

NEW JERSEY

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I Statutes of Limitation and/or Repose Applicable to Drug and Medical Device Product Liability Claims

In New Jersey, products liability claims are governed by the Products Liability Act, N.J.S.A. 2A:58C-1 et seq. The Act subsumes a host a common law causes of action, including negligence, strict liability and implied warranty claims, see N.J.S.A. 2A:58C-1b(3), but it does not contain any limitations or repose provisions. As a result, practitioners must turn to the two-year statute of limitations that is applicable generally to personal injury claims:

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years after the cause of any such action shall have accrued.

N.J.S.A. 2A:14-2. There is no statute of repose applicable to claims stemming from use or exposure to an allegedly defective medicine or medical device.

Wrongful death claims are not governed by N.J.S.A. 2A:14-2, but by N.J.S.A. 2A:31-3:

Every action brought under this chapter [the Wrongful Death Act, N.J.S.A. 2A:31-1 et seq.] shall be commenced within two years after the death of the decedent and not thereafter.

This statute focuses on the date of death, not the accrual of an action. N.J.S.A. 2A:31-3 is not a statute of limitations, but a condition precedent to the statutory right to file a wrongful death action. See Lombardi v. Simon, 266 N.J. Super. 708, 711-12, 630 A.2d 426 (Law Div. 1993).

II Issues Related to the Accrual and Tolling of the Statute of Limitations Applicable to Drug and Medical Device Product Liability Claims

Generally, a cause of action accrues on the date of the occurrence of the accident or incident giving rise to the case. To avoid the "harsh results" that can flow from "mechanical application" of the two-year statute, various statutes and other remedies have been adopted to postpone the running of the statute of limitations. See Vispisano v. Ashland Chemical Co., 107 N.J. 416, 426, 527 A.2d 66 (1987). The most commonly applied is the judicially-created discovery rule, which provides that "a cause of action will be held not to accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, that he may have the basis for an actionable claim."

Lopez v. Sawyer, 62 N.J. 267, 272, 300 A.2d 563 (1973). (The discovery rule is not applicable to wrongful death claims.)

The Lopez "discovery rule" was refined in Burd v. New Jersey Bell Telephone Co., 76 N.J. 284, 386 A.2d 1310 (1978), where the Court observed that the rule "[m]odified the conventional limitation rules only to the extent of postponing the commencement of accrual of the cause of action until the plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." 76 N.J. at 291 (emphasis in original).

In Vispiano, supra, the Court observed that while more than a "suspicion" is required, certainty or "confirmation" of connection between product and injury was not required to trigger the statute of limitations. 107 N.J. at 437. Instead, a cause of action accrues, and the statute of limitations begins to run, when there is "some reasonable medical support for plaintiff's impression of injury and its possible cause." Id.

In its most recent application of the discovery rule, the New Jersey Supreme Court effectively made it more difficult for defendants to bar stale claims, holding that the discovery rule requires not only knowledge of the existence of an injury and its possible cause, but also knowledge of "facts suggesting the possibility of wrongdoing." Savage v. Old Bridge-Sayreville Memorial Medical Group, 134 N.J. 241, 248, 633 A.2d 514 (1993). In so doing, the Court stated that "knowledge of fault" was not tantamount to knowledge that plaintiff knew "of a basis for legal liability." Instead, "it requires only awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the cause of the injury and that conduct itself might possible have been unreasonable or lacking in due care." Id.

In many ways, the fault requirement articulated in Savage is an expansion of prior discovery rule case law. It is difficult to reconcile the holding of the case with Apgar v. Lederle Laboratories, 123 N.J. 450, 588 A.2d 380 (1991), a products liability case stemming from very similar facts. See Savage, 134 at 250-51 (Clifford, J., dissenting). Regardless, the "fault" requirement, which was endorsed by only four of the seven justices, erodes some of the utility of the statute of limitations as a defense in New Jersey.

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In addition to the judicially-devised discovery rule, the New Jersey Legislature has approved legislation that tolls the running of the statute of limitations in certain cases. For example, with respect to infants, N.J.S.A. 2A:14-21 postpones the running of the statute of limitations until plaintiff is of "full age," i.e., until he reaches the age of eighteen. See Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 606 A.2d 1093 (1992). By virtue of N.J.S.A. 2A:14-2.1, parents with derivative claims arising out of the injury of a minor child have the same time period as the child to file suit. (The infancy tolling statutes are not applicable in wrongful death cases. See Cockinos v. GAF Corp., 259 N.J. Super. 204, 209, 611 A.2d 1154 (Law Div. 1992.)) In addition to infancy, the Legislature has carved an exception in cases where a person is "insane" at the time of the accrual of the cause of action. See N.J.S.A. 2A:14-21 (limitations period is tolled until his being "of sane mind").

III Practice Pointers

The statute of limitations is an affirmative defense. It is not self-executing and must be pleaded to be preserved. See Fees v. Trow, 105 N.J. 330, 521 A.2d 824 (1987); Zaccardi v. Becker, 88 N.J. 245, 440 A.2d 1132 (1982). Practitioners should endeavor to pursue the defense aggressively, as failure to do so may result in the waiver of the defense. See Hadden v. Eli Lilly and Co., 208 N.J. Super. 716, 722, 566 A.2d 844 (App. Div. 1986), certif. den., 104 N.J. 441, 517 A.2d 431 (1986).

The procedure for applying the discovery rule is set forth in Lopez v. Sawyer, *supra*. There, the Court held that the determination of when plaintiff knew or should have known of his cause of action is a non-jury question for the Court alone to decide, ordinarily by way of pretrial inquiry in the form of affidavits and depositions, or by the taking of testimony in what has become known as a Lopez hearing. 62 N.J. at 275.

New Jersey state practice allows plaintiffs to use "John Doe" pleading to avoid the bar of the statute of limitations in cases where plaintiff is unaware of a defendant's true identity. See New Jersey Court Rule 4:26-4. In order to invoke properly the rule so as to have an amended complaint relate back to the filing of the original complaint, plaintiff must show (a) that the "John Doe" description was sufficiently specific, (b) that the identities of the fictitious parties were unknown, and (c) that diligent efforts were made to identify the fictitious parties. Id.