

STATUTES OF LIMITATIONS **IN TOXIC INJURY CASES**



Toxic Injury - Statutes of Limitations

There are three very different Statutes of Limitations (SOL) that may control the filing of a third-party civil lawsuit for an injury, illness or death based upon exposure to toxic substances or hazardous materials. The time is either **6 months** (*for government claims*), **one year** (*for Asbestos cases*), or **two years** for toxic substances (*other than Asbestos*).

Note: The fact that the claimant is still working does **not** delay the Statute of Limitations for a civil case. Continued employment has some relevance in Asbestos cases, since a worker who has not lost any time from work might be able to argue that the accrual of the Statute of Limitations is delayed, but that only applies in civil cases based upon Asbestos exposure.

(1) Toxic Injury Cases - other than those due to Asbestos Exposure

If the illness, injury or death is based upon exposure to toxic substances or hazardous materials (*other than Asbestos*), the Statute of Limitations is **two years** and is controlled by Code of Civil Procedure § 340.8.

So what starts the Statute of Limitations clock running? Ordinarily, the date of diagnosis of an injury or illness attributable to the exposure would start the clock. There may be circumstances that excuse a delay, but those are technical and involve concepts of “constructive knowledge”, “inquiry notice” and other aspects of the “discovery rule”.

CCP § 340.8:

(a) In any civil action for injury or illness based upon exposure to a hazardous material or toxic substance, the time for commencement of the action shall be no later than either two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later.

(b) In an action for the wrongful death of any plaintiff’s decedent, based upon exposure to a hazardous material or toxic substance, the time for commencement of an action shall be no later than either (1) two years from the date of the death of the plaintiff’s decedent, or (2) two years from the first date on which the plaintiff is aware of, or reasonably should have become

aware of, the physical cause of the death and sufficient facts to put a reasonable person on inquiry notice that the death was caused or contributed to by the wrongful act of another, whichever occurs later.

(c) For purposes of this section:

(1) A "civil action for injury or illness based upon exposure to a hazardous material or toxic substance" does not include an action subject to Section 340.2 or 340.5.

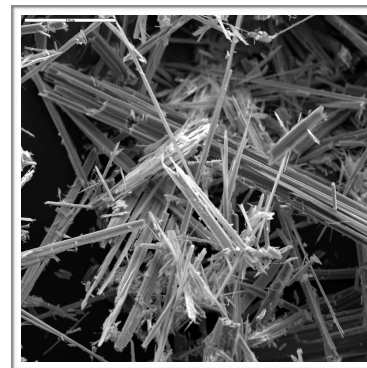
(2) Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another.

(d) Nothing in this section shall be construed to limit, abrogate, or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance.

(2) Asbestos Exposure Cases

If the illness, injury or death is caused by exposure to Asbestos fiber, the Statute of Limitations is **one year** and is controlled by Code of Civil Procedure § 340.2.

So what starts the clock running? The unique feature of this Statute is that it does not begin to run for personal injury cases until the Plaintiff has suffered "disability", which is defined in the statute as a loss of time from work attributable to the exposure.



The reason for this caveat is that many workers might technically have a mild degree of Asbestosis - *an asbestos lung disease* - but the disease has not yet interfered with their ability to work. To avoid a flood of cases, the Legislature included a "disability" trigger, so that a Plaintiff diagnosed with the disease does not need to file a lawsuit, until he has lost time from work attributable to the exposure.

What about a worker who retired due to his age, and did so *before* he ever lost time from work attributable to the exposure? Oddly, while he is allowed to bring a lawsuit, the Statute of Limitations is never really triggered. Since the Plaintiff has stopped working for unrelated reasons, the event that starts the Statute running (i.e., "*a loss of time from work as a result of such exposure*"), will never actually occur. *Duty vs. Abex* (1989) 213 Cal.App.3d 742.

The Statute of Limitations for a wrongful death case from Asbestos exposure is also **one year** and is ordinarily triggered by the death of the worker.

A spouse's claim for loss of consortium is more complicated. A wife suffering loss of consortium as a result of her husband's Asbestos exposure has **one year** from the date she suffered the loss. It appears that the definition of "disability" (i.e., "*loss of*

time from work as a result of such exposure”) does not apply to a spouse’s loss of consortium claim and will not extend the time to file.

It is worth noting that Asbestos can cause more than one disease: Asbestosis, Lung Cancer and Mesothelioma. Since these are distinct diseases, each diagnosis can trigger its own distinct SOL period.

CCP § 340.2:

(a) In any civil action for injury or illness based upon exposure to **asbestos**, the time for the commencement of the action shall be the later of the following:

(1) Within one year after the date the plaintiff first suffered disability.

(2) Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.

(b) “Disability” as used in subdivision (a) means the loss of time from work as a result of such exposure which precludes the performance of the employee’s regular occupation.

(c) In an action for the wrongful death of any plaintiff’s decedent, based upon exposure to **asbestos**, the time for commencement of an action shall be the later of the following:

(1) Within one year from the date of the death of the plaintiff’s decedent.

(2) Within one year from the date the plaintiff first knew, or through the exercise of reasonable diligence should have known, that the death was caused or contributed to by such exposure.

(3) Government Claims

If the Plaintiff intends to file a civil action against a “Public Entity” for an injury, illness or death based upon exposure to toxic substances, hazardous materials, or Asbestos, the Plaintiff must file a Government Claim within **six months** of the accrual of a cause of action. Gov. Code § 911.2.

The definition of a “Public Entity” is found at Gov. Code § 811.2:

“Public entity” includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

The filing of a Notice of Claim to the Public Entity should produce a written response. If the claim is rejected, the Plaintiff has **6 months** thereafter to file a lawsuit (or two years if there is no written rejection). Gov. Code § 945.6.

So what starts the clock running? The accrual date is defined as “the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto.” (Gov. Code, § 901).

Ordinarily, this would be the date of diagnosis. For Asbestos cases, the delay

incorporated in CCP § 340.2 (i.e. waiting until a “*loss of time from work as a result of such exposure*” occurs), probably does not apply to the Government Claim requirement. In Asbestos cases, it is advisable to use the date of diagnosis when calculating the commencement of the 6 months for Government Claims.

Prenatal Injuries

Sometimes a worker’s exposure to toxic substances results in a prenatal injury. There is a separate **six year** Statute of Limitations for injuries sustained before or at birth, and the fact that the injured party is a minor does not delay the limitations period. CCP § 340.4. *However*, the California Supreme Court recently ruled that in the case of toxic exposures, the issue is controlled by the more recently enacted CCP § 340.8, which sets the relevant Statute of Limitations at **two years**, and it does not begin to run until *after* the injured party turns 18 years old.

Conclusion

As you can see, the issues raised by the Statutes of Limitations in Toxic Injury cases can be complex. It is imperative that you seek advice from someone who has a thorough knowledge of these issues - and the sooner, the better.

If it appears that a Statute of Limitations may have run, do not be too quick to despair. It is possible, in some cases, that the Statute of Limitations has not actually run, despite initial appearances. There are a number of circumstances that might extend the commencement date, or delay the expiration date.

If you need help with this issue, or any other aspect of a toxic injury case that you are handling, please contact us as soon as possible at heubecklawpc@gmail.com.

Knowledge and Experience

John C. Heubeck, Esq. has prosecuted hundreds of toxic injury cases over the last 30 plus years, involving exposures to asbestos, benzene, chromium, hydrogen sulfide, talc and numerous other substances. A degree in Chemistry and employment as an Assistant Attorney General prosecuting OSHA violations have provided him with a unique and proven ability to litigate such cases through trial and before the appellate courts. Most plaintiff lawyers - *and defense lawyers* - lack a similar technical background and are usually at a clear disadvantage when handling such cases.

