

## Civil Practice and Procedure

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# Legal Malpractice Claim Dismissed Under Six-Year Statute of Repose Where Plaintiffs Alleged Negligent Legal Advice in Underlying Breach of Contract Lawsuit

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As detailed in a previous *IDC Monograph*, the statute of repose applicable to attorneys presents a vexing set of problems. Donald Patrick Eckler & Matthew F. Tibble, *As Clear As Mud: The Limitations Periods Applicable to Attorneys Under 735 ILCS 5/13/214.3 in Estate Planning Situations*, IDC QUARTERLY, Vol. 23, No. 1, at M-6 to M-8 (2013). Two recent cases have further expanded the issues related to the statute of repose. In *Terra Foundation for American Art v. DLA Piper LLP (US)*, 2016 IL App (1st) 153285, the court addressed when the statute of repose begins to run outside of the estate planning context. Further development in the area occurred in *Prospect Development, LLC v. Donald Kreger*, 2016 IL App (1st) 150433, which addressed the doctrines of fraudulent concealment and equitable estoppel as they relate to the statute of repose.

### *Terra Foundation for American Art v. DLA Piper LLP (US)*

Arising out of a real estate transaction, the defendant lawyers prepared a sale agreement for the subject property which included a provision for further payments either to, or from, the plaintiff seller. *Terra Found. for Am. Art*, 2016 IL App (1st) 153285, ¶¶ 1-5. The sale involved a property upon which a mixed use building was to be built, with portions for retail, residential, and office space. *Id.* ¶ 4. The area of the retail space was not known at the time of the closing and so a baseline square footage of the retail space was determined and the agreement provided that the seller would receive \$5,500 per square foot above the baseline and would pay \$5,500 per square foot for every foot below the baseline. *Id.* ¶ 5. This difference in square footage calculation, called the retail parcel credit, could cause a several million dollar difference either owing to the seller or to be paid by the seller.

The parties executed a term sheet setting forth the agreement in April 2005. *Id.* ¶ 5. The term sheet included an exclusionary provision which provided that the common areas would not be included in the square footage calculation. *Id.* ¶ 6. However, in the initial version of the purchase agreement executed in June 2005, which was intended to memorialize the term sheet, the exclusionary language was not included. *Id.* ¶¶ 7-8. Various versions of the original purchase agreement were executed in 2007, 2008, 2009, and 2010, in which changes were made to the amount of the retail space, yet none of these versions of the purchase agreement included the exclusionary language. *Id.* ¶¶ 9-12.

Prior to the completion of the building, disputes arose between the buyer and seller as to the square footage to be included in the calculation of the retail parcel credit and the parties submitted the disputes to an arbitration process. *Id.* ¶¶ 16-19. The buyer prevailed at both arbitrations and was awarded \$3.8 million for the retail parcel credit to be paid by the plaintiff seller. *Id.* ¶¶ 16-19. The plaintiff seller paid the award to the buyer and then instituted a legal malpractice

action against the defendant law firm for failing to include the exclusionary language in the executed purchase agreements. *Id.* ¶¶ 19-20.

### Legal Malpractice Suit

In the malpractice action filed on February 23, 2015, the plaintiff seller alleged that the law firm failed to advise that the definition of the space would include the common areas and ignored the plaintiff's concern that the exclusionary language had been removed from the purchase agreement. *Id.* ¶¶ 20-21. The plaintiff sought \$6.4 million in damages, which represented the \$3.8 million had to pay as compared to the \$2.6 million it claimed it should have recovered from the buyer. *Id.* ¶ 22. Though the lawsuit was actually filed in February 2015, the filing was deemed to have occurred on October 7, 2014 pursuant to a tolling agreement entered into between the defendant law firm and the plaintiff. *Id.* ¶ 20.

The defendant law firm filed a motion to dismiss claiming that, notwithstanding the tolling agreement, the complaint was not timely filed because the statute of repose had expired prior to the execution of the tolling agreement. *Id.* ¶¶ 23-24. The trial court agreed and found that the negligence occurred when the purchase agreement was executed in 2007 because it was that document that did not include the exclusionary language present in the term sheet. *Id.* ¶ 24.

### Appellate Court Opinion

In upholding the trial court's dismissal, the appellate court first found that the event giving rise to the plaintiff's injury occurred on May 29, 2007, when the parties executed the purchase agreement and therefore, the plaintiff had until May 29, 2013 to file the complaint. *Id.* ¶¶ 33-34. The court noted that both arbitration awards against the plaintiff were entered and the closing took place during the repose period. *Id.* ¶ 35. The court rejected the plaintiff's claim that the last act of the defendant attorneys, in this case the representation of the plaintiff at the closing in 2013, was the triggering event for the statute of repose to begin to run. *Id.* ¶¶ 35, 49.

The court specifically rejected the plaintiff's argument that transactional practice should be treated different from litigation practice as it relates to the statute of repose. *Id.* ¶ 36. While acknowledging that some courts have pointed to a distinction between transactional and litigation practice, the language of 735 ILCS 5/13-214.3 makes no such distinction and only addresses "acts," "omissions," and "performance of professional services." *Id.* ¶¶ 37-38. The court also distinguished the case of *Snyder v. Heidelberger*, 2011 IL 111052, and stated that while that court had said that the last act of the attorney was when the statute of repose began to run, that does not mean that this applies in every case. *Id.* ¶¶ 43-46.

In disposing of the last of the plaintiff's arguments, the court stated that its ruling was consistent with prior cases that held that the statute of repose is not tolled by the continuation of the attorney-client relationship, and because the failure to correct the omitted exclusionary language through the many years of continued representation did not exacerbate the plaintiff's injury, the repose period was not extended. *Id.* ¶¶ 49-53.

*Prospect Development, LLC v. Donald Kreger*

This legal malpractice lawsuit arose out of Prospect Development’s unsuccessful suit for breach of contract filed against the City of Prospect Heights. *Prospect Dev., LLC*, 2016 IL App (1st) 150433, ¶ 1. As detailed in the unpublished appellate decision in the underlying matter, in 1997, Prospect Development and its agent John Wilson entered into a contract with the City of Prospect Heights to build a sports arena that was to be financed by tax increment financing (TIF) bonds. *Prospect Dev., LLC v. City of Prospect Heights*, 2012 IL App (1st) 103759-U, ¶¶ 1-3. The arena was never built and by 2004 the project was not going to be completed, which the developer plaintiff alleged was as a result of the City’s failure to sell the bonds, and which the City claimed was as a result of “a lack of investor confidence in an inexperienced, incompetent developer that had been bribing the City’s attorney for his influence.” *Prospect Dev., LLC*, 2012 IL App (1st) 103759-U, ¶ 1.

The City’s attorney, Donald Kreger, a partner at Schiff Hardin LLP was general counsel for Prospect Heights between 1977 and 2003. *Id.* ¶ 2. He and Prospect Development’s agent, John Wilson, were social friends who shared an interest in building a hockey arena in the northwest suburbs of Chicago. *Id.* ¶ 2. Based upon that mutual interest, Kreger introduced Wilson to a Prospect Heights alderman and an entity created by Wilson undertook a feasibility study to determine if Prospect Heights was an appropriate location for the proposed arena. *Id.* Following that study, Prospect Development, another entity created by Wilson, entered into the contract with the City. *Id.* A sufficient amount of the TIF bonds were not sold by the City and the deal collapsed, allegedly leaving Wilson with \$25 million in expenses incurred because of this failure. *Id.* ¶ 4. Wilson filed suit against the City and in response, the City alleged that the developer failed to perform and that the developer, Wilson, had unclean hands. *Id.* ¶ 4.

Prospect Development alleged in its original pleading in the underlying matter that Kreger solicited a loan from Wilson. *Id.* Specifically, in paragraph 25 of the complaint, plaintiffs alleged:

In addition, during this time, Kreger, one of the City’s agents, approached Developer’s principal Wilson on multiple occasions to “request” a \$100,000 loan in connection with a personal financial problem. In light of the close role that City’s Agents had played in the Arena Project, Wilson granted such a loan in excess of \$100,000 for fear that its refusal would adversely affect the Developer’s ability to complete the arena Project.

*Id.* Indeed, Wilson, as an agent of Prospect Development, “loaned” Kreger, as an agent of the City, \$150,000 between December 1996 and October 2001. *Id.* ¶ 10. These loans were never disclosed to the City. *Id.* Kreger alleged that Wilson advised him that it was not necessary to advise the City of the loan. *Id.* ¶ 2.

On July 23, 2010, following a bench trial in the underlying matter, the court found that the City breached the contract. *Id.* ¶ 1. The court, however, denied plaintiffs’ recovery of damages based on the doctrine of unclean hands. *Id.* ¶ 11. In support, the trial court cited to Paragraph 25 of plaintiffs’ complaint, and made a specific factual finding that Wilson knew that the loans to Kreger were improper, that he and his company engaged in bad faith, and that there was clear misconduct in not disclosing the “friendship” loan and his relationship with Kreger. *Id.* Both parties appealed and on March 30, 2012, the First District entered its order affirming the trial court’s judgment. *Id.* ¶ 35.

## Legal Malpractice Lawsuit

Almost two years after the entry of the judgment in the underlying matter, on July 12, 2012, Prospect Development and Wilson filed a legal malpractice suit against Kreger and his law firm alleging that defendants provided negligent legal advice that caused them not to disclose the loan to the City. *Prospect Dev.*, 2016 IL App (1st) 150433, ¶ 12. Specifically, the plaintiffs alleged that Kreger told them (1) the loans were legal, proper, and would not jeopardize the plaintiffs' contract with the City; (2) the City hired Bruce Huvard to represent it so that the relationship between the plaintiffs and defendants no longer presented a problem; (3) plaintiffs did not need to and, in fact, should not disclose the loans to the City; and (4) plaintiffs did not need to seek outside counsel concerning the loans. *Id.* ¶ 23.

Further, the plaintiffs claimed that as a result they were unable to recover from the City in the underlying lawsuit. *Id.* ¶ 12. Defendants moved to dismiss plaintiffs' malpractice complaint pursuant to section 2-619(a)(5) under the statute of repose, citing paragraph 25 of the plaintiffs' January 2005 breach of contract complaint. *Id.*

After initial motion practice, in 2013 the plaintiffs filed a second amended complaint in which they acknowledged that they filed their legal malpractice suit after expiration of the six-year statute of repose. *Id.* ¶ 13. In order to maintain their cause of action, the plaintiffs now asserted that the statute of repose was tolled under the doctrines of equitable estoppel and fraudulent concealment. *Id.* The fraudulent concealment claim was based upon the following allegations:

- (1) Kreger concealed the fact that the loans were improper and impaired the rights of Prospect Development LLC and Prospect Development Corporation to enforce their legal rights against the City of Prospect Heights;
- (2) Kreger concealed the fact that his legal opinions were not based on sound legal analysis;
- (3) Kreger concealed the fact that his recusal from negotiations with Prospect Development was insufficient to mitigate or cure Kreger's conflicts;
- (4) Kreger concealed the fact that the appointment by the City of Prospect Heights of independent counsel Bruce Huvard did not resolve Kreger's conflicts of interest; and
- (5) Kreger concealed the fact that his own disclosures to the City about his relationship with Jack Wilson were insufficient.

*Id.* ¶ 14. Further, plaintiffs alleged that they did not know Kreger's statements were false until the conclusion of the breach of contract action on July 23, 2010. *Id.* ¶ 13.

After initially denying the motion to dismiss, the trial court reconsidered its denial and dismissed plaintiffs' lawsuit with prejudice. The trial court initially held that the plaintiffs did not suffer any injury that would trigger the statute of repose to run until the entry of the decision in the underlying case. *Id.* ¶ 15. In reversing its initial ruling, the trial court found that the plaintiffs were on notice by January 2005 that they could not rely on Kreger's advice with respect to the loans and that they had a cause of action for legal malpractice. *Id.* ¶ 16.

## Appellate Court Opinion

On appeal, plaintiffs argued solely that their lawsuit should not have been dismissed under the statute of repose and that Kreger's malpractice was concealed from them until the underlying trial court's ruling in 2010. *Id.* ¶ 20. The statute of repose in legal malpractice actions is governed by section 13-214.3(c) of the Illinois Code of Civil Procedure which states: "[e]xcept as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(c); *Prospect Dev.*, 2016 IL App (1st) 150433, ¶ 22.

At the outset, the court noted the difference between statutes of repose and statutes of limitations. *Id.* ¶ 22 (citing *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271). The court noted that "[u]nlike a statute of limitations, which begins running upon accrual of a cause of action, a statute of repose begins running when a specific event occurs, regardless of whether any action has accrued or whether an injury has resulted." *Prospect Dev.*, 2016 IL App (1st) 150433, ¶ 22. The court acknowledged that the statute of repose can create a harsh result. *Id.* ¶ 22.

The "specific event" alleged by the plaintiffs occurred in October 2001 when Kreger last received a loan payment. *Id.* ¶ 13. Therefore, the plaintiffs had six years, until October 2007, to file their legal malpractice lawsuit. Recognizing the potential problem, the plaintiffs claimed that the statute of repose was tolled.

In disposing of the plaintiffs' argument that the statute of repose was tolled by equitable estoppel and fraudulent concealment, the court held that the doctrines do not toll the statute of repose where the plaintiff should have discovered the cause of action through ordinary diligence and a reasonable time remains within the remaining limitation period to file suit. *Smith v. Cook Cnty. Hosp.*, 164 Ill. App. 3d 857, 862 (1st Dist. 1987). As to fraudulent concealment, that claim is premised on 735 ILCS 5/13-215 which states that "[i]f a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215.

Applying the statute, the court found that plaintiffs knew by January 2005 that the loans and Kreger's legal advice may have been inappropriate and generated a conflict of interest. *Prospect Dev.*, 2016 IL App (1st) 150433, ¶ 25. Further, the plaintiffs had two years, from January 2005, when they admitted knowledge of Kreger's conduct, until October 2007 to file their lawsuit. *Id.* ¶ 25.

The court also held that plaintiffs could not successfully assert equitable estoppel to claim that they did not know the statements of Kreger were false until the conclusion of the breach of contract action on July 23, 2010. *Id.* ¶ 27. The application of the equitable estoppel doctrine is similar to fraudulent concealment and neither doctrine applies when a party is on inquiry notice of a claim. *Id.* ¶ 28. Here, the trial court in the breach of contract action issued a final judgment on the merits necessarily finding that plaintiffs had notice of the alleged legal malpractice by January 2005 when they filed their breach of contract lawsuit. *Id.* ¶ 29. Therefore, plaintiffs were not allowed to re-litigate whether they had notice of their legal malpractice claim in January 2005. *Id.*

Finally, plaintiffs argued that the trial court ruling only provided that plaintiffs *may* have known that the loans and Kreger's advice presented a conflict, and therefore, the statute of repose did not apply. *Id.* ¶ 31. The court disposed of plaintiffs' final argument by citing well-settled Illinois authority that holds that statutes of repose apply where plaintiffs *should have discovered* the potential cause of action through ordinary diligence and a reasonable time remains within the remaining limitation period. *Smith*, 164 Ill. App. 3d at 862.

## Conclusion

These two opinions are very favor-able to the defense of lawyers as they limit the period within which to bring malpractice claims. The *Terra Foundation* opinion reaffirms and brings together three key points with respect to the statute of repose. First, the statute of repose is treated the same in both the transactional or litigation context. Second, continued representation does not extend the running of the statute of repose. Third, the statute begins to run when the injury occurred, and so long as the injury is not made worse, the continued failure to correct the mistake does not extend the repose period.

The interesting point in the *Prospect Development* case is that the plaintiffs' loss of both of their lawsuits and their appeal was caused by three self-inflicted injuries. The plaintiffs pleaded that they had knowledge of the legal malpractice claim in their breach of contract lawsuit, failed to appreciate the potential legal effect of their pleading, and waited almost three years after the statute of repose expired to file their legal malpractice lawsuit following their loss in the breach of contract suit.

The *Prospect Development* court also reaffirmed two important points regarding application of the statute of repose in legal malpractice actions that should be kept in mind by practitioners. First, the triggering event for application of the statute of repose is not when the cause of action accrues, but rather, when an event occurs whereby a plaintiff should have discovered the potential cause of action with reasonable diligence. Second, a plaintiff's actual knowledge of a potential claim is not required. In sum, courts will not permit legal malpractice plaintiffs to avoid the statute of repose where they *should have discovered* the potential cause of action through ordinary diligence and when a reasonable time remains within the remaining limitation period.

## About the Authors

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