LIMITATION ISSUES IN SETTLEMENT NEGOTIATIONS: HOW TO AVOID WAIVER OF THE STATUTE OF LIMITATIONS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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LIMITATION ISSUES IN SETTLEMENT NEGOTIATIONS:
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I. INTRODUCTION

A frequent issue for those handling claims is the existence of a statute of limitations and the tolling of that limitation. Specifically, there are many instances in the lives of claims handlers where activity on the claim proceeds and, suddenly, the statute of limitations is approached or has passed. There are several issues that a claims handler needs to be familiar with when handling these types of limitations issues in settlement negotiations. The following material should help a claims handler navigate this potential mine field and intends to offer suggestions on how to avoid waiving any potential statute of limitations.

II. STATUTES OF LIMITATIONS

Illinois provides for a two-year statute of limitations for personal injury cases. 735 ILCS 5/13-202. This is the statute of limitation that attorneys and claims handlers are most familiar with. It should be noted, however, that there are a variety of statutes of limitations in Illinois. For example, causes of actions against state or governmental entities may have a one-year statute of limitations. Various construction statutes of limitations are four years. Property damage claims are five years. In addition to statutes of limitations, there are also statutes of repose which serve as an absolute cut-off date for claims. Therefore, it should never be assumed what the statute of limitations is at first glance. This is especially true in any case involving a minor because minors typically have two years after they reach the age of majority to file their claims. Therefore, every effort should be made to determine exactly what statute of limitation is involved for the type of claim that is being handled.

Statutes of limitations exist to promote certainty and finality in the administration of affairs. *Hupp v. Gray*, 73 Ill. 2d 78, 381 N.E.2d 1211, 22 Ill. Dec. 513 (1978). Another stated reason for limitations provisions is to require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims. *Tom Olesker’s Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 334 N.E.2d 160 (1975). The stated purposes of statutes of limitations, however, are not to shield a wrongdoer from liability. Courts in Illinois have generally considered statutes of limitations to be “clear” and are by definition not arbitrary. That is to say, there are very few defenses that one can use when a statute of limitations has expired if there have not been steps taken to preserve that cause of action. The strictness by which these rules are enforced serves to promote the stated goals of the statute of limitations as mentioned above.

It should also be pointed out that statutes of limitations and statutes of repose are different. A statute of repose is intended to terminate the possibility of liability after a period of time. Therefore, if a statute of repose is involved, the issue is whether there is *any* possibility of the
claim being filed. Statute of limitations is also designed to accelerate settlement of controversies and is therefore favored by courts. *Nogle v. Nogle*, 53 Ill. App. 2d 457, 202 N.E.2d 683 (4th Dist. 1964). For reasons more fully stated below, however, statutes of limitations do have exceptions and there are circumstances in which even though a statute of limitation has expired, the court may find reasons for tolling that statute and allow the cause of action to proceed. The following material should assist claims handlers to successfully navigate the quandaries presented by these difficult limitation issues.

### III. ESTOPPEL V. WAIVER

In order to understand these issues, one must be familiar with the terms of estoppel and waiver. These are important terms to know when considering the issue of the possible tolling of statute of limitations.

In the event that a statute of limitations has expired, a litigant may still attempt to bring a cause of action. Frequently, the claim of “estoppel” is made by a claimant when a statute of limitations has expired. There are a host of Illinois cases on this issue. They have set out several elements that must be met in order for a successful claim of estoppel. A party claiming estoppel must demonstrate the following:

- The other person misrepresented or concealed material facts;
- The other person knew at the time he or she made the representations that they were untrue;
- The party claiming estoppel did not know that the representations were untrue when they were made and when that party decided to act, or not act, upon the representations;
- The other person intended or reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representation;
- The party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and
- The party claiming estoppel would be prejudiced by his or her reliance on the representations.

*DeLuna v. Burciaga*, 223 Ill. 2d 49, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006). Each of the above cited factors must be found by the trier of fact on behalf of the party claiming estoppel. Therefore, when considering the issue of estoppel, the focus is on the conduct of the insured in response to representations made by an insurer. *Twin City Fire Ins. Co. v. Old World Forum Trading Co.*, 266 Ill. App. 1, 12, 639 N.E.2d 584, 203 Ill. Dec. 264 (1st Dist. 1993). Therefore under this theory, a court will look to the conduct of the insured, and the insured’s “reasonable” beliefs.
and expectations, in considering whether to allow the doctrine of estoppel to “supercede” a statute of limitations which may have expired.

The case of Tegeler v. Industrial Comm’n, 173 Ill. 2d 498, 672 N.E.2d 1126, 220 Ill. Dec. 114 (1996), provides a good example of “estoppel” in this context. In the Tegeler case, a claimant filed an application and was granted an adjustment of claim pursuant to the Workers’ Compensation Act. The employer later appealed. The Industrial Commission reversed, finding that the claim was barred by the statute of limitations. The Supreme Court held that the employer had no duty to advise a claimant when the applicable limitations period would expire, but the employer was estopped from asserting the statute of limitations as a defense due to the conduct and statements of the claims adjuster during the course of settlement negotiations. Claimant Brian Tegeler was injured in a motor vehicle accident during the course of his employment. As a result of his injuries, he was sent to several different physicians. Eventually, his employer offered to settle the workers’ compensation claim for $7,346.00. The Appellate Court found that the claimant had been injured on July 29, 1987. A formal workers’ compensation claim was not filed, however, until January 4, 1991, several months after the expiration of the three-year limitations period. One of the issues presented on appeal was whether the employer should be estopped from asserting the statute of limitations defense because of its conduct and statements by the claims adjuster during the course of settlement negotiations. The Court agreed. The Court considered the expectations and judgments of the petitioner, in light of the conduct of the employer, in determining whether or not estoppel would preclude the employer from asserting its statute of limitations defense.

Conversely, “waiver” focuses exclusively on the conduct of the insurer. Under a waiver argument, the conduct of the insured and his or her beliefs or expectations are irrelevant; the only inquiry is that of the statements and actions of the insurer. Both of these concepts are frequently used in interpreting limitations issues as they apply to settlement negotiations. Examples of these two issues and their impact follow below.

IV. EXAMPLES

It should be noted that there is no one magic rule or procedure to follow to avoid waiving the statute of limitations during settlement negotiations. The guidance and suggestions which follow come from reviewing the case law. Thus, it is only through reported cases that we can glean any rules or suggestions on how to avoid waiving a statute of limitations defense. The case of Griffin v. Willoughby, 369 Ill. App. 3d 405, 867 N.E.2d 1007, 311 Ill. Dec. 21 (4th Dist. 2006), is illustrative of this point. In this case, the plaintiff filed a complaint on April 25, 2005 against the defendant, a school bus driver. The complaint stemmed from allegations of negligence in a collision that occurred on February 18, 2004. The trial court dismissed the suit with prejudice. On appeal, the plaintiff argued the one-year statute of limitations period found in the Local Governmental and Governmental Employees Tort Immunity Act did not apply to this action. Plaintiff also argued that the defendant should be “equitably estopped” from asserting the limitations period. One of the issues on appeal was the plaintiff’s
argument that he delayed filing suit because he relied on statements made by the school
district’s insurance carrier.

The plaintiff claimed that his attorney communicated with the insurance company at various
times between March 15, 2004 and April of 2005. Plaintiff asserted the insurance company led
him to believe it intended to settle the claim for a reasonable amount, but needed more
information for its file. Plaintiff further alleged that on April 20, 2005, the adjuster announced
her company was denying plaintiff’s claim because plaintiff did not file suit within one year of
the collision.

On appeal, the Court addressed the equitable estoppel issue. The Court determined that
equitable estoppel precludes a limitations defense “where [an insurer’s] actions during
negotiations are such as to lull the [plaintiff] into a false sense of security, thereby causing him
to delay the assertion of his rights.” The Court noted that conduct by a defendant’s insurance
company can, in some instances, give rise to an “apparent intent to pay a claim” which would
estop a defendant from raising the statute of limitations as a defense. The Court also listed
conduct which has been found to amount to estoppel. Included were concessions of liability by
an insurer, advanced payments by the insurer to the plaintiff in contemplation of eventual
settlement, and statements by the insurer which encouraged the plaintiff to delay filing his
action. As is the general rule in Illinois, the Court also reiterated the point that “the mere
pendency of negotiations conducted in good faith is insufficient to give rise to estoppel.”

In the Griffin case, correspondence and communication took place between plaintiff’s attorney
and the insurance company on several occasions. At no time, however, did the insurance
company take a position on the presumed liability in the case. Most of the correspondence and
communication was from the plaintiff’s counsel indicating that the plaintiff was continuing to
treat and was continuing to incur medical bills. Apparently, plaintiff’s counsel was unaware that
there was a one-year statute of limitations because the defendant involved was a governmental
entity, versus the normal two-year personal injury statute. Most importantly, the Court
determined that there was nothing that indicated the insurance company knew of the plaintiff’s
attorney’s mistake concerning the applicable limitations period and it had no duty to inform the
plaintiff’s attorney of the applicability. Based on those facts, the Court determined there was no
equitable estoppel and the statute of limitations defense was proper.

Another case considering the potential waiver of the statute of limitations is Mitchell v. State
Mitchell, the plaintiffs filed suit against the defendant insurance company to compel the
defendant to provide coverage pursuant to an insurance policy. State Farm moved to dismiss on
the basis that the plaintiffs’ suit was barred by a one-year limitations period found in the
insurance policy. The trial court granted defendant’s motion to dismiss, from which the plaintiffs
appealed. The Appellate Court reversed and remanded the case for further proceedings.

The record revealed that plaintiffs’ house burned down on November 11, 1999. At the time,
plaintiffs had an insurance policy through State Farm that would have covered the loss. On
November 23, 1999, State Farm sent a letter to plaintiffs which detailed the various requirements in the insurance policy requiring the plaintiffs to provide documentation within 60 days after the loss. On May 8, 2000, defendant notified the plaintiffs of the decision to deny the claim. The denial was based upon plaintiffs’ failure to provide documentation and to submit to an examination under oath as required by the policy. This letter further informed the plaintiffs that if they intended to proceed with litigation, strict compliance with the policy provisions would be required. Specifically, the policy required suit to be commenced within one year after the loss. This period of limitation was tolled from the date on which the proof of loss was filed until the date the claim was denied in whole or in part. Because defendant had never received a proof of loss, the letter explained, the defendant did not believe there was any tolling of the period of limitations. Defendant then suggested that plaintiffs had to file suit on or before November 11, 2000, if they were so inclined. The letter ended by recommending the plaintiffs consult an attorney. After receiving this letter, plaintiffs hand-delivered various documents to one of the defendant’s claim offices. Defendant then responded with a letter dated May 16, 2000 informing the plaintiffs that some of the documentation satisfied their prior request and that some of it did not. The letter finished by stating:

This claim remains in a state of denial as indicated in our letter of May, 8, 2000. When and if you comply with the requests noted herein, we will consider whether such delayed compliance is adequate for reconsideration of our position on your claim.

Mitchell, 343 Ill. App. 3d at 283.

On November 3, 2000 plaintiffs delivered more documentation to the defendant. On November 11, 2000, plaintiffs filed a sworn proof of loss with their insurance agent. According to the plaintiffs, their agent told them that the investigator gave the agent a list of things plaintiffs still had to do. Plaintiffs then asked their agent if they needed to have an attorney since the defendant was requesting that more information be submitted. Plaintiffs’ agent responded that he did not think defendant would be asking for more information if the defendant were not willing to settle the claim. On November 16, 2000, the defendant sent a letter to plaintiffs which informed them that their claim had been denied on May 8, 2000, that the claim was still denied, and plaintiffs had failed to file suit within the one year limitations period. The last piece of evidence was a letter furnished to the plaintiffs by State Farm stating:

To summarize, if the documents you submitted shortly before the period of limitations expired had been submitted in a timely fashion, they would have constituted the first step towards compliance with the policy conditions but they would not have been adequate to fully comply with the policy conditions. Your untimely and incomplete attempts to reverse our stated denial of the claim are ineffective and the claim remains denied.

Id. at 284.
Plaintiffs subsequently filed a complaint at law against State Farm in 2001. The defendant moved
to dismiss on the basis that the suit was barred because of the one-year limitations period in the
policy. The trial court granted the motion to dismiss from which the plaintiffs appealed.

On appeal, the plaintiffs argued that the statute of limitations had been tolled. Specifically,
plaintiffs argued that the one-year period had been extended by the number of days between
the date that the proof of loss was filed and the date the claim was denied in whole or in part. In
support of this argument, plaintiffs argued that the May 8, 2000 letter denying plaintiffs claim
was not actually a denial of their claim. Plaintiffs argued that they did not file the claim until
November 11, 2000 when they filed their proof of loss. Therefore, according to the plaintiffs, the
May 8 letter could not be a denial of their claim because there was no claim to deny. Plaintiffs
further argued that the November 16, 2000 letter which defendant sent to plaintiffs
acknowledging receipt of the proof of loss on November 11, 2000, but still denying the claim,
was not a denial of the proof of loss. Thus, plaintiffs argued the one-year limitations period was
still tolled because defendant had never “denied” plaintiffs’ claim. The court found that
defendant expressed that it was amenable to reconsidering its decision if the plaintiffs provided
the requested documentation. Further, according to plaintiffs, on November 11, 2000, the last
day the plaintiffs had to file suit, plaintiffs’ insurance agent requested more documentation from
plaintiffs and indicated a willingness on defendant’s part to settle the claim. The court found
that such actions (if proved true) could have “ lulled plaintiffs into believing that the defendant
was still interested in negotiating a settlement beyond the one year limitations period.” The case
was then remanded back to the trial court. Therefore, this case stands for the proposition that a
Court may look to any set of facts which could arguably be construed to suggest that the
plaintiffs were “lulled into a sense of security” by any act of the defendant insurer. In this case,
the carrier’s explanations to the plaintiffs as well as the request for additional documentation,
were construed to have lulled the plaintiffs into a sense of security that settlement negotiations
would continue.

Another case which found that there was no waiver of the statute of limitations is Thede v.
Kapsas, 386 Ill. App. 3d 396, 897 N.E.2d 345, 325 Ill. Dec. 97 (3d Dist. 2008). In this case, a patient
who chose to have a mole removed while seated, subsequently fainted and fell off the
examination table breaking her front teeth and injuring her jaw and nose. She filed a medical
malpractice action against the hospital and doctor. Summary judgment was granted by the trial
court on the affirmative defense that the suit was untimely. An appeal followed. Again, the issue
involved the applicable statute of limitations. Specifically, the applicability of the one-year
statute of limitations period for governmental entities and municipal corporations. Again, the
plaintiff was unaware of the one-year versus two-year statute of limitations in this instance. The
plaintiff argued, however, that under “equitable” considerations, an extension of limitations was
warranted. The Court reiterated that a case may be equitably tolled if a defendant has actively
misled the plaintiff or if the plaintiff has been prevented from asserting his or her rights some
extraordinary way or if the plaintiff has mistakenly asserted his or her rights in the wrong forum.
The Court went on to explain that the limitations period can be tolled against the defendant
who did not mislead a plaintiff if the plaintiff faced an extraordinary barrier to asserting her
rights in a timely fashion. Such extraordinary barriers may include a legal disability, an
irredeemable lack of information or situations where the plaintiff could not learn the identity of proper defendants through the exercise of due diligence. In the *Thede* case, the Court simply found that it was clear the plaintiff was unaware of the one year statute of limitations. There was nothing in the conduct of the defendant which sought to undermine the plaintiff’s ability to learn of this information. Even though the result was harsh, the Court stated, it was proper.

Another case in which the statute of limitations was not waived was found in the case of *Phelan v. Keiser*, 312 Ill. App. 3d 573, 727 N.E.2d 390, 245 Ill. Dec. 137 (5th Dist. 2000). In *Phelan*, a husband and wife brought suit to recover for injuries sustained in an automobile accident. Defendant moved for involuntary dismissal based on the statute of limitations. The trial court found that the defendant was not equitably estopped by actions of its insurer which had made a partial offer of settlement. On appeal, the Court determined that suit was filed 11 days after the statute of limitations ran. Plaintiffs argued the statute of limitations had been tolled because of the conduct of the defendants liability insurer. Plaintiffs claim that the insurance carrier’s conduct tolled the statute of limitations based on the doctrine of equitable estoppel. The Court disagreed. The Court then looked at the evidence in the case. The evidence revealed that the plaintiff had sought and received medical treatment one year past the date of the initial injury. He testified that the carrier had subsequently asked him to sign a medical release. He signed the release, returned it to the carrier, but heard nothing back from the carrier. The plaintiff testified that in April and May of 1998, he repeatedly contacted the insurance company and was told that someone would contact him, but no one did until a claims adjuster met with him in July of 1998. The plaintiff testified that it was not until he contacted a lawyer after November 22, 1998, that he was made aware of any time limit in presenting a claim. The plaintiff testified that until then, he thought that once he had contacted the insurance company and was in negotiations with the company, the time limit was tolled. The conduct of the claims adjuster was also analyzed. The casualty claims adjuster testified that she had been assigned to the claim on December 3, 1996. At that time, she had settlement authority of up to $25,000.00. She also testified that “early on” she had determined that the carrier was contractually obligated to pay the claim. The claims adjuster then contacted the plaintiffs to determine the extent of their injuries. She reviewed their medical records and met with them at their home on July 13, 1998. On that date, the claims adjuster offered to settle the claim for $7,500.00. The plaintiffs refused the offer. The adjuster testified that at no time did she advise the plaintiffs that the carrier was not going to pay their claim. The adjuster testified that she did not make any suggestions to them that they should hire counsel. The adjuster also testified that she did not believe it was necessary to inform the plaintiffs of the statute of limitations because in July of 1998 the plaintiff told the adjuster “we need to get this moving on because of the two-year statute approaching.” She testified that she never told them that it was not necessary to file a lawsuit. In looking at these facts, the Court determined that the carrier did not advance payments for lost wages or medical expenses and did not encourage the plaintiffs to delay in filing suit or to hire an attorney. The Court then went on to state:

> Although the plaintiffs believed that the statute of limitations was tolled as long as negotiations continued that assumption was made by them, separate and apart from any statements made to either plaintiff by [the insurance carrier]. The
[plaintiffs] concede that their last contact with [carrier] was in September of 1998. They had until November 22, 1998, to file suit. Based on these facts, the trial court ruled, ‘Merely settling part of plaintiffs’ claim and negotiating the balance without some act or statement, intended or otherwise, that led the plaintiffs to miss the limitation deadline is insufficient to invoke equitable estoppel.’

*Phelan*, 312 Ill. App. 3d at 576.

Thus, the Appellate Court found that the trial court’s decision was not erroneous in that there was not equitable estoppel in this case.

V. SUMMARY

A. General Rule

1. A plaintiff who delays filing a claim in the expectation of reaching a settlement, without obtaining an agreement to toll the running of the statute of limitations, delays at his own peril.

B. Exceptions to General Rule

1. The courts have carved out only very limited exceptions to the general rule. In Illinois, if the plaintiff can show that he allowed the statute of limitations to expire because the defendant intentionally lulled him into a false sense of security, then the defendant may be precluded from asserting any statute of limitations defense.

2. The intent behind this exception is to prevent a defendant from misleading a plaintiff in bad faith with repeated promises to settle, and then turning around and asserting that the statute of limitations has lapsed after the plaintiff delayed filing an action.

3. Even under this exception, plaintiff's reliance on the defendant’s behavior must have been reasonable under the circumstances.

4. Reliance has been deemed reasonable when an insurance adjuster represents that no harm would come to plaintiff if she delayed in bringing suit.

5. If the circumstance giving rise to the tolling of the statute of limitations no longer exists before the limitations period expires, plaintiff is required to bring suit within the limitations period.
C. Suggestions

1. If negotiating with unrepresented party, inform them of the statute of limitations. No need to specify the date of the statute of limitation. Only the existence of a statute of limitations.

2. If dealing with an attorney, there is no need to inform of statute of limitations.

3. Tolling Agreements. If it is clear that settlement is imminent and the limitations period is closing in, parties may agree to toll the statute of limitations for a period sufficient to enable the parties to conclude negotiations.

D. Once Suit is Filed

1. After suit is filed, while negotiations occur, do not ignore obligations.
   a) Ongoing settlement discussions are not good cause for failing to answer a complaint.
   b) Likewise, settlement negotiations are not good cause for failing to comply with scheduling orders, discovery, etc.

2. If settlement appears imminent, parties may ask the court or by express agreement amongst themselves to stay the proceedings.
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Matt has spent his entire legal career with Heyl Royster, beginning in 2000 in the Springfield office. His practice focuses on healthcare law, representing physicians, hospitals, long-term care facilities, and other similar healthcare organizations. His defense of these entities involves a range of issues including licensure, discipline, fraud and abuse, risk management, staff concerns, and defense of malpractice and other civil litigation.

With his extensive litigation experience, Matt has personally defended a variety of civil cases, taking over 25 to verdict. In recent years, he has developed a special focus on long term care and nursing home litigation. Many of his cases are against top Chicago and national counsel with settlement demands often in the millions of dollars.

Matt's experience in the healthcare arena is vast. He began working in a hospital at the age of 15. After graduating from college, he began work as a registered nurse in a Central Illinois emergency room. While there, his responsibilities included charge nurse positions as well as house supervisor. Working as a nurse, he obtained trauma nurse specialist certification, was an advanced cardiac life support instructor and achieved certification in pediatric advanced life support. He also was directly involved in the training of paramedics at various level one trauma centers.

Matt has also presented and lectured to various healthcare groups and other educational entities involving medical record privacy, nursing practice, and long term care litigation. He has also presented various courses on evidence and evidence presentation. He has co-authored Smart Evidence, Medical Malpractice, and an evidentiary guide for medical malpractice cases.