

Client Alert **Product Liability Law**

New Jersey Supreme Court Puts Out a Welcome Mat for Out-Of-State Plaintiffs with Time Barred Claims

Introduction

On January 24, 2017, the New Jersey Supreme Court reinstated a \$25 million verdict in favor of an Alabama plaintiff in the Accutane litigation, a Multi-County Litigation, that has been pending in the Superior Court of New Jersey, Atlantic County, since 2005. See *McCarrell v. Hoffman-La Roche, Inc.*, 2017 N.J. LEXIS 19 (N.J. Jan. 24, 2017). In a unanimous ruling, the Court reversed the Appellate Division's application of long standing New Jersey precedent and determined that Plaintiff's lawsuit, time barred under Alabama law, was not time barred under New Jersey's statute of limitations. The issue before the Court was which state's statute of limitations applied under New Jersey's choice-of-law jurisprudence. In reaching a decision that reinstated the verdict and applied New Jersey's discovery rule, the Court adopted a new test under Restatement (Second) of Conflict of Laws ("Restatement"), § 142, and determined that when New Jersey has a substantial interest in litigation brought in its courts, New Jersey's statute of limitations should ordinarily apply absent exceptional circumstances.

Background and Procedural History

In 2003, Plaintiff Andrew McCarrell, an Alabama resident, filed a lawsuit against Defendants Hoffman-La Roche, Inc., and Roche Laboratories, Inc. (collectively

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“Roche”) alleging, among other things, that Roche failed to provide adequate warnings about the risks associated with taking the acne medication Accutane. Roche denied Plaintiff’s allegations, arguing that its warning sufficiently conveyed the associated risks of taking Accutane, and that Plaintiff’s use of Accutane was not the proximate cause of his injuries.

In June 1995, Plaintiff was prescribed Accutane by his dermatologist in Alabama, and took daily doses for four months. At the time of his prescription, Roche provided various warnings, including warnings on the label, a patient brochure, and a Dear Doctor letter, about Accutane’s possible adverse side effects, including gastrointestinal symptoms.

In August 1996, ten months after taking Accutane, Plaintiff experienced gastrointestinal symptoms, which worsened over the next several months. In November 1996, Plaintiff was diagnosed with inflammatory bowel disease. Over the next several years, Plaintiff underwent several surgeries in Alabama, including removal of his colon and rectum and received a J-Pouch. Plaintiff developed complications with the J-Pouch and continued to experience severe gastrointestinal problems.

Before the trial court, Roche moved for summary judgment arguing that Plaintiff’s claims were time barred under Alabama’s statute of limitations because his injury occurred in 1996, but his lawsuit was not filed until 2003. Under Alabama law, personal injury claims are subject to a two-year statute of limitations without any equitable tolling. Plaintiff opposed the motion arguing that under New Jersey’s statute of limitations law, including its equitable discovery rule, his claim was timely because the statute of limitations did not begin to run “until the injured party discovers, or by the exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.” *Lopez v. Swyer*, 62 N.J. 267, 272 (1973). Applying the governmental-interest test as set forth in *Gantes v. Kason Corp.*, 145 N.J. 478, 484 (1996), the trial court determined that New Jersey’s statute of limitations applied because Alabama had no interest in barring one of its residents from pursuing a claim against a New Jersey pharmaceutical company in New Jersey. The trial court reasoned that New Jersey had a distinct interest “in deterring the manufacture and distribution of unsafe products within the state.” Because Plaintiff had filed his claim in New Jersey within six weeks of discovering that his injury could have been caused by his use of Accutane, the trial court determined that his claim was timely under New Jersey law.

In 2007, a New Jersey jury, applying Alabama’s substantive products-liability law, awarded Plaintiff \$2.6 million in damages. In 2009, the Appellate Division reversed

based on errors in evidentiary rulings and remanded for a new trial. *McCarrell v. Hoffman La Roche, Inc.*, 2009 N.J. Super. Unpub. LEXIS 558 (App. Div. Mar. 12, 2009). The Appellate Division, however, approved of the trial court's statute of limitations reasoning and application of New Jersey's statute of limitations and equitable tolling. The Supreme Court denied Roche's petition for certification. *McCarrell v. Hoffmann-LaRoche Inc.*, 199 N.J. 518 (2009).

In 2010, at Plaintiff's second trial, the jury found Roche liable and awarded over \$25 million in damages. Roche moved for judgment notwithstanding the verdict arguing that New Jersey's statute of limitations should not have been applied because the governmental-interest test used by the trial court had been supplanted by the most-significant relationship test of Restatement §§ 146, 145, and 6. See *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132 (2008); *Cornett v. Johnson & Johnson*, 414 N.J. Super. 365 (App. Div. 2010). Under the latter test, Roche argued that Alabama's statute of limitations should apply and Plaintiff's claims were time barred. The trial court denied Roche's motion. The trial court determined that Roche's change-in-law argument was untimely because it had not argued for adoption of §§ 146 and 145, and 6 before the Appellate Division, and that New Jersey's statute of limitations would still apply under such analysis any way.

In 2015, the Appellate Division adopted Roche's change-in-law argument, held that Alabama's two-year statute of limitations applied under §§ 146, 145, and 6, and that Plaintiff's claims were time barred under Alabama law. *McCarrell v. Hoffmann-La Roche, Inc.*, 2015 N.J. Super. Unpub. LEXIS 1925 (App. Div. Aug. 11, 2015). As a result, the Appellate Division reversed the judgment on retrial and directed dismissal of Plaintiff's claim. The Supreme Court granted Plaintiff's petition for certification.

Court's Decision

Before the Supreme Court, Roche argued that §§ 146, 145 and 6 of the Restatement provided the proper choice-of-law vehicle for determining the applicable statute of limitations. Roche further argued that under these sections, Plaintiff failed to overcome the presumption that the statute of limitations where the injury occurred should be applied. Roche also argued against adoption of § 142 of the Restatement entitled "Statute of Limitations Forum" because it was similar to the defunct common-law rule that the forum state's statute of limitations prevails as a matter of procedure, which was rejected in *Heavner v. Uniroyal, Inc.*, 63 N.J. 130 (1973). Roche also contended that that even under § 142, Alabama's statute of limitations should apply because nearly all of the events occurred in Alabama.

Plaintiff argued that the Appellate Division erred by not adopting § 142, which was specifically designed to address choice-of-law issues related to the timeliness of tort actions when there is a conflict of law. Plaintiff further argued that under either § 142, or even if §§ 146, 145, and 6 applied, New Jersey's statute of limitations should apply because New Jersey had the most significant relationship with Plaintiff's claim.

The Court first determined that it was not bound by the findings of the lower courts as the choice-of-law determination is a matter of law, that its review was *de novo*, and that there was a conflict between Alabama and New Jersey statute of limitations law. The Court noted that going forward, it was establishing a "bright-line rule" to address conflicts between state statutes of limitations: a conflict exists if selection of one state's statute of limitations over another is outcome dispositive.

The Court next adopted § 142 of the Restatement to resolve statute of limitations conflicts of law. Section 142 provides:

Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:

- (1) The forum will apply its own statute of limitations barring the claim.
- (2) The forum will apply its own statute of limitations permitting the claim unless:
 - (a) maintenance of the claim would serve no substantial interest of the forum; and
 - (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Although it had previously adopted the significant relationship test of §§ 146, 145, and 6 for conflicts of substantive law in *Camp Jaycee*, the Court justified its adoption of § 142 because it had apparently made clear that the significant relationship test only applied to resolve conflicts of substantive law in tort actions, but not for conflicts on which state's statute of limitations should apply. Under § 142, the Court explained that New Jersey's statute of limitations law would generally apply whenever New Jersey has a substantial interest in the maintenance of the claim, unless exceptional circumstances render such a result unreasonable. And, only when New Jersey has "no substantial interest" in maintaining the claim would the court need to consider whether the claim would be time barred under the statute of limitations of another state with

a more significant relationship to the parties and the occurrence. In determining if another state has a more significant relationship, the court would consider the factors in § 6.

Applying § 142 to Plaintiff's case, the Court determined that New Jersey had a substantial interest in the litigation and there were no exceptional circumstances. Roche was a New Jersey corporation, with corporate offices in New Jersey; Accutane was designed, manufactured, distributed, and labeled in New Jersey; and Roche's label inadequately warned plaintiff of Accutane's potential risks. Deterrence of New Jersey manufacturers from developing, manufacturing, and distributing unsafe produces was within New Jersey's substantial interest, along with protecting the citizens of other states from unreasonably dangerous products from New Jersey.

While the Court recognized that Alabama had a significant relationship to the parties and the occurrence, the Court believed that Alabama's interest was not more significant than New Jersey's interest. Further, the Court noted that Alabama did not have an interest in denying its citizens the right to sue in another state where another state has an equitable tolling doctrine providing a remedy. The Court, therefore, determined that the verdict should be reinstated under New Jersey's statute of limitations. The Court could not conclude that "'maintenance of the claim would serve no substantial interest' of this State and because there [were] no 'exceptional circumstances' that call[ed] for the application of Alabama's limitation period."

Analysis

The Court's adoption of § 142 of the Restatement is a departure from established New Jersey law. In conflict of law situations, trial courts will now have to apply two standards on choice of law issues: one to decide which state's substantive law applies; and another to decide which state's statute of limitations applies. By distinguishing between which test to apply for choice-of-law analyses of substantive law versus the statute of limitations, the Court has laid out a "welcome mat" for out-of-state plaintiffs with time barred claims to sue New Jersey companies in New Jersey.

Ironically, the Court attempted to justify its reasoning as benefitting New Jersey companies by providing a bright line test and protecting them against another state's potentially longer statute of limitations period. Time will tell, but this decision may likely lead to an increase in tort claim filings by out-of-state plaintiffs in New Jersey with time barred claims thereby placing more burden on New Jersey companies and the judiciary.

Client Alert Product Liability Law

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