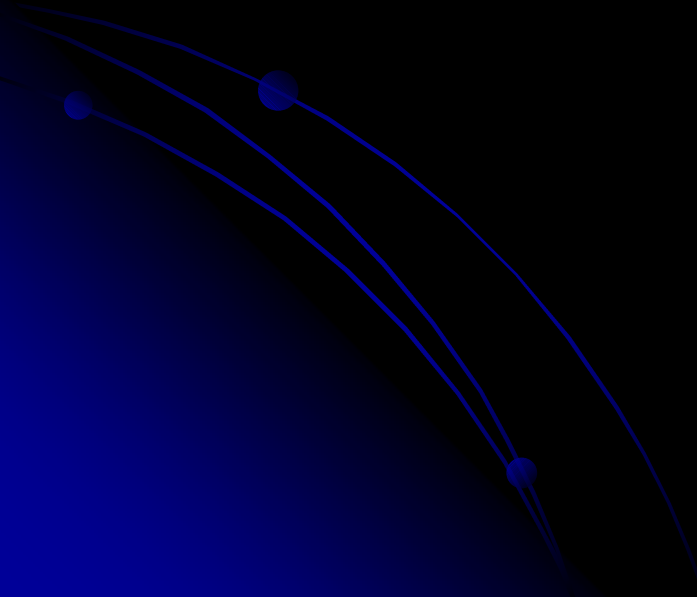


Navigating the Statute of Limitations in Texas



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Statute of Limitations

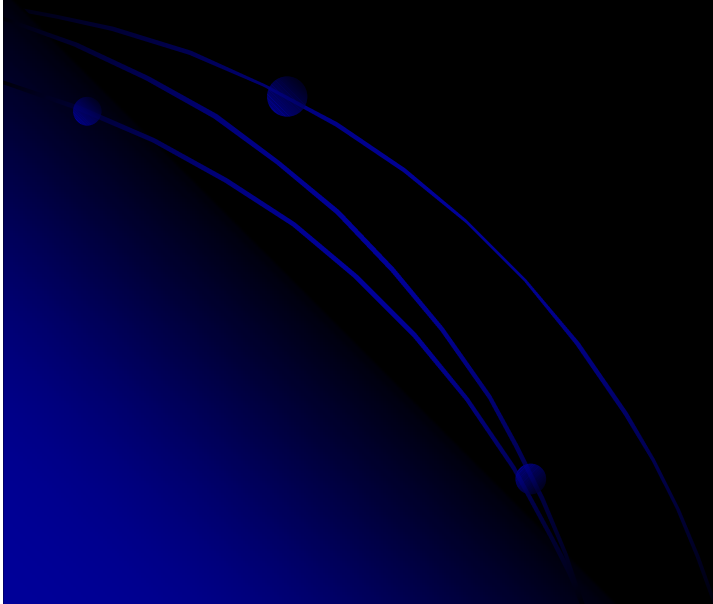
- The statute of limitations establishes the time limit by which a plaintiff must file suit on its claim(s).
 - Suit must be filed on or before the last day of the statute of limitations.
 - Otherwise, plaintiff's claim will be time barred.

Statute of Limitations

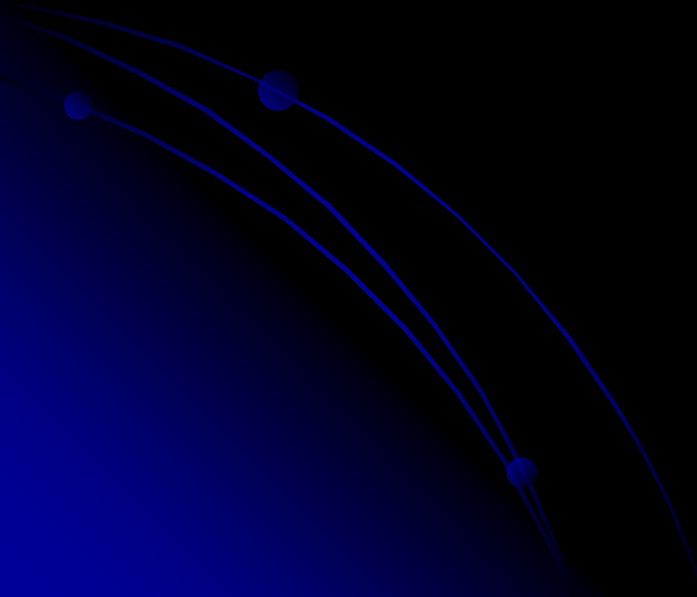
- The statute of limitations applicable to a claim is defined by common law or statute in Texas.
- Some questions to ask:
 - What is the length of the statute of limitations?
 - When did the claim accrue?
 - Was the accrual date deferred?
 - Was the statute of limitations tolled?

Length of the Statute of Limitations

- Each claim's statute of limitations must be examined as the limitations period for each varies



Limitations Period in Contract Actions

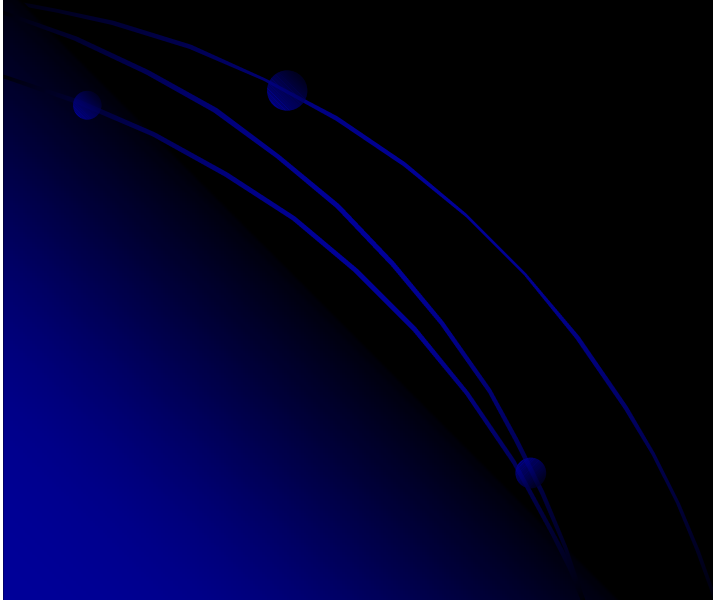
- General Rule: Four years
 - Parties can reduce this timeframe in the contract, but no less than two years
 - This is inclusive of most warranty claims
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Limitations Period in Tort Claims

- Negligence: Two year limitations period;
- Conversion: Two years
- Assault: Two years;
- Negligent Misrepresentation: Two years
- DTPA: Two years
- Most torts: two years

Tort Claims With Longer Periods

- Breach of Fiduciary Duty: Four years
- Fraud: Four years




Insurance Claims

- Insurance Bad Faith (Violations of Texas Insurance Code) – Two Years;
- Breach of *Stowers* duty to handle lawsuit prudently – two years from when all appeals on underlying claim are exhausted.

See Tex. Civ. Prac. Rem Code § 16.003(a)

Accrual Date

- Accrual Date: when the statute of limitations begins to run; when plaintiff first has a legal claim.
 - Legal-Injury Rule: plaintiff's claim accrues on the date that defendant's action causes a legal injury to plaintiff.
- 

Exception to the Legal-Injury Rule

- Continuing-Tort Doctrine
 - A continuing tort involves injury being caused by repetitive wrongful acts.
 - It is NOT an ongoing, continuous injury resulting from one wrongful act.
 - The statute of limitations does not accrue until the tortious conduct ceases.

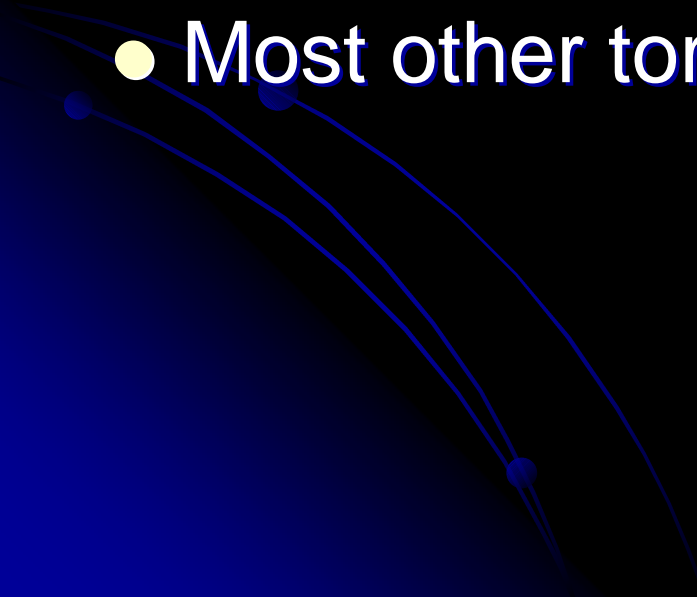
Deferring the Accrual Date

- *Two Ways:*
 - Discovery Rule
 - Fraudulent Concealment
- In some causes of action, the statute of limitations is not triggered until the plaintiff discovers and/or should have discovered facts giving rise to plaintiff's injury.

Discovery Rule

- Defers the accrual date until such time as plaintiff knows or should know, through the exercise of due diligence, of facts giving rise to the claim.
- General rule in construction defect litigation: the statute of limitations begins to run when the plaintiff becomes aware of the property damage.

Causes of Action Where The Discovery Rule Applies

- All Negligence Claims;
 - Fraud;
 - Trespass;
 - Negligent Misrepresentation;
 - Most other tort claims
- 

Discovery Rule in Contract Disputes

- Generally does not apply;
- Never applies for breach of sales contract;
- Might apply to other contracts if a special relationship exists, such as a fiduciary relationship;
- Frequently, late “discovery” of breach is not enough to defer accrual

Discovery Rule

- Burden on Plaintiff:
 - Must plead the discovery rule.
 - Must prove the injury was inherently undiscoverable *and* objectively verifiable.

Discovery Rule: Inherently Undiscoverable

- Plaintiff must show the injury was difficult to discover.
- Examples: damage that results from water intrusion, latent disease
- What will not qualify: an immediate and traumatic event such as a car accident or a construction accident

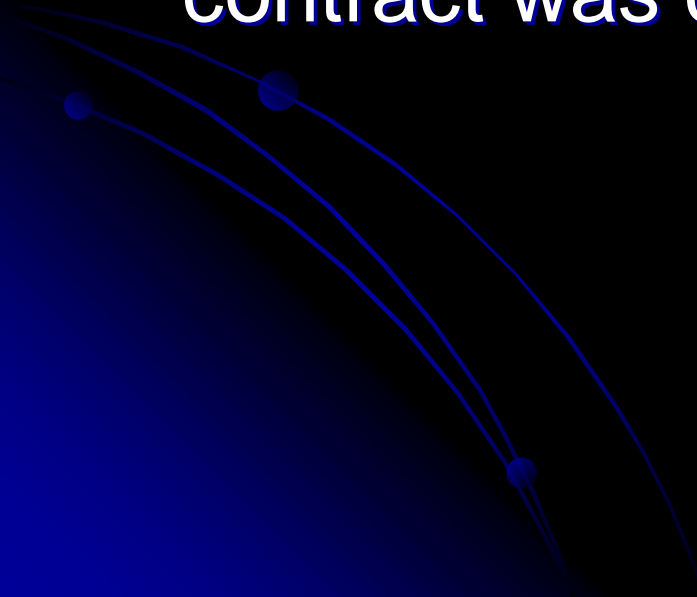
Discovery Rule: Objectively Verifiable

- Plaintiff must show that its injury is objectively verifiable and not based on solely on plaintiff's assertions.
- To do this, Plaintiff needs to establish:
 - The injury and defendant's conduct cannot be disputed.
 - The facts supporting liability are demonstrated by direct physical evidence.
 - Expert testimony based on accepted scientific evidence combined with objective evidence.

Fraudulent Concealment

- Extends the statute of limitations when the defendant deceitfully conceals wrongdoing.
- Statute of limitations is deferred until plaintiff discovers or should have discovered the deceitful conduct or facts upon which the cause of action is based.

Fraudulent Concealment

- This is the primary vehicle for extending limitations in contract actions in lieu of discovery rule;
 - Requires allegation that a breach of the contract was concealed
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Fraudulent Concealment: Four Elements

- Burden on Plaintiff to establish that Defendant:
 - Possessed actual knowledge of the wrong.
 - Concealed the wrong by:
 - Remaining silent when there was a duty to speak, or
 - Making a misrepresentation that concealed the wrong.
 - Had a fixed purpose to conceal the wrong
- Plaintiff must also show that it relied on Defendant's misrepresentation or silence.

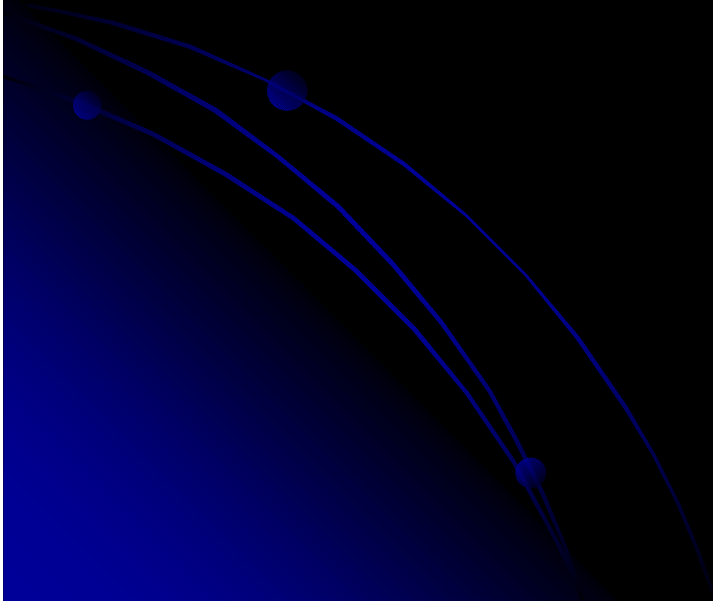
Tolling the Statute of Limitations

- Tolling suspends the running of the limitations period after the cause of action has accrued.
- Examples: under age 18, of unsound mind, death.
- By contract: parties agree to waive the statute of limitations. Requirements:
 - Before the limitation period expires.
 - Be specific
 - Waive it for a pre-determined length of time.

Exempt Governmental Entities

- Some governmental entities are exempt from applicable statutes of limitations.
- Examples:
 - State of Texas.
 - Counties, city or town, municipal utility district, and more. See Tex. Civ. Prac. & Rem. Code § 16.061(a).

**SPECIFIC ISSUES
IMPACTING
LIMITATIONS IN
CONSTRUCTION
CASES**



Contribution Claim

- Loop-hole that benefits defendants.
- Defendant can bring a contribution claim against each person who is not a settling person and who is liable to plaintiff. Tex. Civ. Prac. & Rem. Code §33.016.
- Derivative of plaintiff's claim against the contribution defendant.

Contribution Claim: Statute of Limitations Not Applicable

- Whether the statute of limitations expired on plaintiff's claim is immaterial.
- A defendant will not know whether it will owe a judgment or possess an injury claim against a contribution defendant until liability is established.
 - Plaintiff recovers damages or settles the case.
 - At that point, the statute of limitations begins to run on the contribution claim.

Contribution Claim and Plaintiff

- Does not benefit the Plaintiff.
- After a contribution claim has been brought against a third-party defendant, the plaintiff's expired claim will not be revived.

Tex. Civ. Prac. & Rem. Code §16.069(a)

- Cross and/or counterclaims are not barred by limitations if they arise out of the same transaction or occurrence that is the basis of plaintiff's claims.
- Plaintiff's potential claim against a third party contribution defendant is not a cross or counterclaim; it is simply a claim against a third party defendant.

Designation of Responsible Third Parties

- Tex. Civ. Prac. & Rem. Code §33.004(a) allows a defendant to designate a non-party as a responsible third party.
- Responsible third party: “person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission” Tex. Civ. Prac. & Rem. Code §33.011(6).

Previous Loophole

- Past practice that benefitted plaintiff.
- If a defendant designated a person or entity as a responsible third party under Tex. Civ. Prac. & Rem. Code §33.004(a), plaintiff could then bring that person into the lawsuit, even if the statute of limitations had expired. Tex. Civ. Prac. & Rem. Code §33.004(e).
 - Had to do so within 60 days after the person was designated as a responsible third party.

H.B. 274

- In 2011, Texas Legislature repealed the loophole provided to plaintiff by Tex. Civ. Prac. & Rem. Code §33.004(e).
- Tex. Civ. Prac. & Rem Code 33.004(e) has been repealed from the statute

Statute of Repose

- 10 year limitations period that starts after substantial completion.
- Bars claims for “(1) injury, damage or loss to real or personal property; (2) personal injury; (3) wrongful death; (4) contribution; or (5) indemnity.” Tex. Civ. Prac. & Rem. Code §16.008(b) and §16.009(b)

Statute of Repose: Who Benefits?

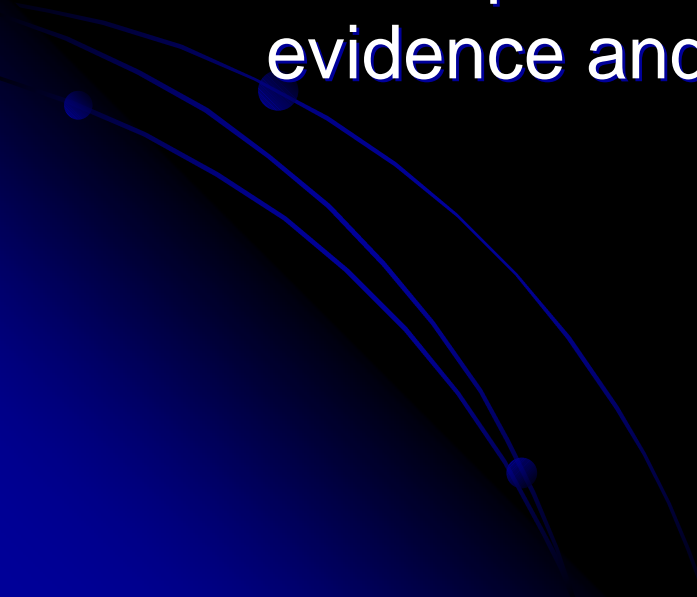
- Design Professionals: “a registered or licensed architect, engineer, interior designer, or landscape architect in this state who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property.” §16.008(a).
- Contractor: “a person who constructs or repairs an improvement to real property.” §16.008(b).

**STATUTE OF
LIMITATIONS AND
COVERAGE:
OVERLAPPING
INVESTIGATIONS?**



Statute of Limitations and Triggering Coverage

- Past:

- Manifestation rule: property damage had to manifest or become apparent during the policy period.
 - Overlaps with discovery rule due to similar evidence and analysis.
- 

Statute of Limitations and Triggering Coverage

- Now:

- Injury-in-fact: establish when the damage first occurred. See *Don's Bldg. Supply v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008).
- No overlap with discovery rule.
- Overlap with establishment of the accrual date if the plaintiff does not plead the discovery rule or fraudulent concealment.

Known Loss/Fortuity Doctrine

- Known Loss Doctrine: generally excludes coverage for known losses or losses that the insured knew or should have known were ongoing before the policy issued.
 - A known loss is one the insured knew occurred or was occurring when the policy was purchased.
- A policy is designed to protect against unknown risks, not those that are certain.

Known Loss Doctrine and Fraudulent Concealment

- Potential overlap.
- Involve defendant concealing information from plaintiff and/or the carrier.
- Information supporting fraudulent concealment could establish or lead to an investigation of whether the defendant/insured possessed prior knowledge of the loss when the policy was issued.

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