CHAPTER 72

LIMITATION OF ACTIONS

SCOPE

This chapter discusses statutes of limitation applicable in civil actions other than actions for title to real property. The general statutes of limitation governing torts and contracts are examined, as are particular statutes of limitation governing statutory causes of action. These discussions are supplemented by an analysis of the rules for the commencement and tolling of limitation periods. Finally, rules for pleading and proving limitations issues are explained.

The legal discussion is supplemented by a practice guide listing issues to be considered in analyzing, asserting, and responding to the defense of limitations. Forms for allegations setting forth the defense of limitations are also provided.

Limitation periods applicable to specific causes of action are discussed more fully in the specific chapters devoted to those causes of action. The special statutes of limitation applicable to actions for the recovery of real property are the subject of Ch. 250, Adverse Possession. Other statutes of limitation relating to real property are discussed in Ch. 251, Trespass to Try Title, and Ch. 255, Vendor’s Liens and Deeds of Trust.
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PART I. LEGAL BACKGROUND

§ 72.01 Definition and Purpose

Every cause of action must be brought within a specified period of time. These specified time periods are prescribed by the legislature, and are commonly known as statutes of limitation. Failure to bring a cause of action within the prescribed limitation period bars the action for all time [see Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988)].

Statutes of limitation establish what the legislature deems a reasonable time within which to bring a claim. Absolutely cutting off claims that are brought after the limitation period has expired prevents a party from having to defend against “stale” claims. Claims become “stale” when the evidence becomes lost, whether due to the death or disappearance of witnesses, faded memories, the disappearance of documents, and so forth [see S.V. v. R.V., 933 S.W.2d 1, 6 (Tex. 1996); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990)]. Furthermore, the uncertainty and insecurity created by unsettled claims hinders the flow of commerce [see Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 545–546 (Tex. 1986)].

Statutes of limitation are distinguishable from the equitable doctrine of laches [see Ch. 70, Answer]. Laches applies to bar a claim when the defendant would be prejudiced if the claim were not barred. Laches is similar to limitations in that it bars a claim when the claimant unreasonably delays bringing the claim and the defendant is prejudiced as a result of a good faith change of position because of the delay [Gulf, Colorado & Santa Fe Railway Co. v. McBride, 159 Tex. 442, 322 S.W.2d 492, 500 (1958)]. However, limitations apply automatically, without proof of prejudice, whenever the fixed, statutory period expires. In contrast, laches is not conclusively determined by the passing of any specific period of time, but applies only when there is a specific showing of prejudice by the defendant. Generally, when a cause of action is timely under a statute of limitation, the defense of laches does not apply. Laches may apply when a claim is not barred by limitations only when there are extraordinary circumstances that would justify application of the defense [see Buzbee v. Castlewood Civic Club, 737 S.W.2d 366, 369 (Tex. App.—Houston [14th Dist.] 1987, no writ); see also Ch. 70, Answer].

§ 72.02 Limitation Periods

[1]—Tort Actions

[a]—Generally

Most tort causes of action are governed by a two-year statute of limitation found in the Texas Civil Practice and Remedies Code. The statutory language
of Civil Practice and Remedies Code Section 16.003 expressly governs claims for: (1) personal injuries, (2) conversion of personal property, (3) trespass for injury to the estate or to the property of another, (4) taking or detaining the personal property of another, and (5) forcible entry and detainer [C.P.R.C. § 16.003].

These classifications of actions are not always easy to apply to modern litigation. Chapter 16 is drafted by reference to the types of common law actions that existed in Anglo-American jurisprudence when Chapter 16’s statutory predecessors were enacted by the Fifth Congress of the Republic in 1841, rather than in terms of modern causes of action (negligence, strict liability in tort, breach of contract, etc.). Although it is clear that the two-year period is applicable to “personal injury” cases (regardless of whether the claim is grounded on negligence or strict liability), historical analysis is necessary to determine in which category some types of cases fall. Generally, the Texas Supreme Court has interpreted the statutory language covering “trespass for injury to the estate or to the property of another” [C.P.R.C. § 16.003(a)] to encompass the general body of tort law [see First Nat. Bank of Eagle Pass v. Levine, 721 S.W.2d 287, 288–289 (Tex. 1986); see also Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)]. However, fraud actions are treated differently and are governed by the four-year statute [see [b], below]. This distinction is made because the modern fraud cause of action developed from an action on the case for deceit and was related to debt as an evolution of the action of assumpsit, in contrast to tort actions in general, which developed from the law of trespass. Nevertheless, the Texas Supreme Court has stated that a tort not expressly covered by a limitation provision nor expressly held by the Court to be governed by a different provision would presumptively be a “trespass” for limitations purposes [Williams v. Khalaf, 802 S.W.2d 651, 654–656 (Tex. 1990)]. Thus, it is likely that virtually all tort litigation is governed by the two-year statute, at least until the Court says otherwise, with the exception of fraud actions and actions expressly covered by a separate statute, such as the separate one-year statute for malicious prosecution, libel, and slander [C.P.R.C. § 16.002; see [d], below].

The case law indicates that the following causes of action are governed by the two-year statute of limitation:

1. Negligence and gross negligence [American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 255 (Tex. App.—Houston [1st Dist.] 1991), aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992)].

2. Legal malpractice [Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)].

3. Wrongful death [C.P.R.C. § 16.003(b); see also Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 350 (Tex. 1990)].

5. Invasion of privacy. This term actually comprehends four separate torts, all of which are no doubt governed by the two-year statute: (1) intrusion on seclusion; (2) appropriation of name or likeness; (3) public disclosure of private facts; and (4) placing a person in a false light [see Stevenson v. Koutzarov, 795 S.W.2d 313, 319 (Tex. App.—Houston [1st Dist.] 1990, den.); Covington v. Houston Post, 743 S.W.2d 345, 347–348 (Tex. App.—Houston [14th Dist.] 1987, no writ)—two-year statute applies to false light claim; but see Cain v. Hearst Corp., 878 S.W.2d 577, 579–584 (Tex. 1994)—holding that Texas does not recognize false light invasion of privacy because it duplicates tort of defamation; see also Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1087 (5th Cir. [Tex.] 1984), cert. denied, 469 U.S. 1107 (1985)—two-year statute applies to public disclosure of private facts; see also Collins v. Collins, 904 S.W.2d 792, 804 (Tex. App.—Houston [1st Dist.] 1995) den., 923 S.W.2d 569 (Tex. 1996)—state wiretap statute, C.P.R.C. §§ 123.001–123.004, sounds in tort and is governed by two-year statute]. By contrast, defamation actions, although closely related to privacy actions based on public disclosure of private facts or on placing a person in a false light, are governed by a separate one-year statute [C.P.R.C. § 16.002; see [d], below].


8. An insurer’s breach of its duty of good faith and fair dealing [Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 827 (Tex. 1990); see also Acts 1999, 76th Leg., ch. 950 § 2(b)—statute clarifying that four-year statute of limitation applies in fraud actions was not intended to affect two-year statute applicable to action for breach of duty of good faith and fair dealing; see generally Ch. 345, Insurer’s Duties of Good Faith and Fair Dealing].

9. Insurance claims governed by the Stowers doctrine [American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 254 (Tex. App.—Houston [1st Dist.] 1991), aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992); see G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Comm. App. 1929, holding approved); see generally Ch. 345, Insurer’s Duties of Good Faith and Fair Dealing].

10. Wrongful termination under the workers’ compensation statutes [see Johnson & Johnson Medical v. Sanchez, 924 S.W.2d 925, 927 (Tex.

11. Claims for damage to real property [see Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex. 1997)—damages arose from spraying of pesticide at apartment complexes].


Causes of action for sexual assault and for misappropriation of trade secrets are governed by other statutes and are specifically excepted from the two-year tort statute [C.P.R.C. § 16.003(a); C.P.R.C. § 16.0045—five-year period for sexual assault; C.P.R.C. § 16.010—three-year statute for misappropriation of trade secrets].

[b]—Fraud Actions

Actions for fraud or breach of fiduciary duty (constructive fraud) are governed by the four-year statute of limitation. A person must file these actions not later than four years after the day the cause of action accrues [C.P.R.C. § 16.004(a)(4), (5)]. Civil Practice and Remedies Code Section 16.004 was amended in 1999 to clarify that fraud and breach of fiduciary duty were covered by the four-year statute. Before the amendment, actions for fraud were considered to fall under the four-year statute on the theory that they were actions for “debt” [Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990); see Gordon v. Rhodes & Daniel, 102 Tex. 300, 116 S.W. 40, 41–42 (1909); see also [a], above]. However, the limitation period for a breach of fiduciary duty claim was unsettled. Some cases held that the four-year residual statute applied, apparently on the ground that breach of fiduciary duty could not be classified as either a trespass or as the type of fraud that is related to the common-law action for debt [see C.P.R.C. § 16.051; Perez v. Gulley, 829 S.W.2d 388, 390 (Tex. App.—Corpus Christi 1992, den.); Spangler v. Jones, 797 S.W.2d 125, 132 (Tex. App.—Dallas 1990, den.)]. Other cases applied the two-year tort statute [see Kansas Reinsurance v. Congressional Mortg. Corp., 20 F.3d 1362, 1374 (5th Cir. [Tex.] 1994); Smith v. Chapman, 897 S.W.2d 399, 402–403 (Tex. App.—Eastland 1995, no writ); Hoover v. Gregory, 835 S.W.2d 668, 676 (Tex. App.—Dallas 1992, den.)]. The 1999 amendment resolved this split of authority by specifically including both fraud and breach of fiduciary duty in the language of the four-year statute.

It remains unclear whether fraud cases involving claims for emotional distress are governed by the two-year or four-year statute. Similarly, cases of negligent misrepresentation are also difficult to classify [see Texas American Corp. v. Woodbridge, 809 S.W.2d 299, 302–303 (Tex. App.—Fort Worth 1991, no writ)—two-year statute applies to negligent misrepresentation claims; see also
Sioux Ltd. Sec. Litigation v. Coopers & Lybrand, 914 F.2d 61, 63–64 (5th Cir. [Tex.] 1990)—two-year statute applies to negligent misrepresentation claims.

The four-year residual statute [see [10], below] applies to actions arising from fraudulent conduct in which an equitable remedy is sought. For example, an action for rescission of a contract because of fraudulent inducement falls within the four-year residual statute [Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990); Thomason v. McIntyre, 113 Tex. 220, 254 S.W. 315, 315 (1923); see [10], below]. Other equitable actions, such as a claim for imposing a constructive trust on personal property because of fraud, are also governed by the four-year residual statute of limitation or, if the action is for recovery of real property, by the general statutes of limitation applicable to suits for the recovery of real estate [Peak v. Berry, 143 Tex. 294, 184 S.W.2d 272, 275 (1944); see Ch. 55, Constructive Trusts].

[c]—Medical Malpractice

The Medical Liability and Insurance Improvement Act of Texas contains its own two-year statute of limitation. Under that statute, claims against health care providers, including medical malpractice claims, must be brought within two years of the date of the occurrence of the breach or tort, or within two years from the date the medical or health care that is the subject of the claim is completed [R.C.S. Art. 4590i § 10.01]. This statute, by its terms, applies to all health care liability claims notwithstanding any other law. For example, in wrongful death cases based on medical malpractice, the claims must be brought within the time specified by the statute, not within two years of the death of the decedent as would be the case under the statute of limitation applying to wrongful death claims generally [Bala v. Maxwell, 909 S.W.2d 889, 892–893 (Tex. 1995); see C.P.R.C. §§ 16.003(b), 16.062]. The statute of limitation for medical malpractice claims is discussed in detail in Ch. 321, Medical Malpractice.

[d]—Defamation, Malicious Prosecution, and Promises to Marry

Actions for libel, slander, and malicious prosecution are governed by a one-year limitation period. Likewise, a claim for breach of a promise to marry must also be brought within one year of the date the cause of action accrues [C.P.R.C. § 16.002].

The limitation period for these causes of action is comparatively short for public policy reasons. Public policy favors quick disposition of frivolous claims. In addition, the nature of the injuries in these actions, humiliation and reputation damages, is difficult to assess and transitory in nature [see Comment, The Privacy Action in Texas: Its Characterization and a Determination of Applicable Statutes of Limitations, 29 Sw. L.J. 928, 939 (1975)].
One court of appeals has held that the one-year statute applies only to those malicious prosecution suits based on criminal prosecutions, and that malicious prosecution suits based on a civil action are governed by the two-year tort statute [see Toranto v. Wall, 891 S.W.2d 3, 6 (Tex. App.—Texarkana 1994, no writ)—relying on 19th century precedent].

[e]—Sexual Assault

In personal injury claims based on “sexual assault” or “aggravated sexual assault,” as those terms are defined by the Penal Code, a person must bring suit not later than five years after the day the cause of action accrues [C.P.R.C. § 16.0045(a); see Pen. C. §§ 22.011, 22.021; see generally Ch. 330, Assault and Battery]. If the action is for personal injury resulting in death, the cause of action accrues on the death of the injured person [C.P.R.C. § 16.0045(b)]. This limitation period is tolled for a suit on the filing of a petition by any person in an appropriate court alleging that the identity of the defendant in the suit is unknown and designating the unknown defendant as “John or Jane Doe.” The person filing the petition must proceed with due diligence to discover the identity of the defendant and amend the petition by substituting the real name of the defendant not later than the 30th day after the date that the defendant is identified to the plaintiff. The limitation period begins running again on the date that the petition is amended [C.P.R.C. § 16.0045(c)].

[f]—Misappropriation of Trade Secrets

A person must bring a suit for misappropriation of trade secrets not later than three years after the misappropriation is discovered, or by the exercise of reasonable diligence should have been discovered. A misappropriation of trade secrets that continues over time is a single cause of action, and the three-year period begins running without regard to whether the misappropriation is a single or continuing act [C.P.R.C. § 16.010]. This statute of limitation applies to all actions commenced on or after the effective date of the enacting legislation (May 1, 1997), or pending on the effective date and in which the trial, or any new trial or retrial, begins on or after the effective date [Acts 1997, 75th Leg., ch. 26 § 3]. This statute was meant to reverse the Texas Supreme Court decision in Computer Associates International v. Altai, which held that the discovery rule [see § 72.03[3]] does not apply to causes of action for misappropriation of trade secrets. Under the former law as interpreted in this decision, the two-year tort statute was applicable and began to run at the time of the actual use of a trade secret [see Computer Associates Intern. v. Altai, 918 S.W.2d 453, 456–457 (Tex. 1994)]. The statute extends the period to three years and provides that the period begins on discovery of the wrongful act.

The extension of the period from two to three years does not revive claims that have become barred because of the running of the former two-year statute.
Because of the constitutional prohibition of retroactive statutes [Tex. Const. Art. 1 § 16; see generally Ch. 4, Statutory Construction], a statute cannot be given application if to do so would destroy or impair rights that had become vested before the act became effective. Thus, after a cause has become barred by the statute of limitation, the defendant has a vested right to rely on the statute as a defense [Baker Hughes, Inc. v. Keco R. & D., Inc., — S.W.3d —, 43 Sup. Ct. J. 9, 10–11 (Tex. 1999)].

[2]—Contract Actions

Breach of contract actions are governed by one of two four-year statutes of limitation: either the general four-year statute, codified in the Civil Practice and Remedies Code [see C.P.R.C. § 16.004] or the special four-year statute that applies to contracts for the sale of goods, governed by the Uniform Commercial Code [see Bus. & Com. C. § 2.725; see also § 72.03[1][d]; see generally Ch. 210, Sales].

The general four-year statute of limitation in Civil Practice and Remedies Code Section 16.004 does not explicitly state that it applies to contract actions except for actions for specific performance of a contract for the conveyance of real property [see C.P.R.C. § 16.004]. Court interpretations of the statute have, however, made clear that an action for “debt” encompasses a contract action such that the statute is applicable to them. The Texas Supreme Court has characterized an unliquidated damages claim based on a contract as a claim for an ascertainable debt and, therefore, within the four-year statute of limitation [see Franco v. Allstate Insurance Company, 505 S.W.2d 789, 791–792 (Tex. 1974)].

Other examples of claims that are considered “debt” claims covered by the four-year statute of limitation applicable to contracts include: (1) a breach of contract claim [see Hurbrough v. Cain, 571 S.W.2d 216, 221 (Civ. App.—Tyler 1978, no writ)], (2) a claim to recover a deposit wrongfully withheld or offset by a bank in a breach of a depository contract [Upper Valley Aviation v. Mercantile Nat. Bank, 656 S.W.2d 952, 955 (Tex. App.—Dallas 1983, ref. n.r.e.)], and (3) a claim based on the uninsured motorists provisions of a liability insurance policy [Franco v. Allstate Insurance Company, 505 S.W.2d 789, 791–792 (Tex. 1974)].

Although breach of contract actions are governed by a four-year statute of limitation, it may not always be apparent whether the applicable four-year statute of limitation is the one in the Civil Practice and Remedies Code or the one in the Business and Commerce Code [compare C.P.R.C. § 16.004 with Bus. & Com. C. § 2.725]. The distinction between the two statutes of limitation involves the accrual date of the limitation periods. An action may be timely under one statute but time-barred by the other statute. In this situation, the
court must determine which statute controls [see Childs v. Taylor Cotton Oil Co., 612 S.W.2d 245, 247–250 (Civ. App.—Tyler 1981, ref. n.r.e.)—action on account for goods and material did not accrue on tender of delivery of goods under Bus. & Com. C. § 2.725, but accrued on date of last transaction between parties under C.P.R.C. § 16.004].

[3]—Actions for Specific Performance of Contract for Real Property

Suits for specific performance of a contract for the conveyance of real property are expressly governed by the four-year statute of limitation [C.P.R.C. § 16.004(a)(1); see Murphy v. Sills, 268 S.W.2d 296, 305 (Civ. App.—Beaumont 1953, dis.).]

[4]—Actions for Debt

An action for the recovery of a debt is expressly governed by the four-year statute of limitation in the Civil Practice and Remedies Code [C.P.R.C. § 16.004(a)(3)]. Thus, for example, a suit on a promissory note must be filed within four years of the date the cause of action accrues [G & R. Inv. v. Nance, 683 S.W.2d 727, 728 (Tex. App.—Houston [14th Dist.] 1984, ref. n.r.e.); Loomis v. Republic Nat. Bank of Dallas, 653 S.W.2d 75, 77 (Tex. App.—Dallas 1983, ref. n.r.e.)]. However, the Texas Supreme Court has concluded successors in interest to the FDIC are entitled to a six-year federal statute of limitation pursuant to the common law maxim that an assignee stands in the shoes of his or her assignor [Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994); see 12 U.S.C. § 1821(d)(14)]. Thus, collection actions commenced by FDIC assignees within six years after appointment of the FDIC as receiver are timely [Jackson v. Thweatt, 883 S.W.2d 171, 178 (Tex. 1994)].

The Business and Commerce Code sets out statutes of limitation that apply to negotiable instruments governed by the UCC [see Bus. & Com. C. § 3.118—as amended 1995, effective with respect to action or proceeding that is commenced or right that accrues on or after January 1, 1996]. With respect to actions on instruments covered by the UCC, these limitations provisions, because of their particularity, supersede the more general provisions of the Civil Practice and Remedies Code that might otherwise control such actions [see Bus. & Com. C. § 3.118, State Bar Committee Comments]. These statutes of limitation provide as follows:

1. Note payable at definite time. An action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date [Bus. & Com. C. § 3.118(a); see Bus. & Com. C. § 3.104(e)—definition of “note”].

2. Note payable on demand. If demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party
to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years [Bus. & Com. C. § 3.118(b); see Bus. & Com. C. § 3.104(e)—definition of “note”; cf. G & R Inv. v. Nance, 683 S.W.2d 727, 728 (Tex. App.—Houston [14th Dist.] 1984, ref. n.r.e.)—under prior Texas law applicable to demand notes, limitation period began to run on date note was made].

3. Unaccepted draft. An action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first [Bus. & Com. C. § 3.118(c); see Bus. & Com. C. § 3.104(e)—definition of “draft”; Bus. & Com. C. § 3.409(a)—acceptance].

4. Certain checks. An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller’s check, cashier’s check, or traveler’s check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be [Bus. & Com. C. § 3.118(d); see Bus. & Com. C. §§ 3.104(f)–(i), 3.409(d)—definitions]. This provision controls over the provisions discussed in 2 and 3, above [Bus. & Com. C. § 3.118(b), (c)].

5. Certificate of deposit. An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed [Bus. & Com. C. § 3.118(e); see Bus. & Com. C. § 3.104(j)—definition of “certificate of deposit”]. This provision controls over the provisions discussed in 1 and 2, above [Bus. & Com. C. § 3.118(a), (b)].

6. Accepted draft. An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (1) within six years after the due date or dates stated in the draft or acceptance, if the obligation of the acceptor is payable at a definite time; or (2) within six years after the date of the acceptance if the obligation of the acceptor is payable on demand [Bus. & Com. C. § 3.118(f); see Bus. & Com. C. § 3.104(e)—definition of “draft”; Bus. & Com. C. § 3.409(a)—acceptance].

7. Other actions. Unless governed by other law regarding claims for indemnity or contribution, the following actions must be commenced within three years after the cause of action accrues: (1) an action for conversion of an instrument, an action for money had and received, or like action based on conversion; (2) an action for breach of warranty; or (3) an action to enforce
an obligation, duty, or right arising under this chapter and not governed by this section [Bus. & Com. C. § 3.118(g)].

Section 3.118 sets out statutes of limitation, but does not define when a cause of action accrues. Accrual of a cause of action is defined by other UCC sections such as those that state the various obligations of parties to an instrument. Nor does the section attempt to state all rules with respect to a statute of limitation. For example, the circumstances under which the running of a limitation period may be tolled is left to other law [Bus. & Com. C. § 3.118, UCC Comment 1; see Bus. & Com. C. § 1.103—UCC provisions supplemented by general principles of law]. Texas law permitting parties to extend, waive, or shorten limitation periods also applies to these limitation periods [see Bus. & Com. C. § 3.118, State Bar Committee Comments; see, e.g., C.P.R.C. §§ 16.065, 16.070; see also Fuqua v. Fuqua, 750 S.W.2d 238, 241 (Tex. App.—Dallas 1988, den.)].

The statutes of limitation contained in Section 3.118 apply only with respect to an action or proceeding that is commenced or a right that accrues on or after January 1, 1996 [see Acts 1995, 74th Leg., ch. 921, §§ 9, 10]. In cases in which a shorter limitation period had not run on that date, the longer limitation period provided by Section 3.118 should be applied, because the defense of limitations would not become a vested right until the limitation period had actually run [see Bus. & Com. C. § 3.118, State Bar Committee Comments; Whittle v. Mcorp Properties, 17 S.W.3d 718, 720–721 (Tex. App.—Amarillo 2000, no pet. h.)—when four-year statute had not run with respect to any installment payments at time six-year statute was enacted, six-year statute applied; see also National Mar-Kit, Inc. v. Forrest, 687 S.W.2d 457, 460 (Tex. App.—Houston [14th Dist.] 1985, no writ)—applying this principle with respect to change in limitation period for oral debts].

Negotiable instruments as governed by Chapter 3 of the UCC are discussed in detail in Ch. 230, Negotiable Instruments.

[5]—Suits on Bonds of Executor, Administrator, or Guardian

The four-year statute of limitation applies to suits on the bond of an executor, administrator, or guardian [C.P.R.C. § 16.004(b)]. Consequently, in one case, it was held that a surety on a guardianship bond was subrogated to the rights of the ward and was, therefore, subject to a four-year period of limitation on the cause of action [U. S. Fidelity & Guaranty Co. v. Harper, 561 S.W.2d 630, 631 (Civ. App.—Fort Worth 1978, no writ)].

[6]—Suit to Establish Partnership and for Accounting

The timing of a partnership action depends on the nature of the claims being asserted. A claim based on fraud, or breach of statutory duties of care or loyalty,
or breach of the terms of the partnership agreement, is governed by the statute
of limitation appropriate to the nature of the claim [see R.C.S. Art. 6132b—
4.06(c)]. This means that partners cannot wait until the winding up of the
partnership to litigate claims against the partnership or another partner [R.C.S.
Art. 6132b—4.06]. Even though a claim for an accounting is available, an
accounting may not be used to revive claims that are otherwise barred by law
[R.C.S. Art. 6132b—4.06(d)]. In general, suits between the partners of a
partnership for a settlement of the accounts must be brought within four years
from the date the cause of action accrued [C.P.R.C. § 16.004(c)]. Therefore,
a suit to establish the existence of a partnership and for an accounting is
governed by a four-year limitation period [Heathington v. Heathington Lumber
Company, 420 S.W.2d 252, 253–254 (Civ. App.—Amarillo 1967, ref. n.r.e.)].

Section 16.004 of the Civil Practice and Remedies Code provides that “the
cause of action accrues on the day that the dealings in which the parties were
interested together cease” [C.P.R.C. § 16.004(c)]. The former Texas Uniform
Partnership Act, applicable to some partnerships until January 1, 1999, provided
that the right to an action for an accounting accrued at the date of dissolution
of the partnership in the absence of any agreement to the contrary [R.C.S.
Art. 6132b § 43]. However, this is not the case under current law. For additional
discussion, see Ch. 181, Withdrawal of Partners and Winding Up.

[7]—Deceptive Trade Practices

The Deceptive Trade Practices Act (DTPA) contains its own two-year statute
of limitation applicable to claims under that statute. A DTPA claim must be
brought within two years of the false, misleading, or deceptive act or practice,
or within two years after the claimant discovered or in the exercise of reasonable
diligence should have discovered the false, misleading, or deceptive act or
practice [Bus. & Com. C. § 17.565; see generally Ch. 220, Deceptive Trade
Practices].

[8]—Suits Against Planners of Construction Projects, Surveyors, and
Persons Constructing or Repairing Improvements

[a]—Persons Who Design or Plan Construction Projects

A special 10-year limitation period applies to claims against a registered or
licensed architect, engineer, interior designer, or landscape architect who
designs, plans, or inspects the construction of an improvement to real property
or equipment attached to real property. The statute limits claims in actions
arising out of a defective or unsafe condition of the real property, improvement,
or equipment [C.P.R.C. § 16.008(a)]. The statute applies to claims for (1)
injury, damage, or loss to real or personal property; (2) personal injury; (3)
wrongful death; (4) contribution; or (5) indemnity [C.P.R.C. § 16.008(b)]. A
claim governed by the statute must be brought no later than 10 years after
the substantial completion of the improvement or the beginning of operation
of the equipment [C.P.R.C. § 16.008(a)]. If the claimant presents a written
claim to the architect, engineer, interior designer, or landscape architect within
the 10-year period, the period is extended for two years from the day the claim
is presented [C.P.R.C. § 16.008(c)]. To extend the 10-year period, the claim
must be presented by or on behalf of the person bringing the suit. Notice by
others of similar claims will not extend the period with respect to claimants
who did not give notice [Kazmir v. Suburban Homes Realty, 824 S.W.2d 239,
245 (Tex. App.—Texarkana 1992, den.)].

This statute was amended in 1997 to add interior designers and landscape
architects. With respect to these defendants, the statute applies to a cause of
action regardless of when it accrues, but does not apply to a cause of action
for which suit is commenced before January 1, 1998 [Acts 1997, 75th Leg.,
ch. 860 § 3].

Whether a defendant is an architect, engineer, interior designer, or landscape
architect is a question of fact. A firm need not provide only engineering services
to be considered an “engineer” under Section 16.008. However, the mere fact
that the firm employs an engineer does not bring the firm within the protection
of the section. Moreover, a firm that provides engineering services in connec-
tion with other services is not necessarily within the protection of the section
[Kazmir v Suburban Homes Realty, 824 S.W.2d 239, 243 (Tex. App.—
Texarkana 1992, den.)—material issues of fact as to whether company that
developed subdivision was engineer within meaning of statute precluded
summary judgment].

This statute is, in fact, a statute of repose rather than a statute of limitation.
For a discussion of the distinction, see [e], below.

[b]—Persons Constructing or Repairing Improvements

[i]—10-Year Period

A claim against a person constructing or repairing an improvement to real
property must be brought within 10 years after the substantial completion of
the improvement. This special statute applies only if the claim arises from a
defective or unsafe condition of the real property or from a deficiency in the
construction or repair of the improvement [C.P.R.C. § 16.009(a)]. In addition,
the suit must be one for (1) injury, damage, or loss to real or personal property,
(2) personal injury, (3) wrongful death, (4) contribution, or (5) indemnity
[C.P.R.C. § 16.009(b)]. If the statute applies, it provides a complete defense
to a personal injury action based on strict products liability or negligence [see,
e.g., Reames v. Hawthorne-Seving, Inc., 949 S.W.2d 758, 761 (Tex. App.—
Dallas 1997, den.)].
If a written claim is presented to the person performing or furnishing the construction or repair work during the 10-year period, the period is extended for two years from the date the claim is presented [C.P.R.C. § 16.009(c)]. Similarly, if the damage, injury, or death occurs in the tenth year of the limitation period, the suit must be brought no later than two years after the cause of action accrues [C.P.R.C. § 16.009(d)].

The statutory period begins to run at the time the improvement is “substantially completed” [C.P.R.C. § 16.009(a)]. The period runs from this date without regard to when the cause of action actually accrued [see Hernandez v. Koch Machinery Co., 16 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2000, pet. filed)]. One court of appeals has ruled that when different subcontractors are responsible for the construction of different parts of a larger project, the statute should be applied to each of the individual subcontractors beginning on the date they complete their respective improvements [Gordon v. Western Steel Co., 950 S.W.2d 743, 746–749 (Tex. App.—Corpus Christi 1997, den.)—defendants were entitled to summary judgment when they met burden of proving they substantially completed their improvements to larger project more than 10 years before suit]. On the other hand, when a single entity, such as a general contractor, is responsible for successive phases of a project, it would be unduly burdensome to segregate the completion of various successive portions. In this situation, it appears that the statutory period should begin when the entity has completed all its work toward the project [see Gordon v. Western Steel Co., 950 S.W.2d 743, 746–749 (Tex. App.—Corpus Christi 1997, den.)—discussing cases from other jurisdictions on this point].

This statute is, in fact, a statute of repose rather than a statute of limitation. For a discussion of the distinction, see [e], below.

[ii]—Qualifying Persons and Improvements

The 10-year statute applicable to improvements to real property protects only those parties who actually alter the realty by constructing additions or annexing personalty to it. The statute does not protect manufacturers of personalty that is later transformed by other parties into an improvement. The statute was not intended to grant repose to manufacturers in product liability suits but only precludes suits against persons or entities in the construction industry that annex personalty to realty [Sonnier v. Chisholm-Ryder Co., Inc., 909 S.W.2d 475, 478–483 (Tex. 1995)—manufacturer of tomato chopper that was installed in cannery by its owner was not protected by 10-year statute; see also Hernandez v. Koch Machinery Co., 16 S.W.3d 48, 52–55 (Tex. App.—Houston [1st Dist.] 2000, pet. filed)—statute did not protect marketer who brokered deal for equipment that was later transformed into improvement by third parties]. In Sonnier, the Texas Supreme Court expressly disapproved of earlier decisions that had held that manufacturers of a total system that was
annexed by others to real property were protected by the statute, while manufacturers of component parts of a total system were not [see, e.g., Conkle v. Builders Concrete Prod. Mfg., 749 S.W.2d 489, 491 (Tex. 1988); Ablin v. Morton Southwest Co., 802 S.W.2d 788, 791 (Tex. App.—San Antonio 1990, den.); Dubin v. Carrier Corp. 798 S.W.2d 1, 3 (Tex. App.—Houston [14th Dist.] 1989, dis. agr.); Reddix v. Eaton Corp., 662 S.W.2d 720, 724 (Tex. App.—San Antonio 1983, ref. n.r.e.); Ellerbe v. Otis Elevator Co., 618 S.W.2d 870, 872 (Civ. App.—Houston [1st Dist.] 1981, ref. n.r.e.). The Court noted that the focus on the distinction between a component part and a total system had resulted in a confused body of law leading to irreconcilable applications since no meaningful distinction can be made between a system and a component part. Most items can be considered both as complete systems and as component parts of larger systems [Sonnier v. Chisholm-Ryder Co., Inc., 909 S.W.2d 475, 481 (Tex. 1995)].

For the statute to apply, two requirements must be met: (1) the defendant seeking repose must “construct or repair,” and (2) the item constructed or repaired must be an “improvement to real property.” A defendant who meets only one of the two prerequisites is not protected. Consequently, the statute does not bar a claim against a defendant who has performed some function in relation to an improvement to real property but who is not considered a constructor or repairer of the improvement. Conversely, the statute does not bar a claim against a defendant who constructed or repaired something that is not an improvement to real property [Williams v. U.S. Natural Resources, Inc. 865 S.W.2d 203, 207–209 (Tex. App.—Waco 1993, no writ)—expressly approved by Texas Supreme Court in Sonnier; see, e.g., Reames v. Hawthorne-Seving, Inc., 949 S.W.2d 758, 763 (Tex. App.—Dallas 1997, den.)—defendant general contractor was sufficiently involved in construction of conveyor belt to rely on statute when it designed conveyor belt and arranged for its construction and installation by subcontractor].

An improvement includes all additions permanently attached to the freehold except for trade fixtures that can be removed without injury to the property. In determining whether personality has become permanently attached to the realty three factors are considered: (1) the mode and sufficiency of annexation; (2) the adaptation of the personality to the use or purpose of the realty; and (3) the intention of the owner who causes the personality to be annexed to the realty. The third factor is the most significant [Sonnier v. Chisholm-Ryder Co., Inc., 909 S.W.2d 475, 479 (Tex. 1995); see Reames v. Hawthorne-Seving, Inc., 949 S.W.2d 758, 762 (Tex. App.—Dallas 1997, den.)—conveyor belt was improvement even though it was moveable because it was adapted to use of realty and was not intended to be moved more than a few feet].
[iii]—Claims Not Within Statute

This special statute does not apply to warranties or agreements expressly providing for longer effective periods. The statute will not bar claims against persons in actual possession of the property at the time of the damage, injury, or death. In addition, the statute will not bar actions based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair [C.P.R.C. § 16.009(e); see, e.g., Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 121–122 (Tex. 1996)—affidavit did not raise fact issue on willful misconduct].

[c]—Surveyors

A suit against a registered public surveyor or licensed state land surveyor must be brought within 10 years of the date the survey is completed if: (1) the claim arises from an injury or loss caused by an error in a survey, and (2) the survey was completed on or after September 1, 1989. If the survey was completed before September 1, 1989, suit must have been brought no later than September 1, 1991, or 10 years after the date the survey was completed, whichever is later [C.P.R.C. § 16.011(a)]. If a written claim is presented to the surveyor during the 10-year period, the period is extended for two years from the date the claim is presented [C.P.R.C. § 16.011(b)]. In one case, for example, the court ruled that a suit was time-barred because it was brought more than 10 years after the original survey. Further, the court rejected an argument that the statute of limitation was revived when the surveyor resurveyed a small portion of the plot, even though the second survey repeated the error in the boundary of the larger plot. There is no statutory revival provision, the court said, nor does the discovery rule apply. To allow revival would defeat the purpose of the statute, since surveyors continuously base new surveys on previous surveys that may depict a hidden error [Boeker v. Syptak, 916 S.W.2d 59, 62 (Tex. App.—Houston [1st Dist.] 1996, no writ)].

This statute is, in fact, a statute of repose rather than a statute of limitation. For a discussion of the distinction, see [e], below.

[d]—Manufacturers or Sellers of Manufacturing Equipment

A products liability action against a manufacturer or seller of manufacturing equipment that accrues on or after September 1, 1993, must be commenced before the end of 15 years after the date of the sale of the equipment by the defendant [C.P.R.C. § 16.012(b)]. However, if a manufacturer or seller expressly represents that the manufacturing equipment has a useful life of longer than 15 years, a products liability action against that manufacturer or seller must be commenced before the end of the represented number of years after the date of the sale of the equipment by that seller [C.P.R.C § 16.012(b)].
For the purposes of this section, the term product liability action is defined broadly to encompass any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product. The action may be based on strict tort liability, negligence, misrepresentation, breach of warranty, or any other theory or combination of theories [C.P.R.C. § 16.012(a)(1)—definition incorporated from C.P.R.C. § 82.001]. Similarly, the terms “seller” and “manufacturer” are also defined broadly. A seller is a person engaged in the business of distributing or otherwise placing in the stream of commerce, for any commercial purpose, (1) a product or (2) any component part of a product [C.P.R.C. § 16.012(a)(1)—definition incorporated from C.P.R.C. § 82.001]. A manufacturer is a person who (1) is a designer, formulator, constructor, rebuilder, fabricator, producer, compounding, processor, or assembler of any product or any component part, and (2) places the product or component part in the stream of commerce [C.P.R.C. § 16.012(a)(1)—definition incorporated from C.P.R.C. § 82.001]. In contrast, the term manufacturing equipment is defined narrowly to mean equipment and machinery used in the manufacturing processing, or fabrication of tangible personal property. The term does not include agricultural equipment or machinery [C.P.R.C. § 16.012(a)(2)]. Moreover, the statute applies only to the sale and not the lease of manufacturing equipment [C.P.R.C. § 16.012(f)].

As with other statutes of repose [see [e], below], this special statute does not reduce or extend a limitation period that is otherwise applicable to a products liability action involving manufacturing equipment, including a period that is applicable to an action that accrues before the end of the 15-year period after the date of sale [C.P.R.C. § 16.012(d), (e)].

[e]—Statutes of Repose

The 10-year statutes of limitation applicable to planners of construction projects, surveyors, and persons constructing or repairing improvements to real property [see [a]–[c], above] and the 15-year statute applicable to sellers of manufacturing equipment [see [d], above] are more accurately referred to as “statutes of repose.” Statutes of repose not only cut off rights of action after they accrue, the statutes may cut off rights of action before they accrue [see Johnson v. City of Fort Worth, 774 S.W.2d 653, 654 n.1 (Tex. 1989)]. Statutes of repose protect parties from the burden of indefinite potential liability and represent a response to the inadequacy of the traditional statutes of limitation, whose time periods begin on discovery of the claim or on occurrence of the injury [see Boeker v. Syptak, 916 S.W.2d 59, 62 (Tex. App.—Houston [1st Dist.] 1996, no writ)].

These statutes protect against claims brought for defects in design and construction that do not become manifest for many years [see Tumminello v. [Matthew Bender & Co., Inc.]
U.S. Home Corp., 801 S.W.2d 186, 187 (Tex. App.—Houston [1st Dist.] 1990, den.). For example, the special 10-year statute applicable to persons constructing improvements on real property does not “extend or affect” the limitation period applicable for bringing an action under any other law of the state [C.P.R.C. § 16.009(f)]. Thus, if a claimant sustains a personal injury due to defective construction more than two years prior to the 10-year period, the cause of action will be extinguished by the normal, personal-injury statute of limitation [see C.P.R.C. § 16.003] at the end of two years. This special statute applies only to extinguish claims that would otherwise be filed after the 10-year period.

Challenges to statutes of repose have been raised on constitutional grounds. The Texas Supreme Court has held that the 10-year statute of repose does not violate the rights to due process or equal protection under the United State Constitution or the rights to due course of law or equal protection under the Texas Constitution. Moreover, the Court held that under the facts of the case, in which the owner of the property sought recovery against the builder, the statute does not violate the open courts provision of the Texas Constitution [Trinity River Auth. v. URS Consultants, 889 S.W.2d 259, 261–265 (Tex. 1994)]. The Court emphasized, however, that it was not expressing an opinion as to whether the discovery rule might be adopted with respect to such claims in an appropriate case. The Court also noted that it was expressing no opinion as to whether the 10-year statute would violate the open courts provision if applied to the claim of a third party who sustained damages from a defective structure after the 10-year repose period [Trinity River Authority v. URS Consultants, 889 S.W.2d 259, 263, 263 n.4 (Tex. 1994)]. The courts of appeals are unanimous in the view that the statutes do not violate the “open courts” provision of the Texas Constitution [see Tex. Const. Art. 1 § 13], nor do they violate equal protection or due process provisions of the Texas and Federal Constitutions [see Jones v. Pullman Kellogg Corp., 785 F.2d 1270, 1272–1273 (5th Cir. [Tex.] 1986); Nelson v. Metallic-Braden Bldg. Co., 695 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, ref. n.r.e.); Texas Gas Exploration v. Fluor Corp., 828 S.W.2d 28, 31 (Tex. App.—Tyler 1991, den.); Rodarte v. Carrier Corp., 786 S.W.2d 94, 96 (Tex. App.—El Paso 1990, dis. agr.); Barnes v. J.W. Bateson Co., Inc., 755 S.W.2d 518, 521 (Tex. App.—Fort Worth 1988, no writ)].

[9]—Miscellaneous Statutory Actions

Many statutory causes of action contain their own special statutes of limitation. When a cause of action is based on a statute, that statute must be consulted to determine if it contains a special limitation provision. Examples of special statutory limitation provisions include: a one-year limitation period

(Matthew Bender & Co., Inc.)
for nuisance actions against agricultural operations [Agric. C. § 251.004], a four-year limitation period for actions to set aside fraudulent transfers [Bus. & Com. C. § 24.010(a)], a one-year limitation period for recovery of costs in connection with violations of hazardous waste regulations [Health & Safety C. § 361.197(a)], and a two-year limitation period for claims against insurers for unfair competition and unfair practices [Ins. C. Art. 21.21 § 16(d)].

When a statute lacks an express limitation period, courts look to analogous causes of action for which an express limitation period is available either by statute or by case law. For example, the Texas Supreme Court has determined that because of the close relationship between Insurance Code Article 21.21 and the DTPA, the two-year statute of limitation provision of the DTPA should be applied to Article 21.21 claims that accrued prior to April 4, 1985, the effective date of the limitation provision contained in current Article 21.21 [see Johnson & Higgins of Tx v. Kenneco Energy, 962 S.W.2d 507, 514 (Tex. 1998)—disapproving cases that analogized Article 21.21 cause of action to action for breach of written contract and thus applied four-year statute applicable to actions for debt; see also Tectonic Realty Inv. Co. v. CNA Lloyd’s of Tex. Ins. Co., 812 S.W.2d 647, 655 (Tex. App.—Dallas 1991, den.)].

[10]—Residual Limitation Period

In the case of actions in which no other statute of limitation is expressly applicable, a four-year residual statute of limitation applies [C.P.R.C. § 16.051]. Determining whether there is another statute of limitation that is expressly applicable may be difficult. The statutory language of Sections 16.002, 16.003, and 16.004 of the Civil Practice and Remedies Code has been interpreted much more broadly than the plain language of the statutes imply. For example, many contract actions are not covered by the express language of any statute of limitation. Nonetheless, the “debt” language of the Civil Practice and Remedies Code Section 16.004 [see C.P.R.C. § 16.004(a)(3)] has been construed to include actions for breach of contract [see [2], above]. Because the “debt” statute applies, the residual statute of limitation does not apply. Similarly, a claim for legal malpractice rarely involves personal injuries. Nonetheless, such claims are considered to be tort claims for the purpose of applying the two-year statute of limitation set out in Civil Practice and Remedies Code Section 16.003 [see C.P.R.C. § 16.003(a); see also [2][a], above].

It is possible to catalogue a number of the causes of action that fall within the residual statute. As noted above [see [1][a], above], it should not be assumed that the residual statute applies merely because the action is not clearly covered by another statute, such as the two-year limitation statute that applies to most tort actions. Some examples of cases that have been held to be covered by the residual limitation statute include an action to impose a constructive trust on personal property [Peek v. Berry, 143 Tex. 294, 184 S.W.2d 272, 275 (1944);
Austin Lake Estates, Inc. v. Meyer, 557 S.W.2d 380, 383 (Civ. App.—Austin 1977, no writ)], a suit against the county clerk to delete certain records not subject to recordation [Hinojosa v. Edgerton, 447 S.W.2d 670, 671–672 (Tex. 1969)], or a claim for contractual rescission because of fraudulent inducement [Williams v. Khalaf, 802 S.W.2d 651, 657–658 (Tex. 1990)]. Similarly, a suit to reform a deed or contract [Brown v. Havard, 593 S.W.2d 939, 943 (Tex. 1980)], as well as an action to cancel or set aside a judgment are governed by the residual statute of limitation [Klemm v. Schroeder, 204 S.W.2d 675, 676–677 (Civ. App.—San Antonio 1947, no writ)]. In addition, an action seeking to set aside a compromise settlement agreement because of fraud has been held to be governed by the residual statute [Johnston v. Barnes, 717 S.W.2d 164, 165 (Tex. App.—Houston [14th Dist.] 1986, no writ)].

One court of appeals has ruled that constitutional claims under the Due Course of Law and Equal Protection Clauses of the Texas Constitution are governed by the residual statute. The court reasoned that these claims were not analogous to any of those listed in the one and two-year statutes, and were further distinguished in that only injunctive relief, not damages, was available to remedy the constitutional harm [see Ho v. University of Texas at Arlington, 984 S.W.2d 672, 686–687 (Tex. App.—Amarillo 1998, pet. denied)].

[11]—Agreements Affecting Limitation Period

A purported blanket waiver of limitations in advance is void as against public policy. However, this does not mean that the parties may not agree to be bound by a different limitation period from the one specified in the statutes. The parties may agree by contract or stipulation to alter the statutory limitation period as they choose, so long as the modification is specific and for a reasonable period of time [Squyres v. Christian, 253 S.W.2d 470, 472 (Civ. App.—Fort Worth 1952, ref. n.r.e.)].

An agreement establishing a limitation period of less than two years is void [C.P.R.C. § 16.070(a); National Military Mutual Life Ins. Co. v. Cross, 379 S.W.2d 96, 99 (Civ. App.—Corpus Christi 1964, no writ)]. In one case, for example, a performance bond contained a provision that purportedly established a two-year limitation period. However, the contractual provision in this bond specified that the limitation period began to run on the date of the triggering event, rather than the day after the triggering event. As a result, the provision actually shortened the limitation period to less than two years. The bond provision was, therefore, void, and the normal, four-year statute of limitation for contract claims applied [Safeway Stores, Inc. v. Certainteed Corp., 687 S.W.2d 22, 25 (Tex. App.—Dallas 1984, ref. n.r.e.); see also U. S. Fidelity v. Eastern Hills Meth. Church, 609 S.W.2d 298, 299–300 (Civ. App.—Fort Worth 1980, ref. n.r.e.)—contract requiring suit be brought before expiration of two years was void because time provided was less than two years].
Similarly, a provision in an insurance policy that required that suit be brought “within” two years of the date of the loss was void because it restricted the time to bring suit to less than two years after the cause of action accrued on the policy [American Surety Co. v. Martinez, 73 S.W.2d 109, 111–112 (Civ. App.—El Paso 1934, ref.)].

A provision for an agreed limitation period may attempt to avoid the effect of the two-year rule by providing for alternative limitation periods to account for the possibility that one may be declared invalid. However, such a savings clause must be specific. In one case, it was held that a savings clause providing that suit must be commenced within the shortest limitation period permitted by law was not sufficiently specific to comply with the statute [Duster v. Aetna Ins. Co., 668 S.W.2d 806, 807 (Tex. App.—Houston [14th Dist.] 1984, ref.)].

There are two exceptions to the two-year rule. An agreement limiting the limitation period to less than two years is valid if: (1) it relates to the sale or purchase of a business, and (2) one party to the agreement pays or receives consideration of $500,000 or more [C.P.R.C. § 16.070(b)]. In addition, in contracts for the sale of goods governed by the Uniform Commercial Code, the parties may agree to reduce the limitation period to not less than one year. However, in such cases, the parties may not agree to extend the limitation period to more than the four-year statutory limitation period [Bus. & Com. C. § 2.725(a)].

Contracts or agreements governed by federal law are not restricted by the two-year rule. The federal preemption doctrine permits agreements that shorten the limitation period to less than two years. For example, a collective bargaining agreement that established a nine-month limitation period was governed by federal labor law, was unaffected by the contrary two-year rule under state-law, and was valid [Crockett v. Union Terminal Company, 342 S.W.2d 129, 133 (Civ. App.—Dallas 1960, no writ)].

[12]—Year 2000 Computer Date Failure Actions

Special limitations provisions apply to actions governed by Chapter 147 of the Civil Practice and Remedies Code. Generally, Chapter 147 applies only to an action in which a claimant seeks recovery of damages or any other relief for harm caused by either a computer date failure or the failure to properly detect, disclose, prevent, report, correct, cure, or remediate a computer date failure. The chapter applies to these actions regardless of the legal theory, statute, or cause of action on which the action is based, including an action based in tort, contract, or breach of an express or implied warranty [C.P.R.C. § 147.002]. However, the chapter does not apply to an action: (1) for death or bodily injury; (2) to collect workers’ compensation benefits; or (3) to enforce the terms of a written agreement, or to seek contractual remedies for breach
of a written agreement, that specifically provides for liability and damages for a computer date failure [C.P.R.C. § 147.004]. A “computer date failure” is defined as the inability to correctly process, recognize, store, receive, transmit, or in any way use date data referring to the year 2000 or affected by the transition between the 20th and 21st century or between 1999 and 2000, or data with years expressed in a two-digit or four-digit format [C.P.R.C. § 147.003]. Chapter 147 applies only to actions commenced on or after May 19, 1999, the effective date of the enacting legislation. In addition, the limitations provisions of Chapter 147 apply only to an action commenced on or after September 1, 1999 [Acts 1999, 76th Leg., ch. 128 § 6].

Any action governed by Chapter 147 must be brought not later than two years after the date the computer date failure first caused the harm that is the subject matter of the action. However, this provision does not extend the limitation period if a shorter period would otherwise be applicable, nor does it revive a claim that is barred by the operation of any other law [C.P.R.C. § 147.041].

Chapter 147 also contains a statute of repose. A claimant must commence an action against a manufacturer or seller of a computer product or computer service product before the end of 15 years after the date of the sale by the defendant. If the computer product that caused the computer date failure is a component of another product and if the product and computer product were sold at different times, the 15-year period begins to run on the date the defendant sold the computer product. If a manufacturer or seller expressly represented that the computer product would not manifest the computer date failure, this statute of repose does not apply. The statute of repose does not reduce a limitation period that applies to an action that accrues before the end of the limitation period. The statute of repose does not extend the limitation period within which an action may be commenced under any other law [C.P.R.C. § 147.042].

The statute of limitation and statute of repose created by Chapter 147 are tolled during periods of legal disability [C.P.R.C. § 147.043; see C.P.R.C. § 16.001; § 72.04[2]].

A federal law, the Y2K Act of 1999, also governs actions of this type. This Act supersedes state law to the extent that it and state law are inconsistent. However, the federal Y2K Act does not affect the applicability of any state law that provides stricter limits on damages and liabilities, affording greater protection to defendants, than are provided in the Act [see 15 U.S.C. § 6601 § 3(e), 15]. The federal Act does not contain any statute of limitation or repose. Because the statutes of limitation and repose contained in the Texas law are stricter and provide greater protection to defendants that the federal Act, the Texas law is apparently valid and not preempted with respect to these provisions.
For further coverage of year 2000 computer litigation, see Ch. 223, *Computer Date Failure Litigation*.

§ 72.03 Commencement of Limitation Period

[a]—Generally

A number of rules are applied to determine when the limitation period commences. The “general” statutes of limitation, which are those contained in the Texas Civil Practice and Remedies Code [see C.P.R.C. §§ 16.002–16.004], apply to common-law causes of action and statutory causes of action that are not governed by a specific limitation statute [see Gov. C. § 311.026(b)].

Each of the general statutes of limitation provides that a cause of action must be brought within a specified period dating from “after the day the cause of action accrues” [C.P.R.C. §§ 16.002–16.004, 16.051]. “Accrual” is a substantive law concept that is used to determine when the limitation period commences [Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)]. A cause of action generally accrues, and the statute of limitation begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy [see Johnson & Higgins of Tex v. Kenneco Energy, 962 S.W.2d 507, 514 (Tex. 1998); see also Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990)—cause of action can generally be said to accrue when wrongful act causes injury]. When tort actions accrue is discussed below at subsections [b] and [c]. When contract actions accrue is discussed below at subsection [d]. Delays in accrual caused by the so-called “discovery rule” are discussed in [3], below.

The limitation period for a cause of action governed by a special statute of limitation is not necessarily triggered by the “accrual” of such a cause of action. Most special statutes of limitation provide for the commencement of the limitation period on the happening of a specified event or act. The rules for these special statutes are discussed in [2], below.

[b]—Tort Actions

A tort cause of action generally accrues, for limitations purposes, when all the facts come into existence that authorize a claimant to seek a judicial remedy. Accrual does not depend on when the plaintiff learns of the injury (except in those cases in which the discovery rule applies) [see Johnson & Higgins of Tex v. Kenneco Energy, 962 S.W.2d 507, 514 (Tex. 1998)—“As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred”; Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990)—cause of action can generally be said to accrue when
wrongful act causes injury]. Thus, when the defendant’s act is a legal injury in itself, the cause of action accrues at the time of the act. If the defendant’s act is not wrongful in itself, the cause of action accrues later, when actual injury is sustained [Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967); see Hoover v. Gregory, 835 S.W.2d 668, 672–674 (Tex. App.—Dallas 1992, den.)—when defendant’s conduct is lawful, cause of action accrues when plaintiff became, or should have become, aware with reasonable diligence that there was some concrete and specific risk of harm to legally protected interest; Zidell v. Bird, 692 S.W.2d 550, 554–558 (Tex. App.—Austin 1985, no writ)—when defendant’s act giving rise to cause of action is originally lawful, cause of action does not accrue until some subsequent invasion of plaintiff’s legally protected interest].

Normally, a defendant’s tortious act is considered a legal injury in itself such that the cause of action accrues on the date of the wrongful act, notwithstanding that damages may not be ascertainable at that time [Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967); Houston Water-Works Co. v. Kennedy, 70 Tex. 233, 8 S.W. 36, 37 (1888); see also Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878, 878–879 (1942)—cause of action for negligence in leaving gauze sponge in patient’s body accrued at time of wrongful act, closing of wound; American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 255 (Tex. App.—Houston [1st Dist.] 1991), aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992)—cause of action for negligence accrued on date of breach of duty, even though injury was not immediately apparent]. For example, defamation is treated as an act that is wrongful in itself. An action for libel accrues on the date the defamatory material is published, not from the date of its damaging consequences [Langston v. Eagle Pub. Co., 719 S.W.2d 612, 615 (Tex. App.—Waco 1986, ref. n.r.e.)]. Similarly, a slander cause of action accrues when the words are spoken. The limitation period commences at the time of the defamatory communication [Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410, 412 (Tex. App.—Corpus Christi 1988, no writ)].

The single action doctrine, also known as the rule against splitting claims, provides a plaintiff one indivisible cause of action for all damages arising from a defendant’s single breach of a legal duty. The doctrine is considered as “a species of res judicata that prohibits splitting a single cause of action and subsequently asserting claims that could have been litigated in the first instance” [Pustejovsky v. Rapid-American Corp., — S.W.3d —, —, 44 Sup. Ct. J. 89, 91 (Tex. 2000)]. In most cases, the single action rule serves the purpose of giving defendants a point of repose and protects them from vexatious, piecemeal litigation, thereby promoting judicial economy [Pustejovsky v. Rapid-American Corp., — S.W.3d —, —, 44 Sup. Ct. J. 89, 96 (Tex. 2000)]. Because this rule can operate unfairly in asbestos-related litigation, the Texas Supreme Court held that, for cases involving workplace exposure, a
person who sues on or settles a claim for a non-malignant asbestos-related disease, such as asbestosis, with one defendant is not barred by the single action rule or the statute of limitations from prosecuting a subsequent action against another defendant for a distinct malignant asbestos-related condition, such as mesothelioma [Pustejovsky v. Rapid-American Corp., — S.W.3d —, —, 44 Sup. Ct. J. 89, 97 (Tex. 2000)], if the subsequent action is filed within the statutory limitations period. The Dallas Court of Appeals has applied a similar approach to a defendant’s wrongful conduct that invades two separate interests of the plaintiff. Under this approach, the plaintiff’s causes of action with respect to each interest accrue at the time that interest is invaded. For example, in a case in which a pharmacist allegedly misfilled the plaintiff’s prescription with a drug that caused her to fall asleep while driving, it was held that the plaintiff’s cause of action for the invasion of her economic interest in having the prescription properly filled arose at the time she was given the wrong drug; however, her cause of action for the invasion of her interest in bodily security did not arise until she was injured when she had an accident while under the influence of the drug [Parker v. Yen, 823 S.W.2d 359, 363–364 (Tex. App.—Dallas 1991, no writ)].

The time of accrual of a claim based on an insurer’s violation of common-law tort duties depends on whether the claim is a first-party or a third-party claim. The limitation period on a first-party claim for breach of the duty of good faith and fair dealing begins to run on the date of wrongful denial of coverage, which is considered to be the injury-producing event for statute of limitation purposes. On the other hand, despite the fact that a Stowers, third-party claim matures when the insurer unreasonably fails to settle a claim within policy limits, the injury-producing event that triggers the limitation clock is the final adjudication of the judgment in excess of the policy limits [Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 829 (Tex. 1990); see G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Comm. App. 1929, holding approved)]. In other words, a Stowers action can be filed before the underlying claim is resolved on appeal, but the insured may wait until the underlying action has been resolved before bringing such an action against the insurer [see Street v. Second Court of Appeals, 756 S.W.2d 299, 300–301 (Tex. 1988); but see American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 255 (Tex. App.—Houston [1st Dist.] 1991), aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992)]. In a suit by an insured against its agent for negligent breach of the agent’s duty to obtain insurance, the injury-producing event is the denial of coverage by the insurance company, not the final resolution of the coverage dispute by the courts, because all facts required for a cause of action exist at the time of denial [Johnson & Higgins of Tx v. Kenneco Energy, 962 S.W.2d 507, 514 (Tex. 1998)].
The discovery rule may make the legal injury rule irrelevant. For example, fraud is a wrongful act in itself. In general, a cause of action for fraud accrues when the fraud is perpetrated. However, fraud is a tort to which the discovery rule is applicable. When the fraud is concealed or is not known to the injured party, the limitation period commences on the date the fraud is discovered or should have been discovered by reasonable diligence [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988); Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981); Quinn v. Press, 135 Tex. 60, 140 S.W.2d 438, 440 (1940)]. A cause of action for legal malpractice is also subject to the application of the discovery rule. A legal malpractice claim accrues when the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of a cause of action [Willis v. Maverick, 760 S.W.2d 642, 645–646 (Tex. 1988)].

Similarly, although a person suffers legal injury in an accounting malpractice case when the professional advice is taken, the discovery rule applies in such cases so that the time of accrual may be deferred to a later date [Murphy v. Campbell, 964 S.W.2d 265, 270–271 (Tex. 1997)—latest possible date from which statute could begin to run in accounting malpractice case based on faulty tax advice was date plaintiff received notice of deficiency from IRS; see also Atkins v. Crosland, 417 S.W.2d 150, 152–153 (Tex. 1967)—explained in Murphy]. The discovery rule is discussed at [3], below.

[c]—Continuing and Repeated Torts

If a tort is continuing in nature, a different set of accrual rules apply. If the wrongful act is continuous in nature, the limitation period does not commence until the tortious conduct ceases [see Adler v. Beverly Hills Hospital, 594 S.W.2d 153, 156–157 (Civ. App.—Dallas 1980, no writ)—limitations for false imprisonment commences when unlawful detention ends; Newton v. Newton, 895 S.W.2d 503, 506 (Tex. App.—Fort Worth 1995, no writ)—continuing course of conduct doctrine available in claims based on intentional infliction of emotional distress; Twyman v. Twyman, 790 S.W.2d 819, 820–821 (Tex. App.—Austin 1990), rev’d on other grounds, 855 S.W.2d 619 (Tex. 1993)]. A continuing tort involves not only continuing wrongful conduct, but continuing injury as well. If the defendant’s acts cause a continuing injury, rather than a single, distinct injury, they constitute a continuing tort. However, engaging in wrongful conduct that causes injury and then refusing to modify, reverse, or cease that conduct for some period thereafter does not constitute a continuing tort. Instead, the statute of limitation begins to run when the injury is first sustained [see Dickson Const. v. Fidelity and Deposit Co., 960 S.W.2d 845, 851 (Tex. App.—Texarkana 1997, no writ)].

Continuous torts are distinguishable from repeated torts. In cases in which a series of wrongful acts are alleged, each of which is a complete tort, each
tortious act is a separate cause of action. A separate limitation period applies to each act [Harang v. Aetna Life Insurance Company, 400 S.W.2d 810, 813 (Civ. App.—Houston 1966, ref. n.r.e.)—each separate overt act in alleged conspiracy constituted new cause of action]. But if the wrongful acts are not complete in themselves because they are a part of a course of conduct, it may be more appropriate to attribute the claimant’s injury not to single incidents, but to the cumulative effect of the continuing conduct. Under this reasoning, the statute either does not begin to run or is tolled until the activity ceases [see Twyman v. Twyman, 790 S.W.2d 819, 821 (Tex. App.—Austin 1990), rev’d on other grounds, 855 S.W.2d 619 (Tex. 1993)].

Courts have not applied the continuing tort doctrine to causes of action based on permanent injury to land [see Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 436 (Tex. App.—Fort Worth 1997, den.)]. Thus, if a nuisance is permanent and continuing in nature, most cases hold that the limitation period commences when the injury begins, rather than when it ends [see McClellan v. Krebs, 183 S.W.2d 758, 761–763 (Civ. App.—Fort Worth 1944, ref. w.o.m.)]. If the nuisance is temporary and sporadic in nature resulting in injuries that are temporary and recurring, each injury-producing event gives rise to a separate cause of action with a separate limitation period [McClellan v. Krebs, 183 S.W.2d 758, 761–763 (Civ. App.—Fort Worth 1944, ref. w.o.m.); City of Honey Grove v. Mills, 235 S.W. 267, 269–270 (Civ. App.—Texarkana 1921, dis.)]. For example, the construction of certain camp houses that obstructed the enjoyment of certain real property was continuing in nature. The nuisance action accrued immediately on erection of the camp houses [see Eidelbach v. Davis, 99 S.W.2d 1067, 1073 (Civ. App.—Beaumont 1936, dis.)]. On the other hand, the construction of a sewage treatment plant constituted only a temporary nuisance, because the release of sewage onto the plaintiff’s land was sporadic. Consequently, a separate limitation period commenced with each discharge of sewage [City of Honey Grove v. Mills, 235 S.W. 267, 269–270 (Civ. App.—Texarkana 1921, dis.); see also Youngblood’s, Inc. v. Goebel, 404 S.W.2d 617, 619–620 (Civ. App.—Waco 1966, ref. n.r.e.)—nuisance was temporary when smell from rendering plant was sporadic, depending on wind conditions; see also Callaway v. City of Odessa, 602 S.W.2d 330, 332 (Civ. App.—El Paso 1980, no writ)—intermittent discharges from sewer line into plaintiffs’ residence characterized as continuous, so that suit filed within two years of occurrence complained of was timely].

[d]—Contract Actions

A cause of action for breach of contract generally accrues when the contract is breached. Consequently, the limitation period commences at the time of the breach [Hurbrough v. Cain, 571 S.W.2d 216, 221 (Civ. App.—Tyler 1978, no writ)].
If the parties’ agreement contemplates a continuing contract for performance, and a claim for payment or some other form of contractual performance is based on the entire continuous contract, the limitation period on the claim for payment does not commence until the contract is fully performed or a party refuses to perform or prevents the other party from performing [Intermedics, Inc. v. Grady, 683 S.W.2d 842, 845–846 (Tex. App.—Houston [1st Dist.] 1984, ref. n.r.e.); Alexander & Polley Construction Co. v. Spain, 477 S.W.2d 301, 303 (Civ. App.—Tyler 1972, no writ)]. For example, if a party is hired to construct improvements to a house, with progress payments to be made but no dates or amounts of the payments are set out in the contract, a continuing contract is contemplated such that the limitation period on a claim for payment does not commence until the contract has been concluded [Godde v. Wood, 509 S.W.2d 435, 437–441 (Civ. App.—Corpus Christi 1974, ref. n.r.e.)—when claim for work, labor, or materials performed or furnished is outgrowth of entire contract for continuous work, labor, or materials, claim is treated as entire demand and limitation period does not commence until contract has been finished].

On the other hand, when a contract requires fixed, periodic payments, a separate cause of action arises for each missed payment [F.D. Stella Products Co. v. Scott, 875 S.W.2d 462, 465 (Tex. App.—Austin 1994, no writ); see Intermedics, Inc. v. Grady, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, ref. n.r.e.)]. The cause of action on each payment accrues when the payment is due, and the limitation period begins then. Thus, a suit for the breach of a contract requiring payment in periodic installments may include all payments due within the four-year statute of limitation period, even if the initial breach was beyond the limitation period. Recovery of any payments due before the four-year limit is barred [Austin v. Austin Professional Fire, 935 S.W.2d 179, 183–184 (Tex. App.—Austin 1996, vacated)—claims for back pay under fire fighters’ contract were not barred except with respect to payments due more than four years before filing of suit; F.D. Stella Products Co. v. Scott, 875 S.W.2d 462, 465–466 (Tex. App.—Austin 1994, no writ)—suit on lease was not barred by limitations except with respect to payments accruing before four-year period].

When a contract calls for performance of a specific obligation at a definite time before the entire contract is complete, the limitation period with respect to a claim based on that obligation may begin at the time of performance. For example, if an employment contract calls for the distribution of company stock to the employee at the end of one year, the limitation period may commence at the end of the year even though the employment contract is contemplated to last for a much longer period [see Irwin v. Prestressed Structures, Inc., 471 S.W.2d 865, 866–868 (Civ. App.—Eastland 1971, ref. n.r.e.)].
A claim for an installment payment accrues on the date the installment is due. In installment contracts, the statute of limitation period runs against each installment from the time that installment becomes due [Gabriel v. Alhabbal, 618 S.W.2d 894, 897 (Civ. App.—Houston [1st Dist.] 1981, ref. n.r.e.); Goldfield v. Kassoff, 470 S.W.2d 216, 217 (Civ. App.—Houston [14th Dist.] 1971, no writ)].

A cause of action for breach of UCC warranties on the sale of goods accrues with the delivery of the goods. However, if an express warranty is made that explicitly extends to future performance of the goods, the existence of the claim may depend on future performance. Therefore, the cause of action accrues (and the limitation period begins) when the breach is or should have been discovered [Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546 (Tex. 1986); Muss v. Mercedes-Benz of North America, 734 S.W.2d 155, 157–158 (Tex. App.—Dallas 1987, ref. n.r.e.)]. By definition, implied warranties do not explicitly extend to future performance [Safeway Stores, Inc. v. Certainteed Corp, 710 S.W.2d 544, 546 (Tex. 1986)].

[2]—Special Statutes of Limitation

[a]—Medical Malpractice

[i]—Generally

The special two-year statute of limitation governing medical malpractice actions [see R.C.S. Art. 4590i § 10.01; see also § 72.02[1][c]] provides that the limitation period commences at the time of conduct by the defendant that constitutes a breach of contract or a tort. When the plaintiff is injured during a course of treatment and a precise date of injury cannot be determined, the limitation period commences on the last date of “treatment” or “hospitalization” [R.C.S. Art. 4590i § 10.01; see Rowntree v. Hunsucker, 833 S.W.2d 103, 104 (Tex. 1992)]. When the precise date of the wrongful act is known or easily determinable, the limitation period commences on that date, despite the fact that the treatment may have continued [Kimball v. Brothers, 741 S.W.2d 370, 372 (Tex. 1987)]. Although the statute thus specifies three dates from which the limitations period might commence (the date of the breach or tort, the completion of treatment, or the completion of hospitalization), a plaintiff cannot choose the most favorable of the three. If the date of negligence can be ascertained, limitations must be measured from that date [Earle v. Ratliff, 998 S.W.2d 882, 886 (Tex. 1999); Husain v. Khatib, 964 S.W.2d 918, 919 (Tex. 1998)].

The existence of a general physician-patient relationship does not necessarily equate with a continuing course of “treatment” sufficient to delay the start of the limitation period [see Dougherty v. Gifford, 826 S.W.2d 668, 673 (Tex. 1992)].
App.—Texarkana 1992, no writ)—continuing treatment doctrine applies in situations where patient’s injury occurs during course of treatment for particular condition and only readily ascertainable date is last day of treatment. Moreover, the last examination date is not necessarily the last date of “treatment” in all cases [see Rowntree v. Hunsucker, 833 S.W.2d 103, 104–107 (Tex. 1992)].

For example, continuing treatment for a condition unrelated to the one about which complaint is made does not delay the start of the limitation period until the continuing treatment for the unrelated condition ends. If a physician renews a drug prescription at the urging of a patient for one condition, that act does not delay the start of the limitation period on a claim asserting that the physician failed to properly diagnose a different medical problem [Rowntree v. Hunsucker, 833 S.W.2d 103, 104–107 (Tex. 1992)—for summary judgment purposes, court could not conclude that condition of occluded arteries and high blood pressure were unrelated conditions; Damron v. Ornish, 862 S.W.2d 683, 685–686 (Tex. App.—Dallas 1993, den.)—plaintiff’s wearing dental retainer, without any visits to doctor during 14-month period, was insufficient to show continuing course of treatment].

When a physician fails to diagnose a condition, the cause of action accrues on that date. The continuing nature of the diagnosis does not extend the tort for limitations purposes [Bala v. Maxwell, 909 S.W.2d 889, 892 (Tex. 1995); see Rowntree v. Hunsucker, 833 S.W.2d 103, 105–106 (Tex. 1992)—“[w]e cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment”]. For example, the statute of limitation began to run on the day the plaintiff’s hand injury was incorrectly diagnosed in the emergency room, even though the plaintiff returned to the hospital the next day for a six-day stay during which her injury was correctly diagnosed and treated [Casey v. Methodist Hosp., 907 S.W.2d 898, 901–903 (Tex. App.—Houston [1st Dist.] 1995, no writ)]. On the other hand, if the physician is under a continuing duty to monitor a patient for a certain condition, so that there are multiple failures to diagnose, the tort continues and the cause of action accrues on the last such appointment between the doctor and patient [see Chambers v. Conaway, 883 S.W.2d 156, 158–159 (Tex. 1993)].

The Medical Liability and Improvement Act [see R.C.S. Art. 4590i § 12.01(a)] bars DTPA claims for damages for personal injury or death arising from a health care provider’s negligence. A claim that a physician or health care provider was negligent may not be recast as a DTPA action to avoid the limitation period prescribed by the Medical Liability and Insurance Improvement Act [Gormley v. Stover, 907 S.W.2d 448, 450 (Tex. 1995); Walden v. Jeffrey, 907 S.W.2d 446, 447–448 (Tex. 1995)—dentist who supplies ill-fitting dentures is not liable for breach of implied warranty relating to product but for negligence in the rendition of services]. However, if the claims are truly based on knowing misrepresentations or breaches of express warranty in cases
in which physicians or health care providers warrant particular results, DTPA actions are not barred [Sorokolit v. Rhodes, 889 S.W.2d 239, 242 (Tex. 1994)].

The statute of limitation governing medical malpractice actions is discussed in more detail in Ch. 321, *Medical Malpractice*.

[iii]—Effect of Statutory Notice

Before filing suit, a claimant in a medical malpractice action must give 60 days' written notice of the claim, by certified mail, return receipt requested, to each physician or health care provider against whom a claim is asserted [R.C.S. Art. 4590i § 4.01(a)]. Giving this notice extends the limitation period for an additional 75 days [see R.C.S. Art. 4590i § 4.01(c)]. In effect, compliance with the notice provision gives a party two years and 75 days within which to file an action [see Rowntree v. Hunsucker, 833 S.W.2d 103, 104–105 n.2 (Tex. 1992); Desemo v. Gafford, 692 S.W.2d 571, 573 (Tex. App.—Eastland 1985, ref. n.r.e.)].

In response to certified questions from the Fifth Circuit, the Texas Supreme Court has concluded that (1) assuming the limitations period for all defendants is still running when notice is served, notice of a health care liability claim to one health care provider tolls the statute of limitations for 75 days for all health care providers against whom a claim is timely asserted; (2) a claimant is entitled to only one 75 day extension; (3) no claim may ever be timely “launched more than two years and seventy-five days after its accrual”; (4) a claim is barred when notice is served within two years and 75 days but suit is not filed for another 60 days, thereby placing the commencement of litigation outside the extended limitations period; (5) because the only consequence of failure to provide timely notice is a 60-day abatement of the suit, to avoid limitations a plaintiff “may be required to file suit before the sixty-day presuit notice period elapses or file suit without tendering any notice to avert the expiration of the limitations period”; and (6) a 60-day pre-suit negotiation period is required for each party sued, but abatement may occur beyond the two-year and seventy-five day extended limitations period [De Checa v. Diagnostic Ctr. Hosp., Inc., 852 S.W.2d 935, 936–939 (Tex. 1993); see also Thompson v. Community Health Inv. Corp., 923 S.W.2d 569, 570–571 (Tex. 1996)—notice to hospital tolled limitations with respect to former owner of hospital].

[b]—Deceptive Trade Practices

A claim governed by the Deceptive Trade Practices Act must be brought within two years after the date of the false, misleading, or deceptive act or practice, or within two years after the claimant discovered or in the exercise of reasonable diligence should have discovered the false, misleading, or deceptive act or practice [Bus. & Com. C. § 17.565; American Centennial

A discovery rule [see [3], below] is expressly incorporated into the terms of the statute [see Bus. & Com. C. § 17.565; American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 256 (Tex. App.—Houston [1st Dist.] 1991), aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992)]. However, the effect of making the claim commence on discovery may not be used for an indefinite delay in the running of limitations. If a claim is governed by both the Deceptive Trade Practices Act statute of limitation and one of the 10-year statutes of repose [see C.P.R.C. §§ 16.008–16.011; see also § 72.02[8]], the more absolute 10-year bar of the statute of repose prevails [Tumminello v. U.S. Home Corp., 801 S.W.2d 186, 187–188 (Tex. App.—Houston [1st Dist.] 1990, den.)].

The limitation period may be extended for 180 days by proof that the defendant knowingly engaged in conduct solely calculated to induce the plaintiff to refrain from filing suit and that the defendant’s conduct caused the untimely filing of suit [Bus. & Com. C. § 17.565; Brooks Fashion Stores v. Northpark Nat. Bank, 689 S.W.2d 937, 942–943 (Tex. App.—Dallas 1985, no writ)].

The Austin Court of Appeals has held that an action brought by the Attorney General pursuant to Section 17.47 of the DTPA on behalf of a specified group of individuals qualifies as a de facto class action and tolls the running of the statutes of limitation on the consumers’ individual complaints [Bara v. Major Funding Corp. Liq. Trust, 876 S.W.2d 469, 471–472 (Tex. App.—Austin 1994, den.)].

[c]—Insurance Code Actions

The two-year limitation period governing actions for unfair competition or unfair and deceptive acts or practices under Article 21.21 of the Insurance Code begins to run on the date on which the unfair competition or the unfair or deceptive act or practice occurred, or when the claimant discovered or in the exercise of reasonable diligence should have discovered the unfair practice [see Ins. C. Art. 21.21 § 16(d); American Centennial Ins. v. Canal Ins., 810 S.W.2d 246, 256 (Tex. App.—Houston [1st Dist.] 1991, aff’d in part, rev’d in part on other grounds, 843 S.W.2d 480 (Tex. 1992)]. Article 21.21 thus incorporates a discovery rule [see [3], below].

The limitation period will be extended for 180 days if the untimely filing was due to conduct of the defendant solely calculated to induce the claimant to refrain from or postpone commencement of the action [Ins. C. Art. 21.21 § 16(d)].
Section 16.003(b) of the Civil Practice and Remedies Code requires that a wrongful death suit must be brought within two years of the date of death [C.P.R.C. § 16.003(b)]. Therefore, a wrongful death action accrues on the death of the injured person [C.P.R.C. § 16.003(b); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351–352 (Tex. 1990)]. Because the statute determines the date of accrual, the judicially created discovery rule is not applied to determine the date of accrual of wrongful death actions [Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 357 (Tex. 1990); see generally [3], below]. On the other hand, the doctrine of fraudulent concealment does apply to toll the statute of limitations in wrongful death actions [see Cox v. Upjohn Co., 913 S.W.2d 225, 230 (Tex. App.—Dallas 1995, no writ); see generally § 72.04[1]].

An action brought within the two-year period commencing with the date of death may still be time-barred. Wrongful death claims are “derivative” claims. The wrongful death statute states that a wrongful death suit is proper only if the decedent would have been entitled to bring suit “if he had lived” [C.P.R.C. § 71.003(a)]. Therefore, if a wrongful death suit is brought within two years of the decedent’s death, but at a time when the decedent’s cause would have been barred by limitations had he or she lived, the wrongful death action could be barred. One interpretation of the interrelationship of these statutes is that the wrongful death action is barred by “limitations.” However, it is not really limitations that is the bar to the wrongful death claim in this situation; it is the derivative nature of the wrongful death action that permits the assertion, in the wrongful death claim, of defenses that would have been applicable against the decedent had he or she survived. The substantive wrongful death statute limits the right to file a wrongful death suit. The two-year statute of limitation provides that the limitation period for wrongful death commences with the death and governs the time period for filing a wrongful death suit [see Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345–352 (Tex. 1992); Davenport v. Phillip Morris, Inc., 761 S.W.2d 70, 71–72 (Tex. App.—Houston [14th Dist.] 1988, no writ)]. Consequently, if an injured party dies after the applicable limitation period expires on his or her claim, the decedent’s beneficiaries never acquire a right to bring a wrongful death claim, even if they bring that suit within two years of the death [Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 345–352 (Tex. 1992)].

[3]—Will Contests

The two-year statute of limitation for contesting the validity of a will commences to run when the will has been admitted to probate. However, if the grounds asserted for cancelling the will are forgery or fraud, the action may be brought within two years of the discovery of the forgery or fraud [Prob. C. § 93; see also Ch. 392, Admitting Wills to Probate].
A person interested in an estate in probate is charged with constructive notice of the contents of probate records. Therefore, when evidence of fraud may be discovered by an examination of the records, the limitation period begins to run from the date the will is admitted to probate [Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981)].

[f]—Paternity

The two-year statute for an action to establish paternity commences to run on the 18th birthday of the child [see Fam. C. § 160.002(a); see generally Ch. 380, Paternity].

The two-years-from-age-18 rule was promulgated in response to a ruling by the United States Supreme Court that an earlier statute of limitation was unconstitutional. Specifically, the Supreme Court held that a statute giving illegitimate children only one year after birth to establish paternity denied illegitimate children the same opportunity to obtain child support afforded to legitimate children and thus denied illegitimate children equal protection of the law [Mills v. Habluetzel, 456 U.S. 91, 97–101, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982); see also In Interest of J.A.M., 631 S.W.2d 730, 731–732 (Tex. 1982)].

In certain circumstances, a second suit to establish paternity may be brought following an earlier suit that was brought but was barred by limitations. If the first suit was brought at a time when the statute of limitation required suit to be brought before age 18, and the suit was dismissed on the basis of a limitations plea, a second suit may be brought [see Fam. C. § 160.002(b); but see Fite v. King, 718 S.W.2d 345, 347 (Tex. App.—Dallas 1986, ref. n.r.e.)—decided before 1989 amendment to statute that permits second suit so that second suit not barred by res judicata].

The Texas Supreme Court has held that even the two-years-after-age-18 paternity statute of limitation violates equal protection guarantees for persons who were denied their rights under the earlier law. There is a group of illegitimate children who were too old when the new, two-year statute was passed. As to them, the Texas Supreme Court has determined that they must be afforded an opportunity to establish paternity in order to establish rights of inheritance [Dickson v. Simpson, 807 S.W.2d 726, 727–728 (Tex. 1991)].

[3]—Discovery Rule

[a]—Effect of Rule

The discovery rule defers the time a cause of action accrues, and the limitation period begins, for certain types of tort cases. This deferral of accrual is an exception to the general rule under which a cause of action accrues when
a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred [S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)]. Under the discovery rule, the limitation period starts running from the date the injury is actually discovered or the date when the injury should have been discovered if the plaintiff had exercised reasonable diligence, whichever is earlier [Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990); Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988); Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1977)]. Deferral of accrual under the discovery rule should be distinguished from suspending or tolling the running of limitations once the period has begun [S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)].

The Texas Supreme Court has identified two categories of cases in which accrual of causes of action is deferred for limitations purposes: those involving fraud and fraudulent concealment [see [c][ii], below], and all others. Accrual of cases involving fraud and fraudulent concealment is deferred because a person cannot be permitted to avoid liability by deceitfully concealing wrongdoing until limitations has run. The second category in which accrual is deferred comprises those cases in which the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable. Although the term “discovery rule” has typically been applied to both categories, the term is properly applied only to the type of deferral of accrual that is applied in the second category of cases. Different substantive and procedural rules may apply to each category [S.V. v. R.V., 933 S.W.2d 1, 4, 6 (Tex. 1996)].

The discovery rule may also be inapplicable to certain categories of cases because of legislative policies. The Texas Supreme Court has held that, absent constitutional considerations, the discovery rule is unavailable in suits by adoptees to assert a right of inheritance. The Court determined that “[t]he legislative policies embodied in the statutes calling for confidentiality of adoption records and finality of estate matters weigh heavily against preserving such claims indefinitely.” This decision came about in a case in which a woman did not discover the identity of her biological mother until the woman was in her fifties. She then attempted to assert an interest in the estate of her biological grandmother, whose estate had been finally distributed almost eight years before the suit was begun. The Court further held that tort claims arising out of the same situation against the estate administrator and other heirs, including claims for breach of fiduciary duty, gross negligence, and conspiracy, were also barred by limitations for the same policy reasons. The legislature is free to determine that the discovery rule should not apply in certain cases, the Court said, and when clear legislative policies bear directly on whether the discovery rule should be applied the legislative determination of the weight to be given competing interests should guide the Court’s decision [Little v. Smith, 943 S.W.2d 414, 419–420, 422 (Tex. 1997)]. The Court also noted that Texas courts
have usually refused to apply the discovery rule to claims arising out of probate proceedings, even in the face of fraud allegations, on the grounds that the claimant has constructive notice of the probate proceedings. These cases recognize the strong public interest in according finality to probate proceedings, the Court said, although the constructive notice theory did not apply in the present case because the claimant did not know the identity of her mother and thus could not have known which probate records were applicable to her [Little v. Smith, 943 S.W.2d 414, 420–421 (Tex. 1997); see Mooney v. Harlin, 622 S.W.2d 83, 84 (Tex. 1981); Neill v. Yet, 746 S.W.2d 32, 33–34 (Tex. App.—Austin 1988, den.)].

[b]—Discovery of Injury

The discovery rule delays accrual of the cause of action until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury [S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)]. Once the plaintiff discovers or should have discovered the injury and that it was likely caused by the wrongful acts of another, the limitations period begins even if the plaintiff does not know the exact identity of the wrongdoer [Childs v. Haussecker, 974 S.W.2d 31, 40 (Tex. 1998)].

The rule does not delay the start of the limitation period until the plaintiff discovers a legal theory under which the injury might be compensable [see Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 357 (Tex. 1990)]. Some cases have suggested in broad terms that the limitation period did not run until the plaintiff discovered the cause of action, rather than the injury [see Allen v. Roddis Lumber and Veneer Co., 796 S.W.2d 758, 760–761 (Tex. App.—Corpus Christi 1990, den.); see also Coody v. A.H. Robins Co., Inc., 696 S.W.2d 154, 156 (Tex. App.—San Antonio 1985, no writ)]. In Moreno v. Sterling Drug, the Texas Supreme Court appears to have rejected the argument that the discovery rule delays the start of the limitation period until the time a plaintiff discovers a specific cause of action [Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 357 n.9 (Tex. 1990)]. The Court also appears to have rejected the argument that the discovery rule would delay the start of the limitation period until the plaintiff discovered scientific links between his or her injury and the conduct of the defendant [Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 357 n.9 (Tex. 1990)]. Thus, in another case the Court held that because the claimed injuries were not inherently undiscoverable, since they involved business losses due to tenant fears about chlordane levels at an apartment complex, the discovery rule did not save the claims from limitations until the owners discovered chlordane concentrations amounting to contamination [Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529, 531 (Tex. 1997)].

The cause of action accrues when the wrongful act and injury are discovered, not at the time the full extent of the resulting damages are ascertainable. Thus,
in a case in which the plaintiff’s illness resulted from mold and sporing caused by water leakage from a faultily repaired air conditioner, the cause of action accrued when the plaintiff knew of the property damage to his home caused by the leaking air conditioner, however slight, not later when he began to manifest symptoms of physical illness [Palmer v. Sears, Roebuck Y Co., 969 S.W.2d 582, 584–586 (Tex. App.—Fort Worth 1998, no pet. h.)].

[c]—Application of Rule in Common-Law Actions

[i]—Generally

The discovery rule applies only in certain limited circumstances. Generally, application is permitted only in those categories of cases in which both (1) the nature of the injury incurred is inherently undiscoverable and (2) the evidence of injury is objectively verifiable. The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances in which it is difficult for the injured party to learn of the negligent act or omission despite the exercise of due diligence [Computer Associates Intern. v. Altai, 918 S.W.2d 453, 456 (Tex. 1994)—misappropriation of trade secrets was not cause of action that was inherently undiscoverable; but see C.P.R.C. § 16.010]. The discovery rule applies only when the wrong and injury were unknown to the plaintiff because of their very nature and not because of any fault of the plaintiff [S.V. v. R.V., 933 S.W.2d 1, 7 (Tex. 1996)]. For example, in a claim based on the death of trees caused by diversion of water, the court ruled that the discovery rule was not applicable. The cause of injury was the diversion of the water, which was not inherently undiscoverable even though the trees did not die until several years after the event. The plaintiff offered no evidence that he used due diligence to discover the effect of the diverted water, or that if he had used due diligence he would not have discovered that the trees were dead or dying [see Gillespie v. Fields, 958 S.W.2d 228, 231 (Tex. App.—Tyler 1997, den.)]. In another case, the plaintiff claimed he was injured by a company whose faulty genetic tests failed to exclude him as a suspect in a criminal case. The court ruled that the discovery rule did not apply and the statute of limitation began to run when he discovered that he was not excluded, even though he did not know precisely what the problem was in the testing. This could have been discovered with reasonable diligence [see Larue v. Genescreen, Inc., 957 S.W.2d 958, 961 (Tex. App.—Beaumont 1997, den.)].

The requirement of objective verifiability balances the policy of preventing individual injustice against the policy of preventing stale or fraudulent claims. This aspect of the rule prevents the potential abuse of the discovery rule [Computer Associates Intern. v. Altai, 918 S.W.2d 453, 457–458 (Tex. 1994)]. For example, the Texas Supreme Court has held that the discovery rule does
not apply in repressed memory sexual abuse cases when the existence of abuse is not objectively verifiable by some means other than the recovered memories of the plaintiff or the expert testimony of a psychologist [S.V. v. R.V., 933 S.W.2d 1, 19–20 (Tex. 1996)—Court assumed without deciding that injury was inherently undiscoverable; see also Sanchez v. Archdiocese of San Antonio, 873 S.W.2d 87, 89–92 (Tex. App.—San Antonio 1994, den.); Heron Fin. Corp. v. U.S. Testing Co., 926 S.W.2d 329, 333 (Tex. App.—Austin 1996, den.)—matter may be objectively verifiable even though it requires proof by expert testimony].

The discovery rule has been held to apply in medical malpractice cases [see Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1977)], although now a special rule applies in these actions [see [d][ii], below]. The discovery rule has been applied in defamation cases [see [iii], below] and in cases involving latent onset diseases [see [v], below]. In fraud and fraudulent concealment cases, a similar rule requiring deferral of accrual of the cause of action is applied [see [ii], below; § 72.04(1)].

The discovery rule has been applied in actions against a fiduciary, including legal malpractice actions, in which the injury was inherently undiscoverable because the plaintiff was unable to inquire into the fiduciary's actions or unaware of the need to do so [see Willis v. Maverick, 760 S.W.2d 642, 645–646 (Tex. 1988)—attorney; Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 394 (1945)—trustee; see also S.V. v. R.V., 933 S.W.2d 1, 19–20 (Tex. 1996); see [iv], below—legal malpractice actions]. Following a similar rationale, one court of appeals applied the discovery rule in an action for negligence in the performance of engineering services. The court reasoned that the nature of the injury is undiscoverable in these cases because ordinary persons hire engineering consultants to remedy their own lack of expertise, and cannot be expected to assess the competence of the engineer’s work before there is an opportunity to test the final product [Thomson v. Espey Huston & Associates, Inc., 899 S.W.2d 415, 423 (Tex. App.—Austin 1995, no writ)—summary judgment evidence did not conclusively establish that general contractor could perceive problems with engineer’s services before flooding occurred causing damage].

The discovery rule applies in accountant malpractice actions for the same reasons it applies in legal malpractice actions [see [iv], below]. The injury is inherently undiscoverable because of the difficulty a lay person has in knowing of the fault in the advice. It is unlikely that a client would know that tax advice was faulty at the time it was received, because the very reason to seek expert advice is that tax matters are often not within the average person's common knowledge. The injury resulting from faulty accounting advice is also objectively verifiable. When the taxing authority prevails in tax court, or when the taxpayer settles or pays the tax claim, the injury is clear and objectively verifiable. Thus,
under the discovery rule, an accounting malpractice claim involving tax advice accrues when the claimant knows or in the exercise of ordinary diligence should know of the wrongful act and resulting injury [Murphy v. Campbell, 964 S.W.2d 265, 270–272 (Tex. 1997)—evidence did not establish when claimant knew or should have known advice was flawed, but latest possible date was date claimant received notice of tax deficiency from IRS].

The discovery rule has also been applied to claims for non-obvious permanent injuries to land. The statute of limitation in such cases begins to run on discovery of the first actionable injury, not on the date when the extent of the damages to the land are fully ascertainable [Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)—claim for permanent damage to land caused by salt water migration from oil companies’ leasing operations; Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 436 (Tex. App.—Fort Worth 1997, den.)—jury question was improper because it asked when plaintiffs discovered cause of injury rather than fact of injury].

One court has declined to apply the discovery rule to claims barred by one of the statutes of repose, reasoning that any other interpretation would defeat the legislative purpose in enacting a statute of repose [see Tumminello v. U.S. Home Corp., 801 S.W.2d 186, 187–188 (Tex. App.—Houston [1st Dist.] 1990, den.)].

[ii]—Fraud Cases

The accrual of a cause of action for fraud or involving fraudulent concealment [see § 72.04[1]] is deferred as in cases under the discovery rule. In fraud cases, the cause of action does not accrue until the fraud is discovered or could have been discovered through reasonable diligence [see Computer Associates Intern. v. Altai, 918 S.W.2d 453, 455–456 (Tex. 1994); Ruebeck v. Hunt, 142 Tex. 167, 176 S.W.2d 738, 739 (1943); Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988); see generally Ch. 336, Fraud]. The mere power or opportunity to investigate fraud will not cause the limitation period to begin running. The limitation period commences when the claimant becomes aware of facts that would cause an ordinary prudent person to investigate [Kilgore Federal Sav. & Loan v. Donnelly, 624 S.W.2d 933, 939 (Tex. App.—Tyler 1981, ref. n.r.e.)].

Although the term “discovery rule” is often applied to deferral of accrual in fraud and fraudulent concealment cases, the Texas Supreme Court has indicated that fraud and fraudulent concealment cases are a separate category from cases governed by the discovery rule proper. Accrual of a cause of action involving fraud or fraudulent concealment is deferred because a person cannot be permitted to avoid liability by deceitfully concealing wrongdoing until limitations has run. In discovery rule cases, on the other hand, accrual is
deferred when the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable. Different substantive and procedural rules may apply to each category [S.V. v. R.V., 933 S.W.2d 1, 4, 6 (Tex. 1996)]. It is not clear, for example, that the requirement that the evidence of injury be objectively verifiable must be applied in fraud or fraudulent concealment cases [see S.V. v. R.V., 933 S.W.2d 1, 24 (Tex. 1996)—unnecessary to resolve question under facts of case].

Some Texas courts of appeals have applied the discovery rule to negligent misrepresentation claims [Matheissen v. Schaefer, 27 S.W.3d 25, 31 (Tex. App.—San Antonio 2000, pet. filed)—negligent misrepresentation was inherently undiscoverable so that discovery rule applied; Heron Fin. Corp. v. U.S. Testing Co., 926 S.W.2d 329, 333 (Tex. App.—Austin 1996, den.)—summary judgment was improper because there was genuine issue of material fact as to whether discovery rule tolled statute of limitation as to negligent misrepresentation claims; but see Kansa Reinsurance v. Congressional Mortg. Corp., 20 F.3d 1362, 1374 (5th Cir. [Tex.] 1994)—reasoning that discovery rule generally does not apply to negligence claims].

It appears that the discovery rule applies to claims for breach of fiduciary relationship (constructive fraud) [see Russell v. Campbell, 725 S.W.2d 739, 748 (Tex. App.—Houston [14th Dist.] 1987, ref. n.r.e.)]. The Texas Supreme Court has indicated that the fiduciary relationship between lawyer and client is one of the considerations on which the discovery rule is applied in attorney malpractice claims [see [iv], below; see also [i], above]. The Court concluded that “in the fiduciary context, it may be said that the nature of the injury is presumed to be inherently undiscoverable [so that the discovery rule is applied], although a person owed a fiduciary duty has some responsibility to ascertain when an injury occurs” [Computer Associates Intern. v. Altai, 918 S.W.2d 453, 456 (Tex. 1994)].

The time when an ordinary prudent person would commence an investigation is determined under the facts of each case. The relationship of the parties is one factor to be considered in determining the amount of diligence required to discover fraud. When there is a fiduciary relationship between the claimant and the defendant, the claimant need not be as prompt or searching as when there is no fiduciary relationship. The fiduciary relationship is one of the circumstances to be considered by the fact-finder in determining whether the exercise of reasonable diligence would have uncovered the fraud [Andress v. Condos, 672 S.W.2d 627, 630 (Tex. App.—Fort Worth 1984, ref. n.r.e.); Kilgore Federal Sav. & Loan v. Donnelly, 624 S.W.2d 933, 939 (Tex. App.—Tyler 1981, ref. n.r.e.)].

[iii]—Defamation Cases

The tort of defamation also illustrates the fact-specific nature of the discovery rule. The discovery rule may apply to claims for defamation [Kelley v. Rinkle,
532 S.W.2d 947, 949 (Tex. 1976)—claim for defamation by publication of false credit report]. However, if the alleged defamatory matter is communicated by mass media, the discovery rule does not apply [see Langston v. Eagle Pub. Co., 719 S.W.2d 612, 615–616 (Tex. App.—Waco 1986, ref. n.r.e.); see also Ch. 333, *Libel and Slander*].

**[iv]—Legal Malpractice Cases**

The discovery rule applies to legal malpractice actions. Such actions necessarily involve a special relationship between the parties justifying imposition of the discovery rule. Moreover, it is difficult for a lay person to detect legal malpractice; facts that require investigation may not excite suspicion in the fiduciary context [Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988); see also Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990)—rule applied retroactively to pending cases]. Because of these two factors, the injury in legal malpractice claims is considered to be inherently undiscoverable, so that the discovery rule is applied [Computer Associates Intern. v. Altai, 918 S.W.2d 453, 456 (Tex. 1994)]. Thus, the accrual of a cause of action for legal malpractice is deferred until the injury is discovered or should have been discovered had the plaintiff used reasonable diligence [see [a], above; see, e.g., Smith v. Flinn, 968 S.W.2d 12, 16 (Tex. App.—Corpus Christi 1998, no pet.)—plaintiff did not exercise reasonable diligence when she delayed seven years before asking attorney about status of complaints].

In addition to the discovery rule, a special rule tolls the limitation period for legal malpractice actions until all appeals are exhausted in the underlying suit in which the malpractice occurred. This rule is discussed in § 72.04(a).

**[v]—Latent Onset Diseases**

A latent injury or disease “is the epitome of the type of injury that is often inherently undiscoverable within the applicable limitations period.” Thus, accrual in latent disease or injury cases is deferred until an innocent and diligent plaintiff discovers the injury and its likely cause [see Childs v. Haussecker, 974 S.W.2d 31, 38–39 (Tex. 1998)—claims for silicosis]. The discovery rule has been applied in cases involving latent onset diseases, such as a strict liability claim arising from injuries to the plaintiff’s reproductive system caused by the Dalkon Shield intrauterine device [Corder v. A.H. Robins Co., Inc., 692 S.W.2d 194, 196–197 (Tex. App.—Eastland 1985, no writ); see also Mann v. A.H. Robins Co., Inc., 741 F.2d 79, 81–82 (5th Cir. [Tex.] 1984)—products liability claim against manufacturer of Dalkon Shield]. Because of the undetectable nature of AIDS, one court of appeals has concluded that “[p]articularly because individuals cannot know for certain they have the virus until they test positive, . . . the sounder rule is to apply the traditional discovery rule in HIV cases even where the plaintiff suspects exposure immediately” [Casarez v. NME
Hospitals, Inc., 883 S.W.2d 360, 364–366 (Tex. App.—El Paso 1994, dis. agr.). In response to concerns that plaintiffs would deliberately put off testing for the virus, the court responded that the formulation of the discovery rule itself addresses this problem in that if a person suspects exposure it would not be reasonable to put off ascertaining it until symptoms developed [Casarez v. NME Hospitals, Inc., 883 S.W.2d 360, 366 (Tex. App.—El Paso 1994, dis. agr.)].

In latent onset cases involving occupational diseases, the Texas Supreme Court has adopted the following rule: “a cause of action accrues whenever a plaintiff’s symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related” [Childs v. Haussecker, 974 S.W.2d 31, 33 (Tex. 1998)—silicosis claims]. The accrual of the cause of action does not depend on a confirmed medical diagnosis; the limitations period begins even though the plaintiff may not have discovered the precise name of the disease or that the disease is permanent. The seriousness of a personal injury need not be fully apparent or even fully developed in order to commence the statute of limitation. However, accrual will always be deferred until the plaintiff, if reasonably diligent, uncovers some evidence of a causal connection between the injury and the plaintiff’s occupation [Childs v. Haussecker, 974 S.W.2d 31, 40–42 (Tex. 1998)].

The Court’s opinion in Childs suggested that when more than one disease process results from a particular exposure, it is likely that the statute of limitation runs separately for each disease [see Childs v. Haussecker, 974 S.W.2d 31, 41 (Tex. 1998)].

Moreover, the Texas Supreme Court has held that a person who sues on or settles a claim for a non-malignant asbestos-related disease, such as asbestosis, with one defendant is not barred from prosecuting a subsequent action against another defendant for a distinct malignant asbestos-related condition, such as mesothelioma [Pustejovsky v. Rapid-American Corp., —, S.W.3d —, —, 44 Sup. Ct. J. 87, 96–97 (Tex. 2000)].

The Court also ruled in Childs that the filing of a workers’ compensation claim or lawsuit alleging that the plaintiff has an occupational injury does not necessarily start the running of the statute of limitation. The plaintiff’s suspicions about the nature and cause of the injury, which may be evidenced by the filing of a workers’ compensation claim or a lawsuit, represent only one factor that should be considered together with the other facts and circumstances to determine if the plaintiff knew or should have known of the injury and its likely cause [Childs v. Haussecker, 974 S.W.2d 31, 42–43 (Tex. 1998)—court noted that res judicata and collateral estoppel may still apply]. In determining whether a plaintiff knew or should have known about the nature
or cause of an illness, it is reasonable for the plaintiff to rely on the opinions of doctors. Thus, when medical experts consistently reject a layperson’s suspicions concerning the cause of symptoms, ordinarily a fact question arises about what the plaintiff knows or should reasonably know, even if the plaintiff has other information about co-workers who suffer from similar symptoms [Childs v. Haussecker, 974 S.W.2d 31, 45–46 (Tex. 1998)].

[d]—Application of Rule in Statutory Actions

[i]—Generally

The common-law discovery rule [see [a], above] usually is not applied in statutory, as opposed to common-law, actions. For example, the discovery rule does not apply in wrongful death actions. The damage or injury in such cases is usually immediately apparent. Moreover, the wrongful death statute provides for accrual of the cause of action on a specified event, death [Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990)].

Even when the common-law discovery rule does not apply to a statutory claim, some statutes creating causes of action expressly provide for the equivalent of the common-law discovery rule. For example, the Deceptive Trade Practices Act expressly provides a built-in, statutory discovery rule [see Bus. & Com. C. § 17.565; see also [2][b], above]. The DTPA discovery rule applies so that the cause of action accrues on the date that the damage or injury is discovered, not on the date on which the plaintiff discovers the act or the identity of the wrongdoers [Smith v. Gray, 882 S.W.2d 103, 104–106 (Tex. App.—Amarillo 1994), den. per curiam, 907 S.W.2d 444 (Tex. 1995)—purchasers discovered injury when they discovered cracks in house, rather than when they learned that leak in sewer was cause of injury or that vendors knew about leak; Foreman v. Pettit Unlimited, Inc., 886 S.W.2d 409, 412 (Tex. App.—Houston [1st Dist.] 1994, no writ)—injury discovered at time of fire, not when alleged wrongdoers were identified]. Article 21.21 of the Insurance Code, which creates a statutory cause of action for unfair insurance practices, also contains its own, built-in discovery rule. Under this statute, the limitation period does not commence until the plaintiff discovers or should have discovered the unfair practice [see Ins. C. Art. 21.21 § 16(d); see also [2][c], above]. DTPA actions and action under Article 21.21 are discussed in Ch. 220, Deceptive Trade Practices.

The special statute of limitation governing medical malpractice claims [see R.C.S. Art. 4590i § 10.01] does not expressly include a discovery rule. Nevertheless, the Texas Supreme Court has imposed, for constitutional reasons, a special rule that functions somewhat like a discovery rule. A discussion of this special rule is set forth at [ii], below.
[ii]—Medical Malpractice Discovery Rule

A special discovery rule applies to claims brought under the Medical Liability and Insurance Improvement Act [see R.C.S. Art. 4590i; see generally Ch. 321, Medical Malpractice]. As passed by the legislature, the act abolished the discovery rule in favor of an absolute two-year limitation period [see Diaz v. Westphal, 941 S.W.2d 96, 99 (1997)]. The limitation period generally commences to run on the date that a provider of medical care or health care services commits a tort [R.C.S. Art. 4590i § 10.01; see [2][a], above]. The statute does not delay commencement of the limitation period until the cause of action “accrues” [see Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985)].

In some cases, it would be unconstitutional to apply this absolute two-year bar. Application of an absolute two-year bar would violate the “open courts” provision of the Texas Constitution [see Tex. Const. Art. 1 § 13] if it cut off a valid cause of action at a time before the claimant could reasonably discover the wrong and file suit [see Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985)]. If the injury is discoverable only at such a time that the claimant has no reasonable opportunity to bring suit before the limitation period expires, then the limitation period is unconstitutional as applied [see 685 S.W.2d at 14–15—concurring opinion]. However, the open courts provision applies only with respect to causes of action cognizable under the common law. Thus, the constitutional discovery rule is not applied in statutory causes of action such as survival or wrongful death actions, and the absolute two-year bar governs in these cases [Diaz v. Westphal, 941 S.W.2d 96, 100–101 (Tex. 1997); Bala v. Maxwell, 909 S.W.2d 205, 208 (Tex. 1995)].

Application of the two-year bar is constitutional only in those cases in which the injury has been discovered, or should have been discovered by exercising reasonable diligence, within the limitation period. When the injury is discovered well within the two-year period, the statute of limitation is constitutional as applied, and the two-year limitation period runs from the date of the tort [Morrison v. Chan, 699 S.W.2d 205, 207 (Tex. 1985)—plaintiff had approximately 18 months left within limitation period to bring suit; DeLuna v. Rizkallah, 754 S.W.2d 366, 368 (Tex. App.—Houston [1st Dist.] 1988, den.)—discovery not possible within two years].

The open courts provision requires only that plaintiffs have a reasonable time within which to bring suit after becoming aware of the injury and the facts giving rise to their cause of action [Gomez v. Carreras, 904 S.W.2d 750, 753 (Tex. App.—Corpus Christi 1995, no writ)—patient who discovered injury nine months after last treatment by defendant had reasonable time to file suit within statutory two-year period; Adkins v. Tafel, 871 S.W.2d 289, 293–295 (Tex. App.—Fort Worth 1994, no writ)—mere fact that plaintiffs could not find lawyer to file suit until after it was time-barred does not prevent application
of statute of limitation]. This “reasonable time” will begin to run once the plaintiff becomes aware of the injury and the facts giving rise to the cause of action, even if the plaintiff does not yet know the precise extent of the consequences of the alleged malpractice [Hooten v. Fleckenstein, 836 S.W.2d 300, 301–302 (Tex. App.—Tyler 1992, dis. w.o.j.)—relevant date was when patient learned that doctor failed to diagnose fractured elbow, not when patient learned of loss of mobility], or has not yet obtained an expert opinion that the defendant’s actions violated the applicable standard of care [LaGesse v. Primacare, Inc., 899 S.W.2d 43, 46–47 (Tex. App.—Eastland 1995, den.)]. Whether the plaintiff had a reasonable opportunity to discover the nature of his or her medical injury or condition within the two-year limitation period is ordinarily an issue to be determined by the trier of fact [see Del Rio v. Jinkins, 730 S.W.2d 125, 127–128 (Tex. App.—Corpus Christi 1987, ref. n.r.e.); Tsai v. Wells, 725 S.W.2d 271, 273 (Tex. App.—Corpus Christi 1986, ref. n.r.e.)].

What constitutes a “reasonable time” in which to file suit once the plaintiff discovers the injury and its cause has not yet been determined by the Texas Supreme Court [see Neagle v. Nelson, 685 S.W.2d 11, 13–15 (Tex. 1985)—Robertson and Kilgarlin, J.J., concurring opinions]. Generally, a reasonable time should be allowed for investigating, preparing, and filing a suit. Whether a delay was reasonable is ordinarily a question of fact. However, it has been held that a year’s delay in filing suit is unreasonable as a matter of law. In this situation it is not unconstitutional to apply the absolute two-year statute of limitation [see Fiore v. HCA Health Services of Texas, Inc., 915 S.W.2d 233, 238 (Tex. App.—Fort Worth 1996, den.); LaGesse v. Primacare, Inc., 899 S.W.2d 43, 46–47 (Tex. App.—Eastland 1995, den.)].

[e]—Fraudulent Concealment Distinguished

The doctrine of fraudulent concealment [see § 72.04[1]] defers the accrual of a cause of action in much the same way as the discovery rule. However, the distinction between the two avoidance doctrines should be observed because each is characterized by different substantive and procedural rules [S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996); compare Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988)—plaintiff has burden to plead and prove discovery rule at trial but if defendant moves for summary judgment on limitations, burden is on defendant to negate discovery rule if pleaded by plaintiff with American Petrofina, Inc. v. Allen, 587 S.W.2d 829, 830 (Tex. 1994)—party asserting fraudulent concealment has burden to come forward with proof raising issue of fact, and mere pleading or response to summary judgment motion does not satisfy this burden]. In cases involving fraud or fraudulent concealment, accrual is deferred because a person cannot be permitted to avoid liability for his or her action by deceitfully concealing wrongdoing until limitations has run. The discovery rule, on the other hand,
is applied in those cases in which the injury by its nature is inherently undiscoverable and the evidence of injury is objectively verifiable [S.V. v. R.V., 933 S.W.2d 1, 6 (Tex. 1996)]. The discovery rule balances society's interest in having disputes either settled or barred within a reasonable time in situations in which it is difficult for the injured party to learn of the tortious act [Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529, 530–531 (Tex. 1997)].

The rules governing fraudulent concealment are discussed in § 72.04[1].

[f]—Pleading and Proof Burdens

The party seeking to benefit from the discovery rule has the burden to plead and prove the elements of the avoidance doctrine. Consequently, once the limitations defense has been pleaded, the burden then shifts to the claimant to plead and prove facts to show applicability of the discovery rule [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517–518 (Tex. 1988); see, e.g., Dickson Const. v. Fidelity and Deposit Co., 960 S.W.2d 845, 850 (Tex. App.—Texarkana 1997, no pet. h.)—discovery rule could not be asserted when not pleaded as matter in avoidance in response to defendant's assertion of statute of limitation; see also § 72.09]. The only exception to this rule is when the limitations defense is raised in a motion for summary judgment. Summary judgment procedure requires a movant seeking summary judgment on the grounds of limitations to bear the burden of negating the discovery rule if it is pleaded by the non-movant [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988); Weaver v. Witt, 561 S.W.2d 792, 794 (Tex. 1977)—per curiam].

Before the Texas Supreme Court's decision in Woods v. William M. Mercer, Inc. [769 S.W.2d 515, 517–518 (Tex. 1988)], there had been a conflict in the precedent with respect to the pleading and proof burdens. In Weaver v. Witt [561 S.W.2d 792, 794 (Tex. 1977)—per curiam], the rule was characterized as a test to be applied in determining when a cause of action accrued and not as an affirmative defense to the statute of limitation defense. In Smith v. Knight [608 S.W.2d 165, 166 (Tex. 1980)], however, the rule was characterized as a rule of pleading. These cases created some confusion with respect to the proper application of the discovery rule [see National Resort Communities v. Short, 712 S.W.2d 200, 201 n.1 (Tex. App.—Austin 1986, ref. n.r.e.); Hartsough v. Steinberg, 737 S.W.2d 408, 412–413 (Tex. App.—Dallas 1987, den.)].

§ 72.04 Other Suspension and Extension Rules

[1]—Fraudulent Concealment

[a]—Generally

The fraudulent concealment doctrine applies when a defendant makes fraudulent misrepresentations or, if under a duty to disclose, conceals facts from
the plaintiff and thereby prevents the plaintiff from discovering the cause of action against the defendant [see, e.g., Santanna Natural Gas v. Hamon Operations, 954 S.W.2d 885, 890–891 (Tex. App.—Austin 1997, pet. denied)]. As with the discovery rule, this doctrine tolls the statute of limitation until the fraud is discovered or could have been discovered with reasonable diligence [Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529, 530–531 (Tex. 1997); Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983)]. Although it has been frequently said that the doctrine suspends the statute after it has begun to run [see, e.g., Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied)] it is more correctly viewed as deferring the accrual of the cause of action in the same manner as the discovery rule [see S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996); see also § 72.03[3]—discovery rule].

The fraudulent concealment doctrine has its origins in equitable estoppel. Because fraud vitiates whatever it touches, a party will not be permitted to rely on the protection of a statute of limitation when the party by fraud has prevented the other party from seeking redress within the period of limitations [Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983)—“To reward a wrongdoer for his own fraudulent contrivance would make the statute a means of encouraging rather than preventing fraud”; S.V. v. R.V., 933 S.W.2d 1, 6 (Tex. 1996)—in cases involving fraud or fraudulent concealment, accrual is deferred because person cannot be permitted to avoid liability by deceitfully concealing wrongdoing until limitations has run].

Fraudulent concealment is an affirmative defense to the limitations defense. Consequently, the party seeking to avoid the limitations defense has the burden to plead and prove facts to support fraudulent concealment [Weaver v. Witt, 561 S.W.2d 792, 793 (Tex. 1977); Nichols v. Smith, 507 S.W.2d 518, 520 (Tex. 1974); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied); see also § 72.09]. This burden applies both at conventional trials and in summary judgment proceedings [see American Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994)—party asserting fraudulent concealment has burden to come forward with proof raising issue of fact, and mere pleading or response to summary judgment motion does not satisfy this burden].

Several courts have analyzed the elements of fraudulent concealment as including the following: (1) the existence of the underlying tort; (2) the defendant’s knowledge of the tort; (3) the defendant’s use of deception to conceal the tort; and (4) the plaintiff’s reasonable reliance on the deception [Arabian Shield Dev. Co. v. Hunt, 808 S.W.2d 577, 584 (Tex. App.—Dallas 1991, den.); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied); DiGrazia v. Old, 900 S.W.2d 499, 502 (Tex. App.—Texarkana 1995, no writ)]. The defendant must also have a fixed purpose to conceal the facts necessary for the plaintiff to know that it has a
cause of action [Santanna Natural Gas v. Hamon Operations, 954 S.W.2d 885, 890 (Tex. App.—Austin 1997, pet. denied)]. In general, a party seeking to invoke the doctrine of fraudulent concealment should show [Cook v. Smith, 673 S.W.2d 232, 235 (Tex. App.—Dallas 1984, ref. n.r.e.); see also Dotson v. Alamo Funeral Home, 577 S.W.2d 308, 311 (Civ. App.—San Antonio 1979, no writ)]:

1. A false representation or concealment of a material fact that serves to conceal the cause of action from the plaintiff. One court of appeals has held that failure of a product manufacturer to disclose its identity did not amount to fraudulent concealment when the plaintiff was aware of the existence of a cause of action [Otis v. Scientific Atlanta, Inc., 612 S.W.2d 665, 666 (Civ. App.—Dallas 1981, ref. n.r.e.)]. In another case, however, concealment of a defendant’s identity was held to be the type of affirmative conduct that could be fraudulent concealment. In this case, a co-owner of the defendant company gave deposition testimony that the company “had nothing to do with” a well that exploded. It was later discovered, after the limitation period had expired, that the defendant had worked on the well that exploded. The court of appeals held that the defendant’s false statements raised a fact issue of fraudulent concealment sufficient to preclude summary judgment on the basis of limitations [Cherry v. Victoria Equipment & Supply, Inc., 645 S.W.2d 781, 782 (Tex. 1983)].

2. The representation or concealment was made with knowledge of the real facts underlying the cause of action. Mere negligence of the defendant does not amount to fraudulent concealment. Fraudulent concealment requires actual knowledge of the fact that a wrong has occurred and a fixed purpose to conceal the wrong from the plaintiff [Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878, 879 (1942); see Santanna Natural Gas v. Hamon Operations, 954 S.W.2d 885, 890 (Tex. App.—Austin 1997, pet. denied)].

3. The representation or concealment was made with the intention that the other party would act in reliance on the representation or concealment [see Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878, 879 (1942)].

4. The party to whom the representation or concealment was made reasonably relied on the misrepresentation or concealment to his or her detriment [Powers v. McDaniel, 785 S.W.2d 915, 919 (Tex. App.—San Antonio 1990, den.); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 439 (Tex. App.—Fort Worth 1997, pet. denied)]. Of course, in some cases reliance will be manifested by a party’s failure to take legal action rather than by some affirmative conduct.

In addition, and frequently most significantly, the plaintiff should demonstrate that he or she had no knowledge or the means of knowledge of the real facts. The effect of fraudulent concealment is to delay accrual of the cause of action until the fraud is discovered or could have been discovered with
reasonable diligence [Velsicol Chemical Corp. v. Winograd, 956 S.W.2d 529, 530–531 (Tex. 1997)]. Thus, the tolling effect of the concealment ends when the plaintiff learns of facts or circumstances that would cause a reasonable person either to be aware of the existence of a cause of action or would cause a reasonable person to make inquiry that would lead to the discovery of the cause of action if pursued [Nash v. Carolina Cas. Ins. Co., 741 S.W.2d 598, 602 (Tex. App.—Dallas 1987, den.)]. A party must be vigilant and diligent in making inquiries into the existence of a cause of action. Diligence is required even in the context of a family relationship. However, the relationship of the parties is one factor that may be considered in determining whether fraud might have been discovered through reasonable diligence [see Powers v. McDaniel, 785 S.W.2d 915, 918–920 (Tex. App.—San Antonio 1990, den.)]. Determining when the plaintiff knew or reasonably should have known of the cause of action, and thus when the statute of limitation began to run, is normally a question of fact [Santanna Natural Gas v. Hamon Operations, 954 S.W.2d 885, 891–892 (Tex. App.—Austin 1997, pet. denied)].

If the fraudulent concealment claim is based on the defendant’s failure to disclose, the plaintiff must plead and prove that there was a relationship of trust between the defendant and the plaintiff that created a duty in the defendant to disclose the existence of a cause of action [Owen v. King, 130 Tex. 614, 111 S.W.2d 695, 697–698 (1938); Powers v. McDaniel, 785 S.W.2d 915, 918–919 (Tex. App.—San Antonio 1990, den.)]. For example, the physician-patient relationship is a fiduciary relationship requiring a doctor to disclose facts that would constitute a cause of action by the patient against the doctor [Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983)]. The relationship of trustee and beneficiary is a similar fiduciary relationship [see Powers v. McDaniel, 785 S.W.2d 915, 918–919 (Tex. App.—San Antonio 1990, den.)]. On the other hand, an ordinary principal-agent relationship is not necessarily a fiduciary relationship requiring disclosure [Owen v. King, 130 Tex. 614, 111 S.W.2d 695, 697–698 (1938)]. Nor does a seller of products that is not in a fiduciary or confidential relationship with the buyer have a duty to disclose an alleged cause of action to the buyer [see Seibert v. General Motors Corp., 853 S.W.2d 773, 778 (Tex. App.—Houston [14th Dist.] 1993, no writ)].

Some courts have stated generally that a duty to disclose the wrong is a necessary element of fraudulent concealment [see, e.g., Savage v. Psychiatric Institute of Bedford, 965 S.W.2d 745, 753 (Tex. App.—Fort Worth 1998, pet. denied)]. However, one court has ruled persuasively that when the fraudulent concealment claim is based on affirmative misrepresentation rather than failure to disclose, it is not necessary to prove a special relationship giving rise to a duty to disclose. Once a party undertakes to speak, the party is not permitted to misrepresent the truth [Santanna Natural Gas v. Hamon Operations, 954 S.W.2d 885, 891 (Tex. App.—Austin 1997, pet. denied)].
The fraudulent concealment doctrine applies in wrongful death actions to extend the ordinary two-year statute of limitation [Cox v. Upjohn Co., 913 S.W.2d 225, 230–232 (Tex. App.—Dallas 1995, no writ)]. Also, in spite of the absolute effect statutes of repose have in cutting off causes of action [see § 72.02[8]], some courts of appeals have recognized that the doctrine of fraudulent concealment applies to Section 16.009 of the Civil Practice and Remedies Code [see Ablin v. Morton Southwest Co., 802 S.W.2d 788, 792–793 (Tex. App.—San Antonio 1990, den.); Suburban Homes v. Austin-Northwest Dev., 734 S.W.2d 89, 91 (Tex. App.—Houston [1st Dist.] 1987, no writ)].

[b]—Medical Malpractice Claims

Although the Medical Liability and Insurance Improvement Act purports to create an absolute two-year limitation period, the Act does not abolish fraudulent concealment in medical malpractice actions governed by the Act. Thus, fraudulent concealment may suspend the running of the limitation period in medical malpractice cases as in other cases [Borderlon v. Peck, 661 S.W.2d 907, 909 (Tex. 1983); see R.C.S. Art. 4590i, § 10.01; see also § 72.03[3][d][ii]]. The statute begins to run when the plaintiff learns of facts or conditions that would cause a reasonably prudent person to make inquiry leading to the discovery of a concealed cause of action [Borderlon v. Peck, 661 S.W.2d 907, 908–909 (Tex. 1983); Leeds v. Cooley, 702 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, ref. n.r.e.); Rascoe v. Anabtawi, 730 S.W.2d 460, 461–462 (Tex. App.—Beaumont 1987, no writ)]. For example, the defendant’s failure to provide the plaintiff with his or her medical records before the plaintiff filed suit did not estop the defendant from asserting the statute of limitation when the plaintiff’s statutory notice to the defendants clearly indicated that she knew facts that would cause a reasonably prudent person to make inquiry [Casey v. Methodist Hosp., 907 S.W.2d 898, 904 (Tex. App.—Houston [1st Dist.] 1995, no writ)].

Proof of fraudulent concealment requires more than evidence that the physician failed to use ordinary care; it requires evidence that the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff [Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999)—on summary judgment, plaintiff failed to raise genuine issue of fact to support fraudulent concealment; see generally [a], above]. For example, the plaintiff may not raise fraudulent concealment merely because the defendant fails to furnish the plaintiff with his or her medical records. As in other cases, the plaintiff must also establish that the defendant had actual knowledge that a wrong occurred or had a fixed purpose to conceal the wrong [Casey v. Methodist Hosp., 907 S.W.2d 898, 903 (Tex. App.—Houston [1st Dist.] 1995, no writ)].
The statute of limitation in medical malpractice actions is discussed in greater detail in Ch. 321, *Medical Malpractice*.

[2]—Disabilities

[a]—Minors

[i]—Generally

Minority is a disability that suspends the statute of limitation until the disability is removed. Consequently, the limitation period will not begin to run against a minor until the minor reaches 18 years of age [C.P.R.C. § 16.001(a)(1); Hidalgo v. Lechuga, 407 S.W.2d 545, 550 (Civ. App.—El Paso 1966, ref. n.r.e.); see also Prob. C. § 93—will contests]. The tolling rule applies to minors who are married as well as those who are single [C.P.R.C. § 16.001(a)(1)]. The Texas Family Code contains a general provision that states that marriage emancipates a minor, giving a married minor the power and capacity of an adult [see Fam. C. § 1.104]. However, the Family Code rule of emancipation applies only in the absence of an express statute to the contrary, and the statute establishing the tolling of limitations for those under 18 years of age explicitly states that it applies “regardless of whether the person is married” [C.P.R.C. § 16.001(a)(1); see Gibson v. Oppenheimer, 154 S.W. 694, 697 (Civ. App.—San Antonio 1913, ref.)].

The filing of suit by a minor or by someone on the minor’s behalf removes the minor from the protection of the tolling statute and requires the use of due diligence to effect service of process to satisfy the statute of limitation [see Johnson v. McLean, 630 S.W.2d 790, 793 (Tex. App.—Houston [1st Dist.] 1982, no writ); see also § 72.05[1][a]].

In survival actions brought after the death of a minor, the period is tolled during the life of the minor, but begins to run on the child’s death. The Texas Supreme Court rejected an argument, in a medical malpractice case, that the parents of the deceased minor should have until the deceased minor’s 14th birthday to file a survival action, even though the statute of limitation governing the case provided that minors under the age of 12 years have until their 14th birthday in which to file the claim or have it filed on their behalf [Brown v. Shwartz, 968 S.W.2d 331, 334–335 (Tex. 1998)—medical malpractice action; “The statutes of limitations do not indicate that a minor’s survivors should have longer to assert their claims than the survivors of an adult”; see R.C.S. Art. 4590i § 10.01; see also Campos v. Ysleta Gen. Hosp., Inc., 879 S.W.2d 67, 73 (Tex. App.—El Paso 1994, den.); Cestro v. Medina, 781 S.W.2d 640, 641 (Tex. App.—Eastland 1989, no writ)].
[ii]—Medical Malpractice Claims

Despite a contrary provision in the statute governing medical malpractice actions, the minority tolling provision applies in medical malpractice cases [C.P.R.C. § 16.001(a)(1); Weiner v. Wasson, 900 S.W.2d 316, 321 (Tex. 1995)]. The medical malpractice statute provides that the two-year limitation period may be extended for those malpractice victims under the age of 12. The statute states that minors under the age of 12 who are victims of medical malpractice have until their 14th birthday in which to file a claim or have the claim filed on their behalf [R.C.S. Art. 4590i § 10.01]. The Texas Supreme Court has ruled that this statute is unconstitutional as applied to minors under the open courts provision of the Texas Constitution, because it cuts off a minor’s cause of action before the time the minor can sue on his or her own behalf [Weiner v. Wasson, 900 S.W.2d 316, 317–318 (Tex. 1995)—relying on Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983), which reached same result with respect to similar provision under Texas Insurance Code]. Therefore, the limitation period provided by the general tolling and limitation provisions of the Texas Civil Practice and Remedies Code applies to minors’ malpractice claims [Weiner v. Wasson, 900 S.W.2d 316, 321 (Tex. 1995)].

On the other hand, limitations on an adult’s wrongful death action based on medical malpractice is not tolled or extended because the decedent was a minor. The open courts provision does not apply to this type of action because a wrongful death action did not exist at common law [see Baptist Mem. Hosp. v. Arredondo, 922 S.W.2d 120, 121–122 (Tex. 1996)].

[b]—Persons of Unsound Mind

As a general rule, the limitation period will not start to run if the claimant is of unsound mind at the time the cause of action accrues [C.P.R.C. § 16.001(a)(2), (b); see Pugh v. Clark, 238 S.W.2d 980, 986 (Civ. App.—Galveston 1951, ref. n.r.e.); see also Prob. C. § 93—will contests]. The term “unsound mind” is not limited to persons who are adjudicated incompetent. Generally, however, the term refers to a condition that is substantial and prolonged [see Jones v. Miller, 964 S.W.2d 159, 164–166 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.)—no competent summary judgment evidence that plaintiff was incompetent]. It has been held not to apply to a personal injury claimant who was sleepy, groggy, disoriented, unable to think clearly, and unable to care for herself for two days following the injury due to the effects of the injury and necessary medication [Hargraves v. Armco Foods, Inc. 894 S.W.2d 546, 547–548 (Tex. App.—Austin 1995, no writ)—suit filed two years and one day after accident was not timely; see also Bank of Commerce v. Barton, 605 S.W.2d 638, 639–640 (Civ. App.—Fort Worth 1980, dis.)].

This rule suspending the running of the limitation period is applicable only if the claimant is of unsound mind at the time the cause of action accrues.
Once the limitation period commences to run, disabilities that subsequently arise have no effect [see Blum v. Elkins, 369 S.W.2d 810, 812–813 (Civ. App.—Waco 1963, no writ)]—when claiming suspending of limitation period on account of imprisonment, imprisonment subsequent to accrual of cause is irrelevant. However, it should be noted that one court of appeals appears to have ignored explicit statutory language and ruled that a disability occurring subsequent to the date of the accrual of the cause of action was sufficient to suspend the limitation period during the period of the disability [see Naylor v. Gutteridge, 430 S.W.2d 726, 734 (Civ. App.—Austin 1968, ref. n.r.e.)—limitation period applicable to loan made on October 20, 1964, was tolled when obligee/claimant was declared incompetent on April 26, 1966].

The protection of the tolling provision is not lost by the commencement of a lawsuit by, or on behalf of, a person of unsound mind, even though the possibility exists that a limitation period may remain open for the lifetime of the plaintiff. Limitations is tolled as long as the plaintiff remains incompetent. However, after final judgment, a lawsuit commenced by, or on behalf of, a legally unsound person may be subject to direct attack in certain circumstances [Ruiz v. Conoco, Inc., 868 S.W.2d 752, 754–756 (Tex. 1993); see Ch. 131, Judgment].

To establish the unsound mind exception, the party must produce specific evidence that would enable the court to conclude that mental capacity was lacking, or produce a fact-based expert opinion to that effect. Thus, a woman who relied only on her own conclusory statements without medical testimony failed to create a fact issue regarding her mental capacity sufficient to toll the statute of limitation [Grace v. Colorito, 4 S.W.2d 765, 769–770 (Tex. App.—Austin 1999, no pet. h.)—party did not produce evidence of unsound mind sufficient to avoid summary judgment on limitations issue].

[c]—Imprisonment

Imprisonment does not constitute a legal disability that will suspend the running of the limitation period. However, imprisonment once was a basis for tolling the limitation period [see former C.P.R.C. § 16.001(a)(2) (amended 1987); see also Adler v. Beverly Hills Hospital, 594 S.W.2d 153, 157–158 (Civ. App.—Dallas 1980, no writ)]. This provision for tolling the limitation period was repealed in 1987. The amended statute provides that any limitation period tolled on August 31, 1987, because of imprisonment would begin to run on September 1, 1987 [Acts 1987, 70th Leg., ch. 1049, § 57].

[3]—Death of Claimant

The limitation period is suspended for 12 months by the death of a claimant. If an executor or administrator of the claimant’s estate qualifies before the
expiration of 12 months, the limitation period recommences at the time of the qualification [C.P.R.C. § 16.062; Markward v. Murrah, 138 Tex. 34, 156 S.W.2d 971, 973 (1941); see Guardia v. Kontos, 961 S.W.2d 580, 585 (Tex. App.—San Antonio 1997, no pet.)—in summary judgment proceeding, limitations was tolled for entire 12 months because defendant failed to conclusively establish he qualified as executor by filing oath and proper bond in shorter period]. This tolling provision applies only to causes of action existing at the time of death [Jones v. Young, 539 S.W.2d 901, 905 (Civ. App.—Texarkana 1976, ref. n.r.e.)]. Consequently, the statute does not apply to a wrongful death cause of action, but does apply to a survival action [see Rigo Manufacturing Company v. Thomas, 458 S.W.2d 180, 181 (Tex. 1970)].

The Medical Liability and Insurance Improvement Act contains a two-year statute of limitation that applies to health care liability claims “[n]otwithstanding any other law” [see R.C.S. Art. 4590i § 10.01; see § 72.02[1][c]; see generally Ch. 321, Medical Malpractice]. Thus, most courts have held that the tolling provision for death of a claimant does not apply to medical malpractice claims [see Wilson v. Rudd, 814 S.W.2d 818, 821 (Tex. App.—Houston [14th Dist.] 1991, den.); Rascoe v. Anabtawi, 730 S.W.2d 460, 461 (Tex. App.—Beaumont 1987, no writ); see also Brown v. Shwartz, 968 S.W.2d 331, 335 n.1 (Tex. 1998)—noting Wilson and Rascoe cases, but not reaching issue]. One court of appeals has held that the two statutes are not in conflict and applied the tolling provision [see Valdez v. Texas Children’s Hosp., 673 S.W.2d 342, 344–345 (Tex. App.—Houston [1st Dist.] 1984, no writ)].

[4]—Military Service

For persons serving in the military, the limitation period on any cause of action is suspended for the period of military service. Federal law, the Soldiers’ and Sailors’ Civil Relief Act, compels this suspension [50 U.S.C. App. § 525; Crawford v. Adams, 213 S.W.2d 721, 723 (Civ. App.—Galveston 1948, ref. n.r.e.)] and preempts any Texas law to the contrary [see Winship v. Gargiulo, 761 S.W.2d 301, 301 (Tex. 1988)—federal act creates distinct right of relief independent of Texas procedures for vacating default judgments].

One court of appeals applying this statute refused to make a distinction between career service personnel and noncareer service personnel. This court held that the plain language of the statute supports a simple, universal rule [Barstow v. State, 742 S.W.2d 495, 500–501 (Tex. App.—Austin 1987, den.)]. The Court of Appeals for the Fifth Circuit came to a different conclusion. It held that the statute does not relieve career service personnel, absent a showing that the military service handicapped the person from asserting a claim before termination of the limitation period [Pannell v. Continental Can Co., Inc., 554 F.2d 216, 225 (5th Cir. [Ga.] 1977)].
Application of the Soldiers’ and Sailors’ Civil Relief Act operates to the benefit of the assigns or successors-in-interest of the service member. Consequently, in one case, the purchaser of real property relied on the prior owner’s military service to avoid a claim of easement by prescription. Travis County contended that it had established an easement across the property by prescription. The claim of right, adverse and hostile to the property owner, allegedly began before the purchaser held title. The prior owner, however, had been in the military, and the court of appeals held that that service suspended the limitation period from running until the property was conveyed to the purchaser [Barstow v. State, 742 S.W.2d 495, 503–504 (Tex. App.—Austin 1987, den.)].

[5]—Absence From State

In general, the absence of the defendant from the state suspends the running of the limitation period during the defendant’s absence [C.P.R.C. § 16.063; Loomis v. Skillerns-Loomis Plaza, Inc., 593 S.W.2d 409, 410 (Civ. App.—Dallas 1980, ref. n.r.e.)]. A narrow exception to this rule exists for nonresident defendants. If the defendant is not a Texas resident and is absent from Texas when the cause of action accrues, there is no suspension. However, even if the defendant is not a Texas resident, if the defendant is present in Texas when the cause of action accrues, the suspension rule applies. The limitation period is suspended while the defendant is absent from the state [Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 879 (1962); Stone v. Phillips, 142 Tex. 216, 176 S.W.2d 932, 933–934 (1944); Dicker v. Binkley, 555 S.W.2d 495, 496 (Civ. App.—Dallas 1977, ref. n.r.e.); Mehaffey v. Barrett Mobile Home Transport, Inc., 473 S.W.2d 643, 646–647 (Civ. App.—Fort Worth 1971, no writ); see Guardia v. Kontos, 961 S.W.2d 580, 585 (Tex. App.—San Antonio 1997, no pet. h.)].

The rules regarding a defendant’s absence from the state apply to corporations as well as to individuals. A foreign corporation that maintains an agent for service of process is “present” in the state, and although the statute is applicable, the limitation period is not tolled when the presence of the agent is continuous [see Davis v. B. E. & K., Inc., 595 S.W.2d 895, 896 (Civ. App.—Eastland 1980, ref. n.r.e.)]. Presumably, the departure from Texas of such an agent of a foreign corporation over which Texas courts have jurisdiction would implicate the suspension rule [see Mehaffey v. Barrett Mobile Home Transport, Inc., 473 S.W.2d 643, 646–647 (Civ. App.—Fort Worth 1971, no writ)—noting “confused state” of decided cases].

The availability of substituted service on the defendant while absent from the state does not change the tolling rule. Unless the defendant is actually present, the limitation period is suspended by the defendant’s absence from the state [Vaughn v. Deitz, 430 S.W.2d 487, 490 (Tex. 1968); Dicker v. Binkley,
The rule that a defendant’s absence from the state suspends the limitation period, despite the availability of substituted service, may have constitutional limits. In one case, the United States Supreme Court struck down an Ohio tolling provision as violative of the Commerce Clause. Ohio law, somewhat like Texas law, suspended the limitation period against corporations absent from the state. As a result, Ohio law required foreign corporations to choose between exposure to personal jurisdiction by appointing an agent or remaining liable for the claims of Ohio residents in perpetuity. The Court held that such a restriction overly burdens interstate commerce and exceeds any interests of the state [Bendix Corp. v. Midwesco Enterprises, 486 U.S. 888, 891–893, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988)].

The tolling provision for defendants who are absent from the state does not apply to medical malpractice claims. The Medical Liability and Insurance Improvement Act has its own set of limitation and tolling provisions that apply instead [Hill v. Milani, 686 S.W.2d 610, 611 (Tex. 1985); see R.C.S. Art. 4590i § 10.01; see also [8], below; § 72.03[2][a]].

Once the limitations defense has been raised by the defendant, the burden of pleading and proving the defendant’s absence from the state is on the plaintiff [Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 880 (1962)]. An exception to this burden of proof rule applies in summary judgment motions. If a defendant moves for summary judgment on the basis of limitations, the defendant has the burden to negate the applicability of the out-of-state tolling rule if it is raised by the plaintiff [see Zale Corporation v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975); Los Angeles Airways, Inc. v. Lummis, 603 S.W.2d 246, 248 (Civ. App.—Houston [14th Dist.] 1980, ref. n.r.e.); Shead v. Grissett, 566 S.W.2d 318, 321 (Civ. App.—Houston [1st Dist.] 1978, dis.); see also § 72.09].

[6]—Legal Malpractice

In legal malpractice cases, the limitation period may be suspended until all appeals are exhausted in an underlying suit if it is alleged that the malpractice occurred in the underlying suit. The rationale for this special tolling rule in legal malpractice actions is that, without such a tolling rule, the statute of limitation might require a party to bring a legal malpractice claim prior to the resolution of the underlying claim. This might require the client, to his or her prejudice, to take a position inconsistent with that taken in the underlying action. In addition, tolling is justified on the grounds that the viability of the malpractice action may depend on the outcome of the appeal in the underlying suit [Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991); Adudell v. Parkhill, 821 S.W.2d 158, 159 (Tex. 1991); see American Centennial Ins. v. Canal Ins., 843 S.W.2d 480, 483–484 (Tex. 1992); see also Murphy v.
Campbell, 964 S.W.2d 265, 272 (Tex. 1998)—to require client to file malpractice claim against lawyer representing him in another case would make it virtually impossible for lawyer to continue representation]. Similarly, the statute of limitation for legal malpractice for failure to sue a tortfeasor is tolled until litigation has concluded against other tortfeasors liable for the same indivisible injury [Sanchez v. Hastings, 898 S.W.2d 287, 288 (Tex. 1995); cf. Cherokee Water v. Advance Oil & Gas, 843 S.W.2d 132, 133–135 (Tex. App.—Texarkana 1992, den.)—limitations not suspended by appeal in independent suit]. When no appeal is taken, the statute of limitation is tolled until the time the judgment becomes final and an appeal may no longer be perfected [Washington v. Georges, 837 S.W.2d 146, 146–147 (Tex. App.—San Antonio 1992, den.); see T.R.C.P. 329b).

The Hughes rule does not toll limitations in all situations in which a litigant might be forced to take inconsistent positions. The rule is narrow and applies only when a lawyer commits malpractice in the prosecution or defense of a claim. Thus, the Texas Supreme Court ruled that in a suit for accountant malpractice based on faulty tax advice, limitations is not tolled until the underlying tax claims against the client are resolved. Even though the accountant might be expected to testify in the underlying tax suit, the relationship between client and witness is not the same as the relationship between attorney and client. It is unreasonable to expect an attorney to continue to represent a client who is simultaneously suing the attorney for mishandling the very same matter, but it is not unreasonable to expect an expert to testify consistently regardless of whether the client is suing. The Court further explained that, although prosecuting both the tax suit and a malpractice suit at the same time may require plaintiffs to take inconsistent positions, they can avoid this dilemma by requesting the court to abate the malpractice case pending resolution of the tax suit. A court in such circumstances should grant the abatement. Thus, plaintiffs in an accountant malpractice case simply do not suffer the prejudice the Hughes plaintiffs would have suffered by either suing the lawyer who was still representing them and thereby losing his services or allowing limitations to run against their malpractice claim [Murphy v. Campbell, 964 S.W.2d 265, 272 (Tex. 1998)].

The courts of appeals disagree as to whether the Hughes rule continues to toll the statute of limitation after the client has terminated the lawyer-client relationship and retained other counsel to prosecute the underlying suit. In Murphy, the Texas Supreme Court stated that the Hughes rule “is expressly limited to claims against a lawyer arising out of litigation where the party must not only assert inconsistent positions but must also obtain new counsel” [see Murphy v. Campbell, 964 S.W.2d 265, 273 (Tex. 1997)]. Some courts of appeals have concluded that under Murphy, the mere fact that a client must take inconsistent litigation positions is not enough; the client must also be in a
position in which the party will be forced to obtain new counsel if the malpractice suit is filed. Thus, the Hughes rule cannot be invoked to toll the statute of limitation after the lawyer-client relationship is terminated, because the client is not forced to seek new counsel. The problem with taking inconsistent positions can be alleviated, as in Murphy, by requesting an abatement of the malpractice case [see Eiland v. Turpin-Smith, 16 S.W.3d 461, 465–466, 470 (Tex. App.—El Paso 2000, pet. filed); Brents v. Haynes & Boone, L.L.P., 10 S.W.3d 772, 775–778 (Tex. App.—Dallas 2000, pet. filed); Apex Towing Co. v. Tolin, 997 S.W.2d 903, 905 (Tex. App.—Beaumont 1999, pet. granted); Swift v. Seidler, 988 S.W.2d 860, 861–862 (San Antonio 1999, pet. denied); Norman v. Yzaguirre & Chapa, 988 S.W.2d 460, 461–463 (Tex. App.—Corpus Christi 1999, no pet.)]. These courts of appeals hold that Murphy, whether intentionally or unintentionally, modified the Hughes rule because Hughes in fact involved a situation in which the client had obtained new counsel to prosecute the underlying suit and the Texas Supreme Court nevertheless held that limitations was tolled until the underlying suit was resolved [see, e.g., Eiland v. Turpin–Smith, 16 S.W.3d 461, 465–466, 470 (Tex. App.—El Paso 2000, pet. filed)—“we prefer to follow the rule that as an intermediate court, when faced with inconsistent opinions of the Supreme Court, we rely on the most current opinion and leave it to the Supreme Court to distinguish or explain earlier cases”; Norman v. Yzaguirre & Chapa, 988 S.W.2d 460, 462–463 (Tex. App.—Corpus Christi 1999, no pet.)—“[A] careful reading of the Hughes opinion fails to uncover any reference to the ‘forced to obtain new counsel’ requirement that Murphy recites. Nevertheless, we are bound by Murphy’s exposition of the rule in this area”].

The Fourteenth Court, on the other hand, has disagreed with this view, holding that the Hughes test has only three prongs: (1) an attorney malpractice claim (2) arising out of litigation (3) that would cause a party to assert inconsistent positions. The court noted that the Murphy decision seems to add a fourth prong, requiring that the party be placed in a position that would force the party to obtain new counsel. This modification of the Hughes test was dicta because Murphy dealt with accountant malpractice, not legal malpractice, and if applied to the facts of Hughes would give an opposite result. The Fourteenth Court concluded that the present case was factually indistinguishable from Hughes and therefore it was required to follow the holding in Hughes rather than the dicta in Murphy [Edwards v. Kaye, 9 S.W.3d 310, 312–314 (Tex. App.—Houston [14th Dist.] 1999, pet. filed)].

The Hughes rule applies only when a lawyer commits malpractice in the prosecution or defense of a claim, not when the malpractice concerns other duties. Thus, in a suit for malpractice in connection with the preparation and execution of partnership and corporate documents, limitations was not tolled for the duration of an underlying suit against the client based on the documents,
even though the amount of damages in the malpractice suit depended on resolution of this underlying suit [see Burnap v. Linnartz, 914 S.W.2d 142, 147 (Tex. App.—San Antonio 1995, den.)].

In one case, the Hughes rule was held to toll the statute of limitation during the pendency of the attorney's representation of the client in an ongoing bankruptcy proceeding [see Guillot v. Smith, 998 S.W.2d 630, 631–633 (Tex. App.—Houston [1st Dist.] 1999, no pet.)]. On the other hand, the tolling rule was held not to apply to an investor's cause of action against a tax lawyer based on advice given before the advent of any litigation, even though the investor's partnership was being audited by the IRS when the alleged malpractice was discovered, because the IRS audit was not considered to be a judicial proceeding that forced the investor to adopt a litigation posture inconsistent with the malpractice claim [Ponder v. Brice & Mankoff, 889 S.W.2d 637, 644 (Tex. App.—Houston [14th Dist.] 1994, den.)].

A variation on this principle of equitable tolling has been applied to litigation that is instituted against a client on the basis of an attorney's conduct. When a wrongful foreclosure action results from an attorney's malpractice in conducting a nonjudicial foreclosure sale of real property, the limitation period is suspended until the wrongful foreclosure action is finally resolved [Gulf Coast Inv. Corp. v. Brown, 821 S.W.2d 159, 160 (Tex. 1991)—per curiam].

Prior to the time that this special tolling rule was announced by the Texas Supreme Court, the principal basis for extending the limitation period in legal malpractice actions was the application of the discovery rule [see Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988)]. Although its importance has been reduced, the discovery rule remains applicable to legal malpractice claims [see Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 156 (Tex. 1991)]. For a discussion of how the discovery rule operates, see § 72.03[3].

[7]—Jurisdictional Dismissals

When an action is dismissed for lack of jurisdiction, or set aside or annulled in a direct proceeding, a party may refile the suit in a different court with proper jurisdiction. If this is done not later than the 60th day after the date the dismissal becomes final, the running of the applicable statute of limitations is suspended during this period [C.P.R.C. § 16.064(a)]. Thus, the second filing is timely if the first was timely. The limitations period is not tolled, however, if the adverse party shows that the first filing was made with intentional disregard of proper jurisdiction [C.P.R.C. § 16.064(a)]. The statute is designed to provide relief to litigants who mistakenly file an action in the wrong court. The statute should be construed liberally to achieve this end [see Clary Corp. v. Smith, 949 S.W.2d 452, 461 (Tex. App.—Fort Worth 1997, den.)—statute did not apply because case was not refiled in a different court and there was
no evidence of initial mistake; Turner v. Tx. Dept of Mental Health, 920 S.W.2d 415, 418–419 (Tex. App.—Austin 1996, den.)—despite liberal construction, statute did not apply when party filed action that would not have been valid cause of action in either federal or state court].

This tolling statute applies to the dismissal of an action by a federal court because of the federal court’s lack of subject-matter jurisdiction [see Republic Nat. Bank of Dallas v. Rogers, 575 S.W.2d 643, 646–648 (Civ. App.—Waco 1978, ref. n.r.e.)—amount-in-controversy lacking]. But if it cannot be determined as a matter of law that the suit was dismissed for lack of jurisdiction, the state statute does not apply [Allen v. Port Drum Co., Inc., 777 S.W.2d 776, 777–778 (Tex. App.—Beaumont 1989, den.); see also Turner v. Tx. Dept of Mental Health, 920 S.W.2d 415, 418 (Tex. App.—Austin 1996, den.)—ordinarily dismissal is treated as final adjudication if no grounds are stated, but under circumstances of case Texas court assumed that federal court dismissed for lack of jurisdiction because federal jurisdiction was barred by 11th Amendment]. Likewise, the statute has been applied to the discretionary dismissal of a pendent state claim from federal court [see Vale v. Ryan, 809 S.W.2d 324, 326–327 (Tex. App.—Austin 1991, no writ)], and to dismissals based on the absence of personal jurisdiction [see Long Island Trust Co. v. Dicker, 659 F.2d 641, 647 (5th Cir. [Tex.] 1981)—New York state court dismissed and case refiled in federal district court in Texas]. In addition, the Fifth Circuit Court of Appeals has held that a dismissal because of forum non conveniens comes within the statute [see Hotvedt v. Schlumberger Ltd. (N.V.), 914 F.2d 79, 81 (5th Cir. [Tex.] 1990)].

A dismissal for want of prosecution is not a dismissal for lack of jurisdiction and is not covered by the tolling statute [see Shaw v. Corcoran, 570 S.W.2d 96, 98 (Civ. App.—Austin 1978, no writ)].

The statute allows refiling in a different court but not the same court. Thus, when parties are dismissed for failure to state a claim within the jurisdictional limits of the court, the parties may not amend the pleadings and refile the case in the same court and receive the benefit of the tolling provision. The proper procedure is for the parties to amend the pleadings before dismissal in response to the plea to the jurisdiction or other motion on which dismissal was granted. Application of the statute would serve no purpose in this context [Clary Corp. v. Smith, 949 S.W.2d 452, 461 (Tex. App.—Fort Worth 1997, den.)].

Similarly, when the court lacks venue rather than jurisdiction, there is no need for application of a tolling rule. When a suit is filed in a county that is not a proper venue, the objection to venue may be waived. If the other party does object to venue, the proper procedure is a motion to transfer venue [see T.R.C.P. 87]. If the motion is sustained, the court may not dismiss the action but must transfer it to a proper court [T.R.C.P. 89; see generally Ch. 61, Venue].
Tolling on account of a jurisdictional dismissal is limited by the concept of “good faith.” The rule does not apply when the first suit was filed with intentional disregard for proper jurisdiction (C.P.R.C. § 16.064(b); Technical Consultant Services v. Lakewood Pipe, 861 F.2d 1357, 1361 n.1 (5th Cir. [Tex.] 1988)). However, good faith in the initial filing is presumed. If the defendant contends that the first suit was filed with intentional disregard for proper jurisdiction, the defendant bears the burden of proving that allegation (see C.P.R.C. § 16.064(b); Williamson v. John Deere Co., 708 S.W.2d 38, 40 (Tex. App.—Tyler 1986, no writ)).

Once limitations is raised by the defendant, the plaintiff has the burden to prove that (1) suit was filed within the limitation period, (2) the suit was dismissed because of lack of jurisdiction, and (3) suit was commenced in a court of proper jurisdiction within 60 days of the dismissal becoming final (Watson v. General Motors Corporation, 479 S.W.2d 104, 106 (Civ. App.—Houston [1st Dist.] 1972, no writ); see § 72.09). If the plaintiff asserts the jurisdictional dismissal tolling statute in response to a defendant’s motion for summary judgment based on limitations, the defendant bears the burden of negating the applicability of the tolling statute (Vale v. Ryan, 809 S.W.2d 324, 326 (Tex. App.—Austin 1991, no writ); Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ)).

[8]—Effect on Medical Malpractice Claims

The medical malpractice statute, which adopts an absolute two-year limitation period, expressly states that its provisions apply “notwithstanding any other law” (see R.C.S. Art. 4590i § 10.01). The extent to which this statutory language bars application of the normal rules suspending the running of limitation periods is uncertain. The Texas Supreme Court has determined that the statute suspending the limitation period while a defendant is absent from the state (see C.P.R.C. § 16.063) does not apply in medical malpractice actions (see Hill v. Milani, 686 S.W.2d 610, 611 (Tex. 1985)). On the other hand, the minority tolling provision (C.P.R.C. § 16.001(a)(1)—statute of limitation does not begin to run until minor reaches age 18) does apply in medical malpractice cases, notwithstanding contrary language in the medical malpractice statute. This result is required by the open courts provision of the Texas Constitution, because otherwise the medical malpractice statute would cut off a minor’s cause of action before the time the minor could sue on his or her own behalf (Weiner v. Wasson, 900 S.W.2d 316, 317–318 (Tex. 1995); see also [2][a], above).

The statute tolling the limitation period while a plaintiff is of unsound mind (C.P.R.C. § 16.001(a)(2)) does not apply in medical malpractice actions (see Jones v. Miller, 964 S.W.2d 159, 164 (Tex. App.—Houston [14th Dist.] 1998, no pet.); Desemo v. Gafford, 692 S.W.2d 571, 574 (Tex. App.—Eastland 1985, ref. n.r.e.); Liggett v. Blocher, 849 S.W.2d 846, 850–851 (Tex. App.—Houston [14th Dist.] 1993, no pet.).
However, several courts of appeals have held that when the mental disability is caused by the malpractice and the plaintiff is totally disabled, the statute of limitation is tolled. Application of the strict two-year statute of limitation under these circumstances would violate the open courts provision, because the plaintiff would be unreasonably prevented from bringing the cause of action [see Tinkle v. Henderson, 730 S.W.2d 163, 167 (Tex. App.—Tyler 1987, ref.)—suit was not barred when plaintiff was continuously disabled from time of injury until suit was filed; see also Jones v. Miller, 964 S.W.2d 159, 165 (Tex. App.—Houston [14th Dist.] 1998, no pet.)—discussing cases; Felan v. Ramos, 857 S.W.2d 113, 117–118 (Tex. App.—Corpus Christi 1993, den.); Palla v. McDonald, 877 S.W.2d 472, 476–477 (Tex. App.—Houston [1st Dist.] 1994, no writ)].

The courts of appeals have split on the question of the applicability of other suspension provisions. Several courts have held that the 12-month tolling statute because of the death of the claimant [see C.P.R.C. § 16.062; see also [3], above] does not apply to medical malpractice claims [see Sanchez v. Memorial Medical Center Hosp., 769 S.W.2d 656, 659–660 (Tex. App.—Corpus Christi 1989, no writ); Rascoe v. Anabtawi, 730 S.W.2d 460, 461 (Tex. App.—Beaumont 1987, no writ); Waters Ex Rel. Walton v. Del-Ky, Inc., 844 S.W.2d 250, 255–256 (Tex. App.—Dallas 1992, no writ)]. On the other hand, another case held that the 12-month tolling statute does apply to medical malpractice claims [see Valdez v. Texas Children’s Hosp., 673 S.W.2d 342, 344–345 (Tex. App.—Houston [1st Dist.] 1984, no writ)].

Medical malpractice claims, including the medical malpractice statute of limitation, are discussed in detail in Ch. 321, Medical Malpractice.

[9]—Legal Impediments

The statute of limitation is tolled when a legal impediment prevents a plaintiff from filing suit until the impediment is removed. A legal impediment may include: (1) an injunction [Pioneer Building & Loan Ass’n v. Johnston, 117 S.W.2d 556, 558 (Civ. App.—Waco 1938, dis.)], (2) a bankruptcy stay [Peterson v. Texas Commerce Bank—Austin, 844 S.W.2d 291, 294 (Tex. App.—Austin 1992, no writ)], or (3) a situation in which the outcome of an initial case determines the viability of a subsequent cause of action. For example, the statute was tolled when separate requests to probate competing wills were filed by interested parties within the period of limitations. After the county court denied probate of the second will and confirmed probate of the first, the proponent of the second will appealed to the district court pursuant to former Probate Code Section 30. However, the district court dismissed the appeal for want of jurisdiction before the proponent obtained service on all necessary parties. The court of appeals later reversed the district court’s decision and
remanded the case for trial on the merits. On remand, the district court granted summary judgment against the proponent of the second will because service had not been obtained on persons needed for adjudication within the period of limitations. On appeal from the summary judgment, the court of appeals held that the first appeal tolled limitations because the district court’s dismissal of the appeal constituted a legal impediment to obtaining service of process [Walker v. Hanes, 570 S.W.2d 534, 536–540 (Tex. Civ. App.—Corpus Christi 1978, ref. n.r.e.)].

By contrast, a pending appeal of a divorce judgment did not toll the statute of limitation for the wife’s filing of a tort suit against the husband’s mother for fraudulent transfers of community property because the appeal did not prevent the wife from filing a separate suit against her former mother-in-law [Hunt Steed v. Steed, 908 S.W.2d 581, 584–585 (Tex. App.—Fort Worth 1995, den.)].

[10]—Duress

In cases in which the cause of action is based on duress, the statute of limitation is tolled until the duress is removed. The burden of showing the continued existence of duress is on the plaintiff asserting that the cause of action is not barred by the statute of limitation [Whatley v. National Bank of Commerce, 555 S.W.2d 500, 505–506 (Civ. App.—Dallas 1977, no writ); McNeill v. Lovelace, 529 S.W.2d 633, 637 (Civ. App.—Fort Worth 1975, no writ)].

One court of appeals has considered and rejected the contention that duress may toll the statute of limitation in a suit in which the claims are not based on duress. In this case, the plaintiff alleged medical malpractice and fraud claims against several hospitals and facilities. She further alleged that her former husband, who had treated her as a therapist before their marriage, had abused and threatened her with violence and death if she filed suit against him or complained about his treatment of her as a therapist or husband (he was apparently never actually served in the suit). The court ruled that duress did not toll the claims, and that further even if duress could be applied to toll limitations in fraud claims, duress imposed by a third party cannot inure to a plaintiff’s benefit to toll limitations as to those parties who did not impose the duress [Slater v. National Medical Enterprises, 962 S.W.2d 228, 235 (Tex. App.—Fort Worth 1998, pet. denied)].
§ 72.05 Procedure to Satisfy Statute of Limitation

[1]—Filing of Suit and Service of Process

[a]—Generally

In general, the filing of the plaintiff’s petition satisfies the statute of limitation on the claim pleaded and stops the limitation period from expiring [see, e.g., Danesh v. Houston Health Clubs, Inc., 859 S.W.2d 535, 536–537 (Tex. App.—Houston [1st Dist.] 1993, ref.)—Civil Procedure Rule 5, which deems document filed when mailed on or before last day for filing if it is received not more than 10 days late, defined when personal injury suit was filed for limitation purposes]. However, the filing of the petition stops the limitation period from expiring only if it is accompanied by “due diligence” in securing the issuance and service of citation [Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990); Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990); Zale Corporation v. Rosenbaum, 520 S.W.2d 889, 890 (Tex. 1975)—per curiam; Loomis v. Skillerns-Loomis Plaza, Inc., 593 S.W.2d 409, 410 (Civ. App.—Dallas 1980, ref. n.r.e.)]. Due diligence is measured by what an ordinarily prudent person would do under the same or similar circumstances [Hamilton v. Goodson, 578 S.W.2d 448, 449 (Civ. App.—Houston [1st Dist.] 1979, no writ)].

When a defendant raises the defense of limitations and the failure to timely serve the defendant, the burden shifts to the plaintiff to explain any delay [Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990)]. When the plaintiff asserts a reasonable explanation, whether due diligence has been exercised becomes a question of fact [see Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990); Perry v. Kroger Stores Store No. 119, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ)]. This question involves two considerations: (1) whether the plaintiff acted as an ordinary prudent person would have acted under the same or similar circumstances, and (2) whether the diligence continued up until the time the defendant was served [Rodriguez v. Tinsman & Houser, 13 S.W.3d 47, 49, 50 (Tex. App.—San Antonio 1999, pet. denied); see Boyattia v. Hinojosa, 18 S.W.3d 729, 733 (Tex. App.—Dallas 2000, pet. denied)—duty to exercise diligence continues until service of process is achieved; Perry v. Kroger Stores Store No. 119, 741 S.W.2d 533, 535 (Tex. App.—Dallas 1987, no writ)]. In one case, for example, the secretary for the plaintiff’s attorney testified that she had written a check for the filing fee and had mistakenly assumed that it covered two citations rather than one. In the view of the court of appeals, this explanation raised a fact issue on the diligence question, precluding summary judgment [Valdez v. Charles Orsinger Buick Co., 715 S.W.2d 126, 127–128 (Tex. App.—Texarkana 1986, no writ)].

The plaintiff’s excuse must show a bona fide intent that process be issued and served and must demonstrate how due diligence was exercised in the

(Matthew Bender & Co., Inc.)
issuance and service of citation [see Broom v. McMaster, 992 S.W.2d 659, 664 (Tex. App.—Dallas 1999, no pet.); McGuire v. Federal Dep. Ins. Corp., 561 S.W.2d 213, 215–216 (Civ. App.—Houston [1st Dist.] 1977, no writ)—when plaintiff knew correct business address for defendant for 18 months and failed to serve defendant, there was lack of diligence as matter of law]. However, merely offering an explanation does not necessarily raise a fact issue precluding summary judgment; the explanation must be one that is reasonable and valid. In one case, two plaintiff's attorneys explained that the delay in procuring service was due to miscommunication between them: both attorneys thought the other attorney had requested that the defendant waive service. Because this explanation did not show any diligence on the part of the attorneys to serve the defendant, it failed to raise a fact issue on diligence [Rodriguez v. Tinsman & Houser, 13 S.W.3d 47, 49–52 (Tex. App.—San Antonio 1999, pet. denied)].

It is the clerk's duty to issue citations when requested [see T.R.C.P. 99], and a plaintiff may ordinarily rely on the clerk to perform this duty within a reasonable amount of time. However, when a plaintiff learns, or by the exercise of diligence should have learned, that the clerk has failed to fulfill this duty, the plaintiff must ensure that the job is done. Thus, if an unreasonable amount of time elapses without the clerk issuing the citation and the plaintiff fails to take any action, this may show that the plaintiff lacks a “bona fide intention” to have process served [Boyattia v. Hinojosa, 18 S.W.3d 729, 733–734 (Tex. App.—Dallas 2000, pet. denied)—plaintiffs failure to act during clerk's three-month delay constituted lack of diligence as matter of law].

A lack of diligence may be found as a matter of law if no excuse is offered for a delay or if the plaintiff's acts conclusively negate diligence [see Instrument Specialties Co v. Texas Employment Comm'n, 924 S.W.2d 420, 422 (Tex. App.—Fort Worth 1996, den.); Perry v. Kroger Stores Store No. 119, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ)]. In a case in which the defendant was not served for more than six years after the filing of the petition, the Texas Supreme Court held that unexplained delays of three separate periods in which no attempt to effect service was made established a failure to use diligence as a matter of law [Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990)—per curiam]. In another case, the Dallas Court of Appeals held that a nine-month delay in effecting service conclusively negated diligence, even though the plaintiff's attorney mistakenly believed service had been effected. The Dallas Court held that reliance on assurances of service from court personnel did not create a fact issue because it was the attorney's responsibility to ascertain the status of citation [Perry v. Kroger Stores Store No. 119, 741 S.W.2d 533, 535–536 (Tex. App.—Dallas 1987, no writ); see also Instrument Specialties Co v. Texas Employment Comm'n, 924 S.W.2d 420, 423 (Tex. App.—Fort Worth 1996, den.)—when plaintiffs failed to serve defendants after being put on notice of inadequacy of their attempted service...
and six months had passed since petition was filed, due diligence was lacking as matter of law].

Typically, cases in which the plaintiff’s due diligence is challenged involve delays of several months. However, when no explanation for the delay is offered, the plaintiff fails to meet the burden of raising a fact issue. Thus, due diligence is lacking as a matter of law even though the delay might not be lengthy. In one case, the plaintiff argued on appeal that a three-month delay in procuring service did not show a lack of due diligence. However, the plaintiff had not filed any response to the defendant’s summary judgment motion providing an explanation for the delay. Under these circumstances, the trial court properly granted the summary judgment against the plaintiff, who had failed to raise any fact issue on the reasonableness of the delay [Holt v. D’Hanis State Bank, 993 S.W.2d 237, 241 (Tex. App.—San Antonio 1999, no pet.)].

In another case, the court of appeals found that due diligence was lacking when approximately one month had elapsed between filing and service. In this case the attorneys had directed the clerk not to issue citation because they intended to notify the defendant about the lawsuit through written correspondence in which they would also inquire whether the defendant would waive service of citation. However, due to miscommunication, neither attorney took any steps to carry out this plan. The court ruled that this excuse of miscommunication did not show any diligence in attempting to effectuate service and was therefore invalid and failed to raise a fact issue. “An invalid explanation of delay, like no explanation for delay, constitutes lack of diligence as a matter of law” [Rodriguez v. Tinsman & Houser, 13 S.W.3d 47, 49–51 (Tex. App.—San Antonio 1999, pet. denied)].

[b]—Suit by Improper Plaintiff

The filing of suit by a party not entitled to maintain the action may be ineffective in tolling the limitation period. For example, when the shareholders of a corporation attempted to bring a derivative action without a proper showing that the board of directors’ refused to bring suit on the basis of improper motives, the filing of the suit had no effect on the limitation period. Although the corporation subsequently intervened in the action, the claim was barred because the intervention came too late [Langston v. Eagle Pub. Co., 719 S.W.2d 612, 616–618 (Tex. App.—Waco 1986, ref. n.r.e.)].

But if a plaintiff merely misnames itself (such as when a corporation mistakenly names another, related corporation as the plaintiff), a petition amended to correctly name the plaintiff relates back to the file date of the original petition. Thus, limitations will not bar the claim even though the limitation period may have run out in the meantime. Moreover, even if the mistake is one of misidentification of the plaintiff [see [c], below—distinction between misnomer and misidentification], limitations will not necessarily bar
the claim. The purpose behind statutes of limitation is to compel a party to file suit within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh. A timely petition serves this purpose when it gives fair notice of the suit, and the statute of limitation should not apply when no party is misled or disadvantaged by the error in pleading. When the proper defendants are sued in the correct court within the statute of limitation, have proper notice of the claim and the facts on which it is founded, and are not disadvantaged by the misidentification, the amended petition may relate back to the original petition [Pierson v. SMS Financial II, L.L.C., 959 S.W.2d 343, 347 (Tex. App.—Texarkana 1998, no pet. h.); see also [c], [d], below].

[c]—Effect of Mistake in Naming Defendant

Texas courts distinguish between two types of mistake in naming a defendant. Misnomer occurs when a plaintiff misnames the defendant in the petition, but the correct parties are involved. Misidentification occurs when the defendant named in the pleading is not the party with an interest in the suit. If the plaintiff serves the correct defendant under a mistaken name (misnomer), the statute of limitation is tolled and a subsequent amendment of the petition relates back to the date of the original petition. If the plaintiff is mistaken as to which of two defendants is the correct party, and the wrong one is named and served with process (misidentification), the plaintiff has sued the wrong party and limitations ordinarily is not tolled [Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990); Pierson v. SMS Financial II, L.L.C., 959 S.W.2d 343, 347 (Tex. App.—Texarkana 1998, no pet. h.); Hernandez v. Furr’s Supermarkets, Inc., 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, den.)]. Misnomer is discussed in this subsection and misidentification in [d], below.

The main consideration in misnomer and misidentification cases is whether the correct party received notice of the suit. The statute of limitation is tolled in cases of misnomer because the correct party has been served and put on notice that he or she is the intended defendant [Pierson v. SMS Financial II, L.L.C., 959 S.W.2d 343, 347 (Tex. App.—Texarkana 1998, no pet. h.); Hernandez v. Furr’s Supermarkets, Inc., 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, den.)]. The type of factual mistake justifying the application of the misnomer rule is illustrated in a case in which the plaintiff’s original petition named “Bartlett Rural Electrification Authority” as the defendant. Service was had on an officer of the intended defendant, “Bartlett Electric Cooperative, Inc.” There was no other corporation or company operating under a similar name. Under these circumstances, the statute of limitation was tolled by the original filing and the plaintiff’s amended petition naming the correct defendant related back to the date of the original petition [Callan v. Bartlett Electric Cooperative, 423 S.W.2d 149, 155–156 (Civ. App.—Austin 1968, ref. n.r.e.)].
Although this rule is generally applied to mistakes of fact as to the correct name of the intended defendant, the rule has been applied to a mistake of law in at least one case. In this case, suit was brought against an estate. An estate is not a legal entity that may be sued. The Texas Supreme Court held that because the legal administrator of the estate answered and defended, the statute of limitation was satisfied at the time the plaintiff’s original petition was filed [Price v. Estate of Anderson, 522 S.W.2d 690, 691–692 (Tex. 1975)].

[d]—Effect of Mistake as to Identity of Defendant

When a plaintiff misidentifies the defendant and therefore sues and serves the wrong person, limitations ordinarily is not tolled as to the proper defendant, and an amended petition naming the proper defendant after limitations has run does not relate back to the original petition [Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990); Hernandez v. Furr’s Supermarkets, Inc., 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, den.)]. In cases of suits filed against the wrong business entities, the general rule is that these wrong defendants owe no duty to notify the plaintiff of the mistake. Likewise, the correct and intended defendants have no duty to intervene and point out the error. The limitation period will expire unless the plaintiff discovers the mistake and files a new or amended petition naming the proper defendant within the limitation period [Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990); Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 833–835 (Tex. App.—Waco 1987, ref. n.r.e.); Braselton-Watson Builders, Inc. v. Burgess, 567 S.W.2d 24, 27 (Civ. App.—Corpus Christi 1978, ref. n.r.e.); Thomas v. Cactus Drilling Corporation of Texas, 405 S.W.2d 214, 216 (Civ. App.—Austin 1966, no writ)]. For example, in one case, “Matthews Trucking Company, Inc., d/b/a Louisiana-Matthew Trucking Company, Inc.” was named as the defendant and timely served. The correct defendant was “Matthews Trucking Company,” a completely separate entity, which was not served until after the limitation period had expired. The filing of suit against the wrong defendant did nothing to satisfy the statute of limitation as to the correct defendant and did not obligate the correct defendant to intervene and point out the error [Matthews Trucking Co. v. Smith, 682 S.W.2d 237, 238–240 (Tex. 1984)].

This general rule is subject to an equitable exception. When the wrong defendant is sued and the proper defendant is not named until after limitations has expired, suit against the proper defendant is not barred if there is a relationship between the two defendants such that the added defendant was aware of the facts, not misled, and not disadvantaged in preparing a defense. The reviewing court should examine the entire record to decide whether the added defendant had notice and a reasonable opportunity to defend [Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990); Walls v. Travis County, 958 S.W.2d 944, 946 (Tex. App.—Austin 1998, pet. denied); Hernandez v. Furr’s
The plaintiff’s diligence is not a determining factor, because in these cases the plaintiff will have filed the suit and served the named defendant within the limitation period. Rather, the result depends on whether it is equitable to apply limitations under the circumstances [Hernandez v. Furr’s Supermarkets, Inc., 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, den.); see Walls v. Travis County, 958 S.W.2d 944, 946 (Tex. App.—Austin 1998, pet. denied)—statutes of limitation should not apply when no party is misled or disadvantaged by error in pleading; cf. [a], above—plaintiff must exercise diligence in serving defendant when suit is filed before but defendant is served after limitations has expired].

For example, in a leading case, suit was brought against “Continental Trailways, Inc.” The correct defendant should have been “Continental Southern Lines, Inc.” The evidence showed that the entities were related and that there was a conscious effort on the part of the bus companies to make it appear to the public that the defendant was, in fact, called “Continental Trailways.” The evidence also showed that the companies had the same agent for service of process, that Continental Southern Lines, Inc., was aware of the accident that gave rise to the claim, and that the proper Continental entity may have been aware of the suit. Based on this record, the Texas Supreme Court determined that the plaintiff should have been entitled to prove that the correct defendant was aware of the facts, and was not misled or placed at a disadvantage in obtaining relevant evidence to the suit. When a plaintiff makes this type of showing, equity will prevent assertion of the statute of limitation by the unsued defendant, despite the plaintiff’s failure to sue the correct defendant [Continental Southern Lines, Inc. v. Hilland, 528 S.W.2d 828, 829–831 (Tex. 1975); see also Enserch Corp. v. Parker, 794 S.W.2d 2, 4–6 (Tex. 1990)—correct defendant was subsidiary of defendant sued and limitation period would be satisfied if correct defendant had notice and was not misled; Sumrak v. Tenneco Oil Co., 648 S.W.2d 778, 780–782 (Tex. App.—Fort Worth 1983, no writ)—suit against Tenneco, Inc., satisfied limitation period against correct defendant, parent corporation, when parent was not misled and in fact answered interrogatories propounded to subsidiary; cf. Howell v. Coca-Cola Bottling Co. of Lubbock, 595 S.W.2d 208, 211–213 (Civ. App.—Amarillo 1980), ref. n.r.e. per curiam, 99 S.W.2d 801 (Tex. 1980)—statute of limitation not satisfied in suit against Coca-cola Bottling Company in San Angelo, Texas, instead of Coca-Cola Bottling Company of Lubbock, Inc., when there was no evidence of relationship between companies].

Suits against related political subdivisions are treated like suits against related business entities: if the relationship is close enough and the correct defendant is not misled or disadvantaged, a suit against the wrong defendant is treated as a suit against the correct defendant for purposes of the statute of limitation.
In one case, Harris County was named as the defendant instead of the correct defendant, Harris County Flood Control District. Notice of the injury that gave rise to the claim was properly given, and service was had on the proper agent for service of process, who was the same for both the County and the Flood Control District. Under these circumstances, the statute of limitation was satisfied because the correct defendant was aware of the action and was not misled [Castro v. Harris County, 663 S.W.2d 502, 503–505 (Tex. App.—Houston [1st Dist.] 1983, dis.); see also Walls v. Travis County, 958 S.W.2d 944, 946 (Tex. App.—Austin 1998, pet. denied)].

[e]—Effect of Alter Ego Claims

When the alter ego doctrine permits treating two different persons or entities as identical, filing a petition against and serving one will satisfy the statute of limitation as to the other. For example, if suit is filed against a subsidiary corporation, the limitation period will be satisfied as to a parent corporation that is joined in the action after expiration of the limitation period when the management and operation of the parent and subsidiary are so assimilated that the subsidiary is simply a name or conduit through which the parent conducts business. The corporate fiction is disregarded by the alter ego theory to prevent fraud and injustice [Gentry v. Credit Plan Corporation of Houston, 528 S.W.2d 571, 573 (Tex. 1975); Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 834 (Tex. App.—Waco 1987, ref. n.r.e.); see Harwood Tire-Arlington, Inc. v. Young, 963 S.W.2d 881, 888 (Tex. App.—Fort Worth 1998, pet. dism’d by agr.); Nelson v. Schanzer, 788 S.W.2d 81, 86 (Tex. App.—Houston [14th Dist.] 1990, den.); Sumrak v. Tenneco Oil Co., 648 S.W.2d 778, 780–782 (Tex. App.—Fort Worth 1983, no writ); see also Ch. 165, Disregard of Corporate Entity].

A separate suit against an alter ego to enforce a judgment obtained previously against a subsidiary corporation is, likewise, not barred by the statute of limitation that is pertinent to the underlying claim that has been reduced to judgment. It makes no difference that the defendant in the second action was not named or sued in the underlying action that resulted in the judgment. If the doctrine applies, a suit against one of the entities is simply a suit against the “other self” of the remaining entity [see Castleberry v. Branscum, 721 S.W.2d 270, 271–273 (Tex. 1996)—discussing at least six bases for disregarding corporate form]. If limitations was satisfied as to the judgment debtor subsidiary, it is satisfied as to the alter ego. In this situation, it appears that the only limitations defense that the alter ego may assert is either the 10-year limitation period applicable to the enforcement of a judgment or the four-year residual statute of limitation [Matthews Const. Co., Inc. v. Rosen, 796 S.W.2d 692, 694 & n.3 (Tex. 1990)].
§ 72.05[1][f]

Effect of Assumed or Common Names

A suit brought against a partnership, unincorporated association, private corporation, or individual doing business under an assumed name may name the defendant by the assumed or common name [T.R.C.P. 28; Bailey v. Vanscot Concrete Company, 894 S.W.2d 757, 759 (Tex. 1995)—T.R.C.P. 28 allows plaintiff to sue obvious entity and prevents defendant from “laying behind the log” of assumed name; see generally Ch. 12, Pleading the Parties]. The filing of a petition using the assumed or common name of the defendant or defendants satisfies the statute of limitation as to these defendants [see Northwest Sign Company v. Jack H. Brown & Company, Inc., 680 S.W.2d 808, 809 (Tex. 1984)—per curiam; Howell v. Coca-Cola Bottling Co. of Lubbock, 595 S.W.2d 208, 211 (Civ. App.—Amarillo 1980), ref. n.r.e. per curiam, 599 S.W.2d 801 (Tex. 1980)]. Civil Procedure Rule 28 is not a tolling provision that extends the statute of limitation. Instead, it allows suit directly against the correct party in its assumed name. The statute of limitation is met when the plaintiff files suit against the party in its assumed name within the prescribed time, even though the plaintiff has used the assumed name rather than the actual name of the person or entity. Because Rule 28 is not a tolling provision, it applies to medical malpractice actions despite the statute of limitation provision of the Medical Liability Act which, by its terms, limits the time for bringing medical malpractice actions “notwithstanding other law” [Chilkewitz v. Hyson, M.D., P.A., — S.W.3d —, 43 Sup. Ct. J. 52, 54–55 (Tex. 1999)—disapproving contrary language in Bailey v. Vanscot Concrete Co., 894 S.W.2d 757 (Tex. 1995) and other cases; see generally Ch. 321, Medical Malpractice].

For example, when suit was brought against “Lester L. Munson d/b/a Naco Brake and Alignment,” the statute of limitation was satisfied. There was no obstacle when, after the limitation period expired, the plaintiffs amended their petition to add “L.L.M., Inc. d/b/a Naco Brake and Alignment” as a defendant. The fact that the initial petition had included the assumed name of “Naco Brake and Alignment” satisfied the statute as to all defendants doing business under that assumed name [L.L.M. v. Mayes, 733 S.W.2d 642, 644–645 (Tex. App.—San Antonio 1987, no writ)].

Under the practice of suing a defendant in its assumed name, the correct party is still entitled to actual notice of the suit. Thus, if the petition names “Rubus Realty d/b/a Furr’s Food Stores” as the defendant, the plaintiff must serve the actual company operating Furr’s Food Stores, or at least serve a closely related entity so that the proper defendant receives actual notice. If the plaintiff serves Rubus Realty and this is not the entity operating Furr’s Food Stores, the plaintiff has sued an existing corporation that turned out to be the wrong defendant, and Civil Procedure Rule 28 does not toll the statute of limitation with respect to the true defendant [see Hernandez v. Furr’s Supermarkets, Inc., 924 S.W.2d 193, 196 (Tex. App.—El Paso 1996, den.).]
It should be noted that although Civil Procedure Rule 28 is broad enough to allow suit to be brought by or against unincorporated associations as if they were legal entities, the procedural rule does not affect substantive rights by imposing liability on unincorporated associations when none exists under the substantive law [see Cox v. Thee Evergreen Church, 836 S.W.2d 167, 171 (Tex. 1992)].

[g]—Effect of Improper Service on Proper Defendant

The relation-back doctrine applies to toll the statute of limitation when the proper party is sued within the limitations period but is not served correctly until after the limitations period expires [Peek v. DeBerry, 871 S.W.2d 520, 521–522 (Tex. App.—San Antonio 1994, den.)]. Nevertheless, the correct defendant must not have been misled and must have had the opportunity to defend the suit before the statute of limitation runs. Thus, when there is no suggestion that the correct defendant was misled by improper service, service on the correct defendant relates back to the filing of the suit [Peek v. DeBerry, 871 S.W.2d 520, 521–522 (Tex. App.—San Antonio 1994, den.)—correct defendant answered suit within limitations period and was represented in all proceedings affecting case].

[2]—Computing Deadline for Filing Suit

[a]—Omit Date of Accrual

In computing the time within which a suit must be brought for limitations purposes, the date the cause of action accrues should be excluded, and the last day of the period should be included [T.R.C.P. 4]. A year is defined as a calendar year. To illustrate, if a cause of action accrues on a given date and is governed by the two-year statute of limitation, the cause must be filed on or before the same date two years later. In one case, for example, the cause of action accrued on February 6, 1993, and was required to be filed on or before February 6, 1995. Because the suit was not filed until February 7, 1995, it was barred by the two-year statute [Fisher v. Westmont Hospitality, 935 S.W.2d 222, 224–226 (Tex. App.—Houston [14th Dist.] 1996, ——); see also Texas & P. Ry. Co. v. Moore, 43 S.W. 67, 68 (Civ. App. 1897, ref.); Ellis v. Heidrick, 154 S.W.2d 293, 294 (Civ. App.—San Antonio 1941, ref. w.o.m.)—action for conversion accruing on September 4, 1935, filed on September 4, 1937, was filed within two-year limitation period; but see Hughes v. Autry, 874 S.W.2d 887, 890 (Tex. App.—Austin 1994, no writ)—when notice was given on November 13, 1989, action required to be brought within three months of notice was timely when filed on February 14, 1990].

This method of calculation of limitation periods may have unexpected consequences when attempting to interpret the statutory ban on agreements
voluntarily shortening limitation periods to less than two years [see T.R.C.P. 4; C.P.R.C. § 16.071; see also § 72.02[11]]. For example, an agreement that purported to shorten the limitation period for covered claims to a period of two years including the day of accrual violated this statutory ban [Safeway Stores, Inc. v. Certainteed Corp., 687 S.W.2d 22, 25 (Tex. App.—Dallas 1984), rev’d on other grounds, 710 S.W.2d 544 (Tex. 1986)].

[b]—Saturday, Sunday, or Holiday

When the last day for filing a cause of action falls on a Saturday, Sunday, or holiday, the limitation period is extended to include the next day that the county offices are open for business [C.P.R.C. § 16.072]. Therefore, when the last day for filing a cause of action under a two-year limitation period fell on Thanksgiving Day, and a suit alleging that cause of action was filed the Monday following Thanksgiving, the next day that the offices of the county were open for business, the suit was timely filed [Harper v. American Motors Corp., 672 S.W.2d 44, 44–45 (Tex. App.—Houston [14th Dist.] 1984, no writ)].

The statute is not limited in application to legal holidays. It applies in cases in which the commissioners court in a county in which a case should be filed has ordered the courthouse closed. It may also apply in other instances in which the county offices are not open for business [see Martinez v. Windsor Park Development Co., 833 S.W.2d 950, 951 (Tex. 1992)].

The statute extending the limitation period in cases in which the last day for filing falls on a Saturday, Sunday, or holiday may not apply to all statutes of limitation. In the case of worker’s compensation claims, for example, the extension is inapplicable. The courts have held that the Worker’s Compensation Act has its own provisions dealing with such extensions [see Green v. Texas Employment Com’n, 675 S.W.2d 809, 811 (Tex. App.—El Paso 1984, ref. n.r.e.)—discussing pre-1991 Worker’s Compensation Act].

[c]—Suit Filed When Mailed

Suit is “filed” when the plaintiff mails the petition to the district clerk, rather than when the petition is received by the clerk [Danesh v. Houston Health Clubs, Inc., 859 S.W.2d 535, 536–537 (Tex. App.—Houston [1st Dist.] 1993, ref.)]. In Danesh, a personal injury suit, the court concluded that Civil Procedure Rule 5, which deems a document filed when mailed on or before the last day for filing if it is received not more than 10 days late, defines when suit is filed for limitations purposes.

[3]—Amended Pleadings

[a]—Relation-Back Rule

An original pleading tolls the limitation period for claims asserted in subsequent, amended pleadings as long as the amended pleading does not
allege a wholly new, distinct, or different transaction. The subsequent pleading “relates back” to, and is considered as having been filed at the time of the initial pleading, at least for limitations purposes [see C.P.R.C. § 16.068; Stevenson v. Koutzarov, 795 S.W.2d 313, 319 (Tex. App.—Houston [1st Dist.] 1990, den.); Meisler v. Republic of Texas Sav. Ass’n, 758 S.W.2d 878, 881–882 (Tex. App.—Houston [14th Dist.] 1988, no writ)].

[b]—When Rule Applies

The test of whether the early pleading will “relate back” is whether the cause of action in the amended pleading is based on and grows out of the previously alleged transaction or occurrence or a new and distinct or different transaction and occurrence [Ex parte Goad, 690 S.W.2d 894, 896 (Tex. 1985); Leonard v. Texaco, Inc., 422 S.W.2d 160, 163 (Tex. 1967)]. Applying this test, an amended claim for quantum meruit brought nine years after an original claim based on an oral contract was not barred by limitations. The new claim did not grow out of a new, distinct, or different transaction or occurrence [Williams v. Roberts, 621 S.W.2d 427, 428–429 (Civ. App.—San Antonio 1981, no writ)]. Similarly, a claim in tort for damages sustained because of the defendant’s seismic operations that was filed within the limitation period permitted the filing of a post-limitation period amendment asserting a claim for the same damages based on a contractual promise to pay them [Leonard v. Texaco, Inc., 422 S.W.2d 160, 163–164 (Tex. 1967)]. Likewise, an amended petition that described a separate tract of real property from the tract described in the original pleading was not barred by limitations because the amendment did not relate to a new and distinct or different transaction. The original and amended petition were both suits to remove the same cloud on the plaintiff’s title to real property [Stone v. Brown, 621 S.W.2d 182, 183–184 (Civ. App.—Texarkana 1981, ref. n.r.e.)]. An action for negligence and breach of contract arising out of an employer’s failure to pay benefits under a self-insurance program that was filed within the limitations period permitted the filing of a post-limitation period amendment asserting a breach of the duty of good faith and fair dealing [E-Z Mart Stores, Inc. v. Hale, 883 S.W.2d 695, 700–701 (Tex. App.—Texarkana 1994, no writ)]. Finally, an amendment asserting a claim for negligent entrustment of a motor vehicle presented no limitations problem because it grew out of the same transaction or occurrence as a previously pleaded claim for negligent operation of the vehicle. Both claims arose from the same automobile collision [Ramos v. Levingston, 536 S.W.2d 273, 275 (Civ. App.—Corpus Christi 1976, no writ)].

On the other hand, a claim for damages in connection with postoperative negligence could not be asserted by way of post-limitation period amendment. The court of appeals considered the claim of postoperative negligence to be a wholly different transaction from the previously pleaded claim for negligent
conduct in the performance of the operation itself [Harris v. Galveston County, 799 S.W.2d 766, 769 (Tex. App.—Houston [14th Dist.] 1990, no writ)].

[c]—Amended Counterclaims and Cross-Claims

The rule that an amendment asserting matters from the same transaction or occurrence “relates back” to, and is considered as filed, for limitations purposes, at the time of filing of the initial pleading, also applies to amended counterclaims and cross-claims [C.P.R.C. § 16.068; see also [4], below]. On the other hand, relation back does not apply to a defendant’s answer that does not contain a counterclaim or a cross-action. For example, in one case, the answer was a general denial with no mention of a counterclaim. The court of appeals held that a subsequent amendment adding a counterclaim to the answer did not relate back to the time of the original answer [Flukinger v. Straughan, 795 S.W.2d 779, 787 (Tex. App.—Houston [14th Dist.] 1990, den.)].

[d]—Amendments Affecting Parties

An amended pleading adding a party ordinarily does not relate back to the original pleading [see Kirkpatrick v. Harris, 716 S.W.2d 124, 125 (Tex. App.—Dallas 1986, no writ); see also Chien v. Chen, 759 S.W.2d 484, 492 (Tex. App.—Austin 1988, no writ)— C.P.R.C. 16.069 does not purport to deal with amendments that add or drop parties, so that rules developed under common law were not altered by enactment of statute]. When a defendant is added to a suit by an amended pleading, the statute of limitation is applied with respect to that defendant as of the time the defendant is brought into the suit [Leeds v. Cooley, 702 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, ref. n.r.e.); Ramos v. Levingston, 536 S.W.2d 273, 275–276 (Tex. Civ. App.—Corpus Christi 1976, no writ)]. In the same way, if an amended petition names additional plaintiffs, the viability of their claims must be determined as of the date of the amendment [Koch Oil Co. v. Wilber, 895 S.W.2d 854, 863 (Tex. App.—Beaumont 1995, den.)].

However, the relation-back doctrine applies when correctly named defendants are sued in an improper capacity, or when proper defendants are improperly named. In these situations, the pleadings may be amended to correct the defect after the statute of limitation has run [Stokes v. Beaumont, Sour Lake & Western Railway Co., 161 Tex. 240, 339 S.W.2d 877, 877–878 (1960)—however, suit against corporate defendants that could not be liable did not stop running of statute with respect to different defendant; see also Chien v. Chen, 759 S.W.2d 484, 493 (Tex. App.—Austin 1988, no writ)].

Ordinarily, omission of a party from an amended petition dismisses that party. If the petition is later amended again to rejoin a defendant who has been dismissed, this is treated as a new action against the defendant and the statute
of limitation must be determined as of the time of the amendment rejoining the dismissed defendant [Chamberlain v. McReight, 713 S.W.2d 372, 374 (Tex. App.—Beaumont 1986, ref. n.r.e.); Evans v. Hoag, 711 S.W.2d 744, 746 (Tex. App.—Houston [14th Dist.] 1986, ref. n.r.e.)]. In some cases, however, a claim may be considered to relate back to the time of the original pleading for purposes of limitations if the omission is due to excusable inadvertence or mistake, and the defendant at all times has fair notice of the claims and is not prejudiced by the omission and rejoinder. This principle was applied by the Texas Supreme Court in a case in which a plaintiff was named in the first, second, and third amended petitions, omitted from the fourth, and then renamed 37 days later in the fifth. The relevant defendants were named in all of the amended petitions so that they had fair notice of the claims against them at all times. Thus, under the relation-back doctrine, the plaintiff’s claims related back to the original pleading and were not time barred [American Petrofina, Inc. v. Allen, 887 S.W.2d 829, 831 (Tex. 1994)].

[e]—Amendments to Medical Malpractice Pleadings

The rule governing when amendments do and do not relate back to the time of filing of the initial pleading [see C.P.R.C. § 16.068] has been applied to medical malpractice actions. Two cases have held that a timely filed malpractice action may be amended, on the death of the alleged malpractice victim, to assert claims for wrongful death by the statutory beneficiaries of the alleged victim [see Bradley v. Etessam, 703 S.W.2d 237, 240–242 (Tex. App.—Dallas 1985, ref. n.r.e.); Bradley v. Burnett, 687 S.W.2d 53, 54–55 (Tex. App.—Dallas 1985, no writ)]. Reliance on relation back principles may be unnecessary when a patient’s death gives rise to wrongful death claims. The wrongful death claims of the statutory beneficiaries are, in essence, entirely new causes of action that arise on the death of the alleged victim and that may be governed by their own statute of limitation [see C.P.R.C. § 16.003(b); Wilson v. Rudd, 814 S.W.2d 818, 822 (Tex. App.—Houston [14th Dist.] 1991, no writ)]. Under this reasoning, as long as the underlying claim of the victim was not barred by limitations at the time of his or her death, the derivative wrongful death claim would also not be barred until two years after the decedent’s death [see Davenport v. Phillip Morris, Inc., 761 S.W.2d 70, 71–72 (Tex. App.—Houston [14th Dist.] 1988, no writ)]. There would be no need to relate a wrongful death claim back to the date that the plaintiffs’ decedent in the wrongful death action filed his or her own claim.

[4]—Counterclaims and Cross-Claims

[a]—Relation-Back Rule

The filing of the plaintiff’s petition does not automatically toll the limitation period for any counterclaims or cross-claims raised by defendants [see Finger
v. Morris, 468 S.W.2d 572, 579–580 (Civ. App.—Houston [14th Dist.] 1971, ref. n.r.e.)]. However, a counterclaim or cross-claim otherwise barred by limitations may be asserted if it arises out of the same transaction or occurrence that is the basis of plaintiff’s claim as set out in the petition [C.P.R.C. § 16.069(a); see Hobbs Trailers v. J.T. Arnett Grain Co., Inc., 560 S.W.2d 85, 88 (Tex. 1977); Lyles v. Johnson, 585 S.W.2d 778, 783 (Civ. App.—Houston [1st Dist.] 1979, ref. n.r.e.)]. Because the rule expressly mentions cross-claims as well as counterclaims, at least one court of appeals has applied the rule to a third-party claim. The Waco Court of Appeals permitted a party to file a claim against a third party within 30 days of the defendant’s answer day, asserting that its conduct was the sole cause of the collision giving rise to the litigation, even though the claim would have been barred if asserted as an original claim [see Smith v. Lone Star Cadillac, Inc., 470 S.W.2d 791, 792 (Civ. App.—Waco 1971, no writ)]. Counsel should note, however, that this decision appears to be based on a technical misinterpretation of the term cross-claim, as it is defined in the Texas Rules of Civil Procedure [see T.R.C.P. 97(e)].

The rationale for the relation-back rule is that it prevents a plaintiff from waiting until the limitation period on an adversary’s claim expires before the plaintiff asserts a own claim. Thus, the rule does not apply if the claim is considered to be a counterclaim only because the parties were realigned after the claim in question was originally asserted in a petition [Hobbs Trailers v. J.T. Arnett Grain Co., Inc., 560 S.W.2d 85, 88–89 (Tex. 1977)].

[b]—30-Day Requirement

To take advantage of the relation-back rule for cross-claims and counterclaims, the cross-claim or counterclaim in question must be asserted within 30 days after the date the counterclaimant’s or cross-claimant’s answer is due [C.P.R.C. § 16.069(b)]. Of course, if a counterclaim or a cross-claim is asserted within the applicable limitation period, the counterclaim or cross-claim is timely and not subject to a challenge on the basis of limitations, regardless of when it is filed in relation to the petition [see Williams v. Khalaf, 802 S.W.2d 651, 653 (Tex. 1990)—counterclaim for fraud asserted within four years of accrual of cause of action not barred by limitations].

[c]—When Rule Applies

The relation-back rule is frequently difficult to apply because the reasoning used to determine whether the counterclaim or cross-claim arises from the same transaction or occurrence as set out in the petition is both technical and difficult to master. For example, in an action for malicious prosecution, the claims that allegedly had been maliciously prosecuted in the prior litigation could not be set out by counterclaim because they did not arise out of the same transaction or occurrence as the claims in the malicious prosecution.
petition. The court of appeals determined that a malicious prosecution arises from a party's wrongful conduct and not from the underlying transaction or occurrence [see Leasure v. Peat, Marwick, Mitchell & Co., 722 S.W.2d 37, 39 (Tex. App.—Houston [1st Dist.] 1986, no writ)].

In contrast, a breach of contract claim based on a contract for the sale of land entered into at the same time as a promissory note was executed by the purchaser in connection with the purchase was not time-barred and was permitted to be asserted as a counterclaim to an action on the promissory note [North American Land Corp. v. Boutte, 604 S.W.2d 245, 246–247 (Civ. App.—Houston [14th Dist.] 1980, ref. n.r.e.).] Similarly, when a petition sought to remove a cloud on title and cancel a mechanic's lien, a counterclaim seeking a setoff for the goods and services that gave rise to the lien was considered a counterclaim that arose from the same transaction and was not time-barred [Joseph v. PPG Industries, Inc., 674 S.W.2d 862, 866 (Tex. App.—Austin 1984, ref. n.r.e.)].

In one case, a husband filed for divorce in 1988 and argued that because the couple had previously been legally divorced in New Mexico in 1979, he was entitled to all property acquired from that time until the time of the couple's move to Texas in 1987. The wife counterclaimed and contended that the 1979 divorce decree was obtained through fraud, misrepresentation, and breach of fiduciary duties. She sought damages equal to what would have been her share of community property absent the “secret divorce.” The jury found that the husband had defrauded the wife as to their status, and in response to another question, but also found that the wife, using ordinary diligence, could have learned of the divorce decree on the date it was entered. Nonetheless, the Texas Supreme Court held that the statute of limitation did not bar the wife's counterclaim for fraud and ruled that the jury's finding as to when the wife could have or should have discovered the 1979 divorce was immaterial. The Court explained that the wife's counterclaim was covered by Civil Practice and Remedies Code § 16.069 as a counterclaim that arose out of the same transaction or occurrence as the husband's action. The Court reasoned that the basis of the husband's divorce action was the marital relationship between the parties and the duration of that relationship. The wife's fraud counterclaim also arose out of the facts that determined the duration of that relationship [Oliver v. Oliver, 889 S.W.2d 271, 272–273 (Tex. 1994)—“Disallowing the counterclaim would effectively reward [the husband] for concealing his fraudulent conduct until limitations had expired”].

[d]—Cause of Action Asserted as Defense

If the relation-back rule does not apply to the cause of action that the defendant wants to assert as a counterclaim or if the 30-day period for filing
the counterclaim has elapsed before the counterclaim is filed, it may nevertheless be possible to assert the cause of action defensively if the cause of action “goes to the foundation” of the plaintiff’s claim or demand [Morris-Buick Co. v. Davis, 127 Tex. 41, 91 S.W.2d 313, 314 (1936)—tenant’s barred claim for liquidated damages under lease contract based on landlord’s failure to give possession under terms of lease could not be asserted defensively in response to primary action for unpaid rentals under lease; see also Hobbs Trailers v. J.T. Arnett Grain Co., Inc., 560 S.W.2d 85, 88 (Tex. 1977)—barred breach of warranty claim could not be asserted defensively in response to action for price of goods because warranty claim constituted independent action not going to foundation of plaintiff’s claim]. Much confusion and some conflict has prevailed on the subject of which claims satisfy the requirement of going to the foundation of the plaintiff’s claim [see Finger v. Morris, 468 S.W.2d 572, 579 (Civ. App.—Houston [14th Dist.] 1971, ref. n.r.e.)]. The courts often use cumbersome language in expressing the nature of the connection required [see Mason v. Peterson, 250 S.W.2d 142, 147 (Comm. App. 1923, holding approved); Finger v. Morris, 468 S.W.2d 572, 579 (Civ. App.—Houston [14th Dist.] 1971, ref. n.r.e.); Hobbs Trailers v. J.T. Arnett Grain Co., Inc., 560 S.W.2d 85, 88 (Tex. 1977)].

It appears that a claim must negate an element of the plaintiff’s cause of action before it goes to the foundation of the plaintiff’s claim [see Nelson v. San Antonio Traction Co., 107 Tex. 180, 175 S.W. 434, 435 (1915)]. The requirement that the claim go to the foundation of the plaintiff’s action constitutes a much more stringent requirement than the common-law rule under which a demand arising from the same transaction as the plaintiff’s claim could be asserted defensively in recoupment even though the same claim asserted as an independent cause of action would be barred by limitation [see Bull v. United States, 295 U.S. 247, 262, 55 S. Ct. 695, 79 L. Ed. 1421 (1935); cf. Morris-Buick Co. v. Davis, 127 Tex. 41, 91 S.W.2d 313, 314 (1936)—to extent remedy of recoupment has been expanded and applied in some jurisdictions, remedy has no place in jurisprudence of Texas].

Several courts have concluded that the common-law doctrine of recoupment, including the aspect of that doctrine concerning the defendant’s ability to assert the claim defensively despite the bar of limitation, applies in Texas [see Brown v. U.S. Life Credit Corp., 602 S.W.2d 94, 96 (Civ. App.—Fort Worth 1980, no writ)—counterclaim asserting violation of Truth in Lending Act was recoupment, not barred by limitations even though same claim would have been barred if asserted as independent action; Garza v. Allied Finance Co., 566 S.W.2d 57, 62–63 (Civ. App.—Corpus Christi 1978, no writ)—same holding; cf. Callaway v. East Tex. Government Credit Union, 619 S.W.2d 411, 416 (Civ. App.—Tyler 1981, ref. n.r.e.)—statutory cause of action based on Truth in Lending Act violation is independent cause of action that does not
go to foundation of plaintiff’s suit on note]. Following the appeal in Garza, the case was remanded for a determination of the attorney’s fees in excess of the amount of the plaintiff creditor’s judgment that had not already been offset by the defendants’ recoupment. Among the questions raised on the second appeal were (1) whether this award should have been offset against the outstanding balance of the creditor’s judgment not otherwise offset, and (2) whether the judgment represented an affirmative recovery that was barred by the statute of limitation. The court held that, because the recovery of attorney’s fees is vital to the effectiveness of the Truth in Lending Act, attorney’s fees awarded under that Act are recoverable regardless of the statute of limitation or the amount of the underlying debt. In addition, the court of appeals held that attorney’s fee award may not be offset by the amount of the creditor’s recovery, if any, on the underlying debt [Allied Finance Co. v. Garza, 626 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1981, ref. n.r.e.)].

Another defensive plea is frequently attempted in order to save a barred claim. This plea, denominated a plea of setoff, was recognized by the fourth Congress of the Republic in 1840 and has been carried forward into the current rules of civil procedure [see McKnight, Spanish Influence on the Texas Law, 38 Tex. L. Rev. 24, 34–36 (1959); T.R.C.P. 97(g)]. Early Texas case authority appears to follow the common-law rule that a cause of action that may be asserted by a plea of setoff is not barred even though it would be barred if asserted as an independent action [see Nelson v. San Antonio Traction Co., 107 Tex. 180, 175 S.W. 434, 436 (1915); see also Holliman v. Rogers, 6 Tex. 91, 98–99 (1851)]. However, the plea of setoff has been considered available only in the case of mutual debts or liquidated money demands [see Alley v. Bessemer Gas Engine Co., 228 S.W. 963, 966 (Civ. App.—Amarillo 1921, dis.)]. It is not entirely clear that the early case law recognizing the defensive use of a plea by setoff despite the bar of limitation has survived the line of cases discussed above concerning the requirement that the defensive claim go to the foundation of the plaintiff’s claim [see Morriss-Buick Co. v. Davis, 127 Tex. 41, 91 S.W.2d 313, 314 (1936)]. Some appellate opinions have assumed that the plea is an independent action that does not go to the foundation of the plaintiff’s claim [see Hemmigan v. Heights Sav. Ass’n, 576 S.W.2d 126, 130 (Civ. App.—Houston [1st Dist.] 1979, ref. n.r.e.)]. Others have suggested that when setoff is a right, rather than a mere remedy, it will not be barred by limitation [I.O.I. Systems, Inc. v. Cleveland, Tex., 615 S.W.2d 786, 791 (Civ. App.—Houston [1st Dist.] 1980, ref. n.r.e.); see Christian v. First Nat’l Bank of Weatherford, 531 S.W.2d 832, 837–838 (Civ. App.—Fort Worth 1975, ref. n.r.e.)]. While this latter reasoning is somewhat difficult to grasp, onecase has explained that mutual accounts extinguish each other pro tanto as a matter of right whenever the plaintiff declares on the demand [see Shaw v. Faires, 165 S.W. 501, 504 (Civ. App.—Dallas 1914, no writ); see also Holliman v. Rogers,
6 Tex. 91, 98 (1851)—could be construed to limit idea to running accounts between merchants]. Under that reasoning, the plea of setoff could be said to go to the foundation of the plaintiff’s claim by definition, allowing it to escape the bar of limitation.

[e]—Application in Medical Malpractice Cases

This special relation-back rule for counterclaims and cross-claims does not apply in medical malpractice cases. It has been applied in some statutory causes of action governed by their own, exclusive statute of limitation. For example, the relation-back rule has been applied to Deceptive Trade Practices Act claims [see ECC Parkway Joint Venture v. Baldwin, 765 S.W.2d 504, 514 (Tex. App.—Dallas 1989, den.)]. However, because the medical malpractice claims are governed by a special statute of limitation that applies “[n]otwithstanding any other law” [see §§ 72.02[1][c], 72.04[8]], the relation-back rule and Civil Practice and Remedies Code Section 16.069 has been held inapplicable to counterclaims and cross-claims attempting to assert medical malpractice claims [see De Los Santos v. S.W. Texas Meth. Hosp., 802 S.W.2d 749, 756 (Tex. App.—San Antonio 1990, no writ)].

§ 72.06 Revival by Acknowledgment

Acknowledgment of a claim by a debtor does not, by itself, operate to revive a claim barred by limitations. However, if the barred claim is acknowledged in a writing that is signed by the debtor, the limitation period starts to run on the new debt [see C.P.R.C. § 16.065; House of Falcon, Inc. v. Gonzalez, 583 S.W.2d 902, 905 (Civ. App.—Corpus Christi 1979, no writ); Allied Chemical Corp. v. Koonce, 548 S.W.2d 80, 81–82 (Civ. App.—Houston [1st Dist.] 1977, no writ)]. Such a written acknowledgment gives rise to a new claim separate from the old debt, and the moral obligation to pay is sufficient consideration for the new promise [Simpson v. Williams Rural High School Dist., 153 S.W.2d 852, 855 (Civ. App.—Amarillo 1941, ref.); see also Matherne v. Carre, 7 S.W.3d 903, 907 (Tex. App.—Beaumont 1999, no pet. h.)—doctrine proceeds from law relating to statute of limitation, not res judicata or judicial estoppel, even if acknowledgement is made in judicial proceeding].

The acknowledgment must evidence a willingness to pay [see e.g., Matherne v. Carre, 7 S.W.3d 903, 907 (Tex. App.—Beaumont 1999, no pet. h.)—acknowledgment in inventory and appraisal in divorce action revived debt owed by husband to mother-in-law because it included implied promise to pay]. If the acknowledgment is unequivocal, the promise to pay is implied [Mercantile Nat. Bank v. Acoustics, Inc., 589 S.W.2d 773, 775–776 (Civ. App.—Eastland 1979, no writ)]. Likewise, a promise to pay may be inferred from a writing requesting forbearance on collection of the debt [see Hanley v. Oil Capital
§ 72.07 Governmental Immunity to Limitations

Governmental entities are exempt from many of the limitation periods contained in the Texas Civil Practice and Remedies Code [see C.P.R.C. § 16.061]. For example, the two-year statute of limitation did not bar a city from maintaining a suit for fraud and for breach of statutory duties against the trustees and director of a water district [City of Port Arthur v. Tillman, 398 S.W.2d 750, 751–752 (Tex. 1965), appeal dismissed, 384 U.S. 315 (1966); see also City of El Paso v. Del Norte Golf, Etc., 614 S.W.2d 168, 169–170 (Civ. App.—El Paso 1980, ref. n.r.e.)—claim by city for past due rents not barred by statute]. Section 16.061 provides that it applies to a right of action of (1) this state, (2) a county, (3) an incorporated city or town, (4) a navigation district, (5) a port authority, (6) an entity acting under Transportation Code Section 54.001 et seq. (former Article 1187f, Revised Civil Statutes), or (7) a school district [C.P.R.C. § 16.061(a); see also C.P.R.C. § 16.061(b)—definitions; Trans. C. § 54.001 et seq.—formerly R.C.S. Art. 1187f]. The Texas Supreme Court has held that a political subdivision having only local or limited jurisdiction is not afforded protection by the term “state” in Section 16.061. The term “state” includes only those entities having statewide jurisdiction. Therefore, the Court held that Section 16.061 does not apply to municipal utility districts [Monsanto v. Cornerstones Mun. Utility, 865 S.W.2d 937, 939–941 (Tex. 1993)]. It should be noted that Civil Practice and Remedies Code Sections 16.008 through 16.011 are not encompassed within the statutory provision exempting governmental entities from limitations. Thus, government entities
are not exempt from the effect of these statutes of repose [Johnson v. City of Fort Worth, 774 S.W.2d 653, 654–655 (Tex. 1989)—per curiam; see § 72.02[8]].

An individual may not succeed to the government’s right to bring suit unfettered by the statutes of limitation [Weaver v. City of Sunset Valley, 535 S.W.2d 12, 13–14 (Civ. App.—Austin 1976, no writ)]. However, if a governmental entity succeeds to an individual’s claim, the limitation period will cease to run. The government is free of limitations in succeeding to an individual’s claim so long as the government obtains the claim prior to the expiration of the limitation period against the individual. For example, a mother assigned her child’s right to receive child support to the Texas Department of Human Resources when that claim was over four years old. Because the state’s right to claim child support is derived from the right of the child (to the extent the state provides support to the child), the court of appeals held that the defendant had the right to assert limitations even against the state [Texas Dept. of Human Resources v. Delley, 581 S.W.2d 519, 520 (Civ. App.—Dallas 1979, ref. n.r.e.)].

The disparate treatment of governmental entities does not violate equal protection. The Texas Supreme Court has held that the exemption from the statutes of limitation does not create an unreasonable classification so as to be unconstitutional [City of Port Arthur v. Tillman, 398 S.W.2d 750, 753 (Tex. 1965), appeal dismissed, 384 U.S. 315 (1966)].

§ 72.08 Effect of Amendment of Statutes of Limitation

The legislature may not revive a time-barred cause of action by amending a statute of limitation to provide for a longer limitation period. Once the claim is barred, the right to rely on the statute of limitation is vested [Continental Southern Lines, Inc. v. Hilland, 528 S.W.2d 828, 830 (Tex. 1975); Southern Pacific Transport Company v. State, 380 S.W.2d 123, 127 (Civ. App.—Houston 1964, ref.); Mann v. Jack Roach Bissonnet, Inc., 623 S.W.2d 716, 718–719 (Civ. App.—Houston [1st Dist.] 1981, no writ); see also Tex. Const. Art. 1 § 16]. Amendments to statutes of limitation apply prospectively only, unless the legislature clearly indicates otherwise [Doran v. Compton, 645 F.2d 440, 446–447 (5th Cir. [Tex.] 1981)].

If the limitation period is lengthened by the legislature before the existing limitation period expires, the defendant’s right to assert the limitations defense has not vested. Consequently, the longer limitation period applies to the claim [Coffey v. Young, 704 S.W.2d 591, 593–594 (Tex. App.—Fort Worth 1986, no writ)].

The legislature may also shorten the limitation period. However, the legislature must allow claimants a reasonable time after the law goes into effect in which to bring suit on accrued causes of action [Wallace v. Homan & Crimen,
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Inc., 584 S.W.2d 322, 323–324 (Civ. App.—El Paso 1979, ref. n.r.e.); Gonzales v. Gonzales, 728 S.W.2d 446, 447 (Tex. App.—San Antonio 1987, no writ); see also Odum v. Garner, 86 Tex. 374, 25 S.W. 18, 19 (1894)—on substitution of new term of limitation, time elapsed under former law is counted in ratio it bears to whole period, and time under new law is computed on basis of ratio that unexpired term under old law bears to whole time].

§ 72.09  Burden of Pleading and Proof

[1]—Defendant’s Burden to Raise Affirmative Defense

The defense that a claim is barred by the statute of limitation is an “affirmative defense” that the defendant must plead affirmatively [T.R.C.P. 94]. If the defense is not raised affirmatively by the defendant, it is waived [see United Transp. Union v. Brown, 694 S.W.2d 630, 634 (Tex. App.—Texarkana 1985, ref. n.r.e.); Wenzel v. Rollins Motor Co., 598 S.W.2d 895, 902 (Civ. App.—El Paso 1980, ref. n.r.e.); see also Mytel Intern., Inc. v. Turbo Refrigerating, 689 S.W.2d 315, 318 (Tex. App.—Fort Worth 1985, no writ)—waiver by failure to submit defense to jury]. The defense may not be raised for the first time on appeal [Naficy v. Braker, 642 S.W.2d 282, 284 (Tex. App.—Houston [14th Dist.] 1982, ref. n.r.e.)].

The limitations defense may be raised by special exception. When the claimant’s pleading affirmatively alleges facts that demonstrate the suit is time-barred, an exception may be used to test the pleadings [Wynn v. Wynn, 587 S.W.2d 790, 792 (Civ. App.—Corpus Christi 1979, no writ)]. When limitations is raised by this procedure, however, the claimant should be given the opportunity to amend the pleading to set out facts that would suspend the limitation period or otherwise avoid the operation of the statute [see Maher v. Gonzalez, 380 S.W.2d 764, 765 (Civ. App.—San Antonio 1964, no writ); see also Ch. 70, Answer].

[2]—Plaintiff’s Burden to Raise Matters in Avoidance of Limitations Defenses

Once the defendant has sufficiently raised the limitations defense, by pleading it and pointing out when the cause of action arose [see Hoffman v. Wall, 602 S.W.2d 324, 326 (Civ. App.—Texarkana 1980, ref. n.r.e.); Naylor v. Gutteridge, 430 S.W.2d 726, 734 (Civ. App.—Austin 1968, ref. n.r.e.)], the burden shifts to the plaintiff. To avoid the bar of limitations, the plaintiff must plead and prove facts avoiding the operation of the statute of limitation or suspending the running of the limitation period [Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988); Weaver v. Witt, 561 S.W.2d 792, 793 (Tex. 1977)—fraudulent concealment; Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 879–881 (1962)—defendant’s absence from state]. Accordingly, the burden is on
the plaintiff to plead and prove the discovery rule [see § 72.03[3]] and fraudulent concealment [see § 72.04]. The same burdens of pleading and proof probably apply to other tolling doctrines interposed by plaintiffs to avoid the bar of limitations such as fraudulent concealment [see § 72.04[1]], minority of the plaintiff [see § 72.04[2][a]], the plaintiff’s unsoundness of mind [see § 72.04[2][b]], the death of the claimant [see § 72.04[3]], military service [see § 72.04[4]], the defendant’s absence from the state [see § 72.04[5]], and dismissal of an earlier suit for lack of jurisdiction [see § 72.04[7]]. As with affirmative defenses themselves, these defenses to affirmative defenses are considered matters in avoidance. If the plaintiff fails to plead and prove a ground for avoidance or suspension of the bar, that ground will be waived [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517–518 (Tex. 1988); see Wise v. Anderson, 163 Tex. 608, 359 S.W.2d 876, 879–881 (1962)].

The rule permitting limitations to be tolled when the wrong defendant is sued and there is a business relationship between that defendant and the proper defendant [see § 72.05[1][d]] is also classified as a matter in avoidance. Therefore, the burden to both plead and prove facts in avoidance of this limitations defense is on the plaintiff [Toro v. First City Bank-Westheimer Plaza, 821 S.W.2d 633, 635–636 (Tex. App.—Houston [1st Dist.] 1991, den.)].

[3]—Burdens of Proof on Motion for Summary Judgment

In a summary judgment proceeding, the movant has the burden on all issues, including, if necessary, negating the applicability of tolling provisions or the discovery rule [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988); Zale Corporation v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975)—per curiam; Ardila v. Saavedra, 808 S.W.2d 645, 646–647 (Tex. App.—Corpus Christi 1991, no writ); A. C. Collins Ford v. Ford Motor Co., 807 S.W.2d 755, 759 (Tex. App.—El Paso 1990, den.); see also Ch. 101, Summary Judgment].

The fraudulent concealment defense to limitations [see § 72.04[1]] is an exception to the normal summary judgment rules. Even in the summary judgment context, the plaintiff retains the burden of pleading and raising a fact issue to support a claim of fraudulent concealment, even if the plaintiff is not the moving party [Nichols v. Smith, 507 S.W.2d 518, 520–521 (Tex. 1974)]. In this connection, the Texas Supreme Court has made it clear that a mere pleading or a response to the summary judgment motion does not satisfy the burden of coming forward with sufficient evidence of fraudulent concealment to prevent summary judgment [American Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994)—plaintiffs failed to defeat limitations defense].
PART II. PROCEDURAL GUIDE

§ 72.50 Timing of Petition

1. Gather factual details regarding nature of cause of action and timing of events.

2. Categorize all potential claims by nature of action and determine limitation period, such as:

   a. Claims against architects, engineers, surveyors, and persons constructing or repairing improvements—10 years [C.P.R.C. §§ 16.008–16.011; see § 72.02[8]].

   b. Bond claims on bonds of executor, administrator, or guardian—four years [C.P.R.C. § 16.004(b); see § 72.02[5]].

   c. Breach of promise to marry—one year [C.P.R.C. § 16.002; see § 72.02[1][d]].

   d. Civil conspiracy—two years [see C.P.R.C. § 16.003; 72.02[1][a]].

   e. Contract—four years [see C.P.R.C. § 16.004(a)(1); see also § 72.02[2]].

   f. Debt collection actions—four years [C.P.R.C. § 16.004(a)(3); § 72.02[4]].

   g. Defamation—one year [C.P.R.C. § 16.002; see § 72.02[1][d]].

   h. DTPA—two years [Bus. & Com. C. § 17.565; see § 72.02[7]].

   i. Fraud or breach of fiduciary duty (constructive fraud)—four years [C.P.R.C. § 16.004(a)(4), (5); see § 72.02[1][b]].

   j. Good faith and fair dealing—two years [see C.P.R.C. § 16.003].

   k. Infliction of emotional distress—two years [see C.P.R.C. § 16.003; see Ch. 337, Infliction of Emotional Distress].

   l. Invasion of privacy—two years [see C.P.R.C. § 16.003; § 72.02[1][a]].

   m. Legal malpractice—two years [see C.P.R.C. § 16.003].

   n. Malicious prosecution—one year [C.P.R.C. § 16.002; see § 72.02[1][d]].

   o. Medical Malpractice—two years [R.C.S. Art. 4590i § 10.01; see § 72.02[1][c]].

   p. Negligence—two years [see C.P.R.C. § 16.003].
(q) Partnership actions for settlement of partnership—four years [C.P.R.C. § 16.004(c); see § 72.02[6]].

(r) Specific performance of contract for conveyance of real property—four years [C.P.R.C. § 16.004(a)(1); see § 72.02[3]].

(s) Tortious interference with business relationships—two years [see C.P.R.C. § 16.003].

(t) Wrongful death—two years [C.P.R.C. § 16.003(b)].

(3) Determine when limitation period began to run by applying “accrual” rules, such as:

(a) Tort claims generally accrue when either [Atkins v. Crossland, 417 S.W.2d 150, 153 (Tex. 1967); see § 72.03[1][b]]:
   (i) Wrongful act causes injury, if act is wrongful in and of itself.
   (ii) Damages are sustained, if wrongful act is not wrongful in and of itself.

(b) Continuing tort claims accrue when continuous wrongful conduct ceases [see § 72.03[1][c]].

(c) Breach of contract generally accrues when contract is breached [Hurbrough v. Cain, 571 S.W.2d 216, 221 (Civ. App.—Tyler 1978, no writ); see § 72.03[1][d]].

(d) Medical malpractice claim accrues at time of conduct by defendant that constitutes breach of contract or tort, or on last date of treatment if injury occurs in course of series of treatments [R.C.S. Art. 4590i § 10.01; see § 72.03[3][a]].

(e) DTPA claim accrues on date of false, misleading, or deceptive act or practice, or on date claimant discovers or by exercise of reasonable diligence should discover false, misleading, or deceptive act or practice [Bus. & Com. C. § 17.565; see § 72.03[3][b]].

(f) Insurance Code claim accrues on date unfair competition or unfair or deceptive act or practice occurred, or when claimant discovers or, in exercise of reasonable diligence, should discover unfair competition or unfair or deceptive act or practice [see Ins. C. Art. 21.21 § 16(d); see also § 72.03[3][c]].

(g) Will contest claim accrues when will has been admitted to probate, or on date of discovery of any forgery or fraud [Prob. C. § 93; see § 72.03[3][d]].
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(h) Paternity claim must be brought no later than two years from date child becomes adult [Fam. C. § 160.002(a); see § 72.03[3][e]].

(4) Consider whether discovery rule applies to change date of accrual of cause of action, by noting whether:

NOTE: The discovery rule applies to certain tort causes of action and provides that the limitation period commences on the date the nature of the injury was or should have been discovered [see § 72.03[3]]. Special statutes of limitation may have a discovery rule expressly provided for in the statute [see, e.g., Bus. & Com. C. § 17.565]. A special constitutional rule that resembles a discovery rule applies to medical malpractice claims [see § 72.03[3][d][ii]].

(a) Fiduciary relationship exists between tortfeasor and claimant [see § 72.03[3][b]].

(b) Claimant had no opportunity to discover injury or wrong during limitation period [see § 72.03[3][b]].

(c) Action is one for fraud, privately published defamation, legal malpractice, strict products liability, deceptive trade practices, Insurance Code violations, or medical malpractice [see § 72.03[3][c], [d][ii]].

(5) Be certain that statute of limitation is satisfied [see § 72.05[1]] by:

(a) Filing petition within limitation period as calculated by [see § 72.05[2]]:

(i) Determining date cause of action accrued.

(ii) Excluding date of accrual.

(iii) Including last date of accrual period.

NOTE: If the last day for filing suit falls on a Saturday, Sunday, or holiday, suit may be filed on the next day that the county offices are open for business [C.P.R.C. § 16.072; see § 72.05[2][b]]. The petition is “filed” when mailed in accordance with Civil Procedure Rule 5, not when received by the clerk [Danesh v. Houston Health Clubs, Inc., 859 S.W.2d 535, 536–537 (Tex. App.—Houston [1st Dist.] 1993, ref.); see T.R.C.P. 5].

(b) Using due diligence to effect service of process [see § 72.05[1]].

(6) If limitation period has expired before suit can be filed, consider whether limitation period was tolled by:

(a) Fraudulent concealment.

NOTE: If the defendant is under a duty to disclose a cause of action because of a relationship of trust, and if the defendant conceals the cause of action, the limitation period is tolled until the plaintiff discovers or should have discovered the cause of action [see § 72.04[1]].
(b) Minority of plaintiff.

NOTE: The limitation period does not begin to run against a minor until the minor reaches 18 years of age [C.P.R.C. § 16.001(a)(1); see § 72.04[2][a]].

(c) Plaintiff’s unsound mind.

NOTE: If the plaintiff was of unsound mind at the time the cause of action accrued, the limitation period is tolled until the disability is removed [C.P.R.C. § 16.001(a)(2); see 72.04[2][b]].

(d) Death of claimant.

NOTE: The death of the claimant tolls the limitation period for 12 months or until an executor or administrator of the claimant’s estate qualifies [C.P.R.C. § 16.062; see 72.04[3]].

(e) Military service.

NOTE: The limitation period is tolled during a plaintiff’s period of service in the military [50 U.S.C. App. § 525; see § 72.04[4]].

(f) Defendant’s absence from state.

NOTE: A defendant’s absence from the state may toll the limitation period during the period of the defendant’s absence [see C.P.R.C. § 16.063; § 72.04[5]].

(g) Unresolved underlying claim in legal malpractice action.

NOTE: The limitation period in a legal malpractice action is tolled until all appeals of the underlying action in which the malpractice allegedly occurred are resolved [see § 72.04[6]].

(7) Consider whether claim has been revived by debtor's acknowledgment of claim [see § 72.06].

NOTE: To avoid a limitations defense to the original debt, the acknowledgment must be specifically pleaded as the basis for the cause of action either by (1) quoting the writing alleged to constitute the new promise, or (2) attaching it to the pleading as an exhibit [Eldridge v. Collard, 834 S.W.2d 87, 89–90 (Tex. App.—Fort Worth 1992, no writ)—record references regarding acknowledgment insufficient].

(8) If plaintiff is governmental entity, consider whether statute of limitation applies at all [see § 72.07].

§ 72.51 Defendant’s Pleadings and Proof

(1) Determine whether suit was filed within prescribed limitation period.

NOTE: Consider all the matters set forth in § 72.50, above.

(a) If suit was filed by party not entitled to maintain suit, consider filing plea in abatement, but probably only after
The applicable limitation period has expired so that error cannot be remedied [see § 72.05[1][b]; see also T.R.C.P. 93].

NOTE: The limitation period will continue to run in the case of a suit filed by a party not entitled to maintain suit [see Langston v. Eagle Pub. Co., 719 S.W.2d 612, 616–618 (Tex. App.—Waco 1986, ref. n.r.e.)].

(b) If wrong defendant is named in petition, but service is had on correct defendant, and there is no other defendant of similar name, consider filing answer in name of wrong defendant and amending answer to include plea of limitations after expiration of statutory period [see § 72.05[1][c]].

NOTE: The limitation period may be satisfied when the defendant is misnamed, but service is had on the correct defendant within the proper period, if the correct defendant is not misled, and there is no other actual person by that name [see Enserch Corp. v. Parker, 794 S.W.2d 2, 5–6 (Tex. 1990); see also Callan v. Bartlett Electric Cooperative, 423 S.W.2d 149, 155–156 (Civ. App.—Austin 1968, ref. n.r.e.)].

(c) If correct defendant is not identified in petition, and service is also on wrong person, file answer in name of wrong defendant, and if claimant will not desist after being informed of choice of wrong party defendant, defend case on merits [see § 72.05[1][d]].

NOTE: The statute of limitation is not satisfied as to the intended defendant when the incorrect defendant is sued, unless the intended defendant was not misled or prejudiced [see Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990)]. On the other hand, if the intended defendant is an alter ego of the named defendant, the filing of the petition against the named defendant tolls the statute of limitation as to the alter ego [see Gentry v. Credit Plan Corporation of Houston, 528 S.W.2d 571, 573 (Tex. 1975)].

(d) If defendant is sued under common or assumed name, consider seeking amendment from plaintiff setting out correct name by filing special exception [see § 72.05[1][f]].

NOTE: The statute of limitation is satisfied by the filing and service of a petition that names a business by its common or assumed name [see T.R.C.P. 28].

(2) If suit was timely filed, determine whether service of process was timely and diligently effected.

NOTE: The plaintiff must use due diligence in serving the defendant within a reasonable time after suit is filed. Without due diligence, the limitation period is not tolled by the filing of the suit [see § 72.05[1][a]].

(3) Affirmatively plead defense of limitations when either:

NOTE: The defendant has the burden to plead the limitations defense. Failure to plead the defense results in a waiver of the defense [see §§ 72.09, 72.100;
see also Wynn v. Wynn, 587 S.W.2d 790, 792 (Civ. App.—Corpus Christi 1979, no writ)—defense raised by special exception. The defendant also has the initial burden to prove when the cause of action arose [Hoffman v. Wall, 602 S.W.2d 324, 326 (Civ. App.—Texarkana 1980, ref. n.r.e.)].

(a) Suit has not been filed within prescribed limitation period.
(b) Service has not been timely and diligently effected.

(4) Consider whether to file counterclaims or cross-claims.

NOTE: The limitation period for filing counterclaims and cross-claims is extended for 30 days from the date the answer is due if the counterclaim or cross-claim arises from the same transaction or occurrence set out in the petition [see § 72.05[3]].

§ 72.52 Responsive Plea to Limitations Defense

(1) If defense of limitations has been pleaded by opponent, file amended or supplemental pleading setting out any matters suspending operation of limitations defense, such as:

NOTE: The burden of pleading and proving the discovery rule or any matter suspending the limitation period is on the plaintiff [see §§ 72.09, 72.110].

(a) Discovery rule [see 72.03[3]].
(b) Fraudulent concealment [see § 72.04[1]].
(c) Minority of plaintiff [see § 72.04[2][a]].
(d) Plaintiff’s mental state [see § 72.04[2][b]].
(e) Death of claimant [see § 72.04[3]].
(f) Military service [see § 72.04[4]].
(g) Unresolved underlying claim in legal malpractice action [see § 72.04[6]].
(h) Dismissal of prior claim because of lack of jurisdiction [see § 72.04[7]].

(2) If plaintiff is governmental entity, allege that statute of limitation does not apply at all [see C.P.R.C. § 16.061; see also § 72.07].

(3) If applicable, allege that claim for debt was revived by acknowledgment [see C.P.R.C. § 16.065; see also § 72.06].

(4) If statute of limitation has been amended to change limitation period, argue that limitation period has not expired because either [see § 72.08]:
(a) In lengthening limitation period before original limitation period has expired, legislature permitted plaintiff to rely on

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longer period [Coffey v. Young, 704 S.W.2d 591, 593–594 (Tex. App.—Fort Worth 1986, no writ)].

(b) By shortening limitation period, legislature was constitutionally bound to permit plaintiff reasonable time to bring suit on accrued causes of action [see Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322, 323–324 (Civ. App.—El Paso 1979, ref. n.r.e.)].
§ 72.100  Original Answer Alleging Affirmative Defense of Limitations

[1]—Comment—Use of Form

This form is an answer that contains an affirmative allegation that the plaintiff’s claim is barred by expiration of the applicable limitation period. The limitations defense must be affirmatively pleaded or it is waived. If the plaintiff’s pleading shows on its face that the claim is barred by the expiration of the applicable limitation period, the limitations defense might also be raised by special exception [see § 72.09].

The answer should set out the date the limitation period commenced as well as the date suit was filed. The answer should also specify the applicable statute of limitation [see Hoffman v. Wall, 602 S.W.2d 324, 326 (Civ. App.—Texarkana 1980, ref. n.r.e.)]. In this case, the answer contains a general denial, and the affirmative defense relies on the general, two-year statute of limitation that is applicable to most tort causes of action [see C.P.R.C. § 16.003; see also § 72.02[1][a]].

[2]—Form

NO. _________

__________________________ [plaintiff] \n{ \nv. \n__________________________ [defendant] \n{ \nIN THE__________________________ COURT \n{ \n__________________________ COUNTY, TEXAS \n{ \n[__________________________ JUDICIAL DISTRICT]

DEFENDANT’S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF THIS COURT:

__________ [Name], defendant, files this original answer to plaintiff’s original petition, and by way of answer shows:

I.

General Denial

__________ [Name], defendant, denies each and every allegation in plaintiff’s original petition and demands strict proof by a preponderance of the evidence.
II.

Affirmative Defense

Defendant further affirmatively alleges that the plaintiff’s cause of action, if any, is barred by ________ [statute of limitation provision, e.g., Texas Civil Practice and Remedies Code Section 16.003(a)], establishing a ________ [one or two or four]-year limitation period. The cause of action is one for ________ [name the cause of action, e.g., negligence]. The limitation period commenced running on ________ [date], the date of ________ [set out event causing action to accrue, e.g., the accident]. Suit was filed on ________ [date], more than ________ [one or two or four] years after the limitation period commenced running.

WHEREFORE, ________ [name], defendant, requests judgment of the Court that ________ [name], plaintiff, take nothing by this suit, and that defendant recover all costs together with such other and further relief to which defendant may be justly entitled.

Respectfully submitted,

________________________________ [firm name, if any]
________________________________ [signature ]
________________________________ [typed name ]
________________________________ [address]
________________________________ [telephone number]
________________________________ [telexcopier number, if any]
________________________________ [state bar i.d. number]

Attorney for

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above ________ [insert name of pleading for which notice is required, e.g., answer] has this day been ________ [delivered in person or delivered in person by my agent or delivered by courier with receipted delivery or sent by certified mail by depositing it enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the care and custody of the United States Postal Service or sent by telephonic document transfer] ________ [if sent by telephonic document transfer, add if appropriate before 5:00 p.m. of the recipient’s local time] to ________ [name, address, and designation, including telexcopier number if sent by telexcopier, e.g., ________], attorney of record for ________ (name of party), at ________ (address).

SIGNED ________ [date].

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§ 72.110 Plaintiff's Supplemental Petition

[1]—Comment—Use of Form

This form is a supplemental petition containing allegations that respond to a defendant’s plea of limitations. The plaintiff must plead and prove any matter that would change the accrual date of a cause of action (such as the discovery rule) [see § 72.03[3]] or that would suspend the running of the limitation period (such as fraudulent concealment) [see § 72.04[1]]. The allegation may be incorporated into an amended or supplemental petition [Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 (Tex. 1988)].

The examples used in the form rely on the discovery rule [see § 72.03[3]] and fraudulent concealment [see § 72.04[1]]. Other matters that should be affirmatively pleaded include minority of plaintiff [see § 72.04[2][a]], plaintiff’s unsoundness of mind [see § 72.04[2][b]], the death of the claimant [see § 72.04[3]], military service [see § 72.04[4]], the defendant’s absence from the state [see § 72.04[5]], and dismissal of an earlier suit for lack of jurisdiction [see § 72.04[7]].

It is probably advisable to affirmatively plead any matter that the plaintiff claims avoids the bar of limitations, or that delays the running of the limitation period, even if there is no clear rule that absolutely requires affirmative pleading. For instance, it is advisable to affirmatively plead matters such as revival of a barred claim by acknowledgment [see § 72.06], governmental immunity to limitations [see § 72.07], and that an underlying action is not final in cases such as legal malpractice claims [see § 72.04[6]].

[2]—Form

[Caption. See § 72.100[2]]

PLAINTIFF'S FIRST SUPPLEMENTAL PETITION

TO THE HONORABLE COURT:

[Name], the plaintiff, files this first supplemental petition in reply to [opposing pleading, e.g., the defendant’s original answer], and shows:

1. Avoidance of Defense of Limitations; Discovery Rule

The cause of action set out in the plaintiff’s original petition is not barred by limitations because [legal reason statute of limitation does not}
constitute bar, e.g., the discovery rule applies to the cause of action]. In particular, [set out facts supporting defense to limitations, e.g., this is an action for legal malpractice. The malpractice occurred on [date], the date the defendant failed to timely file an appeal bond to perfect an appeal from a judgment taken in Marshall v. Marshall, No. 92-3042 (345th District, Dallas County). The plaintiff was unaware of the omission and had no reason to know of the nature of [his or her] injury until the date the appeal of the matter was dismissed for want of jurisdiction, [date], over two years after the malpractice occurred].

2. Avoidance of Defense of Limitations; Fraudulent Concealment

The defense of limitations alleged in the defendant’s original answer is not a basis for avoiding liability to the plaintiff because the defendant’s fraudulent concealment of the injury resulted in the expiration of the limitations period before the plaintiff was aware of the injury. Specifically, [allege facts supporting fraud defense].

WHEREFORE, the plaintiff requests all relief requested in the original petition.

[Signature. See § 72.100] [Certificate of service. See § 72.100]
PART IV. RESEARCH GUIDE

§ 72.200 Texas Constitution

Open courts provision. Tex. Const. Art. 1 § 13
Retroactive laws. Tex. Const. Art. 1 § 16

§ 72.201 Federal Statutes and Rules

Military service tolls limitation period. 50 U.S.C. App. § 525

§ 72.202 Texas Statutes and Rules

[1]—Statutes

[a]—Tort Limitations

Breach of promise to marry. C.P.R.C. § 16.002
Conversion. C.P.R.C. § 16.003
Violations of hazardous waste regulations. Health & Safety C. § 361.197(a)
Defamation. C.P.R.C. § 16.002
Fraud or breach of fiduciary duty (constructive fraud). C.P.R.C. § 16.004(a)(4), (5)
Fraudulent transfers by debtor. Bus. & Com. C. § 24.010
Malicious prosecution. C.P.R.C. § 16.002
Medical malpractice claims. R.C.S. Art. 4590i § 10.01
Nuisance actions against agricultural operations. Agric. C. § 251.004
Personal injury. C.P.R.C. § 16.003
Trespass. C.P.R.C. § 16.003
Unfair insurance practices. Ins. C. Art. 21.21 § 16(d)

[b]—Contract Limitations

Contracts, debts, or actions against partner. C.P.R.C. § 16.004
Contracts for the sale of goods. Bus. & Com. C. § 2.725

[c]—Architects, Engineers, Surveyors, and Persons Furnishing or Repairing Improvements

Actions against engineers, architects, interior designers, and landscape architects furnishing design, planning, or inspection of construction of improvements. C.P.R.C. § 16.008
Actions against persons furnishing construction or repair of improvements. C.P.R.C. § 16.009
Actions against surveyors. C.P.R.C. § 16.011

[d]—Family Law Actions
Attack on validity of adoption decree. Fam. C. § 162.012
Paternity actions. Fam. C. § 160.002(a)

[e]—Wills and Estates
Claims against estates of decedents and wards. Prob. C. § 298
Claims for expenses of funeral and last illness. Prob. C. § 320
Limitation period to contest wills. Prob. C. § 93
Suit on bond of executor, administrator, or guardian. C.P.R.C. § 16.004
Limitation period against estates tolled by filing claim. Prob. C. § 299

[f]—Workers’ Compensation Claims
Compensation for injuries. Lab. C. § 409.001
Death benefits. Lab. C. § 409.007
Tolling provision. Lab C. § 409.008

[g]—Execution on Judgments
Failure of sheriff or other officer to return execution. C.P.R.C. § 16.007
Revival of judgment. C.P.R.C. § 31.006
Writ of execution on judgments. C.P.R.C. § 34.001

[h]—Unspecified Causes of Action
Miscellaneous or unspecified actions. C.P.R.C. § 16.051

[i]—Tolling Provisions
Absence from state. C.P.R.C. § 16.063
Death of claimant. C.P.R.C. § 16.062
Dismissal for lack of jurisdiction. C.P.R.C. § 16.064
Minority. C.P.R.C. § 16.001(a)(1)
Saturday, Sunday, and holidays. C.P.R.C. § 16.072
Unsound mind. C.P.R.C. § 16.001(a)(2)

[j]—Governmental Immunity
State, counties, incorporated cities or towns, and school districts. C.P.R.C. § 16.061
[k]—New and Additional Claims

Amended pleadings. C.P.R.C. § 16.068
Counterclaims and cross-claims. C.P.R.C. § 16.069

[l]—Agreements to Alter Limitation Period

Agreement to shorten limitation period to less than two years is void. C.P.R.C. § 16.070
Agreement to shorten limitation period for contract for sale of goods is permissible. Bus. & Com. C. § 2.725

[m]—Revival of Barred Claims

Revival of claim by acknowledgment. C.P.R.C. § 16.065

[2]—Rules

Limitations defense must be affirmatively pleaded. T.R.C.P. 94
Suit against defendant doing business under assumed name. T.R.C.P. 28

§ 72.203 Case Law

[1]—Amendments to Statute of Limitation

Amendment to statute of limitation lengthening limitation period must not be applied retroactively to revive barred cause of action. Continental Southern Lines, Inc. v. Hilland, 528 S.W.2d 828, 830 (Tex. 1975)
Legislature must allow reasonable time for claimants to bring suit on existing causes of action before amendment to statute of limitation shortening limitation period is effective. Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322, 323–324 (Civ. App.—El Paso 1979, ref. n.r.e.)

[2]—Applicable Limitation Period

Breach of duty of good faith and fair dealing is governed by two-year statute of limitation. Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 827 (Tex. 1990)
Fraud causes of action not involving personal injuries are governed by four-year limitation period. Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990)
Legal malpractice action is governed by two-year limitation period. Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988)
§ 72.203[3][a]  LIMITATION OF ACTIONS  72–104

[3]—Accrual of Causes of Action

[a]—Tort

Cause of action generally accrues, and statute of limitation begins to run, when all facts come into existence that authorize claimant to seek judicial remedy. Johnson & Higgins of Tx v. Kenneco Energy, 962 S.W.2d 507, 514 (Tex. 1998)

As general rule, cause of action accrues when wrongful act causes some legal injury, even if fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)


Breach of duty of good faith and fair dealing claim accrues on date of wrongful denial of coverage in first party case, including case involving bad faith handling of uninsured motorist claim, but not in Stowers third-party action. Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 829 (Tex. 1990)

Defamation cause of action accrues when defamatory material is published when defamation is published in mass media. Langston v. Eagle Pub. Co., 719 S.W.2d 612, 615 (Tex. App.—Waco 1986, ref. n.r.e.)

Fraud cause of action accrues when fraud is discovered, or should have been discovered through exercise of reasonable diligence. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517 (Tex. 1988)

Legal malpractice action accrues when elements of cause of action are discovered or should have been discovered. Willis v. Maverick, 760 S.W.2d 642, 643 (Tex. 1988)

[b]—Contract

Breach of contract claim accrues on date of breach. Hurbrough v. Cain, 571 S.W.2d 216, 221 (Civ. App.—Tyler 1978, no writ)

Breach of warranty claim accrues with delivery of goods, unless warranty explicitly extends to future performance. Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 546 (Tex. 1986)

[4]—Discovery Rule

Discovery rule applies to cases in which accrual is deferred because nature of injury is inherently undiscoverable and evidence of injury is objectively verifiable. S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)

Discovery rule applies only when nature of injury is inherently undiscoverable and evidence of injury is objectively verifiable, and requirement
of inherent undiscoverability recognizes that discovery rule exception
should be permitted only in circumstances in which it is difficult for
injured party to learn of negligent act or omission despite exercise
of due diligence. Computer Associates Intern. v. Altai, 918 S.W.2d
453, 456 (Tex. 1994)

Discovery rule, when it applies, tolls accrual until claimant discovers or
in exercise of reasonable diligence should have discovered injury and
that it was likely caused by wrongful acts of another. Childs v.
Haussecker, 974 S.W.2d 31, 40 (Tex. 1998)

Accrual in latent disease or injury cases (such as case involving claims for
silicosis) is deferred until innocent and diligent plaintiff discovers
injury and its likely cause. Childs v. Haussecker, 974 S.W.2d 31, 38–39
(Tex. 1998)

Discovery rule applies to accounting malpractice cases, so that latest
possible date from which statute could begin to run in case based
on faulty tax advice was date plaintiff received notice of deficiency
from IRS. Murphy v. Campbell, 964 S.W.2d 265, 270–271 (Tex. 1997)

Discovery rule causes limitation period to commence on date nature of
injury is or should be discovered. Moreno v. Sterling Drug, Inc., 787
S.W.2d 348, 351 (Tex. 1990)

Defamation claim based on private publication is subject to discovery rule.
Kelley v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976)

Fraud claims are subject to discovery rule. Woods v. William M. Mercer,
Inc., 769 S.W.2d 515, 517 (Tex. 1988)

Legal malpractice action is subject to discovery rule. Willis v. Maverick,
760 S.W.2d 642, 645 (Tex. 1988)

Medical malpractice claim is subject to constitutional discovery rule if
claimant could not reasonably discover cause of action before expiration
of two-year limitation period. Neagle v. Nelson, 685 S.W.2d 11,
12 (Tex. 1985)

Wrongful death cause of action is not subject to discovery rule. Moreno
v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990)

[5]—Medical Malpractice

Fraudulent concealment will toll limitation period in medical malpractice

Medical malpractice statute of limitation is unconstitutional in those cases
in which it would bar cause of action before it was known or should
have been known. Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985)

Minors are entitled to reasonable time after attaining majority in which
to bring medical malpractice claims. Sax v. Votteler, 648 S.W.2d 661,
666–667 (Tex. 1983)
Tolling statutes in Civil Practice and Remedies Code are not applicable to medical malpractice claims. Hill v. Milani, 686 S.W.2d 610, 611 (Tex. 1985)

Although statute specifies three dates from which limitations period might commence (date of breach or tort, completion of treatment, or completion of hospitalization), plaintiff cannot choose most favorable; if date of negligence can be ascertained, limitations must be measured from that date. Earle v. Ratliff, 998 S.W.2d 882, 886 (Tex. 1999); Husain v. Khatib, 964 S.W.2d 918, 919 (Tex. 1998)

[6]—Paternity Suits


[7]—Filing of Petition Satisfies Statute of Limitation


Filing of petition must be accompanied by due diligence in effecting service of citation to satisfy statute of limitation. Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990)

Petition naming incorrect defendant, with service on incorrect defendant, does not satisfy statute of limitation. Wright v. Gifford-Hill & Co., Inc., 736 S.W.2d 828, 833–834 (Tex. App.—Waco 1987, ref. n.r.e.)

Petition naming incorrect defendant satisfies statute of limitation if correct defendant is related entity, is aware of suit, and is not placed at disadvantage. Continental Southern Lines, Inc. v. Hilland, 528 S.W.2d 828, 829–831 (Tex. 1975)

Petition naming incorrect defendant, with service on intended defendant, satisfies statute of limitation if intended defendant was not misled. Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex. 1990)


Suit against subsidiary instead of parent satisfies statute of limitation if parent is alter ego of subsidiary. Gentry v. Credit Plan Corporation of Houston, 528 S.W.2d 571, 573 (Tex. 1975)
[8]—Suspension of Limitation Period

[a]—Generally

Civil Procedure Rule 28, which provides that defendant may be sued in assumed name, allows plaintiff to sue obvious entity and prevents defendant from “laying behind the log” of assumed name in order to avoid statute of limitation. Bailey v. Vanscot Concrete Company, 894 S.W.2d 757, 759–760 (Tex. 1995)

Civil Procedure Rule 28 is not tolling provision that extends the statute of limitation, but allows suit directly against correct party in its assumed name; thus, Rule 28 applies to medical malpractice actions despite statute of limitation provision of the Medical Liability Act, which limits time for bringing medical malpractice actions “notwithstanding other law.” Chilkewitz v. Hyson, M.D., P.A., — S.W.3d —, 43 Sup. Ct. J. 52, 54–55 (Tex. 1999)

Limitations is tolled as long as plaintiff remains incompetent. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 754–756 (Tex. 1992)

Date of accrual of cause of action is excluded from limitation period. Texas & P. Ry. Co. v. Moore, 43 S.W. 67, 68 (Civ. App. 1897, ref.)

Legal malpractice limitation period is tolled until all appeals in underlying action are exhausted. Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991)


[b]—Fraudulent Concealment

Fraudulent concealment is affirmative defense to limitations defense. Weaver v. Witt, 561 S.W.2d 792, 793 (Tex. 1977)

Fraudulent concealment tolls limitation period until plaintiff learns of right of action or should have learned of right of action through reasonable diligence. Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983)

Proof of fraudulent concealment requires more than evidence that physician failed to use ordinary care; it requires evidence that defendant actually knew plaintiff was in fact wronged, and concealed that fact to deceive plaintiff. Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999)

[9]—Burden of Pleading and Proof

Affirmative defense of limitations must be raised or defense is waived. United Transp. Union v. Brown, 694 S.W.2d 630, 634 (Tex. App.—Texarkana 1985, ref. n.r.e.)
Discovery rule must be pleaded and proved by plaintiff. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 517–518 (Tex. 1988)

Initial burden to show when cause of action accrues is on defendant. Hoffman v. Wall, 602 S.W.2d 324, 326 (Civ. App.—Texarkana 1980, ref. n.r.e.)

Special exception may be used to test petition when pleading shows, on its face, that claim is barred by limitations. Wynn v. Wynn, 587 S.W.2d 790, 792 (Civ. App.—Corpus Christi 1979, no writ)

Summary judgment procedure requires moving defendant to negate discovery rule. Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988)

Summary judgment procedure requires moving defendant to negate applicability of tolling statutes or rules. Zale Corporation v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975)

Tolling statutes or rules must be pleaded and proved by plaintiff. Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988)

[10]—Waiver of Limitations

Complete waiver of statute of limitation is void as against public policy. Squyres v. Christian, 253 S.W.2d 470, 472 (Civ. App.—Fort Worth 1952, ref. n.r.e.)

§ 72.204 Annotations

Annot., When Statute of Limitations Begins to Run Against Action Based on Unwritten Promise to Pay Money Where There Is no Condition or Definite Time for Repayment, 14 A.L.R.4th 1385 (1982)

§ 72.205 Law Reviews and Periodicals

Jacobson & Wentz, *A Lawyer Has to Know His/Her Limitations—The Statute of Limitations in Medical Malpractice Cases: A Constitutional Compromise*, 23 Tex. Tech L. Rev. 769 (1992)


§ 72.206  **Text References**

50 Tex. Jur. 3d, Limitation of Actions