

## Separate case did not 'continue' representation

### Lawsuits unrelated, claim of malpractice is time barred

By: Traci R. Gantkozi in News Stories October 14, 2014

A legal malpractice suit is barred by the two-year statute of limitations because the firm that represented the plaintiffs in a probate matter did not "continue" that representation in the plaintiffs' bankruptcy case, the Michigan Court of Appeals has ruled.

The plaintiffs were the personal representatives of the decedent's estate. They sued the defendant, Fitzgerald & Dakmak PC, for legal malpractice in the probate matter. The law firm also represented the plaintiffs in a separate federal bankruptcy proceeding.

The trial court dismissed the plaintiffs' legal-malpractice action, ruling it was filed too late.

On appeal, the plaintiffs argued the bankruptcy case was not independent of the underlying case and the trial court should have considered the law firm's "continued" legal representation in the bankruptcy proceeding when deciding whether the statute of limitations had expired.



The Court of Appeals disagreed.

Noting the plaintiffs had filed a separate malpractice action concerning the bankruptcy representation, "the bankruptcy proceedings are not within the scope of the malpractice claims alleged in this case," the appeals court said.

The Court of Appeals also refuted the plaintiffs' claim that fraudulent concealment should have tolled the limitations period. "Plaintiffs have failed to plead fraudulent concealment with sufficient specificity."

The case is *In re Charron Estate* (MILW No. 08-86644, 5 pages). Judges Michael J. Riordan, Mark J. Cavanagh and Michael J. Talbot were on the panel that issued the unpublished decision.

#### 'Multiple-front attempt'

Novi attorney Alan J. Taylor, a partner at Segal McCambridge Singer & Mahoney, Ltd., represents the law firm.

He said the decision affirms that Michigan will enforce statutes of limitation and will not allow the plaintiffs in legal malpractice cases to argue continuous representation or fraudulent concealment to create questions of fact and avoid summary disposition.

"The ruling affirms that statutes of limitation will be strictly applied pursuant to the intent of the Legislature," he said.

"This case represents a multiple-front attempt to avoid the application of the statute of limitations by the plaintiffs arguing that representation by the successor law firm in a completely unrelated bankruptcy case extended the statute of limitations in an estate planning claim," Taylor said.

According to Taylor, even though the law firm obtained a formal release from their clients in the bankruptcy case, the plaintiffs still tried to use that case to extend the statute of limitations, even though the law firm was released

and the bankruptcy matter had no relation to the estate planning process.

The ruling is also important, Taylor said, because it shows that both the Court of Appeals and Michigan trial courts will not automatically let a plaintiff argue continuous representation just because the same/successor law firm is involved in a different matter.

The Court of Appeals ruling affirmed that plaintiffs "are required to prove fraudulent concealment to extend the

statute of limitations not just allege the same negligence claim upon which their professional liability cause of action is premised," he said.

Bloomfield Hills attorney Lawrence J. Acker and Detroit lawyer Mark R. Bendure, who represent the estate, did not respond by deadline to a request for comment.

**'Cursory reference'**

Under MCL 600.5838(1), a claim for malpractice "accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose ...."

The issue in this case, said the Court of Appeals, was whether "the matters out of which the claim for malpractice arose" extended to the plaintiffs' federal bankruptcy proceeding.

Looking to the plaintiffs' complaint, the appeals court said they only provided a "cursory reference" to the bankruptcy proceeding.

"Legal representation in the bankruptcy proceeding was not listed as an issue," the Court of Appeals wrote. "While plaintiffs referenced the bankruptcy proceeding later in the complaint, they did so in a conclusory manner devoid of any detail or allegations."

The plaintiffs offered no details about the alleged legal malpractice in the bankruptcy proceeding, the Court of Appeals noted.

"They did not identify any specific action defendants undertook that was negligent, nor articulate on what grounds any conduct constituted legal malpractice."

Considering the plaintiffs' complaint as a whole, its essence was a legal-malpractice claim arising out of an estate transaction, the appeals court said.

In other words, "the matters out of which the claim for malpractice arose" did not relate to the bankruptcy proceeding and the trial court properly ruled the legal-mal claim was time barred, the Court of Appeals said.

**No tolling**

The plaintiffs alternatively argued the trial court should have considered fraudulent concealment to toll the legal-malpractice statute of limitations.

The plaintiffs argued that by not disclosing numerous conflicts of interest, despite being in a fiduciary relationship with the beneficiaries of the estate, the defendant was guilty of fraudulent concealment sufficient to toll the statute of limitations.

However, the plaintiffs did not plead fraudulent concealment with sufficient specificity and, in their complaint, they did not even use the phrase "fraudulent concealment" in connection with the defendant.

"Because plaintiffs' allegations amount to nothing more than a claim that Fitzgerald and defendant breached the standard of care, their claim of fraudulent concealment fails," the Court of Appeals said.

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