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Courts are increasingly applying statutes of limitations too rigidly, putting an end to meritorious cases before they even begin. It's time to begin treating them as the flexible guidelines they were intended to be.

# Running Out of... Time

For hundreds of years, statutes of limitations were applied narrowly, and they often allowed decades to pass before a claim became stale. In the last two centuries, however, courts have increasingly applied arbitrarily fixed limitations on even the most blameless plaintiffs.

Nowhere is the growing hostility toward plaintiffs more evident than in *Ledbetter v. Goodyear Tire & Rubber Co.*, a 2007 U.S. Supreme Court opinion that barred a woman from suing her employer for sex discrimination even though she could not have known she was being paid less than male coworkers until long after the pay scale had been set.[1] The decision was so shocking that even a sharply divided Congress managed to pass legislation to undo the injustice.

Statutes of limitations and time limits for notices of claim are important. History has shown their worth, and no one seriously calls for their abolition and a return to the doctrine of laches. But the arbitrary nature of these statutes—created for practicality but often used to protect defendants as part of tort "reform" efforts—and their ability to prevent just cases from being heard on their merits should push us toward a policy of narrow construction.

By || Henry G. Miller

Judges who interpret the laws and legislators who develop them must, of course, balance the equities. But shouldn't they do all they can to protect those who may have meritorious claims and avoid shutting down lawsuits merely because of the time lapsed when no harm has been done by the delay? Shouldn't there be a broad reading of saving statutes that stops the clock for disabilities such as infancy or incompetence? Shouldn't there be a greater use of the equitable estoppel doctrine to bar the pleading of the statute of limitations defense? In short, when there is no prejudice—when the parties' memories are fresh and the evidence is preserved—shouldn't our lawmakers and judges strain to find a way to give plaintiffs their day in court?

I believe the attitudes that motivated the majority in the notorious *Ledbetter* case are what we must root out. Instead of finding an opening for the judge to get at the merits of the case, there seemed to be zeal on the part of the majority to end the lawsuit in a severe and unforgiving manner.

History is a great teacher. From it, we learn these statutes are imperfect. They are not substantive rules but merely rules of practicality, and they should be treated as such. They should be respected, yes, but applied with the wisdom and flexibility that have always characterized our most enlightened judges.

A good example of the right approach is the 2009 decision by the Supreme Court of Vermont in *Turner v. Roman Catholic Diocese of Burlington, Vermont*.[2] It is an all too familiar and sorrowful case of a man who alleged that as a minor he was sexually molested by a priest. The statute of limitations was, as usual, the obstacle.

The Vermont high court held that the statute began to run when the man was put on notice that the diocese may have breached its duty to prevent the abuse, not just when he was assaulted. The court acknowledged that its holding was a minority position but argued that the majority rule is unrealistic given the limitations on a plaintiff's ability to discover evidence needed to bring a case. The existence of the duty was not apparent to the plaintiff when his injuries were inflicted, the court reasoned. The holding should inspire other courts to reach out and try to get to the merits of cases, rather than apply limitations statutes inflexibly.

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In New York, courts have on occasion imposed equitable estoppel against the pleading of the statute of limitations when the defendant's wrongdoing caused the delay in filing suit.[3] In one such case, the New York Court of Appeals stated:

> Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the statute of limitations where it is the defendant's affirmative wrongdoing... which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.[4]

But the state has been reluctant to use this doctrine extensively.[5] I believe justice would be better served by expanding this doctrine.

It is encouraging to read the U.S. Supreme Court's unanimous ruling last year in *Merck & Co. v. Reynolds*.[6] The Court held that the litigation was timely and should go forward in spite of the defendant's insistence that the suit was filed after the two-year statute of limitations had run. The Court found that the clock should start ticking only after plaintiffs discover the facts of a fraud violation. This ruling did not guarantee that the plaintiffs would prevail, but it allowed them their day in court.

A further step in the right direction came two months later in *Krupski v. Costa Crociere*, in which the Court held that even though the statute of limitations expired, the plaintiff could amend her original complaint and add a new defendant.[7] Justice Sonia Sotomayor, writing for the majority, stressed that "repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity."[8]

While it is true that many cases would be resolved differently if we adopted a

policy of construing statutes of limitations more narrowly, I do not believe it would be a radical departure from traditional judicial reasoning.

Judge G.B. Smith of the New York Court of Appeals, in his dissent in two consolidated clergy abuse cases, said it plainly: The policy considerations of repose "do not outweigh the policy considerations of addressing affirmative wrongdoing."[9] That is the argument I would like to make to every judge who has to decide whether to bar a claim because too much time has elapsed. Yes, there must be time limits, but our common law has always centered on trying to find ways to provide a remedy for the wrongs that afflict us.

## Inequity

Had the attitude Judge Smith espoused been controlling, certain cases would have been decided differently and, in my opinion, more correctly. Here are a few examples.

In *Dodd v. United States*, the U.S. Supreme Court had to decide whether a one-year limitation on moving to vacate a conviction for a federal offense began to run on the date the Court initially recognized the right to file the motion or whether it was the date the right was made retroactive.[10] The majority held that it was the date on which the right asserted was initially recognized, despite the potential for harsh results. Justice John Paul Stevens, in his dissenting opinion, argued that the majority's reading resulted in the possibility that the statute of limitations period could run before the cause of action even accrued.[11]

A New York case similarly foreclosed several of the plaintiff's arguments without due consideration. In *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, a telecommunications company alleged that its investment banker disclosed confidential information to another client, to the plaintiff's detriment.[12] A trial court held that the claims were not time-barred because they fell under the six-year statute of limitations for equitable claims. The state high court reversed, concluding that the three-year limitation for monetary claims applied. As a result, the plaintiff's claims of breach of fiduciary duty, tortious interference with contract, and misappropriation of confidential information were never heard.[13]

In *Dean Witter Reynolds, Inc. v. Hartman*, the Colorado Supreme Court held that the cosigner of a note who wished to sue for the wrongful withdrawal of funds by the other signer was barred by the statute of limitations.[14] The dissent argued that the "result [was] inequitable and should give rise to [the] equitable tolling of the statute of limitations. . . ."[15] It would seem that the greater claim for justice and equity lies with the dissent.

When statutes of limitations are applied severely and unforgivingly, they become merely statutes of convenience that lead to injustice. We were wise to codify these statutes of repose, but all too often they seem to have taken on a life of their own. Some have mistaken these expedient, pragmatic devices as fundamental rights for the defense. They are not. I believe it is time for a change to a wiser and more flexible approach. ■

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**Notes**

1. 550 U.S. 618 (2007).
2. 987 A.2d 960 (Vt. 2009).
3. *See Gen. Stencils v. Chiappa*, 219 N.E.2d 169 (N.Y. 1966).
4. *Id.* at 171.
5. *See e.g. Zumpano v. Quinn*, 849 N.E.2d 926 (N.Y. 2006).
6. 130 S. Ct. 1784 (2010).
7. 130 S. Ct. 2485 (2010).
8. *Id.* at 2494.
9. *Est. of Boyle v. Smith*, 849 N.E.2d 926 (N.Y. 2006) (consolidated with *Zumpano*, 849 N.E.2d 926).
10. 545 U.S. 353 (2005).
11. *Id.* at 366–67 (Stevens, J., dissenting).
12. 907 N.E.2d 268 (N.Y. 2009).
13. *Id.* at 271–72.
14. 911 P.2d 1094 (Colo. 1996).
15. *Id.* at 1099 (Lohr, J., dissenting).