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STATUTES OF LIMITATIONS: “TOLLING,” “TIME-BARRING,” “DEFERRED ACCRUAL,” AND OTHER MYSTIC PHRASES

Non-lawyers are often hesitant to say the words, “statute of limitations,” as if there were something fishy or arcane about the phrase. In fact, statutes of limitations are conceptually simple: They are laws, passed by the state legislature, that prevent plaintiffs from recovering for “old” claims. Generally, limitations laws “time-bar” a plaintiff’s claim if he waits for several years before filing suit. So, as laws go, statutes of limitations are really pretty simple.

One fundamental point: There are several statutes of limitations. Each type of claim – breach of contract, negligence, fraud, and so on – has its own statute of limitations. Therefore, it is incorrect (or at least imprecise) to say, “The plaintiff’s claim is barred by the statutes of limitations.” There is no all-encompassing legal concept called “The Statutes Of Limitations.” Rather, a specific statute of limitations applies to each sort of claim; if no statute expressly addresses a particular claim, Texas’ residual four-year statute of limitations applies.

The Reasons We Have Statutes of Limitations

It is often said that statutes of limitations are intended to compel plaintiffs to bring suit while the evidence is fresh, and while the facts are clear in the minds of the witnesses. This is a nice argument, and appeals to our sense of fairness. Obviously, we believe, trials are more likely to produce accurate results if the participants have a clear recollection of the events giving rise to the suit. Conversely, we believe, old claims – where memories have gone hazy and evidence has been lost – are more susceptible to mistakes or even fraud.

A second, more pragmatic, reason for time-barring claims is that society can’t function very well with tons of old law suits hanging around in the air. For instance, without limitations laws, it would be virtually impossible to buy a business. If the purchaser wanted to know about the potential legal liabilities of the company he was buying – something he definitely should know – his “due diligence” investigation would have to look back to the formation of the business. In practical terms, such an investigation might be impossible. However, in systems (like ours) that incorporate limitations laws, individuals and companies need not be concerned with the distant past: After a few years, limitations laws wipe their slates clean.

How Limitations Laws Work

When a car is stolen, the owner’s claim against the thief “accrues” on the date of the theft (or maybe, as discussed below, a few days afterward). In Texas, the action for theft is subject to a two-year statute of limitations. Therefore, the owner of the car must sue the thief within two years of the theft or his claim will be “time-barred,” and the thief will escape civil liability.

The same is true for other sorts of claims, including breach of contract. This probably warrants an example, so imagine that you are a wealthy partner at a local law firm. Fat and happy, one spring you hire a construction company to install a swimming pool in your back yard. Together, you and the pool builder ink a contract under which the pool is to be completed by May 15, 2002. May 15 rolls around, and the builder has indeed built a large concrete hole in your back yard. But, when you fill the pool with water, it leaks like a sieve. In fact, you wake up on May 16 to find the pool completely empty. Under these circumstances, your claim for breach of contract would “accrue” on May 16, since that’s the day you knew (or darn sure should have known) you had a problem with the pool. Texas has a four-year statute of limitations for breach of contract, so you would have to file suit within four years of May 16, 2002. If not, tough luck for you, and your pool builder gets off without a scratch.

Exceptions to Limitations

Of course, things don’t always turn out as neatly as they did with the pool example. There are ways for a shrewd

plaintiff's attorney to avoid the effect of a statute of limitations. The three most common plaintiffs' arguments against applying limitations laws – other than mental incompetence, which is always a defense to limitations – are known as the "Discovery Rule," "Fraudulent Concealment," and a catch-all legal concept called "equitable estoppel." All of these exceptions to limitations have one thing in common: They are designed to prevent an application of limitations laws that would be grossly unfair to plaintiffs. You might say that, while statutes of limitations help to level the playing field for defendants, the exceptions to limitations are necessary in order to keep things fair for plaintiffs.

The Discovery Rule

Texas' Discovery Rule "defers the accrual date" for a cause of action. Literally, it prevents the limitations clock from starting until a plaintiff finds out he's been injured. Obviously, the Discovery Rule won't apply in cases like assault; if you get punched in the nose, your injury is pretty clear from the get-go. Therefore, the basic thing you need to know about the Discovery Rule is that it really only applies to injuries that are hard to detect.

Gaddis v. Smith was the first Texas case to recognize the Discovery Rule, and it makes pretty clear why such a rule is necessary. The plaintiff in that case, Dorothy Gaddis, had given birth by Caesarean Section in 1959. In the years following childbirth, she suffered from increasing abdominal pain. By 1963, the pain was so pronounced that she saw a doctor, who discovered what he believed to be a tumor. However, when the doctor operated on Mrs. Gaddis to remove the "tumor," he found instead an old surgical sponge, which had been left inside Mrs. Gaddis during a previous operation – either the Caesarean Section in 1959 or an appendectomy she had undergone in the 1940s.

In 1964, in the wake of her "tumor" removal, Mrs. Gaddis filed a suit against the doctor who had performed her Caesarean Section. She argued that this doctor's negligence had caused her injury. The problem with her case was that the two-year limitations period on her claim had expired. Based on this fact, the trial court granted a motion for summary judgment against her.

The Texas Supreme Court could not abide this result. Instead, the Court opted to recognize the Discovery Rule, which had been cropping up in other jurisdictions for decades. The Court reasoned that, "the cause of action for the negligent leaving of a foreign object in a patient's body by a physician accrues when the patient learns of, or, in the exercise of reasonable care and diligence, should have learned of the presence of such foreign object in his body." Thus, Mrs. Gaddis' claim had not "accrued" at the time of her Caesarean. Rather, accrual was deferred until the date when she *discovered* that a sponge had been left in her body. Her suit was not barred by limitations. Instead, the "clock" had barely begun to run

against her claim at the time she filed suit.

Over the years, *Gaddis v. Smith*'s simple – and extremely narrow – holding has been expanded to apply to cases far-removed from physician's negligence. In its current incarnation, the Discovery Rule can defer the accrual date of any cause of action, so long as the injury complained of is both "inherently undiscoverable" and "objectively verifiable." In fact, under certain circumstances, the Discovery Rule could even apply to the swimming pool that you purchased in the example above.

For instance, let us suppose that, as above, you arrange for a pool to be built in your backyard. However, this time, on May 15, 2002 you fill the pool and all is well. No leaks. The sun is out. You are enormously happy with yourself and your new pool. In fact, you slap the pool builder on the back and compliment him as he is leaving. All summer, you sit poolside in your deck chair, warmed by the sun and by the envy radiating from your neighbors (who you occasionally invite over to discuss the manifold benefits of pool ownership). Fate is, as you should have guessed, conspiring against you.

Unknown to you, your pool builder was a crook: He cut corners. In fact, he used only half the required amount of rebar in the pool's construction. Thus, when you drain the pool on November 30, you discover that its surface is already overrun with tiny cracks. It dawns on you – slowly – that your pool is breaking into pieces. It won't last twenty years. It might not even last for two.

In such a case, the Discovery Rule would delay the accrual date for your breach of contract claim until November 30, 2002, the first date on which you could have known that the builder breached his contract. Why? Because, short of an x-ray, there was no way for you to know that the builder had left out the rebar on May 15; it just wouldn't be fair to hold you to an accrual date that passed before you learned about the cracks. But you aren't allowed to delay forever either. Once the cracks appear, you've got to investigate. Your cause of action accrues once you've seen the signs that something's wrong.

The Doctrine Of Fraudulent Concealment

Like the Discovery Rule, the second exception to statutes of limitations, the Doctrine of Fraudulent Concealment, is designed to prevent the overly-harsh results of a pure limitations system. By virtue of its name, you can probably guess when Fraudulent Concealment "tolls" limitations (i.e. stops the limitations clock from running against the plaintiff): It's when the bad guy covers up his mistake. Specifically, Texas' Supreme Court has noted that fraudulent concealment "estops" a defendant from asserting limitations as a defense because "a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run."

Fraudulent Concealment most often comes into play in

cases involving embezzlement. A crooked accountant can do a lot of damage quickly, but, what's worse, he can do a lot of damage slowly, and cover up his tracks. If an accountant cooks the books, the business he works for can seem outwardly healthy for years, and one morning find itself broke (the accountant will, by this time, be in the Caymans). In a pure limitations environment, the business could only recover for the thefts that occurred within the two-year limitations period. A good chunk of the business' loot would be out of the reach of the courts.

Naturally, Texas does not allow that to happen. In a Fraudulent Concealment case, some courts arrive at this decision by relying on Discovery Rule-like language: they "assume" that the defendant's fraudulent concealment made the plaintiff's injury undiscoverable. A better way of arriving at the same result is to require the plaintiff to establish the elements of fraudulent concealment: (1) existence of the underlying wrong; (2) the defendant's knowledge of the wrong; (3) the defendant's use of deception to conceal the wrong; and (4) the plaintiff's reasonable reliance on the deception. When a defendant fraudulently conceals the facts forming the basis of the plaintiff's claim, limitations will not begin to run until the claimant, using reasonable diligence, discovered or should have discovered the injury.

Equitable Tolling

Lastly, in certain cases where no clear exception to a statute of limitations applies, courts may nevertheless hold that the limitations clock is "equitably tolled." The phrase has a nice ring to it. It sounds official. In reality, it's just a shorthand way for courts to say, "Since there aren't any rules on this, we're going to make one up."

One circumstance in which courts have equitably tolled limitations shows the need for legal catch-alls like equitable tolling. Over the years, grizzled veterans of the defense bar developed a rather infamous defense strategy known as "lying behind a log." Unfortunately, this defense can best be explained by (one last time) returning to your swimming pool. Suppose that, this time, before construction on your pool began, you received an estimate for the pool's cost from an entity called "Bill Dawson Pools, Inc." You accepted the offer, and a man named Bill Dawson came to your house, shook your hand, and supervised the pool's installation. Later, after your pool had begun to leak, you naturally sued Bill Dawson Pools, Inc. You just took the name right off the estimate. (There was a contract too, but you'd lost that.)

Now, let's say that Bill Dawson controls several pool construction companies, and that the one which actually built your pool was "Bill Dawson Ti-D-Pool Co." That's the name of the company that signed the contract with you. Under the "lying behind the log" defense, Bill Dawson Pools, Inc. would drag its heels until the limitations period expired, making all sorts of excuses and resisting all your attempts at

discovery. Literally, Bill Dawson would try to hide the fact that you had sued the wrong entity. Once limitations had expired, Bill would spring out from "behind the log" and say, "Hah! You sued the wrong company!" You would lose your case against Bill Dawson Pool, Inc. because that company hadn't built the pool, and your luck wouldn't be any better against Ti-D-Pool, since your claim against that company would be barred by limitations.

The Texas Supreme Court pretty much got rid of this defense in 1999 in a case called *Chilkewitz v. Hyson*. There, the Court wrote that, "In misidentification cases, limitations may be tolled when a plaintiff sues an incorrect entity if there are two separate entities that use a similar trade name and the correct entity had notice of the suit and was not misled or disadvantaged by the mistake." Basically, since Bill knew the wrong company was sued by mistake, but did nothing to fix the problem, Texas courts are going to "equitably" take away his limitations defense.

Conclusion

Statutes of limitations are designed to make courts fair for defendants, and they do: They help ensure that good evidence will be available at trial, and they allow all of us potential defendants to sleep at night by putting old claims to rest. Nevertheless, limitations laws are not as unforgiving as they are often represented to be. If the application of limitations strikes you as unfair in a particular case, it is probably the subject of some exception to the statutes of limitations. The important thing for plaintiffs to remember is that, once you know you've got a claim, the clock is running, and even the best lawyer can't prevent your claim from being barred by limitations.

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Around The Circuit

– *St. Paul v. Centrum GS, Ltd.*

St. Paul insured Centrum, a property management company, under a Commercial General Liability policy. When a former Centrum security guard, Gerry Perdue, sued the company for wrongful termination and defamation, St. Paul filed a declaratory judgment action against Centrum, arguing that it had no duty to defend Centrum against such allegations.

Under Centrum’s CGL, St. Paul was obligated to defend Centrum against – among other things – suits involving personal injury, which hypothetically could include injuries stemming from defamation. However, the policy only required St. Paul to provide defense for suits including Centrum’s “business activity.” The Northern District of Texas found that termination of an employee for his alleged work-related misconduct fell outside the “business activity” coverage.

The Fifth Circuit disagreed. The term “business activity” was not defined within Centrum’s CGL, and so the Fifth Circuit gave the phrase a broad interpretation. Specifically, the Court found that, after Mr. Purdue’s termination, Centrum’s agents had posted derogatory “Wanted Signs” depicting him, and warning that he might be dangerous. Because such activity potentially amounted to “protecting” the occupants of

Centrum’s property from Perdue, the Court ruled that it was, conceivably, a business activity.

– *AIIC v. Blythe et al*

Insurer AIIC insured general contractor RNC, who employed subcontractor Boyd Blythe. RNC authorized Blythe’s use of an RNC-owned cherry picker. One of Blythe’s employees was involved in an accident while driving the vehicle; Blythe, the permissive user, was not present at the time. AIIC brought a declaratory judgment action asking the Southern District of Texas to declare that RNC’s Commercial Auto policy did not cover an accident involving Blythe’s employee’s use of the vehicle unless Blythe was actually present at the work site. The Southern District ruled for the insurer, and Blythe appealed.

Again, the Fifth Circuit reversed the trial court, relying on the specific language of the policy, which defined an “insured” as “anyone . . . using with your permission a covered auto you own.” Since RNC had authorized Blythe to use the cherry picker and knew that someone other than Blythe would actually drive the vehicle, the fact that Blythe wasn’t present was inconsequential. The Court found that RNC had known that Blythe’s employees would use the company’s vehicle, and that the employee was therefore a “permissive” user of a “covered auto.”

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