

New Jersey Supreme Court Deals Blow to Drug and Device Manufacturers Seeking to Avoid Forum Shopping

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This week, in *McCarrell v. Hoffman-La Roche Inc. et al.*, the New Jersey Supreme Court concluded that where statutes of limitations conflict, New Jersey's limitations period will apply. Case No. 076524 (N.J. Sup. Ct., Jan. 24, 2016). The court's decision reinstated a \$25 million jury verdict for the plaintiff in a product liability action involving Accutane, an acne medication.

The plaintiff, an Alabama resident who was prescribed Accutane in Alabama and received medical treatment there, filed suit in New Jersey where Roche is incorporated and headquartered and where it manufactures Accutane. Roche moved for summary judgement, arguing that the case was time-barred under Alabama's two-year statute of limitations. Plaintiff argued that the equitable "discovery rule" incorporated into New Jersey's two-year statute of limitations, N.J.S.A. 2A:14-2, should apply. Under the "discovery rule," which is not available in Alabama, the statute of limitations does not begin to run "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Pg. 9 (citing *Lopez v. Swyer*, 62 N.J. 267, 272 (1973)).

The court deemed the operative choice-of-law rule in New Jersey for resolving conflicting statutes of limitations to be Section 142 of the Second Restatement of Conflicts of Law. Section 142 provides that the forum state's statute of limitations will apply if the state has a substantial interest in the maintenance of the claim unless exceptional circumstances would render that result unreasonable. The court declined to apply the most-significant relationship test set forth in Sections 145, 146 and 6, which it had adopted in *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132 (2008). The court explained that *Camp Jaycee* was intended to resolve conflicts of *substantive* law in tort actions and that the Appellate Division erred in applying it to both substantive law and statutes of limitations. Pg. 4. The court then formally adopted Section 142 to address statutes of limitations conflicts. Pg. 29.

In reaching this decision, the court departed from *Cornett v. Johnson & Johnson*, 211 N.J. 362 (2012), which addressed a similar question. In *Cornett*, the court considered whether to apply Kentucky's one-year statute of limitations or New Jersey's two-year statute. The court applied Kentucky law and concluded that the case was time-barred. The court determined that, because the two states had equitable tolling provisions, the differences in their limitations periods did not "create a true conflict of laws" because the differences were not "offensive or repugnant to the public policy of this state." 211 N.J. at 377. The *McCarrell Court* disagreed with this analysis and established a bright-

line rule that whenever selecting one statute of limitations over another is outcome dispositive, a conflict of law is present. Pg. 27.

The court explained that, in its view, applying the forum state's statute of limitations pursuant to Section 142 will lead to more predictable and uniform results that are "consistent with the **just expectations** of the parties." (emphasis added). Pg. 4. A drug and device manufacturer forced to litigate in New Jersey a case that would be time-barred in a plaintiff's state of residence and injury will disagree, expecting (or hoping) instead that the court recognizes forum shopping for what it is and dismisses the case – an unlikely outcome in light of *McCarrell v. Hoffman-La Roche Inc. et al.*

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