Factual Allegations Toll Statute of Repose in Legal Malpractice Case

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Summary

- Repeated assurances that advice was correct added years to the period of repose.
- Facts alleging fraudulent concealment and equitable estoppel tolled a six-year statute of repose to bring a legal-malpractice claim against the attorneys.

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Over several years, defendant attorneys repeatedly assured their client that their original legal advice was correct even after that advice was questioned in a lawsuit. A state appellate court held that facts alleging fraudulent concealment and equitable estoppel tolled a six-year statute of repose to bring a legal-malpractice claim against the attorneys. This decision reminds ABA Litigation Section members of the need to promptly inform clients of mistakes so they can be corrected.

Attorneys Had an Opportunity to Correct Prior Advice

In *Comprehensive Marketing, Inc. v. Huck Bouma, PC*, a marketing company sued its former attorneys in Illinois state court for legal malpractice based on claims arising from the defendants' legal advice regarding opt-out notices under the Telephone Consumer Protection Act of 1991. In 2010 and earlier, the defendant attorneys provided the company legal advice and draft language for use in an opt-out notice under the act. In 2010, a claim was brought against the company alleging the opt-out notice was legally insufficient.

The defendant attorneys assured the company its notice was compliant, and the 2010 claim was eventually dropped. The defendant attorneys allegedly told the marketing company that the claim was dropped because of their defense of the legal sufficiency of the opt-out notice.

Attorneys Repeatedly Assured Their Client That Their Original Advice Was Correct

The company continued to use the same opt-out language between 2010 and 2017, and it maintained a continual attorney-client relationship with the same attorneys. The scope of services included statutory representation and overall review of compliance issues. In this time frame, there was never any mention that the opt-out language was not statutorily compliant.

In 2017, the company was sued in two federal class action lawsuits over alleged violations in the same opt-out notice language. The defendant attorneys recommended replacing the opt-out notice language after the 2017 lawsuits were filed. After the company settled the first class action in 2019, it filed its complaint against its former attorneys in December 2019, alleging legal malpractice, fraudulent concealment, and equitable estoppel.

The defendant attorneys moved to dismis b ed n ix- e r u e f rep e. he ri l c ur gr n ed he mo i n di mi s, and the marketing company appealed.

Alleged Concealment of the Error Tolled the Statute of Repose and Prevented Dismissal

The Illinois appellate court reversed the dismissal, holding that the company pled sufficient facts to show that fraudulent concealment and equitable estoppel tolled the statute of repose. Specifically, the company alleged that in connection with the 2010 claim, the defendant attorneys knew that the opt-out language was not statutorily compliant and concealed this issue. Accordingly, the company alleged it did not discover that defendants had drafted and advised them to use a non-compliant opt-out notice. The company also alleged that in the years preceding the 2017 claims, the defendant attorneys intentionally concealed their error causing the company to rely on erroneous legal advice and continue using a deficient opt-out notice.

In its opinion, the appellate court recognized the statute of repose curbs the discovery rule's potential to indefinitely lengthen the statute of limitations. The appellate court also recognized that the statute of repose commenced when the original challenged legal advice was given for the opt-out language, regardless of whether a cause of action accrued at that time. Finding that the company is entitled to move forward with its legal malpractice claim, the appellate court remanded the matter for further proceedings.

This Case Is Instructive for Plaintiffs and Defendants

Seasoned practitioners agree with the appellate court on when the statute of repose began to operate. "The statute of repose is tied to an event, regardless of when the injury is realized," explains Miranda L. Soto, Miami, FL, Co-Chair of the Attorneys' Liability Subcommittee of the Litigation Section's Professional Liability Committee. Here, "the event was the drafting of alleged erroneous opt-out language" that led to a claim in 2010, notes Soto. But the appellate court essentially held that the alleged "repeated assurances made the plaintiff feel the 2010 advice was correct," and this tolled the period of repose, she elaborates. Allowing a legal-malpractice plaintiff to "plead alternative theories of equitable estoppel and fraudulent concealment avoids injustice because the vast majority of professional liability claims could be extinguished by professionals insulating themselves from malpractice liability," explains Soto.

"A motion to dismiss is one the largest hurdles in a legal malpractice case" and this case is "instructive for plaintiffs and defendants," Soto adds. "This case clarifies how clearly a plaintiff must plead fraudulent concealment to avoid dismissal…but at the summary-judgment stage a plaintiff cannot just rest on allegations," cautions Nancy E. Hart, New York, NY, a member of the ABA and litigator who defends law firms. The defense bar "should be aware of the potential use of a tolled statute of repose and alternative pleadings to extend exposure" for prior legal advice, says Soto. The years of "continuous representation gave the defendants an opportunity to mitigate the harm after the 2010 claim . . . but defendants allegedly gave repeated assurances the legal advice was correct," remarks Soto.

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- Bryan House and Eric G. Pearson, "Wisconsin Court Affirms Validity of Statute of Repose for CPAs," *Prof'l Liab. Litig.* (Mar. 29, 2024).

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