Although statutes of limitations are deadlines, based on when a cause of action shall have accrued, after which a lawsuit cannot be filed, there are situations where the time in which to file a lawsuit is extended. The reasons usually fall into two categories of cases. The first category of cases occurs where delay is due to the status of a party. The second category of cases occurs where the delay is due to the lack of accrual of the cause of action. The methods used to compute the running of the statute in these two categories are different and result in the statute of limitations expiring at different times. Choosing the wrong method of computation can result in the statute of limitations expiring before a complaint is filed.

The first category, incapacity, occurs when a party lacks the capacity to sue or to be sued. Classic examples of when a party lacks the ability to sue include when a plaintiff is a nonemancipated minor or is incompetent. Likewise, a defendant in bankruptcy cannot be sued during the period of the automatic stay. In such cases, the statute of limitations does not run during that period of incapacity and resumes when the incapacity ceases. In incapacity cases, the tolling has a stopwatch effect and the statute of limitations may be computed by adding a specified period of time relative to the normal statute of limitations period.

DELAYED DISCOVERY AND ACCRUAL: FOR WHOM THE STATUTE OF LIMITATIONS DOES NOT TOLL

Paul Eisner
The second category, delayed accrual, occurs when the plaintiff lacks sufficient knowledge of the facts to file the case and depends on the circumstances. A cause of action accrues when the act is completed and there is a result for which there is liability. *Norgart v. Upjohn Co.*, 21 Cal.4th 383, 397, 87 Cal.Rptr.2d 453, 981 P.2d 79 (1999). A classic example of delayed accrual is delayed discovery. In delayed discovery cases, discovery occurs when the plaintiff suspects or has reason to suspect a factual basis, *Rivas v. Safety-Kleen Corp.*, 98 Cal.App.4th 218, 225, 119 Cal. Rptr. 503 (2002), or actually discovered or by reasonable diligence should have discovered the existence of a cause of action, *Sanchez v. South Hoover Hospital*, 18 Cal.3d. 93, 97, 132 Cal.Rptr. 657, 555 P.2d 1129 (1976). A suspicion combined of any element of a cause of action combined with knowledge of any remaining element is sufficient. *Grisham v. Philip Morris, U.S.A., Inc.*, 40 Cal.4th 623, 634, 54 Cal.Rptr.3d 735, 151 P.2d 1151 (2007). The computation for determining when the statute of limitations expires in a delayed accrual case differs from the computation where the delay in filing a complaint is due to the inability of a party to sue or be sued.

There are two required elements to show delayed accrual of the statute of limitations. The first element is delayed discovery. In a delayed discovery case, the plaintiff must plead that the relevant facts were not and could not be discovered with reasonable diligence within the statutory period. *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 809, 35 Cal.Rptr. 797, 110 P.3d 914 (2005). To assert a claim of delayed discovery, the injured party plaintiff needs to be ignorant of the facts and lack the ability to have earlier discovered the facts, and the complaint needs to plead this ignorance, the lack of discovery, and how and when the facts were eventually discovered. *Casualty Insurance Company v. Rees Investment Company*, 14 Cal.App.3d 716, 720, 92 Cal.Rptr. 857 (1971); also see *Kirby v. Albert D. Seeno Const. Co.*, 11 Cal.App.4th 1059, 1068, 14 Cal.Rptr. 604 (1992).

The second element requires that the discovery have occurred after the statute of limitations normally would have expired. If discovery actually occurred or should have occurred before the normal statute of limitations period had expired, the normal statute of limitations period applies, and there is no delayed accrual of the statute of limitations. If actual discovery did not occur and discovery should have not occurred until after the normal statute of limitations period expired, there is delayed accrual, and the statute of limitations runs from the date on which the discovery should have occurred or actually occurred.

Statutory language can mislead the unwary plaintiff to believe there is a delayed accrual of the statute of limitations where none exists. Although the language of the three-year statute of limitations for fraud, Code of Civil Procedure § 338(d), states in part, “The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” Although this may give the impression that the statute or limitations does not start to run until the fraud was actually or should have been discovered, that is not how the statute is interpreted. The case law treats delayed discovery in fraud cases like delayed discovery in other types of cases. If fraud is actually discovered or should have been discovered within the original three-year statute of limitations period, there is no delayed accrual and the complaint must be filed before the original three years expires. *Knapp v. Knapp*, 15 Cal.2d 237, 242, 100 P.2d 759 (1940); also see *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 437, 159 P.2d 958 (1945), and *Orange County Rock Products Co. v. Cook Bros. Equipment Co.*, 246 Cal. App.2d 698, 703, 55 Cal.Rptr. 265 (1966). However, if discovery of fraud
did not actually occur and should not have occurred until after the three-year statutory period has run, there is delayed accrual, and the statute of limitations runs from the earlier of when fraud was actually discovered or should have been discovered. This rule with respect to fraud cases is embodied in California Civil Jury Instructions (CACI) 1925.7

Proper analysis of delayed discovery cases is critical to avoid dismissal for failure to file within the statute of limitations period. Treating delayed discovery cases in the same manner as capacity to sue and be sued cases, as a simple tolling of the statute of limitations like a stopwatch in the stopped mode, can have disastrous consequences for plaintiffs. Since assertion of delayed discovery requires lack of and inability to discover the relevant facts within the statutory period, pleading the reasons for and the date of delayed discovery, a plaintiff who waits too long to file a complaint should expect to face a demurrer or a motion for judgment on the pleadings. If during the course of litigation, later discovery shows that the plaintiff should have discovered the relevant facts during the original statutory period, there is no delayed accrual of the statute of limitations, and the plaintiff should expect to face a motion for summary judgment. If the summary judgment motion is unsuccessful, the defendant still may seek to bifurcate trial and have the statute of limitations separately tried before the merits of the plaintiff’s claim are heard. Given the risks and pitfalls of relying on delayed accrual of the statute of limitations, plaintiffs should avoid reliance on delayed discovery to extend the time in which to file a complaint. By doing so, a plaintiff case can avoid the disastrous consequence of losing a demurrer, motion for judgment on the pleadings, motion for summary judgment, or motion for bifurcation based on the claim that the statute of limitations has run out and can look forward to a resolution of the case on the merits.

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Notes
2. Other categories that are beyond the scope of this article include estoppel to plead the statute of limitations, Code of Civil Procedure § 352.1, where the court’s assumption over an attorney’s practice that applies to cases where the court has assumed jurisdiction over the practice of an attorney pursuant to Business and Professions Code §§ 6180 or 6190, and actions by a bankruptcy trustee, 11 U.S.C. § 108.
5. The amount and method of computing time for filing an action varies depending on the reason for the inability to sue or be sued.
6. This includes independent discovery when there has been an attempt to conceal. *Sanchez*, 18 Cal.3d. 93, 99.
7. CACI, 2009 and 2011 supplements.