KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedPreempted by Ruffing ex rel. Calton v. Union Carbide Corp., N.Y.Sup., Aug. 12, 2002

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 2. Limitations of Time (Refs & Annos)

McKinney's CPLR § 214-c

§ 214-c. Certain actions to be commenced within three years of discovery

Currentness

1. In this section: "exposure" means direct or indirect exposure by absorption, contact, ingestion, inhalation, implantation or injection.

2. Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

3. For the purposes of sections fifty-e and fifty-i of the general municipal law, section thirty-eight hundred thirteen of the education law and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented within a specified period of time after the claim or action accrued, a claim or action for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property shall be deemed to have accrued on the date of discovery of the injury by the plaintiff or on the date when through the exercise of reasonable diligence the injury should have been discovered, whichever is earlier.

4. Notwithstanding the provisions of subdivisions two and three of this section, where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two and three of this section.

5. This section shall not be applicable to any action for medical or dental malpractice.

6. This section shall be applicable to acts, omissions or failures occurring prior to, on or after July first, nineteen hundred eighty-six, except that this section shall not be applicable to any act, omission or failure:

(a) which occurred prior to July first, nineteen hundred eighty-six, and

(b) which caused or contributed to an injury that either was discovered or through the exercise of reasonable diligence should have been discovered prior to such date, and

(c) an action for which [1] was or would have been barred because the applicable period of limitation had expired prior to such date.

Credits
(Added L.1986, c. 682, § 2. Amended L.1992, c. 551, § 1.)

Editors' Notes

PRACTICE COMMENTARIES

by Vincent C. Alexander

2019

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C214-c:1 Toxic Tort Statute of Limitations: Background, Applicability.

CPLR 214-c was the Legislature's response, in 1986, to repeated invitations from the Court of Appeals to enact a discovery rule for tort cases based on exposure to toxic substances that cause imperceptible injuries at the time of exposure. See Practice Commentaries on CPLR 214, at C214:4 & C214:5. The longstanding rule in New York is that accrual of a cause of action based on exposure to a toxic substance occurs immediately upon exposure because of the assumption that injury occurs at that time. For example, in *Steinhardt v. Johns-Manville Corp*., 1981, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297, the plaintiffs inhaled asbestos particles at their places of employment. They sued the manufacturers of the asbestos long after their exposure, but within three years of the development of adverse health effects that could not have been discovered sooner. Their actions were time-barred, said the Court of Appeals because "the statutory period of limitations began to run when the plaintiff[s] inhaled the foreign substance." Id. at 1010, 446 N.Y.S.2d at 246, 430 N.E.2d at 1299. Any change in this rule of accrual, such as adoption of a discovery rule, should come from the Legislature.

And so it did with CPLR 214-c, which creates a discovery rule in cases involving exposure to substances causing injuries with latent effects. The basic rule allows for suit up to three years from the discovery of injury to person or property caused by exposure to a toxic substance (CPLR 214-c(2)) with a possible independent one-year period (subject to specified conditions) if the toxic cause of the injury was unknown for three years after the injury itself was discovered (CPLR 214-c(4)).

CPLR 214-c is known as the "toxic tort statute of limitations" even though the word "toxic" appears nowhere in the statute. Nevertheless, the legislative sponsor, as well as the Governor and Attorney General, referred to it as "the toxic torts bill" in memoranda relating to its adoption. See *Blanco v. American Telephone and Telegraph Co.*, 1997, 90 N.Y.2d 757, 767, 666 N.Y.S.2d 536, 539, 689 N.E.2d 506, 509. In uncodified legislation accompanying CPLR 214-c, claims time-barred as of 1986 and based upon exposure to five specified substances (DES, tungsten-carbide, asbestos, chlordane, and polyvinylchloride (PVC)), obviously all toxic, were revived for a one-year period. This revival legislation was challenged on federal and state constitutional grounds as a violation of due process and equal protection, but the revival was upheld in *Hymowitz v. Eli Lilly & Co.*, 1989, 73 N.Y.2d 487, 513, 541 N.Y.S.2d 941, 951, 539 N.E.2d 1069, 1079, certiorari denied 493 U.S. 944, 110 S.Ct. 350, 107 L.Ed.2d 338, as a reasonable response to an apparent injustice that called for a remedy.

As for claims that post-date the enactment of CPLR 214-c, the Legislature addressed retroactivity issues in subdivision 6, but it took a decision of the Court of Appeals to decide definitively that the discovery rules apply without regard to the antiquity of the plaintiff's exposure to an injurious substance. So long as discovery of the injury reasonably occurs after July 1, 1986, it matters not that the exposure occurred prior to that date--even decades prior. *Rothstein v. Tennessee Gas Pipeline Co*, 1995, 87 N.Y.2d 90, 637 N.Y.S.2d 674, 661 N.E.2d 146. "[B]ecause the statutory enactment is a remedial package of complex, interlocking provisions, we read it generously to effect the core and overriding purpose." Id. at 96, 637 N.Y.S.2d at 677, 661 N.E.2d at 149.

The types of substances to which CPLR 214-c applies are not statutorily defined. The broadest reading would be unlimited, including one's collision with the fender of a car or the tapping of a computer keyboard. The Court of Appeals, however, observed that the statute's proponents contemplated only "toxic" substances (see above), and therefore only toxic substances are within its scope. While acknowledging that the discovery rule is remedial in nature, the court declined to "stretch the statute beyond its intended coverage." *Blanco v. American Telephone and Telegraph Co.*, supra, 90 N.Y.2d at 766, 666 N.Y.S.2d at 539, 689 N.E.2d at 509 (computer keyboard, use of which allegedly caused repetitive stress injury (RSI), was not toxic substance within CPLR 214-c). Other nontoxic substances include loud noise at a firing range, compressed air in a construction tunnel, and cold air at a construction site. See Practice Commentaries on CPLR 214, at C214:5. For cases falling outside the ambit of CPLR 214-c, the traditional rule of accrual on date of exposure applies. But see *Blanco v. American Telephone and Telegraph Co.*, supra (unique rules developed for RSI injuries).

Toxic substances may be manufactured or natural, such as blood tainted by the AIDS or genital herpes diseases. *Prego v. City of New York*, 1989, 147 A.D.2d 165, 541 N.Y.S.2d 995 (2d Dep't); *DiMarco v. Hudson Valley Blood Services*, 1989, 147 A.D.2d 156, 542 N.Y.S.2d 521 (1st Dep't); *Plaza v. Estate of Wisser*, 1995, 211 A.D.2d 111, 117-18, 626 N.Y.S.2d 446, 451 (1st Dep't); *Yong Wen Mo v. Gee Ming Chan*, 2005, 17 A.D.3d 356, 792 N.Y.S.2d 589 (2d Dep't).

"Exposure," in contrast to substance, is statutorily defined in subdivision 1. The language covers just about every conceivable way in which a harmful substance might transfer to a person or piece of property--by direct or indirect absorption, contact, ingestion, inhalation, injection, or implantation (e.g., silicone breast implants). Even this broad definition, however, has limits. In *Enright by Enright v. Eli Lilly & Co.*, 1991, 77 N.Y.2d 377, 568 N.Y.S.2d 550, 570 N.E.2d 198, certiorari denied, 502 U.S. 868, 112 S.Ct. 197, 116 L.Ed.2d 157, the plaintiff suffered a premature birth because her mother had been exposed to DES while in utero. The Court of Appeals rejected the existence of a cause

of action in favor of the "DES offspring," in part, by reliance on the various descriptions of "exposure" in CPLR 214-c. Implicit in the statutory language, says the Court, "is the notion that some contact with the substance is essential to a cause of action, an element lacking here." 77 N.Y.2d at 385, 568 N.Y.S.2d at 554, 570 N.E.2d at 202. Although the ultimate issue in *Enright* concerned the merits of the cause of action, not its time limitation, the Court is clearly signaling its intention to give the term "indirect exposure" something less than its broadest possible meaning.

Subdivision 5 explicitly excludes medical malpractice from the applicability of CPLR 214-c. Medical malpractice cases are governed exclusively by CPLR 214-a. Thus, a physician who injects a patient with harmful medication or implants an injurious chemical in the patient's body is without the benefit of the discovery rule. Similarly, a personal injury-based breach of warranty claim against a supplier of a toxic product (UCC 2-318) is not subject to CPLR 214-c. Breach of warranty claims accrue upon the seller's tender of delivery of the injury-causing product (UCC 2-725(2)), without regard to the date of actual injury or discovery thereof. See, e.g., *Doyle v. American Home Products Corp.*, 2001, 286 A.D.2d 412, 413-14, 729 N.Y.S.2d 194, 196 (2d Dep't). See generally *Heller v. U.S. Suzuki Motor Corp.*, 1985, 64 N.Y.2d 407, 411, 488 N.Y.S.2d 132, 134, 477 N.E.2d 434, 436 (computation of date-of-delivery rule for multiple members of chain of distribution).

Annunziato v. City of New York, 1996, 224 A.D.2d 31, 37, 647 N.Y.S.2d 850, 854 (2d Dep't), held that the discovery rule of CPLR 214-c cannot be used to extend the two-year statute of limitations for wrongful death actions, which runs from the date of death, because subdivisions 2 and 3 explicitly limit the discovery rule to claims for personal injury and property damage. Assuming, however, a wrongful death action based on exposure to a toxic substance is brought within two years of the decedent's death, the discovery rule can play a role in determining whether the decedent, when he or she died, had a viable personal injury claim against the defendant, i.e., the decedent did not discover injury from the latent effects of such exposure until a date within three years of death.

To the extent the discovery computations of CPLR 214-c leave a personal injury plaintiff without the ability to recover, the provisions of CPLR 214-f may prove to be of assistance if the exposure occurred at a Superfund site. See Practice Commentaries on CPLR 214-f.

When it comes to property damage, the applicability of CPLR 214-c may be a mixed blessing. Under common law, the "continuing tort" doctrine keeps the statute of limitations running on a trespass the or nuisance claim if a contaminating substance continues to do harm to the plaintiff's property: each day of invasion of the plaintiff's rights creates a new cause of action, thereby daily regenerating CPLR 214(4)'s three-year period for property damage. This allows a landowner to recover damages for the three-year period immediately preceding commencement of the action. See Practice Commentaries on CPLR 214, at C214:4. Under CPLR 214-c(2), the statute of limitations for property damage resulting from exposure to a substance with latent effects generally runs from the date of discovery of the injury. While no one doubts that CPLR 214-c(2) applies to claims for property damage based on negligence and strict liability, does the statute supersede the traditional rule of "daily accrual" for claims based on continuing trespass or nuisance?

Indeed it does, the Court held, 4-3, in *Jensen v. General Electric Co.*, 1993, 82 N.Y.2d 77, 603 N.Y.S.2d 420, 623 N.E.2d 547, an action seeking damages and injunctive relief based on the presence of hazardous chemicals underneath plaintiffs' property. Plaintiffs became aware of the contamination in 1986 but did not commence an action until 1990. The defendants invoked CPLR 214-c(2) as a defense, arguing that the action was time-barred because not brought within three years of discovery of the injury. The plaintiffs countered that the traditional "daily-accrual" rule for claims of continuing trespass and nuisance permitted relief for damages incurred within three years of commencement of the action. CPLR 214-c, they argued, displaced neither the common law of continuing trespass and nuisance nor the traditional method of computing the statute of limitations in such cases, namely, that each day of the trespass or nuisance creates a new cause of action. Plaintiffs' argument prevailed in the Appellate Division but not in the Court of Appeals.

Both the majority and dissent agreed that the legislative history was devoid of any mention of the potential effect of the statute on the doctrine of continuing trespass and nuisance in cases involving property damage. From this silence, the majority and dissent drew conflicting inferences. The majority reasoned that the Legislature presumably was aware of the preexisting law with respect to continuing trespass, yet it provided no exception for such claims in the statute's discovery rule. The statute, therefore, must have intended to establish a preemptive, all-inclusive discovery rule for property-damage actions involving exposure to toxic substances. The majority buttressed its interpretation with the following axiom of statutory construction: "'[A] general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but, so long as it is expressed in general language, the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy.'" 82 N.Y.2d at 86, 603 N.Y.S.2d at 424, 623 N.E.2d at 551, quoting *In re Di Brizzi*, 1951, 303 N.Y. 206, 214, 101 N.E.2d 464, 468. The majority also argued that perpetuation of the daily-accrual rule for continuing trespass would deprive defendants of the measure of repose that is inherent in a uniform date-of-discovery rule.

The majority, however, confined its holding to that portion of the plaintiffs' action that sought money damages. Injunctive relief--to stop the continuing trespass and nuisance--was held to be outside the scope of CPLR 214-c, which, by its terms, is limited to "action[s] to recover damages." To smooth over this anomaly, the majority noted that the traditional role of equity is to provide a measure of relief when legal remedies are inadequate.

The dissent argued that the majority's interpretation of CPLR 214-c turned a remedial statute into "an instrument for the diminution of common-law rights." 82 N.Y.2d at 96, 603 N.Y.S.2d at 429, 623 N.E.2d at 556. The continuing trespass doctrine was impliedly preserved in the adoption of CPLR 214-c because "[t]he common law is never abrogated by implication." 82 N.Y.2d at 94, 603 N.Y.S.2d at 429, 623 N.E.2d at 556, quoting McKinney's Consol. Laws of N.Y., Statutes § 301(b). Thus, there was no need for the Legislature to carve out an exception from the discovery rule for cases of continuing trespass.

The issue was a close one. One may question the *Jensen* plaintiffs' wisdom in delaying suit for more than three years after discovery of the hazardous condition on their property, but it is difficult to fault their reliance on a long-standing rule of law that was never explicitly put in jeopardy by the adoption of CPLR 214-c. As the majority opinion noted, however, an important benefit of CPLR 214-c is that plaintiffs whose property is exposed to a toxic substance will be able to recover all of their damages--not just those incurred during the three years immediately preceding suit--provided they commence litigation no later than three years after discovery. Furthermore, they are not constrained by the discovery rule to the extent they seek an injunction against continuation of the trespass or nuisance.

One inroad on *Jensen*'s abrogation of the continuing harm doctrine in CPLR 214-c cases is the "two-injury" doctrine that may apply if the exposure to the toxic substance causes an additional distinct injury that is discovered later. See Commentary C214-c:2, below.

C214-c:2 Discovery of Injury Triggers Running of Statute of Limitations.

CPLR 214-c(2) states the basic rule. When the plaintiff discovers injury to his or her person or property, and such injury was caused by the latent effects of exposure to a toxic substance (see above), the statute of limitation begins to run on the claim. As with most of the discovery rules of the CPLR, the statute of limitations will begin to run from the date the plaintiff, with reasonable diligence, should have discovered the injury when this date precedes the date of actual discovery. Usually the relevant period is that of three years under CPLR 214(4) (property damage) or CPLR 214(5) (personal injury), although the period is shorter in actions against a municipality or the state of New York. See Commentary C2124-c:3, below. Implicit in the basic rule is the assumption that upon the discovery of the injury its toxic cause is known. Subdivision 4 deals with the situation where the plaintiff knows of the injury but is unaware of what caused it.

Discovery of Toxic Personal Injury

What constitutes "discovery of the injury" within the meaning of CPLR 214-c(2)? It is the date "when the injured party discovers the primary condition on which the claim is based." *In re New York County DES Litigation (Wetherill v. Eli Lilly & Co.)*, 1997, 89 N.Y.2d 506, 509, 655 N.Y.S.2d 862, 863, 678 N.E.2d 474, 475. Such discovery triggers the running of the statute of limitations even if the plaintiff does not know the nature of the medical condition from which she is suffering or that it has an external, toxic cause. Under the basic rule, the running of the statute of limitations should not await the accurate diagnosis of a physician, either as to the nature of the condition or its toxic cause. Why would the Legislature have included subdivision 4 if knowledge of the cause of the condition was an implicitly required component of subdivision 2? In enacting the new discovery rule, "the Legislature had in mind only the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced ... and not ... the more complex concept of discovery of both the condition and the nonorganic etiology of that condition." Id. at 514, 655 N.Y.S.2d at 866, 678 N.E.2d at 478. See also *Whitney v. Quaker Chemical Corp.*, 1997, 90 N.Y.2d 845, 660 N.Y.S.2d 862, 683 N.E.2d 768 (worker discovered injury when he developed respiratory symptoms such as difficult breathing, throat and chest pain and coughing, causing him to seek treatment, file workers' compensation claim and submit injury investigation reports to employer); *Vincent v. New York City Housing Auth.*, 2015, 129 A.D.3d 466, 11 N.Y.S.3d 47 (1st Dep't) (plaintiff discovered injury from exposure to mold when her asthma symptoms worsened, resulting in frequent attacks and hospital visits, and additional medication prescriptions).

The Court of Appeals has indicated, however, that some "early symptoms" may be "too isolated or inconsequential to trigger the running of the Statute of Limitations." *In re New York County DES Litigation*, supra, 89 N.Y.2d at 514 n.4, 655 N.Y.S.2d at 866, 678 N.E.2d at 478. Such was the situation in *Malone v. Court West Developers, Inc.*, 2016, 139 A.D.3d 1154, 30 N.Y.S.3d 760 (3d Dep't), where the plaintiff sued for physical ailments--asthma and permanent allergies--caused by his exposure to mold in defendant's building, his place of employment. Some of the symptoms emerged more than three years before suit, specifically skin and eye irritation and tightness in the throat. But those early symptoms abated when plaintiff left the building at the end of each work day, and he sought no medical treatment, missed no work as a result of the symptoms, and filed no workers compensation claim until about five months later. The court found that "the symptoms that plaintiff exhibited more than three years prior to the commencement of the action were too intermittent and inconsequential to trigger the running of the statute of limitations." See also *Cabrera v. Picker International, Inc.*, 2003, 2 A.D.3d 308, 770 N.Y.S.2d 302 (1st Dep't) (early symptoms of shortness of breath and intermittent coughing after exposure to chemical fumes did not constitute primary condition upon which claim was based); *In re New York City Asbestos Litigation*, 2016, 53 Misc.3d 579, 584-85, 39 N.Y.S.3d 629, 634 (Sup.Ct.N.Y.Co.) (noting that First, Third and Fourth Departments consider the following factors to determine threshold of discovery: "whether a plaintiff sought regular medical treatment; whether a plaintiff is limited in physical activity or misses time from work; and whether a plaintiff files a workers' compensation claim").

Discovery of Toxic Injury to Property

For claims of property damage caused by the presence of contaminating substances on property, the Court of Appeals added the following modification to the "primary condition" test: "[D]iscovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, 'the injured party discovers the primary condition on which the claim is based.'" *MRI Broadway Rental, Inc. v. United States Mineral Products Co.*, 1998, 92 N.Y.2d 421, 429, 681 N.Y.S.2d 783, 787, 704 N.E.2d 550, 554. The dangers of asbestos were so well known in the late 1970s and early 1980s that plaintiff's discovery at that time of the presence of asbestos in the fireproofing of his property constituted discovery of injury. The "primary condition" here was the very presence of the asbestos, not the later date when actual physical damage to the building began to occur.

The *MRI Broadway* test has been invoked in cases of seepage, leakage and infiltration of toxic liquids in close proximity to property: discovery of injury occurs when the presence of the substance is known and its capacity for harm makes actual contamination an imminent threat. For example, in *Sullivan v. Keyspan Corp*., 2017, 155 A.D.3d 804, 806, 64 N.Y.S.3d 82, 85 (2d Dep't), leave to appeal dismissed, 2018, 31 N.Y.3d 1141, 81 N.Y.S.3d 365, 106 N.E.3d 748, a 2012 action for property damage based on emanations from a manufactured gas plant was time-barred because the defendant, from 1999 through 2002, had engaged in a widespread information campaign in the affected neighborhood about contamination and remediation activity, giving the plaintiffs "an objective level of awareness of the dangers and consequences of the contamination sufficient to place them on notice of the primary condition on which their claims [were] based."

Similarly, in *Benjamin v. Keyspan Corp*., 2013, 104 A.D.3d 891, 963 N.Y.S.2d 128 (2d Dep't), the defendant's notification to plaintiff landowner of monitoring activities and test results about the presence of contaminants "in the vicinity of the subject property" was enough to start the running of the statute of limitations under CPLR 214-c(2); such knowledge was enough to put "a reasonable person on notice of the need to undertake further investigation to ascertain the scope of the contamination." 104 A.D.3d at 892, 963 N.Y.S.2d at 129, quoting *Oliver Chevrolet Inc. v. Mobil Oil Corp*., 1998, 249 A.D.2d 793, 794-95, 671 N.Y.S.2d 850, 852 (3d Dep't) (limitations period began to run when plaintiff knew that gasoline had leaked from underground storage tanks, not upon later discovery of gasoline in water). See also *Bethpage Water District v. Northrop Grumman Corp*., 2018, 884 F.3d 118, 127-28 (2d Cir.) (mere anticipation of future need to remediate pollution does not constitute discovery of injury, but knowledge that threat of contamination is significant enough to justify "an immediate or specific remediation effort" will do it; landowners should not wait until wells are actually contaminated if they know that toxic substance is in groundwater that feeds into wells).

Latent Effects

CPLR 214-c(2) also requires that the injury be the result of "latent effects" of exposure to a toxic substance. An injury is not latent if it is immediately apparent to the plaintiff, as, for example, breaking out in a rash upon touching a toxin, or suffering a stroke right after swallowing a pill. But what if the rash or stroke does not occur until two days later? For how long does an effect have to remain hidden in order to qualify as "latent"? In *Giordano v. Market America, Inc*., 2010, 15 N.Y.3d 590, 915 N.Y.S.2d 884, 941 N.E.2d 727, the Court acknowledged that the primary purpose of the toxic tort legislation was to change the accrual rule for injuries that do not manifest themselves "for years," but held that the statute can also apply to latency periods of much shorter duration, including "within a few hours" of the toxic exposure. In *Giordano*, the plaintiff consumed the dietary supplement ephedra and suffered a stroke some 24 to 48 hours later. The effects of the ephedra were "latent," said the Court, for the simple reason that the dictionary definition of latent is "not now visible, obvious, active, or symptomatic." This interpretation benefited the plaintiff because she became eligible for the one-year extension in subdivision 4, which is available when the toxic *cause* of a latent injury is not discovered until a future date. In the present case, the connection between ephedra and strokes was not known until four years after the plaintiff's stroke.

Does the latent presence of a toxic substance constitute a latent "effect"? No. CPLR 214-c(2) applies only when a toxic substance causes injuries with hidden effects or consequences; in contrast, the unknown presence of the toxic substance itself does not qualify for application of the discovery rule. *Germantown Central School District v. Clark, Clark, Millis & Gilson, AIA*, 2003, 100 N.Y.2d 202, 761 N.Y.S.2d 141, 791 N.E.2d 398. The plaintiff in *Germantown* retained an architect and an engineer to remove asbestos previously installed in school property. Thirteen years later, plaintiff discovered that some asbestos still remained and sued for professional malpractice, relying on the discovery rule. The Court held, however, that the action became time-barred three years from completion of the asbestos removal services. (Under CPLR 214(6), a malpractice claim accrues upon completion of the project. See Practice Commentaries on CPLR 214, at C214:6.). Plaintiff's injuries were "not ... within the purview of CPLR 214-c." The statute's language, the Court said, should be given a reading consistent with the purpose of the legislation,

i.e., to facilitate recovery for exposure-induced injuries that do not have a perceptible effect until many years after exposure. By its terms, the statute requires injury "caused by the *latent effects* of exposure." Here, no additional damage or change in consequences--no "latent effects"--occurred to persons or property after the original installation of the asbestos. "[T]here [was] no allegation ... that the asbestos migrated to a different location, became airborne or friable, or caused illness to any occupants of the building." 100 N.Y.2d at 206, 761 N.Y.S.2d at 144, 791 N.E.2d at 400. See also *Manhattanville College v. James John Romeo Consulting Engineer, P.C.*, 2004, 5 A.D.3d 637, 774 N.Y.S.2d 542 (2d Dep't) (discovery rule inapplicable where boiler installed in 1993 exploded in 1999 and released carbon monoxide into building; until boiler explosion occurred, harmful nature of the carbon monoxide was "abated," and the building was safe for its occupants).

Two-Injury Rule

The "two-injury rule" allows a renewed running of the statute of limitations from the discovery of a second injury caused by a single exposure. To qualify, the second injury must be separate and distinct--"qualitatively different"--from the first, "such as [in the case of property] contamination spreading to a new site." The rule has no application if the secondary injury is merely an "outgrowth, maturation or complication of the original contamination." *Suffolk County Water Authority v. Dow Chemical Co.*, 2014, 121 A.D.3d 50, 991 N.Y.S.2d 613 (2d Dep't). The rule was applied to a personal injury claim in *Wells v. 3M Company*, 2016, 137 A.D.3d 1556, 28 N.Y.S.3d 746 (3d Dep't). There, the plaintiff alleged that her exposure to asbestos caused a form of mesothelioma, "MEM," that was first discovered within three years of commencement of her action. The defendant moved to dismiss on the ground that the MEM was merely an outgrowth or complication of a tumor that was discovered more than three years before the action. Defendant's proof, however, failed to rule out the applicability of the two-injury rule, i.e., that the MEM was a "separate and distinct disease" from the tumor. Each separate and distinct injury would have its own date of discovery. Compare *Rosner v. Mira, Inc.*, 2005, 16 A.D.3d 277, 792 N.Y.S.2d 41 (1st Dep't) (plaintiff's alleged second injury was merely a "complication" of an "already-emerged ailment"); *Oeffler v. Miles, Inc.*, 1997, 241 A.D.2d 822, 826, 660 N.Y.S.2d 897, 900 (3d Dep't) (plaintiff failed to show date of alleged new injury or that it was "qualitatively different" from earlier one).

C214-c:3. Municipal Defendants: Notice of Claim.

Subdivision 3 of CPLR 214-c covers the occasional situation in which the tortfeasor in a toxic tort action is a branch of local government. The statute of limitations in such cases is one year and ninety days, rather than three years. CPLR 217-a; Gen.Mun.Law § 50-i. Thanks to CPLR 214-c(3), the statute will not start to run until the plaintiff discovers the injury (or when the plaintiff should have discovered the injury, whichever is sooner). Moreover, the requirement that a notice of claim be served on the municipality within 90 days of the accrual of the claim (Gen.Mun.Law § 50-e), is not triggered until the discovery of the injury. See, e.g., *O'Brien v. County of Nassau*, 2018, 164 A.D.3d 684, 686, 83 N.Y.S.3d 311, 314 (2d Dep't).

C214-c:4 Unknown Cause Exception: One-Year Period from Discovery of Cause.

Occasionally, a party injured by exposure to a toxic substance will not know, when he or she becomes aware of the resulting condition (injury), that it was caused by an injurious substance, as compared to some nontoxic, biological cause. The injured party will have no basis to investigate a possible lawsuit against anybody, and yet the clock will have started ticking on the three-year period that runs from discovery of the injury. If the plaintiff fails to commence an action within three years of discovery of injury because the toxic cause of such injury is unknown, subdivision 4 may offer a measure of relief. CPLR 214-c(4) grants an extra period of one year from the discovery of the cause of the injury, subject to two conditions. First, there is a time cap on the extension: the discovery of the cause of injury must occur less than five years from the date of discovery of the injury itself. Second, the plaintiff must make a showing that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his

[or her] injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized." Put another way, the scientific community had not ascertained a causal connection between the toxic substance and the particular type of injury until more than three years after the plaintiff experienced such injury. See generally *Pompa v. Burroughs Wellcome Co*., 1999, 259 A.D.2d 18, 21-22, 696 N.Y.S.2d 587, 590 (3d Dep't).

Whose identification of the toxic cause of the injury governs? Is it that of the plaintiff herself, plaintiff's lawyer, or plaintiff's personal physician? Does it depend on when the media disseminates information about the relevant science to the public at large? *Giordano v. Market America, Inc*., 2010, 15 N.Y.3d 590, 915 N.Y.S.2d 884, 941 N.E.2d 727, adopted the same standard that governs the admissibility of scientific evidence under New York evidence law: "[T]he test is one of general acceptance of [the causal] relationship in the relevant technical, scientific or medical community." In other words, "a causal relationship will be sufficiently ascertained for CPLR 214-c(4) purposes at, but not before, the point at which expert testimony to the existence of the relationship would be admissible in New York courts." 15 N.Y.3d at 601-02, 915 N.Y.S.2d at 890, 941 N.E.2d at 733. This is the *Frye* standard of general acceptance in the relevant scientific community. See Robert A. Barker & Vincent C. Alexander, *Evidence in New York State and Federal Courts* § 7:5 (West, 2d ed.). It is not a requirement of "medical certainty or information sufficient to prevail at trial," but rather a "showing that sufficient information and knowledge existed to enable the medical or scientific community to ascertain the probable causal relationship between the substance and plaintiff's injury." 15 N.Y.3d at 601, 915 N.Y.S.2d at 890, 941 N.E.2d at 733, quoting *Pompa v. Burroughs Wellcome Co*., supra, 259 A.D.2d at 24, 696 N.Y.S.2d at 591-92.

In *Giordano*, the specific question for the trier of fact was the point in time at which the scientific community generally accepted that the dietary supplement ephedra was a probable cause of aneurisms and strokes. The issue arose in a federal diversity action, the legal question having been certified to the New York Court of Appeals by the Second Circuit. Adoption of the *Frye* standard to determine when the scientific community has ascertained causal connection will produce some complicating evidentiary issues in such diversity actions. Under federal evidence law on expert testimony, which generally governs in all federal actions whether based on federal question jurisdiction or diversity, the flexible *Daubert* standard of admissibility applies. Barker & Alexander, supra, § 7:11. But in a diversity action governed by New York substantive law, the federal court, in deciding the statute of limitations issue pursuant to CPLR 214-c(4), must apply *Frye*'s standard of general acceptance. (In diversity actions, federal courts must apply state substantive law pursuant to *Erie*, and this includes state law and standards governing the statute of limitations.) In applying the scientific causation issue to the particular plaintiff's injury, however (assuming the case gets over the limitations hurdle), the federal court will direct the fact-finder to consider scientific testimony in accordance with the federal *Daubert* standard, unconstrained by the general acceptance rule of *Frye*.

The basic point, however, is that it is not enough that the plaintiff or her physician was personally unaware of the toxic etiology of her medical condition; the scientific community's lack of knowledge is what matters. To take advantage of the one-year extension, therefore, the plaintiff must show that it was not generally accepted in the scientific community that toxic substance *x* (to which she was exposed) can cause injury *y* (plaintiff's condition), at the time of, and for three years following, the discovery of her condition.

If the plaintiff's exposure occurred at a location that is designated as a Superfund site, CPLR 214-f, in personal injury actions only, confers an independent discovery rule of three years from the Superfund site designation. Pursuant to CPLR 214-f, the plaintiff gets the benefit of whichever statute confers the longer period within which to sue--CPLR 214-c, or CPLR 214-f. See Practice Commentaries on CPLR 214-f.

Notes of Decisions (316)

Footnotes

1 So in original.

McKinney's CPLR § 214-c, NY CPLR § 214-c

Current through L.2019, chapter 758 and L.2020, chapters 1 to 242. Some statute sections may be more current, see credits for details.