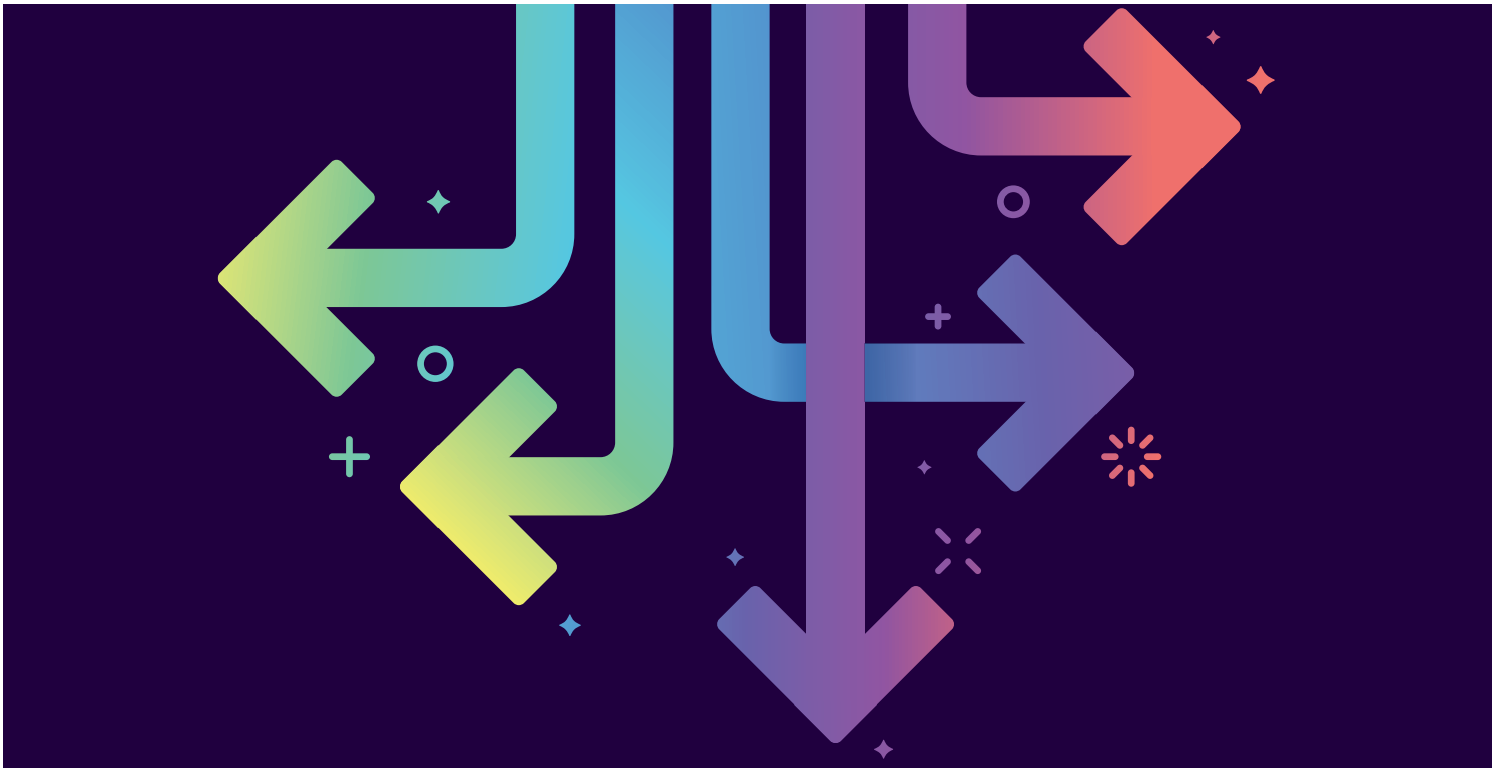

Is the Doctrine of Laches Still Alive in Colorado?

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Laches is one of the most commonly pleaded affirmative defenses. But in Colorado, the law that governs this doctrine is surprisingly unsettled. A somewhat recent string of Colorado Court of Appeals decisions has suggested that laches is close to a dead letter, and that courts instead should apply the most analogous statute of limitations when adjudicating a laches defense. This article examines recent caselaw and offers some practical tips about how lawyers can navigate this difficult legal terrain.

Laches—a defense asserting that the plaintiff's unreasonable delay bars the claim—is an exceedingly common affirmative defense. This legal doctrine has been referenced at least 8,000 times in the last 40 years by litigants across the state.[1] But is laches still a viable doctrine in Colorado? That's something of an open question. On the one hand, for over 130 years the Colorado Supreme Court has applied the "traditional rule" and held that laches requires three elements: full knowledge of the facts, unreasonable delay, and prejudice.[2] On the other hand, at least three published Colorado Court of Appeals decisions have adopted the "*Interbank* rule" and held that, barring extraordinary circumstances, trial courts should ignore those elements and instead apply the most analogous statute of limitations.[3] What's more, there doesn't appear to be any case where a court found that any such "extraordinary circumstances" existed. As a result, state and federal courts have inconsistently applied the law concerning laches in Colorado for years, with some applying the traditional rule and others adopting the *Interbank* rule and effectively reading laches out of state law entirely. Even the court of appeals has toggled back and forth on this question. Until the Supreme Court steps in to provide some clarity, trial and appellate courts will likely continue to apply the law inconsistently to cases that come before them. This article reviews the critical cases on laches and offers some practical guidance about how lawyers can litigate this complex issue.

The Traditional Rule

For more than 130 years, the Colorado Supreme Court has applied the traditional rule and held that laches requires proof of three elements: full knowledge of the facts, unreasonable delay, and prejudice. This principle was arguably first articulated in 1885 in *Yates v. Hurd*, where the Colorado Supreme Court noted that "[w]henever the rights of other parties have intervened by reason of a man's conduct or acquiescence . . . , and his conduct or acquiescence, or even laches, was based upon a knowledge of the facts, he will be deemed to have made an effectual election, and will not be permitted to disturb the state of things . . . ."[4] Over the intervening 13 decades, the Court affirmed the traditional rule in at least seven separate opinions.[5] In a 2016 case, *Johnson v. Johnson*, the Supreme Court declined the opportunity to modify the traditional rule.[6] In *Johnson*, the Court took up the question of whether a parent may raise laches to defend against the other parent's claim for interest on a child support debt.[7] Answering in the affirmative, the Court confirmed that in adjudicating the laches defense at issue, "the courts below should apply the [traditional] three-pronged test for laches . . . ."[8] The Court noted that an amicus party "urge[d] us to modify this test," but it rejected that proposal, concluding that "the long-established elements of laches, *which require unconscionable delay and prejudice*, can be readily applied, without modification, here."[9]

The *Interbank* Rule

Despite this long string of Supreme Court precedent, the court of appeals has held in at least three published decisions that rather than apply the traditional rule, courts should instead apply the most analogous statute of limitations when ruling on a laches defense.

The court of appeals first articulated this new rule in *Interbank Investments, L.L.C. v. Vail Valley Consolidated Water District*.[10] In that case, the plaintiff raised an unjust enrichment claim, which the district court dismissed on statute-of-limitations grounds.[11] The plaintiff appealed, and the *Interbank* court began its analysis by noting that "plaintiff's unjust enrichment claims, being equitable in nature, are technically subject to an equitable laches rather than a legal statute of limitations analysis."[12] The court nevertheless held that "[a]bsent extraordinary circumstances, [] a court 'will usually grant or withhold relief in analogy to the statute of limitations relating to actions at law of like character.'"[13] The court determined that the three-year period applicable to contract claims is the most analogous statute of limitations to an unjust enrichment claim, and it then applied that three-year limitations period.[14] The court did not consider whether the defendant had proven full knowledge of the facts, unreasonable delay, or prejudice.

Notably, the *Interbank* court didn't explain why it deviated from Supreme Court precedent or why it determined this new rule is preferable to the old one. The only authority the appellate court cited in support of its view was a federal district court case, *Brooks v. Bank of Boulder*.[15] But the *Brooks* court didn't go as far as the *Interbank* rule: *Brooks* did say that "[u]nder ordinary circumstances, a suit in equity . . . will be stayed after[] the time fixed by the analogous statute" of limitations.[16] But in the very next paragraph the court noted that "[l]apse of time alone, however, in the absence of resulting injury, prejudice or disadvantage . . . does not constitute laches."[17] Moreover, the court then denied summary judgment after finding that the defendant did not establish prejudice—an element under the traditional rule.[18]

One other point warrants mention—this article's authors have not been able to find a single case where a court applying the *In-*

terbank rule found that any "extraordinary circumstances" were present. As a result, and without guidance on what circumstances might qualify as "extraordinary," application of the *Interbank* rule may functionally abolish laches altogether, substituting the most analogous statute of limitations in its place.

Inconsistent Application of the Law

A trip through the annals of history reveals that the *Interbank* rule can be traced back to before the merger of the courts of law and equity. In 1929, in *Columbian National Life Insurance Co. v. Black*, the Tenth Circuit was faced with a laches defense asserted by a doctor.[19] Like a Monopoly® community chest "Bank Error in Your Favor" card, the doctor had been issued a favorable life insurance policy due to a printing error, and then had attempted to trade it in.[20] The insurance company's predecessor in interest had been aware of the printing error 20 years before it brought an action to reform the life insurance policy.[21] In considering the laches defense, the court cited Judge Sanborn's opinion in *Kelly v. Boettcher*, which held that "courts in equity are not bound by, but they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character."[22] Although the case was not decided on laches, the court illustrated the different approaches taken by the courts of law and equity on the question of laches: courts of law applied the traditional rule; courts of equity considered, but were not bound by, the most analogous statute of limitations. Although the courts of law and equity later merged, the two different approaches were never reconciled.

This rule-by-analogy has now calcified into a genuine court split that has led to widespread confusion in appellate and trial courts. State and federal courts have struggled to uniformly apply Colorado law in the wake of *Interbank*.

At the appellate level, the court of appeals has issued inconsistent opinions for years. The court of appeals applied Supreme Court precedent and followed the traditional rule in numerous cases before the *Interbank* opinion came out.[23] In the years following *Interbank*, the Supreme Court reaffirmed the traditional rule on several occasions,[24] and divisions of the court of appeals continued to follow it. To take one example, in *Cullen v. Phillips*, the appellate court explicitly held that "laches is not dependent upon the statute of limitations" and that "[m]ere lapse of time and staleness are material issues, but not conclusive of a laches claim."[25] Other divisions applied the same rule in at least five other published opinions.[26] The most recent published decision came down in March 2022. In *Board of County Commissioners of Adams County v. City & County of Denver*, the appellate court took up Denver's appeal of a $33 million judgment arising out of a dispute about an inter-governmental agreement between the two parties.[27] The appellate court, applying the traditional rule, held that "Denver failed to prove the elements of laches," and affirmed the judgment below.[28]

> "At the same time, other trial courts have continued to use the traditional rule and require the party asserting laches to prove full knowledge, unreasonable delay, and, most critically, prejudice."

Nevertheless, some divisions of the court of appeals continued to publish decisions declining to apply the traditional rule. For example, in *Jackson v. American Family Mutual Insurance Co.*, the court cited *Interbank* and applied a three-year limitations period to an equitable claim arising under the Colorado Auto Accident Reparations Act.[29] And in *Sterenbuch v. Goss*, the court again cited *Interbank* and applied a three-year statute of limitations to an unjust enrichment claim.[30] As with *Interbank*, neither *Jackson* nor *Sterenbuch* explain why the court declined to follow the traditional rule; all three cases assert that the *Interbank* rule is valid and apply it to the case at hand without further discussion.

Likely as a result of these mixed signals, trial courts have not fared any better. Many state and federal courts have followed the *Interbank* rule and applied the most analogous statute of limitations to the claim at issue.[31] In August 2022, in *Voodoo Leatherworks, LLC v. Waste Connections US, Inc.*, Colorado's federal district court applied the *Interbank* rule. The court first determined that a three-year statute of limitations applied to the plaintiff's breach of contract and breach of covenant of good faith and fair dealings claims. Finding that no extraordinary circumstances prohibited it, the court then held that a three-year statute of limitations also applied to the plaintiff's equitable unjust enrichment claim.[32] At the same time, other trial courts have continued to use the traditional rule and require the party asserting laches to prove full knowledge, unreasonable delay, and, most critically, prejudice. For example, the Adams County District Court recently took up a dispute involving a community development project.[33] The court held that laches barred third-party claims against the City of Brighton and found that the municipality had properly pleaded and proven the necessary elements, including prejudice.[34] Other state district courts have made similar rulings.[35] As these cases demonstrate, courts across Colorado have been issuing contradictory opinions about a basic principle of Colorado common law for years.

Practical Tips

What, then, can practitioners do in light of these conflicting decisions? First, and perhaps most

important, attorneys should develop a record as to both tests. Because there is a split of authority among published court of appeals decisions, trial courts can decide for themselves which test to apply. Moreover, whichever test the trial court adopts, the court of appeals may select the other rule on appeal. Thus, the only way to protect a client against this split is to litigate under both tests. Second, lawyers should notify the trial court about this issue. Disclosing this split gives the lawyer the opportunity to argue in favor of whichever test best supports the client's position. It's much better to disclose this split of authority than to pick one test, litigate only under that test, and run the risk that the trial or appellate court decides to apply the other one. And in fact, lawyers who would prefer to apply the *Interbank* rule may have an ethical obligation to disclose the Supreme Court precedent cited above.[36] Third and finally, lawyers should advise their clients that the law surrounding laches is unsettled and it's therefore more difficult to predict how a court will rule. That is, while all litigation carries substantial risk, a case involving laches is particularly difficult to forecast.

Conclusion

Laches is regularly pleaded and litigated in state and federal courts throughout Colorado. Yet despite the doctrine's ubiquity, Colorado law remains stubbornly uncertain when it comes to the elements needed to make out a laches defense. Until the Supreme Court weighs in, lawyers and litigants should know that the elements for a laches defense will continue to vary from case to case. CL


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NOTES

1. A search for "laches" in the Lexis+ database that covers Colorado pleadings, motions, briefs, and other court documents (not opinions or orders) from 1981 to the present generated 8,110 hits.

2. *E.g., Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014).

3. *Interbank Inv., L.L.C. v. Vail Valley Consol. Water Dist.*, 12 P.3d 1224 (Colo.App. 2000).

4. *Yates v. Hurd*, 8 P. 575, 579 (Colo. 1885) (quotation omitted).

5. *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 20 P. 771, 777–78 (Colo. 1888); *Stubbs v. Standard Life Ass'n*, 242 P.2d 819, 821 (Colo. 1952); *Bd. of Cnty. Comm'rs v. Echternacht*, 572 P.2d 143, 146 (Colo. 1977); *Manor Vail Condo. Ass'n v. Vail*, 604 P.2d 1168, 1170 (Colo. 1980); *Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005); *Cent. Colo. Water Conservancy Dist. v. City of Greeley*, 147 P.3d 9, 17–18 (Colo. 2006); *Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014).

6. *Johnson v. Johnson*, 380 P.3d 150, 151 (Colo. 2016).

7. *Id.*

8. *Id.* at 156.

9. *Id.* (citations omitted) (emphasis added).

10. *Interbank*, 12 P.3d 1224.

11. *Id.* at 1227.

12. *Id.* at 1229–30 (citations omitted).

13. *Id.* at 1230 (quoting *Brooks v. Bank of Boulder*, 911 F.Supp. 470, 477 (D.Colo. 1996)).

14. *Id.*

15. *Id.*

16. *Brooks*, 911 F.Supp. at 477 (quoting *Shell v. Strong*, 151 F.2d 909, 911 (10th Cir. 1945)).

17. *Id.*

18. *Id.*

19. *Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571, 572–73 (10th Cir. 1929).

20. *Id.*

21. *Id.*

22. *Id.* at 575–76 (quoting *Kelley v. Boettcher*, 85 F. 55, 62 (8th Cir. 1898)).

23. *E.g., Pasternak v. Robin*, 511 P.2d 529, 530–31 (Colo.App. 1973) ("Mere delay, short of the running of the applicable statute of limitations, does not in and of itself constitute laches."); *Bd. of Cnty. Comm'rs v. Blanning*, 479 P.2d 404, 408 (Colo.App. 1970) (laches did not bar the claim because defendant wasn't prejudiced by 12-year delay).

24. *E.g., City of Greeley*, 147 P.3d at 17–18; *Robbins*, 107 P.3d at 388; *Hickerson*, 316 P.3d at 623; *Johnson*, 380 P.3d at 151.

25. *Cullen v. Phillips*, 30 P.3d 828, 834 (Colo.App. 2001).

26. *E.g., Keller Cattle Co. v. Allison*, 55 P.3d 257, 260 (Colo.App. 2002) (reciting the three elements of laches and noting that a party seeking summary judgment must prove "that the other party unreasonably delayed the proceedings, and that such delay caused substantial prejudice"); *People v. Lanari*, 410 P.3d 516, 518 (Colo.App. 2014) ("Delay alone is insufficient; the record must show a lack of diligence in the face of actual knowledge of the conditions giving rise to the claim.") (quotation omitted); *In re Marriage of Kann*, 488 P.3d 245, 253 (Colo.App. 2017) ("Laches in legal significance, is not mere delay, but delay that works a disadvantage to another. Thus, the party asserting laches has the further burden of demonstrating prejudice.") (quotation omitted); *State Farm Mut. Auto Ins. Co. v. Steul*, 477 P.3d 778, 781 (Colo.App. 2020) (holding that trial court did not rely on laches in issuing an order because it did not cite the three elements "nor did it evaluate whether State Farm had 'full knowledge of the facts' or whether Steul's conduct demonstrated her 'reliance'").

27. *Board of Cnty. Comm'rs of Adams County v. City & Cnty. of Denver*, 511 P.3d 692, 696–99 (Colo.App. 2022).

28. *Id.* at 706.

29. *Jackson v. Am. Fam. Mut. Ins. Co.*, 258 P.3d 328, 331 and n.4 (Colo.App. 2011).

30. *Sterenbuch v. Goss*, 266 P.3d 428, 437 (Colo. App. 2011).

31. *E.g., VanPortfliet v. Carpet Direct Corp.*, No. 16-cv-00616, 2017 U.S. Dist. LEXIS 37923, at *17 n.8 (D.Colo. Mar. 15, 2017) ("However, in the absence of extraordinary circumstances, the court will apply the statute of limitations relating to actions at law of like character."); *Tisch v. Tisch*, No. 2016CV30697, 2017 Colo. Dist. LEXIS 425, at *15 (Jefferson Cnty. Dist. Ct. Feb. 16, 2017) ("The Court declines to supplant the application of the statute of limitations on these claims utilizing the doctrine of laches in the absence of extraordinary circumstances, which are lacking here."); *Zook v. El Paso Cnty. Ret. Plan*, No. 15CV3, 2016 Colo. Dist. LEXIS 762, at *10 (El Paso Cnty. Dist. Ct. June 20, 2016) ("The Court, therefore, evaluates Plaintiff's claims for unjust enrichment and promissory estoppel under the three-year statute of limitations actions applicable to breach of contract claims.").

32. *Voodoo Leatherworks, LLC v. Waste Connections US, Inc.*, No. 1:21-cv-02005, 2022 U.S. Dist. LEXIS 136311, at *21 (D.Colo. Aug. 1, 2022).

33. *Pres. at Brighton Homeowners' Ass'n v. Freund Invs.*, No. 2018CV31229, 2020 Colo. Dist. LEXIS 2171, at *1–3 (Adams Cnty. Dist. Ct. Oct. 29, 2020).

34. *Id.* at *40.

35. *E.g., Urban Autocare LLC v. Arnautovic*, No. 2019CV31678, 2020 Colo. Dist. LEXIS 1810, at *16 (Jefferson Cnty. Dist. Ct. June 23, 2020) (denying motion to dismiss on laches in part because prejudice was a disputed fact); *Devil Creek Ranch v. Isgar*, No. 2018CV30161, 2019 Colo. Dist. LEXIS 4869, at *10 (La Plata Cnty. Dist. Ct. July 5, 2019) (denying motion to dismiss on laches because full knowledge of the facts, unreasonable delay, and prejudice weren't established).

36. Colo. RPC 3.3(a)(2) (lawyer may not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").