Is the plaintiff SOL?

When the SOL clock truly starts, and stops, ticking: the current state of accrual and tolling

By Anoush Lancaster
The Veen Firm, P.C.

Take ten seconds and fill in the blanks:
__________ months/years to file a claim against a public entity. (Code Civ. Proc., § 342; Gov. Code, § 945.6);
__________ months/years to file a Workers Compensation claim. (Lab.Code, § 5405);
__________ months/years to file a personal injury claim. (Code Civ. Proc., § 335.1.)

Chances are, most of you scored three out of three on my pop-quiz without much mental exertion. As attorneys admitted to the State Bar of California, we are sworn to be competent in the laws of California. However, it is often the seemingly obvious (see the 10 second quiz) that gets overlooked.

A tremendous amount of investigation is required to build, brick by brick, the wall that is a plaintiff's case. Usually, though, much of that research and analysis is left to pre-trial discovery. When speaking with a potential client, the first question we ascertain is whether the statute of limitations (SOL) has passed. An expired SOL translates to "Do not pass go. Do not collect $200" a la Monopoly. A case with great damages and clear liability can be rejected because of SOL problems. Yet we may be overlooking important investigation at the outset, missing out on a potentially successful case, and possibly committing malpractice in the process.

Problems relating to a cause of action's SOL requires more than a cursory glance at one's codebook. Below are four steps necessary to your analysis of when the SOL clock starts, and the actions that may toll it, prior to rejecting a case for limitations problems.

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Is the clock ticking?

Imagine your family's recent holiday gathering. Uncle Ned cornered you and launched into a story about his hip surgery gone awry. You scanned the room for any means of escape. You didn't have time for Ned's newest conspiracy theory but if Ned had a real case, he, and potentially you, needed to know if the SOL clock was ticking. One thing you should've considered before you sprinted to the eggnog wasn't *when* Ned's SOL runs, but rather if the cause of action even accrued. A statute of limitations does not begin to run until a cause of action "accrues." Accrual doesn't occur until there is a negligent act and "appreciable harm." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 712, citing *Budd v. Nixon* (1971) 6 Cal.3d 195, 200.) More importantly, the cause of action will not accrue until the "appreciable harm" (Uncle Ned's painful hip after the corrective surgery) is coupled with plaintiff's reasonable suspicion that the harm was caused by a negligent act.

• ***Knew/Should've Known:*** "Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights." (*Jolly v. Eli Lilly* (1988) 44 Cal.3d 1103, 1111.) The court balances the 'snooze you loose' principle with plaintiff's need to develop a sense that some wrong has occurred. "The [...] accrual of a cause of action marks the starting point for calculating the claims presentation period." (Gov. Code, § 901; *Mosesian v. County of Fresno* (1972) 28 Cal.App.3d 493, 500.) In *Jolly v. Eli Lilly*, the cause of action for the daughter of a diethylstilbestrol (DES) user did not accrue when the plaintiff was born, but more than 20 years later when: she began experiencing health problems (appreciable harm); and learned that her mother had taken DES; and that daughters of DES users could suffer injury (reasonable suspicion of negligence). (*Jolly, supra,* 44 Cal.3d at 1110.)

• ***Delayed Discovery Delays SOL:*** While the court's fairness concerns about stale claims requires that a defendant be on notice of a potential suit as soon as possible, there are times when plaintiff simply cannot know all the wrongs that relate to her injury. In *Fox v. Ethicon-Surgery, Inc.* (2005) 35 Cal.4th 797, plaintiff Fox filed a medical malpractice claim against her surgeon after developing ongoing symptoms following a surgery. (*Fox*, *supra*, 35 Cal.4th at 804.) Unbeknownst to plaintiff Fox, during defendant's deposition he revealed that a stapler used during Fox's surgery may have malfunctioned, and that such a stapler in fact had malfunctioned on prior occasions. (*Ibid*.)

Ten years earlier, in *Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, the Court held that "[w]hen a plaintiff has cause to sue based on knowledge or suspicion of negligence the statute [of limitations] starts to run as to *all* potential defendants." (*Bristol-Myers Squibb Co., supra,* 32 Cal.App.4th at 966.) Fox and her attorneys argued that the Court's holding in *Bristol-Myers Squibb Co.* was inapplicable to Fox's product defect claims. The Court agreed, finding that the facts of *Fox* laid out an exception to *Bristol-Myers Squibb Co.* because "plaintiff [pled] and prove[d] that a reasonable investigation at the time would not have revealed a factual basis for that particular cause of action." (*Fox, supra,* 35 Cal.4th at 803.) If filing all potential causes of action would result in the risk of sanctions under Code Civ. Proc., § 128.5 for filing without any factual support, an allegation of delayed discovery is proper and may save the claim.)

While *Fox* protects plaintiffs who could not have *known* a specific wrong occurred, 2009's *KJ v. Arcadia Unified School District*, 172 Cal.App.4th 1229, a child molestation case, seems to throw open the courtroom doors for plaintiffs who knew the facts constituting a particular cause of action but didn't *comprehend* the wrong. (*KJ v. Arcadia Unified School District* (2009) 172 Cal.App.4th 1229.) In *KJ,* a minor had a sexual relationship with her teacher. KJ believed she was in love, failed to inform her parents of the relationship until after she turned 18, and continued to defend the relationship even after the teacher pled guilty to criminal charges stemming from their "relationship." KJ did not file her government tort claim with the school district until almost one year after the criminal case was over.

While courts have applied the delayed discovery doctrine of accrual to "cause[s] of action arising out of childhood abuse," these cases generally involved minor plaintiffs. (See *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405, 1418.) KJ, on the other hand, was an adult at the time she filed suit. The court found Code of Civil Procedure section 340.1's (discussed below) tolling of the SOL for victims of sexual abuse "instructive" to the Court's analysis of accrual, noting that "the limitations period begins to run only after the victim, who is then an adult, appreciates the wrongfulness of the abuser's conduct." (*KJ, supra,* 172 Cal.App.4th at 1242, citing *Tietge v. Western Province of the Servites, Inc.* (1997) 55 Cal.App.4th 382, 387.) KJ argued that she did not realize the harm of defendant's conduct until after a significant amount of therapy, at which time she immediately filed her claim. (*KJ, supra,* 172 Cal.App.4th at 1243.) The court agreed, finding "[KJ's] allegations sufficient to invoke the delayed discovery rule of accrual..." (*KJ, supra,* 172 Cal.App.4th at 1242.) While *KJ* deals specifically with a victim of child sexual abuse, it reminds us that you should recognize an SOL problem before you draft the complaint and plead around it.

• ***Use a Doe, Don't Wait to Decide:*** The delayed discovery doctrine is an essential tool for plaintiffs who lack the basic facts to form a "factual basis for [a] particular cause of action." (*Fox, supra,* 35 Cal.4th at 803.) However, "[a] plaintiff need not be aware of the specific 'facts' necessary to

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establish the claim; that is a process for pretrial discovery." (*Jolly, supra,* 44 Cal.3d at 1111, citing *Gutierrez v. Modif* (1985) 39 Cal.3d 892, 896-97.) The identity of potential defendants is not required for the accrual of a cause of action.

In *Jolly* (discussed above), plaintiff's cause of action accrued following her delayed discovery of general facts leading to a reasonable suspicion of wrongdoing and its connection to her health problems. As the court noted, "[p]laintiff stated that as early as 1978 she was interested in 'obtaining more information' about DES because she wanted to 'make a claim'; she felt that someone had done something wrong to her concerning DES, that it was a defective drug and that she should be compensated...In sum, the [SOL began to run] no later than 1978." (*Jolly, supra,* 44 Cal.3d at 1112.) Counsel for plaintiff *Jolly* made a fatal legal mistake. Counsel presumed that because plaintiff was unaware of the specific identity of defendants in 1978, she could wait to file. Unfortunately for plaintiff Jolly, this was a bad call. "'If a plaintiff believes because of the injuries she has suffered that someone has done something wrong' the statutory period begins." (*Jolly v. Eli Lilly, supra,* 44 Cal.3d at 1111, quoting *Graham v. Hansen* (1982) 128 Cal.App.3d 965, 972-73.) In *Norgart v. Upjohn* (1999) 21 Cal.4th 383, the court distinguished "between ignorance of the identity of a defendant, and ignorance of a cause of action, believing... 'the commonsense assumption that once plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' to discover the identity of the former." (*Norgart, supra,* 21 Cal.4th at 399.)

Ignorance of causation or an identifiable harm is quite different than ignorance of a defendant. (*Fox, supra,* 35 Cal.4th at 807, citing *Norgart, supra,* 21 Cal.4th at 397.) "The identity of the defendant is not an element of a cause of action." *Norgart, supra,* 21 Cal.4th at 399. Nevertheless, the Court still requires that a plaintiff identify their 'wrongdoer' at the time of filing with enough particularity that the potential defendant is put on notice. While California allows plaintiffs to identify these unknown defendants as Does for the purposes of filing (Code Civ. Proc.,§ 474), the Federal Rules do not. Yet even California's permissive use of Doe amendments still requires that a plaintiff carefully lay out each type of potential Doe in the initial complaint to avoid being denied the right to doe them in once the defendant is identified.

Which SOL applies?

While the client may clearly have a personal injury case, triggering the SOL, make sure to take a look at less often used statutes that offer longer SOLs. For example, Labor Code section 3706 creates a statutory cause of action for an employee against their uninsured employer, triggering a 3 year SOL. (See *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 600, citing *Valdez v. Himmelfarb* (2006) 144 Cal.App.4th 1261, 1268-1271.) In August 2010, Plaintiff magazine published an article on SOLs written by Andrew Dunk, III. It's a great refresher, but also identifies less common SOLs that can be overlooked by a seasoned plaintiff's attorney well-versed in the SOLs usually applicable to their case load.

Was the SOL tolled?

"In the oft-quoted words of Justice Holmes, [the purpose of the SOL] is to (prevent) surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Elkins v. Derby* (1974) 12 Cal.3d 410, 416, citing *Order of R.R. Telegraphers v. Railway Express Agency, Inc.* (1944) 321 U.S. 342, 348-349.) But what about situations where a potential plaintiff is not sleeping on her claims and has apprised potential defendants of her specific injuries and claims, but for whatever reason, fails to file before the statute of limitations has run?

Tolling due to factors out of the plaintiff's control

Check for prerequisites to filing, such as administrative remedies, that automatically toll the SOL under Code Civ. Proc., § 356. For example, Insurance Code section 2071 tolls the SOL for one year while a plaintiff awaits his insurer's required approval or denial prior to filing suit. (See, *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 690-691.) Labor Code section 1197.5 tolls the SOL for two years while a plaintiff pursues an FLSA claim before filing his wage discrimination claim.

Under Code of Civil Procedure section 351, if a defendant is absent from California at the time of accrual, or if "after the cause of action accrues, he departs from the state," the SOL is tolled during his absence. (See *Code Civ. Proc., § 351*; *Dew v. Appleberry* (1979) 23 C.3d 630, 634.) However, there are limits to Code of Civil Procedure section 351's application: the SOL will not be tolled during the absence of a California resident for "facilitation of interstate commerce," and Code of Civil Procedure section 351 has been found violative of the Commerce Clause as applied to nonresidents' absence from California. (See *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1282-83; *Abramson v. Brownstein* (9th Cir. N.D. Cal. 1990) 897 F.2d 389.)

Also, don't forget to review Code of Civil Procedure section 352 and 352.1 if the potential client was a minor, insane, or imprisoned at the time the action accrued. Lastly, if the plaintiff has been the victim of childhood sexual abuse, consider Code of Civil Procedure section 340.1 ["[t]he goal of Code of Civil Procedure section 340.1 is to allow victims of childhood sexual abuse 'a longer time period in which to become aware of their psychological injuries and remain eligible to bring suit against their abusers.' The intimidation which allows an abuser to take advantage of a child does not magically or suddenly end the day the child attains majority."] (*KJ, supra,* 172

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Cal.App.4th at 1242, citing *Tietge, supra,* 55 Cal.App.4th at 387.)

Is it fair?

Application of Equitable Tolling

Sometimes a plaintiff *chooses* to proceed with an administrative remedy prior to filing and the SOL runs. Can an argument for equitable tolling be used?

McDonald v. Antelope Valley Community College District, a 2008 California Supreme Court case, revisited the court's application of equitable tolling, reminding us that "it has been well settled [for over 30 years] that equitable tolling may apply to the voluntary pursuit of alternate remedies." *(McDonald* (2008) 45 Cal.4th 88, 101.) The judiciary applies equitable tolling to extend or suspend the SOL "as necessary to ensure fundamental practicality and fairness" and to "alleviat[e] the fear of claim forfeiture [by] afford[ing] grievants the opportunity to pursue informal remedies, a process we have repeatedly encouraged." (See *McDonald, supra,* 45 Cal.4th at 99-101, citing *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) "[The] tolling doctrine does so without compromising defendants' significant 'interest in being promptly apprised of claims against them in order that they may gather and preserve evidence' because that notice interest is satisfied by the filing of the first proceeding that gives rise to tolling." (*McDonald, supra,* 45 Cal.4th at 100, citing *Elkins v. Derby, supra,* 12 Cal.3d at 417-418.) Tolling also benefits the court system by reducing duplicative filings, encouraging informal remedies, and attempting to resolve some if not all issues before court involvement. (*McDonald, supra,* 45 Cal.4th at 100, citing *Elkins, supra,* 12 Cal.3d at 420.)

In the mid-20th century, the California courts started applying equitable tolling to various situations where a plaintiff pursued an alternative remedy before filing a civil cause of action. (See *County of Santa Clara v. Hayes Co.* (1954) 43 Cal.2d 615 [SOL for county to sue newspaper for misprinted proposed charter equitably tolled until judicially invalidated]; *Tu-Vu Drive-In Corp v. Davies* (1967) 66 Cal.2d 435 [equitable tolling applied to third-party claim to recover property prior to filing damages claim]; *Myers v. County of Orange* (1970) 6 Cal.App.3d 626 [equitable tolling found applicable for plaintiff who sought declaration of reinstatement for deceased husband prior to filing for wrongful discharge].) However, the reach of equitable tolling's applicability was unclear.

The tolling trilogy and their reach

In the 1970's, three equitable tolling cases made their way through the California Supreme Court in rapid succession, beginning with *Campbell*, followed the next year by *Elkins*, and then *Addison*.

In *Campbell v. Graham-Armstrong* (1973) 9 Cal.3d 482, the Court held that the plaintiffs' pursuit of an administrative remedy for back payment of salaries with the school board tolled the SOL "even though no statute makes it a condition of the right to sue." (*Campbell, supra,* 9 Cal.3d at 490.) One year later, in *Elkins v. Derby*, plaintiff was injured from an encounter with a "performing timber wolf at 'Animal Kingdom.'" (*Elkins, supra,* 12 Cal.3d at 413.) The Workers Compensation referee determined that Mr. Elkins was not an employee and therefore not entitled to benefits. Plaintiff then sought to recover his damages in a personal injury action, despite the SOL having run. Surprisingly, the court allowed his claim, applying equitable tolling to Mr. Elkins' case, even though he could have sought both remedies at the same time. "The [equitable tolling] principle is that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled 'when an injured person has several legal remedies and, reasonably and in good faith, pursues one.'" (*Elkins v. Derby*, *supra,* 12 Cal.3d at 414, citing *Myers v. County of Orange* (1970) 6 Cal.App.3d 626, 634.)

Four years later, the California Supreme Court took up the case of *Addison v. State of California* (1978) 21 Cal.3d 313, wherein plaintiff Addison sued defendants in federal court, after complying with the Tort Claims Act requirements and receiving right to sue letters. Plaintiff's state court claims were dismissed by the federal district court without prejudice due to lack of jurisdiction, and plaintiff immediately re-filed in state court. The Court held that *Addison* met the equitable tolling requirements laid out in *Elkins,* finding that equitable tolling was equally applicable to claims against public entities. (*Addison, supra,* 21 Cal.3d at 319.)

Recent equitable tolling holdings

Since the California Supreme Court's equitable tolling rulings in the 1970's, it seemed that an argument for equitable tolling could be made in various situations. (See *Anderson v. City of Los Angeles* (1973) 9 Cal.3d 482 [challenging validity of employment discharge prior to suing for disability benefits]; *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, 552-553 [class action denied due to lack of numerosity]; *Bangert v. Narmco Materials, Inc.* (1984) 163 Cal.App.3d 207, 212 [class action denied due to insufficient community interest]; *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100 [Title VII complaint w/EEOC]; *Marcario v. County of Orange* (2008) 155 Cal.App.4th 397, 407-409 [internal labor grievance procedure]; *McDonald v. Antelope Valley, supra,* 45 Cal.4th 88 at 96 [voluntary pursuit of an internal school remedy prior to filing claims under the FEHA].)

Yet, our poor plaintiff in *Jolly* learned the Court's limits. The Court has repeatedly pointed out that the facts of the first claim must be "so similar" to the second claim that investigation into the first puts defendant "in a position to fairly defend the second." (*Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 925.) In *Jolly, supra,* 44 Cal.3d 1103, the Court found a request for equitable tolling "inappropriate" given that plaintiff's DES class was

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denied due to lack of commonality. "[The] class action neither put defendants on notice of the substance and nature of plaintiff's claims, nor served to further economy and efficiency of litigation, so as to justify affording plaintiff shelter under [equitable tolling's] protective umbrella." (*Jolly, supra,* 44 Cal.3d 1103 at 1122.) Also in 1983, a California Appellate Court in Division Seven noted that "[i]t is not altogether clear whether the Supreme Court would insist on all three prerequisites" for equitable tolling to apply, indicating that equitable tolling's reach was as broad as it appeared back in the era of *County of Santa Clara* (1954) and *Tu-Vu* (1967) when the court applied equitable tolling in cases where the second cause of action was against a defendant not named in the first. (*Collier v. City of Pasadena*, *supra*, 142 Cal.App.3d at 924.)

While 2008's California Supreme Court case *McDonald* made clear that equitable tolling was applicable to voluntary pursuits of remedies, it was also a year of clarifying the limits of this powerful tool. *McDonald* made clear that "[all] three elements" are required. (*McDonald, supra,* 45 Cal.4th 88 at 102.) The next year, *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590 continued in the same narrowing vein. In *Aguilera*, plaintiff first filed a workers compensation claim against his employer. After more than one year, the Workers Compensation judge ordered joinder of additional defendants. *Aguilera*'s worker's compensation claims took 10 years to reach final decision, at which time he filed a civil action. "[A]n awkward duplication of procedures is not necessary to serve the fundamental purpose of the limitations statute, which is to insure timely notice to an adverse party so that he can assemble a defense when the facts are still fresh. The filing of a compensation claim accomplishes this purpose and the tolling of the statute does not frustrate it." (*Elkins, supra,* 12 Cal.3d at 412.) Yet, notice normally means that "the defendant in the first claim is the same one being sued in the second." (*Collier, supra,* 142 Cal.App.3d at 924.) Unfortunately, because defendants were joined in the workers compensation claim after the SOL for *Aguilera*'s personal injury claims ran, the first prong of *Elkins* was not met, and *Aguilera* joined the ranks of plaintiff *Jolly* in having his request for equitable tolling denied.

While the doctrine of equitable tolling is independent from the Code of Civil Procedure and other codified sources, equitable tolling is not immune from the language of statutes. (*McDonald, supra,* 45 Cal.App.4th 99, citing *Addison, supra,* 21 Cal.3d at 318-19. If a statute is explicit that tolling can only occur under certain conditions, then equitable tolling is unavailable.) California case law holds that courts should liberally apply equitable tolling as long as the three *Elkins* requirements are met.

While we all recognize the basic SOLs applicable to many of our cases, a proper SOL inquiry requires determining: 1) whether the cause of action accrued; 2) which SOL applies; 3) whether the SOL has been tolled on statutory grounds; and 4) whether an equitable tolling rationale exists. Often a little research, a lot of thought, and not a lot of money, can sort an SOL issue out, leaving you with a potentially lucrative case and preventing your client from being left on the courtroom steps.

Anoush Lancaster is an associate at the Veen Firm, P.C., *as part of the Lancaster Trial Team. She litigates complex catastrophic injury cases involving negligence, wrongful death, products-liability, industrial accidents and exceptions to the workers' compensation exclusive remedy doctrine. For more information on this article, sample motions in limine, and other helpful materials, please e-mail a.lancaster@veenfirm.com or visit our Web site: www.veenfirm.com.*

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William Veen founded The Veen Firm *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates, and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*

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