

How to Win on the Statute of Limitations

Whitney Frazier Watt
Stites & Harbison, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202
wwatt@stites.com

Scott J. Wilkov
Tucker Ellis LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
Scott.Wilkov@TuckerEllis.com

Robin E. McGuffin
Stites & Harbison, PLLC
250 West Main Street, Suite 2300
Lexington, KY 40507-1758
rmcguffin@stites.com

Regardless of the type of case, the statute of limitations can be a powerful tool in defending your client. Actually establishing a successful statute of limitations defense, however, can be more challenging than it first appears. It is therefore important to carefully consider the statute of limitations at every step of the case. This tip sheet is intended to provide pointers on how to craft a winning statute of limitations defense.

Reviewing and Responding to the Complaint

- **Verify the applicable statutes of limitations and repose.** Of course, statutes of limitations and repose vary across jurisdictions, as does the law regarding when a cause of action accrues. Therefore, upon receiving a complaint, one of the first steps should be to determine the applicable limitations periods, especially when practicing in an unfamiliar jurisdiction.

Unlike a statute of limitations, which generally starts running from the date on which the plaintiff “knew or should have known” of her injury and its cause, a statute of repose starts running from the date of the defendant’s action, even if the plaintiff’s injury has yet to occur. If a complaint alleges a newly discovered injury stemming from a wrongdoing that occurred long ago, the case could be a good candidate for a statute of repose defense.

For a 50-state compendium of statutes of limitations and repose, see the “IADC Product Liability 50 State Damages Caps/Spoliation/Statutes of Limitation and Repose Guide” published in June 2018.

- **Consider all of the plaintiff’s causes of action and alleged injuries.** Because limitations periods can vary from claim to claim, a plaintiff who brings multiple causes of action regarding the same basic facts might be subject to several different limitations periods. A motion that knocks out only some of the plaintiffs’ claims can still be extremely useful, both for winning the case outright and for establishing a more favorable settlement position.

For example, in cases alleging injuries caused by a product, plaintiffs often assert breach of warranty and fraudulent misrepresentation in addition to traditional product liability claims. These claims are often subject to different limitations periods; for example, while the statute of limitations for product liability is only one year in many jurisdictions, the limitations periods for breach of warranty and fraud can be up to four years and five years. But, breach of warranty and fraudulent misrepresentation are typically weak claims for plaintiffs, since breach of warranty requires privity and fraud is notoriously difficult to prove. Therefore, even if you are able to defeat only the plaintiff’s product liability claims on statute of limitations grounds, that often has the practical effect of winning the entire case.

- **Preserve the defense in the answer.** In most jurisdictions and in federal court, the statute of limitations is an affirmative defense that must be asserted in the answer. *See* FRCP 8(c)(1). Failure to assert the defense in the answer may result in waiver and an inability to rely on the defense later in the case.

Federal courts are split on how much detail must be included in the answer to meet FRCP 8’s “fair notice” standard. Some courts have granted plaintiffs’ motions to strike when the defendant failed to provide any factual support for a statute of limitations defense or identify the applicable statute of limitations. *See, e.g., Sims v. Peak Legal Advocates*, No. SACV 18-1199 JVS (KESx), 2018 U.S. Dist. LEXIS 196245, *5-6 (C.D. Cal. Nov. 16, 2018). Other courts hold that a bare statement that the statute of limitations bars the

complaint is sufficient. *See, e.g., Xerox State & Local Sols., Inc. v. Xchanging Sols. (USA), Inc.*, 216 F. Supp. 3d 355, 366-67 (S.D.N.Y. 2016). Additionally, a minority of federal courts hold that the *Twombly/Iqbal* pleading standard also applies to affirmative defenses. *See generally Cohen v. SunTrust Mortg., Inc.*, No. 3:16-cv-02513-CMC, 2017 U.S. Dist. LEXIS 47678, at *4-7 (D.S.C. Mar. 30, 2017) (collecting cases and adopting majority approach). Counsel therefore should check the applicable precedent in their jurisdiction before filing the answer.

- **Do not discount the possibility of a motion to dismiss.** In many cases, a motion to dismiss will not be viable due to a plaintiff claiming the applicability of the discovery rule or tolling doctrine and the corresponding requirement to assume the truth of the complaint's factual assertions. However, especially in federal court where the *Twombly/Iqbal* standard applies, motions to dismiss should not be overlooked.

Under the federal pleading standard, a plaintiff cannot merely claim that a tolling doctrine applies; rather, she must plead facts that plausibly support all elements of the claimed doctrine. If she does not, her complaint is subject to dismissal. *See, e.g., Menichino v. Citibank, N.A.*, Civil Action No. 12-0058, 2013 U.S. Dist. LEXIS 101102, at *35 (W.D. Pa. July 19, 2013) (dismissing the complaint when plaintiffs failed to plead sufficient facts to support equitable tolling).

Cases removed from states with more lenient pleading standards may present particularly good opportunities to assert *Twombly/Iqbal* arguments, as the vast majority (if not all) of federal courts apply the federal pleading standard to removed complaints. If plaintiff's counsel overlooked the possibility of removal, they may have also neglected to include sufficient factual detail to meet the federal pleading standard.

Tailoring the Discovery Plan

- **Fully research your jurisdiction's applicable law on the statute of limitations and any tolling doctrines asserted by the plaintiff.** In order to gather evidence that will support your defense, you first need to know what you are looking for. Doing the research on the applicable statute of limitations and tolling doctrines early in the case is therefore necessary to guide your discovery plan.

When a cause of action accrues can vary from state to state and from claim to claim. Generally speaking, however, for most cases alleging any type of personal injury, the plaintiff's cause of action will accrue when she "knew or should have known" both that she was injured and the cause of her injury. Thus, the statute of limitations defense can generally be proven either by establishing the plaintiff's actual knowledge or by showing that she failed to investigate the cause of her injury with reasonable diligence.

Although the details of the doctrines vary across jurisdictions, plaintiffs commonly rely on the discovery rule as well as the tolling doctrines of fraudulent concealment (also known as equitable estoppel) and equitable tolling. Generally speaking, the discovery rule provides that the statute of limitations does not begin to run until the plaintiff discovers, or should have discovered, her injury; therefore, because the rule affects the accrual date, it is not truly a "tolling" doctrine. Fraudulent concealment (also known as equitable estoppel) applies when the plaintiff knows of her injury but the defendant takes affirmative steps to prevent the plaintiff from suing in time, such as by concealing the identity of the wrongdoer or inducing her not to file suit. Equitable tolling applies when the plaintiff knows of her injury, but cannot obtain information necessary to determine whether the injury was caused by a wrongdoing and/or the identity of the

wrongdoer; unlike fraudulent concealment, equitable tolling does not require wrongful conduct on behalf of the defendant. See generally *Cada v. Baxter Healthcare Corp.*, 90 F.2d 446, 450-51 (7th Cir. 1991) (discussing differences between discovery rule and tolling doctrines).

Importantly, all three of these doctrines require that the plaintiff act with “reasonable diligence” in discovering her causes of action. The defendant’s strategy for defeating the discovery rule or a tolling argument consequently often rests on proving that the plaintiff was aware of facts that should have raised her suspicions and, if she had diligently investigated those suspicions, that she would have been able to discover her injury and its alleged cause within the limitations periods.

Additionally, jurisdictions vary with respect to the applicability of tolling doctrines to statutes of repose. Compare *Joslyn v. Chang*, 837 N.E.2d 1107 (Mass. 2005) (statute of repose for medical malpractice not tolled by fraudulent concealment or equitable estoppel), with *Tomlinson v. George*, 116 P.3d 105, 106 (N.M. 2005) (statute of repose for medical malpractice can be tolled by the defendant’s fraudulent concealment). Therefore, if a statute of repose is at issue in the case, counsel should verify their jurisdiction’s precedent on the applicability of tolling doctrines.

- **Request or subpoena records that could be relevant to establishing the plaintiff’s knowledge of her condition at various points in time.** Written discovery can be a treasure trove for supporting a statute of limitations defense. A single narrative buried in a mountain of medical records might recount that the plaintiff expressed her suspicions to her doctors that your client’s product caused her alleged injury long before she filed suit. Prior claims for disability benefits or workers’ compensation can prove when the plaintiff first knew that she was

injured and may contain deposition transcripts that elucidate the plaintiff’s theory regarding the cause of her injury. It is therefore essential to request or subpoena these types of records early and review them with a fine-tooth comb.

- **Carefully craft deposition questions with an eye towards the statute of limitations.** Depositions of both the plaintiff as well as close family members or other acquaintances are often key to winning a dispositive motion on statute of limitations grounds.

Well-prepared witnesses often try to create issues of fact when presented with questions aimed at the statute of limitations. A questioner therefore can try to approach the topic more indirectly. For example, in the product liability context, a questioner might try to establish that the plaintiff understood how the product was supposed to work when she was using it—with the necessary implication being that the plaintiff should have known that the product was defective as soon as she became injured. It is also important to consider the placement of questioning throughout the exam – so a plaintiff does not realize you are collecting admissions to bolster a statute of limitations defense.

Alternatively, less-prepared witnesses are often eager to shore up their damages claims by emphasizing the extent of their injuries and that they “always knew” that your client was culpable. A questioner therefore might give the witness space during the deposition to offer this testimony and unknowingly provide the defendant with good ammunition for a later motion defeating the plaintiff’s tolling doctrines.

Additionally, depositions of family members and close acquaintances can be useful for establishing if the plaintiff ever

discussed her suspicions regarding the cause of her injury with others.

- **Conduct expert discovery keeping in mind the state of limitations.** As with written discovery and fact witnesses, expert reports and depositions can reveal important information as to when the alleged injury first manifested or the plaintiff became aware of her diagnosis and when the statute of limitation began running.

Moving for Summary Judgment

- **Do not delay in filing for summary judgment and pay careful attention to your jurisdiction's law regarding waiver.** Some jurisdictions hold that a statute of limitations defense can be waived based on unreasonable delay between the defendant's asserting the defense in its answer and filing a dispositive motion. *See, e.g., Pollan v. Wartak*, 240 So. 3d 1185, 1991-92 (Miss. 2017) (recognizing that it is possible for a defendant to waive a statute of limitations defense based on delay in filing a motion but declining to find waiver on facts of the case). It is therefore necessary to research your jurisdiction's applicable law on waiver to ensure that your motion for summary judgment is timely filed. Furthermore, asserting the defense as soon as practicably reasonable can avoid incurring additional litigation costs for your client.

- **Frame the issue as being a matter of law for the court to consider.** Plaintiffs' counsel are often quick to argue that the issues of when the plaintiff first discovered her injury and whether or not she exercised "reasonable" diligence are questions of fact for the jury. Nonetheless, a motion for summary judgment can still be successful when it avoids disputed facts and argues that, even if true, the plaintiff's claimed actions and knowledge cannot satisfy the elements of the discovery rule or any tolling doctrine.

- **Support the motion with the evidence and testimony gathered in discovery.** Use the information elicited in discovery to demonstrate to the court that no reasonable jury could find that the plaintiff timely filed her complaint.

Preserving the Defense in FRCP 16 Final Pretrial Order

- In federal court, an affirmative defense omitted from the final pretrial order is generally forfeited, even if the defense was asserted in the answer. The statute of limitations is no different, and district courts routinely refuse to entertain statute of limitations arguments made during trial if the defense was not included in the final pretrial order. *See, e.g., Klingenberg v. Vulcan Ladder USA, LLC*, No. 15-CV-4012-KEM, 2018 U.S. Dist. LEXIS 39007, at *23-25 (N.D. Iowa Mar. 9, 2018). Counsel therefore must be diligent to ensure that the statute of limitations defense is properly preserved in the final pretrial order.

Presenting the Defense During Trial

- **Tread carefully when arguing the statute of limitations to the jury.** It is easy to lose credibility with the jury when asserting a statute of limitations defense, particularly when the discovery rule or tolling doctrines are involved. For example, simultaneously arguing both that your client's product is not defective *and* that the plaintiff should have known that it was defective long before she filed suit typically does not sit well with the jury. Likewise, even if the discovery rule or tolling doctrines are not involved, juries generally dislike defendants whom they perceive are trying to "get out on a technicality" rather than the merits.
- **Consequently, consider focusing efforts on pursuing a judgment as a matter of law.** During trial, elicit the testimony and introduce

the evidence necessary to prove the defense and present the issue to the jury—but perhaps do not emphasize the statute of limitations in the opening or closing. The statute of limitations defense can then be asserted in a FRCP 50(a) motion for a judgment as a matter of law, renewed in a FRCP 50(b) post-trial motion for judgment as a matter of law, and included in an appeal if necessary. At the same time, because it has been presented, but not emphasized, to the jury, the risk of losing credibility with the jury is minimized in the event that the FRCP 50 motions are denied.