Time Barring of Liability Actions.

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Extinctive time barring is of the greatest relevance in all kinds of legal matters, including issues related to liability.

Thanks to this, anybody who attempts to take legal action for compensation for damages against another person, company, or entity, is obliged to do so within a specific period of time. If the person does not comply with this, the action shall become time barred, and the court that would be hearing this action should reject it for the mere reason that the defendant can invoke said prescription. In this regard, it is understood that prescription is a penalty against a person who is entitled to exercise his or her right, but does not do so within the established period of time, thus allowing the passing of time to consolidate de facto situations, and provide the necessary juridical security to whom is favoured by it.

Along these same lines, a series of requirements must be met in order for prescription to operate; these basically seek to define when the period begins, how long it lasts, and what a plaintiff should do to ensure that his or her action does not prescribe. The majority of these rules are found in legislation, but for some time now they have been subject to modifications – either legal or by means of interpretations of them made by the courts in their rulings – which have generated a more complex and doubtful scenario than the one that existed a few years back. Based on the above, the purpose of this bulletin is to show what makes up these new tendencies and their interpretation and effect.

FIRST TENDENCY: When does the Time-bar Period begin?

The main rules on time barring can be found in Civil Code, and have not changed since they were issued in 1857. According to these rules, the time barring period for actions for tort compensation is taken *"as from when the action is perpetrated"* (art. 2332 CC). On the other hand, the period of time for ordinary actions for tort is taken *"as from when the obligation has become enforceable* (art. 2514 CC).

This rule grants a significant degree of certainty to all interested parties, because potential plaintiffs and defendants can easily calculate the period of time within which they can file a suit for compensation, or as from what date a potential complaint would be inadmissible, respectively.

However, events have shown that many times this rule is unfair to the potential plaintiff, especially in those cases wherein perpetration of the event and knowledge of the damage suffered are separated by time. It is true that in many cases both situations arise simultaneously (a road accident resulting in death, work related accident that injures a worker), but in others, there is in fact a period of time that, if above 4 years, would deprive the affected party of the possibility of exercising his or her right. The clearest example arises in cases of medical malpractice, where damage can be produced (or be discovered) a long time after the action that generated it (a surgical procedure or an error diagnosing an illness).

Some special laws address this problem and provide a solution. Thus, for example regarding contamination, faulty sanitary products or clinical trials, the periods of time are taken as from the appearance of the damage, and, in some cases, as from the *"evident appearance"* of same. On the other hand, in all cases wherein rules of the Civil Code should be applied, current interpretation of these rules has set out that as the damage is an essential element of liability, it is only when said damage appears that the prescription time limit can begin. More so, in recent opportunities the Supreme Court has used the concept of *"consummation"* (in the trial where this ruling was issued, this corresponded to the death of the patient, notwithstanding the fact that the damage had appeared months before). When explaining this change in interpretation, the Supreme Court mentioned that:

> *"… at the beginning, jurisprudence and doctrine interpreted that the 4-year time barring limit began with the negligent or wilful action or omission by the author of the damage, even though the damage was caused afterwards. The Supreme Court established sound doctrine, changed its opinion, and interpreted the beginning of time barring limit as from the moment in which the damage was produced, thus avoiding the absurdity of an action having prescribed before it had even been filed, because the existence of damage that can manifest itself after the negligent or wilful action is a requirement for indemnity" (Case File Nº 18.743-2018, Recital thirteen).*

As can be seen, the beginning of the time barring limit should be taken as from the moment damage manifests itself, which may or may not coincide with the moment when the action or omission that caused it occurred.

Finally, juridical doctrine has suggested the existence of a time limit for exercising liability actions, which would be ten years as from when the action was committed (based on the maximum time limit for extraordinary prescription), even though this issue has not generated consistent supporting jurisprudence.

SECOND TENDENCY: Time Barring Limit

The Civil Code sets out that actions related to tort liability "*shall be time barred within four years* (art. 2332 CC) and ordinary actions for contractual liability, in five years (art. 2515 CC).

However, there are multiple exceptions to this rule, set out in various special laws, that force the interested parties to determine the specific regime that would be applicable to a given liability complaint. The following exceptional time limits are among the more relevant ones:

› National aviation liability:	1 year
› International aviation liability:	2 years
› Employer liability:	5 years
› Environmental liability:	5 years
› Liability for faulty sanitary products:	5 years
› Liability for hydrocarbon spills under Navigation Law:	6 years
› Liability for damage produced during clinical trials:	10 years

The above shows how relevant it is to determine the specific liability regime applicable to each situation, so as to be aware of the period of time within which there is a risk of a complaint pursuing said liability.

THIRD TENDENCY: Time Barring Limit Interruption

Due to the fact that the time limit for exercising compensatory actions begins as from when the damage manifests itself, it is fundamental to learn what actions can be taken by the plaintiff in order to interrupt said prescription, and thus succeed in preventing the complaint from being rejected because it had already prescribed.

Once again, guidelines are established by the Civil Code, which sets out that civil interruption must occur by means of a judicial complaint (art. 2.518 CC), and goes on to add that this will be insufficient if *"notification of the complaint has not been executed in a legal manner".*

Historically, this disposition was interpreted in such a way that both the complaint and the notification thereof (an action that, due to its very nature, can only take place after presentation of the complaint and, in many cases, quite a long time after) should take place prior to the expiry of the time limit for prescription.

This meant that in practice, a plaintiff did not have until the last day of the time limit for prescription (for example, 4 years) to file a complaint before the court; instead, this had to be carried out well ahead of time, in order for notification to take place prior to said limit. In other words, even if a complaint is filed in a timely manner, but notified after the 4-year time limit mentioned above, defendant could plead in his favour that actions had prescribed.

This interpretation certainly provided a significant degree of security, especially to potential defendants, who, when confirming that the time limit for prescription had elapsed and they had not been notified, could understand that no valid actions could be brought against them, and that if they were notified afterwards, they could plead that said action had prescribed.

In line with this, it was very surprising when some sentences passed by the Supreme Court changed this historic and established criterion, declaring that *"It does not seem to be appropriate to demand for interrupting service of the complaint, which although should be provided with consequences within the strict field of procedural law when configuring the beginning of the procedure, should not be considered as an essential element for civil interruption of the time barring period. This is reinforced if we consider that service does not constitute an act within the*

creditor's field of action, because its fulfilment is dependent on the fluctuations of the recipient's procedural action and the location of the debtor, which is not always easy. To this should be added that the grounds for prescription are to penalize the creditor's indolence or negligence in protecting his rights or in claiming same. Filing the complaint would appear to satisfy this requirement as it makes known his will to exercise his right by means of respective actions, without the need for notification of the complaint. (…)" (Case File Nº 6.900-2015, Recital five)

Since then, other sentences from said court have confirmed this, although there have been a few that have opted for the opposite interpretation.

As can be seen, the above introduces an important element of uncertainty, because under this new jurisprudence the mere fact that the time limit for prescription elapsed and a notification of a complaint was not received, is no longer sufficient for considering that said action has prescribed, because it is perfectly possible that the complaint was in fact presented within said time limit and it only lacks notification, which could well occur much later.

Finally, it should be noted that law Nº 21.226, which sets out exceptional rules for judicial proceedings during the current Covid-19 pandemic, sets out under its Article 8 that *"While the state of constitutional exception and catastrophe is valid (…) prescription of actions shall be understood to be interrupted by the mere presentation of the complaint, under the condition that said complaint shall not be declared inadmissible and shall be validly notified within fifty days following the date of cessation of the abovementioned constitutional exception, or within thirty working days following the date on which the complaint is resolved, whichever occurs last".*

This rule means that when the state of constitutional exception is lifted, there will be many complaints that under normal circumstances could have been declared as prescribed, and which, due to this specific circumstance, could still be notified and give rise to trials wherein in it shall not be possible to claim prescription of said actions.