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## An Assessment of the Real World Implications of the New Jersey Supreme Court's McCarrell Decision

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**January 30, 2017** - On January 24, 2017, the New Jersey Supreme Court, in *McCarrell v. Hoffmann-La Roche*, addressed New Jersey's choice-of-law rules with regard to the selection of the statute of limitations in tort actions, including specifically taking on how New Jersey trial courts should choose a statute of limitations in product suits brought by out-of-state plaintiffs against New Jersey corporations. No. 076524, 2017 WL 344449 (N.J. Jan. 24, 2017). The decision is of critical importance to the pharmaceutical industry, as so many of its members are domiciled in New Jersey and thus may be sued with relative ease in its state courts. It is also important to other companies concerned with being sued in New Jersey's courts, especially in the robust mass tort system where plaintiffs' attorneys continue to bring new cases.

To be clear, *McCarrell*, from our perspective, neither leads to a good outcome nor is well-reasoned. It has the effect of reinstating a \$25 million verdict in a single plaintiff case that would, to any first-year law student employing basic concepts of procedural/substantive law distinctions, seem obviously time-barred. The plaintiff in *McCarrell* was an Alabama resident who lived in, ingested the medicine (Accutane) in, and suffered his alleged injury in Alabama. Plaintiff's claim against the manufacturer was obviously time-barred under Alabama's relevant two-year statute of limitations, a statute that does not have any tolling provision.

Undeterred, plaintiff filed in New Jersey and argued that his claim was timely under New Jersey's two-year statute of limitations, which does include an equitable "discovery rule." Both the trial court and the New Jersey Supreme Court (with only the intermediate appellate court seeing it differently) sided with the plaintiff, holding that New Jersey's statute of limitations did apply and that plaintiff's claim was timely. While it should come as no surprise, it is nevertheless still galling to see the New Jersey Supreme Court using the same paternalistic language and concepts -- e.g., "[o]ur State's interest extends to protecting not just the citizens of this State, but also the citizens of other states, from unreasonably dangerous products originating from New Jersey" (Id. at \*16) -- that other state

appellate courts have used to justify their trial courts accepting cases that could and should be filed and maintained elsewhere.<sup>1</sup>

Rather than plow through the tortured reasoning of New Jersey's highest court, an exhausting exercise that we leave to others, we consider how McCarrell might practically change things moving forward. In particular, we home in on statements made by the New Jersey Supreme Court that may actually be defense-friendly. Though hard to believe that a decision that reinstates a \$25 million verdict the court below had thrown out, McCarrell is not all bad. In fact, the New Jersey Supreme Court itself believes its decision -- which seems to invite all-comers with claims that may have expired under their home states' statutes of limitations, but not under New Jersey's -- "also benefits New Jersey companies" McCarrell, 2017 WL 344449, \*14. In the Court's own words:

A New Jersey company, generally, should not have to defend against a claim that is stale under this State's statute of limitations in our courts, whether that claim is brought by a New Jersey resident or a citizen of another state. When a plaintiff from another state with a longer limitations period seeks to press a claim against a New Jersey manufacturer in our state courts after New Jersey's statute of limitations has expired, section 142 ordinarily will not permit the claim to proceed.  
Id. at \*14.

If the caveats are ignored ("generally", "ordinarily"), and we are to take the Court to mean that a consumer who purchases a product manufactured and sold by a New Jersey company, and is injured elsewhere, cannot use a longer statute of limitations in his home state to maintain a suit that is time-barred in New Jersey, what would be the practical effect? A natural, and correct, first instinct would be to say that any plaintiffs' attorney whose clients have statute of limitations problems in New Jersey, but not in their home state, should simply stay away from New Jersey's courts. The "benefits [to] New Jersey companies" are thus in some ways illusory. Smart and hard-working plaintiffs' attorneys will recognize that New Jersey courts stand to benefit plaintiffs whose claims may have expired in their home states, and that New Jersey courts should be avoided where the opposite is true and application of the New Jersey statute of limitations would potentially disallow their claims.

Here though, we think two observations are worth making. First, some plaintiffs' attorneys have traditionally liked gathering as many of their cases as possible in one court, with this court of choice sometimes being in the New Jersey mass tort system.

Second, and relatedly, it is unclear how much the uncertainty surrounding the prior rule ever really benefited the defense in recent practice. We promised we would not go into the McCarrell Court's tortured legal reasoning, or the history of the how statutes of limitations were considered in New Jersey here. Nevertheless, we note that prior to the McCarrell decision, which at least appears to have the benefit of stating a clear rule pointing to New Jersey's statute of limitations, the "most significant relationship test" under the Restatement (Second) Conflict of Laws was the law of the land. This test was one that some commentators have described with words like "incoherence" and "mush."<sup>2</sup> That mush seemed, from our perspective, to work more often to plaintiffs' benefit than it did for the defense's.

For example, and by way of anecdote, the same judge (the late Judge Higbee) that issued the trial court opinion in McCarrell, allowing a case that would have been time-barred in plaintiff's home state of Alabama, but not in New Jersey to proceed, later allowed a different case with opposite facts -- where the case would seemingly have been time-barred in New Jersey, but not under Florida's four-year statute -- to proceed by applying Florida law. *Sessner v. Merck Sharp & Dohme Corp.*, No. ATL-L-3394-11-MT, Trial Tr. at 12-17 (N.J. Sup. Ct. Atl. Cnty. Feb. 27, 2012). At least in McCarrell, the Supreme Court appears to be providing some real (if, in our judgment, misguided) clarity.<sup>3</sup>

So with that as backdrop, what actual impact will McCarrell likely have on filings into the New Jersey courts, particularly cases that would go into an existing or potential mass tort designation? Will, for example, this decision

have the effect of opening the floodgates to cases being brought in the New Jersey courts against New Jersey companies that were time-barred elsewhere? Here, with the ink still drying on the decision, is our best guess:

- For most possible cases, McCarrell will either have no effect whatsoever, or very little. Most cases that get or might be filed either do not have obvious statute of limitations issues, or do not have statute of limitations issues where there is an obvious difference between the domicile state's statute of limitations, and that in New Jersey.
- For cases where the plaintiff resides and/or was injured in a state with an obviously short statute of limitations, or one whose discovery exception either does not exist, or is harder for a plaintiff to meet than New Jersey's, New Jersey will provide a lifeline for some cases where the New Jersey statute has not expired. States of concern include Kentucky, Louisiana, and Tennessee, all of which have a one year statute of limitations. Additionally, states like Alabama that have no tolling or discovery rule attached to its statute of limitation are also of concern. Seeing the practical effect in a case like McCarrell is obviously concerning for the defense -- taking a case that could and should have been time-barred, and instead allowing for a potential \$25 million verdict -- but it is simply hard to know how many similar cases like it are out there, or may come in the future.
- Finally, McCarrell may have some beneficial chilling effect on plaintiffs' attorneys looking to bring as many cases as possible into the New Jersey courts while doing as little pre-suit investigation as possible if the plaintiffs come from states whose statutes of limitations are generally more favorable for the plaintiffs' bar. For example, there are many more states with a statute of limitations longer than New Jersey's than there are states with a shorter one (Florida's is 4 years; New York's is 3).

On balance, the defense bar is rightfully concerned with the reasoning and outcome of McCarrell. But the certainty it provides as to the statute of limitations that applies to a case brought by an out-of-state plaintiff against a New Jersey company can provide some benefit to defendants going forward.

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[1] The California Supreme Court's decision in *Bristol-Myers Squibb Co. v. Sup. Ct.* being the best recent example of a state appellate court embracing a trial court's unjustified power grab. See 377 P.3d 874 (Cal. 2016). On January 19, 2017, the United States Supreme Court granted certiorari in that case.

[2] See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *Colum. L.Rev.* 249, 253 (1992) ("Trying to be all things to all people, it produced mush."); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 *Buff. L.Rev.* 329, 349-50 (1997) ("Because the second Restatement tries to be so much and do so much, it is rife with inconsistency, incongruence, and incoherence.").

[3] In fact, the N.J. Supreme Court appears to go to lengths to make the point that it is trying to describe an approach to statute of limitations that may be interpreted definitively, see, e.g., fn. 9 ("Going forward, to avoid any confusion, we are establishing a bright-line rule: a conflict of law is present whenever the selection of one statute of limitations over another is outcome dispositive.").

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