

Is time on your side?

How statutes of limitation impact litigation **Interviewed by Chelan David**

The business industry has long desired to avoid stale claims. Over time, the record retention policy of a company may result in the destruction of documents that could support its defense. Witnesses move or change jobs and can be hard to track down. Memories fade, and the potential for a meaningful investigation can disappear. Michigan law, through statutes of limitation, limits the time period in which a plaintiff can bring suit against a prospective defendant.

“Generally speaking, a statute of limitation begins to run from the time the claim accrues,” says Michael Crow, executive partner at Secrest Wardle. “The claim accrues, for the most part, at the time the wrong occurs.”

Smart Business spoke with Crow about the “discovery rule” and recent legislative developments that could significantly impact businesses operating in Michigan.

What is the ‘discovery rule’?

The ‘discovery rule’ protects diligent plaintiffs who fail to bring a timely claim because of either the latent nature of their injury or the inability of the plaintiff to identify the proper defendant. The ‘discovery rule’ applies as an exception to the statute of limitation when the plaintiff discovers an injury and the causal connection between that injury and the defendant’s breach of duty to the plaintiff.

In other words, if a plaintiff has no reasonable method by which to determine whom to sue for his injuries or, by the nature of his injuries, is unaware for some period of time that he was injured, the ‘discovery rule’ provides a window of time during which a plaintiff may file a lawsuit after ‘discovery’ of the relevant facts. The ‘discovery rule’ has been applied for decades by the Michigan Court of Appeals and the Michigan Supreme Court.

How was the ‘discovery rule’ recently interpreted by the Michigan Supreme Court?

In July, 2007, the Michigan Supreme Court issued its opinion in *Trentadue v. Gorton*, 479 Mich 378 (2007). This case involves the November 1986 rape and



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murder of Margaret Eby — crimes that remained unsolved for years. In 2002, DNA evidence established that Jeffrey Gorton, an employee of his parents’ corporation, which serviced sprinkler systems on Mr. Eby’s property, committed the crime. In August 2002, upon learning of the identity of Ms. Eby’s killer, the Eby estate filed suit against Gorton, his parents and his parents’ corporation.

The plaintiff’s complaint alleged several theories of negligence. The defendants argued that the action of the Eby estate was barred by the three-year statute of limitations for wrongful death actions. The plaintiff asserted the common law ‘discovery rule’ applied as an exception to the period of limitation. The trial court and the Michigan Court of Appeals accepted the plaintiff’s argument and denied defendants’ motion for summary disposition.

The Supreme Court in *Trentadue*, however, reversed the lower courts, dismissed the plaintiff’s claim as ‘time-barred’ and thereby functionally eliminated the ‘discovery rule.’ The Court held that no ‘court-created’ or common law ‘discovery rule’ exists. Only when the Legislature has specifically included a ‘discovery’ provi-

sion in a statute of limitation (i.e. medical malpractice; certain actions against contractors) is it available to extend the time within which a lawsuit may be filed.

How will the decision affect businesses that operate in Michigan?

Under the *Trentadue* decision, Michigan defendants no longer need to brace for the prospect of lawsuits that may not be filed for years. Other than the few isolated situations where the Legislature has codified a ‘discovery’ based exception to the statute of limitation, the statute of limitation will be strictly applied.

The *Trentadue* decision provides a measure of certainty regarding document retention, investigations and memorializing witness testimony. Such a holding will also provide businesses additional certainty regarding future finances.

The response of the Michigan Legislature to legislatively reverse the *Trentadue* decision was immediate. In September, 2007, a bill was introduced to incorporate the ‘discovery rule’ into the statute of limitations. In essence, they are responding to the Supreme Court’s position that the ‘discovery rule’ only exists if codified by the Legislature.

The proposed statute, which is currently before the Judicial Committee, eliminates language that provides when a lawsuit may be filed and employs a new trigger adopting the ‘discovery rule’ approach from the common law. Significantly, the proposed statute goes even further and provides that ‘discovery’ only occurs when the plaintiff knows the name of the intended defendant. Should this proposed legislation be enacted, the benefits of *Trentadue* would be eliminated and the potential for stagnant claims would increase. We are continuing to monitor these legislative developments for our clients. <<

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