



## Alerts

### For Statute of Repose to Be Tolled, Attorney Must Make Affirmative Misrepresentations

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*Lawyers for the Profession® Alert*

*Koczor v. Melnyk*, \_\_\_ Ill. App. 3d \_\_\_, 944 N.E.2d 345 (1st Dist. 2011)

#### Brief Summary

The Illinois Appellate Court, First District, recently held that for the legal malpractice statute of repose to be tolled under the doctrine of equitable estoppel, an attorney must make misrepresentations that delay the filing of the legal malpractice suit. Equitable estoppel may not be based simply on the client's reliance on the lawyer to perform a task that he or she promised to perform.

#### Complete Summary

In October 1997, plaintiff buyers purchased two parcels of property from a seller, which the seller had purchased on January 14, 1997, in a tax sale. The buyers retained defendant lawyer (the Lawyer) to handle the closing and record the deeds to the property. In 2007, the buyers decided to build a new house on the lots. In November 2007, they discovered that one of the parcels had not been recorded in their names. The buyers then contacted the Lawyer, who told them that he would investigate the matter. In January 2008, the buyers retained subsequent counsel. The Lawyer then admitted that he had failed to record the deed.

In February 2009, the buyers filed a legal malpractice action, alleging that the Lawyer was liable for failing to record the deed. The Lawyer moved from summary judgment, arguing that the buyers' claim was time-barred by a six-year statute of repose. The trial court granted the motion, and the appellate court affirmed.

The statute of repose, 735 ILCS 5/13-214.3, provides that an action against an attorney arising out of an act or omission in the performance of professional services may not be commenced more than six years after the date on which the act or omission occurred. The appellate court determined that January 14, 2001, was the last day the parcel could have been recorded. The court arrived at this date based on provisions of the Illinois Property Tax Code. In summary, however, the redemption period expired on January 14, 2000. The buyers had one year from that date to record the deed. The court determined that because

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the malpractice claim was based on failure to record the deed, the last date on which an act or omission occurred was January 14, 2001.

The buyers contended that the statute of repose was tolled under the doctrine of equitable estoppel. The buyers argued that equitable estoppel applied because they were entitled to rely on the Lawyer's representation that he would record the deed. The appellate court rejected this argument. For equitable estoppel to toll the repose statute, an attorney must make a misrepresentation that the clients relied on to refrain from filing their claim for legal malpractice. The basis for the malpractice claim may not be the basis for equitable estoppel. The Lawyer had made no misrepresentation to the buyers that delayed the filing of their legal malpractice claim because he did not know of his error until the buyers contacted him in 2007. The court noted also that the Lawyer had made no misrepresentations to the buyers about the status of their case.

Instead, after failing to record the deed, he had no contact with the buyers during the next 10 years. After the buyers contacted the Lawyer, he told them that he would investigate the matter. The Lawyer then admitted his failure to record the deed.

### **Significance of Opinion**

Notably, the court held that equitable estoppel may not be based simply on the client's reliance on the attorney to perform a task he agreed to perform, but failed to do so. For equitable estoppel to toll the repose statute, an attorney must make an affirmative misrepresentation(s) that the clients relied on to delay the filing of legal malpractice action. The basis for the malpractice claim may not be the basis for equitable estoppel.

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

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