

A 9633-A Weinstein Same as [S 7588-A](#)
 DEFRANCISCO
 Civil Practice Law and Rules
 TITLE....Relates to the accrual of causes of
 action for medical, dental and podiatric
 malpractice; repealer

Currently on Assembly Committee Agenda

Codes (LENTOL)
 OFF THE FLOOR, Monday, January 29, 2018

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01/26/18 referred to codes

01/27/18 amend and recommit to codes

01/27/18 print number 9633a

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 ON FILE: 01/27/18 Civil Practice Law and Rules
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01/27/18 AMEND AND RECOMMIT TO RULES

01/27/18 PRINT NUMBER 7588A

STATE OF NEW YORK

9633--A

IN ASSEMBLY

January 26, 2018

Introduced by M. of A. WEINSTEIN -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the civil practice law and rules, in relation to certain negligent actions or claims; to amend a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, in relation to the effectiveness thereof; to repeal certain provisions of a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, relating to certain negligent acts or omissions; and to repeal certain provisions of the civil practice law and rules relating thereto

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

1 Section 1. Paragraph 2 of subdivision (g) of section 203 of the civil
 2 practice law and rules, as added by a chapter of the laws of 2017,
 3 amending the civil practice law and rules relating to accrual of causes
 4 of action for medical, dental and podiatric malpractice, as proposed in
 5 legislative bills numbers S.6800 and A.8516, is REPEALED and a new para-
 6 graph 2 is added to read as follows:
 7 2. Notwithstanding paragraph one of this subdivision, in an action or
 8 claim for medical, dental or podiatric malpractice, where the action or
 9 claim is based upon the alleged negligent failure to diagnose cancer or
 10 a malignant tumor, whether by act or omission, for the purposes of
 11 sections fifty-e and fifty-i of the general municipal law, section ten
 12 of the court of claims act, and the provisions of any other law pertain-
 13 ing to the commencement of an action or special proceeding, or to the
 14 servng of a notice of claim as a condition precedent to commencement of
 15 an action or special proceeding within a specified time period, the time
 16 in which to commence an action or special proceeding or to serve a
 17 notice of claim shall not begin to run until the later of either (i)

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

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1 when the person knows or reasonably should have known of such alleged
2 negligent act or omission and knows or reasonably should have known that
3 such alleged negligent act or omission has caused injury, provided, that
4 such action shall be commenced no later than seven years from such
5 alleged negligent act or omission, or (ii) the date of the last treat-
6 ment where there is continuous treatment for such injury, illness or
7 condition.

8 § 2. Section 214-a of the civil practice law and rules, as amended by
9 a chapter of the laws of 2017, amending the civil practice law and rules
10 relating to accrual of causes of action for medical, dental and podia-
11 tric malpractice, as proposed in legislative bills numbers S.6800 and
12 A.8516, is amended to read as follows:

13 § 214-a. Action for medical, dental or podiatric malpractice to be
14 commenced within two years and six months; exceptions. An action for
15 medical, dental or podiatric malpractice must be commenced within two
16 years and six months of the [~~accrual of any such action. The accrual of~~
17 ~~an action occurs at the later of either (a) when one knows or reasonably~~
18 ~~should have known of the alleged negligent failure to diagnose a malig-~~
19 ~~nant tumor or cancer, whether by act or omission and knows or reasonably~~
20 ~~should have known that such negligent act or omission has caused the~~
21 ~~injury, or (b) the date of the last treatment where there is continuous~~
22 ~~treatment for the same illness, injury or condition which gave rise to~~
23 ~~the accrual of an action. However, such action shall commence no later~~
24 ~~than seven years from the~~] act, omission or failure complained of or
25 last treatment where there is continuous treatment for the same illness,
26 injury or condition which gave rise to the said act, omission or fail-
27 ure; provided, however, that: (a) where the action is based upon the
28 discovery of a foreign object in the body of the patient, the action may
29 be commenced within one year of the date of such discovery or of the
30 date of discovery of facts which would reasonably lead to such discov-
31 ery, whichever is earlier; and (b) where the action is based upon the
32 alleged negligent failure to diagnose cancer or a malignant tumor,
33 whether by act or omission, the action may be commenced within two years
34 and six months of the later of either (i) when the person knows or
35 reasonably should have known of such alleged negligent act or omission
36 and knows or reasonably should have known that such alleged negligent
37 act or omission has caused injury, provided, that such action shall be
38 commenced no later than seven years from such alleged negligent act or
39 omission, or (ii) the date of the last treatment where there is contin-
40 uous treatment for such injury, illness or condition. For the purpose
41 of this section the term "continuous treatment" shall not include exam-
42 inations undertaken at the request of the patient for the sole purpose
43 of ascertaining the state of the patient's condition. For the purpose of
44 this section the term "foreign object" shall not include a chemical
45 compound, fixation device or prosthetic aid or device.

46 § 3. Section 3 of a chapter of the laws of 2017, amending the civil
47 practice law and rules relating to accrual of causes of action for
48 medical, dental and podiatric malpractice, as proposed in legislative
49 bills numbers S.6800 and A.8516, is REPEALED.

50 § 4. Notwithstanding sections 50-e and 50-i of the general municipal
51 law, section 10 of the court of claims act, and the provisions of any
52 other law pertaining to the commencement of an action or special
53 proceeding, or to the serving of a notice of claim as a condition prece-
54 dent to commencement of an action or special proceeding within a speci-
55 fied time period, with regard to any action or claim arising from
56 alleged medical malpractice based upon an alleged negligent failure to

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1 diagnose cancer or a malignant tumor, whether by act or omission, which,
2 within ten months prior to the effective date of the act that created
3 this section, became time-barred under any applicable limitations period
4 then in effect, such action or claim may be commenced within six months
5 of the effective date of the act that created this section, and not
6 beyond. The provisions added by section one and amended by section two
7 of the act that created this section shall not apply to such actions.

8 § 5. Section 4 of a chapter of the laws of 2017, amending the civil
9 practice law and rules relating to accrual of causes of action for
10 medical, dental and podiatric malpractice, as proposed in legislative
11 bills numbers S.6800 and A.8516, is amended to read as follows:

12 § 4. This act shall take effect immediately and shall apply to acts,
13 omissions, or failures occurring on or after such effective date.

14 § 6. This act shall take effect immediately; provided, however, that
15 sections one, two and three of this act shall take effect on the same
16 date and in the same manner as a chapter of the laws of 2017, amending
17 the civil practice law and rules relating to accrual of causes of action
18 for medical, dental and podiatric malpractice, as proposed in legisla-
19 tive bills numbers S.6800 and A.8516, takes effect provided, further,
20 that the provisions added by section one of this act shall also apply to
21 acts, omissions, or failures occurring within 1 year and 90 days prior
22 to the effective date of this act, and not before, and further provided,
23 however, that for actions or claims governed by section 10 of the court
24 of claims act such section one shall also apply to acts, omissions, or
25 failures occurring within 2 years prior to the effective date of this
26 act, and not before; provided, further, that the provisions amended by
27 section two of this act shall also apply to acts, omissions, or failures
28 occurring within 2 years and 6 months prior to the effective date of
29 this act, and not before.

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

BILL NUMBER: A9633A

SPONSOR: Weinstein

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to certain negligent actions or claims; to amend a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, in relation to the effectiveness thereof; to repeal certain provisions of a chapter of the laws of 2017, amending the civil practice law and rules relating to accrual of causes of action for medical, dental and podiatric malpractice, as proposed in legislative bills numbers S. 6800 and A. 8516, relating to certain negligent acts or omissions; and to repeal certain provisions of the civil practice law and rules relating thereto

PURPOSE OF BILL:

To amend the statute of limitations for medical, dental or podiatric malpractice for actions involving a failure to diagnose cancer or a malignant tumor to include a discovery of injury rule, allowing the current two and half year statute of limitations to run from the date an injured patient discovers, or should have discovered, that their injury was caused by malpractice.

SUMMARY OF PROVISIONS OF BILL:

Amends Sections 203 and 214-a of the Civil Practice Law and Rules to accomplish the above purpose.

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.

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 discovered until the well after the statute of limitation has expired.

This injustice is sometimes seen when a patient discovers the growth of a cancerous tumor. For example, 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 a 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 (assuming no continuous course of treatment), the patient's claim is time barred, despite the fact that the patient could not have reasonably known of the existence of the medical misconduct.

The patient may in fact be totally asymptomatic for years after the two and one half year statute of limitations has expired. However, if symptoms (and hence discovery of the medical misconduct) become apparent only after the expiration of the statute, the patient nevertheless has no legal recourse.

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.

This bill would remove this gaping loophole in the law, as applicable to the victims of medical negligence referable to failure to diagnose cancer or a malignant tumor, which allows a patient's rights to expire prior to the patient even knowing that she had any rights in the first place. The bill would certainly not mandate that any claim be deemed meritorious - instead, the bill would merely prevent the statute of limitations from being used as an unfair and inequitable shield front professionally negligent medical misconduct.

LEGISLATIVE HISTORY:

New bill, but clarifying the provisions of A.8516 of 2017.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

Undetermined.

EFFECTIVE DATE:

Immediately and provides that any action or claim for medical malpractice based on a failure to diagnose cancer or a malignant tumor that expired within the last 10 months is revived, and may be filed within 6 months of the effective date. Further, the bill would apply the new date of discovery provisions to any action or claim that was still timely on the effective date.

