

When Does the Clock Begin Ticking on a Legal Malpractice Claim?

Usually the clock begins ticking on a legal malpractice claim under the applicable statute of limitations when the negligent conduct has occurred, not when the client has realized an actual loss. *Wachovia Bank, M.A. v. Ferretti*, 935 A.2d 565 (Pa.Super.Ct. 2007). This principle is referred to as the occurrence rule. But there are instances where a client could not reasonably have discovered his or her injury or its cause at the time when the negligent conduct occurred, such as where the harm has not yet become apparent or where the harm has been concealed. In these instances, equitable principles can be applied to avoid the potentially harsh result that application of the occurrence rule may otherwise cause. These principles include the so-called discovery rule and the doctrine of fraudulent concealment.

The discovery rule applies to delay the date on which the statutory period begins until the point in time when “the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and its cause.” Knowledge may be imputed to clients “when an adverse action is taken against them, be it through a court order or through a third party action.”

The doctrine of fraudulent concealment delays the start of the clock where the defendant lawyer has engaged in unintentional or intentional fraud or concealment to prevent the client from learning that the lawyer has committed malpractice.

At one time case law suggested that these two principles can apply only if the initial discovery is made after the applicable statute of limitation has expired under the occurrence rule. But now a Pennsylvania Supreme Court holding in a medical malpractice action suggests that these principles can be applied in a legal malpractice action even when such discovery occurred within the ini-

tial statutory period. *Fine v. Checcio*, 870 A.2d 850 (Pa. 2005).

As a general rule, the date when the exercise of due diligence would or should have revealed the harm and its cause is deemed a question of fact to be resolved by the jury. But in *Fine* the court determined that it can be deemed a question of law for the court where “reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause.”



The 3rd U.S. Circuit Court of Appeals recently visited this area of the law in *Knopick v. Connelly*, ___F.3d___, 2011 WL 1379517 (C.A. 3 (Pa.)) (decided April 13, 2011). In *Knopick*, a lawyer who was engaged to sue two matrimonial lawyers for malpractice found himself a defendant where he did not timely file an action against the two matrimonial lawyers. The matrimonial lawyers had represented husband in a divorce action. Wife contended that husband had withheld the existence of some of his assets, including \$2 million worth of stock, when they had entered into a separation and property settlement agreement more than a year before husband filed for



Avoiding Liability



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divorce. Husband contended that wife had full knowledge of his assets, including the stock, when she signed the agreement, and husband also contended that the stock had no equity because it was substantially encumbered.

In the divorce action wife filed a motion to set aside the agreement on the grounds of husband’s alleged nondisclosure. Husband informed his lawyer (Connelly) of four witnesses who could testify that wife had full knowledge of his assets when she signed the agreement. Husband contended that Connelly promised to contact all four of them. But on the date of the hearing, husband was informed that one of the other lawyers in Connelly’s firm (Kadel) would be representing husband at the hearing.

At the hearing, Kadel did not call any of the witnesses suggested by husband. Instead, Kadel contended that they were unnecessary because he had offered the testimony of his client that wife had full knowledge of husband’s assets and he had moved into evidence the parties’ joint income tax returns, which had been signed by wife. But wife testified that husband fraudulently under-disclosed the nature of his assets and she denied that she had ever discussed her knowledge of husband’s assets with any of the witnesses husband had suggested that his lawyers call. Wife also denied that husband had shown her his financial information when they did their taxes.

Notwithstanding the tax returns and husband’s testimony to the contrary, the court ruled in wife’s favor almost a year later. In the interim, husband was told by his matrimonial lawyers that the hearing had “gone well” and “that

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there was nothing to worry about.” Under these circumstances, husband engaged the defendant to file a malpractice action against the matrimonial lawyers.

To determine whether husband, now plaintiff, had a claim against the lawyer who failed to sue his matrimonial lawyers in a timely manner, it had to be determined whether the statute of limitations on plaintiff’s claims against his matrimonial lawyers had expired before he retained defendant lawyer. If the occurrence rule applied, then the statute of limitations on plaintiff’s claim against the matrimonial lawyers had expired. That’s because the hearing had occurred longer ago than the length of the statutory period. On the other hand, if either the discovery rule or the doctrine of fraudulent concealment is applied, then whether due diligence would have resulted in discovery of a potential claim becomes a jury question.

Plaintiff argued that either the discovery rule or the doctrine of fraudulent concealment creates a genuine issue of material fact with respect to whether the statute should be deemed tolled until the adverse ruling. The defendant lawyer was granted summary judgment by the district court, among other reasons falling outside the scope of this column, on the basis that the occurrence rule applied. The court reasoned that plaintiff was present for the hearing and knew at that time that his matrimonial lawyers had not called the four witnesses that he suggested, which failure he contends was negligence. Yet

plaintiff did not know that he may have been harmed by this failure until the court ruled adversely almost a year later. If the applicable statute were tolled until the date of the adverse ruling, then defendant lawyer was retained before the applicable statute on claims against the matrimonial lawyers had expired, which means that plaintiff may have been harmed by defendant lawyer’s failure to file suit.

The 3rd Circuit panel held that the district court erred in finding, as a matter of law, that the hearing triggered the limitations period. Instead the panel found it to

be a jury question whether plaintiff “reasonably knew or should have known of his injury before” the adverse ruling. Accordingly it reversed and remanded so that the case could proceed.

Lawyers who suspect a malpractice claim should not take solace in the expiration of a statute of limitations under circumstances where the discovery rule or the fraudulent concealment doctrine may apply. As seen from *Knopick*, application of these doctrines may result in a jury trial to determine that seemingly threshold question.