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CASENOTE

CERCLA'S FEDERALLY REQUIRED DATE "CLEANS UP THE MESS" IN TOXIC TORT LITIGATION

*Freier v. Westinghouse Elec. Corp.*¹

I. INTRODUCTION

The logistics of toxic tort litigation can vary widely among states. While a plaintiff in one state may have a cause of action, that cause of action could possibly be barred in another state given a different statutory limitations period or accrual date. Even two cases with seemingly identical fact patterns can yield different results depending on the state where the plaintiff resides or where the action occurred. Thus, the Federally Required Commencement Date ("FRCD") solves this problem in part by providing a uniform accrual date, so that plaintiffs and the lawyers who represent them can better understand the dynamics of their particular claims. As a result of *Freier*, attorneys can now better advise clients of whether they have a legitimate claim. This would enable the lawyer to counsel her client to the best of her ability, and thus be able to produce, if not more favorable, at least more predictable results.

II. FACTS AND HOLDING

Plaintiffs include Raymond Freier and other injured parties, in addition to those with standing to sue on account of their relationships to the parties, for injuries allegedly resulting from exposure to toxic materials contained in a Cheektowaga, New York landfill.² The United States District Court for the Western District of New York dismissed the majority of the plaintiffs' claims as untimely, because they were barred by the statute of limitations under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").³ Under CERCLA, the statute of limitations begins when the plaintiffs either knew, or with "reasonable diligence" should have known that their injuries in fact were a result of exposure to the landfill.⁴ After weighing the evidence, the District Court held that the plaintiffs should have suspected the landfill was the cause of their injuries no later than the latter part of 1991, and thus their 1995 claims were subsequently barred.⁵ On appeal, the plaintiffs argued that a three-year statute should have been applied in lieu of the one-year statute of limitations that the court used.⁶

In addition to the forementioned aggrieved parties, other third-party defendants cross-appealed and urged that the verdict be affirmed for the reason that Section 9658 of CERCLA was unconstitutional in the sense that it violated both the Tenth Amendment to the U.S. Constitution and the Commerce Clause.⁷ Additionally, they urged that Section 9658 does not apply to wrongful death actions brought on behalf of a plaintiff's decedent.⁸

¹ 303 F.3d 176 (2d Cir. 2002).

² *Id.* at 176.

³ *Id.*; 42 U.S.C. §§9601-9675 (2000).

⁴ *Freier*, 303 F.3d at 182.

⁵ *Id.*; *See* 42 U.S.C. § 9658.

⁶ *Freier*, 303 F.3d at 182.

⁷ *Id.*

⁸ *Id.*

The injuries complained of were alleged to have been caused by exposure to a landfill, operated by Pfohl Brothers and Pfohl Enterprises in Cheektowaga, New York, adjacent to Buffalo, New York.⁹ Since 1983, the landfill has been listed in New York's Registry of Active Hazardous Waste Disposal Sites.¹⁰ Over 60 individual plaintiffs filed suit against Pfohl between 1995 and 1997, claiming that they contracted cancer as a result of exposure to toxins contained in the dumping site Pfohl operated.¹¹ Specifically, the illnesses complained of were alleged to have resulted from exposure by those who had either worked, lived, or, in the case of children, played near the site.¹² The object of the various plaintiffs' lawsuits were defendant companies who, between the years 1946 and 1969, had either sent hazardous materials from their respective plants to the landfill or deposited them in the landfill.¹³

The District Court heard the case based upon diversity jurisdiction, applying New York law to the facts (to the extent that it was not preempted by Federal law).¹⁴ Under New York law, there are three different possible dates on which a toxic tort claim can commence: (1) the date of the victim's first exposure to the toxic substance, (2) the date of discovery of the injury, possibly as late as the victim's death, or (3) the date of discovery of the cause of the injury.¹⁵ For claims other than for wrongful death, or, "survival claims," New York state law *generally* grants a three-year statute of limitations for injuries caused by hazardous substances.¹⁶ The statute begins either on the date the injury was discovered or on the date when, with reasonable diligence, the injury should have been discovered (whichever is first).¹⁷ New York law provides that an action may be brought within one year "after the date of discovery of the injury's cause ("discovery-of-cause" date), so long as the discovery-of-cause date is within five years after the discovery-of-injury date."¹⁸ Therefore, a plaintiff has five years after discovery of the injury to determine its cause.¹⁹ If she fails to do so, the plaintiff is barred from a later suit.²⁰ The statute also provides that if the toxic tort claim is not asserted within three years of the discovery-of-injury date, the plaintiff must prove that sufficient medical technology or knowledge did not exist during that period.²¹

Federal CERCLA legislation mandates standard accrual dates for injuries caused by exposure to hazardous toxins.²² Specifically, Section 9658(a)(1) grants a "Federal Commencement Date," which begins the state statute of limitations on "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 or pollutant or contaminant concerned."²³

At the District Court level, defendants sought dismissal of plaintiff's wrongful death, loss of consortium, and survival claims, and additionally, they challenged the constitutionality of Section 9658.²⁴ As to the survival claims, defendants claimed that they were "time-barred," because the injured parties were exposed initially to

⁹ *Id.* at 182-83.

¹⁰ *Id.* at 183.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* For purposes of wrongful death claims, the limitation period begins on the date of the decedent's death. *Id.*

¹⁶ *Id.* at 183-84. These actions include recovery for damage to one's person or property. *Id.*

¹⁷ *Id.* at 184.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* "Discovery" of the injury can be either actual or, as discussed previously, constructive discovery. *Id.*

²² *Id.*

²³ *Id.* (quoting 42 U.S.C. § 9658(b)(4)(A)).

²⁴ *Id.*

the landfill toxins no later than 1968 but did not file a claim until 1995, thus failing the three-year period.²⁵ Concerning their wrongful death claims, defendants claimed that those too were time-barred, because the claims were filed later than the two-year period allowing for such claims.²⁶

In response to defendants' arguments, plaintiffs submitted that the Federal Commencement Date provided for in Section 9658 preempts the law of New York state in the situations where state law would use an earlier accrual date, and more specifically, that their claims became ripe only on the date on which they knew or reasonably should have known the landfill was in fact the cause of their injuries.²⁷ Plaintiffs contended that the latter of the two was no earlier than December 19, 1994, after the "Rigle-Sawyer" report preliminary findings were made available to them.²⁸ Defendants did not, at this time, argue that the discovery-of-cause date should be earlier,²⁹ but instead argued that the federal legislation was either inapplicable or, in the alternative, unconstitutional.³⁰ In support of their argument that the statute was inapplicable, defendants interpreted the language, "any action brought under State law for personal injury or property damages," as not applying to wrongful death actions brought by a plaintiff on behalf of a decedent.³¹ Alternatively, if the Court found that the statute *was* applicable to those actions, defendants argued that the legislation nonetheless violated both the Commerce Clause and the Tenth Amendment.³²

However, the District Court rejected the defendants' statutory interpretations, holding that the federal CERCLA legislation did in fact preempt state law, at least in cases where state law would otherwise provide an earlier accrual date for toxic substance tort claims.³³ Therefore, in the instant case, New York's use of the date of death as the applicable date for the statute of limitations for purposes of a wrongful death case and the maximum five-year period for survival claims for toxic torts were both superceded by the Federal Commencement Date.³⁴

Additionally, the District Court also threw out defendants' constitutional assertions.³⁵ Specifically, the Court found no Commerce Clause violation, because excluding Congress's federally-mandated accrual rules "would frustrate Congress's purpose to provide greater access to the courts for injured parties as part of its comprehensive response to the national problem of controlling and remediating the effects of release of dangerous contaminants."³⁶ Further, denying the use of the uniform accrual rules would inversely achieve "lack of uniformity of redress" for injured plaintiffs.³⁷ Thus, the Federal Commencement Date does not violate Congress's authority under the Commerce Clause.³⁸ The Court also held that the FRCD did not violate the

²⁵ *Id.* at 185.

²⁶ *Id.* Additionally, defendants concluded that since the wrongful death actions were inappropriate, so too were the plaintiffs' corresponding loss of consortium claims. *Id.*

²⁷ *Id.*

²⁸ *Id.* The report linked the increased frequency and exact type of cancers the plaintiffs and their decedents experienced to the hazardous material contained in the Pfohl landfill. *Id.*

²⁹ Defendants did not contest the discovery-of-cause date argued for by the plaintiffs, because discovery had not been completed at this stage of the trial. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 186.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (quoting *In re Pfohl Bros. Landfill Litig.*, 26 F. Supp. 2d 512, 543 (W.D.N.Y. 1998).

³⁷ *Id.*

³⁸ *Id.*

Tenth Amendment, because it did not regulate the *content* of state law, but only the accessibility of the court system.³⁹

Although the District Court found that the FRCD was both constitutional *and* applicable, it nonetheless found that some of the plaintiffs' claims were still barred for lack of timeliness.⁴⁰ While it held that the federal legislation preempted New York state law with respect to the accrual date, the Court did not interpret CERCLA to preempt state law with respect to the *length* of the statute of limitations.⁴¹ Specifically, "given plaintiffs' failure to assert the survival claims within three years of the discovery-of-injury date, those claims, to be timely, should have been asserted within one year after plaintiffs discovered the cause of the injuries."⁴² However, because defendants had not provided the Court with an alternate discovery-of-cause date, the District Court denied the defendants' motion to dismiss survival claims filed prior to December 19, 1995.⁴³ The Court similarly denied the defendants' motion to dismiss their wrongful death claims, because the claims were filed within two years after the December discovery-of-cause date and thus were "timely."⁴⁴

Defendants next sought dismissal of plaintiffs' own personal injury claims.⁴⁵ They argued that, even given the applicability of the FRCD, the claims, having been maintained in 1995, were outside the one-year statute of applications.⁴⁶ Specifically, defendants contended that although plaintiffs had asserted that they had no reason to know the cause of their injuries until the 1994 Ragle-Sawyers report, there existed sufficient information much earlier to make a reasonable person suspect that the cause of injury could be attributed to exposure to the landfill.⁴⁷ In response to this contention, plaintiffs offered evidence of "official reassurances" to combat the notion that they should have been aware that the landfill was the cause of their injuries.⁴⁸

After consideration of the evidence presented by both sides, the District Court granted defendants' dismissal of most of plaintiffs' claims, for the reason that it did not believe that plaintiffs had shown a material issue of fact existed as to the earliest date they should have discovered the cause of their injuries.⁴⁹ Further, the Court held that plaintiffs, if acting reasonably, would have discovered that their injuries occurred in connection to exposure to toxic pollutants in the Pfohl landfill prior to the end 1991.⁵⁰ Also, the Court recognized that plaintiffs provided no reason as to why they could not have obtained a scientific report on the safety of the

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 186-87.

⁴² *Id.* at 187. Plaintiffs admitted that they discovered the cause of the injuries with the advent of the Ragle-Sawyers study in December 19, 1994; thus claims filed later than December 19, 1995 would be subsequently barred. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The court excluded the January 1997 claims because pretrial discovery proceedings had not been completed and thus were "not encompassed by the summary judgment motion." *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 187-89. Defendants offered several pieces of evidence in support of this contention, ranging from bright yellow signs which appeared in 1986 near the landfill, reading, "DANGER HAZARDOUS WASTE AREA UNAUTHORIZED PERSONNEL KEEP OUT," to numerous newspaper articles discussing a possible causal connection between the Pfohl landfill and reported cancers in the surrounding area. In addition, defendants cited committees formed by citizens to discuss the possible social problem of the landfill as evidence that the plaintiffs should have reasonably been on notice much earlier than 1994, when the Ragle-Sawyers report preliminary findings were reported. *Id.*

⁴⁸ *Id.* at 189. Plaintiffs contended that they had received numerous pronouncements that the landfill was safe. For example, a few of the newspaper headlines at the time had read, "Radiation at Pfohl site not over limits," and "State calls Pfohl dump no big risk," and finally, "Study can't link Pfohl landfill to cancer." *Id.* at 189-92.

⁴⁹ *Id.* at 193.

⁵⁰ *Id.* at 194. The Court based this opinion on the evidence of newspaper articles, etc. provided by defendants. *Id.*

landfill similar to the Rigle-Sawyer report sooner.⁵¹ Specifically, plaintiffs do not suggest that the techniques employed in the Rigle-Sawyer report could not have been employed sooner, or that those specific techniques did not exist earlier than 1994.⁵² Therefore, based upon the above-mentioned reasons, the District Court dismissed these claims as time-barred for the purpose of the possibility of the plaintiffs gaining recovery.⁵³

III. LEGAL BACKGROUND

In state toxic tort cases, CERCLA preempts state law by mandating the use of the FRCD in lieu of a state provided accrual date. The FRCD provides that the statute of limitations does not begin to run until a prospective plaintiff knows of both the injury and the *cause* of the injury.⁵⁴ In this way, CERCLA provides for a discovery of cause of injury, which in many situations is adverse to corresponding state provisions. Thus, the FRCD makes it possible for the statute of limitations to toll in the favor of the injured plaintiff until she knows or *reasonably should have known* that the hazardous substance was the cause of her injury.⁵⁵

A. Tenth Amendment

Because the FRCD preempts otherwise applicable state law, there has been an issue as to whether its use violates the Tenth Amendment to the U.S. Constitution.⁵⁶ The Tenth Amendment says that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁷ Historically, the Tenth Amendment was designed and has been used to limit Congress’ power of regulating the sovereign states.⁵⁸ Thus, Congressional legislation that allows for the preemption of a state statute of limitations’ accrual date is, on its face, a direct violation of the Tenth Amendment.

However, case law has held before that Congress may supercede state law in some situations by means of the Constitution’s Supremacy Clause. Specifically, the Supreme Court has held that Congress does not violate the Tenth Amendment when it mandates a federal cause of action on which state courts must pass judgment.⁵⁹ The Court has also held that Congress would not violate the Tenth Amendment if it disallowed a state court to entertain a certain state cause of action.⁶⁰ In a case more similar to the issue in the current case, the Supreme Court allowed Congress to extend a state statute of limitations without finding a corresponding violation of the Tenth Amendment.⁶¹

⁵¹ *Id.*

⁵² *Id.* at 195.

⁵³ *Id.*

⁵⁴ *Second Circuit Confirms Validity Of Federal Toxic Tort Accrual Rule; Ruling Favors Plaintiffs*, <<http://www.bsk.com/archives/infomemo.dbm?StoryID=300>> (last updated Oct. 2, 2002).

⁵⁵ *Id.*

⁵⁶ *Freier*, 303 F.3d at 203-04.

⁵⁷ U.S. Const. amend. X.

⁵⁸ *Freier*, 303 F.3d at 203; *See N.Y. v. U.S.*, 505 U.S. 144, 161 (1992).

⁵⁹ *Testa v. Katt*, 330 U.S. 386 (1947).

⁶⁰ *English v. General Electric Co.*, 496 U.S. 72 (1990).

⁶¹ *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493 (1870). In this case, Congress enacted a federal statute that tolled the applicable statute of limitations against persons who were not able to be given service of process due to the fact that they were currently in a Confederate territory; *See also* 15 U.S.C. § 6603(h) (extended the statute of limitations for mortgage foreclosures when Y2K caused technological difficulties in processing mortgage payments); 50 U.S.C. app. § 525 (tolled the statute of limitations in favor or against people who were in the midst of active military duty).

Prior to the case at hand, neither the U.S. Supreme Court nor any other Federal Court of Appeals had considered specifically whether the FRCD provided for by CERCLA violated certain provisions of the United States Constitution.⁶² Very few courts have addressed the issue at all, and those that have at best addressed it only indirectly.⁶³ Before *Freier*, the Second Circuit had only “hinted” in one previous case that the FRCD may violate the Tenth Amendment to the Constitution.⁶⁴ In that case, the court stated that under 42 U.S.C. § 9658, “if a claim is brought under state law for property damages caused by hazardous chemicals and state law does not provide a discovery rule, the state statute of limitations cannot begin to run until the plaintiff knew or should have known that the damages were caused by hazardous chemicals.”⁶⁵ However, in that case, the court never definitively decided the issue of whether the FRCD provision of CERCLA violated the Tenth Amendment, but merely suggested that because the FRCD preempted the state statute of limitations accrual dates, that it was of “questionable constitutionality.”⁶⁶

Other courts have upheld federal legislation that preempted state legislation while not reaching the constitutional issue. For example, one court found that the federal discovery of the cause of injury date superceded the state toxic tort statute of limitations.⁶⁷ Also, in another case similar to the one at hand, the plaintiffs argued in favor of application of the FRCD as opposed to the application of the Texas accrual date.⁶⁸ The defendants argued that since the underlying action was not based on CERCLA, a federally required commencement date was inapplicable.⁶⁹ However, plaintiffs cited as authority a case in which the FRCD was substituted for a state accrual date even in the absence of an underlying CERCLA claim.⁷⁰ Regardless, that court did not reach the issue of whether an underlying CERCLA claim was necessary.⁷¹ Rather, because the court determined that the plaintiffs ‘reasonably knew’ of the cause of their injuries much earlier than claimed, the court did not implement the FRCD. In that case, the state statute of limitations gave the plaintiffs a commencement date that was either the same or later than that provided by the FRCD.⁷² Regardless, neither of these cited cases directly addressed the issue of whether a federally required commencement date violates the Tenth Amendment to the U.S. Constitution.

B. Commerce Clause

While few courts had considered the Tenth Amendment issue regarding the FRCD, another Constitutional issue had received much more attention. Generally, the Commerce Clause of the Constitution gives Congress the authority to regulate commerce among the states and with other countries.⁷³ Because toxic material is almost always a by-product of “business activity,”⁷⁴ and CERCLA legislation was intended to give the Environmental Protection Agency a means by which to deal with hazardous waste and its consequences,⁷⁵

⁶² *Supra* n. 54.

⁶³ *Id.*

⁶⁴ *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 360 (2d Cir. 1997).

⁶⁵ *Id.* at 360 n. 5.

⁶⁶ *Id.*

⁶⁷ *Ruffing ex rel. Calton v. Union Carbide Corp.*, 746 N.Y.S.2d 798 (2002).

⁶⁸ *Achee v. Port Drum Co.*, 197 F. Supp. 2d 723, 734 (E.D. Tex. 2002).

⁶⁹ Defendants relied on *Becton v. Rhone-Poulenc, Inc.*, 706 So.2d, 1134, 1142 (Ala. 1997) for this proposition, where the Alabama Supreme Court did not allow the application of the FRCD, because of the lack of an underlying CERCLA claim.

⁷⁰ *Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104, 107 (W.D.N.Y. 1994).

⁷¹ *Achee*, 197 F. Supp. 2d at 735.

⁷² *Id.*

⁷³ U.S. Const. art. I, § 8, cl. 3.

⁷⁴ *Freier*, 303 F.3d at 201.

⁷⁵ *Id.* at 201.

the Commerce Clause and CERCLA have been construed as interrelated.⁷⁶ Indeed, toxic wastes are often shipped via interstate commerce.⁷⁷ Therefore, “[c]ongress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders.”⁷⁸ While a court has not spoken specifically on the issue of whether the FRCD is a violation of constitutional objectives, courts have held that CERCLA is in sync with the powers of the Commerce Clause. Thus, it can be inferred that because the FRCD is an “integral” part of the CERCLA legislation and CERCLA does not violate the Commerce Clause, the FRCD does not violate the Commerce Clause as well.⁷⁹

IV. INSTANT DECISION

The United States Court of Appeals for the Second Circuit agreed with the District Court’s findings as to the defendants’ constitutional assertions against the statute.⁸⁰ As to the defendants’ Commerce Clause challenge, the court found that businesses commonly generate toxic waste, and that such wastes are often transferred in interstate commerce.⁸¹ Thus, “Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders.”⁸²

In addition, the Court of Appeals agreed that the one-year limitations period was correctly applied in the prior proceeding.⁸³ The Second Circuit reiterated the District Court’s decision that the FRCD preempts the state accrual date, when the state rule would otherwise be more restrictive.⁸⁴ The Court of Appeals likewise agreed that the length of the state statute of limitations was unaffected in the situation where CERCLA would provide a longer period.⁸⁵

However, in contrast to the lower court, the Court of Appeals ruled that there indeed were unresolved issues of fact as to when those persons injured should have reasonably known the source of their injuries.⁸⁶ In the decision at hand, the Second Circuit held that the District Court improperly charged to the FRCD the standard of “reasonable suspicion.”⁸⁷ The Court of Appeals’ decision pointed out that the FRCD test focuses on “actual knowledge” and not mere suspicion, and although an injured plaintiff may have reasonable suspicion of the cause of her injuries, that does not mean that she “reasonably should have known” of the cause.⁸⁸ Also, the Court of Appeals rejected the lower court’s holding that the plaintiffs needed to prove that the injury “could not have been” determined within three years after the date of discovery of the injury.⁸⁹ Instead, the Court of Appeals held that the New York statute was intended to encompass information that was “reasonably available” to the plaintiffs at the relevant time.⁹⁰

⁷⁶ See *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Nat. Resources*, 504 U.S. 353, 359 (1992), stating, “solid waste, even if it has no value, is an article of commerce.” *Id.*

⁷⁷ See generally *Chemical Waste Mgmt. Inc. v. Hunt*, 504 U.S. 334, 337 (1992).

⁷⁸ *N.Y. v. U.S.*, 505 U.S. at 149.

⁷⁹ *Freier*, at 203.

⁸⁰ *Id.* at 195.

⁸¹ *Id.* at 202.

⁸² *Id.* at 202 (quoting *N.Y. v. U.S.*, 505 U.S. at 149).

⁸³ *Id.* at 195.

⁸⁴ *Id.* at 210.

⁸⁵ *Id.* at 210.

⁸⁶ *Id.* at 195.

⁸⁷ *Id.* at 295.

⁸⁸ *Id.* at 205-06.

⁸⁹ *Id.* at 206.

⁹⁰ *Id.* at 207.

The Court of Appeals also found that the District Court did not correctly apply the standard required for motion for summary judgment.⁹¹ Additionally, the reviewing Court noted that a large number of the reports on which the defendants relied did not contain any real scientific evidence that the landfill had been linked to carcinogens.⁹² Therefore, the appellate court found the trial court did not view this evidence most favorably to the plaintiffs, which they should have done because the defendants sought summary judgment on this issue.⁹³

V. COMMENT

As discussed previously, the main point of contention between the parties in the present action are issues surrounding the FRCD and its use in place of the New York state statute accrual date. Thus, it is helpful to examine general policy reasons for and against a federally required commencement date in the area of tort litigation and justifications behind the statute of limitations generally.

A law degree is not necessary to understand reasons in opposition to the application of a statute of limitations. It is entirely obvious to the layperson that while the application of a statute of limitations will certainly discourage many claims that are entirely frivolous and disallow redress in claims from so long ago that all the evidence and perhaps some of the parties have disappeared, an unfortunate consequence is that some meritorious claims will also be barred. Thus one must look at a given statute of limitations in practice to determine if it ultimately is doing more harm than good.

However, it is not to say that there are not seemingly equally compelling interests on the contrary. In a litigious society such as the one in which we live today, it oftentimes appears as if a new cause of action is born daily. For instance, it was probably inconceivable 20 years ago, that a patron of a fast food restaurant would charge the restaurant with liability for her weight gain.⁹⁴ Such suits make corporations and average citizens unnecessarily fear litigation. Thus, policy supports that at some point, people need to be able to put their fears to bed indefinitely. This same policy rationale would undoubtedly promote a rule which would provide relief for citizens from a constant nagging fear of being the subject of “frivolous” litigation. Historically, the statute of limitations is one means that has served this policy goal in the past and although not without flaw, it continues to serve it currently.

However, the statute of limitations can cause problems for plaintiffs in particular kinds of suits. The field of toxic tort claims is one such area. While a plaintiff injured in a car accident can easily identify both a definite time and cause of her injury, the toxic tort victim is not privileged in the same way. An unfortunate truth is that the average person often does not have the medical training to conduct a self-diagnosis. Often, symptoms are ambiguous in their occurrence and also masquerade as symptoms of everyday, non-serious illnesses. As a result, how can one really know if she has a cause of action or merely the common cold?

Additionally, in toxic tort litigation in particular, the average person may not be familiar with the statute of limitations generally, or, if familiar, may not be knowledgeable of the relevant dates in determining how long he or she has before their cause of action is barred. For example, New York’s statute provides more than one possible accrual date for a toxic tort injury.⁹⁵ Specifically, the statute uses the victim’s first exposure to the toxin as one possible date, the date of discovery of the injury as another, and the date of discovery of the injury’s cause as a third.⁹⁶ As in the case of the car accident plaintiff, it is easy to know that the injury occurred

⁹¹ *Id.* at 207.

⁹² *Id.* at 208.

⁹³ *Id.*

⁹⁴ *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

⁹⁵ *Freier*, 303 F.3d at 183.

⁹⁶ *Id.*

on the date of the accident. However, a toxic tort plaintiff may be confused and not understand her rights, because a cause of action can arise, and as a consequence thus be barred, on a number of dates.

A potential plaintiff's claim under toxic tort litigation can also be compromised on account of the nature of the injury usually involved. Because of the type of common injuries caused by exposure to certain toxic chemicals, a plaintiff who is in the midst of treating a difficult and possibly terminal illness will be concerned first with her health issues and, if at all, will contemplate damage recovery second. Most diseases and respiratory problems such as cancer, caused by exposure to harmful toxins are difficult to identify initially and generally much harder to treat. Compared to common curable ailments, diseases like cancer frequently require numerous and consistent doctors visits and often require the consultation of specialists. Because health is one of the most important aspects of one's person, patients who are undergoing this degree of medical treatment are generally concerned with physical, not monetary recovery for their injuries.

These aforementioned concerns with the application of a statute of limitations generally, while they do not support the abandonment of the statute of limitations entirely, would support a uniform accrual date in the area of toxic tort litigation. For example, as the Court states, if the federal date were used in lieu of the differing state dates, more plaintiffs' legitimate actions would not be barred, because they or their counsel could easily refer to the federal rule and would not be "tricked" by a nuance of their particular state statute. Also, the competing policy rationales both for and against the adoption of a statute of limitations in the area of toxic tort claims ultimately lend themselves to the question of who should ultimately bear the cost of the plaintiff's injuries. If the question came down to whether the innocent plaintiff or the defendant company should bear the cost, certainly most citizens would find the defendant company liable on a logical basis, because the company is often in a better position financially to bear the cost of such injuries. On an emotional basis, the average citizen would identify with the plaintiff and find her to be in a more sympathetic position, because her fault is marginal at best when compared to that of the defendant company whose toxins caused the plaintiff's harm. People would reason that but for the defendant company, the plaintiff would not be injured in the first instance.

Based upon this line of reasoning, it necessarily seems like it is of sounder policy that the final expenses should lie with the cause of the injury, and not with the innocent plaintiff. However true it is that the plaintiff did not pursue her cause within the required statutory time constraints, it cannot be said she is not still innocent as to the cause of her injuries. Thus, in this situation, innocence becomes a question of degree. Therefore, because a uniform accrual date would be easier for more plaintiffs and their counsel to understand, a uniform statute of limitations date in toxic tort litigation would ultimately put the cost of the injury more often with its cause.

Compelling policy considerations support the use of the federally required commencement date in lieu of an otherwise applicable state provided accrual date for certain personal injury actions. In its decision, the Court provided Congressional considerations behind the federally required commencement date.⁹⁷ In response to defendants' attack on the constitutionality of the FRCDC, the Court stated that by the general denial of the federal accrual date to plaintiffs would be counterintuitive to Congress's purpose of dealing with the growing need to deal with hazardous substance issues efficiently.⁹⁸ An explanation the Court provided was that Congress intended potential plaintiffs to have greater access to the legal system to seek redress of their toxic tort claims and that that interest could be provided by a uniform federally mandated accrual date.⁹⁹ Specifically, the Court explained, "[l]ack of uniformity in achieving redress in state courts for toxic torts would also lead to potential competitive imbalances in the hazardous wastes disposal industry based on differing schemes for

⁹⁷ *Id.* at 186.

⁹⁸ *Id.*

⁹⁹ *Id.*

invoking relevant statutes of repose.”¹⁰⁰ While this argument at first glance seems easy to swallow, it is not without flaw.

If the application of a federally mandated commencement date is appropriate to replace state statutory accrual dates in toxic tort claims, it belies the question of why there is not a federally mandated statute of limitations *length* as well. In *Freier*, the Court of Appeals merely glossed over the plaintiff’s claim that the length of the limitations period should be federally mandated as well as the accrual date. The Court touched lightly on the issue, by only stating that a federally mandated statute of limitations length was inapplicable, but at no time supported its opinion with sound reason or policy justification.¹⁰¹

While the Court was seemingly silent about the rationale behind not imposing a federal statutory length in toxic tort claims, it referred to the FRCD as “an essential part of a national regulatory system established by CERCLA” and that it “represent[ed] a valid exercise of congressional power.”¹⁰² This statement is internally inconsistent with the Court’s lack of discussion of the length of the statutory period, because while it is easily arguable that both a uniform accrual date and uniform limitations period would serve the congressional goals previously mentioned, one is found to be ‘essential’ while the other was found not even worthy of discussion or explanation. Any ‘reasonable’ person would understand both to be methods that would aid in the uniformity of state toxic tort claims. Unfortunately, the Court of Appeals did not reconcile this seemingly conflicting position. Thus, because the Court left no guidance on this issue, future tribunals will regrettably find no guidance in this decision.

VI. CONCLUSION

While this decision by no means controls in every jurisdiction, and it is true that courts could later decide to its contrary, this decision will at least provide precedent for courts in the future to consult if faced with the same issue. By holding that the FRCD provided for in CERCLA “trumps” individual state statutory accrual dates in the area of toxic tort litigation, the Second Circuit has provided its legal community with an easily understandable and applicable standard. However, while a standardized accrual date favors this goal, naturally, one’s next question would be why the length of the statute of limitations should not be regulated and standardized as well? Absent any direction or explanation from the Court, at the very least, this result is counterintuitive.

KELLY E. SHAMEL

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 186-87.

¹⁰² *Id.* at 186.