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Northern District of Illinois District Court Finds that a Factual Omission May Amount to a Fraudulent Concealment in an Attorney-Client Relationship

Brandolino v. Schlak

The statute of limitations and statute of repose for legal malpractice actions are two years and six years, respectively, as codified in 735 ILCS 5/13-214.3(b) and (c). However, the doctrine of fraudulent concealment, codified separately in 735 ILCS 5/13-215, may impact these periods in malpractice suits. Fraudulent concealment can toll either the statute of limitations or the statute of repose until a claimant has had an opportunity to discover the alleged malpractice. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 53-54 (2006). For the fraudulent concealment doctrine to apply, courts have generally held that an affirmative act is required, as opposed to mere silence. For example, in *Orlak v. Loyola University Health System*, the Illinois Supreme Court found that the concealment contemplated under section 13-215 must consist of affirmative acts and representations calculated to induce a claimant into delaying filing his or her claim, or to prevent a claimant from discovering their claim; mere silence on the part of a defendant is insufficient. *Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 18 (2007) (citing *Smith v. Cook Cty. Hosp.*, 164 Ill. App. 3d 857, 862 (1st Dist. 1987)).

An exception to the requirement of an affirmative act has developed with regard to cases in which the parties maintain a special relationship, such as a fiduciary relationship. In *DeLuna v. Burciaga*, the Illinois Supreme Court set forth the general rule that affirmative act or representation must be part of the fraudulent concealment. However, the court also recognized the exception that when a person acts in a relation of fiduciary or trust or other confidential relationship, that person occupying the position of fiduciary is under a duty to reveal the facts to the claimant, and that when he or she ought to speak, or ought to disclose, silence in the face of duty is the equivalent of an affirmative representation or act, as a matter of law. *DeLuna*, 223 Ill. 2d at 76 (quoting *Hagney v. Lopeman*, 147 Ill. 2d 458, 463 (1992)). Both the *DeLuna* court and the *Hagney* court recognized that fiduciary relationship—and the duty that one ought to speak or ought to disclose as a basis for the fraudulent concealment—in claims against an attorney.

The question of whether or not a special relationship exists can usually be determined as a matter of law by the court (such as an attorney-client relationship or a doctor-patient relationship); however, other times it may be a question that is decided by a jury. In *Doe v. Boy Scouts of America*, 2016 IL App (1st) 152406, the court could not find a special relationship as a matter of law in a case involving child sexual abuse by a former scoutmaster in the Boy Scouts. That issue is one that could be sent to the jury to determine if the plaintiff placed his trust in the Boy Scout defendants, and the Boy Scout defendants accepted that trust. *Doe*, 2016 IL App (1st) 152406, ¶ 91.

Similarly, the *Doe* court cited *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119 (5th Dist. 2011), in which the trial court did not find a special relationship as a matter of law in a pastoral relationship, but instead sent the question

to the jury. *Id.* ¶¶ 87-88 (citing *Wisniewski*, 406 Ill. App. 3d at 1149). The Illinois Appellate Court Fifth District upheld the jury's finding of a special relationship between the Diocese and claimant Wisniewski, one of its parishioners. *See id.* at 1160; *see also Doe*, 2016 IL App (1st) 152406, ¶ 88. Ultimately, the Fifth District affirmed the verdict of the jury even though the sexual abuse occurred in the range of 24 to 29 years prior to filing suit. *Wisniewski*, 406 Ill. App. 3d at 1122-79.

Recently, the United States District Court for the Northern District of Illinois adjudicated a matter in which the plaintiffs alleged that an attorney committed malpractice by failing to disclose certain facts concerning certain real estate transactions, tax documents and closing forms. *Brandolino v. Schlak*, No. 19-cv-00102, 2019 WL 3287891 (N.D. Ill. July 22, 2019). The Northern District recognized Illinois law and the doctrine of fraudulent concealment in dealing with statutes of limitations and repose, and the exception to the general rule that permits silence to be the equivalent of an affirmative action in legal malpractice cases.

The court found that there were sufficient allegations in the complaint to support a fraudulent concealment theory by stating that the attorney: (i) induced the plaintiffs (his clients) to forego attending the closing and personally signing the closing documents (the attorney signed the required documents on their behalf pursuant to a power of attorney); (ii) signed the papers without discussing the documents with the plaintiffs; and (iii) failed to deliver tax and closing documents to the plaintiffs after the sale. *Brandolino*, 2019 WL 3287891, at *3. The plaintiffs further stated that they did not understand the nature of the transaction until they discovered the closing documents in their father's house. *Id*. Accordingly, the motion to dismiss the amended complaint was denied and the case proceeded forward to the discovery phase.

In defending or prosecuting legal malpractice cases, statutes of limitations or repose are almost always a pertinent issue. The *Brandolino* case underscores that there can be questions as to whether there was a triggering event (such as an adverse ruling in the course of legal proceedings) for purposes of the discovery rule. However, there may also be questions of fraudulent concealment. The relationship between an attorney and his or her client can pose a significant hurdle for the defense in attempting to terminate the case either on a section 2-619 motion to dismiss or on a motion for summary judgment. The fiduciary relationship between an attorney and his or her client, and statements from the Illinois Supreme Court stating that an attorney ought to keep their client well informed of the case, emphasize the need for communications about the representation at key points in time.

A well-documented file demonstrating full disclosure of information concerning the representation at all critical stages, along with production of relevant documents such as closing documents and tax records, can serve as the defense to not only the substantive legal malpractice claim but a fraudulent concealment theory. Therefore, it is of utmost importance for all attorneys to keep the client well informed of his or her representation, and to provide documents that would be important for any client to keep as a part of their personal file. Detailed communication also allows the attorney to keep a full grasp of his or her case, including where the matter has been and where it will be heading in the future. Communication is the key.

About the Author

John F. Watson is a partner with *Craig & Craig, LLC* in the Mattoon office. Mr. Watson graduated with a Bachelor of Science in Mechanical Engineering from Bradley University in 1990 and received his J.D., with Honors, from The John Marshall Law School in 1993. During law school, Mr. Watson served as an Associate Editor for *The John Marshall Law*

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