

Court of Appeals No. 13CA0239
City and County of Denver District Court No. 12CV1699
Honorable Edward D. Bronfin, Judge

C. Randel Lewis, solely in his capacity as Receiver,

Plaintiff-Appellee and Cross-Appellant,

v.

Steve Taylor,

Defendant-Appellant and Cross-Appellee.

JUDGMENT REVERSED, ORDER VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE ASHBY
Casebolt and Plank*, JJ., concur

Opinion Modified and
Petition for Rehearing DENIED

Announced March 13, 2014

Lindquist & Vennum PLLP, Michael T. Gilbert, John C. Smiley, Theodore J. Hartl, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant

Podoll & Podoll, P.C., Richard Podoll, Robert A. Kitsmiller, Dustin J. Priebe, Greenwood Village, Colorado, for Defendant-Appellant and Cross-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2013.

OPINION is modified as follows:

The following footnote is inserted at page 4, line 19:

imposes are jurisdictional.¹ See *First Interstate Bank*, 937 P.2d at

¹ By using the words “jurisdictional” and “jurisdiction” we do not suggest that the court is deprived of subject matter jurisdiction or the authority to act. Instead, we use “jurisdiction” in this context to distinguish between those time limits which describe when a claim or remedy no longer exists as opposed to those time limits which are included as an element of a claim.

Page 7, line 16 currently reads:

Internal Revenue, 213 F.3d 1173 (9th Cir. 2000); *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 676 (S.D. Tex. 2007) (holding that time limitation in Texas’ UFTA, which is identical to Colorado’s, may not be tolled by provision of Bankruptcy Code because “a court may not toll a claim that has been extinguished”);

Opinion now reads:

Internal Revenue, 213 F.3d 1173, 1178 (9th Cir. 2000) (holding that extinguishment provision in California’s UFTA was inapplicable to the Internal Revenue Service because a state statute cannot extinguish a claim of the United States where it is attempting to enforce a “valid, fully accrued claim” and is “acting in its sovereign capacity in an effort to enforce rights [tax collection] ultimately grounded on federal law”); *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 676 (S.D. Tex. 2007) (holding that time limitation in Texas’ UFTA, which is identical to Colorado’s, may not be tolled because “a court may not toll a claim that has been extinguished,” but nevertheless concluding that Texas’ UFTA was preempted by federal Bankruptcy Code);

¶ 1 As a matter of first impression, this case requires us to decide if the parties, by express agreement, can toll the statutory time period within which to file a claim pursuant to the Colorado Uniform Fraudulent Transfer Act (CUFTA), section 38-8-101, C.R.S. 2013. We conclude that they cannot. Therefore, we reverse the district court's judgment, vacate its order awarding costs and interest, and remand the case with directions.

I. Background

¶ 2 Defendant, Steve Taylor, invested three million dollars with Sean Mueller, a licensed securities broker, in 2006. In 2007, Taylor withdrew his money, realizing an investment profit of over \$487,000.

¶ 3 In 2010, the Colorado Securities Commissioner discovered that Mueller's investment company was a Ponzi scheme. Mueller was convicted of securities fraud, theft, and violating the Colorado Organized Crime Control Act, and was sentenced accordingly. The district court appointed plaintiff, C. Randall Lewis, as receiver to collect and distribute Mueller's assets to creditors, including his defrauded investors.

¶ 4 Lewis sought to recover the profit that Taylor made from investing with Mueller pursuant to the CUFTA. Within the statutory time period for filing a CUFTA claim, Taylor and Lewis entered into a written tolling agreement that purportedly allowed Lewis to bring a CUFTA claim outside the statutory time period. Lewis eventually filed a CUFTA claim against Taylor outside the statutory time period but within the time period defined by the tolling agreement.

¶ 5 Both parties moved for summary judgment. Taylor argued, among other things, that Lewis' CUFTA claim was untimely because the statutory time period for filing a CUFTA claim cannot be extended by agreement of the parties. The district court disagreed with Taylor, held that the tolling agreement effectively extended the statutory time period, and granted Lewis summary judgment on the merits of his CUFTA claim.

¶ 6 Taylor appeals. He argues that (1) CUFTA claims are not subject to tolling, and the district court erred by concluding otherwise; and, alternatively (2) because he was an innocent investor, the district court erred by holding that his investment profits are recoverable pursuant to the CUFTA.

¶ 7 Lewis cross-appeals, asserting that the district court incorrectly calculated its award of prejudgment interest.

¶ 8 We agree with Taylor that the statutory time period for bringing a CUFTA claim cannot be extended by agreement. Based on this conclusion, we need not address the other issues raised by either party.

II. The CUFTA Time Limitation

¶ 9 We review de novo the district court's ruling that an express agreement of the parties can extend the statutory time period for filing a CUFTA claim. *See Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1256 (Colo. 1995) (reviewing summary judgment order de novo); *Leverage Leasing Co. v. Smith*, 143 P.3d 1164, 1166 (Colo. App. 2006) (statutory interpretation of CUFTA is question of law subject to de novo review).

¶ 10 Section 38-8-110(1), C.R.S. 2013, provides that a CUFTA action is "extinguished" unless brought within the applicable time period set out in section 38-8-110(1)(a)-(c).

¶ 11 The parties devote considerable argument to whether this provision is a statute of limitation or repose. This is

understandable because courts have referred to it as both. See, e.g., *Tiger v. Anderson*, 976 P.2d 308, 309-10 (Colo. App. 1998) (without analysis, referring to section 38-8-110(1) as statute of limitation); *Nathan v. Whittington*, 408 S.W.3d 870, 873 (Tex. 2013) (Texas' statute, identical to Colorado's, is statute of repose rather than statute of limitations). However, because both statutes of limitation and repose may be tolled in certain circumstances, properly labeling section 38-8-110(1) as a statute of limitation or repose does not ultimately resolve the question of whether the parties may toll the statutory time period in which to file a CUFTA claim. See, e.g., *First Interstate Bank of Denver, N.A. v. Cent. Bank & Trust Co. of Denver*, 937 P.2d 855, 860-63 (Colo. App. 1996) (statute of repose was effectively tolled by express agreement of the parties); *In re Estate of Kubby*, 929 P.2d 55, 57 (Colo. App. 1996) (statute of limitations may be subject to equitable tolling).

¶ 12 Rather, because parties cannot waive a jurisdictional time limitation but may agree to toll a nonjurisdictional one, we must determine whether the time limitations that section 38-8-110(1)

imposes are jurisdictional.¹ *See First Interstate Bank*, 937 P.2d at 861. We conclude that they are.

¶ 13 To determine whether a statutory time limitation is jurisdictional, we must examine the terms of the statute. *See id.* (“Whether a particular statute creates a jurisdictional prerequisite or merely a condition precedent or element of the claim is determined primarily by considering the terms of the statute . . .”).

¶ 14 A jurisdictional time limitation is one that, if not met, destroys the right of action underlying the suit. *See Kubby*, 929 P.2d at 56 (nonclaim statute is jurisdictional because it “impose[s] a time limitation for bringing a claim as a condition precedent to having a right of action”). Because a jurisdictional statutory period’s expiration eliminates the right underlying the cause of action, it also provides a defendant with complete immunity from further suit pursuant to that statute. *See First Interstate Bank*, 937 P.2d at 862

¹ By using the words “jurisdictional” and “jurisdiction” we do not suggest that the court is deprived of subject matter jurisdiction or the authority to act. Instead, we use “jurisdiction” in this context to distinguish between those time limits which describe when a claim or remedy no longer exists as opposed to those time limits which are included as an element of a claim.

(jurisdictional time limitation provides complete immunity from further suit).

¶ 15 In contrast, a nonjurisdictional time limitation has no effect on the underlying right, and merely defines the period during which an action based on that right may be brought. *See Kubby*, 929 P.2d at 57 (statute that “limits the time in which an action may be brought . . . does not deprive a court of jurisdiction”).

¶ 16 Section 38-8-110(1) provides that a cause of action is “extinguished” if filed outside the applicable statutory period in section 38-8-110(1)(a)-(c). The official comments clarify that “lapse of the statutory periods prescribed by the section bars the right and not merely the remedy.” § 38-8-110(1), Official Comment (1), C.R.S. 2013; *see West v. Roberts*, 143 P.3d 1037, 1041 (Colo. 2006) (official comments to a statute are relevant to its interpretation). Thus, the existence of a right pursuant to the CUFTA depends on whether the cause of action is brought within the statutory time period. Expiration of the statutory time period extinguishes the substantive right underlying the CUFTA claim, resulting in complete immunity from CUFTA liability. Therefore, the time limitation in section 38-8-110(1)(a) at issue here is jurisdictional

and the parties cannot toll it by agreement. *See First Interstate Bank*, 937 P.2d at 861-62; *cf. Rossi v. Osage Highland Dev., LLC*, 219 P.3d 319, 322 (Colo. App. 2009) (lien “extinguished” by running of the statutory time period could not be revived by promissory note because statutory extinguishment destroyed the underlying claim, not merely the ability to enforce the claim).

¶ 17 The weight of authority from other jurisdictions interpreting extinguishment provisions substantially similar to section 38-8-110(1) supports our conclusion. *See Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1130-31 (D. Ariz. 2006) (analyzing time limitation in Arizona’s UFTA, which is identical to Colorado’s, and holding that “[a] claim that has been extinguished cannot be tolled”); *Roach v. Lee*, 369 F. Supp. 2d 1194, 1199-1200 (C.D. Cal. 2005) (California statute that equitably tolls statutes of limitations while defendants are out of state did not apply to time limitation in California’s UFTA, which is identical to Colorado’s, because extinguishment of substantive cause of action is inconsistent with tolling); *United States v. Vellalos*, 780 F. Supp. 705, 707 (D. Haw. 1992) (“It is clear that the intent of the UFTA is to completely extinguish the statutory cause of action following the expiration of the delineated time

period.”), *abrogated on other grounds by Bresson v. Comm’r of Internal Revenue*, 213 F.3d 1173, 1178 (9th Cir. 2000) (holding that extinguishment provision in California’s UFTA was inapplicable to the Internal Revenue Service because a state statute cannot extinguish a claim of the United States where it is attempting to enforce a “valid, fully accrued claim” and is “acting in its sovereign capacity in an effort to enforce rights [tax collection] ultimately grounded on federal law”); *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 676 (S.D. Tex. 2007) (holding that time limitation in Texas’ UFTA, which is identical to Colorado’s, may not be tolled because “a court may not toll a claim that has been extinguished,” but nevertheless concluding that Texas’ UFTA was preempted by federal Bankruptcy Code); *In re Greater Se. Cmty. Hosp. Corp.*, 365 B.R. 293, 305 n.24 (Bankr. D.C. 2006) (“the doctrine of equitable tolling does not apply to actions brought under the [Illinois Uniform Fraudulent Transfer Act]”); *Nathan*, 408 S.W.3d at 875-76 (analyzing Texas’ UFTA, which is identical to Colorado’s, and holding that UFTA claims are not subject to tolling because the extinguishment provision is absolute); *Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App. 2004) (extinguishment provision in

Texas' UFTA, which is identical to Colorado's, "creates a substantive right to be free from liability after a legislatively determined period").

¶ 18 To support his argument that the parties' agreement effectively tolls the statutory time period, Lewis relies on *First Interstate Bank*. That reliance is misplaced because the limiting language in the statute at issue in that case differs significantly from that of section 38-8-110(1).

¶ 19 The *First Interstate Bank* division held that a securities statute of repose was not jurisdictional and therefore was subject to tolling by express agreement of the parties. See *First Interstate Bank*, 937 P.2d at 862-63. The statute at issue stated that "[n]o person may sue . . . more than three years after the discovery of the facts giving rise to a cause of action . . . and in no event more than five years after the purchase or sale [of a security]." *Id.* at 860. Unlike the securities statute in *First Interstate Bank*, which limited the time within which a party may sue, section 38-8-110(1) limits the time within which the substantive right that will give rise to a CUFTA action exists. § 38-8-110(1) (cause of action is "extinguished"); § 38-8-110(1), Official Comment (1) (statute "bars the right and not merely the remedy"). By its plain language, section 38-8-110(1)

does not merely procedurally bar an untimely filed claim but instead destroys the underlying right of action.

¶ 20 Similarly, we are not persuaded by Lewis' citation to *Fleming Companies, Inc. v. Rich*, 978 F. Supp. 1281 (E.D. Mo. 1997). In that case, without analysis, a federal district court stated that the extinguishment provision in Missouri's UFTA — identical to Colorado's — was not jurisdictional and therefore was subject to waiver, estoppel, and equitable tolling. *Id.* at 1300. As discussed above, the plain language of section 38-8-110(1) does not, in our view, support this conclusion.

¶ 21 Finally, Lewis suggests that prohibiting parties from effectively tolling the time limitation for bringing CUFTA claims would produce unnecessary litigation and increase the costs of resolving Ponzi scheme cases. These kinds of policy considerations are best left to the legislature, not the courts. *See Grossman v. Columbine Med. Grp., Inc.*, 12 P.3d 269, 271 (Colo. App. 1999) (legislature, not the courts, enunciates the public policy of the state). Here, we assume that the General Assembly weighed and balanced the relevant interests before enacting the CUFTA, and we merely give effect to the language that the General Assembly chose.

¶ 22 In sum, we conclude that section 38-8-110(1) imposes a jurisdictional time limitation that the parties cannot extend by express agreement. Because neither party disputes that Lewis filed his CUFTA claim outside of the applicable statutory time period, his claim was extinguished and the court erred by denying Taylor's motion for summary judgment and granting Lewis' motion. Based on this conclusion, we need not address the parties' additional substantive arguments except to vacate the order awarding costs and interest to Lewis.

¶ 23 The judgment is reversed, the order is vacated, and the case is remanded with directions to grant Taylor's motion for summary judgment.

JUDGE CASEBOLT and JUDGE PLANK concur.