

# Statutes of Limitations: New Mexico

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A Q&A guide to the statutes of limitations in New Mexico for several commercial claims. Answers to questions can be compared across a number of jurisdictions (see Statutes of Limitations: State Q&A Tool).

## Account Stated

### 1. What is the statute of limitations for an account stated claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for an account stated is four years (NMSA 1978, § 37-1-4).

#### Accrual Date

The limitations period for an open account starts to run on the date of the last item (NMSA 1978, § 37-1-6).

## Antitrust

### 2. What is the statute of limitations for an antitrust claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for an antitrust claim is four years for a civil action by the state or a private plaintiff (NMSA 1978, §§ 57-1-3 and 57-1-12). If the state files a civil or criminal action, a private plaintiff's claim is not barred until one year after the conclusion of the state's action (NMSA 1978, § 57-1-12(B)).

#### Accrual Date

The four-year limitations period starts to run at the later of:

- When the cause of action accrues.
- When the plaintiff discovered, or with reasonable diligence should have discovered, the facts relied on for

proof of the cause of action (*Butler v. Deutsche Morgan Grenfell, Inc.*, 140 P.3d 532, 538-39 (N.M. Ct. App. 2006)).

(NMSA 1978, § 57-1-12(A).)

A cause of action for a continuing violation is deemed to accrue at any time during the period of the violation (NMSA 1978, § 57-1-12(C)).

## Breach of Contract

### 3. What is the statute of limitations for a breach of contract claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for breach of contract is:

- Six years for actions founded on any bond, promissory note, bill of exchange, or other written contract (NMSA 1978, § 37-1-3(A)).
- Two years for actions against government entities based on valid written contracts (NMSA 1978, § 37-1-23).
- Four years for sale contracts governed by Article 2 of the Uniform Commercial Code, unless shortened by the terms of the original contract, in which case the limitations period can be no less than one year (NMSA 1978, § 55-2-725(1)).
- Four years for lease contracts governed by Article 2A of the Uniform Commercial Code, unless shortened by the terms of the original contract, in which case the limitations period can be no less than one year (NMSA 1978, § 55-2A-506(1)).
- Four years for unwritten contracts (NMSA 1978, § 37-1-4).

### Accrual Date

The limitations period starts to run on the date of the breach of contract (*Brooks v. State Farm Ins. Co.*, 154 P.3d 697, 700 (N.M. Ct. App. 2007); *Nashan v. Nashan*, 894 P.2d 402, 410-11 (N.M. Ct. App. 1995)).

For default under a lease contract governed by Article 2A of the Uniform Commercial Code, the limitations period starts to run on the later of:

- When the act or omission on which the default is based is or should have been discovered by the aggrieved party.
- When the default occurs.

(NMSA 1978, § 55-2A-506.)

### Breach of Fiduciary Duty

#### 4. What is the statute of limitations for a breach of fiduciary duty claim in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for breach of fiduciary duty is four years (NMSA 1978, § 37-1-4; *Durham v. Sw. Developers Joint Venture*, 996 P.2d 911, 921 n.3 (N.M. Ct. App. 1999)).

For actions by successors or creditors against the personal representative of an estate, the statute of limitations is six months from the filing of the closing statement (NMSA 1978, § 45-3-1005; see *Marchand v. Marchand*, 199 P.3d 281, 288 (N.M. 2008)).

### Accrual Date

The limitations period starts to run when the plaintiff knows, or should have known through the exercise of reasonable diligence, the essential facts for the cause of action (*Wilde v. Westland Dev. Co.*, 241 P.3d 628, 635 (N.M. Ct. App. 2010) (fraud claim predicated on breach of fiduciary duty)).

### Breach of Warranty

#### 5. What is the statute of limitations for a breach of warranty claim in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for breach of warranty is:

- Four years for actions involving the sale of goods under the Uniform Commercial Code (UCC) (NMSA 1978, § 55-2-725(1)).
- Six years for claims based on a written contract not involving the sale of goods under the UCC (*Sparks v. Melmar Corp.*, 598 P.2d 1161, 1163 (N.M. 1979)).
- Four years for breach of warranty action under lease contracts governed by Article 2A of the Uniform Commercial Code, unless shortened by the terms of the original contract, in which case the limitations period can be no less than one year (NMSA 1978, § 55-2A-506(1)).
- Four years for breach of unwritten warranty actions not involving the sale of goods under the UCC (*Sparks*, 598 P.2d at 1163-64).

### Accrual Date

The limitations period starts to run:

- For breach of warranty actions involving the sale of goods under the UCC, when the tender of delivery is made. However, if a warranty explicitly extends to future performance of the goods and discovery of the breach must wait until the time of the performance, the cause of action accrues when the breach is or should have been discovered. (NMSA 1978, § 55-2-725(2).)
- For breach of warranty actions involving leases under the UCC on the later of:
  - when the act or omission on which the breach of warranty is based is or should have been discovered by the aggrieved party; or
  - when the default occurs.(NMSA 1978, § 55-2A-506(2)).
- For other contract actions, on the date of the breach of contract (see *Brooks*, 154 P.3d at 698).

### Consumer Protection Statutes

#### 6. What is the statute of limitations for a consumer protection claim in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for a consumer protection claim is:

- Four years for claims under New Mexico's Unfair Trade Practices Act (*Nance v. L.J. Dolloff Assocs., Inc.*, 126 P.3d 1215, 1220 (N.M. Ct. App. 2005)).
- Four years for claims under the New Mexico's Motor Vehicle Franchising Act (NMSA 1978, § 57-16-14).

### Accrual Date

The limitations period starts to run:

- When the plaintiff sustains actual injury and discovers, or should discover through the exercise of reasonable diligence, the facts essential to the cause of action (*Radian Asset Assur., Inc. v. College of the Christian Bros. of N.M.*, 2011 WL 10977180, at \*59-60 (D.N.M. Jan. 24, 2011)).
- On the date of the violation of the Motor Vehicle Dealers Franchising Act. If the person liable conceals the cause of action from the person entitled to bring it, on the date of discovery of the cause of action. If a cause of action accrues during any civil, criminal, or administrative proceeding against a person brought by the US, or any of its agencies, under the antitrust laws, the Federal Trade Commission Act or any other federal act, or the laws of the state related to antitrust laws or to franchising, the actions may be commenced within one year of the final disposition of the civil, criminal, or administrative proceeding. (NMSA 1978, § 57-16-14.)

### Conversion

#### 7. What is the statute of limitations for a conversion claim in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for conversion is four years (NMSA 1978, § 37-1-4).

### Accrual Date

The limitations period starts to run on the date the plaintiff either:

- Discovers the conversion.
- Discovers facts that on a reasonably diligent investigation would lead to knowledge of the conversion.

(See *Wilde*, 241 P.3d at 635.)

### Employment Matters

#### 8. What is the statute of limitations for employment matters in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for employment matters is:

- Fifteen days to give written notice of an accident to an employer for a worker's compensation claim, or as soon as may reasonably be done up to 60 days if the worker is prevented from giving notice by reason of the injury or some other cause beyond the employee's control. No written notice is required if an employer had actual knowledge of the accident (NMSA 1978, § 52-1-29).
- One year for claims against an employer or insurer for not paying workers' compensation benefits under the New Mexico Workers Compensation Act (NMSA 1978, § 52-1-31(A)).
- Fifteen days to give written notice of an occupational disease to an employer for a worker's compensation claim, or as soon as may reasonably be done up to 60 days if worker is prevented from giving notice by reason of the disablement or some other cause beyond the employee's control. No written notice is needed if an employer had actual knowledge of the disablement (NMSA 1978, § 52-3-19).
- One year for claims against an employer or insurer for not paying claims for occupational disease disablement (NMSA 1978, § 52-3-16(A)).
- Two years to request a modification of a compensation order under the Workers' Compensation Act or Occupational Disease Disablement Law (NMSA 1978, § 52-5-9(B)).
- 30 days to file a complaint with the Secretary of Environment for employer retaliation against an employee who reported violations of the New Mexico Occupational Health and Safety Act (NMSA 1978, § 50-9-25(B)).
- 300 days to file a complaint with the New Mexico Human Rights Bureau for employment discrimination (NMSA 1978, § 28-1-10(A)). A party has 90 days to file an appeal from a decision of the Human Rights Commission for a trial de novo in district court (NMSA 1978, § 28-1-13).

### Accrual Date

The limitations period starts to run:

- For a workers' compensation claim based on an accident or injury, on the date the employee knew or should have known of the accident (NMSA 1978, § 52-1-29).
- For an occupational disease disablement, on the date of the occurrence of the disablement (NMSA 1978, § 52-3-19; *Di Luzio v. City of Santa Fe*, 357 P.3d 401, 408 (N.M. Ct. App. 2015)).
- On the date the employer or insurer fails or refuses to pay compensation under the New Mexico Workers Compensation Act (NMSA 1978, § 52-1-31(A)). The statute is tolled for up to one year while the worker remains in the employment of the employer at the time of the accidental injury (NMSA 1978, § 52-1-31(A)).
- On the date the employer or insurer fails or refuses to pay compensation for occupational disease disablement (NMSA 1978, § 52-3-16(A)).
- On the date of the last payment or the denial of benefits, for modification of a compensation order (NMSA 1978, § 52-5-9(B)).
- On the date the employer discharged or discriminated against the employee, for reporting violations of the New Mexico Occupational Health and Safety Act (NMSA 1978, § 50-9-25(B)).
- On the date the alleged discriminatory act was committed against the employee in violation of the Human Rights Act (NMSA 1978, § 28-1-10(A)).

### Enforcement of Judgments

#### 9. What is the statute of limitations for enforcing a judgment in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for enforcing a judgment is:

- 14 years on judgments or decrees of a New Mexico court (NMSA 1978, § 37-1-2).
- The applicable period of limitation, not to exceed 14 years, for a judgment in any court of record of any other US state or territory or the federal courts (NMSA 1978, § 37-1-2).

However, one US Bankruptcy Court ruled that the 14-year limitation did not bar collection of a New Mexico judgment

for student loan debt because, under federal law, no state statute of limitations can prevent the government from collecting on defaulted student loans (*In re Thompson*, 329 B.R. 145, 168-172 (Bankr. E.D. Va 2005)).

### Accrual Date

The limitation period starts to run when the judgment is entered (NMSA 1978, § 37-1-2). The limitation period restarts with a new judgment (*Cadle Co. v. Seavall*, 450 P.3d 471, 475 (N.M. Ct. App. 2019)). However, as amended effective July 1, 2021, NMSA 1978, § 37-1-2 provides that a revival of a prior judgment is not enforceable more than 14 years from the date of the original judgment (NMSA 1978, § 37-1-2).

### Fraud

#### 10. What is the statute of limitations for a fraud claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for fraud is four years (NMSA 1978, § 37-1-4).

### Accrual Date

The limitations period starts to run:

- When the plaintiff discovers the fraud.
- When the plaintiff should have discovered the fraud with reasonable diligence.

(NMSA 1978, § 37-1-7; *Wilde*, 241 P.3d at 635.)

### Fraudulent Concealment

#### 11. What is the statute of limitations for a fraudulent concealment claim in your jurisdiction?

#### Limitations Period

Under New Mexico law, fraudulent concealment is a tolling principle, not a substantive claim. The statute of limitations of a claim does not expire before the plaintiff discovers or, by the exercise of reasonable diligence, should have discovered the right of action (*Estate of Brice v. Toyota Motor Corp.*, 373 P.3d 977, 981 (N.M. 2016));

*Kern By & Through Kern v. St. Joseph Hosp., Inc.*, 697 P.2d 135, 139 (N.M. 1985); see Question 24: Fraudulent Concealment Rule).

If, however, the plaintiff discovers the claim with a reasonable amount of time left to file within the statutory time period, tolling does not apply (see *Brice*, 373 P.3d at 982; *Tomlinson v. George*, 116 P.3d 105, 110-11 (N.M. 2005)).

### Accrual Date

Fraudulent concealment is a tolling principle, not a substantive claim. This means that the statute of limitations of a claim does not expire until the plaintiff discovers or, by the exercise of reasonable diligence, should have discovered the right of action (see *Brice*, 373 P.3d at 981; *Kern By & Through Kern*, 697 P.2d at 139; see Question 24: Fraudulent Concealment Rule).

If, however, the plaintiff discovers the claim with a reasonable amount of time left to file within the statutory time period, tolling does not apply (*Brice*, 373 P.3d at 982; *Tomlinson*, 116 P.3d at 110-11).

## Insurance Bad Faith

### 12. What is the statute of limitations for an insurance bad faith claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations is four years for statutory bad faith insurance claims under the Trade Practices and Frauds Act (TPFA) of the Insurance Code (NMSA 1978, § 59A-16-1 to 59A-16-30) (NMSA 1978, § 37-1-4; *Martinez v. Cornejo*, 208 P.3d 443, 452 (N.M. Ct. App. 2008); *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192, 1202 (10th Cir. 1982) (applying New Mexico law)).

No reported New Mexico decision has decided whether a common law insurance bad faith claim is treated as a contractual claim with a six-year statute of limitations or a tort with a four-year statute of limitations. At least some actions to enforce written insurance contracts are subject to a six-year statute of limitations (*Brooks v. State Farm Ins. Co.*, 154 P.3d 697, 703 (N.M. Ct. App. 2007)).

#### Accrual Date

The limitations period starts to run:

- For negligent failure to obtain insurance, on the date the suit is filed against the prospective insured (*Spurlin v. Paul Brown Agency, Inc.*, 454 P.2d 963, 964 (N.M. 1969)).
- For refusal to settle, when excess liability is established (*Torrez*, 705 F.2d at 1202).

## Negligence

### 13. What is the statute of limitations for a negligence claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for negligence is:

- Three years for personal injury or injury to reputation (NMSA 1978, § 37-1-8).
- Four years for injuries to property including through professional negligence (NMSA 1978, § 37-1-4; *Haas Enters. v. Davis*, 82 P.3d 42, 43 (N.M. Ct. App. 2003); see *Sharts v. Natelson*, 885 P.2d 642, 645 (N.M. 1994)).
- Two years for claims against a governmental entity or a public employee (NMSA 1978, § 41-4-15(A)). But for claims against state or local public bodies, the plaintiff must first give conforming written notice to the defendant within 90 days of the occurrence giving rise to the claim (or later discovery of it), unless the defendant has actual notice of the occurrence (NMSA 1978, § 41-4-16(A)). This requirement is tolled for up to 90 days during incapacity of the plaintiff by reason of the injury (NMSA 1978, § 41-4-16(B)).

#### Accrual Date

The limitations period starts to run when the plaintiff knows or, with reasonable diligence should know, of the injury and its cause (*Gerke v. Romero*, 237 P.3d 111, 115 (N.M. Ct. App. 2010); *Maestas v. Zager*, 152 P.3d 141, 160 (N.M. 2007)).

## Products Liability

### 14. What is the statute of limitations for a products liability claim in your jurisdiction?

#### Limitations Period

In New Mexico, the statute of limitations for product liability is three years (NMSA 1978, § 37-1-8; *Martinez v. Showa Denko, K.K.*, 964 P.2d 176, 181 (N.M. Ct. App. 1998)).

### Accrual Date

The limitations period starts to run when the plaintiff knows or, with reasonable diligence should know, of the injury (*Martinez*, 964 P.2d at 181).

## Shareholder Derivative Suits

### 15. What is the statute of limitations for a shareholder derivative suit in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations is four years for actions with breach of fiduciary duty as the underlying cause of action in shareholder derivative suits (NMSA 1978, § 37-1-4; *Durham v. Sw. Developers Joint Venture*, 996 P.2d 911, 921 n.3 (N.M. Ct. App. 1999)).

### Accrual Date

The limitation period starts to run when the plaintiff discovers the injury (NMSA 1978, § 37-1-7).

## Third-Party Contribution

### 16. What is the statute of limitations for a third-party contribution claim in your jurisdiction?

### Limitations Period

The New Mexico Uniform Contribution Among Tortfeasors Act does not address the statute of limitations (NMSA 1978 §§ 41-3-1 to 41-3-8). The replacement of joint and several liability with pure several liability has effectively abolished the common law right of contribution between concurrent tortfeasors (see *Watson Truck & Supply Co. v. Males*, 801 P.2d 639 (N.M. 1990)).

### Accrual Date

The replacement of joint and several liability with pure several liability has effectively abolished the common law right of contribution between concurrent tortfeasors (see *Watson Truck & Supply Co., Inc.*, 801 P.2d 639).

## Tortious Interference with Contract Rights

### 17. What is the statute of limitations for a claim of tortious interference with contract rights or a business relationship in your jurisdiction?

### Limitations Period

A federal district court ruled that the statute of limitations depends on the nature of the right sued on (*Printron, Inc. v. McGraw-Hill, Inc.*, 35 F. Supp. 2d 1325, 1327 (D.N.M. 1998) (applying New Mexico law)). It may be three years where the underlying wrong is injury to a person or the reputation of a person under NMSA 1978, § 37-1-8, four years for other wrongs such as fraud under NMSA 1978, § 37-1-4, or two years for a wrong by a governmental entity under NMSA 1978, § 41-4-15.

### Accrual Date

For most underlying statutes of limitations, the limitation period starts to run when the plaintiff discovers the injury (NMSA 1978, § 37-1-7).

## Trade Secret Misappropriation

### 18. What is the statute of limitations for a trade secret misappropriation claim in your jurisdiction?

### Limitations Period

In New Mexico, the statute of limitations for trade secret misappropriation is three years (N.M. Stat. Ann. § 57-3A-7).

### Accrual Date

The limitations period starts to run when the misappropriation either:

- Is discovered.
- Should have been discovered with reasonable diligence.

(N.M. Stat. Ann. § 57-3A-7.) A continuing misappropriation is a single claim (N.M. Stat. Ann. § 57-3A-7).

### Trademark Infringement

#### 19. What is the statute of limitations for a trademark infringement claim in your jurisdiction?

##### Limitations Period

The New Mexico Trademark Act does not address the statute of limitations (NMSA 1978, §§ 57-3B-1 to 57-3B-17). The limitation period applied to trademark infringement in New Mexico is likely the four-year statute of limitations for unspecified actions or injuries, but New Mexico courts have not addressed this issue (NMSA 1978, § 37-1-4).

##### Accrual Date

The New Mexico Trademark Act does not address the statute of limitations.

### Unfair Competition

#### 20. What is the statute of limitations for an unfair competition claim in your jurisdiction?

##### Limitations Period

In New Mexico, the statute of limitations for the Unfair Practices Act is four years under the catch-all "other unspecified actions" in NMSA 1978, § 37-1-4 (*Nance*, 126 P.3d at 1220).

##### Accrual Date

For many if not all unfair competition claims, the limitation period starts to run when the plaintiff discovers the injury (NMSA 1978, § 37-1-7).

### Unjust Enrichment

#### 21. What is the statute of limitations for an unjust enrichment claim in your jurisdiction?

##### Limitations Period

In New Mexico, the statute of limitations for unjust enrichment depends on the underlying claim.

For example, when a claim for unjust enrichment is based on a government written contract, the applicable two-year statute of limitations applies (see *Hydro Conduit Corp. v. Kemble*, 793 P.2d 855, 859-62 (N.M. 1990)).

##### Accrual Date

As with the statute of limitations, the accrual date depends on the underlying claim.

### Wrongful Death and Survival

#### 22. What is the statute of limitations for a wrongful death and survival claim in your jurisdiction?

##### Limitations Period

In New Mexico, the statute of limitations for wrongful death actions is three years (NMSA 1978, § 41-2-2).

If the person entitled to a cause of action dies within one year prior to the expiration of the limitation above provided, the representatives of the deceased person or persons shall have one year after such death within which to commence said action.

N.M. Stat. Ann. § 37-1-11 (West)

##### Accrual Date

The limitations period starts to run on the date of death (NMSA 1978, § 41-2-2).

### Other Commercial Causes of Action

#### 23. Please describe any other statutes of limitations for commercial causes of action in your jurisdiction of which practitioners should be aware.

##### Invasion of Privacy

##### Limitations Period

In New Mexico, the statute of limitations is:

- For property-based causes of action, four years (NMSA 1978, § 37-1-4).
- For injuries to person or reputation, three years (NMSA 1978, § 37-1-8).

### Accrual Date

The limitation period starts to run when the plaintiff discovers an injury (NMSA 1978, § 37-1-7).

### Libel

#### Limitations Period

The statute of limitations is three years (NMSA 1978, § 37-1-8; *Woodhull v. Meinel*, 202 P.3d 126, 129 (N.M. Ct. App. 2008); *Printron, Inc.*, 35 F. Supp. 2d at 1327).

#### Accrual Date

The limitations period starts to run at the publishing of the defamatory matter (*Woodhull*, 202 P.3d at 129).

### Slander

#### Limitations Period

The statute of limitations is three years (NMSA 1978, § 37-1-8).

#### Accrual Date

The limitations period starts to run at the publishing of the defamatory matter (*Woodhull*, 202 P.3d at 129).

### Enforcement of Mechanic's Lien

#### Limitations Period

The limitations period is two years for an action to enforce a claim for a mechanics lien (NMSA 1978, § 48-2-10).

#### Accrual Date

The limitations period for the enforcement of a mechanic's lien remains valid for two years after the claim of lien has been filed unless proceedings have been commenced in a court of competent jurisdiction or in binding arbitration within that time to enforce the lien (NMSA 1978, § 48-2-10).

### Adverse Possession

#### Limitations Period

The statute of limitations for challenging adverse possession is ten years from the date any person or persons, their children, heirs or assigns, shall have had adverse possession of the property (NMSA 1978, § 37-1-22).

#### Accrual Date

The limitations period starts to run on the date any person, their children, heirs, or assigns, shall have

had adverse possession of the property. The time for commencing an action in favor of those persons will be extended one year after the termination of the disability, if at the time the cause of action first accrued, the person entitled to commence or prosecute the action is:

- Imprisoned.
- Of unsound mind.
- Under the age of majority.

(NMSA 1978, § 37-1-22.)

This provision only applies to disabilities that existed when the cause of action first accrued. A cumulative disability will not prevent the bar of the limitation. (NMSA 1978, § 37-1-22.)

### Municipal Actions

#### Limitations Period

The statute of limitations is three years for a suit against a city, town, or village. This limitations period includes actions for the recovery of an action arising out of or founded upon:

- Any ordinance, trust relation or contract.
- The appropriation or conversion of any real or personal property.

(NMSA 1978, § 37-1-24.)

The statute of limitations is two years for any action or proceeding to recover damages for personal injury or death resulting from the negligence of any city, town or village or any officer thereof (NMSA 1978, § 37-1-24).

### Special Rules and Exceptions

**24. Please list any special rules and exceptions that may toll or otherwise affect any of the statutes of limitations in the previous questions.**

New Mexico has special rules and exceptions that may toll or otherwise affect any of the statutes of limitations described above. Depending on the cause of action and facts of the case, one or more of the following rules may affect the running of the statute of limitations.

#### Discovery Rule

Under the discovery rule, the statute of limitations begins when the plaintiff learns of facts, conditions, or



circumstances that would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action (*Gerke*, 237 P.3d at 115). The key consideration under the discovery rule is the factual basis for the cause of action. The action accrues when the plaintiff knows or should have known the relevant facts, whether or not the plaintiff also knows that these facts establish a legal cause of action (*Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara*, 267 P.3d 70, 77 (N.M. Ct. App. 2011)).

New Mexico codified the discovery rule as applied to actions for relief on the grounds of fraud, mistake, injury, and conversion (NMSA 1978, § 37-1-7).

### Fraudulent Concealment Rule

New Mexico adopted the doctrine of fraudulent concealment, which prevents expiration of the statute of limitations while a defendant's knowing suppression or concealment of material information, with the intent to deceive or defraud, prevents the plaintiff from bringing the cause of action (*Kern By & Through Kern*, 697 P.2d 135 at 139).

To establish fraudulent concealment, the proponent must demonstrate the following facts:

- The use of fraudulent means by the party using the statute of limitations as a bar.
- Successful concealment from the injured party.
- That the party claiming fraudulent concealment did not know or by the exercise of reasonable diligence could not have known that there might be a cause of action.

(*Continental Potash, Inc. v. Freeport-McMoran, Inc.*, 858 P.2d 66, 74 (N.M. 1993).)

### Equitable Tolling

Equitable tolling is a non-statutory tolling theory suspending the limitations period. Equitable tolling typically applies in cases where an extraordinary event beyond a litigant's control prevented filing suit (*Snow v. Warren Power & Machinery, Inc.*, 354 P.3d 1285, 1290 (N.M. 2015)).

### Class Action Tolling

The statutory limitations are tolled for all alleged class members on the filing of the class action and remain tolled until either:

- The class certification is denied.
- The plaintiff opts out of the class.

(*Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994) (applying New Mexico law).)

### Statutory Tolling under Chapter 37 (NMSA 1978, §§ 37-1-1 to 37-2-17)

Statutory bases for tolling under Chapter 37 (NMSA 1978, §§ 37-1-1 to 37-2-17) do not necessarily apply to all causes of action (NMSA 1978, § 37-1-17).

### Defendant's Absence from the State

The applicable statute of limitations is tolled for the time that a defendant is absent from the state or concealed within the state if such absence or concealment prevents service of process (NMSA 1978, § 37-1-9).

### Plaintiff's Disabilities

New Mexico law extends the statute of limitation period for incapacitated persons to allow one additional year from the end of the incapacity to commence an action (NMSA 1978, § 37-1-10; *Gomez v. Chavarria*, 206 P.3d 157, 160 (N.M. Ct. App. 2009)).

The statutory tolling rule does not apply to all causes of action (*Jaramillo v. State*, 809 P.2d 636, 640-41 (N.M. Ct. App. 1991)).

### Infancy

New Mexico law extends the statute of limitation period for minors. Minors have an additional year from their eighteenth birthday to commence an action. (NMSA 1978, § 37-1-10; *Chavarria*, 206 P.3d at 160 (N.M. Ct. App. 2009).)

The statutory tolling rule may not apply to all causes of action, but the constitution requires some tolling as a matter of due process (*Jaramillo v. Heaton*, 100 P.3d 204, 209 (N.M. Ct. App. 2004) (harsh limitation of tolling under Medical Malpractice Act, NMSA 1978, § 41-5-13, violates due process)).

### Warranty

For a breach of warranty action on a sales contract, a second action may be started after the expiration of the initial limitations period if the first action both:

- Was commenced within four years of the breach (NMSA 1978, § 55-2-725(1)).
- Ended in a way that left a remedy by another action available for the same breach, unless the termination

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resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute (NMSA 1978, § 55-2-725(3)).

The second action must start within six months after the termination of the first action. (NMSA 1978, § 55-2-725(3)).

### Savings Statute

The savings statute permits a second suit within six months, if the first suit fails for any cause except negligence in its prosecution. This prevents a statute of limitations from barring a suit where the plaintiff brought the original suit in a timely fashion, but the statute ran before plaintiff filed the second suit. (NMSA 1978, § 37-1-14; *Amica Mut. Ins. Co. v. McRostie*, 134 P.3d 773, 774 (N.M. Ct. App. 2006).)

### Occurrence Rule

Under the occurrence rule, the accrual date is fixed to the day the negligence occurred even though the plaintiff may be oblivious of any harm (*Cummings v. X-Ray Assocs. of N.M., P.C.*, 918 P.2d 1321, 1334 (N.M. 1996)).

New Mexico's Medical Malpractice Act codified this rule relating to medical malpractice against "qualified health care providers". These medical malpractice claims must be filed within three years after the date that the act of malpractice occurred. However, minors and incapacitated persons have one year from the termination of their incapacity to bring a malpractice claim. (NMSA 1978, § 41-5-13.)

### Statutes of Repose

A statute of repose bars a plaintiff from starting an action after a specific time from a statutorily determined triggering event. This is true even when the plaintiff's injury does not manifest within the time period. (*Cummings*, 918 P.2d at 1331.)

New Mexico applies a statute of repose of ten years to actions to recover damages for any injury to real or personal property. The ten-year period starts to run from

the date of substantial completion of the improvement. This covers actions brought:

- For injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property,
- For contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection, or administration of construction of the improvement to real property, and on account of such activity,

The statute of repose does not apply to any action based on a contract, warranty or guarantee which contains an express agreement for a different statute of limitations (N.M. Stat. Ann. § 37-1-27).

### Statute of Limitations Does Not Generally Run Against the State

New Mexico still follows the common-law rule that statutes of limitations do not generally run against the state, unless:

- the state is not the real party in interest.
- the real party in interest is a political subdivision rather than the state itself.
- the relevant statute clearly applies the statute of limitations to the state.

(NMSA 1978, § 37-1-19; *Bd. of Educ. v. Standhardt*, 458 P.2d 795, 801 (N.M. 1969); *Hurley v. Village of Ruidoso*, 131 P.3d 693, 694 (N.M. Ct. App. (2006)).)

### Rule for Counterclaims and Defenses

New Mexico law allows setoffs and counterclaims to be brought despite the statute of limitations having run if they were not barred when the cause of action sued for accrued, but recovery on the otherwise barred setoff or counterclaim may not exceed the judgment for the plaintiff (NMSA 1978, § 37-1-15).

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