, e.g.*, Dram Shops Act, ILL. REV. STAT. ch. 43, § 135 (1977) ("Every action hereunder shall be barred unless commenced within one year next after the case of action accrued"); Wrongful Death Act, *id.* ch. 70, § 2(c) (1977) ("Every such action shall be commenced within 2 years after the death of such person"); Paternity Act, *id.* ch. 106¾, § 54 (1977):

> No such action may be brought after the expiration of 2 years from the birth of the child. However, where the person accused has acknowledged the paternity of the child by a written statement made under oath or affirmation or has acknowledged the paternity of such child in open court, prosecution may be brought at any time within 2 years from the last time such acknowledgment was made or within 2 years from the last time the person accused contributed to the support, maintenance, education and welfare of the child subsequent to such acknowledgment.

Consumer Fraud and Deceptive Business Practices Act, *id.* ch. 121½, § 270(a), (e) (1977) ("Any action for damages under this Section shall be forever barred unless commenced within 3 years after the cause of action accrued . . . .").

4. *See, e.g.*, Hartray v. Chicago Rys. Co., 290 Ill. 85, 124 N.E. 849 (1919). This case was one of the first instances in Illinois in which a specific time limitation was given this type of interpretation. In constring the Injuries Act (predecessor of the modern Wrongful Death Act, ILL. REV. STAT. ch. 70, § 2(c) (1977)), the court stated:

> It is a condition precedent to the right of recovery granted by this act that the action be brought within one year after the cause of action ac-

gral element of the substantive law that must be pleaded and satisfied by the plaintiff.[5]

In the past, the Illinois courts have refused to apply the equitable doctrines of estoppel and waiver to bar the invocation of specific time periods.[6] This denial follows from reasoning that

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crues. In a statutory action like this, where the right is conditional, the plaintiff must bring himself clearly within the prescribed requirements necessary to confer the right of action. Inasmuch, therefore, as the limitation of the time in which to sue is considered not merely of the remedy but of the right of action itself and *the cause of action exists subject to the limitation*, a declaration must allege or state facts showing that the action is brought within the time prescribed by statute.

290 Ill. at 87, 124 N.E. at 850 (emphasis added, footnotes omitted). *See also* Carlin v. Peerless Gas Light Co., 283 Ill. 142, 119 N.E. 66 (1918) (time limitation under Injuries Act, ILL. REV. STAT. ch. 70, § 1 (1903) is a condition precedent); Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222, 15 N.E.2d 838 (1938) (the limitation period of one year under the Injuries Act, ILL. REV. STAT. ch. 70, § 1 (1937) is a condition precedent); Fitzpatrick v. Pitcairn, 371 Ill. 203, 20 N.E.2d 280 (1939) (the time fixed by the Injuries Act, ILL. REV. STAT ch. 70, § 1 (1937) for bringing an action is not a statute of limitations but a condition precedent); Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949) (court denied the assertion of a counterclaim based on the Injuries Act, ILL. REV. STAT. ch. 70, §§ 1, 2 (1947) because it was not brought within the specific one-year time limitation).

Lowrey v. Malkowski, 20 Ill. 2d 280, 170 N.E.2d 147 (1960) (an action brought under the Dram Shops Act, ILL. REV. STAT. ch. 43, § 135 (1977) must be dismissed when not filed within the one-year period of limitation); Super Valu Stores, Inc. v. Stompanato, 128 Ill. App. 2d 243, 261 N.E.2d 830 (1970) (the statutory one-year period under the Dram Shops Act, ILL. REV. STAT. ch. 43, § 135 (1967) is a condition precedent, thus an integral part of the right of action).

Smith v. Toman, 368 Ill. 414, 14 N.E.2d 478 (1938) (a judgment lien is created by statute, ILL. REV. STAT. ch. 77, § 1 (1937) and thus the time limitation within the statute is a condition precedent and not a statute of limitations).

Brown v. Box, 38 Ill. 2d 80, 230 N.E.2d 204 (1967) (the time limitation under the Paternity Act, ILL. REV. STAT. ch. 106¾, § 54 (1977) held a condition precedent to the right to bring the statutory action).

Spaulding v. White, 173 Ill. 127, 50 N.E. 224 (1898) (the time limitation within the Probate Act of April 11, 1875 now found in ILL. REV. STAT. ch. 3, § 7 (1977) is a condition precedent and not a statute of limitations); Messenger v. Rutherford, 80 Ill. App. 2d 25, 225 N.E.2d 94 (1967) (time provision in act for filing claims against an estate is not a general statute of limitations).

5. *See generally* Horsley & Cambill, *Limitations and Special Defenses Under the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 249, 267; Lederleitner, *Survey of Illinois Limits and Limitations*, 3 J. MAR. J. 56, 56-57 (1969).

6. As the supreme court stated in Wilson v. Tromly, 404 Ill. 307, 312, 89 N.E.2d 22, 25 (1949):

> [A] suit brought under the Injuries Act does not come within any of the other actions enumerated, but is *sui generis*, created by statute, and independent of all others mentioned in the Limitations Act. Moreover, section 12 [now § 13] of the Limitations Act expressly excludes the periods of limitation set out in the act from applying 'when a different limitation is prescribed by statute.' The time prescribed by the Injuries Act for commencing a suit is one year, which has been construed as a condition precedent, so quite obviously the savings provisions contained in section 19 [now § 20] and other sections of the Limitations Act have no

rights derived from special statutory actions were created on the condition that suits be brought within the time so specified. In contrast, a general statute of limitations may be waived, or denied by estoppel because it applies only to remedies.[7] This interpretation of specific limitation periods as substantive elements of their respective causes of action has caused hardships that would not have arisen if the courts had interpreted these periods in the same fashion as time limits in a general statute of limitations.[8] When the limitation is viewed as substantive, even though it is phrased in the same language as a general limitation, courts have denied causes of action and counterclaims that would have been allowed under a procedural interpretation.[9] Although this interpretation exists today, the Illinois courts have begun to develop rationales to circumvent such specific time limitations.[10]

This comment reviews the development of the doctrine requiring courts to designate special statutory time limits as conditions precedent to bringing a cause of action. This comment will then explain the rationale used by the Illinois courts to avoid interpreting the time limitations in certain statutory actions as conditions precedent. The feasibility and desirability of extending this rationale to other statutes are also explored, as is the demise of the substantive interpretation of limitation periods.

HISTORICAL DEVELOPMENT OF TIME LIMITATIONS

Time limitations for initiating legal actions first developed in ancient Rome.[11] No limitation period governed personal ac-

reference to the time limit or condition in another statute creating a new cause of action not existing at common law.

7. *Id.*

8. *See, e.g.*, Wilson v. Tromly, 404 Ill. 307, 310-11, 89 N.E.2d 22, 25 (1949), in which the defendant was denied his counterclaim under the Injuries Act (ILL. REV. STAT. ch. 70, § 2 (1947), same as present Wrongful Death Act, ILL. REV. STAT. ch. 70, § 2 (1977)) due to the interpretation of the specific limitation period of the Act as a condition precedent. If the court had interpreted the limitation period as a statute of limitations, the defendant's counterclaim would have been allowed under ILL. REV. STAT. ch. 83, § 18 (1827) (this section is the same today): "A defendant may plead a . . . counterclaim barred by the statute of limitations, while held and owned by him, to any action, the cause of which was owned by the plaintiff under whom he claims, before such . . . counterclaim was so barred. . . ."

9. *See* note 4 *supra*.

10. Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976); Wood Acceptance Co. v. King, 18 Ill. App. 3d 149, 309 N.E.2d 403 (1974). *See* notes 54-101 and accompanying text *infra*.

11. There is speculation that statutes limiting the time for bringing real property actions existed in England as early as 1236. *See* 2 POLLACK AND MAITLAND, THE HISTORY OF ENGLISH LAW 81 (2d ed. 1898).

tions, as rights in contracts and torts, in the early days of either Roman law or the English common law.[12] Limitations for personal actions were subsequently created by statute; their origin can be traced to 1623.[13] The concept of time limitations on personal actions has spread during the past 350 years, and today, the time within which most personal actions must be brought is governed by a general statute of limitations in every state.[14]

The concept of statutory time limitations in Illinois developed from the equitable doctrine of laches. Time limitations are based in part on the general observation that valid claims are usually not neglected. If no action is commenced during a reasonable period of time, a presumption arises against the original validity of the claim.[15] In addition, time limitations afford the defendant a *fair* opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible.[16] To the extent the span of time accumulates between the events creating the cause of action and the notification to defendant of his liability, the defendant's opportunity is inversely diminished.

Statutes of limitations are statutes of repose;[17] they bar the remedy but not the substantive right. They are designed to pre-

12. At early common law, the plaintiff had a perpetual cause of action. However, certain safeguards were developed to protect parties, such as the notion that an action in tort did not survive the plaintiff or defendant. *See, e.g.*, Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938); Brooklyn Bank v. Barnaby, 197 N.Y. 210, 90 N.E. 834 (1910). *See generally* Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157 (1927); Satter, *Limitations in Illinois: The Tolling and Borrowing Provisions*, 2 DEPAUL L. REV. 225 (1953); Note, *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950); Case-Comment, *World of Fashion v. Dun & Bradstreet, Inc.*, 10 J. MAR. J. 359 (1977).

13. The first recognized statute imposing a limitation period for bringing a personal action was The Limitation Act, 1623, 21 Jac. 1, c. 16. *See* 2 POLLACK AND MAITLAND, THE HISTORY OF ENGLISH LAW 81 (2d ed. 1898).

14. *See, e.g.*, ILL. REV. STAT. ch. 83, § 13 (1977); N.Y. MCKINNEY [Const.] Art. 2, § 214 (1969); S.D. COMPILED LAWS ANN. § 15-2 (1967); WIS. STAT. § 893.01 (1957). These citations afford the reader a sample of the types of limitations statutes in the United States. *See also* Littel, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23 (1945).

15. Weber v. Board of Harbor Comm., 85 U.S. (18 Wall.) 57, 70 (1873). Mr. Justice Field, writing for the majority, stated that a presumption arises against the validity of a claim if enforcement is not demanded within a reasonable time. These presumptions are codified into statutes of limitations which act as a positive bar. *Accord*, Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386 (1868).

16. *See* Cross v. Janes, 327 Ill. 538, 158 N.E. 694 (1927) (statutes of limitations are based on the theory of laches which is based on fairness).

17. *E.g.*, People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927) (statutes of limitations in civil actions are statutes of repose); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942) (statutes of limitations are statutes of repose in that they bar the right to sue for recovery but do not bar the debt or property right).

vent the bringing of fraudulent and stale claims after unreasonable periods of time have elapsed.[18] Such limitations reflect the public policy of the state. If the prescribed time period has expired, the complaining party is precluded from utilizing the courts to enforce an otherwise valid claim.[19]

Any type of time limitation on an action must be arbitrary to some extent. Although the legislature may have reasons for allowing only six months to bring some actions and seven years to bring others, the ultimate decision is arbitrary. After considering all reasons for limiting or prolonging an action, the legislature must decide a cut-off point that is purportedly fair to the majority of people affected.

Three reasons or justifications for statutes of limitations are generally cited: (1) to avoid the litigation of stale claims by preventing the loss or impairment of evidence due to a lapse of time;[20] (2) to encourage diligence in bringing valid actions;[21] and (3) to lend a degree of certainty to people's lives by wiping the slate clean.[22] Considering these three principles in light of the equitable theory of laches, it is a logical conclusion that statutes of limitations were originally established with the perception that fairness should pervade among the competing interests of both parties.

DEVELOPMENT OF PROCEDURAL AND SUBSTANTIVE DISTINCTION

General statutes of limitations are procedural in nature.[23]

18. *See, e.g.*, Cross v. Janes, 327 Ill. 538, 158 N.E. 694 (1927).

19. *See* cases cited in note 17 *supra*.

20. *E.g.*, Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 340, 199 N.E.2d 633, 636 (1964):" A statute of limitations is designed to prevent recovery on stale demands. It is a statute of repose which gives a defendant a reasonable opportunity to investigate a claim and to prepare his defense. . . ." Statutes of limitations afford parties protection from loss of evidence due to" death of witnesses, failure of memory, loss of records and destruction of vouchers after a lapse of time." Satter, *Limitations in Illinois*, 2 DEPAUL L. REV. 225, 228 (1953).

21. *E.g.*, Trainor v. Koskey, 243 Ill. App. 24 (1926).

22. [T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser . . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Holmes, *The Path of the Law*, 10 HARV. L. REV.457, 477 (1897).

23. *E.g.*, Hilberg v. Industrial Comm'n 380 Ill. 102, 105, 43 N.E.2d 671, 673 (1942) ("The law is well settled that provisions for limitation of actions are procedural in their nature. . . ."). In a recent case dealing with whether to apply the Illinois statute of limitations or the limitations law of Yugoslavia, which made causes of action based on war crimes perpetually actionable, the federal court said that "statutes of limitations, in Illinois as elsewhere

As a result of this construction, the courts have held that if the general statutory time period has expired, only the party's remedy is extinguished; his right to the cause of action remains.[24] This interpretation, whereby a party retains the right but not the remedy, has enabled courts to use equitable doctrines to restore a person's opportunity to receive a remedy. For example, acknowledgment by the defendant of the complainant's rights revives the remedy or waives the bar to the action; the right, which is not lost by the running of the statute, can then be enforced.[25] Since general statutes of limitations bar only the remedy and not the right, they are statutes of repose.[26]

The construction of general statutes of limitations as procedural in nature limited their applicability to the jurisdiction of the legislature that enacted them.[27] At common law, a plaintiff's action was not necessarily barred in the forum state although it would have been barred in the state where the cause of action arose.[28] Traditionally in conflict of laws cases, the statute of limitations of the forum state would control.[29] Thus, if a common law cause of action arose in state *A* but the action was brought in state *B*, the general statute of limitations of state *B* would apply, even if it was longer than state *A*'s time limitation. This interpretation, however, could not be automatically applied to those actions created by a state statute that contained within it a specific limitation period.[30] Under the procedural interpretation of a statute of limitations, a cause of action brought pursuant to a right created by state *A*'s statute could be brought in state *B* and state *B*'s general statute would apply under the rule that the statute of limitations of the forum state governed. The United States Supreme Court considered this problem in *The*

. . . are 'procedural in their nature'. . . ." Kalmich v. Bruno, 553 F.2d 549, 553 (7th Cir. 1977).

24. *See, e.g.*, Fleming v. Yeazel, 379 Ill. 343, 40 N.E.2d 507 (1942) (statutes of limitations bar the right to sue for recovery but do not extinguish the debt or property right); Keener v. Crull, 19 Ill. 189 (1857); Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942) (a party may, by acknowledgment and a promise to pay debt, remove the statutory bar of limitation).

25. *See generally* Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

26. *See* notes 16-19 and accompanying text *supra*.

27. This rule applied to both federal and state courts. *See* Townsend v. Jemison, 50 U.S. 406, 420 (1850) (the Court decided that when an action accrued in Mississippi but the suit was brought in Alabama, the proper statute of limitations to apply was that of the forum state). *Accord*, Kalmich v. Bruno, 553 F.2d 549 (7th Cir. 1977) (use statute of limitations of the forum in deciding war crimes); Wetzel v. Hart, 41 Ill. App. 2d 371, 374, 190 N.E.2d 619, 621 (1963) (statutes of limitations are governed by the laws of the forum).

28. Townsend v. Jemison, 50 U.S. 406 (1850).

29. *Id.*

30. *See* note 3 *supra* for examples of such state statutes.

Harrisburg.[31]

The Court in *The Harrisburg* analyzed which limitation period would govern: that of the forum state, or that of the state where the action arose. In deciding this issue, the Court, without citing precedent, stated that when an action at law is created by the statute of a state, a new legal liability is born. From the statute flows the right to sue for its enforcement, *provided* the suit is brought within the time designated by the statute. The Court construed the time period prescribed by the statute that created the action as an element of the cause of action.[32] This marked the first time that a limitation period that was part of a statute which created a right unknown at common law was construed as substantive rather than procedural.

The Harrisburg reasoning signified the origin of a trend toward the application of a foreign state's statute of limitations by characterizing the statutory time period as substantive.[33] This interpretation provided the courts with a means to circumvent the common law rule that the statute of limitations of the forum state would govern even though that time period would extend the time within which the plaintiff could bring his action. Furthermore, the reasoning of *The Harrisburg* substantially narrowed the opportunity for forum shopping.

SUSPENSION OF THE TIME PERIOD

Although the length of time prescribed by a statute of limi-

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31. The Harrisburg, 119 U.S. 199 (1886).

32. In determining which state's statute of limitations governed, the Court drew its answer from the statute creating the action. The Court said:

> The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.

Id. at 214.

33. Other decisions following this reasoning extended the "substantive" label to other causes of action based on special statutes, provided the statutes contained their own limitations periods. *See* Atlantic Coast Line v. Burnette, 239 U.S. 199, 201 (1915) (an action must fail when not brought within limitations period of Federal Employer's Liability Act of 1908, 35 Stat 65); Ewing v. Risher, 176 F.2d 641 (10th Cir. 1949) (limitation period under Social Security Act, 42 U.S.C. § 402 (1939), is a condition precedent to the action); Matheny v. Porter, 158 F.2d 478 (10th Cir. 1946) (time limitation provision of the Emergency Price Control Act, 50 U.S.C. § 925(c) (1942), is a substantive element to the cause of action).

tations generally acts as a bar to a party's remedy,[34] courts in various situations have not held limitation periods to be conclusive and have granted remedies even though the limitation period had already lapsed.[35] The equitable doctrines of waiver and estoppel have been used occasionally to allow remedies even when the time limitation has expired.[36]

Waiver is the intentional relinquishment of a known right.[37] Effecting a waiver requires words or conduct, either express or implied,[38] indicating an intention to relinquish that right.[39] Thus a party can decline to assert as a defense the general statute of limitations. The jurisdictional basis of a court, however, can never be waived.[40] Since time periods interpreted as substantive confer jurisdiction upon the court,[41] the courts have not permitted parties to waive these time periods.[42] Thus, the courts have allowed the waiver of procedural but not substantive time limits, though the wording in both statutes is usually similar.[43]

Estoppel, closely related to waiver,[44] is an equitable princi-

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34. *See, e.g.*, Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942).

35. *See, e.g.*, Stenwall v. Bergstrom, 389 Ill. 377, 75 N.E.2d 864 (1942).

36. For a general guide as to when estoppel will act as a bar to the statute of limitations in Illinois, *see generally* Leiderleitner, *Survey of Illinois Limits and Limitations*, 3 J. MAR. J. 56, 56-57 (1969).

37. *See* Pantle v. Industrial Comm'n, 61 Ill. 2d 365, 335 N.E.2d 491 (1975) (defenses of waiver and estoppel may properly be raised and proved to nullify the effect of a statute of limitations).

38. *See* Gould v. Board of Educ., 32 Ill. App. 3d 808, 336 N.E.2d 69 (1975) (court cites 18 I.L.P. *Estoppel* § 21, waiver may be express or implied).

39. National Bank of Albany Park v. Newberg, 7 Ill. App. 3d 859, 289 N.E.2d 197 (1972) (waiver requires an intentional relinquishment of a known right).

40. For a general discussion of the problem of waiving rights under statutory provisions, see E. CRAWFORD, THE CONSTRUCTION OF STATUTES 540-42 (1940).

41. Substantive time periods are jurisdictional because if they are not met, the action does not arise. *See* note 4 *supra*.

42. *See* Brown v. Box, 38 Ill. 2d 80, 230 N.E.2d 204 (1967) (defendant could not waive his rights because jurisdiction did not exist under the Bastardy Act when action was not commenced within the statutory time period).

43. *Compare* Limitations, ILL. REV. STAT. ch. 83, § 15 (1977) ("Actions for damages for an injury to the person, . . . shall be commenced within two years next after the cause of action accured") *with* Wrongful Death Act, ILL. REV. STAT. ch. 70, § 2(c) (1977) ("Every such action shall be commenced within 2 years after the death of such person").

44. Courts often incorrectly use the terms "waiver" and "estoppel" interchangeably. Waiver is distinguished from estoppel in that, "[i]n waiver, the essential element is an actual intent to abandon or surrender a right, while in estoppel such intent is immaterial, the necessary condition being the deception to his injury of the other party by the conduct of the one estopped." Insurance Co. of N. Am. v. Williams, 42 Ariz. 331, 333, 26 P.2d 117, 119 (1933). Illinois courts have also confused the terms "estoppel" and "waiver." *See, e.g.*, Cassidy v. Luburich, 49 Ill. App. 3d 596, 364 N.E.2d 315 (1977) (conduct of insurer constituted *waiver by estoppel* to raising defense

ple that bars a party from asserting a legal right when that party's conduct has induced another to act in good faith reliance to his own prejudice.[45] Accordingly, a defendant may not assert the general statute of limitations as a bar to an action when his conduct has induced the plaintiff to forbear from bringing his cause of action.[46] Estoppel exists independent of the statute creating the time limitation to suspend the running of the statute.[47] The test of whether estoppel is appropriate under the circumstances emphasizes the plaintiff's reasonableness in relying upon the defendant's conduct.[48] Today, courts will not adhere to the general statute of limitations in situations where a plaintiff's failure to bring his cause of action is attributed to his reliance caused by the misleading conduct of the defendant.[49]

The courts in Illinois have generally been hesitant to apply equitable doctrines to bar special limitation periods due to the reasoning of these periods as substantive elements of the statutory cause of action.[50] To bar these conditions, in effect, would

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of statute of limitations); Marks v. Johnston City, 21 Ill. App. 3d 1089, 1090, 315 N.E.2d 342, 343 (1974) ("The conduct of a party against whom a *waiver* of the statute of limitations is claimed must be such as to cause him to change his position by lulling him into a false sense of security thereby causing him to delay or waive his rights") (emphasis added).

45. *See, e.g.*, DeGraw v. State Sec. Ins. Co., 40 Ill. App. 3d 26, 34, 351 N.E.2d 302, 309 (1976) ("[E]stoppel embraces the concept of reliance, in good faith, on the part of the party asserting estoppel, to the extent that such party changes his position to his detriment in reliance upon the conduct of another. . . ."). *Accord*, Moline I.F.C. Fin., Inc. v. Soucinek, 91 Ill. App. 2d 257, 234 N.E.2d 57 (1968).

46. *See generally* Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935).

47. Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 243 N.E.2d 723 (1968).

48. One court in Illinois has recently gone so far as to list six elements which must be met before the doctrine of estoppel will apply:

> (1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must have not known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the benefit of the estoppel must have relied or acted upon the representations; and (6) the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representation made.

Stewart v. O'Bryan, 50 Ill. App. 3d 108, 109-10, 365 N.E.2d 1019, 1020-21 (1977). *Accord*, National Tea Co. v. 4600 Club, Inc., 33 Ill. App. 3d 1000, 339 N.E.2d 515 (1975).

49. *See generally* Stewart v. O'Bryan, 50 Ill. App. 3d 108, 365 N.E.2d 1019 (1977).

50. *See* note 5 and accompanying text *supra*.

bar one of the essential elements needed to give the court jurisdiction.[51] Nevertheless, courts in Illinois have recently begun to apply equitable doctrines to avoid the harsh results caused by the strict application of limitation periods as conditions precedent.[52] In doing so, the courts in Illinois have focused their attention upon the legislative intent in creating the statutory cause of action before deciding whether to construe a special limitation period as procedural or substantive. By extending the judicial inquiry to consider the factor of legislative intent, the possibility that a substantive limitation period will defeat the policy of the statute is severely reduced.[53]

A New Approach to Substantive Time Limits

In *Wood Acceptance Co. v. King*,[54] the Illinois Appellate Court dealt with an action brought under the Federal Truth in Lending Act (FTLA).[55] The court was faced with virtually the same question that the Illinois Supreme Court had earlier considered in *Wilson v. Tromly*;[56] whether to allow a counterclaim to a statutorily created action after the statutory limitation period had run.[57] In *Wilson*, the court reviewed the underlying principles of counterclaims and found that counterclaims are separate and distinct actions that must contain all of the elements of an original action.[58] The court then followed the princi-

51. As noted earlier, the time element, when construed as substantive, must be pleaded in order to give the court jurisdiction over the subject matter. *See* note 5 and accompanying text *supra*. If the court does not have subject matter jurisdiction it has no power to decide the case. *See* Turner v. President, Directors and Co. of the Bank of N. Am., 4 U.S. (4 Dall.) 8 (1799).

52. *See* notes 54-94 and accompanying text *infra*.

53. *See* notes 95-106 and accompanying text *infra*.

54. 18 Ill. App. 3d 149, 309 N.E.2d 403 (1974). The plaintiff sought to recover a judgment for a deficiency allegedly due after repossession and resale of defendant's car, which was purchased under a retail installment sales contract. Defendant filed an answer denying that any money was due plaintiff and filed a counterclaim praying for a judgment in the amount of double the finance charge, as permitted under the Act. On plaintiff's motion, the counterclaim was dismissed for failure to file a claim within one year from the date of the occurrence of the violation. Defendant appealed from this order.

55. 15 U.S.C. §§ 1601, 1640(a), (e) (1976) [hereinafter referred to as FTLA]. Section 1640(e) establishes the limitation period of the Act. It states, "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

56. 404 Ill. 307, 89 N.E.2d 22 (1949).

57. In *Wilson* the court was interpreting a provision of the Wrongful Death Act, Ill. Rev. Stat. ch. 70, §§ 1, 2 (1977); *see* note 3 *supra* for relevant language of these sections.

58. A counterclaim differs from an answer in that it is a separate cause of action in favor of the defendant against the plaintiff. 404 Ill. at 307, 89

ple that a limitation period found within a statute creating the right is a substantive element of that cause of action. It concluded that the counterclaim could not stand unless all of its elements were pleaded.[59] Consequently, the counterclaim was dismissed.[60]

Disregarding the rationale of *Wilson*, the *Wood* court's inquiry went beyond the language of the Act in order to determine the general legislative intent surrounding the enactment of the FTLA.[61] Though the court's research into the FTLA failed to disclose the purpose behind the statute's one-year filing period,[62] the court discovered that the essential purpose in passing the Act was to safeguard the consumer in connection with the utilization of credit.[63] The FTLA's objective is to achieve fairness for the consumer in credit transactions; the means to this end is by penalizing wrongdoers.[64] The enforcement of this Act was to be accomplished through the institution of civil actions.[65] The court reasoned that since the principle of "fairness"[66] to the consumer was used by Congress to devise the bill, that notion should govern any interpretation of the statute.[67] In this manner, the *Wood* court concluded that the goal of the Act should not be frustrated where the debtor's obligation is not stale,[68] and that the one-year limitation was not such an integral part of the Act as to outweigh the combined purposes of the FTLA and section 17 of

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N.E.2d at 24 (1949). *See* 25 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 568 (2nd ed. 1903).

59. *See* 404 Ill. 307, 89 N.E.2d 22 (1949). *See, e.g.*, Hartray v. Chicago Rys. Co., 290 Ill. 85, 124 N.E. 849 (1919) (time limitation period in Wrongful Death Act construed as a condition precedent); Carlin v. Peerless Gas Light Co., 283 Ill. 142, 119 N.E. 66 (1918).

60. 404 Ill. 307, 314-15, 89 N.E.2d 22, 26 (1949).

61. It is acceptable practice for courts to look at committee reports and conference reports of the legislature. The primary function of these reports is to explain the meaning of the legislation considered. *See generally* E. CRAWFORD, THE CONSTRUCTION OF STATUTES 716-17 (1940); Chamberlain, *The Courts and Committee Reports*, 1 U. CHI. L. REV. 81 (1933); Note, *Conference Committee Materials in Interpreting Statutes*, 4 STAN. L. REV. 257 (1952).

62. It is interesting to note that when the bill first went into committee, it contained a one-year limitation period which was deleted but subsequently reinstated in the final draft. No reason could be found for these changes. *See generally* Report on Truth in Lending Act, S. REP. NO. 392, 90th Cong., 1st Sess. (1967).

63. 18 Ill. App. 3d at 149, 309 N.E.2d at 405.

64. 15 U.S.C. § 1601 (1970).

65. The term "fairness" connotes the idea of reasonableness, which derives its meaning from equity. *See* Utah Assets Corp. v. Dooley Bros. Ass'n, 92 Utah 577, 580, 70 P.2d 738, 741(1937); WESTER'S THIRD NEW INTERNATIONAL DICTIONARY 816 (unabr. ed. 1971).

66. 18 Ill. App. 3d at 151, 309 N.E.2d at 405.

67. *See* notes 62-64 and accompanying text *supra*.

68. 18 Ill. App. 3d at 151, 209 N.E.2d at 405.

the Illinois Limitation Act.[69] The court buttressed its position with decisions from other states involving the same question.[70] Thus, the *Wood* court, in seeking to further the underlying design of the FTLA, was constrained neither by prior judicial interpretation to the contrary[71] nor by the written manifestations of Congress.[72]

In *Cessna v. Montgomery*,[73] the Illinois Supreme Court resorted to the doctrine of estoppel to prevent reaching the undesirable effect that accompanies interpreting special statutory time periods as conditions precedent.[74] The appeal in this case arose from two independent actions by mothers seeking to establish the paternity of their illegitimate children.[75] The trial court dismissed the actions because they were commenced after the two-year limitation period had passed.[76] On appeal, the

69. *Id.* The court buttressed its argument with the statutory provision for counterclaims in Illinois, deeming that the legislative intent of this statute was to be "fair" to the defendants. ILL. REV. STAT. ch. 83, § 17 (1977).

70. *See, e.g.*, First Nat'l City Bank v. Drake, CONS. CRED. GUIDE (CCH) ¶ 98, 939 at 88652 (Civ. Ct. N.Y. 1973). Since the *Wood* decision several other courts have grappled with the time limitation problem in the FTLA with the same result. *Accord*, St. Mary's Hosp. v. Torres, 33 Conn. Supp. 201, 370 A.2d 620 (1976); Reliable Credit Serv. Inc. v. Bernard, 339 So. 2d 952 (La. Ct. of App. 1976); Collector's, Inc. v. Atrisco Ass'n, 4 CONS. CRED. GUIDE (CCH) 98779 (N.M. Dist. Ct. 1974); Conrad v. Home & Auto Loan Co., 366 N.Y.S.2d 850 (1975). *Contra*, Hewlett v. John Blue Employees Fed. Credit Union, 344 So. 2d 505 (Ala. App. 1976); Hodges v. Community Loan & Inv. Corp., 133 Ga. App. 336, 210 S.E.2d 826 (1974); Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 223 S.E.2d 831 (1976).

71. Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949); Carlin v. Peerless Gas Light Co., 283 Ill. 142, 119 N.E. 66 (1918).

72. *See* note 55 *supra*.

73. 63 Ill. 2d 71, 344 N.E.2d 447 (1976).

74. The court was interpreting the Paternity Act, ILL. REV. STAT. ch. 106¾, § 43 (1975), currently found at ILL. REV. STAT. ch 40, § 1354 (1977).

75. In *Cessna*, the child was born July 25, 1970. Plaintiff, the mother, and defendant had had sexual relations over a period of five years before the child's birth and continued to see each other after that time. Plaintiff and defendant lived together in 1972, from July until October. The paternity suit was filed in March 1973. Plaintiff testified that defendant occasionally contributed to the support of the child and had orally acknowledged paternity of the child.

The facts of the other case joined with *Cessna* were as follows. The plaintiff charged the defendant with fathering her child, asserting that for three and one-half years after the child's birth on March 4, 1970, the defendant held himself out as the child's father. The defendant admitted paternity in a signed and witnessed writing the day before the child was born and was named as the father on the birth certificate. Defendant supported the child until September 1973, and six months later plaintiff brought the action. 63 Ill. 2d at 76-77, 344 N.E.2d at 449.

76. The Paternity Act states in part:

> No such action may be brought after the expiration of 2 years from the birth of the child. However, where the person accused has acknowledged the paternity of the child by a written statement made under oath or affirmation or has acknowledged the paternity of such child in

supreme court reversed.

Although the plaintiff's major contentions were constitutional in nature,[77] the court decided the case by addressing the question of whether the two-year limitation provision was an integral element of the statutory action, which, if so concluded, would have barred these paternity actions.[78] Previously this statutory time period had been construed as a condition precedent to the cause of action created by the Act.[79] The *Cessna* court felt, however, that the facts in this case warranted the application of estoppel to prevent the defendant from pleading the special statutory time period as a defense.[80] This marked the first time that the Illinois Supreme Court used estoppel to bar a party from pleading a special statutory time period as a defense.

The Illinois Supreme Court had previously stated, in dicta, that estoppel would not apply in an action brought pursuant to a statute with its own substantive time limitation.[81] In *Cessna*, the court still contended that this proposition may be true for some statutes, but not for actions under the Paternity Act.[82] The court noted the practicalities inherent in paternity actions in rejecting a strict adherence to the two-year limitation period acting as a bar.[83] Since most statutes that contain their own time limits deal with interaction between strangers, there exists little reason to suspect that a party will induce a stranger to forfeit his cause of action.[84] In paternity suits, however, the plaintiff and defendant

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open court, prosecution may be brought at any time within 2 years from the last time such acknowledgment was made or within 2 years from the last time the person accused contributed to the support, maintenance, education and welfare of the child subsequent to such acknowledgment. The time any person so accused is absent from the State may not be computed.

ILL. REV. STAT. ch. 106¾, § 54 (1975) (current version at ILL. REV. STAT. ch 40, § 1354 (1977)).

77. The lawyers for the plaintiffs argued that the Paternity Act was unconstitutional because it denied equal protection to illegitimate children by requiring their mothers to establish paternity within two years in order to sue for support whereas mothers of legitimates may sue for support any time during the child's minority. *Id.* at 78, 344 N.E.2d at 450-52.

78. *See* text accompanying notes 33-39 *supra*.

79. *See* Brown v. Box, 38 Ill. 2d 80, 82, 230 N.E.2d 204, 205 (1967). In this case a paternity action was brought after the statutory two-year period had elapsed but the court held that it did not have jurisdiction to hear the case under the applicable statute.

80. 63 Ill. 2d at 87-88, 344 N.E.2d at 454-55.

81. *See* Helle v. Brush, 53 Ill. 2d 405, 410, 292 N.E.2d 372, 375 (1973) (the court applied estoppel to keep a statutory notice requirement from acting as a bar to the right, but it warned that it could not do this if the notice requirement were a condition precedent to bringing the suit).

82. 63 Ill. 2d at 87, 344 N.E.2d at 454.

83. *Id.*

84. *Id.*

are often emotionally involved, and hence, a plaintiff may be lulled into not pursuing her cause of action within the specified time period. For example, the father of an illegitimate child could support the child for two years and then rely upon the expired statutory time period as an absolute defense to escape a subsequent eighteen-year support obligation.[85] Realizing the likelihood of this possibility, the *Cessna* court refused to allow the statutory limitation to bar petitioner's claim.[86] The court noted that this reasoning had been adopted by other states.[87]

The *Cessna* court employed a balancing test to reach its decision. The potential unfairness to the plaintiff, that would result from a strict construction of the limitation period, was weighed against the policy permeating the entire statute. In this respect, the court perceived that the general policy of the statute should not be impeded by one specific section of the statute, the limitation period.[88] This policy should prevail even though the legislature had provided within the statute the means to toll the running of the limitation period, which was not available in this situation.[89] Thus, the *Cessna* court incorporated a procedural interpretation into the statutory period prescribed by the legislature in order to promote the indirect policy behind the paternity statute —*fairness*. Equitable principles that are based on the concept of fairness were employed to further the goal of the statutory action.

An Illinois Appellate Court[90] in *Kristan v. Belmont Community Hospital* adopted this reasoning and looked to the legislative intent in holding section 24(a) of the Limitation Act[91] to be applicable where a substantive time period had expired during the pendency of the first action. This section allows for the filing of a new action where a case has been dismissed for want of prosecution.[92] The court stated that the purpose underlying section 24(a) was "to afford every defendant a fair opportunity of

85. *See* note 76 *supra* for the text of the Paternity Act.

86. 63 Ill. 2d at 86, 344 N.E.2d at 454.

87. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959); Fetch v. Buehner, 200 N.W.2d 258 (N.D. 1972) (court held that equitable estoppel would apply to toll the substantive time limitation on paternity actions).

88. 63 Ill. 2d at 86, 344 N.E.2d at 455.

89. *See* note 76 *supra* for ways the statute provides for the tolling of the running of the time period.

90. Kristan v. Belmont Community Hosp., 51 Ill. App. 3d 523, 366 N.E.2d 1068 (1977).

91. ILL. REV. STAT. ch. 83, § 24(a) (1977).

92. *See* Franzese v. Trinko, 66 Ill. 2d 136, 361 N.E.2d 585 (1977) (a plaintiff may commence a new action within one year of a dismissal for want of prosecution without a showing of diligence under § 24(a) of the Limitations Act); Aranda v. Hobart Mfg. Corp., 66 Ill. 2d 616, 363 N.E.2d 796 (1977) (a plaintiff has an absolute right to refile his action within one year).

investigating the circumstances based upon which plaintiff wishes to impose liability."[93] The court reasoned that the legislature had intended this purpose to apply to both common law and statutorily created actions. Thus the plaintiff's action under the Wrongful Death Act, which has a two-year substantive time limitation,[94] was allowed even though ultimately commenced six years after the cause of action arose.

A New Look at Substantive Time Limits

Analysis of *Cessna* and *Wood* demonstrates that the courts in Illinois are concerned about the harsh results stemming from the interpretation of special statutory time limitations as conditions precedent to the right to plead a statutory cause of action.[95] Instead of a boilerplate application of these statutory time limits, the courts are balancing the potential unfairness to a plaintiff of having a right extinguished when he has been lulled from pursuing a statutorily created right against the certainty afforded a defendant that he no longer be concerned about potential liability.[96] In this balancing process, a major factor to be recognized is the controlling purpose of the statute.[97] With a time limit for bringing a statutory action that creates a right unknown at common law, this balance of interests requires ascertaining the controlling purpose of the statute.[98] If the court finds that the basic purpose will be negated by interpreting the limitation as a condition precedent, then the court will refuse to follow this rationale and construe the time period as a procedural statute of limitation. Thus, through the application of this balancing approach, the equitable doctrines that were previously applicable only to a general statute of limitations are now appropriate in the context of special statutory time periods.[99]

The salient feature of this new test is the requirement that the court analyze each factual situation before determining whether the policy of the applicable statute will be subverted by interpreting the statutory period as a condition precedent.[100] This test is predicated upon the court's deducing the subjective intent of the legislature in passing the statute and seeing that this intent prevails in enforcing the statute. This extended in-

93. 51 Ill. App. 3d at 528, 366 N.E.2d at 1071 (1977).
94. *See* note 3 *supra*.
95. *See* notes 54-94 and accompanying text *supra*.
96. *See* 63 Ill. 2d 71, 344 N.E.2d 447 (1976).
97. *Id.* at 83-84, 344 N.E.2d at 454-55 (1976).
98. *Id.*
99. *See* text accompanying notes 11-14 *supra*.
100. *See* Cessna v. Montgomery, 63 Ill. 2d at 81, 344 N.E.2d at 455.

quiry represents a recent shift in policy by the courts, demonstrating a concern that the intent of the legislature be promoted, not circumvented, by the judicially created rule of substantive time periods.

Most statutory actions are enacted in response to recurring situations where those adversely affected do not possess an adequate right or remedy. To alleviate the injustice attendant in these circumstances, the legislature will often create a new statutory cause of action.[101] A court, after delving into the legislative history of an act to discover the wrong to be rectified, should not permit the wrong to persist through a unilateral interpretation of time periods as substantive. Thus, by applying the more practical balancing approach, the court assures that the equities favorable to both parties are considered in deciding whether a procedural or substantive interpretation of a statutory time period should govern in a particular case. By comparing the competing interests involved in order to ascertain the legislative purpose of a statutory action, it can be argued that the continued interpretation of some time periods as substantive should be abolished. This argument is premised on the fact that legislative actions creating statutory rights are intended to correct wrongs left unremedied in the past. Hence, the availability of the remedy should control in any factual situation within the scope of the statute.

In advancing this contention, the rules of statutory interpretation come immediately to the forefront. Two questions present themselves: whether such a construction is a legitimate interpretation of these statutory actions; and whether this interpretation is within the authority of the judiciary.

Statutory Interpretation

The canon that courts should interpret statutes to achieve a just or fair result permeates our concept of law.[102] It is generally accepted that the court's function in construing statutes is to give full effect to the intent of the legislature.[103] In doing so, it is difficult, if not impossible, to ascertain all the various intents be-

101. It is apparent from the legislative history of statutes which create new actions that the driving motive of the legislature is fairness. *See* note 62 *supra* and note 102 *infra*.

102. If our system of law is to be practical, our statutory laws *must* be governed by the principles of justice and humanity. E. CRAWFORD, THE CONSTRUCTION OF STATUTES 549 (1940).

103. Mr. Justice Reed stated: "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940). *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13 (1975).

hind any piece of legislation since the rationale behind any individual section may not be entirely consistent with the main thrust of the legislation. The courts, however, are not confined to the written legislation itself in arriving at its meaning.[104] They are permitted to search for the subjective intent of the legislature in order to ascertain the policy pervading the statutes and then to interpret it accordingly.[105]

The problem occurs when a court overrules a particular section of a statute that in some context is contrary to the overall policy underlying the legislature's enactment of the statute. If "intention" refers to the subjective state of mind of the legislature, then it would be a mere technicality to let a word or phrase of a section determine the outcome when other indicators point with assurance to the legislature's purpose.[106] By rejecting such a technical approach, the *Cessna* and *Wood* courts were able to avoid an undesirable result that otherwise would have ensued, while simultaneously ensuring that the policy of the acts was advanced.

Rejection of Substantive Time Limitations

The remaining question is whether the distinction between substantive and procedural limitation periods should endure. A number of commentators have criticized this distinction as creating artificial labels from which the court selects depending upon the results sought.[107] Substantive time limits, like general limitations, are phrased in terms stating when an action should be commenced.[108] Although the language is sometimes identical,[109] substantive time limitations are interpreted to bar the assertion of an underlying right,[110] while limitations construed as procedural bar only the remedy, and not the right.[111] The substantive time limits concept originally emerged from a conflict of laws question where the Supreme Court reviewed an action that

104. *See* text accompanying note 68 *supra.*

105. Sir William Blackstone wrote:

> The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law.

Quoted in H. HART, JR. & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1201 (1958).

106. *Id.* at 1225.

107. *See* note 112 *infra.*

108. *See generally* statutes cited in note 3 *supra.*

109. *See* note 43 *supra.*

110. *See* notes 4-6 and accompanying text *supra.*

111. *See* notes 1-2 and accompanying text *supra.*

was barred in the state that had created the right but was not barred in the forum state.[112] In concluding that the action was also barred in the forum state by applying a substantive interpretation, the Court was primarily concerned with eliminating forum shopping.[113]

Recently, legislatures have alleviated forum shopping by enacting borrowing statutes that forbid a forum state to allow the commencement of an action after the time limitation specified in the state statute creating the right has expired.[114] Since borrowing statutes prevent a plaintiff from extending his right beyond that given in the state where his cause of action arose, he will not be able to forum shop for the purpose of securing a greater period of time within which to bring his action.[115] The legislative enactment of borrowing statutes has cured the problem upon which *The Harrisburg* reasoning was focused. Therefore, the substantive interpretation of time period is no longer necessary to alleviate forum shopping.

Although eliminating the possibility of forum shopping, the reasoning in *The Harrisburg* created a dichotomy in stating that a limitation period in a statute creating a right unknown at common law is substantive, while a general statute of limitations is procedural. This dichotomy has not gone without criticism.[116]

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112. The Harrisburg, 119 U.S. 199 (1886).

113. *See* notes 28-33 and accompanying text *supra*.

114. *See* note 14 *supra* for examples of borrowing statutes.

115. *See* Kalmich v. Bruno, 553 F.2d 549 (7th Cir. 1977) (Illinois borrowing statute is a rule of exclusion whereby actions brought in an Illinois forum, not barred by the applicable Illinois statute of limitations, are denied enforcement if barred by the statute of the place where the cause of action arose). *See also* Manos v. Trans World Airlines, Inc., 295 F. Supp. 1170 (N.D. Ill. 1969) (where nonresidents of Illinois brought action in Illinois against manufacturer of airplane involved in a crash in Italy, the Italian statute of limitations applied).

116. *See* Ailes, *Limitations of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 493 (1933) ("[T]he conclusion is irresistible that statutes are often labelled 'substantive' or 'procedural' depending upon the results sought."). Justice Frankfurter stated that "'[S]ubstance' and 'procedure' are the same keywords to very different problems. . . . The line between substance and procedure shifts as the legal concept changes." Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945). "Since a general statute of limitations cannot be regarded as a qualification of a common law right, there seems no logical reason for holding the reverse merely because the right arose under the statute, and the limitation was made particularly applicable to it." Note, *Foreign Statute of Limitations*, 18 HARV. L. REV. 220, 221 (1905).

In describing the test laid down in *The Harrisburg*, known as the specificity test, one commentator stated:

> The rationale of the test [specificity] is that some limitations are intended to limit rights while others are intended to merely give effect to a general procedural policy. It is doubtful whether such fine distinctions concerning legislative intent actually exist or can be accurately

This rule has caused some unfortunate consequences, especially with respect to the availability of equitable doctrines that postpone the running of a procedural period but are not applicable to postpone the operation of substantive time periods.[117]

When the substantive time period is in a federal statute,[118] the need for uniformity in the enforcement of federal rights may seem a sufficient justification to disregard any state exceptions to the time limitation. Still, it is doubtful whether the equitable results supposedly achieved by the proposed exceptions to the running of the limitation period should be blindly sacrificed to the factor of uniformity.[119] It can be argued that when a state legislature creates a new right with its own limitation period, there exists no general intent to reject such equitable exceptions.[120] Thus, where the application of these equitable exceptions to a limitation period would not frustrate the legislative

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ascertained. Even assuming that they do exist, it may be argued that these distinctions are not relevant to the selection of the appropriate statute of limitations under conflicts of law.

Note, *Specificity Test as Exclusive Criterion Bars Application of Foreign Statute of Limitations*, 55 COLUM. L. REV. 1072, 1075 (1955). The United States Supreme Court, in certain circumstances, has refused to make a constitutional distinction predicated on anything as "unsubstantial" as the difference between substantive and procedural statutes of limitations. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1952).

117. *See* Messenger v. Rutherford, 80 Ill. App. 2d 25, 225 N.E.2d 94 (1967). Plaintiff, as executor of decedent, sought to recover from defendant on an account reportedly made shortly before decedent's death. Defendant counterclaimed on the ground that decedent had committed fraud. The court dismissed the counterclaim on grounds that it was barred by Probate Act, ILL. REV. STAT. ch. 3, § 204 (1977). The court held that fraud would not toll the limitations period of the statute. *Accord*, Westcott v. Henshaw Motor Co., 275 Mass. 82, 175 N.E. 153 (1931) (statutory one-year period for bringing actions for wrongful death from motor vehicles held exclusive and not affected by statute tolling limitation period during defendant's residence outside of state); Smith v. Eureka Pipe Line Co., 122 W. Va. 277, 8 S.E.2d 890 (1940) (the statute permitting actions commenced within due time and abated or dismissed involuntarily to be reinstated within one year does not grant that right in an action under Wrongful Death Statute).

It is notable at this point that Louisiana has taken the position that all exceptions to general statutes of limitations are applicable to substantive time limits.

118. *See* text of Federal Truth in Lending Act at note 55 *supra*. For further discussion of the need for uniformity under federal statutes, see H.R. Rep. No. 71, 80th Cong., 1st Sess. 7 (1947).

119. *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959). The Court in applying estoppel as a defense to a substantive time period stated that where one by "his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage."

120. *See* statutes cited in notes 3 and 55 *supra*. A reading of statutes with their own limitation period does not reveal an intent on the part of the legislature to create substantive time limits. The wording is similar to that found in procedural limitation periods.

intent, then postponement or suspension of the period would, in fact, further the general purpose of the legislature.

The Supreme Court in *Glus v. Brooklyn Eastern District Terminal*[121] held that estoppel was applicable to bar the asserted defense that the time period expired in which to bring a cause of action under the Federal Employer's Liability Act (FELA).[122] The FELA created a new cause of action and limited the time for commencing suit. In deciding the case, Justice Black relied upon the maxim that "no man may take advantage of his own wrong."[123] In *Glus*, the Court reasoned that the principle of estoppel is available against the substantive time period in the FELA. Consistent with this view, certain state courts have taken the position that all such equitable exceptions are applicable to any time limitation even though it had previously been construed as substantive.[124] Thus, the Supreme Court and certain state courts have eroded the substantive time limit interpretation by applying equitable principles to toll the running of the time period.

Arguably, substantive time limits should always have been subjected to equitable considerations. In *The Harrisburg*, the Court did not face the specific question whether equitable doctrines were capable of contravening the defense of time limitations since this argument was not raised by the plaintiff.[125] Furthermore, one can argue that substantive time limitations are susceptible to equitable considerations by reasoning that the limitation period refers only to the effect of the expiration of the time limit; it does not designate the exact moment of expiration. Thus, equitable doctrines could always have been applied to substantive time periods to toll their running.

CONCLUSION

For the first time, the courts in Illinois are using equitable doctrines to avoid the harsh results that sometimes accompany interpretations of specific statutory time limitations as substantive.[126] This new interpretation contravenes the holding in *Wilson v. Tromly* and its progeny,[127] although these cases have not

121. 359 U.S. 231 (1959).

122. 45 U.S.C. §§ 51-60 (1939).

123. 359 U.S. at 232.

124. Mitchell v. Sklar, 196 So. 392 (La. 1940) (Louisiana has taken the position that all equitable exceptions are applicable to substantive time limits).

125. 119 U.S. 199 (1886).

126. *See* Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976); Wood Acceptance v. King, 18 Ill. App. 3d 149, 309 N.E.2d 403 (1973).

127. *See* note 4 *supra*.

been expressly overruled. The interpretation of specific statutory time limitations as substantive elements of the cause of action is no longer necessary due to the incorporation of borrowing statutes.[128] The original interpretation of specific time limits as substantive was based on the notion that it was unfair to allow a party to extend his cause of action by bringing it in one state when the action would have been barred if brought in the state that created the right.[129] Since this interpretation is now unnecessary to alleviate this problem, the courts have returned to the ultimate goal of fairness by applying a new interpretation to these time periods.[130]

In Illinois, the legislature has established that when a party is sued, he has a right to file a counterclaim.[131] In the past, this principle was thwarted in cases where specific time limitations were considered to be substantive.[132] Today, with the courts' new interpretation, many of these counterclaims will now be allowed. This problem could be characterized as legislative in that, if the legislature had intended to allow counterclaims to be filed, it should have so provided in statutes. Yet, it was the judiciary who developed the doctrine of substantive time limits, and therefore, it is only appropriate that the judiciary assume the responsibility in rectifying the harsh results that have occasionally stemmed from this interpretation.

This new approach of the Illinois courts in reference to special statutory time limits has the capability of emasculating the harsh results attendant with the substantive interpretation of time limits. Such interpretations should not be employed where the original reason for their utility has been obviated by other means. This fact, plus the inequitable results from such interpretation, raises serious questions about the validity and desirability of maintaining this approach. The courts in Illinois should be encouraged by the legal community to reject a strict substantive interpretation of statutory time periods. In doing so, the legal community will be fulfilling one of its primary obligations to society: to ensure that the law clearly reflects the changing needs and demands of our society.[133]

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128. *See* note 35 and accompanying text *supra*.

129. *See* The Harrisburg, 119 U.S. 199 (1886).

130. *See, e.g.*, Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959); Cessna v. Montgomery, 63 Ill. 2d 71, 344 N.E.2d 447 (1976); Wood Acceptance v. King, 18 Ill. App. 3d 149, 309 N.E.2d 403 (1973).

131. ILL. REV. STAT. ch. 83, § 18 (1977).

132. *See* note 4 *supra*.

133. Hutchins, *The Autobiography of an Ex-Law Student*, 1 U. CHI. L. REV. 511, 511-12 (1934).