

EMERGING STATUTE OF LIMITATIONS ISSUES FOR LATENT INJURIES PLAINTIFF'S PERSPECTIVE

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THE STORY OF JACK CLINE

INTRODUCTION

A statute of limitations defines the period of time in which one is permitted to bring a lawsuit. In order for a statute of limitations to be constitutional, it must provide plaintiffs reasonable time in which to bring their claim.¹ However, according to a recent Alabama Supreme Court decision, toxic tort victims who do not become ill until several years after they were exposed to a hazardous substance are left with no time in which to bring their claim.² As a result, those plaintiffs that suffer from a latent disease are left with no opportunity to seek redress for their personal injuries. The following is an outline of the statute of limitations issue, a summary of the Alabama Supreme Court decision which confirmed the unjust policy, a history of how Alabama law evolved to create the injustice, and finally, the major arguments against the policy.

THE CATCH 22

Alabama toxic tort plaintiffs claiming personal injury are subject to two, conflicting rules. First, the “date of last exposure” rule requires that such plaintiffs bring their lawsuit within two years of the date when they were last exposed to the hazardous

¹*Terry v. Anderson*, 95 U.S. 628, 632 (1877).

² *Cline v. Ashland*, 2007 WL 30070 (Ala. 2007).

substance.³ Alabama also adheres to the rule that a cause of action for personal injuries does not accrue until the plaintiff's cancer or other dread disease has manifested itself.⁴ However, these two rules do not harmonize because the types of injuries suffered by toxic tort victims (e.g. cancer) do not normally "manifest" until many more than two years after the date of last exposure to the toxic substance. Therefore, if a plaintiff brings a claim within two years of their last exposure but before they have actually been diagnosed with an illness; their claim will be too early. Conversely, should the plaintiff wait to bring the claim until they are diagnosed with an illness, most likely the two years since their last exposure will have already passed. As a result, the plaintiff will be too late. When simultaneously applied, the two rules create a "catch 22" which deprives toxic tort plaintiffs of the opportunity to bring a lawsuit.

JACK CLINE'S CASE

Jack Cline worked as a chemist at a manufacturing plant in Bessemer, Alabama from 1968 through 1987. During this time, Cline was exposed to benzene, a hazardous substance. Twelve years after he was last exposed to benzene, he developed myelogenous leukemia, which his doctor attributed to benzene exposure. Within two years of developing the cancer, Cline brought a lawsuit against his former employer. The trial court threw out the case because Cline did not file the lawsuit within two years after he was last exposed to benzene. However, had he sued within the two years after his last benzene exposure, his suit would have been premature because he did not have any present, manifest injury until twelve years after the last exposure.

³ *Garrett v. Raytheon Co.*, 368 So.2d 516 (Ala. 1979).

⁴ *Thomas v. BSE Indus. Contractors, Inc.* 624 So. 2d 1041, 1046 (Ala. 1993).

The Alabama Supreme Court in a 5-4 decision denied a rehearing in the case of *Cline v. Ashland*.⁵ In a horrible ruling, the Alabama Supreme Court determined that Jack Cline's life was of absolutely no value to the court. The issue before the court was when the statute of limitations begins to run (and when a cause of action accrues) for injuries resulting from exposure to a hazardous substance. The court had originally affirmed, without opinion, the trial court's summary judgment for the defendant, which had been entered on the basis that the claim was not brought within two years from the date of exposure to the substance involved in the case.

The court held that the statute of limitations starts to run on the last date of exposure to the toxic substance, even if the plaintiff did not become sick until many years later. Justice Harwood, joined by Justices Lyons, Woodall, and Parker, disagreed with the other five justices. They felt that Mr. Cline's case should have been allowed to proceed. In his dissenting opinion, Justice Harwood articulates why the majority opinion is unfair and unworkable.

In *Cline*, the Alabama Supreme Court claimed that it is the duty of the legislature to create public policy to alleviate the problem for Jack Cline.⁶ In a concurrence by Justices Nabers, Stuart, and Smith, the court opines that the legislature is better equipped to weigh toxic substances and injuries to their manifestation along with public policy concerns.⁷ Even though the Alabama Supreme Court tried to defer the statute of limitations issue to the legislature, they were made aware of the unconstitutionality of the

⁵ 2007 WL 30070 (Ala. 2007)

⁶ *Id.* at 2.

⁷ *Id.* at 7.

exposure accrual rule.⁸ An *amicus curiae* brief was submitted on behalf of Mr. Cline's case that argued that the exposure accrual rule denied due process of law under the Alabama and the United States Constitutions.

Jack Cline survived over eight years with myelogenous leukemia that was caused by his exposure to benzene on the job. The statute of limitations enacted by the Alabama Legislature gave Jack two years within which to file his lawsuit. But the Alabama Supreme Court, in what can only be described as judicial law-making, effectively eliminated that entire two-year period for Jack and for other victims of exposure to hazardous substances. The court ruled that the two-year limitations period begins when the victim is last exposed to the hazardous substance, but that the victim cannot bring a lawsuit until the cancer or other dread disease has manifested itself, which usually occurs much more than two years after exposure. Therefore, in Alabama, there is never a legally acceptable time for people exposed to toxic substances who do not become ill until several years later, to sue.

HISTORY

The problem first began in *Garrett v. Raytheon Co.*,⁹ where, the plaintiff sued several companies for his exposure to radiation at his place of employment. His problems did not occur until 20 years after the exposure. Twenty-two years after his exposure, the plaintiff determined the radiation exposure to be the cause of his health problems. One year after his diagnosis, the plaintiff brought his action. However, the Alabama Supreme Court held "the statute of limitations of one year began to run when

⁸ *Amicus Curiae Brief of Environmental Litigation Group, P.C. in Response to Defendant's Motion for Summary Judgment*. (Feb. 4, 2005).

⁹ 368 So.2d 516 (Ala. 1979).

the plaintiff was last exposed to radiation and the plaintiff's ignorance of the tort or injury, there being no fraudulent concealment, does not postpone the running of the statute until the tort or injury is discovered."¹⁰

In its ruling in *Garrett*, the court blamed the Legislature for not addressing the problem they had been asked to address, suggesting that only an institution could fix this problem.¹¹ The legislature did respond with an act that stated that the statute of limitations did not begin to run until the date the plaintiff discovered, or should have discovered the injury.¹² However, that act was declared unconstitutional and the court resorted to the "last exposure" rule in *Garrett*.¹³

Notwithstanding the Alabama Supreme Court's ruling in *Garrett*, the Court has continued to apply the antiquated "present, manifest" injury rule to plaintiffs seeking damages for personal injuries. See e.g. *Hinton v. Monsanto Co.*, 813 So.2d. 827, 829 (Ala.2001). The application of both *Garrett* and *Hinton* creates an unreasonable situation for plaintiffs that do not develop a disease until many years after their exposure to a toxic substance. Such individuals will always bring their claim either too early or too late. As a result, there is never a time for these plaintiffs to exercise their right to sue.

PROCEDURAL HISTORY

Less than two years after his diagnosis with leukemia, Jack Cline filed his case on April 6, 2001. The date of filing was more than 12 years of his exposure to benzene. On January 8, 2004, respondents moved for summary judgment and on February 4, 2005, *amicus curiae* briefs were filed. On March 8, 2005, the trial court granted respondents'

¹⁰ *Id.* at 521.

¹¹ *Id.*

¹² Act No. 79-468, Ala. Acts 1979.

¹³ 368 So.2d 516 (Ala. 1979).

motion for summary judgment and held that Cline's claims expired in 1989, within two years of his last exposure to benzene. On April 15, 2005, Cline appealed to the Alabama Supreme Court and on October 14, 2005, the court affirmed summary judgment but did not issue an opinion. After oral arguments and other amicus curiae briefs, the Supreme Court of Alabama once again affirmed summary judgment with no opinion on January 5, 2007. Cline died just twelve days after the ruling and his wife, Martha Jane Cline has been substituted as the plaintiff because she is executrix of his estate. Cline's attorney, Robert Palmer, recently submitted a petition for writ of certiorari to the United States Supreme Court.¹⁴

ALABAMA LAW CONFLICTS WITH THE US SUPREME COURT

In his petition, Palmer argues that the exposure accrual rule is unconstitutional and the Alabama Supreme Court's decision conflicts with numerous decisions of the Supreme Court. Palmer refers the Court to its long-standing decision of *Terry v. Anderson*,¹⁵ in which the Court held that "limitations periods that extinguish claims before the litigant has had a reasonable amount of time to seek judicial recourse are repugnant to the U.S. Constitution."¹⁶ The Alabama Supreme Court's decision in Cline's case fails to give a toxic tort victim who's illness does not manifest for several years *any* time to bring their claim. Therefore, it is apparent that the decision does not meet the "reasonable time" standard set forth by the U.S. Supreme Court.

¹⁴Petition for a Writ of Cert. in the U.S. Supreme Court at 11, Martha Jane Cline, Executrix of the Estate of Jackie Edward Cline v. Ashland, Inc., et al. (No. 06-1329).

¹⁵ 95 U.S. 628, 632 (1877).

¹⁶Petition for a Writ of Cert. in the U.S. Supreme Court at 11, *Cline* (No. 06-1329).

ALABAMA LAW CONFLICTS WITH OTHER STATE SUPREME COURTS

Palmer also argues that Alabama’s law conflicts with decisions of other state courts of last resort. Palmer notes that numerous high state courts have held that “a statute of limitations that does not provide a reasonable time in which to commence a cause of action violates federal due process.”¹⁷ In *Garcia v. Lafarge*,¹⁸ the Supreme Court of New Mexico held a statute of limitations, similar to the law affecting Jack Cline, to be a violation of federal due process. The court held that when the legislature enacts a period of time, it must be a reasonable time within the existing or accruing causes of action may be brought.¹⁹

ALABAMA LAW CONFLICTS WITH OTHER FEDERAL COURT OF APPEALS DECISIONS AND FEDERAL DISTRICTS ARE SPLIT ON THE ISSUE

Many U.S. Courts of Appeals have held that it is unconstitutional to abolish a cause of action without allowing a reasonable time for litigants to bring their claim. For example, in *Lamb v. Powder River Live Stock Co.*²⁰, the 8th Circuit noted that if a statute does not give a litigant a reasonable time in which to bring a lawsuit it is “an unlawful attempt to extinguish rights arbitrarily.”²¹ On the other hand, other circuits fail to afford litigants any time in which to commence their suit. In *Ciccarelli v. Carey Canadian Mines, Ltd.*, the 3rd circuit held that a statute of limitations was constitutional even though the plaintiffs could not have reasonably discovered the cause of absetos-induced illness within that time.²² The confusion illustrated by the U.S. Court of Appeals on this issue is

¹⁷ *Id* at 17.

¹⁸ 893 P.2d 428,430 (N.M. 1995).

¹⁹ *Id.*

²⁰ 132 F. 434, 442, 43 (8th Cir. 1904).

²¹ *Id.*

²² 757 F.2d 548, 554-55 (3rd Cir. 1985).

remarkable in light of the U.S. Supreme Court's clear stance on the matter. As a result, Palmer argues that review by the Court is necessary to correct this unreasonable constraint on a victim's right to bring a claim.

CONCLUSION

The conjunction of both the "date of last exposure" rule and the "present, manifest injury" rule create an injustice for Alabama toxic tort victims who have been personally injured by a hazardous substance. The recent Alabama Supreme Court's decision in Jack Cline's case illustrates that the Court is not interested in correcting the injustice. Additionally, the Alabama Legislature's response to the statute of limitations problem has demonstrated a similar lack of concern. Unfortunately, unless the catch 22 is addressed in the near future, Jack Cline will be only one of many citizens who are left without any avenue to seek redress for their injuries.