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Law Firm's Continued Availability for Background Information Did Not Rekindle the Attorney-Client Relationship

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Perkins v. American Transit Insurance Co., 2013 WL 174426 (S.D.N.Y. 2013)

Brief Summary

The Southern District Court of New York granted summary judgment dismissing a bankruptcy trustee's legal malpractice and breach of fiduciary duty claim against the first of three law firms to represent the judgment debtor in an underlying personal injury suit. Because of the resulting excess judgment, the judgment debtor was forced into bankruptcy. The law firm that handled pretrial matters filed a motion for summary judgment based upon New York's three-year statute of limitations. The court determined that the statute of limitations barred the claims, even though damages had not accrued by the time the legal malpractice suit was filed, and even where the pretrial law firm continued to make itself available to the successor law firm for certain information. Further, the breach of fiduciary duty claims were duplicative of the legal malpractice claims.

Complete Summary
This case arose out of a personal injury action that resulted in an excess judgment against the judgment debtor forcing him into bankruptcy. During the course of the underlying action, three law firms were involved in the judgment debtor's defense, all retained by the insurer. Plaintiff, the trustee in bankruptcy, brought claims against all three law firms for legal malpractice and breach of fiduciary duty, and against the insurer for breach of contract and breach of fiduciary duty. All of the law firms and the insurer made claims against each other. The law firm that initially represented the judgment debtor was retained to handle pretrial proceedings and as the case approached trial, another law firm was substituted as counsel for trial purposes. Plaintiff alleged claims for legal malpractice and breach of fiduciary duty against the pretrial law firm based upon, *inter alia,* the firm's failure to reach a settlement (below policy limits).

The pretrial law firm filed a motion for summary judgment contending that plaintiff's claims were barred by New York's three-year statute of limitations. Suit was not filed until more than five years after the pretrial law firm was substituted out of the case at which time the attorney-client relationship with the judgment debtor ended. Plaintiff opposed arguing that the case had been filed within the

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statute of limitations because the judgment debtor had not sustained actionable injury until the judgment became enforceable against him, and because the pretrial law firm's representation of the plaintiff was continuous, thereby tolling the statute of limitations. Plaintiff relied on testimony stating generally that in cases where the pretrial law firm was substituted out in favor of the trial law firm, the pretrial law firm remained "available" for "lay of the land" questions and would review the trial law firm's bills. However, the same witness testified that after substitution, the pretrial law firm was no longer involved in the case.

The court granted the pretrial law firm's motion finding that the statute of limitations barred the suit. Under New York law, "[a]n action to recover damages for legal malpractice accrues when the malpractice is committed," as opposed to when it is discovered, *Schumsky v. Eisenstein,* 96 N.Y.2d 164, 166 (2001), or when actionable damages have accrued. *Woodson v. Am. Transit Ins. Co.,* 808 N.Y.S.2d 921 (N.Y.Sup.Ct.2005). "[A]ccrual is not delayed until the damages develop or become quantifiable or certain." *Id.* Consequently, the date on which the judgment became enforceable against the judgment debtor was irrelevant to the question of when the legal malpractice claim accrued under the occurrence-based statute.

Turning to plaintiff's argument in support of continuous representation, the court stated:

It is commonplace for law firms to have contact with each other for background purposes when a case is being transitioned from one to another; that does not rekindle the attorney-client relationship between the former firm and the client after it has been terminated. Nor does reviewing the bills of another law firm carry the hallmarks of legal advice or services to the original client.

The court also pointed out that the continued services of the pretrial law firm would have been on behalf of the insurer as opposed to the former client — the judgment debtor. Plaintiff failed to present evidence to undermine the "crystal clear substitution of counsel."

Finally, the court granted summary judgment on the breach of fiduciary duty claim finding it duplicative of the legal malpractice claim because it did not allege distinct facts or damages. The court rejected plaintiff's unsupported argument that a lawyer retained by an insurer to represent an insured has a conflict of interest with the insured, stating the lack of cited precedent "is hardly surprising, because it is the most commonplace of practices."

Significance of Opinion

This case is significant because the court's determination that the continued availability of the pretrial law firm to the successor trial law firm for certain information and to review bills did not constitute continuous representation that would extend the statute of limitations applicable to the pretrial law firm.

For further information, please contact Terrence P. McAvoy.

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