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Civil LITIGATION

Statute of limitations on exposure cases

As the potentially catastrophic health impacts from exposure to myriad chemicals, construction materials and other products becomes more evident, questions often arise as to when the statute of limitations accrues for exposures that may have occurred decades ago.

CPLR 214-c(2) attempts to address the latent exposure issue, providing that the statute of limitations accrues from "the date of discovery of the injury by plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

By COLIN D. RAMSEY
Daily Record Columnist

While the language of the statute seems straightforward enough, determining the "discovery" date can prove quite difficult.

For example, while the onset of symptoms is critical, it is not necessary that the plaintiff actually be aware that their injury was caused by a particular chemical or hazardous material before the limitations' period begins to run.

As stated by the court in *Johnson v. Ashland Oil*, 195 A.D.2d 980, 981 (Fourth Dept. 1993), the subdivision clearly indicates that "discovery of the injury" does not depend upon discovery of the cause of the injury.

The New York State Court of Appeals addressed this very issue in *Wetherill v. Eli Lilly & Co.(In re N.Y. County DES Litig.)*, 89 N.Y.2d 506 (1997), a case in which the plaintiff alleged damages resulting from the diethylstilbestrol (DES) taken by her mother. It was undisputed that plaintiff knew about the medical condition and symptoms forming the basis of her claim more than three years before the commencement of her action. However, she argued that the "discovery of the injury" is not complete within the meaning of the statute until the connection between symptoms and a plaintiff's exposure to a toxic substance is recognized.

In rejecting this interpretation, the court concluded that CPLR 214-c(2)'s reference to "discovery of the injury" was clearly intended to mean discovery of the condition on which the claim was based. It concluded that the time for bringing the action begins to run under the statute when the injured party discovers the primary condition on which the claim is based.

It confirmed this holding the following year in *MRI Broadway Rental v. United States Min. Prods. Co.*, 92 N.Y.2d 421 (1998), writing "discovery 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'."

However, latent exposures can cause multiple medical problems, and New York courts have recognized that even if the statute of limitations has expired on one exposure-related medical problem, a later exposure-related medical problem that is 'separate and distinct' may still be actionable under New York's two-injury rule, see *Braune v. Abbott Labs.*, 895 F. Supp. 530, 555 (E.D.N.Y. 1995) (citing *Fusaro v. Porter-Hayden Co.*, 145 Misc. 2d 911 [N.Y. Sup. Ct. 1989], affd., 565 N.Y.S.2d 357 [App. Div. First Dept. 1991]).

Under the two-injury rule, diseases that share a common cause may nonetheless have separate accrual dates for statute of limitations purposes where the diseases' biological manifestations are different, and where the presence of one is not necessarily a predicate for the other's development.

The *Fusaro* case provides a classic example of where the two-injury rule may be applied. The plaintiff in *Fusaro* claimed exposure to asbestos decades before the onset of any symptoms. He was first diagnosed with asbestosis, and subsequently with mesothelioma.

The defendant argued that both causes of action should be time-barred, as plaintiff's onset of symptoms leading to the asbestosis diagnosis occurred more than three years prior to the commencement of the lawsuit. The plaintiff argued that even if the claims relating to asbestosis were barred, a separate statute of limitations should apply for his mesothelioma symptoms, which developed later.

The court agreed with plaintiff, finding that there was a clear distinction between asbestosis and the more virulent mesothelioma. The court explained that while asbestosis and mesothelioma are both causally connected to asbestos fiber exposure, almost every other aspect of the diseases is different. The effects of asbestosis are generally cumulative in that the continued exposure to asbestos dust increases both the risk and severity of the disease, and symptoms include shortness of breath and a dry hacking cough.

Conversely, mesothelioma is a rare malignancy which may

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occur as a result of only a short exposure to asbestos fibers. Symptoms of mesothelioma include severe chest pain, shortness of breath and weight loss. Further, mesothelioma may develop without any manifestation of asbestosis, and one is not an outgrowth, maturation or complication of the other.

The court concluded that in view of the fact that the diseases were separate and distinct, and as a party with asbestosis has no way of knowing whether or not he will develop mesothelioma, separate statutes of limitations were appropriate and consistent with CPLR § 214-c.

The question then both for defense counsel seeking to invoke a statute of limitations defense in latent exposure cases, and plaintiffs seeking to avoid a dismissal, is when did a plaintiff "discover" his injury within meaning of CPLR § 214-c(2). This fact-specific determination may prove more difficult than the language of the statute suggests, but is critical to determining whether the action is time-barred.

Colin D. Ramsey is an associate in Underberg & Kessler's Litigation Department. He concentrates his practice in civil litigation, with an emphasis on insurance defense and business torts.