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When Does the Statute of Limitations Expire?

One question that frequently arises when health care providers become aware of a possible legal claim or basis for litigation is, "When will the statute of limitations expire?" A statute of limitations is a written law establishing a time limit for a claimant to file a civil lawsuit. There are many reasons for instituting statutes of limitations. Establishing a deadline encourages diligent prosecution of known claims, limits exposure to litigation and provides finality and predictability in legal affairs. In addition, these statutes ensure that claims are resolved while evidence is reasonably available and fresh.

The limitations period within which a lawsuit must be filed will vary. This is because the time limit for filing a civil suit depends upon: (1) the nature of the claim, and (2) the date when the claim accrued, or came into existence. A cause of action accrues as soon as the right to maintain a legal action arises, and the date of accrual is the date when the injured party knew or had reason to know of it. The nature of the claim is important because there are different time limitations for different types of claims. For example, an action alleging battery must be brought within 1 year, while an action for breach of a written contract must be brought within 5 years. However, a plaintiff is not allowed to frame a tort action as a contract action merely to avoid the time limitation.

Medical negligence

Under K.S.A. 60-513(a)(7), an action arising out of "the rendering of or failure to render professional services by a healthcare provider," *i.e.*, a malpractice suit, must be brought within two years. There are many circumstances where the statutory time period may be tolled, or held in abeyance, meaning a plaintiff may file suit outside of the 2-year time limit. In most instances, however, the crucial question is, within two years of what? K.S.A. 60-513(c) provides:

> "[A cause of action for medical malpractice] shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party . . . ."

To determine when the two year period would begin to run, the critical issue is when the action of the health care provider first caused substantial injury or, if the fact of injury was not manifest, when the fact of injury became reasonably ascertainable to the injured party. "Reasonably ascertainable" does not mean actual knowledge and has been interpreted to mean a plaintiff has the obligation to reasonably investigate available sources.[1] As might be imagined, in determining when a cause of action for medical malpractice accrued, there is often conflicting evidence as to when the fact of injury became reasonably ascertainable. In some instances, where there is conflicting evidence as to when the injury was ascertainable, the question is submitted to a jury to determine when the cause of action accrued.

Fraudulent actions taken in order to deceive the patient from discovering the physician's malpractice may also result in a "tolling" of the statute of limitations so the action does not accrue until the patient discovers the fraud. Under these circumstances, even if the malpractice action would otherwise be barred, a patient is still allowed to sue the physician in a separate action for fraud.[2]

The general rule for adults is that medical malpractice actions must be brought within two years of the injury. The time limit for minors is greatly extended. Minors are allowed to bring a cause of action for malpractice within 1 year of reaching the age of majority.[3] However, where there is any question as to whether a patient should have been aware he or she was wrongfully injured, it will not always be possible to pinpoint an exact date when the statute of limitations begins running.

Wrongful death

Regardless of the nature of the underlying claim, a wrongful death action is subject to a 2-year statute of limitations under K.S.A. 60-513(a)(5).[4] Exceptions extending the time period have been recognized. In most instances, however, the 2-year time limit begins on the date of the death so long as the wrongful nature of the death is apparent but, occasionally, the statute can begin to run prior to the date of death.[5] There must be knowledge not only of the fact of injury or death, but also of whose negligence caused the injury. In a recent wrongful death case, the Kansas Court of Appeals noted:

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[1] *See Davidson v. Denning*, 259 Kan. 659, 678, 914 P.2d 936 (1996).

[2] *See Robinson v. Shah*, 23 Kan. App. 2d 812, 936 P.2d 784 (1997).

[3] K.S.A. 60-515(a).

[4] *Bonura v. Sifers*, 39 Kan. App. 2d 617, Syl. ¶ 3, 181 P.3d 1277 (2008).

[5] *See Yadon v. Dennett*, No. 99,215, unpublished Court of Appeals decision filed December 19, 2008.

> "Generally, the limitations period starts when the 'fact of injury' is 'reasonably ascertainable.' Moreover, the 'fact of injury' generally means the date of death. Nevertheless, the commencement of the limitations period may be tolled until the fact of the death or the wrongful nature of the death becomes reasonably ascertainable." (Citations omitted.)

Bonura v. Sifers, 39 Kan. App. 2d 617, 622, 181 P.3d 1277 (2008).

In the *Bonura v. Sifers* case, the Kansas Court of Appeals noted that, although the plaintiffs did not learn the physician actually performed a biliopancreatic diversion procedure rather than the authorized duodenal switch procedure until a reporter contacted them nearly 3 years after the patient's death, the plaintiffs were suspicious about the patient's sudden death, had contacted an attorney and obtained a copy of the decedent's medical records. Finding the claimed misconduct of the physician could have been determined from the medical records existing on the date of the patient's death, the Court upheld the dismissal of the lawsuit on the basis of the statute of limitations.

Statutes of Repose

A similar, but different type of statute that imposes a time limit for filing suit is a "statute of repose." A statute of repose is not related to the accrual (knowledge of) a cause of action. Instead, a statute of repose bars a litigant from bringing suit a fixed number of years after a particular action by the defendant, even if the time period ends before the plaintiff has actually suffered any injury or knows about the claim.

The statute of repose for medical malpractice actions for adults is delineated in K.S.A. 60-513(c), which provides: "in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action." Consequently, if a patient injured by medical malpractice brings a lawsuit more than 4 years beyond the negligent act, the case may be subject to dismissal.

For a malpractice cause of action, the statute of repose begins to run from the time the malpractice occurs, regardless of the negligent doctor's continued treatment of the patient. For example, although minors are allowed to bring a cause of action for malpractice within 1 year of reaching the age of majority, the statute of repose bars an action for malpractice by or on behalf of a minor that is commenced more than 8 years after the time of the act giving rise to the cause of action. Thus, where an 18-year-old plaintiff filed suit contending a doctor failed to diagnose her scoliosis at age 3, her case was dismissed pursuant to the statute of repose.[6]

In conclusion, determining the deadline for a particular lawsuit will depend upon the nature of the claim as well as the underlying facts and circumstances. Physicians should be aware that, on occasion, a lawsuit will be filed within the established time limit but the

[6] *See Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754 (1996).

defendant doctor will not be served with a copy of the petition until after the time period has expired. The lawsuit will be held to be within the limitations period as long as service is obtained within up to 120 days of the date when the plaintiff filed his or her petition.[7] In the event of a lawsuit, always pay particular attention to the date and time when you are served and report it immediately to your risk manager and/or your insurer, since your attorney will have only 20 days from the date of service of the petition to file an answer on your behalf. Your attorney will normally consider the statute of limitations when formulating defenses to the lawsuit.

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[7] K.S.A. 60-203(a).