

ALERT

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SUBROGATION AND RECOVERY

News Concerning
Recent Subrogation and Recovery Issues



NAMING JOHN DOE: SUING A FICTITIOUS DEFENDANT TO FURTHER YOUR INVESTIGATION AND TOLL THE STATUTE OF LIMITATIONS

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SCENARIO 1:

Your insured's hospital suffers a brief power outage that damages an MRI machine before the backup generator kicks on. The power company informs you that it located the source of the disruption and the party responsible for it: one of its customers hired a tree trimming service that inadvertently allowed a severed limb to fall onto a distribution line. That power company, however, maintains a strict policy of not disclosing customer information. It will not reveal to you either the contractor or the customer who hired them. You have exhausted every other lead.

SCENARIO 2:

A Cozen Operation Gold[®] closed file review determines that a loss originally determined to have no subrogation potential may, in fact, have some. The loss involved a new home destroyed by an electrical fire. A recent code change required the home to have ground fault circuit interrupters throughout, but none were installed. Now the statute of limitations is approaching and you need to sue the electrician who mis-wired the home. Your insured knows only the identity of the builder, but the builder is out of business or will not return your calls. The home is in rural Mississippi, and so official records contain no mention of who did the work.

Depending on the jurisdiction, suing a fictitious "John Doe" defendant may be the next best step in both cases. It provides access to litigation tools such as document subpoenas and depositions, which can be used to compel nonparties—such as the power company and the builder in the examples above—to produce necessary information about the responsible party. After filing suit, you could subpoena the recalcitrant entity to a deposition that calls for the production of everything it knows about who and what caused the loss. Moreover, filing suit against a party that can be described but whose name is unknown might—depending on the state within which the loss occurs—toll the statute of limitations until the name of that party can be ascertained through discovery.

For example, some states, such as Alabama, allow the tolling of the statute of limitations for fictitious party names where precise rules are satisfied. See *Jones v. Resorcon*, 604 So. 2d 370 (Ala. 1992) (holding

plaintiff did not meet due diligence standard for discovering defendant's identity). Under Alabama's fictitious party practice rule, a plaintiff can bring a suit against John Doe when it is ignorant of the name of the opposing party. ALA. CODE § 9(h). An amendment substituting the defendant's actual name for John Doe relates back when (1) the original complaint adequately described the fictitious defendant; (2) the original complaint stated a claim against the fictitious defendant; (3) the plaintiff was ignorant of the true identity of the defendant; and (4) the plaintiff used due diligence to discover the defendant's true identity. *Id.* at 372-73.

Similarly, in California, "it is settled that a defendant sued by a fictitious name and later brought into the case by an amendment substituting his true name is considered a party to the action from its commencement for purposes of the statute of limitations." *Scott v. Garcia*, 370 F. Supp.2d 1056, 1064 (S.D. Cal. 2005) (applying California state law in federal § 1983 action but not finding relation back because defendant was an entirely new party and not the described John Doe); see also *Gilmore v. Lick Fish & Poultry, Inc.*, 265 Cal.App.2d 106 (Cal. Ct. App. 1968) (allowing relation back doctrine where named defendant was substituted for fictitious defendant after the statute of limitations had run). A plaintiff can name a fictitious party as John Doe where he is ignorant of the name of the defendant. CAL. CIV. PROC. § 474. Once the plaintiff becomes aware of defendant's name, the pleading must be amended to show the correct name. *Id.* The purpose of this statute is to allow plaintiff who is ignorant of defendant's name to bring an action before it has become barred by the statute of limitations. See *Motor City Sales v. Superior Court*, 31 Cal. App.3d 342, 345 (Cal. Ct. App. 1973). As such, it must be liberally construed. *Id.*

New Jersey permits fictitious name practice to overcome a statute of limitations defense. See *Wilson v. City of Atlantic City*, 142 F.R.D. 603 (D. N.J. 1992) (applying state law). Under Rule § 4:26-4, a plaintiff can file under John Doe when he does not know the name of the defendant if he can provide an "appropriate description sufficient for identification." N.J. STAT. ANN. § 4:26-4. For example, in *Wilson*, the court permitted the amendment to relate back where the description contained information alleging that defendants "acting

under color of State law, grabbed, struck, assaulted and battered the plaintiff.” *Wilson*, 142 F.R.D. at 604. In contrast, the court held that an amendment did not relate back where the description only identified defendant as one “who had designed, manufactured, sold ... or were otherwise responsible for the allegedly defective machine.” *Rutkowski v. Liberty Mut. Ins. Co.*, 209 506 A.2d 1302, 1304 (N.J. Super. 1986). Once the plaintiff knows the defendant’s name, he must substitute the real name. N.J. STAT. ANN. § 4:26-4. If the requirements are satisfied, Rule § 4:26-4 may “save [an] amended complaint from the bar of the statute of limitations.” *Viviano v. CBS, Inc.*, 503 A.2d 296, 302 (N.J. 1986) (finding sufficient description of record press manufacturer but noting causes of action against each would have been a stronger case).

New York adopted a statute which allows a party “who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party” to proceed against the party as John Doe as long as the pleading is amended once the name becomes known. N.Y. LAW § 1024 (McKinney 2010). If plaintiff cannot identify a defendant named as John Doe despite having made diligent efforts to do so, the statute of limitations can be tolled. See *Wilson v. City of New York*, 2006 WL 2528468 at *3 (S.D. N.Y. Aug. 31, 2006) (finding sufficient notice to defendant where John Doe was identified as “the police officer who handcuffed *Wilson* in front of 133 W. 135th St. at approximately 12:30 a.m. on January 13, 2002”). *Id.* A John Doe pleading must sufficiently describe the defendant so that he would have notice of the suit. See e.g., *Olmstead v. Pizza Hut of Am., Inc.*, 28 A.D.3d 855 (3d. Dept. 2006) (disallowing relation back because pleadings were insufficiently descriptive of intended defendant); *City of Mt. Vernon v. Best Dev. Co.*, 197 N.E. 299, 301 (N.Y. Ct. App. 1935); see also *Yaniv v. Taub*, 256 A.D.2d 273, 275 (1st Dept. 1998) (noting “linchpin” of relation-back doctrine is that defendant had sufficient notice of action).

On the other hand, in Pennsylvania, a plaintiff’s amendment substituting John Doe for actual name of defendant does not relate back for purposes of tolling the statute of limitations. See e.g., *Anderson Equip. Co. v. Huchber*, 690 A.2d, 1239, 1241 (Pa. Super. Ct. 1997). In *Anderson*, the court rejected plaintiffs’ argument that they should be able to amend the complaint to name defendant because they did not know his name until discovery. *Id.* at 1241-42.

Likewise, in Florida, the filing of a John Doe complaint does not toll the statute of limitations. See *Grantham v. Blount, Inc.*, 683 So.2d 538, 540 (Fla. Dist. Ct. App. 1996) (disallowing John Doe pleading as it

was not permitted under English common law on July 4, 1776 and it would conflict with Florida’s all-inclusive tolling statute). The court found no distinction between a plaintiff who named a fictitious defendant and one who misidentified defendant by a substantially incorrect name; in neither situation is the proper defendant notified of the action and as such should not toll the statute of limitations against that party. *Id.* at 541. The filing of such an action “merely serves as a legal justification to extend the time in which to find and search the actual defendant.” *Id.*

Texas has scant authority addressing the use of John Doe pleadings to toll the statute of limitations. See *Riston v. Doe*, 161 S.W.3d 525 (Tex. App. 2004) (discussing this situation as an issue of first impression). In *Riston*, the court declined to allow the John Doe petition to toll the statute of limitations because John Doe was not a misnomer or mistake for the proper defendant and thus the pleading did not relate back to the date of original filing. *Id.* at 528 (noting that in this decision Texas joined the majority of federal courts and several states with similar holdings, namely Florida, Minnesota, Maryland, South Dakota, and Washington). A John Doe petition is analogous to a misidentification case, in which the statute is not tolled because the defendant does not have proper notice of the suit. See *Pierson v. SMS Fin., Inc.*, 959 S.W.2d.343, 347 (Tex. App. 1998) (stating main distinction between misnomer and misidentification is whether the correct party received notice of the suit).

In *Riston*, the court continued to explain that though not present in this case, there are specific situations authorized by Texas statutes under which a petition which does not identify a defendant may toll the statute of limitations. *Riston*, 161 S.W.3d at 529. For example, in cases of personal injury based on sexual assault, the plaintiff can toll the statute of limitations by designating the unknown defendant as John or Jane Doe. TEX. CIV. PRAC. & REM. § 16.0045. In this situation, the plaintiff must proceed with “due diligence” to determine the identity of the unknown defendant and must amend the pleading within 30 days after the defendant is identified. *Id.*

Filing suit against a fictitious defendant enables you continue your investigation formally when informal methods become ineffective. Depending on the state you are in, it may also buy you more time to name a defendant when the statute of limitations period is about to expire.¹

¹ Special thanks to Abby Sher, an associate in the Global Insurance Group, for her work on this Alert.