



The Voice

And The Defense Wins

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On December 11, 2015, the United States District Court for the Southern District of New York granted summary judgment for Novartis Pharmaceuticals Corporation in *Haimowitz v. Novartis Pharm. Corp.*, No. 1:09-cv-10068-JFK (S.D.N.Y. Dec. 11, 2015) dismissing all of plaintiffs' claims as untimely. Novartis was represented by [Neil S. Bromberg](#) of [Hollingsworth LLP](#), as well as [David Richman](#) of [Rivkin Radler, LLP](#).

Plaintiffs alleged that their late mother, Beryl Haimowitz, developed osteonecrosis of the jaw ("ONJ") from her use of the bisphosphonate medication Aredia. She was diagnosed with multiple myeloma in 1995 and began treatment with Aredia to reduce the incidence of common bony complications of multiple myeloma, including pathologic fractures, paralyzing spinal cord compression, and hypercalcemia of malignancy (elevated calcium levels in blood).

The court agreed with Novartis that plaintiffs' claims were untimely under New York's three-year statute of limitations for claims involving latent injuries because the "limitations period begins to run on the date that the plaintiff becomes aware of her injury, not when she learns of its cause." *Haimowitz* Order at 7. Ms. Haimowitz's medical records demonstrated that she complained of ONJ-related symptoms as early as November 1997, more than twelve years before her lawsuit was filed. Further, the court found that Ms. Haimowitz's jaw symptoms progressed to being serious enough to require jaw resection surgery in August 2002, and, at the time of her August 2002 surgery, at least some of her doctors had diagnosed her condition as "chronic osteomyelitis" or "Aredia-induced osteonecrosis." *Id.* As such, Ms. Haimowitz's symptoms "were clearly serious enough by August 2002 to put Ms. Haimowitz on notice of her injury, thereby triggering the statute of limitations period under New York law, even if she did not yet know the cause of those symptoms with certainty." *Id.* at 9.

The court also agreed that plaintiffs' claims were untimely even under New York's "unknown cause exception" to the ordinary three-year statute of limitations. See N.Y. C.P.L.R. § 214-c(4). The court explained, "[w]here the unknown cause exception is shown to apply, it tolls the statute of limitation for a *maximum* of [six] years, including up to 'five years after the discovery (actual or constructive) of the injury [for the plaintiff] to ascertain its cause' and a further one year from the date of causal discovery for the plaintiff to commence an action." *Haimowitz* Order at 9. Even assuming the exception applied, it "only could have extended the limitations period on [Ms. Haimowitz]'s tort claims from three-years to a maximum of six years—that is, Ms. Haimowitz would have had at most five years from August 2002 to determine the cause of her injuries (i.e., that they were due to her use of Aredia), and then an additional year to actually commence this action against Novartis." *Id.* at 10. Therefore, Ms. Haimowitz's claims were untimely under the exception because the action was not commenced until December 2009—more than seven years after the latest date by which Ms. Haimowitz's tort claims had accrued. *Id.* Finally, Judge Keenan held that plaintiffs' remaining warranty claims were also untimely under New York's applicable four-year statute of limitations. *Id.* at 11–12.

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