Discovery Rule Still Rules in Legal Malpractice Actions

PLUS Blog
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The United States District Court for the Eastern District of Pennsylvania recently reiterated the long-prevailing discovery rule applicable to legal malpractice actions in Pennsylvania. In *Nupson v. Schnader Harrison Segal & Lewis, LLP, Bruce A. Rosenfield and Blank Rome LLP*, 2022 WL 4635943 (E.D. Pa., Sept. 30, 2022), Judge Alejandro dismissed the plaintiff's untimely 2018 claims for negligence and breach of fiduciary duty against her former counsel based upon conduct which had occurred 15 years prior, in 2001 through 2003.

Pennsylvania follows the "occurrence rule" with respect to the tolling of the statute of limitations in legal malpractice actions – meaning the statute of limitations begins to run upon the occurrence or happening of the alleged breach of duty, except where the injured party (client) cannot discover the injury or its cause despite the exercise of due diligence. *See Pocono Int'l Raceway v. Pocono Produce, Inc.*, 468 A. 2d 468, 471 (Pa. 1983); *Knopick v. Connelly*, 639 F. 3d 600, 607 (3d Cir. 2010). In PA, the statute of limitations for a tort claim is tolled only until the claimant is put on "inquiry notice" of a claim, i.e., "actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct, without the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause." *Rice v. Diocese of Altoona-Johnstown*, 255 A. 3d 237, 249 (Pa. 2021).

The genesis for Ms. Nupson's lawsuit was the defendants' alleged advice pertaining to a series of financial (stock sale) transactions occurring in 2001 through 2003 between family members. Barring any tolling of the statute of limitations, any filing *after* 2005 (two years after the latest transaction) would be time-barred. The plaintiff sought to invoke the discovery rule to extend the life of her claim, which was filed on June 15, 2018.

However, on June 5, 2014, the plaintiff's independent counsel – retained to review and potentially challenge the financial (trust/asset) transactions facilitated by defendant Rosenfield – sent a letter to the plaintiff's brother's counsel, stating in relevant part that he perceived a viable legal action and "determined to proceed against [Defendants.]"

In March 2015, the plaintiff's brother and his company filed a declaratory judgment action in the Orphans' Court of Montgomery County. On May 20, 2015, the plaintiff filed a substantive response to a motion in that action, and on June 23, 2015, filed a verified answer and new matter to the petition for declaratory relief. The latter even included reference to Rosenfield's "unwaivable conflicts of interest." On the same date, the

plaintiff also filed a counterclaim and petition for declaratory and other relief, alleging that Rosenfield had acted in violation of Rule 1.7(b) of the Rules of Professional Conduct, and a petition for discovery seeking discovery on Rosenfield's alleged conflict of interest and – per her own admission in the instant litigation – investigating potential legal/tort claims against the defendants.

The aforementioned events of 2014 and 2015 indicate that the plaintiff was on (at minimum) "inquiry notice" at that time. As of June 5, 2014, the plaintiff was on notice of "at least some form of significant harm and of a factual cause linked to another's conduct." Even assuming, *arguendo*, the June 5, 2014 letter did not operate as sufficient inquiry notice, her ***verified*** pleadings in the Orphan's Court action, filed in 2015, reflected the plaintiff's knowledge of the alleged injuries and conflict of interest upon which the instant complaint was premised. In other words, the facts and claims giving rise to the complaint filed on June 15, 2018 were consistent with those alleged in the plaintiff's 2015 verified pleadings.

The plaintiff's efforts to mitigate her knowledge, positing that counsel in 2015 was merely stating what "they believed may have been the case," proved futile in light of her own signature on the verifications, stating that the averments were "true and correct to the best of her knowledge, information and belief" and subject to penalty of perjury.

The court reexamined the plaintiff's petition for discovery in the 2015 Orphans' Court matter and her expert's opinion in the instant matter, both of which established that she was on inquiry notice of potential legal claims against the defendants as of June 2015. Therefore, any tort claim (i.e. negligence or breach of fiduciary duty) filed *after* June 23, 2017 – two years after the June 25, 2015 filings – was time-barred by the statute of limitations. The court similarly rejected the plaintiff's argument that her claims should be tolled under the fraudulent concealment doctrine on the same "inquiry notice" basis.

While the facts of this case are unique, the lesson is not: actions filed beyond the statute of limitations warrant dismissal, and claimants must exercise due diligence in pursuing claims upon suggestion of significant harm and of a factual cause linked to another's conduct. It is critical for the plaintiffs' bar, when interviewing new prospective clients, to ascertain information about not only the nature of the claim, but the factual timeline of events to identify the date of inquiry notice. It is also important to counsel clients on the importance of swift action upon discovery of a potential claim, even if the full extent of the injury or cause is not yet known. These specific details can be developed through discovery and, as necessary, leave may be sought to amend the complaint to bolster the claims. Alternatively, a writ may be filed to toll the statute of limitations while preliminary investigation proceeds.

From a defense perspective, it is important for litigators and claims professionals to critically review the facts giving rise to a legal cause of action and analyze when the plaintiff first discovered the facts underlying the claim. This, of course, is not unique to legal malpractice actions. Claims against an array of professionals – insurance brokers, real estate agents, and tax professionals to name a few – are generally subject to the discovery rule. Therefore, the statute of limitations should be pled when appropriate as a new matter affirmative defense to

preserve this important and dispositive defense.

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When professionals are faced with claims and lawsuits alleging professional negligence, breach of fiduciary duty and more, Dana provides a vigorous response and defense. As a member of the Professional Liability Department, she routinely defends claims and lawsuits brought against insurance agents and brokers, attorneys, real estate professionals, financial entities, large product manufacturers, lenders and other professionals.

Dana understands the disruption and angst professionals experience when claims are brought against them. With 10 years of civil litigation experience, she approaches each matter with empathy and a strong determination to efficiently resolve the actions brought against her clients. A typical day in her practice might involve securing court dismissals on dispositive motions, mitigating risk via alternative dispute resolution, or collaborating with clients on defense strategy for swift case resolution.

Dana is a member of the Professional Liability Underwriting Society (PLUS) and frequently contributes articles to PLUS Blog. She is also an active member of the Philadelphia Bar Association and previously served on its Young Lawyers Division Executive Committee. She has been recognized by the Best Lawyers organization as a Best Lawyers: Ones to Watch since 2021, and she has been selected a Pennsylvania Super Lawyer Rising Star since 2019.

A graduate of Emory University, she received her juris doctor from the Villanova University School of Law where she was a Dean's Merit Scholarship recipient. While at Villanova, Dana served as a managing editor for student work for the Villanova Sports & Entertainment Law Journal. Dana may be reached at dagittleman@mdwcg.com.