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# Vapor Intrusion: New Exposures, Old Sites

*Law360, New York (March 06, 2009)* -- Statutes of limitations prevent the assertion of stale claims and have long been "'favored in the law'" as a meritorious defense.[1]

They serve salutary purposes in requiring "diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability."[2]

They embody important public policies by providing "opponents with a fair opportunity to defend, elimination of 'stale' claims in which evidence is likely to have been forgotten or destroyed, and protection of defendants from protracted fear of litigation."[3]

Because statutes of limitations provide "'security and stability to human affairs,'" they are every bit as important as the policy of trying actions on their merits.[4]

While statutes of limitations defenses in toxic tort lawsuits have been successful in efficiently eliminating large groups of plaintiffs in the past, the fact that old, highly publicized Superfund sites continue to spawn new toxic tort suits demonstrates that there is no guarantee of success.

Factual differences between plaintiffs, tension in existing case law and special rules, such as those applicable to members of the military, are all factors that can toll the statutory period. Within this framework, a new threat to the usefulness of statutes of limitations has emerged: the vapor intrusion pathway.

**The Vapor Intrustion Pathway**

Although a new case arising out of the New York state court of appeal, Aiken v. General Elec. Co., 869 N.Y.S.2d 263 (N.Y. App. Div. 3d Dept. 2008), treats vapor intrusion as a new and separate cause of action, a more accurate view of vapor intrusion is that it is simply a new pathway for the release of previously known contaminants in the groundwater and soil.

The U.S. Environmental Protection Agency ("EPA") defines vapor intrusion as "vapor phase migration of volatile organic and/or inorganic compounds into occupied buildings from underlying contaminated ground water and/or soil."[5]

This means that vapor intrusion is not a new contaminant, but merely an additional pathway for an existing hazardous substance to escape from the groundwater and soil.

In 2002, the EPA's Office of Solid Waste and Emergency Response ("OSWER") released its Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance).

Before the EPA released its draft guidance, the vapor intrusion pathway was not routinely considered in Superfund site investigations.

But as the EPA finalizes its guidance on vapor intrusion, and more states re-evaluate current and former hazardous waste sites with an eye toward this exposure route, the use of vapor intrusion in toxic tort litigation also has risen.

Sites that have already settled toxic tort lawsuits based on other exposure pathways are being revisited in the courts, with plaintiffs seeking new opportunities to relitigate stale claims based solely on vapor intrusion testing, even though the injury (property damage or personal injury) and the cause (the volatile organic or inorganic compound) remain the same.

Vapor intrusion, these plaintiffs argue, was "undiscoverable" prior to the recent scientific developments that have led to more extensive testing of air quality. The New York court of appeal seemingly adopts this view in Aiken.

Although this is the only case published to date to permit a new accrual date based on the vapor intrusion pathway, if this proves a trend, defendants at long-dormant Superfund sites can expect an onslaught of new litigation to re-emerge.

**The Delayed Discovery Rule and the Problem of Publicity in the Context of Vapor Intrusion: Aiken v. General Electric Company**

In Aiken, the chemical trichloroethane ("TCE") was found in the groundwater located in the Village of Fort Edward, Washington County in 1983.[6]

The contamination plume migrated onto property in nearby residential areas, and the source of the hazardous substance was identified as coming from a General Electric Company ("GE") plant.

Claiming that their drinking water wells had been contaminated by the TCE in this groundwater, the affected residents commenced an action against GE for property damage in the 1980s.[7] That action was subsequently settled, but the terms of that settlement were sealed by stipulation.[8]

In 2004 and 2005, GE tested soil vapor at the request of the New York Department of Environmental Conservation and announced publicly "that soil vapor contamination emanating from the ground water beneath defendant's industrial site was a potential problem for residents" in the vicinity of the contaminated water plume.[9]

The tests showed that TCE vapors had permeated the air and soil of some of the residences located near the site. A new group of plaintiffs, who used municipal water and were not involved in the original settlement, brought a suit based on soil vapor contamination.[10]

GE moved for summary judgment on the grounds that the claims were time barred because it should have been commenced within three years of the detection of the groundwater contamination. The trial court denied GE's motion, and GE appealed.

The court of appeal found that a question of fact exists as to when the plaintiffs "should have reasonably been aware of the presence of soil vapor contamination and the threat it presented to their properties."[11]

In finding a question of fact exists on these facts, the court of appeal noted:

Defendant contends, and plaintiffs acknowledge, that they were clearly on notice as to the threat such ground water contamination presented to them and their properties.

However, plaintiffs contend that it was only recently that they were informed that soil vapor contamination, as opposed to ground water contamination, posed a threat to their properties and, as a result, the time to commence such an action should only begin to run when warnings about such a threat were disseminated throughout their community.[12]

The court of appeal correctly framed the "relevant question" to determining the accrual date under New York's delayed discovery rule as "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.'"[13]

And yet, it split the cause of action into two separate actions: (1) when the plaintiffs had notice of the threat caused by the particular substance and (2) when they had notice of a threat caused by vapor intrusion of that same substance.

This case creates an uncertainty that threatens to pierce the security and finality of the applicable statute of limitations by seemingly resetting the clock when a "newly discovered" pathway for an already known source of contamination is discovered.

Such an approach is a dramatic departure from the well-established jurisprudence governing the statutes of limitations and the delayed discovery rule, and could create substantial uncertainty for defendants who long ago settled or otherwise resolved their liabilities for these old Superfund sites.

## The Role of the Delayed Discovery Rule in Vapor Intrusion Litigation

The delayed discovery rule embodied in Section 203 of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9658, provides a general starting point for determining when a toxic tort statute of limitations likely commences.[14]

Some courts have interpreted CERCLA Section 203 to preempt state commencement rules and apply the federal delayed discovery rule to state toxic tort claims even where there is no underlying CERCLA action.[15]

Thus, even those states that declined to adopt an accrual based on the date of discovery of the injury and its cause can find that they are bound by Section 203 at any rate.[16]

It is not accurate, however, that every state toxic tort statute of limitations accrual date is preempted by Section 203. By its express language, CERCLA's delayed discovery rule only preempts state accrual dates where application of the state's rule would cause the statute of limitations period to commence at an earlier date than under CERCLA.

Under Section 203(a)(1), the statute of limitations period "[i]n the case of any action brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the state statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date ..."[17]

The statute defines federally required commencement date to mean "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance ... concerned."[18]

The delayed discovery rule is an exception to the normal commencement of a statute of limitations. A defendant satisfies its burden of proof on the statute of limitations defense by simply showing accrual outside the statutory period.

The statutes of limitations generally commence when the injury first occurs, "however slight ... even though that injury may [have] later become greater or different."[19] For this reason, courts place the "burden on Plaintiffs to justify delayed discovery."[20]

Once it is established that a plaintiff's claim accrued outside the applicable statutory period, that claim is time-barred unless the plaintiff can prove all of the elements necessary to establish delayed discovery and therefore revive it.

The delayed discovery rule, therefore, does not permit a plaintiff to wait until every aspect of an injury or every pathway that the hazardous substance may travel is known before commencing the limitations period.

Instead, state and federal courts hold that "the discovery rule does not permit a party to await certainty."[21] "To toll the limitations period because a prospective defendant denies its liability, or because the plaintiff lacks absolute certainty as to the tortfeasor's identity, would circumvent the purpose of the statute of limitations."[22]

Properly decided, courts will evaluate when a plaintiff "reasonably should have known" of the injury or the hazardous substance.

California, for instance, defines this reasonableness inquiry as a question of "when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her."[23]

"Under this rule, constructive and presumed notice or knowledge is equivalent to knowledge. So, when the plaintiff has notice of information [or] circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation (such as public records or corporation books), the statute commences to run."[24]

The California Supreme Court has termed this level of suspicion as "notice or information of circumstances to put a reasonable person on inquiry."[25]

Thus, under the delayed discovery rule, the courts will evaluate "whether a reasonable person in plaintiffs' situation would have been expected to inquire about the cause of his or her injury."[26]

Second, courts consider whether such inquiry "would have disclosed the nature and cause of plaintiff's injury so as to put him on notice of his claim."[27]

Under this approach, there would seem to be no reason to restart the statutory period for vapor intrusion at an old site because the injury (property damage or an illness) and the alleged cause (release of the known hazardous substance) are both known or reasonably knowable.

Indeed, the court in Aiken — as well as the plaintiffs there — acknowledged that they had every reason to know that their property may have been damaged and that the cause was a contamination plume emanating from GE's industrial plant.

**Conclusion**

Vapor intrusion can be viewed as a technically new way of looking at an old problem, the release of a known contaminant in the groundwater or soil; allowing vapor intrusion

to be treated as a new injury or a new cause threatens to undermine the policy reasons for the statute of limitations.

Such a trend would, for all practical purposes, create the problem of splitting causes of actions and undermine the resolution of ages-old toxic tort settlements across the country, as it seemingly has been allowed to do in the Aiken case.

As the Washington Supreme Court held in the context of DES litigation, "[t]his could also lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct."[28]

Such a result is not justified based solely on the increased testing capabilities of vapor inside buildings sitting atop known sources of contamination.

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*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] Jordache Enters. Inc. v. Brobeck, Phleger & Harrison, 18 Cal. 4th 739, 756 (1998) (quoting Adams v. Paul, 11 Cal. 4th 583, 592 (1995)).

[2] Id. at 756 (citing Laird v. Blacker, 2 Cal. 4th 606, 618 (1992)).

[3] Vill. of Milford v. K-H Holding Corp., 390 F.3d 926, 932 (6th Cir 2004) (applying the federal discovery rule to a trespass claim based on the release of hazardous chemicals, but finding the claim time barred because the plaintiff "knew before 1996 that [defendant] had released specific chemicals, that those chemicals were present in its water supply, and that there were few, if any, realistic alternative sources of contamination, it knew (or should have known) of its potential cause of action against K-H, and its trespass claim is therefore time-barred.")

[4] Norgart v. Upjohn Co., 21 Cal. 4th 383, 396 (1999) (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)); see also Scherer v. Mark, 64 Cal. App. 3d 834, 844 (1976) ("The policy behind the statute of limitations is equally as meritorious a consideration as is the policy of trying cases upon their merits.").

[5] U.S. EPA, Research on Vapor Intrusion, available at www.epa.gov/ada/topics/vapor.html.

[6] Aiken, supra, 869 N.Y.S.2d at 264.

[7] Id.

[8] Id.

[9] Id. at 265.

[10] Id. at 264 n. 2.

[11] Id. at 265.

[12] Id. at 265.

[13] Id. (quoting MRI Broadway Rental v. United States Min. Prods. Co., 92 N.Y.S. 2d 421, 429 (N.Y. 1998)).

[14] Congress passed the Superfund Amendments and Reauthorization Act (SARA) in 1986. Pub. L 99-499 (1986). Title II, § 203 of SARA, which became § 9658 of CERCLA, establishes a federal standard that governs when delayed discovery of a plaintiff's claims for personal injury or property damage allegedly caused by the release of hazardous substances, pollutants or contaminants will toll the state statute of limitations. Kowalski v. Goodyear Tire & Rubber Co., 841 F. Supp. 104, 107 (W.D.N.Y. 1994).

[15] Id. (citing H.R. Rep. No. 253(I), 99th Cong. 2d Sess. 4 at 257, reprinted in U.S.C.C.A.N. 2835, 2960) (finding no reference to an underlying CERCLA action in the statute or Congressional Reports). Although the commencement date of a state's statute of limitations for toxic torts may be preempted by federal statute, the statute of limitations period itself is still governed by the state's statutes. Evans v. Walter Industries Inc., 579 F.Supp. 2d 1349, 1355-58 (N.D. Al. 2008); see also O'Connor v. Boeing N. Am. Inc., 311 F.3d 1139, 1149 (9th Cir. 2002). Cf., Barnes ex rel. Barnes v. Koppers, Inc., 534 F.3d 357, 365 (5th Cir. Miss. 2008) (rejecting wide-sweeping preemption of the commencement dates for state statutes of limitations, stating that "Congress did not intend broad preemption in the traditional field of state tort remedies" and "that § 9658 operates only where the conditions for CERCLA cleanup are satisfied.").

[16] Evans, supra, 579 F.Supp. 2d at 1355 (citing Burlington Northern & Santa Fe Ry. v. Poole Chem. Co., 419 F.3d 355, 362 (5th Cir. 2005)) ("In essence, § 9658 engrafts a discovery requirement onto a state's "applicable limitations period."); Tucker v. Southern Wood Piedmont Co., 1994 U.S. App. LEXIS 21576 (11th Cir. Ga. 1994) (Thus there is a federally mandated "discovery rule" for environmental torts brought under state law, despite the fact that Georgia generally does not provide such a rule for torts involving only property damage.)

[17] 42 U.S.C. § 9658(a)(1).

[18] 42 U.S.C. § 9658(b)(4)(A).

[19] Evans, supra, 579 F.Supp. 2d at 1355 (quoting Free v. Granger, 887 F.2d 1552, 1556-57 (11th Cir. 1989)); see also, e.g., Green v. A.P.C., et al., 960 P.2d 912, 917 (Wash. 1998) (in DES case, the Washington Supreme Court found the plaintiff's claims time-barred, holding "the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur ... To hold otherwise would run contrary to important policy considerations such as Washington's strong preference for avoiding the splitting of causes of action. [Citation omitted] In effect, a plaintiff would have a new action for damages for each new condition that became manifest. This could also lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct. We reject an approach leading to such a result.")

[20] Bonds v. Nicoletti Oil, Inc., 2008 U.S. Dist. LEXIS 47054, *14-23 (E.D. Cal. May 28, 2008); see also Cutting v. United States, 204 F. Supp. 216, 224 (D. Mass. 2002) ("Once the Government has shown that the plaintiff's suit was facially time-barred, as in this case, the burden shifts to the plaintiff. To toll the clock under the discovery rule, 'the plaintiff may show that he had no reason to believe he had been injured by an act or omission by the government.'").

[21] Evans, supra, 579 F.Supp. 2d at p. 1367.

[22] Vill. of Milford, supra, 390 F.3d at p. 932.

[23] Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1110-11 (1988); see also McKelvey v. Boeing N. Am., Inc., 74 Cal. App. 4th 151, 160 (1999) (stating that the statute begins to run "as of the date he suspects or should suspect that his injury was caused by wrongdoing"); In re Burbank Environmental Litigation, 42 F. Supp. 2d 976, 981 (C.D. Cal. 1998) (same).

[24] McKelvey, supra, 74 Cal. App. 4th at 160 n.11 (quoting 3 Witkin Procedure § 602, at 773).

[25] Jolly, supra, 44 Cal. 3d at 1110-11.

[26] Evans, supra, 579 F.Supp. 2d at p. 1367.

[27] Id.

[28] Green, supra, 960 P.2d at 917.