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<th>SCHNEIDERMAN</th>
<th>Same as A 4627, Weinstein (MS)</th>
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| Currently on Senate Committee Agenda |
| Senate Standing Committee on Codes |
| Senator Eric T. Schneiderman, Chair |
| 10:30 AM, Tuesday, February 10, 2009 |
| Room 123 CAP |

| 02/05/09 | REFERRED TO CODES |

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SCHNEIDERMAN

Amd S214-a, CPLR

Alters the statute of limitations for medical, dental or podiatric malpractice to two years and six months from the time when a person knows or reasonably should have known of the alleged negligent act or omission and knows or reasonably should have known that such negligent act or omission has caused an injury; revives previously dismissed medical, dental and podiatric malpractice actions for a one year period.
AN ACT to amend the civil practice law and rules, in relation to the limitations of time within which an action for medical, dental or podiatric malpractice accrues; and providing for one year revival of previously dismissed actions

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

Section 1. Section 214-a of the civil practice law and rules, as amended by chapter 485 of the laws of 1986, is amended to read as follows:

§ 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions. An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. For the purpose of this section the term “continuous treatment” shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient’s condition. For the purpose of this section the term “foreign object” shall not include a chemical compound, fixation device or prosthetic aid or device, accrual of any such action. For purposes of this section, the accrual of an action occurs when one knows or reasonably should have known of the alleged negligent act or omission and knows or reasonably should have known that said negligent act has caused an injury or, within two years and six months of the last treatment where

EXPLANATION—Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.
1 there is continuous treatment for the same illness, injury or condition
2 which gave rise to the accrual of an action.

§ 2. Every action for personal injury or death sounding in medical,
4 dental or podiatric malpractice, which is barred as of the effective
5 date of this act or which was dismissed prior to the effective date of
6 this act solely because the applicable period of limitations has or had
7 expired, is hereby revived and an action thereon may be commenced
8 provided such action is commenced within one year from the effective
9 date of this act; provided however, that this section shall not revive
10 any action for damages for a wrongful act, neglect or default causing a
11 decedent’s death and could have been brought pursuant to section 5-4.1
12 of the estates, powers and trusts law, and provided, further, that for
13 any revived claim or action, including third party claims and claims for
14 contribution pursuant to article 14 of the civil practice law and rules
15 for which a notice of claim is or would have been required by law as a
16 condition precedent to the claim or action, a notice of claim shall not
17 be required.

§ 3. This act shall take effect immediately.
NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S1729
SPONSOR: SCHNEIDERMAN

TITLE OF BILL:
An act to amend the civil practice law and rules, in relation to the limitations of time within which an action for medical, dental or podiatric malpractice accrues; and providing for one year revival of previously dismissed actions.

PURPOSE OF BILL:
To amend the statute of limitations for medical, dental or podiatric malpractice to include a discovery of injury rule.

SUMMARY OF PROVISIONS OF BILL:
Amends Section 214-a of the Civil Practice Law and Rules to accomplish the above purpose. Section 2 of the bill revives those actions which would have been time barred or dismissed under the present statute of limitations for a period of one-year after the enactment of this legislation. Similar revival legislation has recently been adopted by the legislature in the area of exposure to toxic substances, with regard to D.E.S.

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 not known and is not discovered until the statute of limitation has run.

Most often this injustice is seen in the cancer cases. 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 the 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 and there has been no continuous course of treatment, such as in the case of a radiologist, the patient’s claim is time barred, despite the fact that he or she could not have known that he or she was injured.

In the current climate of breast implant litigation, an equally grave injustice is being thrust upon women in New York State. Under the current statute of the law the victims of breast implantation can bring an action against the device manufacturers but not sue the physicians and surgeons. More than two and a half years has passed from the date of the last treatment for the implant, despite the fact that the surgeon bears some degree of responsibility to the breast implant recipients. The proposed legislation cures this injustice.

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 Tort. 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.

The New York State Trial Lawyers Association strongly supports the proposed amendment of the statute of limitations as it applies to accrual of medical malpractice actions.

LEGISLATIVE HISTORY:
2006 - S.962 - Referred to Codes
2005 - S.962 - Referred to Codes

FISCAL IMPLICATIONS:
None.

EFFECTIVE DATE:
Immediately.