

[Products Liability Law Daily Wrap Up, STATUTES OF LIMITATION AND REPOSE—N.J. Super. App. Div.: \\$25M compensatory award in Accutane trial overturned on statute of limitations grounds, \(Aug. 11, 2015\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Rejecting a trial court's determination that New Jersey's statute of limitations with its discovery rule rather than Alabama's two-year limitations period applied to a product liability action against the manufacturer of Accutane, the New Jersey appellate division reversed a jury award of \$25 million in compensatory damages plus past medical expenses because the patient had filed his action more than two years after he had been diagnosed with irritable bowel syndrome (*McCarrell v. Hoffman-LaRoche, Inc.*, August 11, 2015, *En banc.*).

Background. Andrew McCarrell was prescribed Accutane, an acne treatment medication manufactured by Hoffman-LaRoche, Inc. and he had used the drug for about four months without experiencing any side effects. Several months later, McCarrell began experiencing stomach pain and diarrhea, but no gastrointestinal problems. His symptoms continued to worsen, and he was referred to a gastroenterologist who diagnosed McCarrell in November 1996 with chronic ulcerative colitis, a form of inflammatory bowel disease (IBD). Despite treatment for ulcerative colitis, McCarrell's symptoms worsened again, requiring hospitalization, and eventually his entire colon and rectum had to be removed surgically and replaced with a surgically constructed ileoanal "J-pouch." He experienced a number of post-operative difficulties. After two years of being treated by the same gastroenterologist, the doctor changed McCarrell's diagnosis in December 2003 from ulcerative colitis to Crohn's disease. McCarrell had already filed his lawsuit against Hoffman-LaRoche in July 2003, seeking compensatory and punitive damages under the applicable products liability laws, as well as economic losses under the Consumer Fraud Act.

Prior to the first trial, Hoffman-LaRoche moved for dismissal, arguing that the complaint was barred by Alabama's two-year statute of limitations. The trial court rejected that defense, finding instead that New Jersey's statute of limitations applied. Following a trial, a jury awarded McCarrell \$119,000 for past medical expenses and \$2.5 million in compensatory damages. The verdict was overturned on appeal on evidentiary grounds and the case was remanded. Prior to the second trial, Hoffman-LaRoche preserved for appeal review of several motions, including the motion for summary judgment based on the alleged expiration of the Alabama statute of limitations. The second jury also found for McCarrell, awarding him \$25 million in compensatory damages and \$159,530.19 for past medical expenses. Hoffman-LaRoche appealed on several grounds, including that the trial court erred in refusing to apply Alabama's statute of limitations.

Conflict between New Jersey and Alabama law. The court began its analysis by recognizing that there was an actual conflict between critical aspects of New Jersey law and Alabama law concerning statutes-of-limitations issues. Specifically, New Jersey, applies equitable tolling principles, *i.e.*, the discovery rule, in all tort-based claims whereas in Alabama, the discovery rule applies only to fraud actions. Because the patient had been diagnosed with irritable bowel syndrome in November of 1996, his complaint, which was filed more than four years later, was time-barred by Alabama's two-year limitations period, unless New Jersey's discovery rule applied.

New Jersey choice of law analysis. Prior to November 2008, the choice-of-law analysis in New Jersey tort-based cases, including products liability actions, was based on the "flexible government interest" test. Pursuant to that test, the trial court had determined that in 2007, the "governmental interests" of New Jersey in the state's equitable tolling (or discovery) rule outweighed Alabama's governmental interests, and, thus, New Jersey law applied to control the timeliness of the action, making the patient's filing timely. In November of 2008,

the New Jersey Supreme Court adopted the “most significant relationship” test, which looks at a number of factors but relies on a general presumption in favor of applying the law of the state of injury. In 2010, the most significant relationship test was further clarified and applied to statutes of limitations disputes in drug cases. After considering the potential impact of the 2008 and 2010 decisions on the issue in this case, the trial court determined that its previous ruling that the complaint was timely was “the law of the case” and denied the manufacturer’s renewed motion for summary judgment on statute of limitations grounds.

Appellate division’s decision. The appellate division agreed with the manufacturer that in light of the new precedents, the law of the case doctrine did not foreclose the manufacturer from asking the trial court to reexamine the statute of limitations issue, most importantly because “the law of the case doctrine ‘should not be used to justify an incorrect substantive result.’ ” According to the court, it would be unfair to treat its 2009 unpublished decision, which remanded this case for a new trial, as a rigid barrier to the application of the state supreme court’s clarified teachings in the two cases. The appellate division also rejected the patient’s argument that the manufacturer had waived the application of the Alabama statutes-of-limitations law.

Applying these two controlling precedents to the case at hand, the court decided that Alabama had a more significant relationship to the lawsuit than New Jersey. The patient was a long-time resident of Alabama, he was prescribed the allegedly defective drug in Alabama, he purchased and ingested the drug there, and all of his injuries occurred in Alabama. Thus, the place of injury in Alabama was no fortuity and, when viewed in light of the two precedents, Alabama was the location of the parties’ relationship.

The court went on to conclude that the presumption mandated by the Restatement (Second) of Conflicts of Laws to apply the law of the place of injury had not been overcome. The court also declined to analyze the case under the revised Restatement section 142 factors because the provision had not been raised in the trial court and because the state high court had not yet stated whether it intended that provision to be adopted as part of the law of New Jersey.

Thus, the patient’s product liability claims were time-barred by Alabama’s two-year statutes of limitations and the trial court was ordered to dismiss the complaint.

The case is Docket No. [A-4481-12T1](#).

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Companies: Hoffman-LaRoche, Inc.; Roche Laboratories, Inc.

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