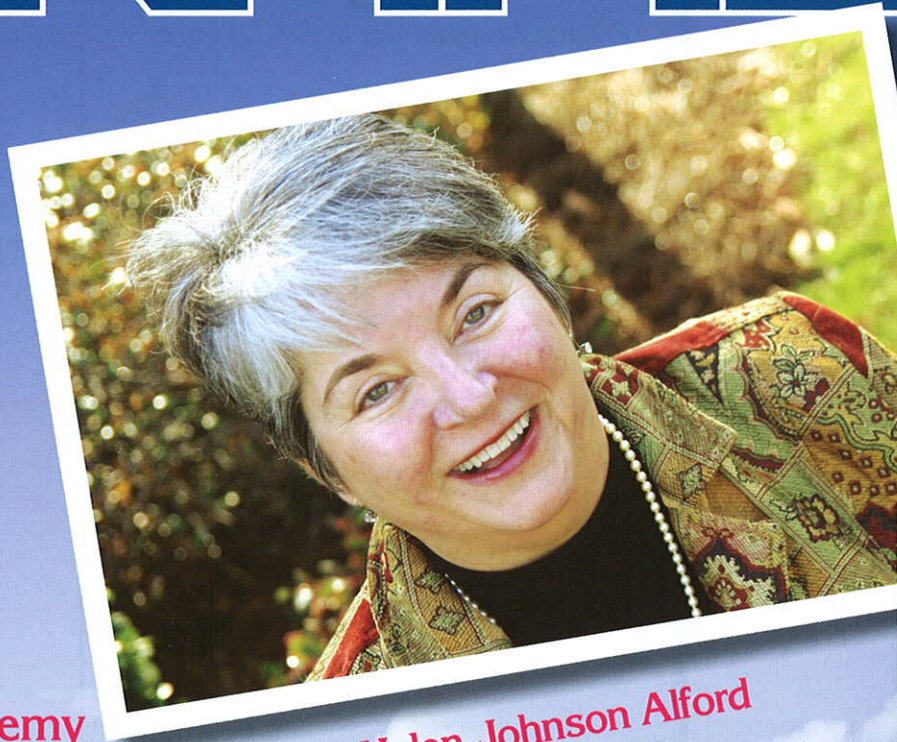


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A TURN OF EVENTS IN ALABAMA TOXIC TORT LAW

By: R. Bruce Barze, Jr. and Conrad Anderson IV

With three short words, the Alabama Supreme Court recently made an about face, reversed decades of precedent and significantly altered the legal landscape of toxic tort law in Alabama. The issue before the Court: whether the “date of last exposure” rule is still the law for determining when the statute of limitations begins to run. The Court’s response: “Stated simply, it is not . . .” *Griffin v. Unocal, Corp.*, 2008 Ala. Lexis 19, *3 (Jan. 25, 2008).

I. Genesis in *Garrett*

In what is generally considered the seminal case sparking the debate about the statute of limitations in toxic tort exposure cases, plaintiff Jerry Kenneth Garrett brought suit against Raytheon Company and several others involved in the design, manufacture and maintenance of radar systems. *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979). He alleged that he was exposed to dangerous radiation at his work from 1955 to 1957. *Id.* at 518. Years later, his hair turned white and began falling out and his overall health condition began rapidly deteriorating. *Id.* In March 1977, he was advised for the first time that his condition was a result of radiation exposure. *Id.* Garrett brought suit less than a year after learning this information, in February 1978. *Id.*

Following the trial court’s determination that Garrett’s claim was barred by the statute of limitations, he appealed to the Alabama Supreme Court. The Court stated that the long-settled rule is that a statute of limitations begins to run when the cause of action “accrues,” and that it accrues as soon as a plaintiff can bring suit on it. *Id.* at 518 – 19. Relying on prior case law, the Court explained that “if the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage [then apparent] however slight . . .” *Id.* (citing *Home Insurance Co. v. Stuart-MCorlde, Inc.* 285 So. 2d 468, 473 (Ala. 1973)). In other words, if the defendant’s alleged wrongful act was exposing a plaintiff to a toxic substance, and the natural sequence was that the plaintiff would suffer injury, then the statute of limitations began to run when the plaintiff was last exposed. It did not matter that the injury might be minimal at the time of the exposure – that is when the statute began to run and the fact that the damages might later worsen did not give rise to a new cause of action.

The Court was also forced to reconcile its construction with that employed in land subsidence cases. In those cases, a plaintiff whose land collapses as a result of underground mining activity completed years earlier gets the benefit of a statute of limitations that does not begin to run until the land collapses. *See, e.g., West Pratt Coal Co. v. Dorman*, 49 So. 849 (Ala. 1909). Distinguishing the situations, the Court explained that no injury occurred at the time of the mining, whereas some damage must have occurred at the time of last exposure to the toxic substance – “It is simply that all the progressive nature of the injury has not made itself manifest at the time of the last exposure.” *Garrett* at 520. The Court did not consider whether it was possible that in toxic tort cases, no injury in fact occurs at exposure. Nor did the Court address whether land collapse is a result of “the progressive

nature of the injury” occurring underneath the land’s surface and that the entire injury is simply not manifest until collapse.

The *Garrett* Court held that the statute of limitations in exposure cases begins to run from the “date of injury,” defined previously in *Garren v. Commercial Ins. Union Co.*, 340 So. 2d 764 (Ala. 1976) as the date on which the plaintiff was last exposed to the damages. *Garrett* at 520. That definition was derived from Ala. Code § 25-5-117 which at that time stated, “The date of the injury shall mean, for all purposes of this article, the date of the last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed to the hazards of the disease.” The Court further pointed out that Alabama courts have consistently held that where the plaintiff is continuously exposed or subjected to the alleged wrong (*i.e.*, a continuous tort), the statute runs from the last day of exposure. *Id.* at 521.

Recognizing that many jurisdictions had adopted a “discovery rule” in which the statute of limitations begins to run from the time that the plaintiff discovered or reasonably should have discovered the injury, the Court noted that it had previously rejected such a rule in medical and professional malpractice cases. *Id.* at 520. Any decision to adopt such a rule was within the inherent power of the legislature to decide. *Id.* at 521. The Court therefore found itself bound to hold, “the statute of limitations of one year began to run when plaintiff was last exposed to radiation and plaintiff’s ignorance of the tort or injury, there being no fraudulent concealment, does not postpone the running of the statute until the tort or injury is discovered.” *Id.*

II. The Catch-22

Clearly, the Court’s decision created a classic catch-22. If a plaintiff filed suit within one year from the date of last exposure (the statute of limitations at the time the *Garrett* decision was announced), the plaintiff would undoubtedly encounter proof problems in demonstrating his injury. If the plaintiff waited until there was some identifiable injury, the statute of limitations would most likely have run. The Court even recognized this inequitable result in *Garrett*, stating that it was up to the legislature to fix the rule “so that a plaintiff’s claim will not be barred when he has no way to ascertain that he has been damaged by a deleterious substance because the result has not manifested itself until the statute of limitations has run.” *Id.* at 521. The Court, however, simply suggested that its hands were tied because to hold otherwise would require departure from decades of precedent on these principles and, more importantly, “would result in usurping the inherent power of the legislature.” *Id.*

III. Legislature Answers the Call

In response to the *Garrett* Court’s invitation, the Alabama legislature acted in 1979 by adopting a discovery rule for cases alleging exposure to toxic substances. Act No. 79-468, Ala. Acts 1979. Under this rule, the statute of limitations did not begin to run until the plaintiff discovered, or should have discovered the injury. As part of the Act, the legislature went on to provide that if any part of it were declared unconstitutional the entire act would

become inoperative. Three years later, in *Lankford v. Sullivan, Long & Haggerty*, 416 So. 2d 996 (Ala. 1982), the Alabama Supreme Court effectively invalidated the legislature's work by declaring a rule of repose within the Act unconstitutional. Thus, the "last exposure rule" announced in *Garrett* made its return.

The legislature later adopted another discovery rule not dependent on the constitutionality of other provisions, but limited the application to asbestos cases. Ala. Code § 6-2-30(b), Act No. 80-566, Ala. Acts 1980. Proposals for the application of a discovery rule in other toxic tort cases have been introduced in the legislature since that time but have never been adopted. See S.B. 534 and 535, 2006 Leg., Reg. Sess. (Ala. 2006); H.B. 659 and 660, 2005 Leg., Reg. Sess. (Ala. 2005); and H.B. 93 and 103, 2004 Leg., Reg. Sess. (Ala. 2004).

IV. *Stare Decisis* Prevails

For years following the decision in *Garrett*, the Alabama Supreme Court adhered to the "last exposure rule" in toxic tort cases. See, e.g., *American Mut. Liab. Ins. Co. v. Phillips*, 491 So. 2d 904, 908 (Ala. 1986) (holding that "the longstanding damages rule followed in [*Garrett*], applied to bar a claim alleging exposure to cotton fibers); *Moore v. Glover*, 501 So. 2d 1187, 1190 (Ala. 1986) ("[T]his Court's opinion in [*Garrett*] settled the question of the 'accrual' of a plaintiff's claim in a radiation exposure case for purposes of determining when the applicable statute of limitations begins to run . . ."); *Hubbard v. Liberty Mut. Ins. Co.*, 599 So. 2d 20, 21 n.2 (Ala. 1992) ("[I]t seems to be settled in Alabama that the 'date of injury,' which starts the running of the statute of limitations in a continuous exposure case, occurs when the plaintiff was last exposed to the chemical or condition causing his injuries."); *Becton v. Rhone-Poulenc, Inc.*, 706 So. 2d 1134, 1135 (Ala. 1997) (citing *Garrett* for the proposition that "[f]or purposes of an action based on continuous exposure to a hazardous substance, the date of the injury is the day on which the plaintiff was last exposed to the hazardous substance causing the injuries.").

V. Mixed Results

As Justice Harwood would later comment, the "last exposure rule" announced by the Court in *Garrett* "became a sword instead of a shield" in the case of *Hillis v. Rentokil, Inc.*, 596 So. 2d 288 (Ala. 1992). Plaintiff William Hillis was allegedly exposed to chromated copper arsenate during his employment with a lumber company. *Id.* at 889. In September 1987, he sought medical treatment for red spots that began appearing on his skin. *Id.* Although the physician was unsure of the cause, Hillis believed at that time that it was caused by exposure to a toxic substance. *Id.* He was terminated three months later, in December of 1987, and brought suit in November 1989. *Id.* at 890. Because Hillis was allegedly exposed to the substance on a continuous basis during his employment, the Court applied the two-year statute of limitations applicable to continuous torts found in Ala. Code § 6-2-38(g). *Id.* Under a common-law approach, Hillis' claims would have been time-barred: he had a manifest, present injury when he sought treatment in September 1987 and did not file suit until more than two years later, in November 1989. Constrained by the "last exposure rule" announced in *Garrett*, however, the Court held that his claims were not time-barred because less than two years had passed since Hillis' last exposure, as he was not terminated until December 1987. *Id.*

VI. A Closer Look

Although the "last exposure rule" adopted by the Court in *Garrett* has been held to be the law for decades, that is not to say that it has not been questioned. Even the *Garrett* opinion adopting the rule was a 5-4 decision. In the Court's most recent (and what would be its last) adherence to the rule, a vehement dissent to the Court's reasoning was written by Justice Harwood. *Cline v. Ashland, Inc.*, 970 So. 2d 755 (Ala. 2007). In *Cline*, the plaintiff alleged that he was exposed to benzene during his employment, from which he retired in 1995. *Id.* at *2. *Cline* was diagnosed with acute myelogenous leukemia in October 1999 and brought suit less than two years later in April of 2001. *Id.* The trial court entered summary judgment for the defendant and, after rehearing, the Alabama Supreme Court affirmed without opinion. *Id.* at *1.

In a lengthy dissent, Justice Harwood called into question nearly every basis upon which the Court had followed the *Garrett* decision over the years. He agreed that it was the legislature's role to declare the public policy applicable to toxic tort exposure cases and pointed out that it had done so by adopting Ala. Code § 6-2-30(a), which provides that "[a]ll civil actions must be commenced after the cause of action has accrued within the period prescribed . . . and not afterwards . . ." *Id.* at *22. He contended, however, that interpreting the word "accrued" consistent with its intent by the legislature was squarely within the Court's proper role. *Id.*

Justice Harwood stated that in determining when the statute of limitations begins to run, the majority in *Garrett* appropriately reasoned that it runs from the date an injury occurs. However, without argument or explanation, the majority simply concluded as a matter of law that the injury occurs at the same time as exposure. *Id.* at *26. While the Court there noted that there are some instances, such as land subsidence cases, in which an injury does not occur at the same time as the act complained of, it made no attempt to determine if toxic tort exposure was such a type of case. *Id.* at *29.

Moreover, the *Garrett* Court's determination that "[t]he date of the injury shall mean . . . the date of the last exposure . . ." was pulled from a section of the Workmen's Compensation Act. *Id.* at *24. Justice Harwood cited to Justice Faulkner's dissenting opinion in *Garrett* in which he suggested that "engraft[ing] this [Workmen's Compensation Act] statutory scheme on unrelated common law claims is illogical and unsupported." *Id.* at *35 (citing *Garrett*, 368 So. 2d at 523).

Justice Harwood also pointed out the fact that the *Garrett* Court invited the legislature to statutorily set the statute of limitations—which it had done shortly after the decision—and that the Court later found the entire statute unconstitutional as a result of a separate and distinct provision. *Id.* at *36 – 37. It had also made other attempts to remedy the situation by introducing bills between 2004 and 2006, but without success. *Id.* at *38.

Justice Harwood acknowledged the role of *stare decisis* but suggested that "a continued blind obedience to [the rule], simply in deference to *stare decisis*, does not serve the law, but rather greatly disserves it." *Id.* at *57. He noted that while the Court continued to accept the "last exposure rule" based on that principle, "it has done so simply by accepting that holding at face value . . . without any reexamination of its underlying rationale." *Id.* at *40-41. He then endeavored to do just that.

As conceded by the *Garrett* Court, the date on which the statute of limitations begins to run is provided by Ala. Code § 6-2-30(a), which provides that a toxic tort action "must be commenced after

the cause of action has accrued." By his interpretation, "a cause of action accrues only when there has occurred a manifest, present injury," defined as an injury with "observable signs or symptoms or the existence of which is medically identifiable." *Id.* at *59. He further explained that it is not necessary that the claimant be aware of the injury or its cause, so long as the injury is "objectively evident and apparent, even if only to the diagnostic skills of a physician." *Id.* at *59-61.

Justice Harwood proposed a completely prospective application of the new rule, should it be adopted, suggesting that "only those persons whose last exposure to a toxic substance, and first manifest injury resulting from that exposure, occurred within two years of the opinion adopting the new rule would be entitled to have the accrual of their cause of action determined according to the new rule." *Id.* at *69. Thus, those plaintiffs whose claims were barred under the "last exposure rule" would still be precluded from bringing suit, although he would have given Cline, the plaintiff in the case, the benefit of the new rule as a reward for bringing about the change. *Id.* at *70.

Under Justice Harwood's approach, it is possible that a plaintiff could develop a "manifest" injury years, or even decades, after the date of last exposure and still bring suit. He therefore solicited the legislature to set a time limit to cut off "stale" claims. *Id.*

VII. The Court Reexamines *Garrett*

The factual circumstances common in toxic tort exposure cases were present once again in the matter of *Griffin v. Unocal, Corp.*, 2008 Ala. Lexis 19 (Jan. 25, 2008), decided in January of this year, and less than a year after *Cline*. David Wayne Griffin was employed at a Tuscaloosa tire manufacturing plant from 1973 until 1993, where he was allegedly exposed to benzene and other toxic chemicals. *Id.* at *1. In 2003, he was diagnosed with acute myelogenous leukemia and died from it a year later. *Id.* In 2006, David's wife, Brenda, filed a wrongful death action against Unocal Corporation and several other companies alleging that their chemicals caused his leukemia and ultimate death. *Id.* The companies moved to dismiss, arguing that the "date of last exposure" rule barred the claim because he had not worked at the plant within the last two years. *Id.* The trial court dismissed the case and Griffin appealed.

On appeal, the Alabama Supreme Court stated, "the dispositive issue in this case is whether 'the date of last exposure rule [is] still the law in Alabama.' . . . Stated simply, it is not, because we hereby overrule *Garrett* and its progeny." *Id.* at *2. In so holding, the Court adopted former Justice Harwood's dissent in *Cline v. Ashland, Inc.*

VIII. What does this mean?

Justice Harwood's dissent in *Cline* made clear that claims that would not have been viable prior to the adoption of the new rule are not now actionable. Thus, the "flood gates of litigation" have not been opened by the Court's opinion. It is not entirely clear, however, exactly which claims will now be heard. Justice Harwood stated that "only those persons whose last exposure to a toxic substance, and first manifest injury resulting from that exposure, occurred within two years of the opinion adopting the new rule would be entitled to have the accrual of their cause of action determined according to the new rule." A narrow reading suggests that for those last exposed between January 25, 2006 and January 25, 2008, there must also have been a "manifest" injury

during that time for them to have a claim. A more reasonable construction, however, is that for anyone exposed after January 25, 2006, the two year statute of limitations will begin to run from the date of the first "manifest" injury, regardless of how long it has been since they were last exposed to toxic substances.

Also unclear is how courts will determine when an injury has become "identifiable" so as to start the statute of limitations. If a plaintiff has not sought any medical treatment for years before discovering the presence of an injury from exposure to a toxic substance, the injury may be one which has progressed and would have been recognized years earlier. It is conceivable that a trial could hinge on whose medical expert a jury believes—the one who says a physician would have observed the condition several years earlier, or the one who says a physician would not have discovered it until only recently.

Although the Court has fixed the inherent unfairness of the "last exposure rule," there is still a problem relating to stale claims, an issue presumably left to the legislature. As the rule stands now, a plaintiff could stop working today and a claim made fifty years from now would not be barred if it did not become "manifest" until less than two years prior to bringing suit. The legislature will have to weigh public policy interests of plaintiffs seeking remedy for a wrong and defendants seeking a fixed period of relief from stale claims.



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