IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Pérez-Maceira, et al., Plaintiffs, v. Customed, Inc., et al., Defendants.	Civil No. 23-1445 (CVR)

OMNIBUS REPORT AND RECOMMENDATION

Pending before the Court are motions to dismiss the Amended Complaint filed by Customed, Inc. ("Customed"), Medtronic PR, Inc. ("Medtronic"), Edward LifeSciences Technology SARL ("Edward LifeSciences"), and Steri-Tech, Inc., ("Steri-Tech") (collectively, the "Sterilizer Defendants"), Mays Chemical Company of Puerto Rico, Inc. ("Mays") and Balchem Corp. ("Balchem"). Docket Nos. 75, 76, 78, 79. Plaintiffs opposed at Docket No. 83. Defendants replied. Docket Nos. 84, 87, 90, 91. The matters were referred to the undersigned for a Report and Recommendation. Docket No. 92. For the reasons discussed below, I recommend that the Motions to Dismiss at Docket Nos. 76 and 79 be **GRANTED in part and DENIED in part**, and the Motions to Dismiss at Docket Nos. 75 and 78 be **GRANTED**.

I. Legal Standard

A defendant may move to dismiss an action for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must establish "a plausible entitlement to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007); Rodríguez–Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007); Fed. R. Civ. P. 12 (b)(6). A claim is plausible when the facts alleged allow for "a reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 663-64 (2009). The factual allegations must be sufficient "to raise

a right to relief above the speculative level." Twombly, 550 U.S. at 555. In considering a motion to dismiss, the Court must accept the well-pleaded factual allegations in the complaint as true and resolve all inferences in favor of the plaintiffs. Mississippi Pub. Employees' Ret. Sys. v. Bos. Sci. Corp., 523 F.3d 75, 85 (1st Cir. 2008); ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 58 (1st Cir. 2008). The plaintiff "bears the burden of stating factual allegations regarding each element necessary to sustain recovery under some actionable theory." Díaz-O'Neill v. Mun. of Carolina, 2024 WL 3495897, at * 1 (D.P.R. July 22, 2024). The plausibility standard assumes "pleaded facts to be true and read in a plaintiff's favor." Sepúlveda–Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 30 (1st Cir. 2010). But courts need not entertain complaints supported only by "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." Díaz-O'Neill, 2024 WL 3495897, at *1 (cleaned up). Unadorned factual statements and pure speculation are insufficient. Id.

II. Discussion

On August 29, 2023, Jeanette Pérez-Maceira, José Luis Mateo-Pérez, and Lilliam Ortiz filed the original complaint, asserting individual and class claims for personal injuries. Docket No. 1. They alleged to have unknowingly inhaled and been subjected to ethylene oxide ("EtO") emissions for decades, causing them illnesses. EtO is used in the sterilization of medical instruments. The use of EtO in Puerto Rico was approved by the Department of Natural and Environmental Resources and the Environmental Protection Agency. See Docket No. 76 at pp. 3-6. Both agencies have issued permissions to operate to each of the Sterilizer Defendants. Id. On February 9, 2024, the complaint was amended to join seventeen (17) plaintiffs. Docket No. 65. After Defendants pointed to several deficiencies in the amended complaint, the Court granted leave so that plaintiffs could again amend the complaint. Plaintiffs filed the operative complaint on February 29, 2024 ("Amended Complaint"). Docket No. 74. Only ten plaintiffs are included in the Amended Complaint at Docket No. 74: Jeanette Pérez-Maceira, José Luis Mateo-Pérez, Lilliam M. Ortiz, Danisha M. Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, Lianibel Colón-Sánchez, Iris M. Rivera-Vargas, Idalia Vargas-Gratacós, and Juana Castro-Moreno. In the Amended Complaint, Plaintiffs, individually and on behalf of the proposed class (all individuals who have resided, worked, or attended daycare and/or school within a four-mile radius of the facilities of the Sterilizer Defendants beginning on the date of initial emissions of EtO by each of

the Sterilizer Defendants), allege that the Sterilizer Defendants, along with Balchem and Mays,[1] have emitted "substantial quantities of EtO into the air, causing those who live, work, pray, and attend school near their facilities to inhale EtO on a routine basis." Id.

The Amended Complaint alleges that Defendants have released "unsafe and hazardous levels" of EtO into the atmosphere, "poisoning the air in four Puerto Rican communities." Id. at pp. 3, 8. According to Plaintiffs, Defendants (1) have released EtO, (2) contaminated the surrounding neighborhoods with EtO emissions, and (3) caused harm and a significantly increased risk of disease to Plaintiffs. Id. at p. 17. Each plaintiff claiming personal injury was diagnosed with a health condition allegedly caused by Defendants' contamination. These include asthma, breast cancer, thyroid cancer, spina bifida, arthritis, maxillary sinus cancer, uterine cancer, high blood pressure, and melanoma. Docket No. 74 at pp. 18-19. The diagnosis of each plaintiff was made more than a year before the filing of the instant action. Id. Plaintiffs assert eleven (11) causes of actions against Defendants: negligence (count one), gross negligence (count two), public nuisance pursuant to P.R. Laws Ann. tit. 32 § 2761 (count three), strict liability-design defect pursuant to P.R. Laws Ann. tit. 31 § 10807 (count four), strict liability-design defect pursuant to P.R. Laws Ann. tit. 31 § 5141 (count five), strict liability-failure to warn pursuant to P.R. Laws Ann. tit. 31 § 108006 (count six), strict liability-failure to warn pursuant to P.R. Laws Ann. tit. 31 § 5141 (count seven), negligent design defect (count eight), gross negligent design defect (count nine), private nuisance pursuant to P.R. Laws Ann. tit. 32 § 2761 (count ten), and unjust enrichment (count eleven). They seek declaratory relief, compensatory and punitive damages, and the creation of a fund for a medical monitoring program. Id. at pp. 23-38.

1. Streamlining the Claims Against Defendants

Plaintiffs make allegations against Defendants collectively and have thus not alerted Defendants of specific actions attributed to each one. Ordinarily, "a 'complaint should at least set forth minimal facts as to who did what to whom, when, where, and why – although why, when why means the actor's state of mind, can be averred generally.'" Betancourt v. Kimco PR Mgmt.

[1] Although Plaintiffs claim that Balchem is a manufacturer of EtO, Balchem argues that "it has never manufactured EtO. Rather, Balchem repackages EtO and distributes it as a sterilant to third parties[.]" Docket Nos. 75 at p. 3; 83 at p. 29. Similarly, while Plaintiffs claim that Mays is a distributor (Docket No. 74 at p. 7), Mays argues that it merely provides "freight services" to Balchem. Docket No. 78. Whether Balchem is a manufacturer of EtO and Mays is a distributor of EtO is of no consequence at this juncture. There is no dispute that Balchem and Mays do not operate a sterilizing facility in Puerto Rico.

Corp., 2023 WL 6393065, at *5 (D.P.R. Sept. 30, 2023) (quoting Figueroa-Collazo v. Ferrovial Construccion PR, LLC, 2021 WL 4482268, at *9 (D.P.R. Sept. 30, 2021)). Nonetheless, group pleadings are not automatically excluded under Rule 8(a) of the Federal Rules of Civil Procedure. At the motion to dismiss stage, a complaint generally will only be dismissed where it is "'entirely implausible' [ ] for the grouped defendants to have acted as alleged." Id. Adhering to this liberal standard, I proceed to examine the sufficiency of the pleadings for each cause of action asserted by Plaintiffs.

Notwithstanding the foregoing, Plaintiffs' Amended Complaint at Docket No. 74 hinges on the alleged proximity of each individual plaintiff to EtO emissions: the affected plaintiffs are those who live, work, pray, and attend school in the area surrounding the facilities of the Sterilizer Defendants (id. at ¶¶ 3-4) and the affected communities are those surrounding the sterilization facilities (id. at ¶ 66). Defendants urge the Court to dismiss the claims that cannot be attributed to each Defendant. Plaintiffs do not address this request. And indeed, the proposed class is defined and limited to those who "have resided, worked[,] or attended daycare and/or school **within a four-mile radius**" of the sterilizing facilities. Id. at ¶ 96 (emphasis added). It follows that each plaintiff's claims are actionable only against the sterilization facility within four miles of his or her respective home, school, or work. For this reason and pursuant to the allegations in the Amended Complaint, the claims of Jeanette Pérez-Maceira, José Mateo-Pérez, Lilliam Ortiz, Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, Lianibel Colón-Sánchez against Medtronic, Customed, and Edwards LifeSciences should be dismissed because these plaintiffs reside, or have resided, in Salinas, within four miles of Steri-Tech. The claims of Idalia Vargas Gratacós against Steri-Tech, Customed, and Edwards LifeSciences should be dismissed because she resides, or has resided, in Villalba, within four miles of Medtronic. The claims of Juana Castro Moreno claims against Medtronic, Steri-Tech, and Edwards LifeSciences should be dismissed because she resides, or has resided, in Fajardo, within four miles of Customed. And the claims of Iris Rivera-Vargas against Steri-Tech, Medtronic, and Customed should be dismissed because she worked in Añasco from the year 2006 to 2008, within four miles of Edward LifeSciences. The remaining claims are: (1) those of Jeanette Pérez-Maceira, José Mateo-Pérez, Lilliam Ortiz, Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez against Steri-Tech, Balchem, and Mays, (2) those of Idalia Vargas Gratacós against Medtronic, Balchem, and Mays, (3) those of Juana Castro Moreno against Customed, Balchem,

and Mays, and (4) those of Iris Rivera-Vargas against Edward LifeSciences, Balchem, and Mays. I examine the sufficiency of the pleadings as to those claims.

2. Statute of Limitations

Defendants argue that Plaintiffs' claims are barred by the one-year statute of limitations for tort claims because they failed to file suit within a year of their injuries. Docket Nos. 75, 76, 78, 79. Sterilizer Defendants argue that Plaintiffs should have known of their injuries more than a year before filing the lawsuit because, as acknowledged in the Amended Complaint, there have been plenty of articles and reports about the harm of EtO exposure. In the Amended Complaint, Plaintiffs refer to a 2022 Environmental Protection Agency ("EPA") announcement that placed Sterilizer Defendants' facilities in a "red flag" list of sites with higher risk of EtO exposure to Puerto Rico citizens, to a report by the Union of Concerned Scientists issued on February 7, 2023 (the "UCS Report"), regarding EtO exposure in Puerto Rico, and to a 2018 EPA report based on a national air toxic assessment made in 2014 ("2018 NATA"). Docket No. 76 at p. 28. See also Docket No. 74 at ¶¶ 7-8, 47, 90-91. Sterilizer Defendants argue that EPA conducted meetings alerting communities about potential EtO exposure. The meetings took place in Fajardo on January 26, 2023 (Customed), in Villalba on January 24, 2023 (Medtronic), and in Añasco on June 23, 2021 (Edward LifeSciences).[2] Docket No. 76 at p. 29. Plaintiffs have not pointed to the exact date when they became aware of the causal link between Defendants' actions and their injuries. Plaintiffs generally rely on the notion that the average citizen cannot comprehend technical issues, such as the effect of EtO emissions. See Docket No. 83 at p. 18 ("Expecting an average plaintiff to sufficiently investigate such a complex issue is unreasonable;" "Defendants fail to provide the means via which a reasonable and prudent person would learn about this EtO exposure."). And Plaintiffs sustain that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq., the American Pipe tolling doctrine, and the continuous violation doctrine apply.

Sterilizer Defendants move the Court to take judicial notice of the UCS Report and the EPA meetings in Fajardo on January 26, 2023, in Villalba on January 24, 2023, and in Añasco on June 23, 2021. These are offered to establish when the relevant information became publicly available to establish a date certain when Plaintiff knew or should have known of the cause of their alleged injuries. Under Rule 201(b) of the Federal Rules of Evidence, a district court can take

[2] Steri-Tech did not argue that EPA meetings took place in Salinas during the relevant time.

judicial notice of a fact that is not in dispute when it: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Plaintiffs have not opposed the request for judicial notice, nor have they disputed the date of the UCS Report or of the EPA meetings. I take judicial notice of the fact that the UCS Report was published and made available online on February 7, 2023, and that EPA meetings took place in Fajardo on January 26, 2023, in Villalba on January 24, 2023, and in Añasco on June 23, 2021.

A federal court sitting in diversity must apply state substantive law. Suero-Algarín v. CMT Hosp. HIMA San Pablo Caguas, 957 F.3d 30, 39 (1st Cir. 2020). For diversity tort actions such as this one, Puerto Rico substantive law controls. The claims before the Court arise from Puerto Rico's general tort statute.[3] Article 1802 of the Puerto Rico Civil Code provided that "[a] person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage done." P.R. Laws Ann. tit. 31 § 5141. A one-year statute of limitations applies to claims under Article 1802 or Article 1536. That period ordinarily begins to accrue "at the time that the aggrieved party knows (or should have known) of both his [or her] injury and the identity of the party who caused it." González-Figueroa v. J.C. Penney Puerto Rico, Inc., 568 F.3d 313, 318 (1st Cir. 2009). See P.R. Laws Ann. tit. 31 § 5298 (the statute of limitations for filing a tort claim under Article 1802 commences when "the aggrieved person had knowledge thereof."). A plaintiff has knowledge of the injury when he or she has notice of (1) the injury and (2) the person who caused it. Rodríguez-Suris v. Montesinos, 123 F.3d 10, 13 (1st Cir. 1997). A person may have actual knowledge or may be otherwise deemed to be on notice. "Actual knowledge" occurs when a plaintiff is "aware of all the necessary facts and the existence of a likelihood of a legal cause of action." Alejandro-Ortiz v. Puerto Rico Elec. Power Auth., 756 F.3d 23, 27 (1st Cir. 2014) (quoting Rodríguez-Suris, 123 F.3d at 14). A plaintiff "is deemed to be on notice of [his or] her cause of action if [he or] she is aware of certain facts that, with the exercise of due diligence, should lead [him or] her to acquire actual knowledge of [his or] her cause of action." Rivera-Carrasquillo v.

[3] Although a new Civil Code was adopted in 2020, the Puerto Rico general tort statute did not suffer substantial changes. See González-Ortiz v. Puerto Rico Aqueduct and Sewer Auth., 2024 WL 3759659, at *10-11 (D.P.R. Aug. 12, 2024); QBE Seguros v. Morales-Vázquez, 2023 WL 3766078, at *3 (D.P.R. June 1, 2023). Because the events giving rise to this action allegedly took place before and after the 2020 Civil Code came into effect, I refer to both. See Orellano-Laureano v. Inst. Médico del Norte, Inc., 2023 WL 4532418, at *6 n.5 (D.P.R. July 13, 2023); Candelaria-Fontanez v. Federal Bureau of Prisons, 2023 WL 2895150, at *3 (D.P.R. April 11, 2023); Wiscovitch v. Cruz, 2022 WL 1272153, at n.15 (D.P.R. Jan 28, 2022).

Centro Ecuestre Madrigal, Inc., 812 F.3d 213, 216 (1st Cir. 2016) (cleaned up). If a plaintiff asserts a cause of action more than a year after the injury, "[he or] she bears the burden of proving that [he or] she lacked the requisite 'knowledge' at the relevant times" and that the statute of limitations period of one year has been tolled. Alejandro-Ortiz, 756 F.3d at 27 (quoting Hodge v. Parke Davis & Co., 833 F.2d 6, 7 (1st Cir. 1987)).

Defendants posit that Plaintiffs' allegations and causes of action sounding in tort were filed after the one-year limitations period elapsed and that they failed to demonstrate lack of knowledge during the statutory period to allow them to file suit more than a year after being diagnosed with their respective health conditions. Plaintiffs counter that CERCLA preempts Puerto Rico's tort statute of limitations,[4] the American Pipe tolling doctrine applies to plaintiffs who joined the suit after the original complaint was filed on August 29, 2023, and that the continuous tort doctrine applies due to the ongoing emission of EtO by the Sterilizer Defendants. Docket No. 83. Overall, Plaintiffs sustain that they "should not be required – as a threshold matter – to have played Sherlock Holmes and Dr. Watson, delving into complex investigations to discover their own claims" given

[4] Plaintiffs' arguments that CERCLA preempts Puerto Rico's statute of limitations can be easily discarded. Section 9658 of the CERCLA provides:

> Actions under State law for damages from exposure to hazardous substances
>
> (a) State statutes of limitations for hazardous substance cases
>
> (1) Exception to State statutes
>
> In the case of any action brought under State law for personal injury [...] which [is] caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. § 9658. The effect of this provision is "to ensure that if a state statute of limitations provides a commencement date for claims of personal injury resulting from release of contaminants that is earlier than the commencement date defined in § 9658, then plaintiffs benefit from the more generous commencement date." O'Connor v. Boeing North America, Inc., 311 F.3d 1139, 1146 (9th Cir. 2002). But naturally, if the commencement date under state law is later than under federal law, or they are the same, the state statute of limitations applies. Id. Such is the case here. Under both CERCLA and Puerto Rico law, the discovery rule provides that the one-year statute of limitations does not begin to accrue until a plaintiff discovers, or reasonably could have discovered, his or her claim. Because both CERCLA and Puerto Rico standards are the same, the Puerto Rico one-year statute of limitations applies and CERCLA is unhelpful for Plaintiffs. See id.

that the harm caused by exposure to EtO "is not nearly as widely known or generally understood." Docket No. 83 at pp. 18-19.

These few things are clear: the alleged injuries occurred one year prior to the filing of this suit, Plaintiffs acknowledge that they learned of the identity of the alleged tortfeasors in 2022, and the suit was first filed on August 29, 2023. Also, Defendants seem to concede that the original plaintiffs— Jeanette Pérez-Maceira, José Luis Mateo-Pérez, and Lilliam Ortiz— filed the complaint within a year of the 2022 EPA announcement of the facilities causing higher risk of EO exposure to Puerto Rico citizens. Plaintiffs allege that it was at that time, in the year 2022, when they first became aware of the entities responsible for their alleged injuries, triggering the commencement of the limitations period. Docket No. 74 at p. 20. Plaintiffs further argue that EtO exposure is a "complex issue," not easy to investigate, and that Defendants did not provide any warnings against EtO exposure. Docket No. 83 at p. 18. Customed, Medtronic, and Edward LifeSciences claim that the EPA held meetings in the municipalities where they operate their facilities informing citizens about EtO exposure. But Jeanette Pérez-Maceira, José Luis Mateo-Pérez, and Lilliam Ortiz's claims are against Steri-Tech and Steri-Tech has not argued that the EPA held similar meetings in Salinas. Further, none of the Sterilizer Defendants have argued, much less pointed to evidence, that could establish that any of the plaintiffs had knowledge of such meetings, attended the meetings, or were provided information disseminated during those meetings. Although in the Amended Complaint Plaintiffs refer to public reports on EtO issued years prior to the filing of the instant action, there is no evidence that Plaintiffs had access to any such reports at the time of publication. Accepting all well pleaded factual allegations as true and drawing all reasonable inferences in favor of the pleadings— as we should at this juncture— the original plaintiffs (i.e., Jeanette Pérez-Maceira, José Luis Mateo-Pérez, and Lilliam Ortiz) have sufficiently pled that it was not until 2022 that they learned of the identity of the entity responsible for their injuries— Steri-Tech. See Rivera-Carrasquillo, 812 F.3d at 216 (The statute of limitations "begins running at the time a reasonably diligent person would discover sufficient facts to allow her to realize that she had been injured and to identify the party responsible for that injury." And the date on which a plaintiff would have learned enough information to file an action presents a question of fact that should be submitted to the jury). At this juncture, it is reasonable to conclude

that Jeanette Pérez-Maceira, José Luis Mateo-Pérez, and Lilliam Ortiz's claims against Steri-Tech, Balchem, and Mays are timely.[5]

I consider the timeliness of the claims brought by the plaintiffs who were added to the instant action after the filing of the original complaint: Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, Lianibel Colón-Sánchez, Iris Rivera-Vargas, Idalia Vargas-Gratacós, and Juana Castro-Moreno (collectively, the "New Plaintiffs"). Docket Nos. 65, 74. Defendants contend that New Plaintiffs' claims are untimely because they did not bring their claims within a year of their respective diagnosis. Additionally, that these New Plaintiffs have failed to allege reasonable diligence to toll the one-year limitations period. Relying on the American Pipe tolling doctrine, the New Plaintiffs counter that they "were putative members of the class before becoming named members upon amendment, and thus had their statutes of limitations tolled." Docket No. 83 at pp. 19-21. Edwards LifeSciences, Medtronic, and Customed reply that Iris Rivera-Vargas, Idalia Vargas-Gratacós, and Juana Castro-Moreno cannot seek refuge under the American Pipe doctrine because, even though Edwards LifeSciences, Medtronic, and Customed were named defendants in the original complaint, the allegations in that complaint were solely against Steri-Tech— none of the original plaintiffs alleged any EtO exposure from emissions by Edwards LifeSciences, Medtronic, and Customed— as the original plaintiffs lived near Steri-Tech's facilities in Salinas. Steri-Tech joined Edwards LifeSciences, Medtronic, and Customed's argument against the application of the American Pipe tolling doctrine.

In American Pipe, the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Id. at 554. In other words, the filing of a class action tolls the statute of limitations "as to all asserted members of the class" until class certification is denied. Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 350 (1983) (quoting American Pipe, 414 U.S. at 554)). American Pipe is consistent with the

[5] Because Plaintiffs bear the burden of proving that knowledge of the injury and the identity of the entity responsible was not acquired until less than one year prior to the date in which the complaint was filed, the Court could revisit this issue if presented by Defendants after conclusion of discovery under Rule 56 of the Federal Rules of Civil Procedure. See María v. Colón, 2024 WL 421381 (D.P.R. Sept. 16, 2024); O'Connor v. Boeing North America, Inc., 311 F.3d 1139, 1156 (9th Cir. 2002) (reversing the grant of summary judgment because it was for the jury to determine whether plaintiffs had discovered all the essential facts constituting their cause of action prior to a report released in 1997, which plaintiffs claimed put them on notice that defendant's facilities were the likely cause of plaintiffs' illnesses).

purpose of a statute of limitation as "[l]imitation periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." Id. at 532. In class actions, the complaint notifies defendants "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." American Pipe, 414 U.S. at 555. The defendant will thus be made aware of the need to "preserve evidence and witnesses respecting the claims of all the members of the class," which prevents "unfair surprises." Crown, Cork & Seal Co., Inc., 462 U.S. at 353.

Plaintiffs urge the Court to find that the American Pipe tolling doctrine applies here because New Plaintiffs are putative class members, and Puerto Rico courts have adopted the doctrine. Docket No. 83 at p. 20. See Rivera Castillo v. Mun. de San Juan, 130 P.R. Dec. 683, 1992 WL 755604 (1992). I first consider whether the American Pipe doctrine applies to the subset of New Plaintiffs that assert claims against Steri-Tech, Balchem, and Mays: Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez. The original plaintiffs filed the present action on August 29, 2023. Nearly six months later, the original plaintiffs amended the complaint to include Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez. Just like the plaintiffs in the original complaint, these New Plaintiffs allege to have been put on notice of the entity responsible for their alleged injuries in 2022, when the EPA announced a list of sites with higher risk of EtO exposure to Puerto Rico citizens. Steri-Tech, Balchem, and Mays were included in the original complaint and, as such, were put on notice of the claims against them. Pursuant to American Pipe, Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez's claims are timely because the commencement of the class action on August 29, 2023, tolled the applicable statute of limitations "as to all asserted members of the class," which includes them. American Pipe, 414 U.S. at 554.

Edward LifeSciences, Medtronic, and Customed sustain that the American Pipe doctrine is inapplicable to Iris Rivera-Vargas (asserting claims against Edwards LifeSciences, Balchem, and Mays), Idalia Vargas-Gratacós (asserting claims against Medtronic, Balchem, and Mays), and Juana Castro-Moreno (asserting claims against Customed, Balchem, and Mays), because none of the original plaintiffs in the original complaint asserted claims against them. Indeed, the original complaint did not have a single plaintiff allege to have suffered injury from EtO exposure by Edwards LifeSciences, Medtronic, or Customed. Plaintiffs in the original complaint lived in the

vicinity of Steri-Tech's facilities in Salinas. Although the allegations set forth by this subset of New Plaintiffs are the same as the ones asserted in the original complaint, Edwards LifeSciences, Medtronic, and Customed were not notified of the number and potential plaintiffs "who may participate in the judgment" because there were no plaintiffs that could have asserted actionable claims against them at that time. Crown, Cork & Seal Co., Inc., 462 U.S. at 353. Simply put, "if there is no case, there can be no tolling." New Jersey Carpenters Health Fund v. DLJ Mortg. Capital, Inc., 2010 WL 6508190, at *2 (S.D.N.Y. Dec. 15, 2010) (finding that the American Pipe rule should not apply where the plaintiff that brought the dismissed claim was found by the court to have no standing). The original complaint was filed on August 29, 2023. Docket No. 1. Iris Rivera-Vargas, Idalia Vargas-Gratacós, and Juana Castro-Moreno were joined in February 2024. They allege, along with the rest of the Plaintiffs, to have found out of the causal link between their injuries and Sterilizer Defendants' EtO emissions in 2022. Although the American Pipe doctrine is applied for the benefit of members of a class, the doctrine requires actionable claims to serve as an anchor for the claims of other class members. The American Pipe tolling doctrine is inapplicable to Iris Rivera-Vargas' claims against Edwards LifeSciences, Idalia Vargas-Gratacós' claims against Medtronic, and Juana Castro-Moreno's claims against Customed. The same is true for their claims against Balchem and Mays. Although the original plaintiffs asserted claims against Balchem and Mays, those claims were for injuries caused by the EtO emissions of Steri-Tech in Salinas. Balchem and Mays were not made aware in the original complaint that they could be held liable for the EtO emissions of the Edwards LifeScience, Medtronic, and Customed facilities. Because Balchem and Mays were not put on notice of actionable claims other than those related to Salinas and were not made aware of the need to preserve evidence and witnesses in connection with the claims against Edwards LifeScience, Customed, and Medtronic, the American Pipe tolling doctrine is inapplicable to Iris Rivera-Vargas, Idalia Vargas-Gratacós, and Juana Castro-Moreno's claims against Balchem and Mays.

Plaintiffs assert that, in any event, Iris Rivera-Vargas' claims against Edwards LifeSciences, Balchem, and Mays, Idalia Vargas-Gratacós' claims against Medtronic, Balchem, and Mays, and Juana Castro-Moreno's claims against Customed, Balchem, and Mays survive under the continuous tort doctrine. Docket No. 83 at pp. 21-23. Under Puerto Rico law, the statute of limitation applicable to torts can be tolled if there is a continuing violation. Rivera Ruiz v. Mun.

de Ponce, 196 P.R. Dec. 410, 417 (P.R. 2016).[6] See also Miller v. Louthan, 2023 WL 11014926, at *3 (D.P.R. Nov. 15, 2023) (report and recommendation adopted in part, rejected in part, 2024 WL 1230255 (D.P.R. Mar. 22, 2024)). The Puerto Rico Supreme Court has defined a continuous tort as a "continued, or uninterrupted, disturbance of unlawful acts or omissions which cause foreseeable lasting damages." McMillan v. Rodríguez-Negrón, 511 F. Supp. 3d 75, 83 (D.P.R. Dec. 18, 2020) (quoting Rivera Ruiz, 196 P.R. Dec. at 417). "Since the tortfeasor's illegal acts are continuous, the cause of action continually renews itself, for the statute of limitation purposes, until the tortfeasor ceases his harmful conduct." Id. A continuous tort, however, arises from ongoing unlawful conduct, not from a continuing harmful effect of the conduct. "For there to be a continuous tort, Defendants must be continuously acting, i.e., continuing to dump pollutants on Plaintiffs' land." M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc., 31 F. Supp. 2d 226, 240 (D.P.R. Dec. 3, 1998).

Plaintiffs allege that Defendants actions have been continuous: "This insidious chemical […] is alarmingly prevalent in the air in many communities in Puerto Rico, where the toxin is continuously released from sterilization facilities[.]" (Docket No. 74 at p. 2); "Defendants never informed the residents of [Salinas, Añasco, Fajardo, and Villalba] or those who attend, live, pray or work nearby that they systematically emit EtO into the air, nor did Defendants warn them that these residents routinely and continuously breathe in [EtO];" (id. at ¶ 4); "[…] punish and deter each Defendant from repeating or continuing such unlawful conduct." (id. at ¶ 116). Taken as true, these allegations establish that Defendants may have engaged in a continued pattern of unlawful acts or omissions. But not all plaintiffs are equally situated. Iris Rivera-Vargas stopped working within four (4) miles of Edward LifeSciences' facilities in 2008. Docket No. 87 at p. 19. As such, Iris Rivera-Vargas' injuries because of Defendants' actions came to a halt when she stopped working in Añasco in 2008. Iris Rivera-Vargas had one year, from the moment she was put on notice of a possible connection between the EtO emissions (i.e., the 2022 announcement made by the EPA regarding EtO emissions) and her diagnosis, to assert a claim against Defendants. And nothing in the Amended Complaint at Docket No. 74 explains why the one-year statute of limitations should be tolled as to her. She was allegedly put on notice of who caused her injuries in 2022 but joined the action in 2024. Her claims against Edward LifeSciences, Balchem, and

[6] A certified translation of this case was included in Civil No. 19-1639 (MDM) at Docket No. 94 and is incorporated to this Report and Recommendation as **Exhibit 1**.

Mays are untimely. On other hand, Idalia Vargas-Gratacós and Juana Castro-Moreno continue to reside within four (4) miles of Medtronic's facility in Villalba and Customed's facility in Fajardo, respectively. Plaintiffs argue that Balchem and Mays continue to manufacture and distribute EtO, respectively, and that the EtO emissions from the Villalba and Fajardo facilities are ongoing. Idalia Vargas-Gratacós and Juana Castro-Moreno's claims against Medtronic and Customed, respectively, and Balchem and Mays survive dismissal under the continuous violation doctrine.

In sum, the claims of Jeanette Pérez-Maceira against Steri-Tech, Balchem, and Mays, Juan Luis Mateo-Pérez against Steri-Tech, Balchem, and Mays, and Lilliam Ortiz against Steri-Tech, Balchem, and Mays, are timely as they learned of the identity of the entity allegedly responsible for their injuries in 2022, within one year of the filing of this action. The claims of Danisha Ortiz-Santiago against Steri-Tech, Balchem, and Mays, Yamel Santiago-Rivera against Steri-Tech, Balchem, and Mays, Elba Meléndez-Figueroa against Steri-Tech, Balchem, and Mays, and Lianibel Colón-Sánchez against Steri-Tech, Balchem, and Mays survive by application of the American Pipe doctrine. Idalia Vargas-Gratacós and Juana Castro Moreno's claims against Medtronic and Customed, respectively, and Balchem and Mays survive under the continuous tort doctrine. Iris Rivera-Vargas' claims against Edward LifeSciences, Balchem, and Mays are untimely and should be dismissed.

3. Negligence (Count I)

Sterilizer Defendants argue that all of Plaintiffs' claims fail because Plaintiffs have not alleged a present injury and Puerto Rico law does not provide relief for potential, future injuries.[7] Docket Nos. 76 at pp. 19-21, 79. Specifically, they argue that, although Plaintiffs allege that they have each been diagnosed with a medical condition, they have not alleged that those conditions were caused by exposure to EtO. Docket No. 76 at p. 21. And that absent an allegation that EtO

[7] Plaintiffs seek a Defendant-funded medical monitoring program given the "high likelihood of latent disease developing decades from now" because of exposure to EtO emissions. Docket No. 74 at pp. 3, 17, 22. Despite not having pled the existence of any "subcellular changes," in their opposition to Defendants' motions to dismiss, Plaintiffs argue that they have suffered "subcellular changes that substantially increased the risk of serious disease and have suffered an economic injury in the form of the costs of medically necessary diagnostic testing any informed individual would reasonably undergo because of their now-increased risk of disease caused by their exposure to EO." Docket No. 83 at p. 38. Balchem and Mays do not weigh in. They will address class action certification and the relief for medical monitoring if the complaint survives this initial pleading stage. Docket No. 75 at p.1 n.1. Sterilizer Defendants urge the Court to dismiss Plaintiffs' request for relief in the form of medical monitoring damages because such a relief in not available under Puerto Rico law. Docket No. 76 at pp. 21-25. Because the class has not been certified and the relief for a medical monitoring program is contingent on that certification, dismissal of the relief for a medical monitoring program is premature.

caused their conditions, Plaintiffs' allegations of past diagnosis cannot satisfy the present-injury requirement in tort claims. Id. At the crux of Medtronic, Customed, Edward LifeSciences, and Steri-Tech's argument is that many of Plaintiffs' allegations contradict their position that they suffered a medical condition after being exposed to EtO. For instance, in the Amended Complaint, Plaintiffs aver that "[e]xposure to toxic chemicals **may cause** latent yet substantial injury, which should be compensated, **even if the full effect of the exposure is not immediately apparent**;" "[m]edical monitoring is necessary to detect the **potential onset of a serious illness or disease** due to physiological changes that indicate a substantial increase in **risk of harm** from exposure to EtO;" "preventing diagnostic tests for the **early detection of signs** or symptoms of latent cancers are medically necessary to assure early diagnosis and effective treatment, mitigating the **risk** of harm of these serious diseases[;]" [h]aving been harmed by regularly breathing in Defendants' elevated levels of EtO, Plaintiffs … seek as damages the costs of such diagnostic testing and medical monitoring, **in order to detect the early onset of disease**[;]" "the only source of EtO and **related cancer risk** largely comes from the [Sterilizer Defendants]." Docket No. 74 at ¶¶ 68, 70, 74, 76 (emphasis added). See also Docket No. 83 at p. 38 (Plaintiffs "have suffered subcellular changes that substantially increased the risk of serious disease and have suffered an economic injury in the form of the costs of medically necessary diagnostic testing and informed individual would reasonably undergo because of their **now-increased risk of disease** caused by their exposure to EtO.") (emphasis added). Plaintiffs counter that they have been exposed to EtO which caused their injuries and damages. Docket No. 83 at pp. 32-33.

Plaintiffs' negligence claim is governed by Puerto Rico's general tort statute. Suero-Algarín v. CMT Hosp. Hima San Pablo Caguas, 957 F.3d 30, 39 (1st Cir. 2020). Article 1802 stated that "[a] person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done." 31 P.R. Laws Ann. § 5141. To prevail in this claim, Plaintiffs must establish "(1) evidence of physical or emotional injury, (2) a negligent or intentional act or omission (the breach of duty element), and (3) a sufficient causal nexus between the injury and defendant's act or omission (proximate cause)." González-Cabán v. JR Seafood Inc., 48 F.4th 10, 14 (1st Cir. 2022) (internal citations omitted). See also Díaz Ramos v. Hyundai Motor Co., 431 F.Supp.2d 209, 213 (D.P.R. May 19, 2006) (a cause of action for tort damages presupposes that plaintiff has suffered an actual injury caused by defendant's negligence); Cintrón Alvarado v. Gómez, 147 D.P.R. 576, 589 (1999) ("In order for an injury to

be redressed, the injury has to have truly been suffered and has to be proven.") (cert. trans. at Docket No. 76-1). The breach of duty element is tied to a relevant duty of care, which is defined as "an obligation to anticipate and take measures against a danger that is reasonably foreseeable." Id. (citing Baum-Holland v. Hilton El Con Mgmt., LLC, 964 F.3d 77, 88 (1st Cir. 2020)). A defendant's duty of care may be established "(1) by statute or regulation; (2) 'as the result of a special relationship between the parties that has arisen through custom; or (3) as the result of a traditionally recognized duty of care particular to the situation." Baum-Holland, 964 F.3d at 88 (citing De Jesús-Adorno v. Browning Ferris Indus. of P.R., Inc., 160 F.3d 839, 842 (1st Cir. 1998)). To establish proximate cause, a plaintiff must prove by preponderance of the evidence that defendant's breach of its duty of care caused the injury, and that the injury was reasonably foreseeable to the defendant. González-Cabán, 48 F.4th at 14-15; see also Cabán v. Centro Médico del Turabo, Inc., 2023 WL 5959189 at *9 (D.P.R. Sept. 13, 2023). Foreseeability is not established by the mere fact that an accident occurred. Id.

Plaintiffs do allege that, after exposure to EtO, they have each suffered specific health conditions. See Docket No. 74 at pp. 18-19 (Pérez-Maceira was diagnosed with breast cancer in 2016, Mateo-Pérez suffers asthma, Ortiz was diagnosed with thyroid cancer in 2022, Ortiz-Santiago was diagnosed with spina bifida in 1994, Santiago-Rivera was diagnosed with thyroid issues in 1976 and arthritis in 2021, Meléndez-Figueroa was diagnosed with maxillary sinus cancer in 2015, Colón-Sánchez was diagnosed with asthma in 2021, Rivera Vargas was diagnosed with uterine cancer in 2007, Vargas-Gratacós was diagnosed with melanoma, asthma, high blood pressure, and arthritis, and Castro-Moreno was diagnosed with stage 5 breast cancer in 2012). See also id. at ¶ 69 ("[Plaintiffs] suffered appreciable harm as a result of inhaling air poisoned with Defendants' dangerously high EtO emissions."), id. at ¶ 107 ("exposure makes it significantly more likely that Plaintiffs and class members will develop **further** injuries") (emphasis added). They have thus plausibly alleged that those medical conditions were the consequence of exposure to EtO. Docket No. 74 at pp. 18-19. While Medtronic, Customed, and Steri-Tech are correct that, under Puerto Rico law, Plaintiffs are not entitled to compensation for potential or speculative injuries and that Plaintiffs would need to establish an actual injury to be entitled to relief, regardless of other expressions in the Amended Complaint, Plaintiffs have sufficiently alleged that they have suffered injuries because of EtO emissions from Sterilizer Defendants' facilities and Article 1802

could plausibly provide a basis for relief in favor of Plaintiffs to compensate for those injuries. Díaz-Ramos, 431 F.Supp.2d at 213.

Balchem and Mays request dismissal of the negligence claim as Plaintiffs cannot establish that Balchem and Mays owed them a duty and Plaintiffs have not alleged any connection between Balchem and Mays and the injuries caused by the emissions of EtO from Sterilizer Defendants' facilities. Docket Nos. 75 at pp. 9-10; 78 at p. 2. Specifically, Balchem argues that there is no plausible connection between Balchem and the emissions of EtO from Sterilizer Defendants' facilities, Plaintiffs failed to allege that Balchem breached a duty, and Plaintiffs cannot establish a proximate cause between Balchem's acts or omissions and the alleged emissions of EtO, much less to Plaintiffs' alleged injuries. Mays argues that is not connected in any way to the operation of the sterilizing facilities as its role has been to provide freight services to Balchem. Docket No. 78. Plaintiffs acknowledge that Balchem and Mays do not own or operate any EtO facilities in Puerto Rico. Docket No. 83 at p. 28. But counter that Balchem provides training to Sterilizer Defendants on the use and handling of EtO and that, although the Occupational Safety and Health Act of 1970 does not require Balchem to provide training, Balchem is an EPA technical registrant of EO. Id. at pp. 30-32. Plaintiffs rely on joint tortfeasor liability to pursue claims against all Defendants. Id. at pp. 28-30.

Plaintiffs have pled that Balchem provided training to Sterilizer Defendants on practices for handling EtO. See Docket No. 74 at ¶¶ 59, 65. As to Mays, Plaintiffs merely allege that Mays was the distributor of Balchem's EtO in Puerto Rico. See Docket No. 74 at ¶¶ 24, 25, 64, 66, 67. Liberally construed, Plaintiffs' allegations against Balchem and Mays in the Amended Complaint are the following: "[d]efendants chose to operate their businesses such that the supply chain culminates in the emission of EtO[;]" "[d]efendants – by way of failure to implement control measures to limit emissions, failure to upgrade sterilization equipment, … and other unsafe practices – subjected Plaintiffs and the Puerto Rican communities to unhealthy and dangerous levels of EtO in order to increase profits and/or cut costs[;]" "[d]efendants failed to train their employees and managers, resulting in unsafe practices which created risky EtO sterilization practices with the goal of saving money." Docket No. 74 at ¶¶ 38, 44, 45. But none of these sufficiently plead a duty by Balchem or Mays. Plaintiffs acknowledge that the Occupational Safety and Health Act of 1970 does not require Balchem to provide training to Sterilizer Defendants. Docket No. 83 at p. 32. In fact, federal regulations on EtO impose the obligation to train employees

on Sterilizer Defendants. See 29 C.F.R. § 1910.1047(j)(1)(iii) (2024) ("Employers shall ensure that each employee has access to labels on containers of EtO and to safety data sheets, and is trained in accordance with the requirements of HCS [Hazard Communication Standard] and paragraph (j)(3) of this section."). And Plaintiffs' threadbare argument that Balchem is an EPA technical registrant with "compliance responsibilities" is severely underdeveloped and waived. See Mega Media Holdings, Inc. v. Aerco Broadcasting Corp., 852 F.Supp.2d 189, 197 n.8 (D.P.R. Mar. 30, 2012) (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)). On the other hand, the sole allegation in the Amended Complaint as to Mays is that it distributed Balchem EtO to Sterilizer Defendants. See Docket No. 74 at ¶¶ 24, 25, 64, 66, 67. But there is no dispute that Mays' relationship was strictly with Balchem and not with the Sterilizer Defendants. Plaintiffs have thus failed to identify a duty owed by Balchem or Mays that could give rise to a tort claim in their favor. The claim of negligence against Balchem and Mays should be dismissed.[8]

4. Gross Negligence (Count II)

Defendants move to dismiss Plaintiffs' gross negligence claim because Puerto Rico law does not recognize a claim for gross negligence. Plaintiffs have not addressed Defendants' request. Puerto Rico law does not recognize a discrete action for gross negligence. I recommend that Plaintiffs' gross negligence claims be dismissed. See Rivera v. Kress Stores, P.R., Inc. (D.P.R. Oct. 13, 2023); Benito-Hernando v. Gavilanes, 849 F.Supp. 136, 140 (D.P.R. Apr. 6, 1994) ("[…] Puerto Rico courts do not recognize gross negligence or any other degrees of negligence found in common law.").

5. Public and Private Nuisance Claims (Counts III and X)

Balchem and Mays challenge Plaintiffs' nuisance claims.[9] Puerto Rico law contemplates actions for private and public nuisance. P.R. Laws Ann. tit. 32 § 2761. Plaintiffs assert both and do not seek injunctive relief, solely damages. In their Amended Complaint, they allege that Defendants' conduct of releasing EtO in the atmosphere has interfered with their right to public health and the enjoyment of life and property. Docket No. 74 at p. 29. Balchem and Mays seek dismissal of Plaintiffs' nuisance claims because these are based on the alleged emissions of EtO

[8] The surviving negligence claims would be: Jeanette Pérez-Maceira, José Mateo-Pérez, Lilliam Ortiz, Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez against Steri-Tech; Idalia Vargas Gratacós against Medtronic; Juana Castro Moreno against Customed.

[9] Other than on statute of limitations grounds discussed above, the Sterilizer Defendants did not seek dismissal of the nuisance claims against them.

and neither Balchem or Mays own or operate sterilizing facilities in Puerto Rico. Docket Nos. 75, 78. Plaintiffs again rest on Balchem's training of employees of Sterilizer Defendants, which in their view contributed to the mishandling of EtO. Docket No. 83 at p. 33. Plaintiffs do not address Mays' arguments.

A nuisance is defined as:

> Anything which is injurious to health, indecent, or offensive to the senses, or an obstruction to free use of property so as to interfere with the comfortable enjoyment of life or property, or that is a nuisance to the wellbeing of a neighborhood, or to a large number of persons or that illegally obstructs free flow traffic in the usual manner by a lake, river, bay, stream channel or navigable basin or by a park, square, street, public road and other similar [] constitute a nuisance and the subject of an action.

P.R. Laws Ann. tit. 32, § 2761. Anything that represents an obstruction to the free use of property is a nuisance and may be the subject of an action brought by those whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. Torres v. Rodríguez, 101 D.P.R. 177, 1 P.R. Offic. Trans. 253, 258 (1973); Ortega Cabrera v. Tribunal Superior, 101 D.P.R. 612, 1 P.R. Offic. Trans. 842, 848 (1973). Article 277 was enacted "to provide a mechanism whereby an aggrieved party could obtain a judicial cease and desist order as to the nuisance, and subsequently be compensated for damages sustained during its duration." Marrero Hernández v. Esso Std. Oil de Puerto Rico, Inc., 2005 WL 1213664, at *3 (D.P.R. May 20, 2005). The cause of action has a dual purpose: the abatement of the nuisance and the compensation of damages caused by the nuisance. Ortega Cabrera, 1 P.R. Offic. Trans. at 848. "It is a question of safeguarding the property right, the security, and the health of the citizens." Id. Trial courts must observe whether the alleged nuisance (i.e., Sterilizer Defendants' EO emissions) "exceeds the bounds of reasonableness and, as a result the right which they also have to the comfortable enjoyment of life or property is destroyed or impaired, imposing a burden greater than they ought to be required to bear, thereby upsetting the equilibrium or balance necessary to harmonize the parties' corelative rights." Casiano v. Lozada-Torres, 91 D.P.R. 488, 499 (1964) at Docket No. 75-10 (cert. trans.). Reasonableness is determined on a case-by-case basis, but courts have considered the place where the activity occurs, the nature, extent, usefulness, and value of any such activity, the nature of the alleged damages, and the right or use affected by the alleged nuisance. SLG Flores Jiménez v. Colberg, 173 P.R. Dec. 843, 856 (2008) (cert. trans. at Docket No. 75-12).

Plaintiffs defend against dismissal by arguing that Balchem's "training [] to the employees of at least some of the Sterilizer Defendants partially contributed to the negligence use and handling of EtO, leading – in part – to the fugitive emissions that caused Plaintiffs' injuries." Docket No. 83 at p. 33. But the foregoing is insufficient to assert a nuisance claim. In a case of drilling and the consequent emission of odors and vapors, a Court in this District expressed that, under Puerto Rico law, plaintiffs need not show that the alleged nuisance has reached "poisonous levels," a nuisance exists if the activity "provokes vomiting, dizziness or other physical discomforts." Hernández v. Esso Std. Oil Co., 429 F.Supp.2d 469, 472-73 (D.P.R. May 2, 2006). Plaintiffs generally claim that Defendants' conduct has interfered with the enjoyment of life and their properties. See Docket No. 74 at p. 28 ("By causing the emission of EtO into the atmosphere, Defendants have injuriously affected rights common to the general public, such as ... public health, public safety, public peace, public comfort, and public convenience."). But the Amended Complaint is devoid of any specificity on how exactly the EtO emissions— which are not obvious to the senses as EtO is odorless and colorless— affected Plaintiffs' property or welfare or how their personal enjoyment has been, or continues to be, lessened by the nuisance. SLG Flores Jiménez, 173 P.R. Dec. at 856. See Docket No. 74 at ¶¶ 31-32 (Plaintiffs allege that until the EPA announcement in 2022, they "were unaware that they were being subjected to dangerous levels of EtO, nor could [they] have known of the EtO emissions coming from the Defendants' facilities."). More importantly, there are no allegations that Balchem or Mays were operating the sterilizing facilities and causing the nuisance. See Municipalities of Bayamón v. Exxon Mobil Corp., 2025 WL 600430, at *42 (D.P.R. Feb. 20, 2025) (no allegations that defendants were burning fossil fuels themselves in Puerto Rico or operating facilities in Puerto Rico, no causal nexus between defendants' acts or omissions and the damages claimed for any prior or ongoing conduct that can be said to be injurious to health and that interfered with the enjoyment of property; dismissal recommended). Indeed, because it is undisputed that Balchem and Mays do not operate the sterilizing facilities in Puerto Rico, they would be unable to abate the purported nuisance— the emission of EtO by the Sterilizer Defendants. See id. at 42 (cases "seem to suggest that the recovery of damages is dependent on abatement. In other words, that one goes with the other."); Ortega Cabrera, 1 P.R. Offic. Trans. at 848 (cause of action has a dual purpose: the abatement of the nuisance and compensation for damages caused by the nuisance). To the extent that Plaintiffs have not pled that Balchem or Mays actually participate in the creation or continuation of the

alleged nuisance or that they even have the ability to stop any such nuisance, Plaintiffs have failed to plead a casual nexus between their "acts or omissions and the damages claimed for any prior or ongoing conduct that can be said to be injurious to health and that interfered with the enjoyment of property by [Plaintiffs]." See Municipalities of Bayamón, 2025 WL 600430, at *42. I recommend that the nuisance causes of action against Balchem and Mays be dismissed.

6. Unjust Enrichment (Count XI)

Defendants seek dismissal of the cause of action for unjust enrichment because such a cause of action is subsidiary; a remedy for unjust enrichment is available only when there are no other forms of relief available. Defendants cite to Rivera Muñiz v. Horizon Lines Inc., 737 F.Supp.2d 57, 65 (D.P.R. 2010), P.R. Tel. Co. v. SprintCom, Inc., 662 F.3d 74, 97 (1st Cir. 2011), and Ocaso S.A., Compañía de Seguros y Reseguros v. P.R. Mar. Shipping Auth., 915 F.Supp. 1244, 1263 (D.P.R. 1996). Plaintiffs did not respond. Instead, they argued that the dismissal of this claim is premature at this stage of the proceedings. Docket No. 83 at p. 33. But to move to discovery and make Defendants incur in the costs of defending from such a cause of action, Plaintiffs must pass the plausibility test. Bell Atl. Corp. v. Twombly, 550 U.S. at 558. Plaintiffs have not as there are other forms of relief available in the instant case. See Ocaso, 915 F.Supp. at 1263 (quoting Medina & Medina v. Country Pride Foods Ltd., 631 F. Supp. 293, 302 (D.P.R. 1986), aff'd by 901 F.2d 181 (1st Cir. 1990)) ("claims for unjust enrichment are 'subsidiary in nature and will only be available in situations where there is no available action to seek relief.'"). This will continue to be the case even after discovery.

Furthermore, to prove a claim for unjust enrichment, a plaintiff must establish: (1) the existence of enrichment; (2) a correlative loss; (3) nexus between loss and enrichment; (4) lack of cause for enrichment; and the (5) absence of a legal precept excluding application of enrichment without cause. Gov't. of Puerto Rico v. Carpenter Co., 442 F.Supp.3d 464, 476 (D.P.R. Feb. 27, 2020); Puerto Rico Tel. Co. v. SprintCom, Inc., 662 F.3d 74, 97 (1st Cir. 2011). Even if the Court were to find that it is too early in the game to dismiss this claim on grounds that it is subsidiary to other claims, Plaintiffs have still not alleged the essential elements of the claim, particularly that there has been a "patrimonial shift, [] which [] cannot be rationally explained by the prevalent body of laws." MCLP Asset Co., Inc. v. Stewart Title Guaranty Co., 731 F.Supp.3d 318, 343 (D.P.R. Apr. 24, 2025) (quoting Punta Lima, LLC v. Punta Lia Dev. Co., LLC, 440 F.Supp.3d

130, 150 (D.P.R. Feb. 11, 2020)). Plaintiffs' unjust enrichment claim would fail on this additional ground. I recommend that the unjust enrichment claim be dismissed as to all Defendants.

7. Product Liability

Although the 1930 Civil Code did not explicitly incorporate the doctrine of strict liability in products' liability cases, Puerto Rico courts adopted the doctrine.[10] Isla Nena Air Servs., Inc. v. Cessna Aircraft Co., 449 F.3d 85, 88 (1st Cir. 2006) (citing P.R. Laws Ann. tit. 31 § 5141); Guevara v. Dorsey Labs., Div. of Sandoz, Inc., 845 F.2d 364, 365 (1st Cir. 1988); Mendoza v. Cervecería Corona, 97 D.P.R. 499 (1969). Furthermore, Article 1542 of the 2020 Puerto Rico Civil Code codified the doctrine of strict liability for cases of defects in the design and manufacturing of a product. See P.R. Laws Ann. tit. 31 § 10807 ("Persons selling a product, in the flow of commerce, whose design or fabrication is unreasonably dangerous, are liable for the harm caused by said product regardless of whether or not there is tort of negligence by the same.") (cert. trans. at Docket No. 76-8).

There are three types of product defects that trigger the application of the strict liability doctrine: (1) manufacturing defects; (2) design defects; and (3) defects for insufficiency of warnings or instructions. Álvarez-Cabrera v. Toyota Motor Sales, U.S.A., Inc., 2020 WL 3620204, at *3 (D.P.R. July 2, 2020); see also P.R. Laws Ann. tit. 31 § 10807. Generally, "[a] manufacturer is strictly liable in tort when an article he places on the market, [] proves to have a defect that causes injury to a human being." Ayala v. Kia Motor Corp., 633 F.Supp.3d 555, 568 (D.P.R. Sept. 30, 2022) (quoting Rivera-Santana et al. v. Superior Pkg., Inc., 132 P.R. Dec. 115 (1992)). Plaintiff has the burden of proving that the product was defective, and that said defect was the cause of the injury. Pérez v. Hyundai Motor Co., 440 F. Supp. 2d 57, 72 (D.P.R. 2006). In other words, to establish strict liability, a plaintiff must prove that (1) the product had a defect that made the product unsafe, and (2) the defect proximately caused the alleged injury. Ayala, 633 F.Supp.3d at 569; Molinary-Fernández v. BMW of North America, LLC, 2021 WL 5263638, at *3 (D.P.R. Mar.

[10] The 2020 Civil Code of Puerto Rico codified in articles 1541 to 1544 the existing rules on product liability. Articles 1541 to 1544 provide for strict liability to apply to all those involved in the distribution chain of defective products. Luis Muñiz-Arguelles, The 2020 Revision of the Puerto Rican Civil Code: A Brief Explanation of Major Changes, 15 Journal of Civil Law Students 393 (2023). See also White v. Sunnova Energy Corp., 2019 WL 1271471, at *3 (D.P.R. Mar. 15, 2019) ("In other words, all those who take part in the manufacturing and distribution chain of a product are solidary liable, along with the manufacturer, to the injured party."). Plaintiffs set forth product liability claims that precede and postdate the 2020 Civil Code. Although product liability jurisprudence was codified in the 2020 Civil Code, the analysis remains the same.

31, 2021). If the damages cannot be traced to a defect in the product, there can be no viable claim under the strict liability doctrine. Id.

a. Design Defects (Counts V, VIII, IX)

A plaintiff claiming damages for a design defect must prove the existence of a defect in the design and that said defect was the proximate cause of the injuries suffered. Ayala, 633 F.Supp.3d at 569. "To prove that the product was unreasonably dangerous, the evidence must show a relation of cause and effect." Id. (cleaned up). Article 1544 of the 2020 Civil Code codifies the cause of action for defects in the design of a product. See P.R. Laws Ann. tit. 31 § 10809; Muñiz-Arguelles, The 2020 Revision of the Puerto Rican Civil Code: A Brief Explanation of Major Changes, at 424. There a two tests under which a claim for defects in product design can be established: the "consumer-expectations test" and the "risk-utility test." Caraballo-Rodríguez v. Clark Equip. Co., 147 F. Supp. 2d 66, 71 (D.P.R. 2001); Vázquez-Filippetti v. Banco Popular de Puerto Rico, 504 F.3d 43, 52 (1st Cir. 2007). Under the consumer expectations test, a product is defective if it "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Álvarez-Cabrera, 2020 WL 3620204, at *4 (quoting Betancourt Ruiz v. Toyota Motor Corp., 2007 WL 9760418, at *1 (D.P.R. 2007)). The risk-utility test requires a plaintiff to establish that defendant's product's design proximately caused its injuries. The burden of proof then shifts to the defendant to show that the "benefits of the design at issue outweigh the risk of danger inherent in such a design." Álvarez-Cabrera, 2020 WL 3620204, at *4. "The risk-utility balancing test is designed to avoid converting the manufacturer into the insurer of every harm that arises out of a product from which the consumer derives utility." Id. (cleaned up).

Defendants move to dismiss all claims premised on the defects of design of EtO. Sterilizer Defendants aver that all product liability claims must be dismissed as to them because they are mere users of EtO and do not sell or manufacture EtO. Docket No. 76 at pp. 34-36. Plaintiffs do not address the arguments of the Sterilizer Defendants. A design defect is "[a]n imperfection occurring when the seller or distributor could have reduced or avoided a foreseeable risk of harm by adopting a reasonable alternative design, and when, as a result of not using the alternative, the product or property is not reasonably safe." García v. Hartford Financial Servs. Group, Inc., 2022 WL 2836272, at 1 (D.P.R. June 1, 2022) (quoting *Defect*, Black's Law Dictionary (11th ed. 2019)). Since Sterilizer Defendants are not in the business of manufacturing, distributing, or selling EtO, they could not have "adopted a reasonable alternative design" for EtO. Plaintiffs' action for the

defects in the design of EtO against the Sterilizer Defendants is not actionable. See P.R. Laws Ann. tit. 31 § 10807; Mestre v. Hilton Intern. of Puerto Rico, Inc., 156 F.3d 49, 54 (1st Cir. 1998) (quoting Restatement (Second) Torts § 402A) (courts have followed the principles of product liability contained in the Restatement (Second) Torts § 402A which limit the application of product liability to manufacturers and sellers of products. That is, "Section 402A applies, however, only if 'the seller is engaged in the business of selling such a product.'").

Balchem and Mays claim that Plaintiffs alleged neither a defect in EtO nor causation. Plaintiffs allege that "Defendants' EtO mixtures and EtO-containing products […] constitute an unreasonably and inherently dangerous design […] in that they contained EtO, a known toxic substance and carcinogen[.]" Docket No. 74 at ¶ 147. And that the "products' toxicity, ability to bioaccumulate, inability to be contained, and environmental persistence rendered [EtO] defective and unreasonably dangerous at all times." Id. at ¶ 148. But as Plaintiffs acknowledge in their opposition, the product at issue is 100% EtO. Docket No. 83 at p. 34. And for a claim based on defective design to be actionable the challenge cannot be to the product itself; it must be to a defect in its design. Ayala, 633 F. Supp. 3d at 569-70, 73-74; City of Philadelphia v. Lead Indus. Ass'n, 1992 WL 98482, at *3 (E.D. Pa. Apr. 23, 1992). Plaintiffs rely on bald allegations to assert a claim for the purportedly defective design of EtO. Dismissal of those claims against Balchem and Mays is warranted. See id. at 569 (quoting Mendoza v. Cervecería Corona, 97 P.R. Dec. 499, 512 (1969) ("In sum, '[i]f the damage is not attributable to a defect of the product, there is no ground for applying the strict liability rule.'")).

Furthermore, Plaintiffs have not sufficiently pled a defective design of EtO under the consumer expectation or risk-utility tests. First, the consumer expectation test "cannot be the basis of liability in cases involving complex technical matters." Álvarez-Cabrera, 2020 WL 3620204, at *4. The consumer-expectation test is "reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." Collazo-Santiago v. Toyota Motor Corp., 937 F.Supp. 134, 139 (D.P.R. 1996). Plaintiffs have not alleged what is the ordinary consumer's expectation in using the product as intended. Id. Second, Plaintiffs allege that "the risk of danger inherent in the design of the Defendants' ETO mixtures and ETO-containing products drastically outweighed any perceived benefits of the design[.]" Docket No. 74 at ¶ 150. But have not pled that EtO emissions proximately caused a design defect

injury. Ayala, 633 F.Supp.3d at 569. Plaintiffs' pleadings are thus also insufficient to establish design defect liability based on the risk-utility test. Plaintiffs' claims for the defective design of EtO against Balchem and Mays should be dismissed.

b. Failure to Warn (Counts IV, VI, VII)[11]

Plaintiffs contend that Defendants' EtO lacked adequate warnings or instructions concerning the dangers and hazards associated with EtO. Docket No. 74 at pp. 29, 32, 34. And that Defendants "manufactured, distributed, marketed, promoted, and sold EtO and EtO-containing products, [and] they knew their products were not safe and were likely[,] if not certain[,] to cause toxic EtO contamination of lands[.]" Id. at p. 29. Balchem moves to dismiss because Plaintiffs admit in their Amended Complaint that the end users of EtO— the Sterilizer Defendants— knew or should have known of the potential dangers associated with EtO. Docket No. 75 at p. 26. And that the warnings and instructions provided by Balchem in the label attached to the product, as well as a Safety Data Sheet ("SDS"), could not have changed Sterilizer Defendants' conduct. Moreover, Balchem argues that it could not have warned about EtO emissions from facilities that are not subject to its control. Mays joined Balchem's arguments and adds that Plaintiffs have not alleged inadequate warning by Mays. Docket No. 78 at p. 3. Plaintiffs counter that employees of Sterilizer Defendants lacked proper training on the use of EtO and that, if the Sterilizer Defendants had been properly warned, "they would not have engaged in the negligent conduct alleged in the complaint." Docket No. 83 at pp. 45-46. They also posit that the EtO warnings were inadequate because they failed to warn Sterilizer Defendants about the impact to nearby communities. Plaintiffs do not address Mays' argument.

To prove a failure to warn cause of action under Puerto Rico law, Plaintiffs must show that: "(1) the manufacturer knew or should have known of the risk inherent in the product; (2) there were no warnings or instructions, or those provided were inadequate; (3) the absence of warnings made the product inherently dangerous; and (4) the absence of adequate warnings or instructions was the proximate cause of plaintiff's injury." Cruz Vargas v. R.J. Reynolds Tobacco Co., 348 F.3d 271, 276 (1st Cir. 2003) (quoting Aponte Rivera v. Sears Roebuck, 144 D.P.R. 830 (1998)). Plaintiffs' failure to warn claims does not hold water because the Amended Complaint is devoid

[11] Plaintiffs style Count IV as a claim for defective design. However, that claim alleges Defendants' failure to provide instructions or warnings. See Docket No. 74 at pp. 28-29.

of allegations as to the fourth prong of the failure to warn test. Plaintiffs do not allege that the EtO purportedly manufactured by Balchem lacked warnings or instructions. Instead, they allege that the instructions were inadequate because Balchem failed to warn Sterilizer Defendants about the impact to nearby communities. Docket No. 83 at pp. 45-46. But Plaintiffs admit that Sterilizer Defendants were aware of EtO's effects, regardless of whether Balchem warned them or not. Docket No. 74 at ¶ 6. And Plaintiffs fail to sufficiently allege how any purported defect in the warnings caused their injuries. See Silva v. American Airlines, Inc., 960 F.Supp. 528, 533 (D.P.R. Apr. 16, 1997); SUEZ Water New York Inc. v. E.I. du Pont de Nemours and Co., 578 F.Supp.3d 511, 563 (S.D.N.Y. Jan. 4, 2022) (dismissing failure to warn claim because plaintiff did not allege any facts regarding what warnings should have been given). Plaintiffs limit themselves to claim, in a conclusory manner, that Balchem "failed to provide adequate warnings and/or instructions." Docket No. 74 at ¶ 135. There is no allegation as to how the warning or instructions or the trainings provided by Balchem would have ameliorated their harm. See Rodríguez v. Torres, 2015 WL 1138256, at *10-11 (D.P.R. Mar. 13, 2015) ("[i]nadequate warnings cannot serve as a proximate cause of injuries where adequate warnings about have resulted in the same injuries") (quoting Barry A. Lindahl, 3 Modern Tort Law: Liability and Litigation § 24:43 (2d ed.)). "Nor do[] Plaintiff[s] allege how, if the warnings were given, the industrial manufacturers or the end-users would have responded or how the harm to Plaintiff[s] would have been averted. SUEZ Water New York Inc., 578 F.Supp.3d at 563. Because Plaintiffs do not allege facts from which it can be reasonably inferred that Balchem failed to provide adequate warnings or instructions for the EtO or that the failure to warn was a proximate cause of their harm, their failure-to-warn claim against Balchem must be dismissed. García, 2022 WL 2836272, at *2. The failure to warn claims fail as to Mays for the same reasons.

III. Conclusion

For the reasons discussed above, the undersigned recommends that the Motions to Dismiss at Docket Nos. 76 and 79 be **GRANTED in part and DENIED in part**, and the Motions to Dismiss at Docket Nos. 75 and 78 be **GRANTED**. In sum, the undersigned recommends the dismissal of the following: Iris Rivera-Vargas' claims against Edward LifeSciences, Balchem, and Mays, all negligence claims against Balchem and Mays, private and public nuisance claims against Balchem and Mays, and all gross negligence, unjust-enrichment, design defects, and failure to warn claims. The negligence claims of (1) Jeanette Pérez-Maceira, José Mateo-Pérez, Lilliam

Ortiz, Danisha Ortiz-Santiago, Yamel Santiago-Rivera, Elba Meléndez-Figueroa, and Lianibel Colón-Sánchez against Steri-Tech, (2) Idalia Vargas Gratacós against Medtronic, and (3) Juana Castro Moreno against Customed, and the private and public nuisance claims against Steri-Tech, Medtronic and Customed would remain.

This Report and Recommendation is filed pursuant to 28 U.S.C. §636(b)(1) and Rule 72(d) of the Local Rules of this District Court. Pursuant to Local Rule 72(d), the parties have **fourteen (14) days** to file any objections to this Report and Recommendation. Failure to file specific objections within the specified time precludes further review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v. Maccarone, 973 F. 2d 22, 30-31 (1st Cir. 1992); Maisonet v. Genett Group, Inc., 863 F.Supp.2d 138, 143 (D.P.R. 2012) (absent specific objection, no obligation to review portion of Magistrate Judge's recommendation).

IT IS SO RECOMMENDED.

In San Juan, Puerto Rico, this 23rd day of May 2025.

s/Giselle López-Soler
GISELLE LÓPEZ-SOLER
United States Magistrate Judge

Carlos J. Rivera Ruiz, et al., appellants, v. Municipio Autonomo de Ponce, et al., petitioners

Puerto Rico Supreme Court
September 14, 2016
AC-2014-4

Reporter
196 D.P.R. 410 *; 2016 PR Sup. LEXIS 199 **; 2016 TSPR 197

Carlos J. Rivera Ruiz, et al., appellants v. Municipio Autonomo de Ponce, et al., petitioners

Previous History: **[**1]** Subject: Extracontractual Civil Liability - The prescriptive term to request compensation in the case of damages caused by any culpable act or negligent omission of a continuing nature, begins to run when the last acts or omissions are verified or when the final result occurs, whichever is later.

Case Summary

Description
HOLDINGS: [1] -The action for damages filed by the residents against the municipality, for damages caused by the floods produced as a consequence of the defects of the sewers in the street where they live, was not time-barred because the last acts or omissions had not been verified nor had the final result been produced and it was foreseeable that the damages would continue as long as the lack of maintenance of the sewers and pipes persisted; [2] -The prescriptive term to initiate an action for damages caused by any culpable or negligent act or omission of a continuing nature begins to run when the last acts or omissions are verified or the final result occurs, whichever is later.

Result
The determination of the Court of Appeals was affirmed. The case was returned to the Court of First Instance for the continuation of the procedures.

Main Terms
cases, continued, cause, this, moment, when, Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN1 **Begins to Run, Continuing Violations**

The continuous damages are those produced by one or more culpable or negligent act or omission attributable to the actor, whether contemporaries or not, resulting in uninterrupted injurious consequences, sustained, lasting without interruption, joined together, which when known also make knowable – for being foreseeable – the continuous and uninterrupted nature of its effects, becoming at that time a certain damage composed of elements of current damage and foreseeable future damage and therefore certain.

Torts > Procedural Matters > Statute of Limitations > Begins to Run

HN2 **Statute of Limitations, Begins to Run**

The difference between the successive damages and the continued damages is that in the successive, each injury caused by a culpable or negligent act or omission produces a different damage, which in turn generates an independent a cause action, while in the continued, a single cause of action is generated that comprises all the actual damages, both the current ones and the ones foreseeable in the future, as result of a continuous tortuous behavior. This difference implies that in these two scenarios the prescriptive term to submit a claim for compensation begins to run at different times.

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN3 **Begins to Run, Continuing Violations**

In the face of damages caused by any culpable or negligent act or omission of a continuing nature, the prescriptive term to initiate an action to request compensation begins to run when the latest acts or omissions are verified or the final result is produced, whichever occurs later.

Lawyers: Court of Appeals: Judicial Region of Ponce, Panel VIII.

Attorneys for petitioners: Carmen E. Torres Rodríguez, Esq., Marieli Paradizo Pérez, Esq.

Attorneys for appellants: Carlos J. Rivera Ruiz, Esq., Yadira Manfredy Ramos, Esq.

Judges: Opinion of the Court issued by the Associate Judge, Mr. MARTÍNEZ TORRES.

Opinion By: Rafael L. Martínez Torres.

[*412] Certiorari

In San Juan, Puerto Rico, on September 14, 2016.

It corresponds to us to determine when the prescriptive term to initiate an action of non-contractual civil liability for continued damages begins to run. We take the opportunity to clarify our previous pronouncements on this matter.

Thus, we determine **[*413]** definitively that in the face of damages and losses caused by any culpable or negligent act or omission of a continuous nature, the prescriptive term **[**2]** to initiate an action to request compensation begins to run when the last acts or omissions are verified or the final result occurs.

I

On December 4, 2009, a group of residents of Clarisas Street in the Urbanization La Rambla of Ponce (appellants) submitted a petition for mandamus and a claim on damages against the Municipio Autónomo de Ponce (Municipality). They said that the Clarisas Street was flooding when it rained copiously due to lack of maintenance and problems with the sewage system. They claimed that this situation prevented the entrance and exit of the urbanization and caused damage to vehicles and personal property of residents, as well as health damages and severe emotional anguish. For that reason, they requested that the Municipality correct this problem and compensate them for the damages and losses suffered.

After several procedural steps, the Court of First Instance concluded that the Municipality had the ministerial duty to provide maintenance to water drains and pipes. Therefore, it granted the petition for mandamus. Subsequently, the Municipality filed a motion for **[**3]** summary judgment, to which it attached depositions wherein the appellants admitted that they had known for several years of the recurrent character of the floods. Due to the foreseeability of the damage, the Municipality noted that the damages claimed were continued and their prescriptive period ended a year after the appellants came to know of the **[*414]** recurrent nature of the floods. The appellants opposed and pointed out that this was not the applicable doctrine. The Court of First Instance denied the motion summary judgment. Where relevant, the primary forum concluded, "that the alleged damages suffered by the plaintiffs due to flooding on the Clarisas Street are continuous damage, and that to this day they allegedly continue to occur." Appendix, p. 321. Consequently, that forum determined that the action in damages of the plaintiffs was not time barred, since the last event had not occurred, neither the final result, nor had the cause that generated the damage ceased. Id. However, the primary forum determined that the following facts, among others, were not in controversy: (1) Ms. Matos Socorro Hernández González resides in Clarisas Street **[**4]** since thirty years ago. She suffers the problem of floods practically since she lives in that place; (2) Mr. Gilberto Rodríguez Zayas lived on Clarisas Street of the La Rambla Urbanization for twenty-five years. He indicated that whenever it rains the street floods. The most remote flood event which he remembers occurred in 1995; (3) Mrs. Milagros Rodríguez Rolón resides on Clarisas Street number 1256 since twenty-five years ago. In her deposition, she stated that the street where she lived was flooding since 1988. Appendix, pp. 324-325.

Dissatisfied with the opinion of the Court of First Instance, the Municipality filed a writ of certiorari before the Court of Appeals. There it pointed out, in synthesis, that the primary forum erred in concluding that the damages claimed in the lawsuit were not time barred. On its part, the intermediate appellate forum denied the issuance of the writ, as it concluded that the Court of First Instance did not err when it denied the dismissal for the reason of prescription. Appendix, pp. 13-25. To reach that conclusion, the Court of Appeals concluded, as did the Court of First Instance, that the instant claim **[*415]** is one **[**5]** for "damages that regenerate, since day by day the possibility of floods is still present, for which reason, being damage that persist and the cause that regenerates them not having ceased, they are of a continued nature." Appendix, p. 24.

In disagreement with that decision, the Municipality presented a writ of certiorari before us. It argued that the Court of Appeals erred in affirming the opinion of the Court of First Instance and not dismissing the complaint for being time barred. On October 31, 2014, we accepted the appeal as a writ of certiorari and we issued the same. With the benefit of the appearance of both parties, we move to resolve.

II

A. The prescription is a figure that extinguishes a right because a party does not exercise it in a period of time determined by law. *Fraguada Bonilla v. Hosp. Aux. Mutuo, 2012 TSPR 126, 186 DPR 365, 372-373, 2012 Juris P.R. 139 (2012)*. In our system, unlike others, the extinctive prescription is a substantive-right figure and is regulated by the provisions of the Civil Code.

This statute provides in Art. 1861, 31 LPRA sec. 5291, that: "Actions prescribe by the mere lapse of time specified by law." Id. However, the term to exercise the actions can be interrupted in three ways, namely, by "their institution **[**6]** before the courts, by extrajudicial claim of the creditor, and by any act of acknowledgment of the debt by the debtor." Art. 1873 of the Civil Code, *31 LPRA sec. 5303*.

These norms are "based on the need to put an end to situations of uncertainty in the exercise of rights and on the presumption of abandonment by its owner." *Maldonado Rivera v. Suárez et al., 2016 TSPR 57, 195 D.P.R. 182, pp. 8-9, 195 DPR (2016)* citing J. Puig **[*416]** Brutau, Expiration, extinctive prescription and usucapion. 3rd ed. Ed. Bosh, Barcelona, 1996, p. 32. Thus, "the inactivity, silence or lack of exercise of the right constitutes the basis of the extinctive prescription because a prolonged situation of legal uncertainty is contrary to the social interest." Id. However, "the prescription is not a rigid figure but [...] admits judicial adjustments, as required by the particular circumstances of the cases and the notion about what is just." *Santiago v. Ríos Alonso, 2002 TSPR 15, 156 D.P.R. 181, 189-190, 2002 Juris P.R. 21 (2002)*.

As a general rule, the one-year prescriptive term provided in Art. 1868 of the Civil Code, 31 LPRA sec. 5298, begins to elapse since the aggrieved party had -- or should have -- knowledge of the damage suffered and was in a position to exercise the cause of action. Art. 1869 of the Civil Code, 31 LPRA sec. 5299; see, also, *Maldonado Rivera v. Suárez* and others, supra, p. 11. **[**7]** For that reason, when the cause of action is for non-contractual civil liability, it is important to specify the type of damage claimed to "be able to establish the starting point or initial moment of the computation and in this way know with certainty what will be its final moment." *Rivera Prudencio v. Mun. de San Juan, 2007 TSPR 19, 170 DPR 149, 167, 2007 Juris P.R. 24 (2007)*.

Several decades ago, we recognized in our system various types of damages. *Rivera Encarnación v. ELA, 13 P.R. Offic. Trans. 498, 113 D.P.R. 383, 386 (1982)*. Among these are the continued damages and the successive damages. *Galib Frangie v. El Vocero de P.R., 138 DPR 560, 566, 1995 Juris P.R. 71 (1995)*. On the one hand, the successive damages are

> a sequence of recognitions of harmful consequences on the part of the injured party, that are produced and manifested periodically, or even continuously, but get to be known at different times among which mediated a finite lapse of time, without at any time the subsequent damages being foreseeable, nor it being possible to discover them using reasonable diligence. In other words, it is **[*417]** a sequence of certain repeated damages (without it being necessary for them to be identical in their nature, degree, extent and magnitude) whose repetition is not predictable in a legal sense nor are susceptible of being discovered using reasonable diligence. [...] Each of the unitary damages **[**8]** that together constitute the successive damages present in said examples constitutes a legal unit of 'damage' that originates the corresponding cause of compensatory action. *Santiago v. Ríos Alonso, supra, p. 191*.

On the other hand, [HN1] the continued damages are

> those produced by one or more culpable or negligent acts attributable to the actor, contemporaries or not, resulting in uninterrupted, sustained, lasting, without interruption, linked together, injurious consequences, which being well-known make also known – by being predictable – the continued and uninterrupted nature of their effects, becoming at that moment a certain damage composed by actual damage elements (one that has already occurred) and by foreseeable future damage and therefore certain. *Rivera Prudencio v. Mun. San Juan, supra, p. 167.*

As we see, [HN2] the difference between both types of damages is that in the successive, each injury caused by a wrongful or negligent act or omission produces a different damage, which in turn generates an independent cause of action, while in the continued a single cause of action is generated that comprises all the actual damages, both the actual and the **foreseeable** in the future, as a consequence of one continuous tortuous behavior. This difference **[**9]** implies that in these two scenarios the prescriptive term to file a claim for compensation begins to elapse in different moments.

It is worth clarifying that although traditionally we refer to the doctrines under study as "continuous damages" or "successive damages", what in reality is continuous or successive in these scenarios is the act or omission that produces the damage and not, necessarily, the injury suffered.

Regarding the continued damage, we so advised over sixty years ago when we explained that the essence of that doctrine "does not rest **[*418]** on the nature [...] of the harm caused by the disturbance, but on the continuous or progressive character of the **cause** [tortious act or omission] that originates it, that constantly renews the harmful action". (Emphasis supplied) *Arcelay v. Sánchez Martínez, 77 P.R.R. 782, 77 D.P.R. 824, 838 (1955)*. Because of this, we understand that a more accurate classification is "damages caused by continuous acts [or omissions]." *Capella v. Carreras, 57 P.R.R. 250, 57 DPR 258, 266 (1940)*. In this way, we avoid the confusion that generates the translation from English into Spanish of the term tort as damage or damages. Note that when that word is used in plural it describes the area of Law that studies extracontractual civil liability, but at the same time **[**10]** can be used to replace the terms harms or injuries.

Our previous pronouncements on this matter, particularly with regard to the so-called continued damage, have been imprecise, since we have applied contradictory norms. That has led to doctrinal confusion. See J.J. Álvarez González, Analysis of the Term 2006-2007 - Extracontractual civil liability, 77 Rev. Jur. UPR 603, 617-619 (2008) and J.J. Álvarez González, Analysis of the Term 2001-02 - Extracontractual civil liability, 72 Rev. Jur. UPR 615, 638-642 (2003). Therefore, it is necessary to clarify the rule that governs our system in these cases.

More than seventy years ago, in *Capella v. Carreras*, supra, a case on a nuisance,[1] we established that the "damages and losses caused by continuous acts ... are latent until the cause that generates them ceases. Well it can be said that in such case the harmful action is renewed **[*419]** from day to day, from hour to hour, from minute to minute, from second to second." Consequently, we concluded that the lawsuit was not time-barred because at the time of claiming compensation, the disturbance remained in force. Subsequently, in *Arcelay v. Sánchez Martínez, 77 P.R.R. 782, 77 D.P.R. 824 (1955)*, where the damage was the product of noise and stench that were constantly produced by a pasteurizing plant **[**11]**, we reiterated the aforementioned norm. In this way, we stated that this rule "does not rest on the intrinsic nature of the damage caused by the disturbance, but on the continuous or progressive character of the cause that originates it, which constantly renews the harmful action". Id., P. 839. In addition, we indicated that this rule not only applied when claiming compensation for damages caused to the plaintiff's property, but also applied to the scenarios where personal damages are claimed. We also validated that the plaintiff amended his claim to request compensation for damages caused up to the time of the trial because they continued after the lawsuit was filed. Id., Pgs. 846-848. We justified our action by stating that in this way the "multiplicity of actions would be avoided, provided that the wrong that produces the damage is of a continuous nature, and that the subsequent damages are similar to those that gave rise to the original claim". Id., P. 847. Similarly, in *Seda et al. v. Miranda Hnos. & Co., 88 P.R.R. 344, 88 DPR 355 (1963)*, we ratified this same norm and we expressed that it was possible to recover damages "for all the time of the duration [**12] of the nuisance". Id., P. 361. Up to that moment our doctrine on this matter did not cause further confusion. The discrepancy we attend today began decades later, when this Court faced cases where nuisances did not properly caused the damages.

In *Galib Frangie v. El Vocero de P.R., supra, p. 575*, a case in which *continued damages* were not before our **[*420]** consideration, but *successive damages* caused by the publication of a series of libelous articles, we established that at the time of determining when the prescriptive term begins in these scenarios "The determining factor is the moment *when* the damages production *begins*, which should be taken into consideration as the beginning of the prescription term, by assuming that the injured parties knew them since **[**13]** then and that they could exercise the cause of action". (Emphasis on original). Although these expressions constitute *obiter dicta*, they were repeated in our jurisprudence and created the doctrinal confusion that we are discussing today. See J.J. Álvarez González, Analysis of the Term 2001-02 - Extracontractual civil liability, supra,

[1] In cases of public nuisances, Art. 277 of the Code of Civil Procedure, 32 LPRA sec. 2761, creates a cause of action so that a person can request that these cease and to be compensated for the damages created. Despite this, with regard to compensation, our analysis in this type of case has focused on Art. 1803 of the Civil Code of 1902, or its current equivalent, Art. 1802 of the Civil Code of 1930, 31 LPRA sec. 5141.

p. 640, n. 83; Ruth E. Ortega-Vélez, Jurisprudence Extracontractual Civil Liability, 2nd Ed. Rev., Ediciones Scisco, 2009, p. 138.

A short time later, in *Sánchez et al. v. A.E.E., 142 D.P.R. 880, 1997 Juris P.R. 45 (1997)*, a brief Judgment, several judges issued concurring and dissenting Opinions where they addressed, directly or indirectly, this same issue. The then Associate Judge Mr. Hernández Denton stated the following: "Modern Spanish jurisprudence has declared with general character that in case of continued damages the computation of the limitation period begins at the moment of the production of the final result". (Quotations omitted). Id., P. 921 (Dissenting opinion of Associate Judge Mr. Hernández Denton). Likewise, the then Associate Judge Mrs. Naveira de Rodón addressed this point indirectly by stating that "[t]he prescriptive term in actions for the creation of a hostile work environment **[**14]** should begin to run from the **cessation** of that environment. This norm recognizes that the prescriptive term [...] must begin to elapse when the circumstances that could hinder the exercise of the action **dissipate**". (Emphasis supplied). **[*421]** id., P. 913 (Dissenting opinion of the Associated Judge Ms. Naveira de Rodón).

Thereafter, in *Santiago v. Ríos Alonso, supra, p. 195*, we determined that before a pattern of physical and emotional abuse, "the last incident of abuse, when the victim breaks the cycle of abuse and recognizes that has suffered a certain damage, is the one that activates the cause of action and, consequently, constitutes the moment from which it can be executed". (Emphasis deleted). However, to justify this result, we cited the case of *Galib Frangie v. El Vocero of P.R., supra*.

Subsequently, *in Nazario v. ELA, 2003 TSPR 116, 159 DPR 799, 807, 2003 Juris P.R. 116 (2003)*, a published Judgment, we applied again the norm of *Galib Frangie v. El Vocero de P.R., supra*, and we indicated that in cases of continued damages "the determining factor to establish the beginning of the limitations period [...] is the moment in which the production of the damage begins". (Emphasis on original). We reasoned that this was because "being foreseeable, it is understood that the term begins to run when the injured party knows, for the first time, **[**15]** the damage and the person responsible for it and that said damage includes all its consequences as possible to foresee." *Nazario v. ELA, supra, p. 807.* In addition to the these pronouncements were in a Judgment, which does not establish precedent, it is also important to mention that in that case the majority of the Court finally determined that the dispute before consideration was the successive and not continued damages, so it did not apply the aforementioned norm. However, Associate Judge Mr. Corrada Del Río issued a dissenting opinion, because he understood that the damages in question were continued. There, after reviewing the different norms on prescription in these types of cases, he suggested that in our system the norm that computes the limitation period should be applied as of the **[*422]** moment in which the cause that generates the damages ends. *Nazario v. ELA, supra, pp. 828-829* (Dissenting opinion of Associate Judge Mr. Corrada del Río) ("We understand that because the continued damages are inexorably tied to the cause that originates them, the definitive knowledge of the losses caused is verified on the day that the source of these ceases, since as long as it exists, and therefore more damages related to it are foreseeable, **[**16]** we can not speak of a definitive result "). (Emphasis deleted).

Subsequently, in *Rivera Prudencio v. Mun. San Juan, supra, p. 167*, we set out that "the prescriptive term to claim for damages of a continuous nature begins to elapse when the **last of the acts is verified or the final result is produced**". (Emphasis supplied). However, as in the previous case, we finally concluded that the damages in question were successive, so we did not apply this rule, whereby those pronouncements on the issue we are dealing with today constitute *obiter dicta*. Later, in *Umpierre Biascoechea v. Banco Popular, 2007 TSPR 21, 170 DPR 205, 2007 Juris P.R. 26 (2007)*, (Judgment), Associate Justice Mrs. Rodríguez Rodríguez issued a Conforming Opinion in which she stated that, in accordance with modern civilist doctrine, "the beginning of the limitations period to claim for [...] [continued damages] commences at the moment of the production of the final result or until the last of the acts is verified". (Emphasis on the original). *Id., pp. 215-219*. Likewise, the then Associate Judge Mrs. Fiol Matta issued a dissenting opinion in which she agreed, as to this point, with what was expressed by the Associate Judge Mrs. Rodríguez Rodríguez. *Id., pp. 230-231.*

As we can see, our jurisprudence is inconsistent **[**17]** as to when the limitations term begins to run in cases of damages caused by continuous acts or omissions. One of the reasons for these contradictions is the apparent tension between the cognitive theory of damage that governs our system and the doctrinal trend that postulates that the limitations term **[*423]** in these cases begins to elapse when the final result is produced. This is due to the fact that, in the majority of the cases, the claimant knows that he or she is suffering damage from the beginning of the continuous culpable or negligent acts or omissions and not since the final result is produced. H. Brau del Toro, Extracontractual Damages in Puerto Rico, 2nd ed., San Juan, Pubs. JTS, 1986, Vol. II, Chap. X, p. 582. This led us to force exceptions to the rule in order to obtain fair results according to the facts of the cases. Thus, we see that in cases where it was sought to deter the nuisances and combat domestic violence, we concluded that the limitations term began to elapse with the final result or the last tortious act or omission, while before other facts, we resolved the opposite.

Another of the **[**18]** reasons why there are inconsistencies in the doctrine is that our cases have been based on authorities from other jurisdictions that have changed their position over time. For example, the precedents of the middle of the last century were anchored, to a large extent, in sources of the American *common law*, while the most recent cases cite with approval civilists scholars, who in turn, comment on Spanish jurisprudence. The latter has also varied in recent times. Therefore, in addition to reviewing our previous pronouncements on this matter, we understand that it is important to examine the treatment that other jurisdictions have given to the controversy before our consideration.

In this regard, the scholar Puig Brutau comments that "[a] few [Spanish] judgments have estimated that the year to appeal must be counted, not at the moment of the cessation of the damage, but since it begins to occur, because since when the same was known the action could have been exercised. But, in other cases, the jurisprudence has clearly tilted in favor of the [*424] other possibility". J. Puig Brutau, Expiration, extinctive prescription and usucapion, 3rd ed., **[**19]** Barcelona, Ed. Bosh, 1996, p. 77 citing Díez-Picazo, The prescription in the Civil Code, Barcelona, 1964 p. 240. See also, Reglero Campos in Albaladejo and Díaz Alabar, Comments to the Civil Code and Foral Compilations, Madrid, Ed. EDERSA, 1994, Volume XXV, Vol. 2, pp. 454-464.

On the one hand, the most strict aspect of the doctrine has its origin in several judgments that the Spanish Supreme Court issued at the beginning of the last century that started "from the moment of the beginning of the production of damages as the originator of the prescription, presupposing that the injured parties knew them since then and that they were able to exercise the pertinent action without obstacle". J. Santos Briz, Civil responsibility, 7th ed., Madrid, Ed. Montecorvo, 1993, p. 1187. On the other hand, the second aspect is found in modern Spanish doctrine that exhibits "a more elastic tendency in placing the beginning of the prescription not at the beginning of the damage, but **at the realization of its total verification**". (Emphasis supplied) Id., p. 1188. In this same line, "the jurisprudence has radically changed the course followed by the one that was dominant until the 1960s [...], noting that in the **[**20]** cases of continued damage, the *dies a quo* of the period of limitations should not be remitted to the date of the occurrence of the accident, but to the moment in which the injured party knows in a certain way the looses definitively caused". Albaladejo and Díaz Alabar, op. cit., pp. 460-461. See, also, I. Sierra Gil de la Cuesta, Commentary on the Civil Code, Ed. Bosch, 2000, T.9, p. 554. As a result, the Supreme Court of Spain has stated in recent cases that "is consolidated jurisprudential doctrine that which refers the beginning of the calculation of the statute of limitations in this type of cases when it comes to continued damages [...] to the one in which the **final result** is produced." (Emphasis supplied) Díez-Picazo **[*425]** and Ponce de León, The extinctive prescription in the Civil Code and in the jurisprudence of the Supreme Court, Ed. Aranzadi, 2nd ed., 2007, p. 253. That is to say, "the computation of the limitation period does not begin **until the production of the final result**, when it is not possible to split the series pursued into different stages or differentiated facts." (Emphasis supplied) Id., p. 1003

Spanish scholars add that it is not always easy "to determine [...] when [**21] that 'final result' is produced or has been produced [because] in relation to the concept of continued damage it is offered to us as something alive, latent and precisely connected to the originating and determining cause of the same, which subsists and is maintained until its proper correction". Albaladejo and Díaz Alabar, op. cit., p. 460. Now, the understanding in modern Spanish doctrine identifies that moment when "the injured party knows in a certain way the **losses definitively caused**". (Emphasis supplied) Díez-Picazo and Ponce de León, op cit., P. 1003. That is, when the culpable or negligent conduct has ceased to cause the damages for which compensation is claimed.

On the other hand, most of the states of the Union follow a norm similar to that of the Spanish Civil Law regarding this matter. "The continuing tort doctrine constitutes an established exception to the usual rule that a statute of limitations starts at the time of injury, in those cases [...] the statute does not begin to run [...] until the negligent or other wrongful act or incident has terminated. " Speiser, et al., The American Law of Torts, West Group, 2013, Vol. 1A, sec. 5:27, p. 347-353. This doctrine, **[**22]** sometimes known as "continuing tort doctrine" and in others as "continuing violation doctrine", has been applied to cases of extracontractual civil liability for emotional abuse, nuances, professional malpractice, insurance disputes, discrimination, intrusions and explosions, among others. Id. See also Elad Peled, Rethinking the Continuing Violation **[*426]** Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims, *41 Ohio N.U.L. Rev. 343 (2015)*.

B. After examining our jurisprudence, the modern precedents in other jurisdictions that we find highly persuasive, as well as the recent comments of different scholars, we understand that it is best to standardize our doctrine in order to give certainty to our system. Thus, HN3 [] we resolve that before damages caused by any culpable or negligent act or omission of a continued nature, the limitations period to initiate an action to request compensation begins to elapse when the last acts or omissions are verified or the final result is produced, whichever is later. This norm is not incompatible with the cognitive theory of damage that governs our system. **[**23]** "Because the continued damages are inexorably linked to the cause that originates them, the definitive knowledge of the losses caused is verified on the day that the source ceases, since as long as it exists, and therefore more damages related to it are foreseeable, we cannot talk about a definitive result". *Nazario v. ELA, supra, p. 828* (Dissenting opinion of the Associate Judge Mr. Corrada del Río).[2] Naturally, this does not exclude that a plaintiff can prove, **[*427]** in addition, that he or she knew the damage suffered at a moment other than the one that ceased the cause that generated it.

We find no reason not to modernize our doctrine as it has happened in other jurisdictions. Nor do we find a valid justification for dealing differently with cases where the damage is not *strictly* produced by nuances or acts of domestic violence. Independently of the nature or type of act or omission that generates the damage, in the context of continued damages, the injured party is suffering a damage that shall not cease, and on the contrary, it shall be repeated until the generating cause ceases to exist. Therefore, the norm we announce today is applicable to *all* cases of damages caused by continued acts or omissions.

Neither are we persuaded by the alternative proposals that when determining **[**25]** when a limitations period begins to elapse, for example, they oblige the courts to analyze whether, despite claiming for continued damages, the damages for which compensation is claimed have sufficient substantivity and autonomy of their own, or if on the contrary, the damage for which it is claimed is of a unitary nature and without its own substantivity. Laracruz Berdejo et al., Elements of Civil Law II, 5th Ed., Madrid, Ed. Dykinson, 2013, T. II, Vol. 2, p. 492. Likewise, we are not convinced by Professor Brau del Toro's proposal that there should be a distinction in the treatment given to permanent nuances and continuous nuances for prescription purposes. H. Brau del Toro, op. cit., pp. 582-583. These alternatives, although they may have their merit, denaturalize the essence of the continued damages, create a new submodality of these and, in turn, equate the same with successive damages for prescription purposes. The

[2] It should be emphasized that sometimes, as in this case, dissident opinions of the past find an echo in the present and become precedents for the future. "A dissent in a court of last resort is an appeal to [...] the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Charles Evans Hughes, The Supreme Court of the United States 68 (1936). The fact that a position does not get the majority of the votes at any given time does not necessarily mean that it is wrong. It simply did not persuade the majority of the judges who composed the Supreme Court **[**24]** at any given time. After all, this Court is not supreme because it is infallible; it is only supreme in hierarchy. For this reason, in reexamining our jurisprudence, this time we are persuaded by the previous statements of several judges of this Court, who from their respective conformity, concurrent or dissenting Opinions, addressed the issue that we resolve today definitively.

doctrine that we now incorporate definitively into our system seems to us more appropriate.

[*428] The opposite implies unnecessarily splitting the causes of action, since we would oblige the injured parties to present their complaints since the damages are initiated **[**26]**, even when the source that generates them has not ceased and, on the contrary, continues and will continue to cause additional damages. This leads to excessively extensive litigation, as the plaintiffs have to constantly amend their claims to include allegations and claims for damages suffered, although for the same cause, after the filing of the original claim. "In this context, the balance of the interests involved in the limitations terms leans in favor of the plaintiffs, since the dismissal of their cause of action would expose them to a [culpable or negligent act or omission], which, in theory, could continue indefinitely." (Our translation) Peled, op cit., p. 348, citing Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitations, 28 PAC. L.J., 453, 505 (1997).

Unlike what could be intimidated, this rule does not encourage plaintiffs to sit idle; rather, it discourages people from continuously acting in a culpable or negligent manner. In this way, we do not penalize a plaintiff who submits his or her claim when one year has not elapsed since the cause that generated the damages for which he seeks compensation ceased. Recall that the focus of analysis **[**27]** in the doctrine before our consideration is the continuous act or omission and not properly the damages suffered. *Arcelay v. Sánchez, supra, p. 838.* If in our system the interruption and the beginning of a new limitations term is recognized by extrajudicial acts, we must also recognize that the limitations term does not begin when the cause of the damage has not ceased. In that sense, in both scenarios the right of the injured parties to claim compensation for the damages they suffered is preserved.

[*429] On the other hand, we constantly emphasize the value of the precedent in our system. However, our decisions are not a dogma written in stone. Therefore, "when the reasoning of a decision no longer resists a careful analysis, we are not obliged to follow it". *Fraguada Bonilla v. Hosp. Aux. Mutual, supra, p. 391.* "[T] he inspiring purpose of the doctrine of stare decisis is to achieve stability and certainty in the law, but never to perpetuate errors." *Am. Railroad Co. of P.R. v. Industrial Commission, 61 D.P.R. 324, 326 (1943).* However, it will only apply to set aside precedents: "(1) if the previous decision was clearly wrong, (2) if its effects on the rest of the system are adverse, and (3) if the number of people who relied on it is limited." *People v. Delgado, 2008 TSPR 174, 175 DPR 1, note 8 (2008); González Natal v. Merck Sharp & Dohme Química de Puerto Rico, Inc., 2006 TSPR 2, 166 D.P.R. 659, 688, 2006 Juris P.R. 10 (2006).*

In the light of all **[**28]** the foregoing and due to the confusion that has caused in our doctrine, we render ineffective our previous pronouncements contrary to this Opinion, in particular, those stated in *Galib Frangie v. El Vocero de P.R., supra,* and its progeny, **on this particular matter**. With this, we remove that thorn from our jurisprudence and eliminate the ailments that this causes to our doctrine of damages.

III

In this case, both the Municipality and the respondents are in agreement with the determinations of the respondent forums that the cause that generates the damages claimed is continuous. The damages are the result of the floods produced as a consequence of the defects of the sewers of the street where the respondents live. The only discrepancy is how the limitations period should be computed, since the respondents admitted in several depositions that they knew of the recurrence of the floods for many years.

[*430] In analyzing these facts in the light of the rule discussed, we conclude that the claim of caption **is not time-barred**, since the last acts or omissions have not been verified nor has the final result been produced. Rather, we are faced with a cause of **[**29]** action that regenerates day by day as long as the lack of maintenance of the sewers and pipes subsists. That causes recurrent and predictable floods.

IV

For the reasons stated above, we affirm the determination of the Court of Appeals. Consequently, the case is returned to the Court of First Instance, Superior Court of Ponce, to continue the proceedings.

Rafael L. Martínez Torres

Associate Judge

JUDGMENT

In San Juan, Puerto Rico, September 14, 2016.

For the reasons stated above, in the forgoing Opinion, which is made an integral part of this Judgment, we affirm the determination of the Court of Appeals. Consequently, the case is returned to the Court of First Instance, Superior Court of Ponce, to continue the proceedings.

It was agreed by the Court and certified by the Secretary of the Supreme Court. The Associate Judge, Mrs. Rodríguez Rodríguez, is satisfied with the determination of this Court and states the following expression: "I am pleased to record my agreement with the opinion expressed today by a majority of this Forum. As the majority opinion emphasizes, 'this Court is not supreme because it is infallible, **[**30]** it is only supreme in hierarchy'". *Carlos J. Rivera Ruiz, et al. v. Municipio Autónomo de Ponce, et al., 2016 TSPR 197, note 2, 19 D.P.R. (2016).*

The course of the doctrine of continued damages in our jurisprudence has been an extensive one. In spite of this, during the last twenty years, the consensus regarding the specific controversy that we are dealing with today could be described as elusive. This is despite the fact that, nine years ago, I tried to persuade a majority of this Court to adopt the norm that we are ruling today. *See Umpierre Biascoechea v. Banco Popular, 2007*

TSPR 21, 170 D.P.R. 205, 2007 Juris P.R. 26 (2007) (Rodríguez Rodríguez, Opinion of conformity). However, it was necessary to wait.

The doctrine of the judicial precedent guides the proceeding of this Court in order to safeguard the uniformity in the interpretation of the Law. Now, we can not rest on this principle when its application has the effect of perpetuating an erroneous reading of the Law. *See Town v. Díaz de León, 2009 TSPR 142, 176 D.P.R. 913, 922 (2009); People v. Pérez Pou, 2009 TSPR 5, 175 D.P.R. 218, 251-252 (2009)* (Rodríguez Rodríguez, Dissident Opinion).

[*431] Finally, I am satisfied that, definitively, we have managed to harmonize the doctrine of continued damages with the figure of extinctive prescription. Thus, we provide greater stability to the general theory of Extracontractual Civil Liability Law.

Juan Ernesto Dávila Rivera

Secretary of the Supreme Court

CERTIFICATION

CERTIFIED: To be a true and correct translation of the original document(s) from Spanish into English. Furthermore, that I am a Certified Interpreter & Translator for the Administrative Office of the U. S. Courts, named on the list of Qualified Interpreters/Translators, at the U.S. District Court for the District of Puerto Rico.

Carlos T. Ravelo

Carlos T. Ravelo, USCCI

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1. *Carlos J. Rivera Ruiz, et al., Recurridos v. Municipio Autónomo de Ponce, et al., Peticionarios, 196 D.P.R. 410*

Client/Matter: -None-
Search Terms: Rivera Ruiz et al. v. Mun. de Ponce et al., 2016 TSPR 197
Search Type: Natural Language
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Content Type	Narrowed by
Cases	-None-

Carlos J. Rivera Ruiz, et al., Recurridos v. Municipio Autónomo de Ponce, et al., Peticionarios

Tribunal Supremo De Puerto Rico

14 de septiembre de 2016

AC-2014-40

Reportero
196 D.P.R. 410 *; 2016 PR Sup. LEXIS 199 **; 2016 TSPR 197

Carlos J. Rivera Ruiz, et al., Recurridos v. Municipio Autónomo de Ponce, et al., Peticionarios

Historia Previa: [1]** Materia: Responsabilidad Civil Extracontractual — El término prescriptivo para solicitar resarcimiento en los casos de daños y perjuicios ocasionados por cualquier acto u omisión culposo o negligente de carácter continuado, comienza a transcurrir cuando se verifiquen los últimos actos u omisiones o cuando se produzca el resultado definitivo, lo que sea posterior.

Resumen de Caso

Descripcion
HOLDINGS: [1]-La acción por daños y perjuicios presentada por los residentes contra el municipio, por daños causados por las inundaciones producidas como consecuencia de los defectos de las alcantarillas en la calle donde viven, no estaba prescrita porque que no se habían verificado los últimos actos u omisiones ni se había producido el resultado definitivo y era previsible que los daños continuaran mientras subsistiera la falta de mantenimiento de las alcantarillas y tuberías; [2]-El término prescriptivo para incoar una acción de daños y perjuicios causados por cualquier acto u omisión culposo o negligente de carácter continuado comienza a transcurrir cuando se verifiquen los últimos actos u omisiones o se produzca el resultado definitivo, lo que sea posterior.

Resultado
Se confirmó la determinación del Tribunal de Apelaciones. Se devolvió el caso al Tribunal de Primera Instancia para la continuación de los procedimientos.

Terminos Principales

casos, continuados, causa, este, momento, cuando, actos, prescriptivo, como, perjuicios, doctrina, acción, prescripción, resultado, nuestro, estos, nuestra, desde, definitivo, comienza, esa, Opinión, sobre, jurisprudencia, nfasis, ordenamiento, transcurrir, Derecho, Responsabilidad, Sentencia

Tesis de LexisNexis ®

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN1[] **Begins to Run, Continuing Violations**

Los daños continuados son aquellos producidos por uno o más actos culposos o negligentes imputables al actor, coetáneos o no, que resultan en consecuencias lesivas ininterrumpidas, sostenidas, duraderas sin interrupción, unidas entre sí, las cuales al ser conocidas hacen que también se conozca — por ser previsible — el carácter continuado e ininterrumpido de sus efectos, convirtiéndose en ese momento en un daño cierto compuesto por elementos de daño actual y de daño futuro previsible y por tanto cierto.

Torts > Procedural Matters > Statute of Limitations > Begins to Run

HN2[] **Statute of Limitations, Begins to Run**

La diferencia entre los daños sucesivos y los daños continuados es que en los sucesivos, cada lesión a causa de un acto u omisión culposa o negligente produce un daño distinto, que a su vez, genera una causa de acción independiente, mientras en que en los continuados se genera una sola causa de acción que

comprende todos los daños ciertos, tanto los actuales como los previsibles en el futuro, como consecuencia de una conducta torticera continua. Esa diferencia implica que en estos dos escenarios el término prescriptivo para presentar una reclamación de indemnización comienza a transcurrir en momentos distintos.

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN3 **Begins to Run, Continuing Violations**

Ante daños y perjuicios causados por cualquier acto u omisión culposo o negligente de carácter continuado, el término prescriptivo para incoar una acción para solicitar resarcimiento comienza a transcurrir cuando se verifiquen los últimos actos u omisiones o se produzca el resultado definitivo, lo que sea posterior.

Abogados: Tribunal de Apelaciones: Región Judicial de Ponce, Panel VIII.

Abogadas de la parte Peticionaria: Lcda. Carmen E. Torres Rodríguez, Lcda. Marieli Paradizo Pérez.

Abogados de la parte Recurrida: Lcdo. Carlos J. Rivera Ruiz, Lcda. Yadira Manfredy Ramos.

Jueces: Opinión del Tribunal emitida por el Juez Asociado señor MARTÍNEZ TORRES.

Opinion Por: Rafael L. Martínez Torres

Opinion

[*412] Certiorari

En San Juan, Puerto Rico, a 14 de septiembre de 2016.

Nos corresponde determinar cuándo comienza a transcurrir el término prescriptivo para incoar una acción de responsabilidad civil extracontractual por *daños continuados*. Aprovechamos la ocasión para aclarar nuestros pronunciamientos previos sobre este asunto. Así, resolvemos **[*413]** de forma definitiva que ante daños y perjuicios causados por cualquier acto u omisión culposa o negligente de carácter continuado, el término prescriptivo **[**2]** para incoar una acción para solicitar resarcimiento comienza a transcurrir cuando se verifiquen los últimos actos u omisiones o se produzca el resultado definitivo.

I

El 4 de diciembre de 2009, un grupo de residentes de la Calle Clarisas en la Urbanización La Rambla de Ponce (recurridos), presentaron una petición de *mandamus* y demanda sobre daños y perjuicios contra el Municipio Autónomo de Ponce (Municipio). Expresaron que la Calle Clarisas se inundaba cuando llovía copiosamente debido a la falta de mantenimiento y a problemas con el sistema de alcantarillado. Alegaron que esta situación impedía la entrada y salida de la urbanización y provocaba daños a los vehículos y propiedad mueble de los residentes, así como daños a la salud y severas angustias emocionales. Por esa razón, solicitaron que el Municipio corrigiera este problema y les compensara por los daños y perjuicios sufridos.

Luego de varios trámites procesales, el Tribunal de Primera Instancia concluyó que el Municipio tenía el deber ministerial de proveerle mantenimiento a las alcantarillas y tuberías pluviales. Por lo tanto, proveyó ha lugar a la petición de *mandamus*. Posteriormente, el Municipio presentó una moción de sentencia **[**3]** sumaria, a la que acompañó unas deposiciones en las que los recurridos admitieron que conocían desde hacía varios años el carácter recurrente de las inundaciones. Debido a la previsibilidad de los daños, el Municipio señaló que los daños reclamados eran continuados y su período prescriptivo culminó un año después de que los recurridos advinieron en conocimiento del carácter **[*414]** recurrente de las inundaciones. Los recurridos se opusieron y señalaron que esa no era la doctrina aplicable.

El Tribunal de Primera Instancia denegó la moción de sentencia sumaria. En lo pertinente, el foro primario concluyó "que los alegados daños sufridos por los demandantes debido a las inundaciones en la calle Clarisas son daños continuados, y que al día de hoy alegadamente continúan ocurriendo". Apéndice, pág. 321. En consecuencia, ese foro determinó que la acción en daños de la parte demandante no estaba prescrita, puesto que no se había dado el último suceso, ocurrido un resultado final, ni cesado la causa que generaba los daños. *Íd.* No obstante, el foro primario determinó que los siguientes hechos, entre otros, no estaban en controversia: (1) la Sra. Matos Socorro Hernández González reside en la Calle Clarisas **[**4]** hace treinta años. Sufre el problema de las inundaciones prácticamente desde que vive en ese lugar; (2) El Sr. Gilberto Rodríguez Zayas vivió en la Calle las Clarisas de la Urbanización La Rambla por espacio de

veinticinco años. Este indicó que siempre que llueve la calle se inunda. El evento de inundación más remoto del que se acuerda ocurrió en el 1995; (3) La Sra. Milagros Rodríguez Rolón reside en la Calle Clarisas número 1256 hace veinticinco años. En su deposición, declaró que la calle donde residía se inundaba desde 1988. Apéndice, págs. 324-325.

Insatisfecho con el dictamen del Tribunal de Primera Instancia, el Municipio presentó un recurso de certiorari ante el Tribunal de Apelaciones. Allí señaló, en síntesis, que el foro primario erró al concluir que los daños reclamados en la demanda no estaban prescritos. Por su parte, el foro apelativo intermedio denegó la expedición del recurso, pues concluyó que el Tribunal de Primera Instancia no erró cuando denegó la desestimación por el fundamento de prescripción. Apéndice, págs. 13-25. Para llegar a esa conclusión, el Tribunal de Apelaciones concluyó, al igual que el Tribunal de Primera Instancia, que la presente reclamación **[*415]** es una **[**5]** por "daños que se regenera[n] ya que día a día la posibilidad de inundaciones sigue estando presente, por lo que, al ser un daño que persiste y no habiendo cesado la causa que los regenera, los mismos son de carácter continuado". Apéndice, pág. 24.

En desacuerdo con esa decisión, el Municipio presentó un recurso de certiorari ante nos. Sostuvo que el Tribunal de Apelaciones erró al confirmar el dictamen del Tribunal de Primera Instancia y no desestimar la demanda por estar prescrita. El 31 de octubre de 2014, acogimos la apelación como un recurso de certiorari y expedimos el auto. Con el beneficio de la comparecencia de ambas partes, pasamos a resolver.

II

A. La prescripción es una figura que extingue un derecho debido a que una parte no lo ejerce en un período de tiempo determinado por ley. *Fraguada Bonilla v. Hosp. Aux. Mutuo, 2012 TSPR 126, 186 DPR 365, 372-373, 2012 Juris P.R. 139 (2012)*. En nuestro ordenamiento, a diferencia de otros, la prescripción extintiva es una figura de derecho sustantiva y está regulada por las disposiciones del Código Civil. *Íd.* Este estatuto dispone en su Art. 1861, *31 LPRA sec. 5291*, que: "Las acciones prescriben por el mero lapso del tiempo fijado por la ley". Sin embargo, el término para ejercer las acciones se puede interrumpir de tres maneras, a saber, por "su ejercicio ante **[**6]** los tribunales, por reclamación extrajudicial del acreedor y por cualquier acto de reconocimiento de la deuda por parte del deudor". Art. 1873 del Código Civil, *31 LPRA sec. 5303*.

Estas normas tienen "su fundamento en la necesidad de poner término a las situaciones de incertidumbre en el ejercicio de los derechos y en la presunción de abandono por parte de su titular". *Maldonado Rivera v. Suárez y otros, 2016 TSPR 57, 195 D.P.R. 182, págs. 8-9, 195 DPR (2016)* citando a J. Puig **[*416]** Brutau, Caducidad, prescripción extintiva y usucapión. 3ra ed. Ed. Bosh, Barcelona, 1996, pág. 32. Así, "la inactividad, silencio o falta de ejercicio del derecho constituye el fundamento de la prescripción extintiva por ser contrario al interés social una prolongada situación de incertidumbre jurídica". Íd. No obstante, "la prescripción no es una figura rígida sino que [...] admite ajustes judiciales, según sea requerido por las circunstancias particulares de los casos y la noción sobre lo que es justo". *Santiago v. Ríos Alonso, 2002 TSPR 15, 156 D.P.R. 181, 189-190, 2002 Juris P.R. 21 (2002)*.

Como norma general, el término prescriptivo de un año dispuesto en el Art. 1868 del Código Civil, *31 LPRA sec. 5298*, comienza a transcurrir desde que el agraviado tuvo -o debió tener- conocimiento del daño que sufrió y estuvo en posición de ejercer su causa de acción. Art. 1869 del Código Civil, *31 LPRA sec. 5299*; véase, además, *Maldonado Rivera v. Suárez y otros, supra, pág. 11*. **[**7]** Por esa razón, cuando la causa de acción es por responsabilidad civil extracontractual, es importante precisar el tipo de daño por el que se reclama, para "poder establecer el punto de partida o momento inicial del cómputo y de esta forma conocer con certeza cuál será su momento final". *Rivera Prudencio v. Mun. de San Juan, 2007 TSPR 19, 170 DPR 149, 167, 2007 Juris P.R. 24 (2007)*.

Desde hace varias décadas, reconocimos en nuestro ordenamiento varios tipos de daños. *Rivera Encarnación v. ELA, 13 P.R. Offic. Trans. 498, 113 D.P.R. 383, 386 (1982)*. Entre estos se encuentran los llamados *daños continuados* y los *daños sucesivos*. *Galib Frangie v. El Vocero de P.R., 138 DPR 560, 566, 1995 Juris P.R. 71 (1995)*. Por un lado, los *daños sucesivos* son

> una secuencia de reconocimientos de consecuencias lesivas por parte del perjudicado, las que se producen y manifiestan periódicamente, o aun continuamente, pero que se van conociendo en momentos distintos entre los que medió un lapso de tiempo finito, sin que en momento alguno sean previsibles los daños subsiguientes, ni sea

> posible descubrirlos empleando diligencia razonable. Dicho en otras palabras, se trata **[*417]** de una secuencia de daños ciertos que se repiten (sin que sea necesario que sean idénticos en su naturaleza, grado, extensión y magnitud) cuya repetición no es previsible en sentido jurídico ni son susceptibles de ser descubiertos empleando diligencia razonable. [...] Cada uno de los daños **[**8]** unitarios que en conjunto constituyen los daños sucesivos presentes en dichos ejemplos constituye una unidad jurídica de 'daño' que origina la correspondiente causa de acción resarcitoria. *Santiago v. Ríos Alonso, supra, pág. 191*.

Por otro lado, ***HN1***[⬆] los *daños continuados* son

> aqu[e]llos producidos por uno o más actos culposos o negligentes imputables al actor, coetáneos o no, que resultan en consecuencias lesivas ininterrumpidas, sostenidas, duraderas sin interrupción, unidas entre sí, las cuales al ser conocidas hacen que también se conozca — por ser previsible — el carácter continuado e ininterrumpido de sus efectos, convirtiéndose en ese momento en un daño cierto compuesto por elementos de daño actual (aquel que ya ha acaecido) y de daño futuro previsible y por tanto cierto. *Rivera Prudencio v. Mun. San Juan, supra, pág. 167*.

Como vemos, ***HN2***[⬆] la diferencia entre ambos tipos de daños es que en los sucesivos, cada lesión a causa de un acto u omisión culposa o negligente produce un daño distinto, que a su vez, genera una causa de acción independiente, mientras en que en los continuados se genera una sola causa de acción que comprende todos los daños ciertos, tanto los actuales como los **previsibles** en el futuro, como consecuencia de una conducta torticera continua. Esa diferencia **[**9]** implica que en estos dos escenarios el término prescriptivo para presentar una reclamación de indemnización comienza a transcurrir en momentos distintos.

Conviene aclarar que aunque tradicionalmente nos referimos a las doctrinas bajo estudio como "daños continuos" o "daños sucesivos", lo que en realidad es continuo o sucesivo en estos escenarios es el acto u omisión que produce el daño y no, necesariamente, la lesión sufrida. Respecto a los daños continuados, así lo advertimos hace más de sesenta años cuando expusimos que la esencia de esa doctrina "no descansa **[*418]** en la naturaleza [...] del perjuicio ocasionado por la perturbación, y sí en el carácter continuo o progresivo de **la causa** [acto u omisión torticera] que lo origina, que renueva constantemente la acción dañosa". (Énfasis suplido) *Arcelay v. Sánchez Martínez, 77 P.R.R. 782, 77 D.P.R. 824, 838 (1955)*. Por eso, entendemos que una clasificación más precisa es "daños y perjuicios causados por actos [u omisiones] continuos". *Capella v. Carreras, 57 P.R.R. 250, 57 DPR 258, 266 (1940)*. De esta forma, evitamos la confusión que genera la traducción del inglés al español del término *tort* como daño o daños. Adviértase que cuando esa palabra se utiliza en plural describe el área del Derecho que estudia la responsabilidad civil extracontractual, pero a la misma vez **[**10]** puede utilizarse en sustitución de los términos *perjuicios* o *lesiones*.

Nuestros pronunciamientos previos sobre este asunto, particularmente en lo referente a los llamados *daños continuados*, han sido imprecisos, pues hemos aplicado normas contradictorias entre sí. Eso ha llevado a una confusión doctrinal. Véanse J.J. Álvarez González, Análisis del Término 2006-2007 - Responsabilidad civil extracontractual, 77 Rev. Jur. UPR 603, 617-619 (2008) y J.J. Álvarez González, Análisis del Término 2001-02 - Responsabilidad civil extracontractual, *72 Rev. Jur. UPR 615, 638-642 (2003)*. Por lo tanto, resulta necesario clarificar la regla que rige en nuestro ordenamiento en estos casos.

Hace más de setenta años, en *Capella v. Carreras, supra*, un caso sobre un estorbo,[1] establecimos que los "daños y perjuicios causados por actos continuos [...] están latentes hasta que cesa la causa que los genera. Bien puede decirse que en tal caso la acción dañosa se renueva **[*419]** de día en día, de hora en hora, de minuto en minuto, de segundo en segundo." Consecuentemente, concluimos que la demanda no estaba prescrita debido a que al momento de reclamarse la indemnización, la perturbación continuaba vigente. Posteriormente, en *Arcelay v. Sánchez Martínez, 77 P.R.R. 782, 77 D.P.R. 824 (1955)*, donde los daños eran producto de ruidos y hedores que producía constantemente una

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[1] En los casos de estorbos públicos, el Art. 277 del Código de Enjuiciamiento Civil, ***32 LPRA sec. 2761***, crea una causa de acción para que una persona pueda solicitar que estos cesen y que se le indemnice por los perjuicios que le crearon. A pesar de esto, en lo que respecta a la indemnización, nuestro análisis en este tipo de casos se ha centrado en el Art. 1803 del Código Civil de 1902, o su equivalente actual, el Art. 1802 del Código Civil de 1930, ***31 LPRA sec. 5141***.

planta **[**11]** pasteurizadora, reiteramos la norma precitada. De esa manera, enunciamos que esa regla "no descansa en la naturaleza intrínseca del perjuicio ocasionado por la perturbación, y sí en el carácter continuo o progresivo de la causa que lo origina, que renueva constantemente la acción dañosa". *Íd., pág. 839*. Además, indicamos que esa norma no solo aplicaba cuando se reclamara indemnización por los daños causados a la propiedad del demandante, sino que aplicaba también a los escenarios donde se reclama por los daños y perjuicios personales. También validamos que el demandante enmendara su demanda para reclamar indemnización por los perjuicios causados hasta el momento del juicio debido a que estos continuaron después de que se presentó la demanda. *Íd., págs. 846-848*. Justificamos nuestro proceder al expresar que de esa forma se evitaba la "multiplicidad de acciones, siempre que el mal que produzca los daños sea de carácter continuo, y que los perjuicios subsiguientes sean similares a los que dieron lugar a la reclamación original". *Íd., pág. 847*. De igual modo, en *Seda et al. v. Miranda Hnos.& Co., 88 P.R.R. 344, 88 DPR 355 (1963)*, ratificamos esta misma norma y expresamos que se podía recobrar por los daños y perjuicios "por todo el tiempo de la duración **[**12]** del estorbo". *Íd., pág. 361*. Hasta ese momento nuestra doctrina sobre este asunto no causó mayores confusiones. El desfase que hoy atendemos comenzó décadas después, cuando este Tribunal se enfrentó a casos donde los daños no eran ocasionados propiamente por estorbos.

En *Galib Frangie v. El Vocero de P.R., supra, pág. 575*, un caso en el que aunque no se encontraban ante nuestra **[*420]** consideración *daños continuados*, sino *daños sucesivos* producidos por la publicación de una serie de artículos libelosos, establecimos que al momento de determinar cuándo inicia el término prescriptivo en estos escenarios "Lo determinante es el momento *cuando comienza* la producción de los daños, que deberá tomarse en consideración como el inicio del término de prescripción, al presuponer que los perjudicados los conocían desde **[**13]** entonces y que pudieran ejercitar la causa de acción". (Énfasis en original). A pesar de que esas expresiones constituyen *obiter dicta*, se repitieron en nuestra jurisprudencia y crearon la confusión doctrinal que hoy abordamos. Véanse J.J. Álvarez González, Análisis del Término 2001-02 - Responsabilidad civil extracontractual, supra, pág. 640, n. 83; Ruth E. Ortega-Vélez, Jurisprudencia Responsabilidad Civil Extracontractual, 2da Ed. Rev., Ediciones Scisco, 2009, pág. 138.

Poco tiempo después, en *Sánchez et al. v. A.E.E., 142 D.P.R. 880, 1997 Juris P.R. 45 (1997)*, una Sentencia breve, varios jueces emitieron Opiniones concurrentes y disidentes en donde abordaron, de forma directa o indirecta, este mismo asunto. El entonces Juez Asociado señor Hernández Denton expuso lo siguiente: "La jurisprudencia española moderna ha declarado con carácter general que en caso de daños continuados el cómputo del plazo de prescripción comienza en el momento de la producción del resultado definitivo". (Citas omitidas). *Íd., pág. 921* (Opinión disidente del Juez Asociado señor Hernández Denton). Igualmente, la entonces Jueza Asociada señora Naveira de Rodón abordó indirectamente este punto al expresar que "[e]l término prescriptivo en acciones por la creación de un ambiente **[**14]** hostil de trabajo debe comenzar a decursar desde que **cese** dicho ambiente. Esta norma reconoce que el término prescriptivo [...] debe comenzar a decursar **cuando se disipan** las circunstancias que podrían entorpecer el ejercicio de la acción". (Énfasis suplido). **[*421]** *Íd., pág. 913* (Opinión disidente de la Jueza Asociada señora Naveira de Rodón).

Luego, en *Santiago v. Ríos Alonso, supra, pág. 195*, determinamos que ante un patrón de maltrato físico y emocional, "el último incidente de maltrato, cuando la víctima rompe con el ciclo de maltrato y reconoce que ha sufrido un daño cierto, es el que activa la causa de acción y, en consecuencia, constituye el momento a partir del cual puede ejecutarse la misma". (Énfasis suprimido). No obstante, para justificar ese resultado, citamos el caso de *Galib Frangie v. El Vocero de P.R., supra.*

Subsiguientemente, en *Nazario v. ELA, 2003 TSPR 116, 159 DPR 799, 807, 2003 Juris P.R. 116 (2003)*, una Sentencia publicada, aplicamos nuevamente la norma de *Galib Frangie v. El Vocero de P.R., supra*, e indicamos que en los casos de *daños continuados* "lo determinante para establecer el inicio del término prescriptivo [...] es el momento en que *comienza* la producción del daño". (Énfasis original). Razonamos que esto se debía a que "al ser previsibles, se entiende que el término prescriptivo comienza a transcurrir cuando el perjudicado conoce, por primera vez, **[**15]** el daño y el responsable de éste y que dicho daño comprende todas sus consecuencias como posibles de prever." *Nazario v. ELA, supra, pág. 807*. Además de que esos pronunciamientos fueron en una Sentencia, la cual no establece precedente, también es importante mencionar que en ese caso la mayoría del Tribunal determinó finalmente que la controversia ante su consideración se trataba de *daños sucesivos* y *no*

continuados, por lo que no aplicó la precitada norma. Sin embargo, el Juez Asociado señor Corrada Del Río emitió una Opinión disidente, pues entendió que los daños en cuestión eran continuados. Allí, luego de hacer un repaso de las distintas normas sobre prescripción en este tipo de casos, sugirió que en nuestro ordenamiento se aplicara la norma que computa el término prescriptivo a partir del **[*422]** momento en que finaliza la causa que genera los daños. *Nazario v. ELA, supra, págs. 828-829* (Opinión disidente del Juez Asociado señor Corrada del Río) ("Entendemos que por estar los daños continuados inexorablemente atados a la causa que la origina, el conocimiento definitivo de los quebrantos ocasionados se verifica el día que cesa la fuente de éstos, ya que mientras ésta exista, y por ende sean previsibles más daños relacionados a ella, **[**16]** no cabe hablar de resultado definitivo"). (Énfasis suprimido).

Posteriormente, en *Rivera Prudencio v. Mun. San Juan, supra, pág. 167*, dispusimos que "el plazo prescriptivo para reclamar por daños de naturaleza continua comienza a transcurrir cuando se verifica el **último de los actos o se produzca el resultado definitivo**". (Énfasis suplido). Sin embargo, al igual que en el caso anterior, finalmente concluimos que los daños en cuestión eran sucesivos, así que no aplicamos esta norma, por lo que esos pronunciamientos sobre el tema que hoy atendemos constituyen *obiter dicta*. Luego, en *Umpierre Biascoechea v. Banco Popular, 2007 TSPR 21, 170 DPR 205, 2007 Juris P.R. 26 (2007)*, (Sentencia), la Juez Asociada señora Rodríguez Rodríguez emitió una Opinión de conformidad en la que expuso que, conforme a la doctrina civilista moderna, "el inicio del plazo prescriptivo para reclamar por [...] [daños continuados] comienza en *el momento de la producción del resultado definitivo o hasta que se verifique el último de los actos*". (Énfasis en el original). *Íd., págs. 215-219*. Igualmente, la entonces Jueza Asociada señora Fiol Matta emitió una Opinión disidente en la que coincidió, en cuanto a este punto, con lo expresado por la Juez Asociada señora Rodríguez Rodríguez. *Íd., págs. 230-231*

Como vemos, nuestra jurisprudencia es inconstante **[**17]** en cuanto a cuándo comienza a transcurrir el término prescriptivo en casos de daños y perjuicios causados por actos u omisiones continuas. Una de las razones para estas contradicciones es la tensión aparente entre la teoría cognoscitiva del daño que rige en nuestro ordenamiento y la corriente doctrinal que postula que el término prescriptivo **[*423]** en estos casos comienza a transcurrir cuando se produce el resultado definitivo. Esto se debe a que, en la mayoría de los casos, el reclamante conoce que está sufriendo un daño desde que comienzan los actos u omisiones culposas o negligentes continuos y no desde que se produce el resultado final. H. Brau del Toro, Los daños y perjuicios extracontractuales en Puerto Rico, 2da ed., San Juan, Pubs. JTS, 1986, Vol. II, Cap. X, pág. 582. Esto nos llevó a forzar excepciones a la norma con tal de procurar resultados justos de acuerdo a los hechos de los casos. Así, vemos que en los casos donde se buscaba disuadir los estorbos y combatir la violencia doméstica, concluimos que el término prescriptivo comenzaba a transcurrir con el resultado definitivo o el último acto u omisión torticera, mientras que ante otros hechos, resolvimos lo contrario.

Otra de las **[**18]** razones por las cuales existen incongruencias en la doctrina es que nuestros casos se han basado en autoridades de otras jurisdicciones que con el paso del tiempo han cambiado su postura. Por ejemplo, los precedentes de mediados del siglo pasado estaban anclados, en gran medida, en fuentes del *common law* estadounidense, mientras que los casos más recientes citan con aprobación a tratadistas civilistas, que a su vez, comentan la jurisprudencia española. Esta última también ha variado en tiempos recientes. Por ello, además de repasar nuestros pronunciamientos previos sobre este asunto, entendemos que es importante examinar el tratamiento que otras jurisdicciones le han brindado a la controversia ante nuestra consideración.

Sobre este particular, el tratadista Puig Brutau comenta que "[a]lgunas sentencias [españolas] han estimado que el año de plazo para recurrir ha de contarse, no en el momento de cesar el daño, sino desde que empieza a producirse, pues desde que se tuvo conocimiento del mismo se pudo ejercitar la acción. Sin embargo, en otros casos la jurisprudencia se ha inclinado claramente a favor de la **[*424]** otra posibilidad". J. Puig Brutau, Caducidad, prescripción extintiva y usucapión, 3ra ed., **[**19]** Barcelona, Ed. Bosh, 1996, pág. 77 citando a Díez-Picazo, La prescripción en el Código Civil, Barcelona, 1964 pág. 240. Véase, además, Reglero Campos en Albaladejo y Díaz Alabar, Comentarios al código Civil y Compilaciones Forales, Madrid, Ed. EDERSA, 1994, Tomo XXV, Vol. 2, págs. 454-464.

Por un lado, la vertiente más estricta de la doctrina tiene su origen en varias sentencias que el Tribunal Supremo español emitió a principios del siglo pasado que partían "del momento de comienzo de producción de los daños como iniciador de la prescripción, presuponiendo que

los perjudicados los conocían desde entonces y que pudieron sin obstáculo alguno ejercitar la pertinente acción". J. Santos Briz, La responsabilidad civil, 7ma ed., Madrid, Ed. Montecorvo, 1993, pág. 1187. Por otro lado, la segunda vertiente la encontramos en la doctrina española moderna que exhibe "una tendencia más elástica al situar el comienzo de la prescripción no en el inicio de los daños, sino **al realizarse su verificación total**". (Énfasis suplido) Íd., pág. 1188. En esta misma línea, "la jurisprudencia ha cambiado radicalmente el rumbo seguido por la que era dominante hasta la década de los sesenta [...], señalando que en los **[**20]** casos de daños continuados, el *dies a quo* del plazo de la prescripción no ha de remitirse a la fecha de la ocurrencia del accidente, sino al momento en que el perjudicado conoce de modo cierto los quebrantos definitivamente ocasionados". Albaladejo y Díaz Alabar, op. cit., págs. 460-461. Véase, además, I. Sierra Gil de la Cuesta, Comentario del Código Civil, Ed. Bosch, 2000, T.9, pág. 554. Como resultado, el Tribunal Supremo de España ha expuesto en casos recientes que "es consolidada doctrina jurisprudencial la que refiere el comienzo del cómputo de la prescripción en este tipo de casos cuando se trata de daños continuados [...] a aquel en que se produce el **resultado definitivo**." (Énfasis suplido) Díez-Picazo **[*425]** y Ponce de León, La prescripción extintiva en el Código Civil y en la jurisprudencia del Tribunal Supremo, Ed. Aranzadi, 2da ed., 2007, pág. 253. Es decir, "el cómputo del plazo de prescripción no se inicia **hasta la producción del definitivo resultado**, cuando no es posible fraccionar en etapas diferentes o hechos diferenciados la serie proseguida." (Énfasis suplido) Íd., pág. 1003.

Los tratadistas españoles añaden que no siempre resulta fácil "determinar [...] cuándo se produce **[**21]** o ha producido ese 'definitivo resultado' [puesto] que en relación con el concepto de daños continuados se nos ofrece como algo vivo, latente y conectado precisamente a la causa originadora y determinante de los mismos, que subsiste y se mantiene hasta su adecuada corrección". Albaladejo y Díaz Alabar, op. cit., pág. 460. Ahora bien, el entendido en la doctrina española moderna identifica ese momento cuando "el perjudicado conoce de modo cierto los **quebrantos definitivamente ocasionados**". (Énfasis suplido) Díez-Picazo y Ponce de León, op cit., pág. 1003. Esto es, cuando la conducta culposa o negligente ha dejado de causar los daños por los que se reclama indemnización.

Por otra parte, la mayoría de los estados de la Unión siguen una norma similar a la del derecho civilista español respecto a este asunto. "The continuing tort doctrine constitutes an established exception to the usual rule that a statute of limitations starts to run at the time of injury. In those cases [...] the statute does not begin to run [...] until the negligent or other wrongful act or incident has terminated." Speiser, et als., The American Law of Torts, West Group, 2013, Vol. 1A, sec. 5:27, págs. 347-353. Esta doctrina, **[**22]** en ocasiones conocida como "continuing tort doctrine" y en otras como "continuing violation doctrine", se ha aplicado a casos de responsabilidad civil extracontractual por maltrato emocional, estorbos, impericia profesional, controversias sobre seguros, discrimen, intrusiones y explosiones, entre otros. *Íd.* Véase, además, Elad Peled, Rethinking the Continuing Violation **[*426]** Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims, *41 Ohio N.U.L. Rev. 343 (2015)*.

B. Luego de examinar nuestra jurisprudencia, los precedentes modernos en otras jurisdicciones que nos resultan altamente persuasivos, así como los comentarios recientes de distintos tratadistas, entendemos que lo más adecuado es uniformar nuestra doctrina en aras de darle certeza a nuestro ordenamiento. De esta forma, *HN3*[⬆] **resolvemos que ante daños y perjuicios causados por cualquier acto u omisión culposo o negligente de carácter continuado, el término prescriptivo para incoar una acción para solicitar resarcimiento comienza a transcurrir cuando se verifiquen los últimos actos u omisiones o se produzca el resultado definitivo, lo que sea posterior**. Esta norma no es incompatible con la teoría cognoscitiva del daño que rige en nuestro ordenamiento. **[**23]** "Por estar los daños continuados inexorablemente atados a la causa que los origina, el conocimiento definitivo de los quebrantos ocasionados se verifica el día que cesa la fuente de éstos, ya que mientras exista, y por ende sean previsibles más daños relacionados a ella, no cabe hablar de resultado definitivo". *Nazario v. ELA, supra, pág. 828* (Opinión disidente del Juez Asociado señor Corrada del Río).[2]

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[2] Conviene recalcar que en ocasiones, como en este caso, las opiniones disidentes del pasado encuentran eco en el presente y se convierten en precedentes de cara al futuro. "A dissent in a court of last resort is an appeal to [...] the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." Charles Evans Hughes, The Supreme Court of the United States 68 (1936). El hecho de que una postura no consiga la mayoría de los votos en un momento dado no significa, necesariamente, que es errónea.

Naturalmente, esto no excluye que un demandante pueda probar, **[*427]** además, que conoció el daño sufrido en un momento distinto al que cesó la causa que lo generó.

No encontramos razón para no modernizar nuestra doctrina al igual que ha sucedido en otras jurisdicciones. Tampoco hallamos una justificación válida para tratar de forma distinta los casos en donde los daños no son producidos *estrictamente* por estorbos o actos de violencia doméstica. Independientemente de la naturaleza o el tipo de acto u omisión que genere el daño, en el contexto de *daños continuados*, el perjudicado se encuentra sufriendo un perjuicio que no ha de cesar, y por el contrario, se ha de repetir hasta que la causa generadora deje de existir. Por lo tanto, la norma que anunciamos hoy es aplicable a *todos* los casos sobre daños y perjuicios producidos por actos u omisiones continuados.

Tampoco nos persuaden las propuestas alternas que al momento de determinar **[**25]** cuándo comienza a transcurrir un plazo prescriptivo, por ejemplo, obligan a los tribunales a analizar si a pesar de reclamarse por daños continuados los perjuicios por los que se reclama indemnización tienen suficiente sustantividad y autonomía propia, o si por el contrario, el daño por el que se reclama es de carácter unitario y sin sustantividad propia. Laracruz Berdejo y otros, Elementos de Derecho Civil II, 5ta Ed., Madrid, Ed. Dykinson, 2013, T. II, Vol. 2, pág. 492. Igualmente, no nos convence la propuesta del profesor Brau del Toro respecto a que debe existir una distinción en el tratamiento brindado a los estorbos permanentes y a los estorbos continuos para fines de prescripción. H. Brau del Toro, op. cit., págs. 582-583. Estas alternativas, aunque pueden tener su mérito, desnaturalizan la esencia de los daños continuados, crean una nueva submodalidad de estos y a su vez, la equiparan a los daños sucesivos para fines de prescripción. La doctrina que hoy incorporamos definitivamente a nuestro ordenamiento nos parece más apropiada.

[*428] Lo contrario implica fraccionar innecesariamente las causas de acción, pues obligaríamos a los perjudicados a presentar sus demandas desde que se inician **[**26]** los daños, incluso cuando la fuente que los genera no ha cesado y, por el contrario, continúa y continuará causando perjuicios adicionales. Esto provoca litigios excesivamente extensos, pues los demandantes tienen que enmendar constantemente sus demandas para incluir alegaciones y reclamos por daños sufridos, aunque por la misma causa, con posterioridad a la presentación de la demanda original. "En este contexto, el balance de los intereses involucrados en los términos prescriptivos se inclina en favor de los demandantes, pues la desestimación de su causa de acción los expondría a un [acto u omisión culposo o negligente], que, en teoría, podría continuar indefinidamente". (traducción nuestra) Peled, op cit., pág. 348, citando a Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitations, 28 PAC. L.J., 453, 505 (1997).

A diferencia de lo que podría intimarse, esta norma no fomenta que los demandantes se crucen de brazos, más bien, desincentiva que las personas actúen de forma culposa o negligente continuamente. De esta forma, no penalizamos a un demandante que presenta su reclamación cuando todavía no ha transcurrido un año desde que cesó la causa que generaba los daños por los que solicita indemnización. Recuérdese que el foco de análisis **[**27]** en la doctrina ante nuestra consideración es la omisión o el acto continuo y no propiamente los daños sufridos. *Arcelay v. Sánchez, supra, pág. 838*. Si en nuestro ordenamiento se reconoce la interrupción y el comienzo de un nuevo término prescriptivo mediante actos extrajudiciales, también debemos reconocer que el término prescriptivo no comienza cuando la causa generadora del daño no ha cesado. En ese sentido, en ambos escenarios se preserva el derecho de los perjudicados a reclamar indemnización por los daños que sufrieron.

[*429] Por otra parte, constantemente enfatizamos el valor del precedente en nuestro ordenamiento. No obstante, nuestras decisiones no son un dogma escrito en piedra. Por eso, "cuando el razonamiento de una decisión ya no resiste un análisis cuidadoso, no estamos obligados a seguirla". *Fraguada Bonilla v. Hosp. Aux. Mutuo, supra, pág. 391*. "[E]l propósito inspirador de la doctrina de *stare decisis* es lograr estabilidad y certidumbre en la ley, mas nunca perpetuar errores". *Am. Railroad Co. of P.R. v. Comisión Industrial, 61 D.P.R. 324, 326 (1943)*. Ahora

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Simplemente no persuadió a la mayoría de los jueces que componían el Tribunal **[**24]** Supremo en un momento dado. Después de todo, este Tribunal no es *supremo* porque es infalible; solo es supremo en jerarquía. Por esta razón, al reexaminar nuestra jurisprudencia, en esta ocasión nos persuaden los planteamientos previos de varios jueces y juezas de este Tribunal, quienes desde sus respectivas Opiniones de conformidad, concurrentes o disidentes, abordaron la cuestión que hoy resolvemos de manera definitiva.

bien, solo procederá dejar a un lado precedentes: "(1) si la decisión anterior era claramente errónea; (2) si sus efectos sobre el resto del ordenamiento son adversos, y (3) si la cantidad de personas que confiaron en ésta es limitada". *Pueblo v. Delgado, 2008 TSPR 174, 175 DPR 1, nota 8 (2008)*; *González Natal v. Merck Sharp & Dohme Química de Puerto Rico, Inc., 2006 TSPR 2, 166 D.P.R. 659, 688, 2006 Juris P.R. 10 (2006)*.

A la luz de todo **[**28]** lo anterior y debido a la confusión que ha causado en nuestra doctrina, dejamos sin efecto nuestros pronunciamientos previos en contrario a esta Opinión, en particular, los expuestos en *Galib Frangie v. El Vocero de P.R., supra*, y su progenie, **en cuanto a este asunto particular**. Con ello, sacamos esa espina de nuestra jurisprudencia y eliminamos las dolencias que esta le causa a nuestra doctrina de daños y perjuicios.

III

En este caso, tanto el Municipio como los recurridos están de acuerdo con las determinaciones de los foros recurridos de que la causa que genera los daños por los que se reclama es de carácter continua. Los daños son el resultado de las inundaciones producidas como consecuencia de los defectos de las alcantarillas de la calle donde viven los recurridos. La única discrepancia es cómo debe computarse el término prescriptivo, pues los recurridos admitieron en varias deposiciones que conocían de la recurrencia de las inundaciones desde hacía muchos años.

[*430] Al analizar esos hechos a la luz de la norma discutida, concluimos que la demanda de epígrafe **no está prescrita**, puesto que no se han verificado los últimos actos u omisiones ni se ha producido el resultado definitivo. Más bien, nos encontramos ante una causa de **[**29]** acción que se regenera día a día mientras subsista la falta de mantenimiento de las alcantarillas y tuberías. Eso causa inundaciones recurrentes y previsibles.

IV

Por los fundamentos antes expuestos, confirmamos la determinación del Tribunal de Apelaciones. En consecuencia, se devuelve el caso al Tribunal de Primera Instancia, Sala Superior de Ponce, para que continúen los procedimientos.

Rafael L. Martínez Torres

Juez Asociado

SENTENCIA

En San Juan, Puerto Rico, a 14 de septiembre de 2016.

Por los fundamentos antes expuestos, en la Opinión que antecede, la cual se hace formar parte integrante de la presente Sentencia, confirmamos la determinación del Tribunal de Apelaciones. En consecuencia, se devuelve el caso al Tribunal de Primera Instancia, Sala Superior de Ponce, para que continúen los procedimientos.

Lo acordó el Tribunal y lo certifica el Secretario del Tribunal Supremo. La Juez Asociada señora Rodríguez Rodríguez está conforme con la determinación de este Tribunal y hace constar la siguiente expresión: "Me place consignar mi conformidad con la opinión que hoy emite una mayoría de este Foro. Como bien subraya la opinión mayoritaria, 'este Tribunal no es *supremo* porque es infalible, **[**30]** solo es supremo en jerarquía'. *Carlos J. Rivera Ruiz, et al. v. Municipio Autónomo de Ponce, et al., 2016 TSPR 197, en la nota 2, 19 D.P.R. (2016)*.

El trayecto de la doctrina de los daños continuados en nuestra jurisprudencia ha sido uno extenso. A pesar de ello, durante los últimos veinte años, el consenso respecto a la controversia puntual que hoy atendemos se podría describir como elusivo. Esto, a pesar de que, hace nueve años, intenté persuadir a una mayoría de este Tribunal de adoptar la normativa que hoy pautamos. Véase *Umpierre Biascoechea v. Banco Popular, 2007 TSPR 21, 170 D.P.R. 205, 2007 Juris P.R. 26 (2007)* (Rodríguez Rodríguez, Opinión de conformidad). Empero, fue preciso esperar.

La doctrina del precedente judicial guía el proceder de este Tribunal en aras de salvaguardar la uniformidad en la interpretación del Derecho y la ley. Ahora bien, no podemos descansar en este principio cuando la aplicación del mismo tiene el efecto de perpetuar una lectura errónea del Derecho. Véase *Pueblo v. Díaz de León, 2009 TSPR 142, 176 D.P.R. 913, 922 (2009)*; *Pueblo v. Pérez Pou, 2009 TSPR 5, 175 D.P.R. 218, 251-252 (2009)* (Rodríguez Rodríguez, Opinión disidente).

[*431] En fin, estoy satisfecha con que, de forma definitiva, hayamos logrado armonizar la doctrina de los daños continuados con la figura de la prescripción extintiva. Así, proveemos a la teoría general del Derecho de Responsabilidad Civil Extracontractual una mayor estabilidad".

Juan Ernesto Dávila Rivera

Secretario del Tribunal Supremo

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