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The actual-injury provision and the statute of limitations

Legal malpractice: Protecting clients from deals that take their time to go bad

Although this is an article about the statute of limitations and legal malpractice, we are going to take a brief but helpful detour into the world of product liability. Don't panic. It will all make sense in a moment. Here is the scenario: An automobile with a defectively designed seat belt is manufactured in May of 2008 and purchased in February 2009. In November of 2012 the owner of the automobile is killed in a car crash because the defectively designed seat belt fails to do its job and the driver is ejected from the vehicle. When does the statute of limitations run against the parties responsible for designing, manufacturing, and selling the defective seat belt?

California Code of Civil Procedure 335.1 states that "an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another" must be filed within two years. Although there are certain exceptions that can extend the statute of limitations period, generally, the two-year limitation will start running on the date of actual injury or the date of the accrual of the injury. In this case, the earliest date the statute could start running is the date the driver of the vehicle was killed in November of 2012. (*Rivas v. Safety-Kleen Corp.* (2002) 98 Cal.App.4th 218, 224-25.) It does not matter that the defective seat belt was manufactured in 2008 and sold in 2009. The belt did not cause injury and did not create a cause of action for wrongful death until it failed and actually caused a death in 2012.

Now let's change the scenario to legal malpractice, specifically legal malpractice that involves a business transaction. Smith and Jones desire to enter into a complex multi-year purchase agreement (the "Agreement"). Smith hires Attorney to negotiate and draft the Agreement. Smith is concerned that Jones might breach the Agreement down the road, so Smith wants Attorney to build into the Agreement certain provisions designed to

protect Smith in case of a Jones' breach. Attorney falls below the standard of care and does not properly draft the requested provisions. If Jones ever breaches the Agreement, the provisions drafted by the Attorney will not protect Smith. The Agreement is signed by Smith and Jones in 2008. Attorney stops representing Smith shortly after the Agreement is signed in 2008. Between 2008 and 2013, there are no problems between Smith and Jones. In 2013, Jones breaches the Agreement. Relying on the provisions of the Agreement, Smith takes Jones to Court. In 2014, the Court rules that Agreement was not properly drafted and does not protect Smith from the Jones' breach. In 2014 Smith files a legal malpractice claim against Attorney. When does Smith's Statute of Limitations for Legal Malpractice run against Attorney?

Under California Code of Civil Procedure section 340.6, subdivision (a), the statute of limitations for legal malpractice claims in California is one year "after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or occurrence, whichever occurs first." This provision also states that the limitations period is tolled during the pendency of the attorney's continued representation of the plaintiff, or until the plaintiff sustains "actual injury." The statute also provides that the limitations period is tolled when the attorney willfully conceals facts related to the malpractice, or if the plaintiff has a legal or physical disability which restricts him or her from commencing the action.

In arguing that Smith's claim for legal malpractice is time-barred, Defense Counsel might try to argue that the malpractice was committed in 2008 and that the attorney-client relationship between Smith and Attorney ended in 2008. Defense Counsel might claim that the

statute of limitations on Smith's claim ran in 2009. Defense Counsel might argue that Smith never would have entered into the Agreement with Jones unless the Agreement adequately protected Smith from a Jones' breach, and therefore, Smith was "harmed" the moment he entered into the Agreement with Jones. Defense Counsel might quote cases such as *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (hereafter, *Jordache*) to argue that Smith was required to file the legal malpractice case against Attorney, before Smith lost his case against Jones in 2014.

Do not let defense counsel or cases relying on the *Jordache* decision mislead you on the statute of limitations. Yes, the malpractice occurred in 2008 and the representation ended in 2008, but arguably the actual injury to Smith did not occur until 2014 when the court ruled that the Agreement's provisions failed to protect Smith from the Jones' breach. For statute of limitations purposes, Smith's malpractice claim against Attorney is potentially no different than the wrongful-death claim for the defectively designed seat belt. In this case, the Jones breach of the Agreement is the crash of the automobile. The Agreement is the defectively designed seat belt. The Court's 2014 ruling against Smith is the moment the defective seat belt failed to protect the driver from being ejected from the vehicle. While a driver would never have purchased a car with a defective seat belt, the car and the seat belt were working fine and did not actually cause harm to the driver until the belt failed in the crash. The same holds true for Smith. Smith's agreement with Jones was working fine until Jones breached the Agreement in 2013 and the Agreement failed to protect Smith in Court in 2014.

The actual-injury requirement found in the statute of limitations for

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legal malpractice is a potentially powerful protection for clients who are the victim of legal malpractice in the transactional setting. Often the harm caused by transactional malpractice does not immediately occur, or even occur within one year of the end of the attorney's representation. Victims of transactional malpractice need this provision to hold an attorney responsible for conduct years after the conduct occurs.

Given the importance of the actual-injury requirement in statute of limitations cases, a battle will often arise as to what actually constitutes actual injury. This article will attempt to navigate you through some of the more interesting/helpful/confusing authorities on the subject.

In *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, the court held that a client sustains actual injury when it becomes "irremediable." The court further held that irremediable harm "means something which is impossible to remedy; something which is lost, or incorrigible." (*Id.* at p. 1507).

It is important to recognize that a client can sustain actual injury in various ways. For example, California courts have held that the statute of limitations for a legal malpractice action will start to run as soon as the client begins to incur legal fees. In *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, the defendant attorney was hired to get a wife's waiver of community-property claims. The defendant attorney did not get the waiver. Eventually litigation erupted over whether the wife had a community-property interest. The plaintiffs hired new attorneys, filed a lawsuit, and incurred extensive attorney's fees litigating the question of whether or not the wife had a community-property interest. The plaintiffs then sued the defendant attorney for legal malpractice before the litigation over the community-property interest had been concluded. The defendant attorney argued the legal malpractice lawsuit was premature because the plaintiff might still prevail in the community-property dispute. (*Id.* at pp. 1460-64.)

The court rejected the argument, noting that had the defendant attorney gotten the waiver, plaintiff would not

have had to file the new lawsuit and incur legal fees.

The court held:

Contrary to defendants' arguments, the outcome of the pending litigation will not determine whether or not plaintiffs have suffered actual injury, it will only determine the amount of that injury. If plaintiffs prevail in the pending litigation, their loss will be limited to their attorney's fees and litigation costs. If they lose, they will have sustained not only those losses, but also the value of Harold's property which will have to be diverted to Kathleen and her children. It is only this latter event which we will not know until the pending litigation is resolved. That plaintiffs have already incurred substantial attorney fees in defending the pending litigation is established fact. Indeed, the estimates cited by plaintiffs' brief reflect that amount is in excess of \$500,000 and counting. These fees are clearly damages resulting directly from the alleged negligence of defendants. (*Id.* at p. 1470.)

Similarly, in *Bennett v. McCall* (1993) 19 Cal.App.4th 122, the court held that a client sustains actual injury "when he is compelled, as a result of the attorney's error, to incur or pay attorney fees." (*Id.* at p. 126.) Moreover, it "is the fact and knowledge of damage and not the amount thereof that is required to prove actual injury." (*Id.* at p. 128.)

As the California Supreme Court wrote in *Jordache*:

'If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm — not yet realized — does not suffice to create a cause of action for negligence. [Citations.] Hence, until the client suffers appreciable harm as a consequence of [the] attorney's negligence, the client cannot establish a cause of action for malpractice.' [Citation.] 'The cause of action arises, however, before the client sustains all,

or even the greater part, of the damages occasioned by [the] attorney's negligence. [Citations.] Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.' [Citation.] [¶] [A]ctual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy. [Citations] ('When malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred.')

(*Jordache, supra*, 18 Cal.4th at pp. 749-50, italics in the original omitted.)

So going back to the malpractice committed by the Attorney for Smith, a tempting argument can be made that the statute of limitations started running for Smith the moment he was required to file suit against Jones in 2013. After all, Smith had to spend money to hire an attorney and file a complaint in court. Under the above authority, that could arguably constitute damage and actual injury.

But was Smith actually compelled to hire a lawyer and file a lawsuit as a result of the Attorney's error? Arguably, Smith filed his lawsuit against Jones because Jones breached the Agreement. Jones' breach of the Agreement is what caused Smith to file the lawsuit, not the error by Smith's attorney. If anything, Smith can argue that he was spending money in court because he thought he had a good Agreement that protected him from Jones' breach and he could use the Agreement against Jones. An argument can be made that until the court determines that Smith's Agreement with Jones fails to protect Smith from a Jones' breach, the money being spent by Smith on attorneys is not connected or caused by the malpractice of the Attorney.

As such, we reach an interesting issue related to the actual-injury requirement of the statute of limitations for malpractice. Although a court ruling is not
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always required to establish an actual injury, sometimes there are certain situations where no injury can actually occur until there is a court ruling.

The case of *Baltins v. James*, (1995) 36 Cal.App.4th 1193 is instructive. In *Baltins* the court concluded that the statute of limitations did not begin until the trial court rendered judgment in related litigation. In *Baltins*, the plaintiff husband and wife alleged the attorney negligently advised them about transferring and managing real property while the husband appealed an order setting aside his community-property settlement agreement with his former wife. The attorney told plaintiffs that, during the appeal, the husband could treat the property as if the order did not exist. The husband transferred a ranch to his new wife, although it was a community asset of his former marriage. He also spent more than \$500,000 on properties he received under the former settlement agreement. He alleged he made the expenditures because the attorney told him he would receive either title to the properties or reimbursement. After the order was affirmed on appeal, the trial court entered judgment finding the husband breached his fiduciary duties regarding the community property and denying most of the reimbursement credit he sought.

In *Baltins* the court concluded that the statute of limitations did not begin until the trial court rendered judgment in related litigation. The court held that “[i]f the existence or effect of a professional’s error depends on a litigated or negotiated determination’s outcome . . . actual injury occurs only when that determination is made.” (*Baltins, supra*, 36 Cal.App.4th at p. 1195.) “Thus, if the propriety of an attorney’s acts or advice is contingent on the outcome of a claim by or against the client, the client does not sustain actual injury until the claim is resolved adversely, which indicates both that the attorney erred and that the error caused harm.” (*Id.* at p. 1203.) The Court of Appeal further explained that the “threat of future harm — not yet realized . . . [is] insufficient to create a cause of action, and thereby end the tolling of the

limitations period under section 340.6.” (*Id.* at p. 1208.)

Smith’s Attorney told Smith that if Jones breached the Agreement, Smith could use certain provisions of the Agreement to protect himself from Jones’ breach. Until Jones breaches the Agreement, there is no need or opportunity to test the strength of the Agreement’s protections for Smith. Furthermore, an argument can be made that until there is a determination by the Court as to whether the Agreement adequately protects Smith from the Jones’ breach, it is purely speculative to argue that Smith has suffered any harm as a result of the Attorney’s malpractice. If the Court rules the Agreement adequately protects Smith, then there is no malpractice against the attorney.

The interpretation of a contested provision in an agreement should not be confused with more traditional legal malpractice. For example, if the attorney representing a personal-injury victim fails to timely file the cause of action and does no further work on the case, an argument can be made that the actual injury occurs when the attorney missed the deadline to file. The client has already lost his right to sue for personal injury when his attorney failed to timely file. Arguably, the client does not necessarily need a ruling from a court that his action is untimely. The action is arguably untimely regardless of any ruling by a court.

In looking at cases in which the malpractice and the harm are separated by long periods of time, *Fritz v. Ehrmann* (2006) 136 Cal.App.4th 1374 is also instructive. In *Fritz*, the plaintiff filed a legal malpractice action in 2003, alleging the attorney failed to properly prepare a promissory note in 1995 to reflect that a third-party borrower could not prepay the principal on funds borrowed from the client. The attorney argued that the client suffered actual injury when the note was signed in 1995 or in November 2000 when the other party to the note prepaid principal without a penalty. (*Id.* at p. 1377-79.)

The *Fritz* Court held that the injury was “still speculative and contingent in 1995” because it was unknown whether the borrowers would have attempted to

prepay the principal or refused to repay the deferred interest. (*Fritz, supra*, 136 Cal.App.4th at p. 1383.) The Court also found there were facts showing there was no actual injury in November 2000 when the borrower made the prepayment because evidence showed the client permitted the prepayment based on an independent tax reason, and not based on the attorney’s alleged drafting error. (*Id.* at pp. 1384-85.)

Compare the above cases to a case that might be cited by Defense Counsel. In *Turley v. Woolbridge* (1991) 230 Cal.App.3d 586, the court held that the plaintiff suffered an “actual injury” from “the allegedly unequal community property division when she executed” the marriage termination agreement at issue, which became effective on the date of its execution. (*Id.* at p. 593.) The *Turley* court further stated that the fact *Turley* could have challenged the agreement in an action for rescission or sought some other relief “did not affect the date she suffered actual harm. When she signed the purportedly unfair Agreement on the alleged negligent advice of counsel and thereby rendered it effective, all essential elements of her cause of action for legal malpractice had occurred. There was no justification for tolling the statute of limitations beyond that point.” (*Ibid.*)

In cases such as *Turley*, the client signs a bad agreement that immediately causes the complete and total loss of a property right. Arguably, the damage occurs at that moment. The damage might be eliminated or reduced down the road, but there is an immediate potential cause of action against the attorney. Husband agreed to divide his property with Wife 60-40, when the agreement should have really divided the property 50-50. Husband has immediately lost ten percent of his property and has the ability to sue his attorney for the immediate loss.

Going back to the malpractice of the Smith-Jones Agreement, Defense Counsel might also improperly look to cases such as *Jordache* to argue there was an “actual injury” the moment the Agreement was signed. In *Jordache* the dispute turned on whether the attorney
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had failed to properly advise the client to timely tender litigation defense in a third-party liability case to an insurance company. The client started suffering injury when it was forced to spend its own money to defend itself in the third-party litigation. However, before suing the negligent attorney, the client sued the insurance company for failing to provide a defense. The lawsuit between the client and the insurance company would ultimately settle. The client then filed a second lawsuit against the attorney who had not told the client to timely tender to the insurance company. (*Jordache, supra*, 18 Cal.4th at p. 746.)

The client argued that it had not suffered an actual injury until the client's lawsuit against the insurance company had been resolved. (*Jordache, supra*, 18 Cal.4th at p. 747.) The *Jordache* Court noted: "Jordache's right to an insurer-funded defense existed or not when that action first embroiled Jordache. The right to that insurance benefit, the impairment of that right, and Jordache's expenditures while that right was unavailable, did not arise for the first time when Jordache settled with the insurers." (*Id.* at p. 753.) Further, the Court observed that the *Jordache* lawsuit against the insurance company could not determine the consequences of the attorney's negligence. The resolution of the lawsuit against the insurance company was only relevant to the negligence claim against the attorney in that it "potentially affected the amount of damages Jordache might recover from Brobeck." (*Ibid.*)

The *Jordache* Court emphasized the determination of when an "actual injury"

occurs does not "depend on facile, 'bright line' rules," and instead requires "a factual analysis of the claimed error and its consequences." (*Jordache, supra*, 18 Cal.4th at p. 752.) "The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Ibid.*) The analysis "concerns whether 'events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.'" (*Id.* at p. 751.)

In order to see how Smith's case against Attorney fits closer to *Baltins* than to *Turley* or *Jordache*, consider the following. The premise of Defense Counsel is that Smith could have and should have sued Attorney a month after the Agreement with Jones was signed in 2008. Imagine if Smith sued his attorney in 2008. Smith would not be able to demonstrate any injury or cause of action at the time of the demurrer. Essentially the hearing would go as follows: "Your Honor, we are concerned that the Agreement might not adequately protect Smith in the event Jones breaches the Agreement. What do you mean, the Agreement MIGHT not adequately protect? Has Jones breached the Agreement? No. Do you think Jones will breach the Agreement? We have no idea. Does Jones plan to dispute the provisions of the Agreement? We don't know. Right now Jones is complying with all of the terms of the Agreement. Does Jones even know there is a problem with the Agreement? We're not sure. We're just filing this legal malpractice lawsuit in case Jones someday breaches the Agreement and in case a judge might later decide the

Agreement does not adequately protect Smith."

If Smith had filed his malpractice case in 2008, he would have lost the case. It was completely speculative as to whether Smith had been harmed and if that harm was going to actually cause damage. If he cannot sue Smith in 2008, the statute of limitations should not start running in 2008.

The date of actual injury in transactional attorney malpractice cases is not always black and white. Actual injury can often be the subject of a number of different factual inquiries and arguments. However, the key thing to remember is that just because the transaction was completed years ago and the representation ended years ago, does not mean the limitations period for the legal malpractice has necessarily expired. The nature of the transaction, the nature of the injury, and the nature of the potential legal remedy for that injury will often drive the actual injury analysis. The point to remember is that the actual injury requirement is a powerful potential tool to protect your clients from statute of limitations claims when the malpractice and representation occurred years before the actual harm was suffered.

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