

BILL TEXT:

STATE OF NEW YORK

5946

2005-2006 Regular Sessions

IN ASSEMBLY

March 2, 2005

Introduced by M. of A. WEINSTEIN, GOTTFRIED, JOHN, GREENE, McENENY,
BRADLEY -- Multi-Sponsored by -- M. of A. A. COHEN, M. COHEN, GREEN,
MILLMAN -- read once and referred to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to the
limitations of time within which an action for medical, dental or
podiatric malpractice accrues; and providing for one year revival of
previously dismissed actions

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Section 214-a of the civil practice law and rules, as
2 amended by chapter 485 of the laws of 1986, is amended to read as
3 follows:
4 § 214-a. Action for medical, dental or podiatric malpractice to be
5 commenced within two years and six months; exceptions. An action for
6 medical, dental or podiatric malpractice must be commenced within two
7 years and six months of the [~~act, omission or failure complained of or~~
8 ~~last treatment where there is continuous treatment for the same illness,~~
9 ~~injury or condition which gave rise to the said act, omission or fail-~~
10 ~~ure; provided, however, that where the action is based upon the discov-~~
11 ~~ery of a foreign object in the body of the patient, the action may be~~
12 ~~commenced within one year of the date of such discovery or of the date~~
13 ~~of discovery of facts which would reasonably lead to such discovery,~~
14 ~~whichever is earlier. For the purpose of this section the term "contin-~~
15 ~~uous treatment" shall not include examinations undertaken at the request~~
16 ~~of the patient for the sole purpose of ascertaining the state of the~~
17 ~~patient's condition. For the purpose of this section the term "foreign~~
18 ~~object" shall not include a chemical compound, fixation device or pros-~~
19 ~~thetic aid or device] accrual of any such action. For purposes of this
20 section, the accrual of an action occurs when one knows or should have
21 known of the alleged negligent act or omission and knows or should have
22 known that said negligent act has caused an injury; or, within two years~~

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 and six months of the last treatment where there is continuous treatment
2 for the same illness, injury or condition which gave rise to the accrual
3 of an action.

4 § 2. Every action for personal injury or death sounding in medical,
5 dental or podiatric malpractice, which is barred as of the effective
6 date of this act or which was dismissed prior to the effective date of
7 this act solely because the applicable period of limitations has or had
8 expired, is hereby revived and an action thereon may be commenced
9 provided such action is commenced within one year from the effective
10 date of this act; provided however, that this section shall not revive
11 any action for damages for a wrongful act, neglect or default causing a
12 decedent's death and could have been brought pursuant to section 5-4.1
13 of the estates, powers and trusts law, and provided, further, that for
14 any revived claim or action, including third party claims and claims for
15 contribution pursuant to article 14 of the civil practice law and rules
16 for which a notice of claim is or would have been required by law as a
17 condition precedent to the claim or action, a notice of claim shall not
18 be required.

19 § 3. This act shall take effect immediately.

SPONSORS MEMO:

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)**

BILL NUMBER: A5946

Revised 1/23/06

SPONSOR: Weinstein (MS)

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to the limitations of time within which an action for medical, dental or podiatric malpractice accrues; and providing for one year revival of previously dismissed actions

PURPOSE OF BILL:

To amend the statute of limitations for medical, dental or podiatric malpractice to include a discovery of injury rule.

SUMMARY OF PROVISIONS OF BILL:

Amends Section 214-a of the Civil Practice Law and Rules to accomplish the above purpose. Section 2 of the bill revives those actions which would have been time barred or dismissed under the present statute of limitations for a period of one-year after the enactment of this legislation. Similar revival legislation has recently been adopted by the legislature in the area of exposure to toxic substances, with regard to D.E.S.

JUSTIFICATION:

New York's current statute of limitations as to medical malpractice is two and one half years from the date of the act, omission or failure complained of or last treatment where there is continuous treatment. It is not only the shortest negligence statute in the State of New York, except for claims against municipalities, but works undue hardship in its application and interpretation.

RETRIEVE BILL

The courts in this State have consistently interpreted the accrual of a cause of action for negligence as occurring at the time the act complained of occurred. In medical malpractice cases, arising out of a misdiagnosis or the failure to diagnose, the injury suffered by the victim of such a tort is often not known and is not discovered until the statute of limitation has run.

Most often this injustice is seen in the cancer cases. A patient is seen by a physician for rather general complaints and a series of tests are ordered, including an x-ray. The patient is diagnosed as having no illness. Several years later the patient is diagnosed as having a spot on the lung by a different physician. Review of the original x-ray films show the presence of the spot on the earlier film. Time is of the essence in the treatment of cancer if one is to get a favorable chance at long term survival. If more than two and one half years have passed from the date of the original x-ray and there has been no continuous course of treatment, such as in the case of a radiologist, the patient's claim is time barred, despite the fact that he or she could not have known that he or she was injured.

In the current climate of breast implant litigation, an equally grave injustice is being thrust upon women in New York State. Under the current state of the law the victims of breast implantation can bring an action against the device manufacturers but not sue the physicians and surgeons if more than two and a half years has passed from the date of the last treatment for the implant, despite the fact that the surgeon bears some degree of responsibility to the breast implant recipients. The proposed legislation cures this injustice.

The current statute of limitations is based upon an archaic rule that a cause of action sounding in negligence accrues at the time of the negligent act. The better rule and the one most widely adopted in other jurisdictions, such as New Jersey, North Carolina, and claims against the United States of America arising under the Federal Tort Claims Act, is one which recognizes that some injuries do not manifest themselves at the time of the negligent act, and which permits a victim of medical malpractice to discover his or her injury before their statutory period to begin suit runs. New York has dealt with this problem in the field of Toxic Torts. In 1986 the Legislature enacted CPLR Section 214-c. That section set forth a discovery rule for injuries suffered as a result of exposure and implantation (1992 amendment) of foreign substances. The justification for the passage of 214-c was that individuals who were exposed to toxic substances did not show any adverse health effects until after the three (3) year general negligence statute of limitations had run. The issue was revisited in 1992 when that act was amended to include implantation within "exposure" to remedy an injustice to victims of breast implants.

The New York State Trial Lawyers Association strongly supports the proposed amendment of the statute of limitations as it applies to accrual of medical malpractice actions.

LEGISLATIVE HISTORY:

1995-96 - A.6041 - Codes Committee

1997 - A.5344 - Codes Committee

1998 - A.5344 - Rules Committee

1999 - A.6559-A - Assembly Calendar

2000 - A.6559-A - Codes Committee

2001 - A.7793 - Codes Committee

2002 - A.7793/S.7454 - Codes Committee/S. Rules Committee

2003-04 - A.6544/S.2588 - Codes Committee/S. Rules Committee

2005 - A.5946/S.962 - A.Codes Committee/S. Rules Committee

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS :

None.

EFFECTIVE DATE :

Immediately.
