

## When New Data Give Way to Claims Over Old Contamination

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One of the most significant hazardous waste issues in New York and elsewhere over the past few years has been the potential exposure to vapor from volatile organic compounds, or VOCs, including chlorinated solvents such as perchlorethylene, a commonly used dry cleaning solvent.

VOCs pose a potential danger because of the risk of vapor intrusion, which occurs when hazardous vapors from contaminated soil or groundwater enter into indoor air of homes and businesses located above contaminated zones.

The risk of vapor intrusion has given rise to increased regulatory oversight and enforcement, as well as private toxic tort lawsuits from persons alleging physical injury and property damage due to vapor intrusion. The New York State Department of Health, or DOH, has been a leader in educating, testing and promoting enforcement relating to vapor levels in homes.

In fact, the Legislature recently revised the Environmental Conservation Law to create new requirements for property owners to notify tenants when indoor air tests exceed certain DOH or federal Occupational Safety and Health Administration guidelines.

This article focuses on the private toxic tort lawsuits, and a recent appellate ruling that could have significant consequences for toxic tort plaintiffs in New York and, potentially, nationwide.

That case, *Aiken v. General Electric Co.*, recently permitted a group of residents to maintain claims for property damage against General Electric from alleged toxic vapors in soil seeping into their homes.

The case is notable because the source of the vapors — contaminated groundwater underneath the homes — had been publicly known for upward of two decades, a fact that usually would bar, on statute of limitations grounds, any lawsuit relating to the known contamination. In *Aiken*, the court denied the defendant's motion to dismiss and held that issues of fact existed as to whether plaintiffs had or should have had notice of the vapors.

As a result of the *Aiken* decision, as well as other recent cases, plaintiffs may now be allowed to proceed with certain injury claims based on historic contamination which previously would have been time-barred, based on a developing interpretation of New York's so-called "discovery" rule. The discovery rule generally requires a plaintiff to sue for certain latent injuries from exposure to harmful substances within three years from the time when "the injuries are discovered or the date that they should have been discovered by a reasonably diligent party."

For claims of personal injury or injury to property arising from latent exposure to toxic substances, the statute of limitations under CPLR §214-c generally begins to run when "the injured party discovers the primary condition on which the claim is based."

For property damage claims arising from environmental contamination, New York courts have traditionally held that the relevant "primary condition" is the presence of contaminants on or under a plaintiff's property. Some courts held that if injuries alleged in the complaint are "an outgrowth, maturation, or complication of the original contamination" they are not separate and distinct injuries with separate accrual dates — rather, all claims related to the contamination apparently accrue for limitations purposes on the same date.

This doctrine has been applied in particular to property damage claims from petroleum leakage — which have been held to accrue at the time a plaintiff was on notice of the leaking underground storage tanks at the property.

It is in this legal context that *Aiken* is decided. The factual context of the *Aiken* case may have played a significant role in the court's decision to allow the plaintiffs' claims to proceed, because in that case there was a long history of the discharger and state regulatory authorities advising homeowners that they had nothing to worry about.

The contamination at issue in *Aiken* was from the VOC trichloroethane, or TCE, in groundwater. The TCE had been first discovered under GE's facility in Fort Edward, N.Y., in the 1980s, and since that time had migrated from the source to groundwater located beneath nearby residential properties owned by the plaintiffs.

After the groundwater contamination was first identified, the New York State Department of Environmental Conservation, or DEC, and GE continually advised homeowners that the contamination presented no health threat inside their homes.

Not until 2005, when vapor testing was undertaken, did the homeowners become aware of a threat from vapors in soil — as opposed to groundwater — migrating into their homes. GE moved to dismiss the suit, arguing that the residents had waited too long, because their time to bring the case began to run when the groundwater contamination was first discovered.

The court rejected this argument, holding that the "discovery" rule did not bar the lawsuit even though arguably the condition — the groundwater contamination — that had led to the vapor intrusion risk had been known for over two decades. The principal issue for the court was to determine when the injury at issue "should have been discovered by a reasonably diligent party," the standard codified in CPLR §214(c).

The *Aiken* court viewed the relevant inquiry under that test to be "when plaintiffs should have reasonably been aware of the presence of soil vapor contamination and the threat it presented to their properties."

The result was driven by how the court formulated the "injury" at issue in that case, which was property damage based on the presence of soil vapor contamination, as opposed to property damage based on the well-known groundwater plume.

The challenge in discovery rule cases dealing with known contamination is determining what is factually reasonable from an objective standpoint. Prior cases on this issue have often failed to give plaintiffs clear guidance on what set of facts triggered the commencement of the statute of limitations in a latent exposure case.

By characterizing the soil vapor as a distinct source of harm, the *Aiken* court could apply a separate time limit to property damage claims based on the risk posed by soil vapor intrusion, despite the fact that the vapors originated from a well-known contaminated groundwater plume that had been discovered long ago. The holding in *Aiken* is notable because it is in tension with other court holdings that have found limitations periods run when "the injured party discovers the primary condition on which the claim is based." In *Aiken* the defendants unsuccessfully argued the groundwater contamination was the "primary condition" resulting in the injury.

The *Aiken* decision thus marks a departure, or at least distinction, from prior cases like *Oliver Chevrolet Inc. v. Mobil Oil Corp.*, where the court held that knowledge of a leak in an underground storage tank was sufficient to trigger the limitations period for claims relating to groundwater contamination by petroleum, which was discovered later.

### **Continuation of a Trend?**

A potential explanation for *Aiken* unquestionably could be the significance of the reassurances that GE and government regulators had provided homeowners over the years regarding the groundwater plume.

It appears from the decision that for many years plaintiffs relied on public statements made by DEC and GE that no threat from vapors existed. It is not difficult to understand the reluctance of

a court to bar a claim based on a condition that the public had been reassured for years would not cause harm to nearby residences.

In the court's view, when a health concern has only recently been identified and announced, the courthouse doors should not be closed to potential plaintiffs, who should be allowed to demonstrate that they did not have adequate notice of the harm.

It should be noted that the court did not entirely resolve the issue of whether plaintiffs had or should have had notice — rather it denied a motion to dismiss, and held that issues of fact existed as to plaintiffs' notice of the vapor condition.

*Aiken* is not the first appellate case to depart from established case law in situations where the state of the knowledge is evolving regarding dangers from known conditions. Other courts have recognized that in certain situations, it may not be reasonable to expect a plaintiff to commence suit before having notice of recent scientific learning.

One such case is *Atkins v. Exxon Mobil Corp.*, where the court held that knowledge of MTBE, a gasoline additive introduced in the late 1970s/early 1980s, present in groundwater did not trigger the limitations period where plaintiffs had knowledge that groundwater had been impacted from the discharge of gasoline, and it was not clear that plaintiffs had knowledge of the "dangers and consequences" of MTBE, or its impact on property values.

In *Atkins*, MTBE was first detected in wells in 1993, and the public was told that while the water was safe to drink, the long-term health effects of low exposure were unknown. Only in Oct. 2000 were plaintiffs told of potential adverse effects of such exposure.

In this context, the court held that because "scientific knowledge and awareness of the dangers and consequences of long-term exposure to MTBE were in progress through the 1990s and, indeed, were not known with any certainty in 2000," plaintiffs had raised an issue of fact as to when they reasonably should have known of their property damage claims, and their claims survived a motion to dismiss.

In *Aiken*, plaintiffs argued that it was not until testing was performed in 2005 that the threat of vapor intrusion was made known to the community. Because the court agreed with plaintiffs' characterization of the injury at issue as the threat of vapor intrusion, it held that a question of fact existed as to when plaintiffs should have discovered the primary condition upon which the claim was based and thus denied GE's motion to dismiss based on statute of limitations grounds.

## **Conclusion**

The *Aiken* case highlights the policy tension embedded in statute of limitations questions involving alleged toxic torts. Courts seek to avoid stale litigation and give defendants repose, but remain cognizant of a plaintiff's right to bring suit where the state of scientific knowledge at the time the condition was discovered is evolving and does not give prospective plaintiffs effective notice of the injury upon which the claim is based.

The ideal rule would preclude claims where plaintiffs have sat on their rights, and information has been lost or evidence trails gone cold. However, where such claims could not have been previously prosecuted absent the scientific data "discovered" within the applicable limitations period, courts are understandably reluctant to bar plaintiffs from prosecuting those claims. The challenge lies in identifying the moment when the reasonable plaintiff should have been aware of the alleged injury that forms the basis of the claim.

The *Aiken* and *Atkins* cases strongly suggest that defendants can no longer rely on the simple discovery of the actual contamination upon which a claim is based as the trigger to commence a limitations period.

The state of scientific knowledge as to the potential harmful effects of the contamination — even if the actual contamination is well known for many years — could delay the commencement of the applicable limitations period under New York's discovery rule.

The reason courts distinguish such circumstances is that even where contamination has long been known, persons may not be aware that they have been "injured" until the harmful effects of the contamination are identified.

A divergence in the limitations trigger from the time contamination is discovered is more likely in cases such as *Aiken* where the public has been reassured that the known condition posed no threat. In such instances courts are likely to find that a question of fact exists as to when the plaintiff knew of, or should have known of, the injury at issue in the lawsuit.

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