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Otten Johnson Alert -

The Difference Between Statutes of Limitation and Non-claim Statutes

Most in the business world are familiar with the concept of a statute of limitation. A statute of limitation bars claims which are not asserted within a certain period of time after the accrual of a cause of action. Accrual of a cause of action generally occurs upon discovery of an injury or damage.

It is not uncommon in business disputes for parties to agree to "toll" or suspend the running of a statute of limitation in an effort to allow the parties more time to settle their dispute, or to allow one of the parties to perform future actions in furtherance of settlement. For example, it is common for financial institutions to enter into tolling agreements to allow a debtor to liquidate property to pay off a debt. Likewise, parties to contractual or construction disputes often enter into tolling agreements to allow the potential defendant to cure defective performance. Generally, there is no provision of Colorado law that prevents parties from contractually tolling statutes of limitation.

That is not the case with a similar type of statute, commonly referred to as a "non-claim" statute. A non-claim statute requires that applicable claims be brought within a certain time. If a claim is not asserted within that time the claim is automatically extinguished and the courts are deprived of jurisdiction to adjudicate the claim, regardless of what the parties may have agreed.

A recent Colorado case highlights the difference between the two kinds of statutes. See *Lewis v. Taylor*, 13CA0239 (March 13, 2014). In that case, Lewis was appointed as a receiver to recover the assets relating to a Ponzi scheme. Taylor was an investor who had withdrawn substantial profits from the scheme, which the receiver sought to recover. The parties entered into a tolling agreement. Ultimately, the parties were unable to resolve their dispute and the receiver filed a claim against Taylor to recover fraudulent transfers of property. Taylor argued that the four year time bar statute contained in the Uniform Fraudulent Transfer Act was a non-claim statute and could not be tolled. The Colorado Court of Appeals agreed and the receiver's claim was dismissed, even though Taylor had signed a tolling agreement.

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Although non-claim statutes are not common, they do exist in other areas of business law. For example, the probate code contains a non-claim statute relating claims against estates, the Governmental Immunity Act contains a non-claim statute for claims against governmental entities, and non-claim statutes exist for certain claims under securities laws.

To perhaps add to the confusion, there is a third type of time bar statute commonly referred to as a statute of repose. A statute of limitation begins to run upon the accrual of a claim, which, as mentioned above, typically happens upon the discovery of an injury or damage. A statute of repose, on the other hand, bars claims after the passage of time from the triggering event. For example, in Colorado, there is a six year statute of repose for construction defect claims (which may be extended for an additional two years under certain circumstances). Under that statute, any defect claims brought more than six years after substantial completion of the project are barred, even if they weren't discovered within that timeframe. Courts in different states have reached inconsistent conclusions on whether statutes of repose can be tolled. With respect to the Colorado construction defect statute of repose, the courts have ruled that it is not a non-claim statute and can be waived. Although there is no case law directly addressing whether that statute can be tolled, the fact that the Court held that it is not a non-claim statute suggests that it can be.

Navigating these issues can be difficult and it is advisable that before entering into any kind of agreement that extends the deadline for filing claims, you consult with counsel familiar with the law surrounding the types of claims that you seek to toll.

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