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Trials & TRIBULATIONS

CPLR Section 214 v. Section 214-c

Civil Practice Law and Rules section 214-c expands the time in which a plaintiff exposed to a latent substance must commence a suit.

But a plaintiff sometimes may argue that section 214 — the shorter statute of limitations — applies. Why? The shorter statute of limitations actually may extend the time a plaintiff has to institute litigation.

What is the difference between CPLR 214 and 214-c, and when should each be employed?

Pursuant to section 214, the statute of limitations for injuries to person or property is three years. The time from which to measure the statute of limitations accrues at the date of the injury. *Snyder v. Town Insulation Inc.*, 81 NY2d 429, 432 (1993).

What happens if the injury does not manifest itself until years after the event that caused it? In that case, a plaintiff would be barred under 214's three-year statute of limitations and therefore would have no recourse.

To prevent punishing a plaintiff whose claim would be barred due to the three-year statute of limitations under 214, CPLR 214-c was passed in 1986. *Jensen v. General Electric Co.*, 82 NY2d 77, 83 (1993). Gov. Mario Cuomo addressed the need for adding 214-c in his Approval Memorandum indicating 214-c “[r]emedies a fundamental injustice in the laws of our State which has deprived persons suffering from exposure to toxic or harmful substances from having an opportunity to present their case in court ... [the old rule] fails to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place. ...

“This bill ... repeals that archaic rule and replaces it with a fair and simple rule which permits a person to discover his or her injury before the statutory time period for suit begins to run.” *Jensen* 82 NY2d at 84, quoting 1986 NY Legis. Ann. at 288.

Under section 214-c, a plaintiff who suffers personal injury due to latent effects of exposure to a substance has three years to bring suit for those injuries. The three years begins to run either from the date the plaintiff discovers the injury, or the date when the plaintiff should have discovered the injury with the exercise of due diligence — whichever is earlier.

When does discovery of the injury occur under 214-c? In the personal injury context “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.’” *MRI Broadway Rental Inc. v. U.S. Mineral Products Co.*, 92 NY2d 421, 429 (1998), quoting *Matter of New York County DES Litigation*, 89 NY2d 506, 509 (1997).

The term “injury” as used in 214-c “refers to the manifestation of the harmful effects of exposure to a substance, not the exposure itself.” *Giordano v. Market America Inc.*, 599 F.3d 87, 98 n. 2 (Second Cir. 2010). That means a person does not suffer an “injury” under the statute at the moment when they are exposed to a harmful substance, but rather when they begin to feel sick. When the actual injury occurs can greatly affect the statute a plaintiff will claim applies to his or her situation.

What is the tactical advantage of arguing 214 applies instead of 214-c, and should such an argument made?

Section 214-c adds some leniency to the rigid statute of limitations imposed under section 214. Even so, some cases exist in which a plaintiff may try to argue section 214 applies as opposed to 214-c. What tactical advantage could be gained by arguing for a shorter statute of limitations?

Consider the case in which a plaintiff is exposed to a substance, discovers physical symptoms from that exposure five years later and then fails to bring suit within three years after the discovery of those symptoms. In that case, section 214-c would bar the action despite its leniency because the plaintiff waited more than three years after the discovery of symptoms to bring suit.

To avoid being barred from bringing suit, a plaintiff in that situation may try to argue his or her injuries are “patent.” If the injury is considered patent, then section 214 can be used. It has been held that there is a “continuing-wrong exception” to this section of the CPLR. *Bano*, 361 F3d at 710. Without the exception, a plaintiff would be barred from bringing suit once three years have passed since the injury.

A plaintiff could allege, however, that he or she endured a repeated harm, which constitutes separate, successive causes of action. In that way, the plaintiff can bring suit for any harms

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occurring within the three years prior to commencing the suit, despite the fact the initial injury/exposure occurred outside the three year statute of limitations. While the plaintiff may not be able to recover for the initial harm because the statute has lapsed on that claim, he or she is not totally barred from recovery for more recent, successive injuries. Conversely, section 214-c offers no continuing-wrong exception for causes of action for damages. See *Jensen* 82 NY2d at 90.

The ability to use 214's continuing-wrong exception depends on whether an injury is patent or latent, however.

Patent v. latent injury

How does one determine whether an injury is patent or latent?

More specifically, how long must the interval between exposure and discovery of the injury be for damages to be considered latent?

A patent injury has been defined as one in which "there is no interval between the alleged exposure and resulting harm." *Dabb v. NYNEX Corp.*, 262 AD2d 1079, 1079 (Fourth Dept. 1999). The term "latent" has been defined as referring to "a thing or condition that is present but not evident or manifest." *Giordano*, 599 F3d 87, 98 (Second Cir. 2010). The Second Circuit addressed the issue of determining the length of passage of time necessary for an injury to be considered latent in the case of *Bano v. Union Carbide Corp.*, 361 F.3d 696 (Second Cir. 2004).

In *Bano*, a plaintiff injured as the result of exposure to toxic gas attempted to avoid the consequences of failing to bring a suit within three years of the discovery of the injury by claiming her injuries were patent as opposed to latent. In that way, plaintiff asserted the continuing-tort doctrine under 214 applied to her case rather than 214-c, which does not include a continuing-tort exception. To support her argument, the plaintiff asserted the interval between her exposure to the harmful substance and the appearance of injuries was only a few weeks, therefore her injury was patent because latent injuries "do not manifest themselves for many years." *Id.* at 710.

In its decision, the court noted that 214-c does not state a length of time that must pass before an injury can be considered latent. *Id.* Accordingly, the court determined an injury can be latent even when the interval between the exposure and the injury is just a few weeks. *Id.* at 711. The plaintiff's claim fell

under 214-c, therefore it was time barred.

Even today, the line between patent versus latent injuries remains murky. It is not clear even to the Second Circuit what the line of demarcation should be between the two, as evidenced by the fact that the court declined to make a decision and instead certified the question to the Court of Appeals in *Giordano*, 599 F3d 87 (Second Cir. 2010). In that case, the court addressed the issue of the length of time that must pass between exposure and injury in order for an injury to be considered latent. The plaintiff alleged that a dietary supplement he ingested that contained ephedra caused his cerebral aneurism and other related medical issues. *Id.* at 89. One of the issues in the case concerned whether an injury can be considered latent if it occurs 24 to 48 hours after exposure to a substance. *Id.* The court noted, as in *Bano*, that CPLR 214-c does not mention any specific time period that must pass for an injury to be considered latent. *Id.*

The court surmised the plaintiff's injury in the case could be considered latent, reasoning that "[a]lthough the period of time between exposure and the manifestation of injury was relatively short in [the plaintiff's] case, it was nonetheless a period of time in which ephedra was present in [the plaintiff's] body, but its effects were not evident or manifest." *Id.*

The court noted that it appeared the New York Legislature enacted 214-c "to address both situations in which injury is not evident immediately upon exposure to a harmful substance and situations in which the cause of physical symptoms cannot be discovered within the otherwise-applicable limitations period." *Id.* at 99. The court declined, however, to make a definitive ruling on the issue, instead certifying the question to the Court of Appeals. *Id.*

There is no bright line between those injuries considered patent versus those considered latent. Due to the lack of clarity, it is not surprising that a plaintiff who suffers injuries from exposure to a dangerous substance and fails to bring suit within the applicable statute of limitations under section 214-c would try to argue section 214's "continuing-wrong exception" applies. The practice likely will continue until the Legislature or the courts impose a definitive test for deciphering patent and latent injuries.

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