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Shutting The Door On Old, Stale Claims: Professional Statutes Of Limitations and Repose

By Randall E. Phillips, Provizer & Phillips, P.C.

One of the first things attorneys look at when their non-medical professional clients receive or are served with a claim or lawsuit, is whether they can cut those claims short or shut the door on them by showing that they were made or filed too late, beyond the time allowed by law, based on the statutes of limitations or repose, or in some cases through limitations in the contract.

The purpose of these laws is to prevent old or stale claims where it would be unfair to the defendant to allow them to proceed, because evidence is no longer available, witnesses may have dispersed or have died or memories have faded.

For non-medical professionals such as lawyers, accountants, and design professionals, statutes of limitations or repose can be used to dismiss cases early before extensive defense costs are incurred, which are often high, even higher than costs to settle or pay claims and which may be charged to the professional through their deductibles or self insured retentions under their professional liability policies. A statute of limitations or repose defense can also bail out a professional who may otherwise be at fault in causing the loss.

Non-medical professional statutes of limitations also may allow claimants a shorter time to sue than other claims such as ordinary negligence claims, or breach of contract claims. For instance, the general negligence statute of limitations in Michigan is 3 years;² for breach of contract claims, it is 6 years³ while the malpractice statute of limitation is 2 years with a 6 month discovery period allowed.⁴

You might think it would be easy to apply the statutes of limitations and repose to actual cases by just counting the number of years before suit, but in practice, statutes of limitations and repose determinations can be complex and uncertain depending on the type of professional, the nature of the claims and facts, or how the claimant words the complaint. Often claimants will include several different legal counts or theories in a complaint based on the same facts or transaction, such as malpractice, breach of contract, fraud, and breach of fiduciary duty. Typically, but not always, the court will look to the essence of the case to see if it is founded on the breach of a professional duty and if so, apply the malpractice statute of limitations, no matter how the claimant words the claim. In other words, if it walks like a duck and quacks like a duck, it is a duck.

Also, the date of claim accrual, or the date that starts the statute of limitations running, is often disputed. Again, the accrual date may depend on the type of professional, the type of claim, and the specific facts of the case.

The two year malpractice statute of limitations in Michigan requires that a suit be filed within 2 years of the date the professional last provided professional services on the matter at issue or within 6 months of when the claimant knew or should have known that there may be an error. Of course, the claim must be for professional liability or malpractice for the 2 year malpractice statute of limitations to apply to lawyers, accountants, and design professionals. Ordinary claims like slips and falls or auto accident cases, even if involving a professional, are not included in those statutes.

For state licensed engineers, architects, and surveyors, if the claim relates to an improvement to real property, a different 6
year statute applies which requires suit within 6 years after occupancy use, or acceptance of the improvement or within 1 year after the defect is discovered or should have been discovered, but in no event more than 10 years after occupancy, use or acceptance. On the other hand, if the claim does not involve an improvement to real property, the 2 year statute may then apply. The 6 year statute is also called a statute of repose because it has a hard cut off that applies even if the damages have not yet occurred and a claimant could not have sued earlier. There is also a recent 6 year statute of repose for lawyers that bars suits filed more than 6 years after the alleged act or omission.\(^6\)

In Ostroth v Warren Regency, G.P., LLC, the Michigan Supreme Court\(^7\) had to decide whether the 2 year malpractice statute of limitations or the 6 year statute of limitations and repose applied to a suit for personal injuries from exposure to environmental hazards, against design professionals on an office renovation project. In this case the court held that the 6 year statute applied and the 2 year statute did not and that it was both a statute of limitations and a statute of repose. In this case, plaintiff’s suit would have been barred under the 2 year statute, while the suit was timely under the 6 year statute.

On the other hand, (if you have any more hands left), if the claim is for contractual indemnity that does not involve a personal injury, a different, general 6 year statute for contract claims applies and the statute may not start to run until the party refuses to pay in response to a demand to indemnify. This general contract statute of limitations does not have the benefit of being a statute of repose or starting to run when a project is completed and put to use.

Even if the statute of limitations would have otherwise run out barring suit, if the professional sues to collect fees or damages, the client could counter sue or raise malpractice as a defense, at least as to the amount of fees sued for.\(^9\)

If fraud or misrepresentation is alleged, usually that involves the 6 year general statute of limitations from the date of the wrongful act, but that can be extended if there was active concealment of the claim as can any claim.\(^10\)

Is that confusing enough? Well, the accrual date issue can be equally troublesome. The two years starts to run:

“At the time that a person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” MCLA 600.5838(1)

Where the professional has performed multiple projects or assignments for a client, the task of figuring out when services for “the matters out of which the claim” arose and ended can be challenging. In legal and accounting malpractice cases the Michigan courts have developed a distinction between discrete services and generalized services. This distinction can also arguably be applied to design professionals.

Where the services are determined to be discrete engagements or projects, the statute of limitations has been found to accrue or begin running for each engagement or project at the end of the work on that engagement or project, despite the professional continuing to work on other matters thereafter.

In Levy v Martin,\(^11\) the court found that successive year tax preparation services constituted generalized services and not discrete services, but in that case no discovery had been done to flesh out all the facts and the court stated that the result may have been different if the Defendant CPA had come forward with evidence that each annual income tax preparation was a discrete transaction.

In Balcom v Zambron,\(^12\) the court held that an attorney’s services in a criminal case are discrete and separate from those in a companion civil case based on the same facts, and that the statute of limitations began to run for alleged malpractice in the criminal case when that case was concluded.

In Schultz v Sarow,\(^13\) legal malpractice was alleged regarding estate planning documents. Subsequent representation of the estate was separate and discrete and did not extend the statute of limitations.
Can We Be of Assistance?

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In the City of Pontiac v Pricewaterhouse LLP, the court also applied the discrete services rule where the accounting firm had performed annual auditing services that continued for years after the year of the alleged malpractice.

The lesson to be learned is that it is important for professionals to identify and limit the scope and duration of their work in written engagement and closing letters, in order to avoid extending statutes of limitations. The discrete versus generalized services rule will likely apply to any licensed professional found to come with the malpractice statute of limitations such as accountants, lawyers, and design professionals.

In Ohio Farmers Insurance Company v Shamie, the court of appeals held in an accountant malpractice case that the statute began to run when the auditor reports involved were issued, even though professional services continued afterwards. Several other court of appeals decisions have applied the discrete services exception of Levy v Martin, in accounting and legal malpractice cases. For instance, in Anderson v David & Wierenga PC post closing work of an attorney regarding possible rescission of the deal after a later dispute was held to be a new engagement and the statute of limitations as to alleged malpractice in the drafting of the transaction papers started to run at closing.

It is not only the discrete versus generalized services issue that makes the accrual date determination hard, but where the end date of an engagement or project is unclear such as where post-completion activities or communications take place, the issue becomes more complex. When they relate to billing and payment, obtaining documentation or file information or some other ministerial actions, such as distribution of settlement proceeds, the start or accrual date is usually not extended as the statute only applies to professional services. Where the plaintiff hires replacement counsel or accountants or fires the professional that usually is sufficient to mark the end of the professional services.

If a court suit is involved, the court rules provide that an attorney and his/her firm continue to be counsel of record until the court formally allows the attorney to withdraw as counsel, usually after a motion is filed. This may extend the date of last service until the court’s withdrawal order.

Another way to limit claims is to include contractual limitations provisions in contracts and engagement letters. Limits of 1 year are usually upheld. Contractual limitations can help limit breach of contract claims but may not stop tort claims including malpractice or fraud claims especially where personal injury or property damage is involved.

While the practical application of the statute of limitations may be complex and difficult, it is often well worth the effort to nip the case in the bud, before defense costs rise and without having to litigate the substantive malpractice issues.

1. MCL 600.5805(10)
2. MCL 600.5805(8)
3. MCL 600.5805 (6)(14); MCL 5838
4. MCL 600.5839(1)
5. MCL600.5838(3)
12. Schultz v Saraw, 2011 Mich App Lexis 1289 (7/14/11). Note that unpublished decision of the Court of Appeals are not binding precedent, but other courts can adopt their reasoning if found persuasive.
14. 2012 Mich App Lex 635 (4/10/12)
15. 2008 WL 379592 (2/12/08)