

# "A Relatively Simple Matter"<sup>1</sup> – Navigating the Utah Discovery Rule

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Simply put, operation of the so-called "discovery rule" tolls a limitations period (e.g., statute of limitations, statute of repose, or lookback period) until a plaintiff discovers or reasonably should have discovered the facts forming the basis for his or her cause of action. The discovery rule serves to balance the competing interests of predictability, on one hand, with penalizing wrongdoing, on the other.<sup>2</sup> However, before the discovery rule can operate, the plaintiff must trigger application of the discovery rule to his or her cause of action. This article aims to guide the plaintiff's cause of action through the potential pitfalls of the Utah discovery rule.

While the discovery rule can apply to any claim, the Utah Supreme Court recently elucidated a framework to determine whether the discovery rule applies to a particular cause of action. Specifically, in the *Russell Packard Development, Inc., v. Carson* case, decided last year, the court explained that the discovery rule applies if the plaintiff demonstrates that his or her cause of action is subject to either the statutory or equitable discovery rule.<sup>3</sup> In other words, although there is just one discovery rule, there are two ways to trigger its application. A plaintiff should frame his or her cause of action with *Russell Packard* in mind, because claims that do not conform to the *Russell Packard* framework may fail to trigger tolling and thus may be lost via a motion to dismiss or a motion for summary judgment. Indeed, whether the discovery rule applies is a question of law to be determined by the court.<sup>4</sup>

The plaintiff's first inquiry is whether the limitations period is at issue. Obviously, tolling the limitations period becomes relevant only when the limitations period on the plaintiff's cause of action has run, and but for the operation of the discovery rule, the claim will be barred. Because the statute of limitations must be raised as an affirmative defense, an examination of the defendant's pleadings will quickly resolve this inquiry.<sup>5</sup>

If the limitations period is at issue, the plaintiff's next inquiry is whether the cause of action stems from a statute that, by its own terms, contains a statutory discovery rule. A statutory discovery rule is language *within* the statute that expressly tolls the limitations period until a party discovers or reasonably should have discovered the facts forming the basis for the cause of action.<sup>6</sup>

In Utah, the civil causes of action that contain statutory discovery

rules are those based upon the following Utah Code sections: 13-24-7 (misappropriation of trade secret), 51-7-24(4) (public treasurer's securities action), 61-1-4(6)(e) (bond liability), 61-7-22(7)(a) (securities sales or purchase action), 70A-2-725(2) (UCC sales breach of warranty extending to future performance), 70A-2a-506(2) (UCC lease default), 75-1-106 (Uniform Probate Code fraud), 77-23b-8(5) (violation of access to electronic communications chapter), 78-12-19 (action to set aside sale of estate property by executor or administrator), 78-12-21.5(3)-(4) (action related to improvements to real property), 78-12-25.1(2) (sexual abuse of child), 78-12-26(1) (waste, trespass, or injury to real property), 78-12-26(3) (fraud or mistake), 78-12-27 (action against corporate stockholder or director), 78-12-48(1) (asbestos damages), 78-14-4(1) (medical malpractice), and 78-15-3 (product liability). If the cause of action stems from one of these statutes, the discovery rule necessarily applies because "[w]here a statute already exists to toll a limitations period, there is no need to invoke equitable principles to achieve the same end."<sup>7</sup>

If the cause of action is not based upon a statutory discovery rule, then the plaintiff must attempt to trigger application of the discovery rule through the second option, the equitable discovery rule. According to the Utah Supreme Court, the equitable discovery rule applies in instances of either fraudulent concealment or exceptional circumstances.<sup>8</sup>

As its name connotes, the fraudulent concealment version of the equitable discovery rule applies where the defendant conceals the plaintiff's cause of action.<sup>9</sup> Thus, the plaintiff must determine whether the defendant concealed facts that would have alerted the plaintiff to his or her cause of action. If the defendant concealed the plaintiff's action, the plaintiff should next evaluate whether, because of the defendant's concealment, (a) "the plaintiff neither

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discovered nor reasonably should have discovered the facts underlying the cause of action before the limitations period expired,” – i.e., the plaintiff reasonably did not know the facts;<sup>10</sup> or (b) the “plaintiff either knew or reasonably should have known of the facts underlying his or her cause of action *before* a limitations period expired,” but reasonably “delayed in filing his or her claim until after the limitations period expired” – i.e., the plaintiff reasonably did not act on the facts.<sup>11</sup> Under either test, the inquiry focuses on the plaintiff’s reasonableness.<sup>12</sup> If the plaintiff is able to satisfy either of these tests, the equitable discovery rule triggers application of the discovery rule.

A plaintiff may also use the exceptional circumstances version of the equitable discovery rule to trigger application of the discovery rule.<sup>13</sup> This version of the equitable discovery rule is a catchall for plaintiffs who are able to demonstrate the existence of exceptional circumstances such that it “would be irrational or unjust” to apply the limitations period, “regardless of any showing that the defendant has prevented the discovery of the cause of action.”<sup>14</sup> The Utah Supreme Court applies a two-step analysis to determine whether the exceptional circumstances version applies.<sup>15</sup> First, the plaintiff usually must show that he or she did not know and could not reasonably have known of the cause of action in time to file suit within the limitations period.<sup>16</sup> Although the court has explicitly left open the possibility of tolling the limitations period even where the plaintiff seeking the tolling knew of the cause of action before the limitations period expired, no Utah court has ever found occasion to do so, illustrating “the high bar [the court] has required those seeking such extraordinary relief to hurdle.”<sup>17</sup> If the plaintiff satisfies the first step, then the court balances the plaintiff’s burden of working within the limitations period against the prejudice to the defendant from letting the action proceed.<sup>18</sup>

Should the plaintiff succeed under the procedures described above, such that the court determines that the discovery rule applies as a matter of law, there remains the question of fact whether the discovery rule will operate to toll the limitations period under the facts at issue.<sup>19</sup> This question – When should the plaintiff reasonably have discovered the facts forming the basis for the cause of action? – is highly fact-dependent and is thus almost invariably left to the finder of fact.<sup>20</sup> Indeed, only in the clearest of cases, when the material facts are not in dispute should the court rule whether the discovery rule operates as a matter of law.<sup>21</sup> For instance, in *Russell Packard*, the court held that the trial court erred when it granted the defendants’ motion to dismiss on limitations grounds because, although “it is possible and perhaps even probable that a reasonable plaintiff would have discovered a sufficient number of” the relevant facts before the limitations period expired, “close calls are for juries, not

judges, to make.”<sup>22</sup>

To summarize, the discovery rule applies to potentially save a cause of action otherwise barred by a limitations period if (1) the applicable statute includes an express discovery rule (statutory discovery rule), (2) because of the defendant’s concealment (a) the plaintiff demonstrates that he or she reasonably did not know the facts underlying the cause of action, or (b) the plaintiff demonstrates that he or she acted reasonably in delaying to file suit (equitable discovery rule – fraudulent concealment), or (3) the presence of exceptional circumstances and the application of the limitations period would be irrational and unjust (equitable discovery rule – exceptional circumstances). Once the plaintiff satisfies one of these tests, generally the inquiry shifts to the fact finder to determine whether the discovery rule operates to toll the limitations period – when the plaintiff discovered or reasonably should have discovered the facts forming the basis for the cause of action. Thus, in most cases, triggering application of the discovery rule is sufficient to overcome the defendant’s motion to dismiss or motion for summary judgment anchored upon a limitations period. Navigating the relative complexity of Utah’s discovery rule need not be a problem, and may indeed be a real advantage to the plaintiff’s attorney who knows how it works.

1. *Russell Packard Dev., Inc., v. Carson*, 2005 UT 14, ¶ 22, 108 P.3d 741.

2. *See id.* ¶ 28.

3. *See id.* at ¶¶ 21, 24.

4. *See id.* at ¶ 18.

5. *See Koch v. Shell Oil Co.*, 52 F.3d 878, 880 (10th Cir. 1995); *Christiansen v. Union Pac. R.R. Co.*, 2006 UT App 117, ¶ 12, 548 Utah Adv. Rep. 3.

6. *See Russell Packard*, 2005 UT 14 at ¶ 21.

7. *Beaver County v. Property Tax Comm’n*, 2006 UT 6, ¶ 36, 128 P.3d 1187.

8. *See Russell Packard*, 2005 UT 14 at ¶ 25.

9. *See id.* at ¶ 29.

10. *Id.*

11. *Id.* at ¶ 30 (emphasis in original).

12. *See id.* at ¶ 28.

13. *See id.* at ¶ 25.

14. *Id.*

15. *See Macris v. Sculpture Software, Inc.*, 2001 UT 43, ¶ 18, 24 P.3d 984.

16. *See id.*

17. *Beaver County*, 2006 UT 6, at ¶ 29.

18. *See Sevry v. Security Title Co. of S. Utah*, 902 P.2d 629, 636 (Utah 1995).

19. *See Russell Packard*, 2005 UT 14 at ¶ 39.

20. *See id.*

21. *See id.*; *see also Stafsten v. LDS Social Servs., Inc.*, 942 P.2d 949, 953 (Utah 1997).

22. *Russell Packard*, 2005 UT 14, at ¶¶ 42–43 (quoting *Berenda v. Langford*, 914 P.2d 45, 54 (Utah 1996)).