

06-2071-cv
In re Ephedra Products Litigation

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: November 8, 2007 Final Submission: April 7, 2009
5 Question Certified: March 17, 2010)

6
7 Docket No. 06-2071-cv

8 -----
9 JOHN GIORDANO,

10 Plaintiff-Appellant,

11 - v -

12 MARKET AMERICA, INC., and THE CHEMINS COMPANY, INC.,

13 Defendants-Appellees.
14 -----

15 Before: McLAUGHLIN, CABRANES, and SACK, Circuit Judges.

16 Appeal from a judgment of the United States District
17 Court for the Southern District of New York (Jed S. Rakoff,
18 Judge) in a personal injury action alleging injuries resulting
19 from the ingestion of ephedra. The district court granted
20 summary judgment to the defendants on statute-of-limitations
21 grounds after concluding that the extended limitations period
22 provided by N.Y. C.P.L.R. § 214-c(4) was inapplicable to the
23 plaintiff's claim because his injuries were not caused by "latent
24 effects" of exposure to ephedra. We remanded the cause to the
25 district court to permit it to determine whether, for purposes of
26 N.Y. C.P.L.R. § 214-c(4), there was a genuine issue of material
27 fact for determination by a trier of fact as to whether

1 sufficient technical, scientific, or medical knowledge of the
2 cause of injury had been discovered, identified, or determined
3 during the original three-year limitations period for filing a
4 claim. Upon the court's response in the affirmative, the appeal
5 returned to us. Resolving it now requires answering three
6 separate questions of New York law, each of which has yet to be
7 addressed by New York courts and involves questions of public
8 policy that New York courts are better situated to resolve than
9 are we. We therefore certify the following three questions to
10 the New York Court of Appeals: (1) Are the provisions of N.Y.
11 C.P.L.R. § 214-c(4) providing for an extension of the statute of
12 limitations in certain circumstances limited to actions for
13 injuries caused by the latent effects of exposure to a substance?
14 (2) Can an injury that occurs within 24 to 48 hours of exposure
15 to a substance be considered "latent" for these purposes? (3)
16 What standards should be applied to determine whether a genuine
17 issue of material fact exists for resolution by a trier of fact
18 as to whether "technical, scientific or medical knowledge and
19 information sufficient to ascertain the cause of [the
20 plaintiff's] injury" was "discovered, identified or determined"
21 for N.Y. C.P.L.R. § 214-c(4) purposes?

22 BRIAN J. ISAAC, Pollack, Pollack, Isaac
23 & De Cicco, for Sanders, Sanders, Block
24 & Woycik, P.C. (Joseph B. Viener, of
25 counsel), New York, NY, for Plaintiff-
26 Appellant.

27 ANDREW ZAJAC, Fiedelman & McGaw,
28 Jericho, NY, for Defendant-Appellee
29 Market America, Inc.

1 Edward J. Stolarski, Jr., Wilbraham,
2 Lawler & Buba, Philadelphia, PA, for
3 Defendant-Appellee The Chemins Company,
4 Inc.

5 SACK, Circuit Judge:

6 Plaintiff John Giordano appeals from a judgment of the
7 United States District Court for the Southern District of New
8 York (Jed S. Rakoff, Judge) in a personal injury action filed by
9 Giordano against defendants Market America, Inc., and The Chemins
10 Company, Inc. Giordano alleges that dietary supplements
11 containing the substance ephedra that the defendants supplied
12 caused his March 1999 cerebral aneurism and subsequent medical
13 events. On April 10, 2006, the district court granted summary
14 judgment for the defendants on the grounds that Giordano's
15 lawsuit, filed on July 28, 2003, was barred by the three-year
16 statute of limitations set forth in N.Y. C.P.L.R. § 214. See In
17 re Ephedra Prods. Liab. Litig., Nos. 04 M.D. 1598, 05 Civ. 1018,
18 2006 WL 944705, at *1, 2006 U.S. Dist. LEXIS 18691, at *1-2
19 (S.D.N.Y. Apr. 10, 2006) ("Ephedra II"). The court concluded
20 that the one-year extension of the statute of limitations
21 provided for in N.Y. C.P.L.R. § 214-c(4) for situations in which
22 the cause of the injury was not discovered during the original
23 three-year period to file suit was inapplicable because section
24 214-c(4) is limited to latent injuries and that injuries caused
25 by ephedra were not latent. Id.

26 The plaintiff appealed from the district court's
27 judgment and we heard oral argument on November 8, 2007. On

1 August 18, 2008, we remanded for the limited purpose of asking
2 the district court to determine whether a genuine issue of
3 material fact existed as to whether an additional requirement of
4 N.Y. C.P.L.R. § 214-c(4) had been met, namely that Giordano
5 "allege and prove that technical, scientific or medical knowledge
6 and information sufficient to ascertain the cause of his injury
7 had not been discovered, identified or determined" prior to the
8 expiration of the otherwise applicable three-year statute of
9 limitations. See Giordano v. Mkt. Am., Inc., 289 F. App'x 467,
10 469 (2d Cir. 2008) (summary order). On February 24, 2009, in
11 response to our question and with expressed doubt as to the
12 standard to be applied under New York law, the district court
13 concluded that under any possible standard there was a genuine
14 issue of material fact as to whether sufficient information had
15 been "discovered, identified or determined" at the relevant time.
16 See In re Ephedra Prods. Liab. Litig., 598 F. Supp. 2d 535, 537
17 (S.D.N.Y. 2009) ("Ephedra III").

18 The applicability of N.Y. C.P.L.R. § 214-c(4) to
19 Giordano's claims is now before this Court again. The resolution
20 of this issue requires us to answer three separate questions of
21 New York law: (1) Are the provisions of N.Y. C.P.L.R. § 214-c(4)
22 providing for an extension of the statute of limitations in
23 certain circumstances limited to actions for injuries caused by
24 the latent effects of exposure to a substance?; (2) Can an injury
25 that occurs within 24 to 48 hours of exposure to a substance be
26 considered "latent" for these purposes?; (3) What standards

1 should be applied to determine whether a genuine issue of
2 material fact exists for resolution by a trier of fact as to
3 whether "technical, scientific or medical knowledge and
4 information sufficient to ascertain the cause of [the
5 plaintiff's] injury" was "discovered, identified or determined"
6 for N.Y. C.P.L.R. § 214-c(4) purposes? Resolving the third
7 question requires us to decide both the level of certainty
8 required for knowledge to be deemed "sufficient to ascertain" the
9 cause of an injury, and the community that must possess this
10 knowledge -- that is, whether the knowledge must be reasonably
11 available to a plaintiff and his or her lawyers, or whether it
12 must be reasonably available to the scientific, technical, or
13 medical community.

14 In this instance, the district court found that "some
15 studies suggesting a possible connection between ephedra and
16 injuries similar to Giordano's were published in reputable
17 scientific journals that were publicly available" during the
18 three-year period after discovery of Giordano's injury, but that
19 there was "a lack of awareness of the risks by even the most
20 interested members of the public" during that time. Ephedra III,
21 598 F. Supp. 2d at 537 n.1.

22 The three questions of statutory interpretation raised
23 by this appeal have not been answered conclusively by New York
24 courts. They, in turn, implicate questions of public policy
25 pertaining to how the New York Legislature intended to balance
26 the rights of those suffering personal injuries with the rights

1 of defendants and with the need for judicial economy. New York
2 courts are better situated to answer these questions than are we.
3 We therefore certify them to the New York Court of Appeals.

4 **BACKGROUND**

5 Pursuant to an order of the Judicial Panel on
6 Multidistrict Litigation, see 28 U.S.C. § 1407, the district
7 court that decided this case is charged with managing some 500
8 civil actions, including this one, involving claims of "personal
9 injury or wrongful death caused by dietary supplements containing
10 ephedra." In re Ephedra Prods. Liab. Litig., 393 F. Supp. 2d
11 181, 184 (S.D.N.Y. 2005) ("Ephedra I"). Ephedra is a plant
12 containing "ephedrine alkaloids." Id. at 185. Until relatively
13 recently, products containing ephedra were widely used by
14 consumers seeking "weight loss, increased energy and improved
15 athletic performance." Id.; see also id. at 189 n.4.

16 The Food, Drug, and Cosmetic Act ("FDCA") prohibits
17 "[t]he introduction or delivery for introduction into interstate
18 commerce of any food . . . that is adulterated" 21
19 U.S.C. § 331(a). Section 402 of the FDCA provides that a "food
20 shall be deemed to be adulterated . . . [i]f it is a dietary
21 supplement or contains a dietary ingredient that . . . presents a
22 significant or unreasonable risk of illness or injury"
23 Id. § 342(f)(1)(A). On February 11, 2004, the United States Food
24 and Drug Administration ("FDA") effectively banned ephedra by
25 declaring dietary supplements containing ephedrine alkaloids

1 "adulterated" under the FDCA. See 21 C.F.R. § 119.1; Final Rule
2 Declaring Dietary Supplements Containing Ephedrine Alkaloids
3 Adulterated Because They Present an Unreasonable Risk ("FDA Final
4 Rule"), 69 Fed. Reg. 6788 (Feb. 11, 2004). This rule became
5 effective on April 12, 2004. Id.

6 The district court's opinion in Ephedra I granting in
7 part and denying in part motions to exclude expert testimony
8 pursuant to Rule 702 of the Federal Rules of Evidence and Daubert
9 v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), provides
10 background regarding the alleged effects of ephedra.

11 According to the consolidated plaintiffs' experts:

12 [E]phedra can cause injury in susceptible
13 people by increasing their blood pressure and
14 heart rate. . . . [A]n individual's blood
15 pressure and heart rate normally vary over
16 the course of a day, week and season,
17 and . . . the effects of ephedra in an
18 individual also vary over the course of the
19 day in relation to when it was ingested and
20 the individual's metabolism. If ephedra can
21 sometimes be a contributing cause of heart
22 attack, stroke, or sudden death in
23 susceptible people, the injury might be
24 triggered by the coincidence of peak events,
25 such as transient peak blood pressure due to
26 other causes occurring at the same time as
27 peak ephedrine blood level. The longer the
28 duration of repeated exposure, the more
29 likely such coincidence will occur.

30 Ephedra I, 393 F. Supp. 2d at 192 n.8.

31 According to the FDA:

32 People who use dietary supplements containing
33 ephedrine alkaloids are at increased risk for
34 serious adverse events, including heart
35 attack, stroke, and death. Susceptible
36 individuals (e.g., those with coronary artery
37 disease or heart failure), many of whom may

1 not know they have underlying illnesses, are
2 at increased risk for adverse events because
3 these products can cause abnormal heart
4 rhythms (pro-arrhythmic effect), even when
5 the product is ingested at recommended doses
6 over a short course (one or a few doses).
7 Over longer periods of use, the risk for
8 adverse health effects to the general
9 population, including susceptible
10 individuals, increases further due to a
11 sustained elevation in blood pressure.

12 FDA Final Rule, 69 Fed. Reg. at 6825.

13 Before the district court, all parties

14 agree[d] that a recommended dose of a product
15 containing ephedra . . . often raises the
16 user's blood pressure and/or heart rate
17 during the first few hours after ingestion,
18 and they agree[d] that any increase
19 maintained over years in a person's usual
20 blood pressure or heart rate significantly
21 increases the risk of cardiac injury and
22 stroke.

23 Ephedra I, 393 F. Supp. 2d at 193-94 (emphasis omitted).

24 The district court also noted in its decision granting
25 summary judgment to the defendants here that "ephedra acts within
26 a few hours to cause a transitory elevation of blood pressure and
27 heart rate and a temporary constriction of certain blood
28 vessels." Ephedra II, 2006 WL 944705, at *1, 2006 U.S. Dist.
29 LEXIS 18691, at *3-*4.

30 For approximately two years, ending on March 15, 1999,
31 Giordano used "ThermoChrome 5000," a dietary supplement
32 containing ephedra. Defendant-Appellee The Chemins Company,
33 Inc., manufactured ThermoChrome 5000; defendant-appellee Market
34 America, Inc., distributed it.

1 On March 15, 1999, Giordano suffered a cerebral
2 aneurysm. He underwent neurosurgery to repair it, but suffered
3 two strokes on March 17, 1999 -- two days later. He was left
4 with substantial cognitive, motor, and visual deficits.
5 Giordano's physicians were unable to determine the cause of the
6 aneurysm or the strokes.

7 Nearly four years later, in February 2003, Giordano
8 became aware of news reports that the sudden death of
9 major-league baseball player Steve Bechler might have been linked
10 to his use of an ephedra-based dietary supplement. According to
11 Giordano's affidavit, these news reports were his first
12 indication that ThermoChrome 5000 may have been a cause of his
13 aneurysm and strokes.

14 Some five months later, on July 28, 2003, Giordano
15 instituted this action in New York State Supreme Court. The
16 defendants removed it to the United States District Court for the
17 Southern District of New York on the basis of diversity of
18 citizenship. See 28 U.S.C. §§ 1332, 1441. They subsequently
19 moved for summary judgment on statute-of-limitations grounds. On
20 April 10, 2006, the district court granted the summary judgment
21 motions. Ephedra II, 2006 WL 944705, at *2, 2006 U.S. Dist.
22 LEXIS 18691, at *4. Giordano appealed.

23 After hearing argument on November 8, 2007, we remanded
24 pursuant to the procedures set forth in United States v.
25 Jacobson, 15 F.3d 19, 22 (2d Cir. 1994), for the limited purpose

1 of having the district court decide whether a genuine issue of
2 material fact existed as to whether an additional requirement of
3 N.Y. C.P.L.R. § 214-c(4) had been met, namely that the plaintiff
4 "allege and prove that technical, scientific or medical knowledge
5 and information sufficient to ascertain the cause of his injury
6 had not been discovered, identified or determined" prior to the
7 expiration of the otherwise-applicable three-year statute of
8 limitations. See Giordano, 289 F. App'x at 469. Had the
9 district court concluded that such knowledge had been discovered,
10 identified or determined prior to the expiration of the
11 otherwise-applicable statute of limitations, and had we affirmed
12 on that issue on appeal, we would have been in a position to
13 affirm the district court's summary judgment without further
14 addressing the other questions raised on appeal.

15 Although it expressed doubt as to what standard to
16 apply, the district court answered this question in the
17 affirmative under any standard. Ephedra III, 598 F. Supp. 2d at
18 537. It also suggested that, on further appeal, we might "want
19 to consider certification to the [New York] Court of Appeals to
20 sort this all out." Id. at 536-37. Lacking the authority
21 itself to certify questions to the Court of Appeals, the
22 district court was "bound to follow the interpretation of the
23 Appellate Division in the absence of persuasive evidence that
24 the New York Court of Appeals would rule differently if

1 presented with the issue," id. at 537, which the district court
2 did.

3 The defendants now seek review of the district court's
4 findings with respect to the existence of sufficient technical,
5 scientific or medical knowledge to ascertain the cause of injury,
6 and also seek affirmance of the district court's prior holding
7 that N.Y. C.P.L.R. § 214-c(4) was inapplicable because ephedra
8 did not cause any latent injuries. See Appellee Market America
9 Ltr. Br. at 5-8 (filed Mar. 19, 2009); Appellee Chemins Co. Ltr.
10 Br. at 1-5 (filed Mar. 20, 2009). In the alternative, the
11 defendants seek certification of these issues to the New York
12 Court of Appeals. See, e.g., Appellee Market America Ltr. Br. at
13 8.

14 Giordano, conversely, seeks affirmance of the district
15 court's findings with respect to the existence of sufficient
16 knowledge of causation, and reversal of the court's findings
17 regarding latency. He opposes certification to the New York
18 Court of Appeals at this time. See Appellant's Aff. in Opp. to
19 Appellees' Ltr. Br. at 1-6 (filed Mar. 31, 2009). His preference
20 for resolution of these issues without the further expenditure of
21 time and money with an uncertain result is understandable.

22 **DISCUSSION**

23 New York Civil Practice Law and Rules § 214-c(4)
24 extends the statute of limitations for filing a personal injury
25 claim in specified circumstances if the cause of injury was not
26 and could not reasonably have been discovered during the three-

1 year period for filing a claim that is set forth in section
2 214(5). Applying section 214-c(4) to the facts at hand requires
3 answering three separate questions, the first of which is whether
4 section 214-c(4) is limited to injuries that are "latent."
5 Provided that the answer to that question is in the affirmative,
6 the second question is whether injuries caused by ephedra, which
7 are typically if not universally experienced within twenty-four
8 hours of its ingestion, are or may be "latent" for section 214-
9 c(4) purposes. If so, the third question is whether a genuine
10 issue of material fact exists for the trier of fact as to whether
11 technical, medical, or scientific knowledge sufficient to
12 ascertain the cause of Giordano's injury had been discovered,
13 identified, or determined during the otherwise-applicable three-
14 year period. Each of these questions involves an issue of law
15 that has not previously been addressed by New York courts.

16 In addressing the third question, we must take into
17 account that "some studies suggesting a possible connection
18 between ephedra and injuries similar to Giordano's were published
19 in reputable scientific journals that were publicly available"
20 during the three-year period after discovery of Giordano's
21 injury, but that there was "a lack of awareness of the risks by
22 even the most interested members of the public" during that time.
23 Ephedra III, 598 F. Supp. 2d at 537 n.1.

24 The third question is further complicated by two
25 ambiguities regarding the standard that should be used in
26 answering it. First, it is unclear what level of certainty is

1 required for knowledge to be "sufficient to ascertain" the cause
2 of an injury. Second, it is unclear what relevant group must
3 possess this knowledge, i.e., the plaintiff and his or her
4 lawyers, or the scientific, technical, or medical community.

5 I. Standard of Review

6 "We review a district court's grant of summary judgment
7 de novo. Summary judgment is warranted only where, construing
8 all the evidence in the light most favorable to the non-movant
9 and drawing all reasonable inferences in that party's favor,
10 there is no genuine issue as to any material fact and the movant
11 is entitled to judgment as a matter of law." McBride v. BIC
12 Consumer Prods. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009)
13 (citations, internal quotation marks, and ellipsis omitted). The
14 same standard applies whether summary judgment is granted on the
15 merits or on an affirmative defense such as the statute of
16 limitations. See Buttry v. Gen. Signal Corp., 68 F.3d 1488, 1492
17 (2d Cir. 1995). Although summary judgment may, of course, be an
18 appropriate means for disposing of an action that is barred by
19 the statute of limitations, it may not be granted if there is a
20 genuine issue of fact as to when the limitations period began or
21 expired and that fact is material to the question of whether the
22 statute has run. See BellSouth Telecomm., Inc. v. W.R. Grace &
23 Co.-Conn, 77 F.3d 603, 609 (2d Cir. 1996) (citing 10A Charles
24 Alan Wright et al., Federal Practice and Procedure § 2734, at
25 419, 421 (2d ed. 1983)).

26 II. New York's Statute of Limitations

1 Because our subject-matter jurisdiction rests on
2 diversity of citizenship and Giordano's cause of action arose in
3 New York, we apply New York's substantive law and statute of
4 limitations. See Guaranty Trust Co. v. York, 326 U.S. 99, 109-11
5 (1945); Stuart v. Am. Cyanamid Co., 158 F.3d 622, 626-27 (2d Cir.
6 1998), cert. denied, 526 U.S. 1065 (1999).

7 New York Civil Practice Law and Rules § 214 sets forth
8 the generally applicable limitations period for personal-injury
9 claims: "[A]n action to recover damages for a personal injury,"
10 N.Y. C.P.L.R. § 214(5), "must be commenced within three years,"
11 id. § 214, "except as provided in[, inter alia,] section[] 214-
12 c," id. § 214(5).

13 Two provisions of section 214-c are relevant here.

14 Section 214-c(2) provides:

15 Notwithstanding the provisions of section
16 214, the three year period within which an
17 action to recover damages for personal injury
18 or injury to property caused by the latent
19 effects of exposure to any substance or
20 combination of substances, in any form, upon
21 or within the body or upon or within property
22 must be commenced shall be computed from the
23 date of discovery of the injury by the
24 plaintiff or from the date when through the
25 exercise of reasonable diligence such injury
26 should have been discovered by the plaintiff,
27 whichever is earlier.

28 Id. § 214-c(2). Section 214-c(4) provides:

29 Notwithstanding the provisions of
30 subdivisions two and three^[1] of this

¹ Section 214-c(3) applies to claims, unlike this one, in which the law requires a "notice of claim [to] be filed or presented within a specified period." N.Y. C.P.L.R. § 214-c(3). It is not relevant to this action.

1 section, where the discovery of the cause of
2 the injury is alleged to have occurred less
3 than five years after discovery of the injury
4 or when with reasonable diligence such injury
5 should have been discovered, whichever is
6 earlier, an action may be commenced or a
7 claim filed within one year of such discovery
8 of the cause of the injury; provided,
9 however, if any such action is commenced or
10 claim filed after the period in which it
11 would otherwise have been authorized pursuant
12 to subdivision two or three of this section
13 the plaintiff or claimant shall be required
14 to allege and prove that technical,
15 scientific or medical knowledge and
16 information sufficient to ascertain the cause
17 of his injury had not been discovered,
18 identified or determined prior to the
19 expiration of the period within which the
20 action or claim would have been authorized
21 and that he has otherwise satisfied the
22 requirements of subdivisions two and three of
23 this section.

24 Id. § 214-c(4).

25 It is undisputed that Giordano did not commence
26 litigation within three years of being exposed to ephedra, and
27 that his suit was thus not commenced within the general
28 limitations period provided by section 214. He ingested the
29 product containing ephedra for two years up to and likely
30 including March 15, 1999. He did not file suit, however, until
31 July 28, 2003, more than three but less than five years later.

32 Moreover, Giordano's claim is not covered by section
33 214-c(2) because he did not assert it within three years of
34 discovering the injury alleged to have been caused by ephedra --
35 the aneurysm, which occurred on March 15, 1999, and the strokes,
36 which occurred two days thereafter. The question for us, then,
37 is whether section 214-c(4), which in certain circumstances

1 provides for a one-year limitations period running from the date
2 of discovery of the cause of an injury, saves Giordano's claim.

3 Because section 214-c and its subsections provide
4 exceptions to the general statute of limitations, Giordano bears
5 the burden of showing that one of the exceptions applies to his
6 claim. See Bano v. Union Carbide Corp., 361 F.3d 696, 710 (2d
7 Cir. 2004); Burger v. Union Carbide Corp., 304 A.D.2d 700, 701,
8 758 N.Y.S.2d 381, 383 (App. Div. 2003) (per curiam).

9 III. The District Court's Decisions

10 The district court granted summary judgment to the
11 defendants based on its conclusion that the foregoing exceptions
12 to New York's three-year statute of limitations did not apply.
13 Ephedra II, 2006 WL 944705, at *1, 2006 U.S. Dist. LEXIS 18691,
14 at *4.

15 The court determined at the outset that New York courts
16 do not allow equitable tolling of the three-year statute of
17 limitations. Id., 2006 WL 944705, at *1, 2006 U.S. Dist. LEXIS
18 18691, at *2-*3 (citing In re N.Y. County DES Litig., 89 N.Y.2d
19 506, 511, 678 N.E.2d 474, 477, 655 N.Y.S.2d 862, 865 (1997)).
20 Consequently, any extension of or exception to the statute of
21 limitations must be found in section 214-c. Id. Giordano does
22 not take issue with this conclusion.

23 The district court then noted that section 214-c(2),
24 but not section 214-c(4), expressly applies only to injuries
25 caused by the "latent effects" of exposure to a substance.
26 Despite the absence of the term "latent effects" in section 214-

1 c(4), the section governing discovery of the cause of injury more
2 than three but less than five years after discovery of the
3 injury, the district court concluded that that section is also
4 limited to injuries caused by "latent effects." The district
5 court's conclusion was based primarily on the several references
6 in section 214-c(4) to section 214-c(2), the section containing
7 the latent effects language. Id., 2006 WL 944705, at *1, 2006
8 U.S. Dist. LEXIS 18691, at *3 (citing Bano, 361 F.3d at 709).

9 The district court then concluded as a matter of law,
10 based on the undisputed evidence before it, that ephedra's
11 alleged effects on Giordano were not "latent." First, the court
12 observed that Giordano "discovered his stroke immediately upon
13 its occurrence." Id., 2006 WL 944705, at *1, 2006 U.S. Dist.
14 LEXIS 18691, at *3. Second, the court noted that the evidence
15 admitted at the Daubert hearings in the consolidated cases showed
16 that ephedra's effects were short-term, usually occurring within
17 a few hours of ingestion. Id., 2006 WL 944705, at *1, 2006 U.S.
18 Dist. LEXIS 18691, at *3-4. The district court reasoned that
19 "[t]o hold § 214-c applicable to a stroke allegedly caused by
20 ephedra would effectively eliminate the statute's limitation to
21 'latent effects.'" Id., 2006 WL 944705, at *1, 2006 U.S. Dist.
22 LEXIS 18691, at *4.

23 Rather than decide the latency question unnecessarily,
24 we remanded with instruction to the district court to determine
25 "whether there is a genuine issue of material fact as to whether
26 sufficient scientific or medical knowledge was available to

1 Giordano such that he could have ascertained the cause of his
2 injury prior to the expiration of the three-year limitations
3 period provided by section 214-c(2)." Giordano, 289 Fed. App'x
4 at 469.

5 In answering this question in the affirmative, the
6 district court recognized two separate ambiguities in the statute
7 and, as noted, suggested that certification to the New York Court
8 of Appeals -- an approach not available to the district court --
9 might be appropriate. Ephedra III, 598 F. Supp. 2d at 536-37.

10 First, the court viewed the statute as ambiguous as to
11 whether sufficient knowledge to "ascertain" the cause of an
12 injury requires certainty as to the cause, as suggested by the
13 dictionary definition of the term, or requires "something akin to
14 finding a probable connection," which the court understood to be
15 the way in which the New York Appellate Division, Third
16 Department, had construed the term. Id. at 536.

17 Second, the district court viewed the statute to be
18 ambiguous as to "precisely who has to know what before § 214-c
19 applies." Id. at 537 n.1. The court was unable to determine
20 from the face of the statute whether the knowledge of the cause
21 of injury needed to be reasonably available to the scientific and
22 medical communities or reasonably available to the plaintiff.
23 Id. The court recognized that some studies did exist linking
24 ephedra to injuries similar to Giordano's as early as 1996, but
25 also observed that most lawsuits related to these studies were
26 not filed until after 2002, "suggesting, at least, a lack of

1 awareness of the risks by even the most interested members of the
2 public prior to that time." Id.

3 Despite these problematic aspects of the statute, the
4 district court found a genuine issue of material fact as to
5 whether the requisite knowledge existed because "there are
6 genuine issues of material fact remaining to be resolved on
7 virtually any view one takes of the meaning of § 214-c(4)." Id.
8 at 537.

9 IV. Analysis

10 A. "Latent Effects"

11 1. The Presence of a Latency Requirement in Section 12 214-c(4).

13 We find insufficient guidance in the text of section
14 214-c(4), its legislative history, and the New York State case
15 law interpreting it to decide whether there is an implied
16 requirement that injuries be latent in order for the provision to
17 apply.

18 There is indeed support for the district court's
19 conclusion that section 214-c(4) is limited to injuries caused by
20 the "latent effects" of exposure even though that subsection does
21 not expressly use those words. The proviso clause of section
22 214-c(4) permits an action to be brought if it is
23 "commenced . . . after the period in which it would otherwise
24 have been authorized pursuant to [section 214-c(2)]" and requires
25 the plaintiff to demonstrate that "he has otherwise satisfied the
26 requirements of [section 214-c(2)]." N.Y. C.P.L.R. § 214-c(4).

1 If Giordano's injuries were not "caused by the latent effects of
2 exposure" to ephedra, N.Y. C.P.L.R. § 214-c(2), then the terms of
3 section 214-c(2) were never applicable to him: His action would
4 not "otherwise have been authorized pursuant to [section 214-
5 c(2)]" and he cannot be said to have "otherwise satisfied the
6 requirements [of section 214-c(2)]." Id. § 214-c(4).

7 But there are persuasive arguments to the contrary.
8 Latency was expressly made a requirement in section 214-c(2) but
9 omitted from section 214-c(4). As these sections are drafted in
10 largely parallel fashions, with the first relating to discovery
11 of an injury and the second relating to discovery of the cause of
12 an injury, we find it plausible that this omission was
13 intentional.

14 The notion that the legislature intentionally omitted
15 this requirement is consistent with the differing purposes of the
16 subsections. Section 214-c(2) governs injuries that are not
17 discovered until after the three-year statute of limitations. A
18 requirement of latency serves a limiting purpose by eliminating
19 claims where the injury could have been but was not discovered,
20 and in so doing places an added onus on the plaintiff to comply
21 with the otherwise-applicable statute of limitations by timely
22 prosecuting actions based on injuries that are discoverable.
23 Were this requirement not in the statute, courts would presumably
24 be forced to decide cases in which there was a dispute over
25 whether a plaintiff was reasonably diligent in discovering an
26 injury. By adding a latency requirement, courts are provided

1 with more of a bright-line rule that serves the purpose of
2 promoting judicial economy while nonetheless permitting suit to
3 be brought in some circumstances for injuries that were not
4 discoverable within the three-year time period.

5 Section 214-c(4), on the other hand, governs injuries
6 whose causes could not have been reasonably known during the
7 otherwise-applicable three-year time period for filing a claim.
8 In these cases, a requirement of latency does not promote the
9 diligent prosecution of claims. The question under section 214-
10 c(4) is whether sufficient information was available regarding
11 the cause of an injury to reasonably expect the plaintiff to have
12 taken timely legal action. Whether the injury was latent or
13 patent is irrelevant to the answer. In contrast to the latency
14 requirement of section 214-c(2), which prods plaintiffs to be
15 diligent in discovering injuries, a latency requirement would
16 have little effect on the purposes of section 214-c(4) inasmuch
17 as it has little impact on the diligence with which plaintiffs
18 make themselves aware of scientific information concerning the
19 cause of an injury.

20 The New York Court of Appeals is, in our view, the
21 appropriate judicial body to decide, if it chooses to do so,
22 whether there is an implicit latency requirement in section 214-
23 c(4), because the decision requires an analysis of the
24 legislative history, intent of the legislature, and broader
25 purposes of that section.

26 2. The Latency of Ephedra.

1 Even were there a latency requirement, we are not
2 entirely persuaded that the purported effects of ephedra are not
3 "latent" within the meaning of section 214-c. The district court
4 relied upon our comment in Bano that "[s]ection 214-c modifies
5 § 214 with respect to a claimed injury that was not discoverable
6 immediately upon its occurrence," Bano, 361 F.3d at 709, to
7 conclude that because Giordano "discovered his stroke immediately
8 upon its occurrence," his injury was not a latent effect of
9 ephedra. Ephedra II, 2006 WL 944705, at *1, 2006 U.S. Dist.
10 LEXIS 18691, at *3. The claimed injuries in this case -- the
11 aneurism and strokes² -- were, as the district court noted,
12 immediately discoverable when they occurred. But section 214-c
13 refers not to a latency period between injury and its discovery,
14 but to "personal injury . . . caused by the latent effects of
15 exposure." N.Y. C.P.L.R. § 214-c(2). In Giordano's case, expert
16 testimony indicates that the effects of exposure to ephedra may
17 not have manifested themselves for hours. The fact that the
18 effects of the exposure -- the aneurysm and strokes -- were
19 discoverable immediately upon their occurrence do not appear to
20 us to matter. The proper question, we think, is whether
21 ephedra's effects were "latent."

² Under section 214-c, the term "injury" refers to the manifestation of the harmful effects of exposure to a substance, not the exposure itself. See Sweeney v. Gen. Printing Inc., 210 A.D.2d 865, 865, 621 N.Y.S.2d 132, 133 (App. Div. 1994) ("The wording of CPLR 214-c makes clear that the injury to which it refers is distinct from the actual exposure to the harmful substance, for the injury is, by definition, caused by the latent effects of that exposure, and consequently must be something that occurs later." (citation omitted)).

1 Addressing this question, the district court observed:

2 [R]esearchers in a study of ephedra and
3 stroke admitted into evidence during the
4 Daubert hearings did not consider stroke
5 patients to have been relevantly exposed to
6 ephedra unless they used it within three days
7 before their stroke; indeed, because of
8 ephedra's short-acting properties, the
9 researchers studied strokes that occurred
10 within 24 hours after using ephedra.

11 Ephedra II, 2006 WL 944705, at *1, 2006 U.S. Dist. LEXIS 18691,
12 at *4. The court compared the time lapse of "a few weeks"
13 between exposure and manifest injury in Bano, where we treated
14 the injury as latent, Bano, 361 F.3d at 709-10, with the time
15 lapse between exposure to ephedra and manifest injury, which
16 appears to be one day, more or less. The district court decided
17 that the "few weeks" before manifestation of injury in Bano
18 rendered the effect "latent" whereas the approximately twenty-
19 four hours in the present case did not. Ephedra II, 2006 WL
20 944705, at *1, 2006 U.S. Dist. LEXIS 18691, at *4.

21 But nothing in the text of section 214-c suggests to us
22 that a relatively short period of latency, such as the likely
23 period of time between Giordano's exposure to the ephedra that
24 allegedly caused his injury and the manifestation of the injury
25 itself, is insufficient to invoke section 214-c(4). The statute,
26 we assume for this purpose, requires that Giordano's injury be
27 caused by the "latent effects" of exposure to ephedra, but says
28 nothing about the time period that must elapse between exposure
29 and manifestation of injury in order for the effects of exposure
30 to be considered "latent."

1 Dictionary definitions of "latent" are, not
2 surprisingly, many and various.³ In substance, however, they
3 seem uniformly to treat "latent" as a term referring to a thing
4 or condition that is present but not evident or manifest.
5 Although the period of time between exposure and the
6 manifestation of injury was relatively short in Giordano's case,
7 it was nonetheless a period of time in which ephedra was present
8 in Giordano's body, but its effects were not evident or manifest.
9 The language of the statute thus suggests that the purported
10 effects of ephedra may, at least, be "latent," and that section
11 214-c may therefore be applicable.

12 Looking to the legislative purpose for the enactment of
13 section 214-c as part of New York's 1986 tort reform package, the
14 New York Court of Appeals has observed that one "goal of the
15 Legislature in adopting CPLR 214-c was to provide relief to
16 injured New Yorkers whose claims would otherwise be dismissed for
17 untimeliness simply because they were unaware of the latent
18 injuries until after the limitations period had expired." N.Y.
19 County DES Litig., 89 N.Y.2d at 513-14, 678 N.E.2d at 478, 655
20 N.Y.S.2d at 866 (citations and internal quotation marks omitted).

³ They include "Concealed; dormant," Black's Law Dictionary 898 (8th ed. 2004); "Present or potential but not evident or active," The American Heritage Dictionary of the English Language 961 (9th ed. 2009); "Hidden, concealed . . . ; present or existing, but not manifest, exhibited, or developed," 8 The Oxford English Dictionary 680-81 (2d ed. 1989); and "[E]xisting in hidden, dormant, or repressed form but usually capable of being evoked, expressed, or brought to light : existing in posse : not manifest," Webster's Third New International Dictionary of the English Language Unabridged 1275 (2002).

1 But in addition to seeking to toll the time period between
2 exposure and manifestation of injury, "the Legislature [also]
3 anticipated and made specific provision for the problem that
4 arises when the plaintiff has discernable bodily symptoms but the
5 toxic etiology of those symptoms has not yet been discovered."
6 Id. at 512, 678 N.E.2d at 477, 655 N.Y.S.2d at 865.

7 Thus, it appears likely to us that by enacting section
8 214-c, the New York legislature sought to address both situations
9 in which injury is not evident immediately upon exposure to a
10 harmful substance and situations in which the cause of physical
11 symptoms cannot be discovered within the otherwise-applicable
12 limitations period. In light of these dual goals, we see no
13 reason why Giordano is not entitled to prove that his injury was
14 caused by the "latent effects" of his exposure to ephedra such
15 that he may invoke section 214-c(4)'s one-year limitation period
16 running from his alleged discovery that ephedra was its cause.

17 Rather than make a definitive decision on this
18 difficult issue of New York law, however, we certify it to the
19 New York Court of Appeals.

20 B. Technical, Scientific, or Medical Knowledge Requirement

21 Even if Giordano surmounts whatever "latency" barriers
22 his invocation of section 214-c(4) may face, to withstand the
23 motion for summary judgment, he must also establish a genuine
24 issue of material fact for the trier of fact to decide as to
25 whether "technical, scientific or medical knowledge and
26 information sufficient to ascertain the cause of his injury had

1 not been discovered, identified or determined" prior to the
2 expiration of the three-year limitations period that would
3 otherwise run from the date of discovery of his injury as
4 provided in section 214-c(4). The district court found this
5 requirement satisfied even though it expressed serious doubt as
6 to what standard it should use in evaluating whether the
7 knowledge or information in question was "sufficient to
8 ascertain" the cause of the injury. That is, the district court
9 expressed its doubt as to both what level of certainty the
10 knowledge or information had to be established, and who was
11 required to possess the knowledge or information. Ephedra III,
12 598 F. Supp. 2d at 536-37.

13 Discussing the level of certainty required by the
14 statute, the district court observed an ambiguity as to whether
15 sufficient knowledge to "ascertain" the cause of an injury
16 requires certainty as to cause, as suggested by the dictionary
17 definition of the term, or, alternatively, "something akin to
18 finding a probable connection," which the court understood to be
19 the way in which the New York Appellate Division, Third
20 Department, had construed the term. Id. at 536 (citing Pompa v.
21 Burroughs Wellcome Co., 259 A.D.2d 18, 24-25, 696 N.Y.S.2d 587,
22 592 (App. Div. 1999)). Addressing the question of who was
23 required to attain this certainty, the court found the statute
24 ambiguous as to whether the knowledge or information in question
25 needed to be reasonably available to the scientific and medical
26 communities, or reasonably available to the plaintiff and his or

1 her lawyers. Id. at 537 n.1 (seeking guidance on "precisely who
2 has to know what before § 214-c applies"). Nevertheless, the
3 district court held that there was a genuine issue of material
4 fact as to whether sufficient knowledge existed under any
5 standard. Id. at 537.

6 The district court made two findings that render the
7 standard applied relevant to the outcome of the question of
8 sufficient knowledge. On the one hand, the court found that some
9 studies did exist linking ephedra to injuries similar to
10 Giordano's as early as 1996. Id. at 537 n.1. On the other hand,
11 it noted that most lawsuits related to these studies were not
12 filed until after 2002, "suggesting, at least, a lack of
13 awareness of the risks by even the most interested members of the
14 public prior to that time." Id. Under this set of facts, the
15 standard applied could affect the outcome of this case in
16 multiple ways.

17 With regard to who must possess the knowledge, if the
18 statute requires that knowledge of causation must be reasonably
19 available to the scientific community, then sufficient knowledge
20 may have been available as early as 1996, rendering section 214-
21 c(4) inapplicable to Giordano. If, however, the standard is that
22 knowledge of causation be reasonably available to the plaintiff
23 and his or her lawyers, then the district court's finding that
24 most related lawsuits were filed after 2002 may create a genuine
25 issue of fact as to whether the knowledge in question was

1 reasonably available during the three-year period following
2 injury and section 214-c(4) may apply.

3 As to the requisite standard of certainty, studies
4 suggesting the relevant causal link between ephedra and the
5 injuries it causes began to appear in 1996, the FDA banned it in
6 2004, and no study has yet confirmed that ephedra causes injuries
7 similar to those suffered by Giordano. See Ephedra I, 393 F.
8 Supp. 2d at 192-96. In light of these facts, if the standard is
9 that information suggesting causation be available, then the
10 information may have been available as early as 1996 and
11 Giordano's claim may be time-barred. If the standard is that
12 information arguably constituting scientific proof of causation
13 be available, then the question is more difficult and later
14 studies or the timing of the FDA's ban may mean the information
15 was available at a later date, in which case Giordano's claims
16 may or may not be time-barred. If the standard tracks the plain
17 meaning of the statute and requires that sufficient information
18 to "ascertain" the cause of injury be reasonably available, then
19 the fact that studies have still not conclusively proven that
20 ephedra causes injuries similar to Giordano's may make section
21 214-c(4) inapplicable for that reason.

22 Although we have in the past attempted to interpret the
23 intention of the New York Legislature in this regard, we have not
24 done so definitively. See, e.g., Freier v. Westinghouse Elec.
25 Corp., 303 F.3d 176, 207 (2d Cir. 2002), cert. denied, 538 U.S.
26 998 (2003) (observing that the New York Legislature likely

1 "intended CPLR § 214-c(4) to refer only to scientific knowledge
2 that was 'reasonably available' to the plaintiff"). In Freier,
3 we recognized that the meaning of "discovered, identified or
4 determined" for the purposes of section 214-c(4) was far from
5 clear. Id. at 206 ("[I]s 'scientific knowledge' 'discovered'?
6 Is 'scientific knowledge' 'determined' -- and if so, does the
7 word 'determined' connote a consensus?"). We therefore look to
8 the New York Court of Appeals for guidance.

9 V. Certification to the New York Court of Appeals

10 The local rules of the Second Circuit provide that
11 "[i]f state law permits, the court may certify a question of
12 state law to that state's highest court." 2d Cir. R. 27.2; see
13 also Prats v. Port Auth. of N.Y. & N.J., 315 F.3d 146, 150-51 (2d
14 Cir. 2002). Certification to the New York Court of Appeals is
15 discretionary, see McCarthy v. Olin Corp., 119 F.3d 148, 153 (2d
16 Cir. 1997), but we have recognized at least four factors as
17 relevant in guiding that discretion.

18 First, we have decided certification to be appropriate
19 where the New York Court of Appeals has not spoken clearly on an
20 issue and we are unable to predict, based on other decisions by
21 New York courts, how the Court of Appeals would answer a certain
22 question. See Kuhne v. Cohen & Slamowitz, LLP, 579 F.3d 189, 198
23 (2d Cir. 2009); O'Mara v. Town of Wappinger, 485 F.3d 693, 698
24 (2d Cir. 2007). We have found no conclusive precedents to answer
25 the three questions certified here.

1 Second, we have concluded that certification is
2 appropriate where the "statute's plain language does not indicate
3 the answer." Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d
4 47, 51 (2d Cir. 1992); accord Colavito v. N.Y. Organ Donor
5 Network, Inc., 438 F.3d 214, 229 (2d Cir. 2006). Here, the plain
6 meaning of the statute does not definitively answer any of the
7 three questions certified. Latency is not explicit in the text
8 of N.Y. C.P.L.R. § 214-c(4), nor does section 214-c(2), which
9 does include an explicit latency requirement, sufficiently define
10 the term to apply it to the effects of ingesting ephedra.
11 Similarly, it is not clear from the text of section 214-c(4) what
12 level of certainty is required or what group is implicated by the
13 subsection's requirement that sufficient knowledge exist to
14 ascertain the cause of the injury. This factor therefore
15 supports certification.

16 Third, we have thought certification to be appropriate
17 where the decision reflects value judgments and important public
18 policy choices that the New York Court of Appeals is better
19 situated than we are to make. See Colavito, 438 F.3d at 229;
20 Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris USA,
21 Inc., 344 F.3d 211, 221 (2d Cir. 2003). The policy questions at
22 issue here directly implicate the New York Legislature's desire
23 to balance, inter alia, a victim's ability to recover for his or
24 her damages, a defendant's ability to live free from fear of
25 litigation, and judicial economy. By enacting section 214-c(4),
26 the New York Legislature created a limited exception to the

1 general rule that personal injury cases be brought within three
2 years. The New York Court of Appeals has more familiarity with
3 and is more competent to interpret the boundaries of that
4 exception.

5 The three questions certified are central to the
6 outcome of this case, inasmuch as each is a hurdle that Giordano
7 must overcome in order for section 214-c(4) to apply and his
8 action to be timely, and resolution of each depends upon the
9 guidance we now seek from the New York Court of Appeals.

10 The balance of these factors therefore militates in
11 favor of certification in this case.

12 **CONCLUSION**

13 For the foregoing reasons, we certify the following
14 three questions to the New York Court of Appeals:

- 15 1. Are the provisions of N.Y. C.P.L.R. § 214-c(4)
16 providing for an extension of the statute of
17 limitations in certain circumstances limited to
18 actions for injuries caused by the latent effects
19 of exposure to a substance?
- 20 2. Can an injury that occurs within 24 to 48 hours of
21 exposure to a substance be considered "latent" for
22 these purposes?
- 23 3. What standards should be applied to determine
24 whether a genuine issue of material fact exists
25 for resolution by a trier of fact as to whether
26 "technical, scientific or medical knowledge and

1 information sufficient to ascertain the cause of
2 [the plaintiff's] injury" was "discovered,
3 identified or determined" for N.Y. C.P.L.R. § 214-
4 c(4) purposes?

5 With respect to the last question, we especially seek
6 guidance that will enable us to answer the question of whether
7 sufficient knowledge exists to ascertain a cause of injury where
8 "some studies suggesting a possible connection between ephedra
9 and injuries similar to [the plaintiff's] were published in
10 reputable scientific journals that were publicly available"
11 during the three-year period after the discovery of the
12 plaintiff's injury, but where there was "a lack of awareness of
13 the risks by even the most interested members of the public"
14 during that time. Ephedra III, 598 F. Supp. 2d at 537 n.1.

15 In formulating three specific questions for
16 certification we do not intend to limit the scope of the Court of
17 Appeals' analysis and we invite the Court of Appeals to expand
18 upon or alter these questions as it should deem appropriate. See
19 Kirschner v. KPMG LLP, 590 F.3d 186, 195 (2d Cir. 2009).

20 Pursuant to New York Court of Appeals Rule 500.27 and
21 United States Court of Appeals for the Second Circuit Rule 27.2,
22 it is hereby ORDERED that the Clerk of this Court transmit to the
23 Clerk of the Court of Appeals of the State of New York this
24 opinion as our certificate, together with a complete set of the
25 briefs, appendix, and record filed in this Court by the parties.
26 We direct the parties to bear equally any fees and costs that may

1 be imposed by the New York Court of Appeals in connection with
2 this certification. This panel will retain jurisdiction of the
3 appeal after disposition of this certification by the New York
4 Court of Appeals.