

CIVIL PROCEDURE

Don't Let the SOL Leave You and Your Client SOL

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Tick, tick, tick... Every one of your cases has a ticking time bomb so that if you don't file within the statute of limitations ("SOL"), you will be ### out of luck. Statute of limitations, statutes of repose, equitable tolling, "arising," "accruing" and the "discovery rule" can be confusing when it comes to determining if you have a viable case.

California's statutes of limitations provide time limits within which to file certain causes of action. Statutes of repose are like statute of limitations on steroids as they act as an absolute bar to certain causes of action – even when the plaintiff was not aware of his or her cause of action.

Our legislature creates statutes of limitations based upon public policy decisions to control litigation. See, *O'Neill v. Tichy* (1993) 19 Cal. App. 4th 114. These laws are meant to protect prospective defendants from liability from old claims when witnesses or evidence are no longer available or because our judicial system can't handle such stale claims effectively. *April Enterprises, Inc. v. KTTV* (1983) 147 Cal. App. 3d 805.

A knowledge of the statute of limitations is absolutely necessary to avoid malpractice. For example, suppose a horrifically-burned potential client comes into your office and tells you that he was rear-ended by a Shell Oil tanker which burst into flames immediately after impact. To put the icing on the cake, he tells you that the driver of the truck was just convicted of felony DUI for the accident. Holding back your excitement from this fantastic, big-dollar case, you ask him when did the accident occur? He tells you three and a half years ago. Do you take the case?

Most of you are probably thinking that this poor victim is out of luck because the statute of limitations for personal injuries in California is only two years under California Code of Civil Procedure ("C.C.P.") §335.1, right? But those of you who know the statutes of limitations would realize that under C.C.P. §340.3, an action for damages against a defendant arising from a felony offense can be brought within one year after the felony conviction judgment even though the two-year negligence statute of limitations has passed.

In *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal. App. 4th 963, for example, the court allowed a civil action for felony elder abuse within one year of the date of the felony conviction even though it would have been barred under the three-year limitations period for medical malpractice. Keep this in mind for all of your cases as it might save an otherwise barred good case and keep you out of a malpractice suit!

Another potential client comes to you and tells you that he was injured in a car accident 2 ½ years ago. He tells you he knew about the two-year statute of limitations and that he was just about to settle the case with the defendant at the one-year and 11-month mark when the defendant keeled over and died. He didn't know what to do so he waited a few months and rgwb came to see you. Do you take the case?

Again, you're probably thinking that here is yet another poor victim who blew the two-year statute of limitations, right? But perhaps you are one who knows about C.C.P. §366.2 which provides that if a

person against whom an action may be brought dies before the expiration of the statute of limitations, any cause of action which survives may be brought within one year of the defendant's death – *even if it would be barred by the statute of limitations if the defendant were still alive!*

Arise vs. Accrue

The first thing one must do when analyzing the viability of a case is to determine when the cause of action **arises** and when it **accrues**. Although the words “arise” and “accrue” have very different meanings when it comes to statutes of limitations, many courts incorrectly use these terms interchangeably. Even our Supreme Court has on occasion done this. See, for example, *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal. 4th 797, 807–809 holding that a cause of action “accrues” when the last fact essential to the cause of action occurs. This is likely based upon the fact that these terms are used in a myriad of statutes having nothing to do with statutes of limitations, but sometimes they are closely related.

For example, a client comes to you and wants to sue a California corporation, but when you check the status of the corporation, you see that it was dissolved last year. Can you still sue? The answer depends on whether your client's cause of action arose prior to the dissolution. If the cause of action **arose** prior to dissolution, you may sue the corporation. However, you must also determine when your client's cause of action accrued to see if it is still viable or barred by a statute of limitations. [Note: California's Secretary of State website allows searches for a corporation's status at: <http://www.sos.ca.gov/business/be/information-requests.htm>.]

In *Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d at 1189, our Supreme Court held that although a corporation has been dissolved and therefore usually cannot be sued, the corporation and its shareholders may be sued in the corporate name upon any cause of action which arose against the corporation prior to its dissolution. So when does a cause of action arise? It **arises** when all of the elements of a cause of action exist.

For example, a client comes into your office today and tells you she had a surgical procedure done in 1998 and the doctor left a scalpel inside her. She went for years without even knowing it was there. Then, one day in 2010 she bent over in the shower to pick up her bar of soap and suddenly the scalpel popped out of her abdomen. When did the cause of action arise? When did it accrue?

In this example, the cause of action **arose** back in 1998 when the doctor committed negligence. The doctor (1) had a duty to remove the scalpel, (2) breached the duty by leaving it in her, (3) which was a substantial factor in (4) causing her damage. The damage was caused the instant the doctor closed up the plaintiff with the scalpel inside. The cause of action **accrued**, however, in 2010 when the patient first learned of her doctor's negligence. Do you take the case?

Many of you are probably thinking that the statute of limitations for malpractice under C.C.P. §340.5 is the lesser of three years from the date of injury or one year from the date of discovering the malpractice and that since the procedure was done 12 year ago in 1998, it is barred, right? A few of you might know of the exception to C.C.P. §340.5 which provides for a tolling during a period when there is the presence of a foreign body which has no therapeutic or diagnostic purpose or effect in the plaintiff. Thus, the scalpel, being a foreign body, tolled the statute and this case is viable!

Common Statutes of Limitations

Now that we understand the difference between “arise” and “accrue,” we need to know where to look for the appropriate statute of limitations statutes. For actions other than for the recovery of real property, most

of the statute of limitations are contained in C.C.P. beginning with C.C.P. §335. Here's a quick summary of some of the ones CASD members may commonly deal with:

- Negligence actions and intentional torts other than defamation and false imprisonment (i.e. assault, battery, personal injury, wrongful death, etc.) is two years – C.C.P. §335.1.
- Breach of written contract is four years -- C.C.P. §337.
- Patent construction defects is four years from the date of substantial completion of the improvement -- C.C.P. §337.1. This is a statute of repose. However, if the plaintiff learns of the patent defect, the statute is only three years from the date of knowledge.
- Latent construction defects is 10 years from the date of substantial completion of the improvement -- C.C.P. §337.15. This is a statute of repose. However, if the plaintiff learns of the latent defect, the statute is only three years from the date of knowledge.
- Breach of written lease and abandonment of property is four years -- C.C.P. §337.2.
- Liability created by statute, trespass or injury to real property, and trespass to chattel is three years -- C.C.P. §338.
- Fraud or mistake is three years -- C.C.P. §338(d). Note that negligent misrepresentation which is a type of fraud is only two years -- C.C.P. §339. This is because the gravamen of negligent misrepresentation is negligence and not fraud.
- Civil penalties or punitive damages for hazardous waste or substance violations is five years -- C.C.P. §338.1.
- Oral contracts is two years -- C.C.P. §339.
- Breach of unwritten lease and abandonment of property is two years -- C.C.P. §339.5.
- Libel, slander, false imprisonment, seduction, forged or raised checks, injury to animals by feeder or veterinarian is one year -- C.C.P. §340. Also, note that the discovery rule does not apply to defamation claims because it would eviscerate the single-publication rule and the statute of limitations as long as a copy of the defamatory document exists. [See, *Shively v. Bozanich* (2003) 31 Cal. 4th 1230, 1253.]
- Childhood sexual abuse is within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later -- C.C.P. §340.1.
- Damages suffered as result of domestic violence is three years from the date of the last act of domestic violence by the defendant against the plaintiff -- C.C.P. §340.15.
- Exposure to asbestos is one year after the date plaintiff first suffered disability or one year after the date the plaintiff knew, or through the exercise of reasonable diligence should have known, that asbestos contributed to plaintiff's injuries -- C.C.P. §340.2.
- Actions for damages against defendant arising from a felony offense is within one year after judgment is pronounced -- C.C.P. §340.3.
- Medical malpractice is the lesser of three years from injury or one year from discovery. For actions by a minor, the statute is three years from the date of the alleged wrongful act except for actions by a minor under six years old which must be commenced within three years or prior to his 8th birthday, whichever provides a longer period. Pretty simple, huh? You have to read this one carefully -- C.C.P. §340.5. Also, you must give at least 90 days' prior notice to the defendant of your intention to commence the action -- C.C.P. §364.
- Attorney malpractice is one year after plaintiff learns of malpractice or four years from the date of the malpractice except for tolling due to actual fraud -- C.C.P. §340.6.
- Recovery or conversion of personal property, baggage, etc., left at hotel, hospital, boarding house, etc., is 90 days -- C.C.P. §341a.
- Actions against public entities (C.C.P. §342 and Government Code §945.6) is six months to file a claim.

- Actions against the federal government is two years -- Federal Tort Claims Act at 28 U.S.C. §2671 *et seq.*
- For relief not otherwise provided for, the statute is four years -- C.C.P. §343.

Obviously, this is not a complete list and there are many more statutes of limitations. In fact, our legislature has actually written statutes pertaining to specific issues such as the Dalkon Shield litigation (C.C.P. §340.7), Northridge earthquake insurance claims (C.C.P. §340.9), terrorist victims from the September 11, 2001 World Trade Center attack (C.C.P. §340.10), recovery of Holocaust-era artwork from enumerated entities (C.C.P. §354.3) and even Armenian Genocide victims (C.C.P. §§354.4).

It is important to note that some of these statutes are as short as 90 days (*i.e.*, recovery or conversion of personal property, baggage, etc., left at hotel, hospital, boarding house, etc. -- C.C.P. §341a). So now that you know where to look up the law, let's say you find that your client's action appears to be barred by the SOL. Do you simply tell your client that he is out of luck? Not if you want to avoid a potential malpractice suit!

The Discovery Rule

There are some other rules and exceptions which might make your otherwise-barred case viable. First is the "discovery rule" which postpones the accrual of a cause of action until the plaintiff discovers or has reason to discover the cause of action.

Suppose a client comes to you with a medical malpractice case. You know that under C.C.P. §340.5, you must sue the doctor within the lesser of three years from the injury or one year from the discovery of the malpractice. Your client says she didn't learn of the malpractice until two years after her surgery and you sue immediately. You feel safe, but during the litigation, the doctor says the problem is not due to his malpractice, but due to a defective medical product. You sue the manufacturer of the product more than two years after the injury. Is the product action time barred?

The answer is no because of the "discovery rule." See, *Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal. 4th 797, 811 holding that even though a related medical malpractice action was pending, a product liability claim did not **accrue** until the plaintiff had reason to suspect her injury resulted from a defective product implanted during the surgery.

"The principal purpose of the rule permitting postponed accrual of certain causes of action is to protect aggrieved parties who, with justification, are ignorant of their right to sue." *Seelenfreund v. Terminix of Northern Calif., Inc.* (1978) 84 Cal. App. 3d 133, 136. The discovery rule applies "where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured." *Leaf v. City of San Mateo* (1980) 104 Cal. App. 3d 398, 406. It is particularly helpful to plaintiffs in actions in which it is difficult to determine the wrongful conduct or where the damages are hidden.

The portion of CACI 455 -- Statute of Limitations—Delayed Discovery – states.

If [name of defendant] proves that [name of plaintiff]'s claimed harm occurred before [insert date from applicable statute of limitations], [name of plaintiff]'s lawsuit was still filed on time if [name of plaintiff] proves that before that date, [[name of plaintiff] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/it] had suffered harm that was caused by someone's wrongful conduct.]

As you can see, the "discovery rule" doesn't require actual knowledge of the cause of action or even who the defendant is. It only requires that one **suspect that there was some kind of harm caused by**

someone's wrongful conduct. This can cause some interesting issues at trial. For example, suppose a defendant has an Oldsmobile with more than 300,000 miles on it. He rolls the odometer back to 100,000 miles and sells it to your client. Your client drives away thinking he got a pretty good deal.

About a year later, the water pump goes out. Your client thinks, "Well that can be expected as the car has more than 100,000 miles on it." Another year goes by and the alternator goes out. Again, your client thinks that can be expected as the car has more than 100,000 miles on it. Another year goes by and your client is driving the car to Las Vegas. It's hot, he has the air conditioner on full blast, he's taxing the engine driving over the mountain range at the California/Nevada border when BOOM!— the engine explodes.

Your client takes the car to a mechanic who says, "Well, that can be expected. You had more than 300,000 miles on the engine." For the first time, your client realizes he has been the victim of fraud. Your client immediately sues the seller; however, it has been more than three years from the date of the fraud/purchase. You think, "So what? The discovery rule applies and we're still alright."

Then the seller asserts that your client buyer should have known he had suffered harm when the water pump went out and if not, certainly when the alternator went out, and that the statute of limitations **accrued** then and thus the fraud action was barred. Who wins this argument? Unfortunately, there are no cases clearly addressing this issue and a jury will have to answer this question based purely on arguments by the attorneys.

Let's add another fact to our example. Your client buys the same Oldsmobile with more than 300,000 miles on it and the rolled back odometer showing only 100,000 miles, but now the defendant also tells your client that the car has never been in a wreck. During the first year of ownership, while your client is getting new tires put on the car, the mechanic says, "Looks like you got rear-ended before." Your client thinks to himself, maybe the seller lied to me, but he thinks so what, the car drives fine and he doesn't do anything about it . . . until a few years later when the engine blows up.

The defendant argues that the statute of limitations is blown because the plaintiff knew or should have known he had suffered a harm when his mechanic told him it looked like the car had been rear-ended. The plaintiff, however, is only suing for the fraud about the rolled back odometer. Is this action time barred?

The answer is probably yes. The rationale is that once the plaintiff learned that the defendant had been untruthful about the car never having been in an accident, the plaintiff could no longer reasonably rely on the defendant's other representations such as the car only having 100,000 miles on it. Again, this will be a question for the jury unless you are the unlucky person who gets to deal with this on appeal from a motion for summary judgment. At least you will likely get a published opinion addressing it for the rest of us.

When dealing with the discovery rule, our courts frequently confuse the delayed "accrual" with "equitable estoppel." These are closely related, but entirely different concepts. Equitable estoppel applies when a defendant fraudulently conceals something from the plaintiff. Obviously, this would prevent discovery, but it is really not the same thing as the discovery rule. Again, even our Supreme Court confuses them. For example, in *Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal. 4th 797, 803, 807, the court states that the statute of limitations "will be tolled until such time as a reasonable investigation would have revealed its factual basis," but later in the same opinion, states that the discovery rule "postpones accrual of the products liability claim until a reasonable and diligent investigation would have revealed its existence."

Just remember that the plaintiff has the burden of proof on this issue. There is "a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of an injury." The plaintiff will have to prove facts showing why the action was not filed until a later date and why the defendant's wrongdoing was

not discovered earlier. *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal. 4th 623, 638.

Disabilities

Certain time frames are not included in the time for calculating the time within which to file an action. For example, the statute of limitations time does not run during minority (under age 18) or while insane (C.C.P. §352); while imprisoned *for up to two years* (C.C.P. §352.1); when a plaintiff due to a state of war is unable to file (C.C.P. §354) and during an injunction (C.C.P. §356). Keep this in mind when calculating dates.

Last Ditch Efforts to Save Your Case

If after having analyzed when the cause of action arose, when it accrued, whether the discovery rule applied and whether there were any disability periods, you think the action is barred, here are some possible last ditch efforts to save your case:

- Can you plead a different cause of action with a longer SOL? (*i.e.*, perhaps breach of a statute which under the Code of Civil Procedure is three years.
- Can you sue in equity?
- Can you apply a longer out-of-state statute of limitations?
- Can you assert an estoppel argument against the defendant?
- Can you plead a continuing tort or continuing negligence? [Continuing torts such as a continuing trespass or nuisance allow a plaintiff to file successive complaints for damages as long as the tort continues. In these cases, the cause of action does not **accrue** “until the date of the last injury or when the tortious acts cease.” *Pugliese v. Sup. Ct.* (2007) 146 Cal. App. 4th 1444, 1452.]

With a good knowledge of the statutes of limitations in the Code of Civil Procedure and the rules applying to them, you may be able to make your client’s day by saving his case after he was told by some other attorney that he was out of luck.