UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to:

***Bartlett v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-0170**

DISPOSITIVE MOTIONS ORDER NO. 10

Application of the Ohio Tort Reform Act

This matter is before the Court on Defendant's Motion to Apply the Ohio Tort Reform Act to the Bartlett Trial (ECF No. 3975), Plaintiff's Memorandum in Opposition (ECF No. 4125), and Defendant's Reply (ECF No. 4182). For the reasons set forth below, the Court **DENIES** Defendant's Motion.

I.

The plaintiffs in this multidistrict ("MDL") all bring personal injury, battery, emotional distress, and punitive damages claims against Defendant E.I. du Pont de Nemours and Company ("DuPont") for injuries they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8") discharged from DuPont's Washington Works plant. DuPont began releasing C-8 into the environment around the Washington Works plant in the 1950s and it contaminated the water supply in several water districts in Ohio and West Virginia, including the Tuppers Plains-Chester Water District in Ohio ("Tuppers Plains").

Plaintiff Carla Marie Bartlett's trial is scheduled for September 14, 2011. She was diagnosed with kidney cancer and, as a result, had surgery to remove a portion of one of her kidneys in 1997. Ms. Bartlett consumed drinking water from Tuppers Plains between approximately1983 to 1989 and 1993 to the present.

On August 31, 2001, a group of individuals filed a state court action in West Virginia against DuPont captioned *Leach v. E. I. du Pont de Nemours & Co.*, No. 01-C-698 (Wood County W. Va. Cir. Ct.) The plaintiffs in the *Leach* case asserted a variety of claims, including claims for "physical" and "bodily" injury against DuPont arising from DuPont's contamination with C-8 of drinking water supplies near its Washington Works Plant (*Leach* Am. Class Action Compl. ¶¶ 65, 90, 100; ECF No. 820-5.) The *Leach* complaint included allegations that DuPont had released C-8 into local water supplies, that C-8 was "carcinogenic," and that the C-8 contamination had made and/or continued to make "class members physically ill and otherwise physically harmed, and/or ha[s] caused and continue[s] to cause . . . fear of significantly increased risk of cancer . . . among . . . class members." (*Id.* ¶¶ 7-8, 41.)

In March 2002, it was first revealed to the public in newspaper articles that Tuppers Plains was one of the local water supplies contaminated with C-8. (Aff. of Robert A. Bilott in Supp. ("Bilott Aff."), ECF No. 4125-1; Ex. A, ECF No. 4125-2.) On April 10, 2002, all liability issues related to each of the claims in the *Leach* case, including DuPont's liability for personal injuries, were certified to proceed as a class action on behalf of a class defined as "all persons whose drinking water is or has been contaminated with [C-8] attributable to releases from DuPont's Washington Works plant" ("Class Members"). *Leach v. E. I. du Pont de Nemours & Co.*, No. 01-C-608, 2002 WL 1270121, at *1 (Wood Cty. W. Va. Cir. Ct. 2002).

In November 2004, DuPont entered into a settlement with the class with respect to their class claims ("*Leach* Settlement Agreement") and, "following appropriate class-wide notice, objection opportunities, full opt-out opportunities, and a final fairness hearing," received final approval through an order entered by the *Leach* court on February 28, 2005. (Disp. Mot. Order No. 3 ("DMO3") at 2 – 3; ECF No.3551.)

In connection with the *Leach* Settlement Agreement, DuPont and the Class Members jointly implemented a court-approved class notice plan in December 2004, which included direct-mail written notice to all Class Members explaining the Settlement Agreement, along with repeated publication of notice in a dozen local newspapers serving the class area and in two nation-wide publications ("Class Notice"). (Bilott Aff. Ex. C at 11–14.) The Class Notice alerted Class Members that those who drank water from any impacted local water supply (including Tuppers Plains) for more than one year prior to December 4, 2004, would be entitled to certain immediate benefits from DuPont in connection with that C-8 exposure, including DuPont's agreement to pay for the prompt removal of C-8 from such water supplies. (Class Notice at 1–2; ECF No. 820-11.)

The Class Notice also specifically advised Class Members that all of the "personal injury and wrongful death claims that the Class Members may have against DuPont relating to their C-8 exposure will be retained and preserved, pending the outcome" of a unique process created and agreed to by the parties under the *Leach* Settlement Agreement for identifying whether and when any such claims could either be actively litigated against DuPont through the filing of individual Class Member cases, or would be released and dismissed. *Id.* at 3–5. It was explained that this determination would depend on decisions by an independent scientific panel jointly selected and

created by the parties ("Science Panel") who would be charged with classifying diseases as either being the subject of a "Probable Link Finding" or a "No Probable Link Finding." *Id.*

The December 2004 Class Notice further explained that, in exchange for certain benefits under the *Leach* Settlement Agreement, Class Members were agreeing not to pursue their personal injury claims against DuPont until such time as the Science Panel completed its disease classification work and, once that work was completed, Class Members would be free to pursue all such disease claims that the Science Panel classified as being subject to a "Probable Link Finding." *Id.* Class Members also were advised at that time that "the running of the statute of limitations with respect to all such" personal injury claims "will be tolled from August 30, 2001 [the date of the filing of the *Leach* Complaint] through and including the date that the Science Panel" finishes its disease classifications. *Id.* at 5. The personal injury claims at issue were specifically defined as including "all claims … whether asserted or not, accrued or not, and known or unknown, for personal injury." *Id.* at 5.

In November of 2012, *Leach* Class Members were notified that the Science Panel issued a Probable Link Finding for, inter alia, kidney cancer. (Short-Form Publication Class Notice, ECF No. 820-12; Direct Mail Class Notice, ECF No. 1152-16.)

Through such notices, the Class Members were further advised that the "tolling of the statute of limitations set forth in the Settlement Agreement will expire on January 28, 2013 for any claims that Class Members are permitted to pursue under the Settlement relating to the Human Disease identified above for which the Science Panel delivered a 'Probable Link' finding." *Id.* Thus, in 2013, following issuance of those notices, Ms. Bartlett filed the instant individual action to pursue her claim against DuPont for her kidney cancer.

II.

On May 20, 2015, this Court issued DMO 3 in which it determined the law that would apply to the plaintiffs in this MDL. (ECF No. 3551.) In that order, the Court has held that Ohio Plaintiffs such as Ms. Bartlett, who live in and were allegedly injured in Ohio, are subject to Ohio law.

Under the Ohio Tort Reform Act of 2004, effective April 7, 2005, the Ohio Revised Code was amended to, *inter alia*, cap the amount of noneconomic damages recoverable in tort actions and to cap the amount of punitive damages. Ohio Rev. Code §§ 2315.1–21. As the Court recognized in DMO 3, "Ohio's tort reform statute does not apply retroactively." (DMO 3 at 12) (citing Ohio Rev. Code § 1.48) ("A statute is presumed to be prospective in its operation unless expressly made retrospective."; *Heffelfinger v. Connolly*, No. 3:06-CV-2823, 2009 WL 112792, at *2 (N.D. Ohio Jan. 15, 2009) (finding no retroactive application of the Act); *see also Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 105 (1988) (setting out principles for evaluating retroactivity of statutes); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 31 (2008) (no retroactive application of provisions of the Ohio Tort Reform Act of 2004). Thus, application of the damage limitations in the Ohio Tort Reform Act "hinges on the accrual date of [an] Ohio Plaintiff['s] injury." (DMO 3 at 21.)

III.

DuPont contends that the Tort Reform Act and its damages caps apply to Ms. Bartlett's claims because her claims accrued after April 7, 2005, the statute's effective date. DuPont premises its argument on Ohio's statute of limitations for bodily injury claims based upon toxic chemical exposure, which incorporates a discovery rule:

[A] cause of action for bodily injury . . . that is caused by exposure to hazardous

> or toxic chemicals . . . accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

Ohio Rev. Code § 2305.10(B)(1).

DuPont maintains that Ms. Bartlett was not informed by competent medical authority that her kidney cancer is related to her exposure to C-8 until the Science Panel issued its Probable Link Finding relating to kidney cancer in 2012. Ms. Bartlett responds that the analysis of when the statute of limitations began to run on her claim is a separate and distinct one from the analysis of when a claim arose for the purpose of application of the Ohio Tort Reform Act. As to the latter inquiry, Ms. Bartlett maintains that her claim arose well before the effective date of the Tort Reform Act. This Court agrees.

"Courts have routinely held that the relevant date for determining whether the [Tort Reform Act] applies is the date the conduct giving rise to the plaintiff's cause of action occurred." *Heffelfinger,* 2009 WL 112792 at *3; *see also Blair v. McDonagh*, , 177 Ohio App.3d 262, 282 (Ohio Ct. App. 2008) ("[A] court cannot apply [the Tort Reform Act] to causes of action that arose before the statute's effective date even if some of the conduct giving rise to the cause of action occurred after the [statute's] effective date."). Indeed, three cases from this Court have made clear that determining when a claim arises or accrues for purposes of determining application of the Ohio Tort Reform Act depends on "whether the initial injury took place before . . . April 7, 2005," regardless of when the plaintiff may have actually discovered or "should have" discovered the injury. *Liming v. Stryker Corp.*, No. 1:11-CV-00788, 2012 WL 1957287, at *3 (S.D. Ohio May 31, 2012) (accrual of claim occurred before effective date of the Act when injuries occurred in 2001, even though plaintiff did not become aware of his cause of

action until 2009); *Troyer v. I-Flow Corp.,* No. 1:11-CV-00045, 2011 WL 2517031, at *4 (S.D. Ohio June 23, 2011) (same); *Edwards v. Warner-Lambert*, No. 2:05-cv-657, 2011 WL 5914008, at *4-5 (S.D. Ohio Nov. 28, 2011) (evidence existed supporting plaintiff's argument that his cause of action accrued within meaning of the Act in 2004, because his injuries occurred between 2002 and 2004, even though he did not become aware of his causes of action until after April 7, 2005)).

DuPont points out, however, that there is a split of authority in this District on this issue. DuPont relies upon *Musgrave v. Breg*, Inc., No. 2:09-cv-01029, 2011 WL 5299489 (S.D. Ohio Nov. 4, 2011), which held that the date for determining when the statute of limitations begins to run is the same date that a claim arose for purposes of application of the Tort Reform Act. The *Breg* court explained:

> [U]nder Ohio law, there is no meaningful distinction between a claim "arising" or "accruing." Indeed, those concepts are synonymous, as the Ohio Supreme Court unequivocally stated:
>
> > Pursuant to R.C. 2305.10, the two-year period of limitations begins to run when a cause of action for bodily injury "arose," while the R.C. 2305.11(B)(1) statute of limitations for "medical claims" begins to run when a cause of action "accrued." However, we believe that the terms "arose" and "accrued" are synonymous and that the rule of discovery long recognized in Ohio as applicable to the "accrual" of causes of action should be applied to the R.C. 2305.10 statute of limitations for claims of hospital negligence in credentialing a physician.
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> *Browning v. Burt,* 66 Ohio St.3d 544 (Ohio 1993). Because the Ohio Supreme Court has so held, Plaintiffs' claim in this case that a cause of action "arises" at one time (when an injury is discovered, according to Plaintiffs) but "accrues" at a later time (when a competent medical professional informs the plaintiff of the relation between his or her injury and a medical device), is incorrect as a matter of law.

Musgrave v. Breg, Inc., No. 2:09-CV-01029, 2011 WL 5299489, at *4 (S.D. Ohio Nov. 4, 2011).[1]

The Ohio Supreme Court case relied upon in *Breg* is distinguishable from the issue before this Court in an important way. That is, the *Browning* court interpreted as synonymous the terms "arise" and "accrue" utilized in *two statute of limitations provisions*: Ohio Revised Code § 2305.10 provides the limitations period for bodily injury begins when a claim accrues, and § 2305.11 provides the limitations period for medical claims is triggered when a claim arose. In that context, this Court agrees that "the rule of discovery long recognized in Ohio" as extending a statute of limitations to a date that the cause of action was or reasonably should have been discovered is appropriately applied to either statute of limitations. There is certainly no meaningful distinction between negligently caused bodily injury claims and negligently caused medical claims for statute of limitations purposes. Thus, it is not surprising that Ohio does not make such a distinction in its case law.

As the *Troyer* court correctly explained, however, the analysis DuPnt asks this Court to adopt conflates the test for when a claim accrues or arose for purposes of application of the Ohio Tort Reform Act with the test for determining when a claim accrues for purposes of statute of limitations analyses. As Judge Spiegel explained in *Troyer*:

> Defendant is conflating the statute of limitations and the effective date of [the Ohio Tort Reform Act]'s abrogation of common law claims. Ultimately the issue is whether the initial injury took place before the amendment to the [Ohio Tort Reform Act] on April 7, 2005, and it did. The fact that Plaintiff did not discover his injury until 2010 brings his Complaint within the statute of limitations.

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[1] The most recent decision from this District disagrees with that reasoning. *Liming*, 2012 WL 1957287, at *3 ("Respectfully, the Court simply disagrees with the *Breg* court and reaffirms the position the Court has taken in its previous pain pump cases: "the issue is whether the initial injury took place before the amendment to the [Ohio Tort Reform Act] on April 7, 2005, and it did. The fact that Plaintiff did not discover his injury until [2009], brings his Complaint within the statute of limitations.").

2011 WL 2517031, *4. Or, framed another way, DuPont asks this Court to impose a discovery rule into the determination of whether the Ohio Tort Reform Act applies to a cause of action.

As to the determination of the triggering date for application of the Tort Reform Act, many courts have appropriately considered it a distinct concept from the date triggering a statute of limitations, particularly one that incorporates a discovery rule. For example, a sister district court explained that "[t]he point at which a cause of action 'arises' can be different from the point at which it 'accrues.' A cause of action 'accrues,' or 'come[s] into existence as an enforceable claim,' when the injured party becomes aware, or reasonably should become aware, of the injury and the cause. . . . a cause of action 'arises' when the act or omission complained of occurs." *Abramson v. P.J. Currier Lumber Co.,* No. 00-315-M, 2001 WL 274772, *1, 2001 U.S. Dist. LEXIS 1039, at *2–3 (D.N.H. Jan. 17, 2001). Other courts agree with this reasoning and recognize a distinction. *See e.g.*, *Kaplan v. Shure Bros.*, 153 F.3d 413, 422 (7th Cir. 1998) ("[A] cause of action can 'arise' before it 'accrues.'"); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510 n.4 (8th Cir. 1983) (noting that "in certain contexts, the words 'accrue' and 'arise' have significantly different meanings"); *Vine v. Republic of Iraq*, 459 F. Supp.2d 10, 21 (D. D.C. 2006) *reversed in nonrelevant part at* 529 F.3d 1187 (D.C. Cir. 2008) (a claim "arises" on the date that the action in question occurred, yet does not "accrue" until a prior disability to suit is removed); *Heinrich v. Sweet*, 118 F.Supp.2d 73, 79-80 (D. Mass. 2000) (explaining the "subtle, yet important, difference between the two words"); *Adobe Lumber, Inc. v. Hellman*, CIV 05-1510-WBS-PAN, 2008 WL 4615285, *4 (E.D. Cal., Oct. 17, 2008) ("The discovery rule allows claims based on distinct types of wrongdoing to accrue at different times, even though the claims arise out the same injury to a plaintiff."). Consequently, the Court finds that the

discovery rule does not apply to the determination of when a claim arose for purposes of determining whether the Tort Reform Act applies to a cause of action.

The Court must, therefore, determine when Ms. Bartlett's injury arose – not when she discovered it was connected to her ingestion of C-8. DuPont began releasing C-8 into the environment in which Ms. Bartlett lived in the 1950s; she began drinking the water in Tuppers Plains in 1983; and she was diagnosed with kidney cancer in 1997. Thus, the Court finds that Ms. Bartlett's injury arose at the very latest in 1997 when she was diagnosed with kidney cancer. Accordingly, the damages caps encompassed in the Ohio Tort Reform Act do not apply to Ms. Bartlett's claims.

However, even if DuPont were correct and the test for determining whether the Tort Reform Act applied to Ms. Bartlett's claims incorporated a discovery rule, her claims still accrued prior to the enactment of the Act. As discussed in detail above, the Ohio statute of limitations does not define the accrual date only as the date upon which competent medical authority informed a plaintiff that she has an injury related to some toxic chemical exposure, but also incorporates a discovery rule. The statute provides that "the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure" may also be determinative. Ohio Rev. Code § 2310 (either medical authority information or discovery, "whichever date comes first").

In 2001 Ms. Bartlett was named as part of a purported class of individuals when drank water contaminated with C-8, which the complaint alleged was a carcinogen. In 2002, it was first revealed in newspaper articles that Tuppers Plains was one of the local water supplies contaminated with C-8. In December 2004 a direct-mailed written notice was sent to all members of the *Leach* Class that explained the *Leach* Settlement Agreement and alerted the

members that if they drank water from any impacted local water supply (including Tuppers Plains) for more than one year prior to December 4, 2004, they would be entitled to DuPont's prompt removal of C-8 from such water supplies. The Class Notice also specifically advised Class Members that they may have personal injury and wrongful death claims against DuPont relating to their C-8 exposure. At that same time, there were repeated publications of notice in a dozen local newspapers serving the class area and in two nation-wide publications. There is no genuine issue of material fact on this question.

The Court finds that through the exercise of reasonable diligence any resident of Tupper Plains who was a *Leach* Class Member and who had been diagnosed with kidney cancer in 1997 would have known before April 7, 2005 that her injury was related to her exposure to C-8. Thus, even if this Court were incorrect in its assessment of the date a claim arose for purposes of application of the Tort Reform Act, that Act still would not apply to Ms. Bartlett's claims.

IV.

Based on the foregoing, the Court **DENIES** Defendant's Motion to Apply the Ohio Tort Reform Act to the Bartlett Trial. (ECF No. 3975.)

IT IS SO ORDERED.

9-8-2015
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE