



Alerts

Illinois Six-Year Statute of Repose Commenced on Date of Injury, Not on Date of Client's Death, and Claim Was Thus Time-Barred

June 28, 2011

Lawyers for the Profession® Alert

Snyder v. Heidelberg, ___ Ill. 2d ___, ___ N.E.2d ___, 2011 WL 2410396 (2011)

Brief Summary

A client's widow sued an attorney for legal malpractice, alleging that he negligently drafted a deed to real property that the client had allegedly intended to convey to his widow as his joint tenant. The Illinois Supreme Court held that injury occurred on the date the deed was prepared, that the six-year statute of repose thus governed the claim, and the claim was time-barred.

Complete Summary

On February 28, 2008, the widow sued the attorney for legal malpractice, alleging that he had negligently prepared a quitclaim deed, and that the deed thereby failed to convey certain real estate to the widow and her husband as joint tenants with right of survivorship. After the husband died, the widow discovered that prior to the date of the alleged malpractice, legal title to the property was held by a trustee in a land trust and not by the husband individually, and that upon the husband's death, the sole beneficial interest in the land trust went to the husband's son, who was the widow's stepson.

In Count I of her complaint, the widow alleged legal malpractice; in Count II, against the widow's stepson, she asked for imposition of a constructive trust upon the premises. The widow alleged that on or about May 23, 1997, the husband retained the attorney to prepare a quitclaim deed conveying the couple's marital home, of which the husband was the sole owner, into the names of the widow and the husband as joint tenants. The attorney prepared the deed, and it was executed and recorded. The husband died in December 2007. Thereafter, the widow's stepson commenced an action in forcible entry and detainer seeking to remove the widow from the property, claiming that he was entitled to possession of the property. The widow alleged that the attorney knew that the husband intended the widow to primarily benefit from the attorney's representation of the husband. She argued that she was thus a third-party beneficiary of the professional relationship between the attorney and the husband. The widow contended that the attorney breached his duty to her by: (1) failing to determine the true owner of the property; (2) failing to prepare the

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appropriate documentation for legal title to be conveyed to the widow and the husband as joint tenants; and (3) allowing the widow and the husband to be subjected to adverse claims for possession and ownership of the property.

The trial court granted the attorney's motion to dismiss Count I of the complaint, finding that the widow's suit was barred by the six-year statute of repose. 735 ILCS 5/13–214.3(c) (1994). The Illinois Supreme Court initially noted that the purpose of a statute of repose like that found in Section 13–214.3(c) operates to curtail the “long tail” of liability that may result from the discovery rule. A statute of repose begins to run when a specific event occurs, regardless of whether an action has accrued. In Illinois, the statute of repose prohibits the commencement of an action more than six years “after the date on which the act or omission occurred.”

The attorney argued that the injury was sustained when the alleged negligent act occurred, not when the husband died. 735 ILCS 5/13–214.3(d) generally provides that “when the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death.” The attorney argued that Section 13–214.3(d) thus did not apply and that the six-year repose period of 735 ILCS 5/13–214.3(c) expired prior to the commencement of the widow's action.

Although the widow conceded that an injury did occur at the time the deed was prepared, she argued that an additional injury occurred when the husband died, and that it was that last injury that determined when the limitations period began to run. The widow argued that the Illinois Supreme Court's decision in *Wackrow v. Niemi*, 231 Ill. 2d 418, 899 N.E.2d 273 (2008) controlled. There, defendant attorney prepared an amendment to a living trust by which the client would give to his sister, the plaintiff, his residence or if the residence was sold prior to his death, the sum of \$300,000. After the client died, the sister made a claim against his estate for the property. The circuit court denied the claim because the property was owned, not by the client individually, but by a land trust. Long after the time for filing claims in the client's estate had expired, the sister filed suit against the attorney, alleging that he had failed to determine the actual owner of the property prior to preparing the trust amendment. The circuit court granted the attorney's 735 ILCS 5/2–619 motion to dismiss on the basis that the suit was time-barred pursuant to 735 ILCS 5/13–214.3(d). The appellate court affirmed.

The Court noted in *Wackrow* that application of 735 ILCS 5/13–214.3(d) turns on whether the injury occurred upon the death of the client. Noting that the sister in *Wackrow* alleged legal malpractice in the drafting of the amendment to the client's trust, the Court stated that “[b]ecause [the client] could have revoked that amendment or changed the beneficiary prior to his death, the injury did not occur until [the client's] death. Consequently, section 13–214.3(d) applies to the widow's claim.”

Here, the widow argued that *Wackrow* supported her argument that the injury in this case occurred on the death of the husband. She emphasized the statement in *Wackrow* that “[b]ecause [the client] could have revoked [the trust] amendment or changed the beneficiary prior to his death, the injury did not occur until [the client's] death.” The widow noted that the husband could have corrected the attorney's alleged error at any time prior to his death, and she argued that the inability to correct an error is the “touchstone” for understanding when the injury occurred in this case.

In rejecting the widow's argument, the Illinois Supreme Court stated that she had failed to recognize a fundamental difference between her case and *Wackrow*. Here, the services rendered to the husband were intended to have an immediate benefit during the husband's lifetime. Had the husband held legal title to the premises, the joint tenancy deed drafted by the attorney would have conveyed a one-half undivided interest to the widow, thus entitling her to possession and enjoyment of the premises. A joint tenancy is a present estate in all the joint tenants. The right of survivorship is thus a present interest that is created by the conveyance of the property into joint tenancy. Accordingly, the failure of the deed drafted by the attorney here to create a joint tenancy in the husband and the widow caused a present injury that occurred at the time the quitclaim deed was prepared.

In contrast, the trust amendment in *Wackrow* was intended to take effect, not during the client's lifetime, but only upon his death. Up until that time, the widow was to receive nothing and there was no injury while the client was alive. The client could have revoked the trust amendment or modified it at any time prior to his death. The sole injury occurred when the client died and the trust amendment became operative.



The widow also argued that there can be more than one injury for statute of limitations purposes. The Court noted, however, that the use of the phrase “the injury” in the statute indicated that the legislature contemplated that only a singular injury would trigger application of the limitations period in 735 ILCS 5/13–214.3(d). Further, Section 13–214.3(d) applies only when the injury occurs upon the death of the client. This section thus does not apply when the injury occurs prior to the client’s death. Because the injury in this case occurred at the time the deed was prepared and executed, the two-year limitations period contained in 735 ILCS 5/13–214.3(b) applied. However, because the widow did not file her malpractice action until more than 10 years later, her claim was barred by the six-year statute of repose, 735 ILCS 5/13-214.3(c). Here, the last act of the attorney’s representation of the husband took place on June 25, 1997, when the attorney mailed the original recorded quitclaim deed to the husband. Thus, the Court held that the statute of repose expired years before the widow filed her malpractice action.

Significance of Opinion

Notably, the Illinois Supreme Court held that 735 ILCS 5/13–214.3(d) applies only when the injury occurs upon the death of the client. This section does not apply when the injury occurs prior to the client’s death. Because the injury here occurred at the time the deed was prepared and executed, Section 13–214.3(d) did not apply, and the widow’s claim was barred by the six-year statute of repose, 735 ILCS 5/13-214.3(c).

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw](#) attorney.

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