

RUN-OFF SPECIAL

Keep the faith for time bar

TIME BAR CAN BE PROBLEMATIC, BUT IT DOES NOT NECESSARILY TERMINATE CLAIMS, ACCORDING TO STEVE BAZIL AT BAZIL & ASSOCIATES IN THE US

Increasingly our London market clients are encountering time bar as a defense to otherwise valid claims. Although this defense has met with very limited success in the US, it remains cause for concern in the UK.

For those of us serving insolvencies or companies in run-off, there are several problems which we regularly encounter. Firstly, once a company goes into run-off, requests to brokers and intermediaries for documents supporting one's claim often go unanswered. Secondly, companies may suffer from a loss of knowledgeable employees as their positions are eliminated or they simply seek opportunities with companies still writing business. Thirdly, whether due to relocating offices, archiving old records, etc., companies may find it difficult to produce documents. In summary, these factors delay the resolution of claims. Aware that there is no further business to be done with the company in run-off, commutation negotiations and/or collection efforts can become more contentious.

Often the debtor will raise time bar as a defense very late in the process in an effort to extort a more favorable outcome. I am aware of situations where part of the claim may be time barred due to the length of time that has passed from the onset of negotiations. The time that passed while the parties worked toward a resolution now works against the creditor.

While such unscrupulous tactics are rare, they occur frequently to companies in run-off or insolvency.

Steps to prevention

Fortunately, there are several steps which can be taken to preserve one's rights.

Firstly, in the US, we utilize a "Tolling Agreement." If the parties are willing to enter into such an Agreement, the clock stops running and the parties have time to attempt an amicable resolution. If no agreement can be reached, the Tolling Agreement is terminated and the clock starts running again. The parties will have the same rights as they did on the effective date of the Tolling Agreement.

Secondly, if the debtor is unwilling to enter into a Tolling Agreement, litigation or an arbitration proceeding should be commenced. Such a step will preserve one's claim. Moreover, taking legal action may make clear your intent to pursue your rights. Naturally, the parties are free to agree to a stay of proceedings (even if the matter is tendered to litigation – at least in the US).

If it appears that part or all of your claim may already be time barred, there may still be a way to pursue your claim. Occasionally, our client believes that its claim is time barred. Upon inspection, however, we determined that a legitimate factual basis exists to pursue the claim in the US where time bar is not a solid defense to claims. There may be a sufficient basis to assert jurisdiction in the US if the broker, opposing party or the covered risks are in the US.

So have faith – all is not lost. Time bar, while problematic, does not necessarily terminate claims.



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