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As Clear As Mud: The Limitations Periods Applicable to Attorneys Under 735 ILCS 5/13-214.3 in Estate Planning Situations

Introduction

The legal malpractice statute of limitation and repose is fraught with confusion and uncertainty. A recent spate of estate planning cases has highlighted this confusion. Absent the Illinois General Assembly's redrafting of the statute, as suggested by Justice Cook in the special concurrence in *Pugsley v. Tueth*,[1] or a clarification from the Illinois Supreme Court, these issues will persist. In this article, we will set forth the applicable statute, 735 ILCS 5/13-214.3, and discuss the recent cases interpreting it. We will then attempt to provide an analysis of the statute and the recent cases in order to try to make this area of the law more understandable.

Applicable Statute of Limitation for Malpractice Claims Against Attorneys

Claims against attorneys are governed by the statute of limitation and repose set forth in Section 13-214.3 ("the statute"). Of this section, the statutory sections that are the subject of the recent estate planning cases referenced in this article are as follows:

> (b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

> (c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.
>
> (d) 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 unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.[2]

The statute creates three different time periods for claims against attorneys. The first is a two-year statute of limitation as found in Section (b), which incorporates the discovery rule.[3] The second is a six-year statute of repose set forth in Section (c). The purpose of the statute of repose found in the statute is to curtail "long tail" claims.[4] The third is a repose period that relates to claims where the injury does not occur until the death of the client.[5]

It is this last section, Section (d), and how it interacts with Sections (b) and (c) that has caused confusion, especially in the estate planning context. Essentially, Section (d) is a statute of repose that extends Section (b)'s statute of limitation and Section's (c) statute of reposed when the injury does not occur until the death of the client. As discussed below, (a) what is "the injury" sufficient for a cause of action to accrue and (b) when did "the injury" occur have become the central questions for Illinois courts to address when dealing with Section 13-214.3(d).

Petersen v. Wallach

In *Petersen v. Wallach*,[6] the Illinois Supreme Court upheld the Appellate Court's decision to reverse the dismissal of a malpractice claim concerning the drafting of an *inter vivos* trust. In *Peterson*, the third party beneficiary plaintiff filed a complaint in 1998 concerning negligent estate planning advice rendered in 1990 and 1991 that caused the deceased client's gifts to be "added back" to the estate, which resulted in a substantial tax liability.[7] The defendant attorney moved to dismiss based on the six year statute of repose found in Section (c) and the trial court granted the motion.[8]

The Appellate Court, First District, agreed with the plaintiff's argument and found that the statute did not make a distinction between distributions by probate and those outside of probate, and rejected the Third District's holding in *Zelenka v. Krone*,[9] which limited Section 13-214.3(d) to only probate matters.[10]

The defendant appealed the First District's holding, and the Illinois Supreme Court agreed with the First District. Specifically, the Supreme Court held that Section (d) "applies to all attorney malpractice cases when injury occurs upon the death of a person for whom services were rendered, regardless of the manner used to distribute the decedent's assets."[11] The court stated that the language of Section (d) "unambiguously supports the application to all cases when the alleged injury caused by the attorney's act or omission does not occur until the death of the person for whom the professional services were rendered."[12] Accordingly, the court held that a third party beneficiary to the attorney-client relationship who sustains an injury because of an attorney's negligence has two years to file an action against an attorney unless letters of office are issued or the will is admitted to probate.[13] Further, the court found that Section (d) is simply an exception to the six year statute of repose when the alleged injury does not occur until the death of the client.[14]

Boiling it down to its essentials, the court held that the "lone inquiry to be made by a court when determining whether section 13-214.3(d) is applicable is simply whether the injury caused by the malpractice occurred upon the death of the client. The manner of distributing the assets is of no consequence."[15] The question of whether the injury occurred at the client's death is an issue the courts have struggled with since *Peterson*.

Wackrow v. Niemi

In *Wackrow v. Niemi*,[16] the Illinois Supreme Court affirmed the trial court's decision to dismiss a complaint pursuant to 13-214.3 where the plaintiff asserted a negligence claim regarding the defendant attorney's improper preparation of a living trust that deprived the plaintiff of the intended interest.[17]

At his client's direction, the defendant attorney prepared a living trust in 1993. Thereafter, in early 2002, the defendant revised the trust. Pursuant to the client's direction, the trust included a transfer of the client's home to the plaintiff.[18] The trust provided that if the home was sold before the client's death, the plaintiff was to receive $300,000.[19] The client died in August 2002.[20] The will was admitted to probate in October 2002.[21] In April 2003, the plaintiff filed a claim with the estate for the property, but the trustee transferred neither the home nor the $300,000 to the plaintiff.[22] In October 2003, the probate court denied the plaintiff's claim.[23]

In December 2004, the plaintiff filed her malpractice claim alleging that the defendant failed to conduct a title search and that a reasonable title search would have determined that the client did not own the home, but that another trust did.[24] The trial court dismissed the plaintiff's complaint and the plaintiff appealed. On appeal, the appellate court affirmed, and citing *Poulette v. Silverstein*,[25] held that the plaintiff had not filed her action within the time provided within the Probate Act, regardless of whether the plaintiff's cause of action had accrued.[26]

In affirming the dismissal, the Illinois Supreme Court, citing *Petersen*, looked to determine whether the plaintiff's injury occurred upon the death of the client.[27] In doing so, the court held that the injury did not occur until the client's death "[b]ecause the [client] could have revoked the amendment or changed the beneficiary prior to his death."[28] Further, the court rejected plaintiff's claim as third-party beneficiary of defendant's services as well as her claim that her injury did not occur until of the client's estate denied the plaintiff's claim.[29]

The court also rejected the plaintiff's argument asserting that Section (d) did not apply because the six year statute of repose in Section (c) had not yet expired.[30] Specifically, the court held that "the exception [set forth in Section (d)] applies *instead of* the two year statute of limitations and the six year statute of repose."[31] In making this finding, the court recognized that the exception in Section (d) may mean that a plaintiff's cause of action is barred before a plaintiff learns of the injury.[32]

Fitch v. McDermott, Will, & Emery, LLP

In *Fitch v. McDermott, Will, & Emery, LLP*,[33] the Appellate Court, Second District, upheld the dismissal of claims against attorneys alleged to have mishandled the drafting and administration of the client's estate.

In May 2005, the testator died and her will was admitted to probate in July 2005.[34] In July 2005, the estate provided publication of notice to file claims with a cutoff date of January 16, 2006.[35]

Before her death the testator engaged attorneys from McDermott, Will & Emery, LLP, to assist in drafting her estate plan and the instruments used to distribute her assets were rather complex.[36] The plaintiffs were the testator's husband and son, and they brought claims asserting that the defendant attorneys failed to advise the

testator about her ability to exercise a limited power of appointment concerning the trust assets such that the assets would have passed directly to the testator's children and would not have been under the trustees' control.[37] The plaintiffs filed their original complaint in January 2007.[38]

In responding to the plaintiffs' complaint, the defendant attorneys filed a motion to dismiss based on Section (d) arguing that the statute of repose had expired because the last day to contest the client's will was January 16, 2006 and plaintiffs had not filed their claims until January 2007.[39] In response, the plaintiffs claimed that the defendants had breached their duties to the plaintiffs, who claimed to be third-party beneficiaries to the defendants' work, and that because of the defendants' malpractice the testator's testamentary intent was not achieved, which harmed the plaintiffs.[40]

In particular, the plaintiffs alleged that the defendant failed to create an estate plan that minimized death taxes and provided for the care and support of the testator's husband.[41] The plaintiffs also claimed that the defendants had fraudulently concealed their negligence and that the defendants' concealment extended the statute of limitations in Section 13-214.3(d).[42]

In upholding the dismissal, the Second District held that Section (d) applied because plaintiffs' injury did not occur until the death of the testator. Further, and just as in *Wackrow*, the Second District found that the testator could have revoked or amended the instruments prior to her death.[43] As a result of these two rulings, the Second District found that the plaintiffs' claims were untimely as plaintiffs failed to file them within the time allotted to challenge the testator's will under the Probate Act. In making this ruling, the court ignored the plaintiffs' fraudulent concealment claim, seeming to indicate that fraudulent concealment cannot extend the statute of limitations or repose periods in Section 13-214.3.

Snyder v. Heidelberger

In *Snyder v. Heidelberger*,[44] the Illinois Supreme Court held that the plaintiff's cause of action against her attorney relating to the negligent preparation of a joint tenancy deed was barred by the statute of repose.

The plaintiff, the wife of the deceased client, alleged that in 1997 the defendant attorney negligently prepared a quit claim deed that was to convey the couple's home into a joint tenancy.[45] After the plaintiff's husband died in December 2007, it was discovered that the client did not own the property when the client executed the quit claim, and shortly thereafter, the client's stepson, who inherited the property, filed an action to eject the plaintiff from the home claiming that he was entitled to the property.[46]

In February 2008, the plaintiff filed her complaint alleging that the defendant attorney committed malpractice in preparing the deed.[47] In response, the defendant filed motion to dismiss based upon Section (c)'s statute of repose arguing that the injury occurred when he prepared the quit claim deed in 1997, and because the plaintiff filed her claim more than six years after the attorney prepared the deed, plaintiff's claim was barred by the statute of repose.[48] In opposition, the plaintiff argued that Section (d)'s two year repose provision applied because she filed her complaint within two years of the client's death.[49] The trial court rejected the plaintiff's argument and dismissed the plaintiff's complaint.[50]

In a split opinion, the Second District reversed the trial court and agreed with the plaintiff's argument that Section (d)'s two year repose period applied.[51] The Second District stated that "[t]he animating principal" of *Wackrow* "is that as long as the plaintiff was still alive the attorney's error could be remedied at any time by the drafting of a deed or other conveyance that effectuated the intent."[52] The Second District also looked to the holding in *Fitch*, and held that the potential for injury was sufficient for relief to be granted, because actual injury did not occur until the testator died.[53] Finally, Second District accepted the plaintiff's argument that two injuries had been suffered, the first when the defendant attorney failed to property transfer the initial interest in

the property, which would have been barred by the statute of repose, and the second when the testator died and the interest in the property did not pass as intended by the joint tenancy deed.[54] As the statute of limitation on this second injury did not begin to run until the death of the client, Section (d)'s two year statute of limitation applied and the Second District found that the plaintiff timely filed her complaint.[55]

Following a subsequent appeal by defendant, the Illinois Supreme Court reversed the Second District and affirmed trial court's dismissal.[56] On appeal to the Supreme Court, the plaintiff took up the Second District's logic and argued that the initial injury occurred when the faulty deed was prepared, but that an additional injury occurred when the plaintiff's husband died. Consequently, the plaintiff argued that the last injury (*i.e.*, the failure to transfer upon the client's death) should be considered for calculating the statute of limitations.[57] The plaintiff further argued that this was the proper statutory calculation because the error could have been corrected at any time prior to the client's death, which was consistent with the supreme court's holding in *Wackrow*.[58]

In rejecting these arguments, the supreme court held that there was a "fundamental difference" with *Wackrow*, as the client intended the defendant's services to benefit the plaintiff during the client's lifetime in the form of a joint tenancy, which would have provided the plaintiff with a present interest in the property.[59] The court held that to rule otherwise would "eviscerate" the statute of repose because it would mean that the repose period would not begin to run against an attorney until the client died and the error could no longer be corrected.[60]

Concerning the plaintiff's multiple injury argument, the court found no legal support for the argument that two injuries could exist for the purposes of application of the statute of limitation or repose.[61] In addition, the court noted that the statute speaks of "the injury" indicating that 735 ILCS 5/13-214.3 only contemplates a single injury as a triggering event.[62] The court further held that Section (d) only applies when the injury occurs at the death of the client and Section (d) does not apply when the injury occurs prior to the death of the client.[63]

Finally, the court held that the repose period in a legal malpractice case begins to run on the "last date on which the attorneys performs the work involved in the alleged negligence."[64] As the last act committed by the defendant attorney was in 1997, when the attorney mailed the original quit claim deed to the client, the statute of repose expired several years before plaintiff filed her malpractice action.[65]

The majority opinion in *Snyder* drew a lengthy dissent from Justice Freeman who argued that the majority had wrongly decided the case because there was no pecuniary injury to the plaintiff until after the client died.[66] Justice Freeman cited to the well settled law that a legal malpractice cause of action is not ripe until pecuniary injury exists.[67] According to Justice Freemen, the majority's ruling required the plaintiff to bring her action during her husband's life when he still had the opportunity to change the instrument and she had not yet suffered any injury.[68]

The ruling also, in Justice Freeman's view, defeated the purpose behind the supreme court's decision to relax the privity requirement for the institution of legal malpractice claims as recognized in *Pelham v. Griesheimer*[69].[70] If injury could occur to a plaintiff sufficient for the statute to begin to run before the client's death, the claims of intended beneficiaries, such as the plaintiff, could not be protected by actions against the attorneys who had committed malpractice.[71]

Finally, Justice Freeman argued that the majority was incorrect in asserting that a finding that the injury did not occur until the client's death would eviscerate the statute of repose, because the plain language of Section (d) allows for the filing of an action within two years of the death of the client.[72]

Ennenga v. Starns

In *Ennenga v. Starns*,[73] the Seventh Circuit upheld the dismissal of two trust beneficiaries' claims asserting malpractice against the defendant attorneys based on an application of Section (d).[74]

In May 2000, the defendant attorneys prepared trusts for their clients that granted gifts to the plaintiffs and others upon the deaths of the clients.[75] The clients died in May and June 2004.[76] The executor admitted the clients' wills to probate four days after the death of the second client.[77] The plaintiffs did not contest the will or the trust documents.[78] In June 2006, the plaintiffs brought a malpractice claim against the defendant.[79] The district court dismissed that claim based on Section (d).[80]

On appeal, the Seventh Circuit affirmed the dismissal and rejected the plaintiffs' equitable tolling argument based on the defendants' alleged fraudulent concealment of their negligence.[81] The court held that equitable tolling did not apply because the plaintiffs discovered the purported malpractice claim with five months left in the statutory period, which provided plaintiffs with sufficient time to file their claim.[82]

After finding that equitable tolling did not apply, the court looked to the statute of limitation and held that the plaintiffs failed to file their claims within the period set forth in Section (d).[83] Specifically, the court found that the plaintiffs failed to timely file their claims because the will was admitted to probate in June 2004 and pursuant to 755 ILCS 5/8-1(a) the plaintiffs had until January 2005 to file their claim against the defendants attorneys.[84] As the plaintiffs did not file their claim until June 2006, the Seventh Circuit found that the district court properly dismissed the plaintiffs' lawsuit.[85]

Pugsley v. Tueth

In *Pugsley v. Tueth*,[86] the Appellate Court, Fourth District, reversed the dismissal of a complaint brought by a client's daughter relating to the defendant's malpractice in preparing documents to transfer the client's farm to her.

The farm at issue was made up of three tracts, "the back 40," the "front tract," and the "homestead."[87] The client owned the back 40 in fee simple and the two other tracts in joint tenancy with her husband.[88] In March 2007, the testator met with the defendant attorney and requested that the defendant sever the joint tenancies and deed the property to the plaintiff.[89] The defendant was alleged to have responded to the client by telling the client that her will would "take care of it."[90]

The testator died in May 2007.[91] The executor admitted the testator's will to probate in June 2007 and the time to contest the will expired in December 2007.[92] In August 2007, the testator's husband renounced the will, which prevented the property from being transferred to the plaintiff.[93]

In February 2009, the plaintiff filed her complaint against the defendant attorney and the defendant answered denying that the client had intended to make an immediate transfer of the farm to the plaintiff.[94] After amending the answer and adding a statute of limitation affirmative defense, the defendant attorney filed a motion to dismiss based on Section (d) and arguing that the plaintiff's claim was untimely as it was not filed within the time to contest the will under the Probate Act. During the course of the briefing, a factual dispute arose concerning whether it was the client's intent to transfer all three parcels as "the farm" or just the back 40.[95]

In response to the motion to dismiss, the plaintiff argued that either the two year statute of limitation of Section (b) or the six year statute of repose of Section (c) applied, and not the exception in Section (d).[96] The plaintiff essentially argued that the injury occurred when the defendant failed to properly sever the joint tenancy at the client's direction, and correspondingly, the injury occurred prior to the client's death.

The trial court found that no dispute of fact existed as to what was intended to be transferred as "the farm" and granted the motion to dismiss. The trial court ruled that the plaintiff's claim was barred by the statute of limitation as it was filed outside the period provided by Section (d), *i.e.,* the period of time to contest the will under the Probate Act.[97]

The Fourth District reversed the trial court and found that the two year statute of limitations applied.[98] In coming to this conclusion, the court considered the three issues raised by the plaintiff: (1) that the injury did not occur until August 2007 when the client's husband renounced the will; (2) that Section (d) did not apply; and (3) that the complaint was timely filed within the two year statute of limitation provided under Section (b).[99]

In making its ruling, the Fourth District first noted that Section (b)'s discovery rule serves to toll the statute of limitation until such time that the plaintiff knew or should have known of an injury.[100] The court found the instant cases similar to that in *Snyder* and distinguished it from *Wackrow*, as the injury occurred at the time the attorney failed to sever the joint tenancy and not at the client's death.[101] Further, the Fourth District stated that in order to determine if Section (d) applies, a court's "sole inquiry is whether the injury caused by the malpractice occurred upon the client's death."[102]

Thereafter, the Fourth District found that the injury either occurred before the testator's death or when the testator's husband renounced the will.[103] Further, the court found that the injury did not occur upon the client's death because the plaintiff was not deprived of the back 40, which was claimed to have been intended to be transferred to the plaintiff, until the testator's husband renounced the will.[104] The court held that whether the plaintiff was to receive the other two parcels, the homestead and the front 40 held in joint tenancy, was a disputed issue of fact that had to be determined at trial.[105]

The court further held that the injury was not caused by the testator's death.[106] Instead, the court held that the injury occurred when the will was renounced by the testator's husband because the back 40 would have been transferred through probate as the testator intended had the will not been renounced.[107]

Further, the court held if the jury found that the two other parcels, the front 40 and the homestead, were to be transferred to the plaintiff, as claimed, the injury occurred between the date of the testator's meeting with the defendant attorney wherein she instructed him to "deed the farm to the girls" in March 2007 and the death of the testator in May 2007.[108] Accordingly, the injury occurred at a date unrelated to the death of the testator meaning the exception of Section (d) did not apply and that the two year statute of Section (b) controlled.[109]

Likely because of the complexity of this case and the issues that it raised, Justice Cook filed a special concurrence that bears consideration. Justice Cook argued that while extending the statute of repose until the time for contesting the validity of a will makes sense as an attorney's error may result in claims being made, he questioned whether Section (d) could ever shorten the statute of repose.[110] Justice Cook took the position that the statute should not shorten the period within which a plaintiff could bring a claim, a position he recognized conflicted with the supreme court's holding in *Wackrow*. He also called on the legislature to clear up the confusion created by the statute through an amendment.[111] Finally, Justice Cook questioned whether the exception created in Section (d) only applies in estate planning cases or if it applies in all cases.[112]

Analysis

The conflict in the Second District Appellate Court and the Illinois Supreme Court's decisions relating to the *Snyder* case illustrates the deep difficulties in interpreting 735 ILCS 5/2-214.3(d). From the opinions in that case, however, it is possible to discern the law as it relates to these issues.

What is an injury following the *Snyder* decision?

When addressing a legal malpractice suit that raises 13-214.3(d)'s issues, the identification of "the injury" is essential for determining whether a viable statute of repose argument exists. As a majority of the Supreme Court in *Snyder* made very clear, "the use of the phrase 'the injury' [in 13-214.2(d)] indicates the legislature contemplate[d] that only a singular injury would trigger the application of the limitation period in subsection (d)."[113] Thus, and when handling a suit that implicates 13-214.3(d), it is important for the practitioner to understand "the injury" at issue and to ensure that the damage claimed by the plaintiff is not an "outgrowth or consequence of the injury."[114]

In identifying "the injury," the *Snyder* decision intimates that "the injury" does not need to be pecuniary in nature.[115] Rather, the *Snyder* opinion suggests that a lost property right is sufficient to trigger the statute of limitation and statute of repose under 13-214.3. What is unclear from the *Snyder* opinion, however, is what other type of "injury" or lost right could trigger the running of Sections 13-214.3(b) and (c). This issue will most likely be an issue in many future appellate opinions. Nevertheless, a clever defense attorney should attempt to expand this notion of "the injury" beyond the property right context at issue in *Snyder*.

We note that the supreme court in *Snyder* somewhat departed from its prior rulings in holding that the loss of a property right was a sufficient basis to start the clock under Section 13-214.3. As Justice Freeman stated in his vigorous dissent, this aspect of the *Snyder* holding "gets off-track when it fails to acknowledge that the 'injury' in a legal malpractice action is a pecuniary injury to an intangible property interest caused by the lawyer's negligence."[116] Despite the well written dissent, the *Snyder* decision opens the door to an argument that the statute of limitation and the statute of repose in a legal malpractice claim may begin before the plaintiff sustains a pecuniary loss.

The *Snyder* case begs the question, what other than a pecuniary loss is sufficient to start the clock under Section 13-214.3? To answer that question, we look to cases like *Snyder* and *Pugsley*. Under *Snyder*, it is clear that the time set forth in Section 13-214.3 begins to run when an attorney fails to properly prepare a joint tenancy deed transferring a property interest to the client and a third party beneficiary.[117] The logic for this holding is that the attorney's failure to properly prepare a joint tenancy deed instantaneously injures the third party beneficiary as it prevents that third party beneficiary from taking an immediate property interest during the client's lifetime.

Similarly, the *Pugsley* court held that the attorney's failure to prepare a property deed severing a client's joint tenancy in conjunction with the attorney's failure to advise the client about a spouse's right to revoke a will is a sufficient enough injury to start the clock under Section 12-214.3 even though the third party beneficiary sustained no pecuniary injury until after the client's death.[118] Clearly based on the lessons from *Snyder* and *Pugsley*, the failure to transfer a property right pursuant to a client's direction is sufficient to start the clock under Section 13-214.3(d).

Following the rulings *Wackrow* and *Snyder*, what does the phrase "does not occur until the death of the person for whom professional services were rendered" mean?

After determining what "the injury" is in the litigation, the practitioner's analysis under Section 13-214.3(d) should shift to determine when "the injury" occurred. As the *Pugsley* court articulated, "[w]hen determining whether section 13-214.3(d) is applicable, a court's sole inquiry is whether the injury caused by the malpractice occurred upon the client's death."[119] Further, and as the dissent in *Pugsley* emphasized, Section 13-214.3(d) can cut short Section 2-214.3(b)'s statute of limitation and 13-214.3(c)'s statute of repose,

which is why this analysis is important to an attorney defending a legal malpractice claim. For determining the legal analysis concerning when "the injury" occurred under Section 13-214.3(d), we examine the Illinois Supreme Court's rulings in *Wackrow* and *Snyder*.

In *Wackrow*, the Illinois Supreme Court held that pursuant to Section 12-214.3(d), an injury occurs at the client's death when the client dies without taking steps to revoke or amend his will or trust, and the item to be transferred to a third party beneficiary pursuant to the will or trust is defeated.[120] The logic behind this rule is that the client had an opportunity to change the negligently prepared document, and the documents become unchangeable following the client's death.[121] In other words, because the right of the third party to take the property does not vest until the client's death and the client has the opportunity to rectify the negligence up to the time of her death, the injury to the third party has not occurred until death.

Taking a different approach, the Illinois Supreme Court in *Snyder* held that as the third party beneficiary sustained a property right loss immediately upon the client's execution of the negligently prepared deed, the third party beneficiary instantaneously sustained an injury and that the failure to transfer the property to the third party beneficiary upon the client's death was merely an outgrowth of the original injury.[122] In making this ruling, the *Snyder*'s court's logic turned upon the third party beneficiary's immediate loss of a property right. *Id*. In other words, the negligence occurred when the client executed the negligently prepared deed because the deed failed to vest the third party beneficiary with a property right.

Comparing *Wackrow* and *Snyder*, it appears that the difference in the court's analysis turns on the third party beneficiary's rights. In *Wackrow*, the third party beneficiary did not have a right to the trust corpus until the client's death. In other words, the third party beneficiary had a contingent interest in the trust's corpus that did not vest until the client died. Thus, and although not explicitly stated, it appears that the *Wackrow*'s court analysis turned on third party beneficiary's lack of a vested right to the property upon the execution of the trust.

In *Snyder*, on the other hand, the court's analysis turned on the third party beneficiary's immediate right to the client's property upon the execution of the joint tenant deed. In other words, the failure to properly transfer the third party beneficiary's immediate right to the property started the clock under Section 13-214.3, and the fact that the third party beneficiary did not receive the property in fee simple following the death of the client was merely an outgrowth of the injury that occurred upon the execution of the negligently prepared deed.

Consequently, the lesson from *Wackrow* and *Snyder* is that if the third party beneficiary loses an immediate right when the attorney's malpractice occurrs, the injury occurs at that time and does not occur upon the death of the client and, consequently, Section 13-214.3(d) does not apply. If, however, at the time the attorney commits malpractice the third party beneficiary receives no property right and merely has an interest that vests upon the client's death, the injury does not occur until the third party beneficiary's right is vested upon the client's death and Section 13-214.3(d) does apply, as in *Pugsley*.

The difficult question becomes what happens when a contingent third party beneficiary incurs an injury due to the attorney's malpractice at the client's death. For example, assume that an attorney commits malpractice in drafting a trust. The trust (1) names the client as the beneficiary during his lifetime, and following the client's death, the trust (2) names the client's son as a lifetime beneficiary (*i.e.,* provides a life estate). After the son's life estate expires, the trust (3) grants the client's grandson a right to the trust corpus in fee. Under this fact pattern, the grandson possesses merely a contingent interest, as it is possible that the grandfather (the client) or his son could extinguish the trust corpus during their lifetimes.

Assume that following the client's death (i.e., the grandfather's death) and due to the attorney's negligence in drafting the trust, the grandson (a contingent beneficiary) is forced to sue the trustee to prevent waste of the trust corpus.[123] Based on this fact pattern, it is clear that the third party contingent beneficiary grandson has an

injury due to the attorney's malpractice, as he has incurred attorney's fees. Yet, it is unclear under *Wackrow* and *Snyder* whether the grandson's injury would trigger the clock under Section 13-214.3(d). Clearly based on this fact pattern the rules set forth in *Wackrow* and *Snyder* become blurred and difficult to navigate.

Additionally, and from a practitioner's perspective, in determining when the third party beneficiary plaintiff possesses a vested right it is important to keep in mind that a potential standing defense might exist. Specifically, a contingent remainderman may not have standing to assert a claim as her rights have not vested.[124] The Seventh Circuit did not address this issue in *Ennenga*, but is one the practitioner should keep in mind. Further, there is also a question concerning whether a contingent remainderman under *Pelham* can establish a duty, as contingent remainderman might not be able to prove that the client's primary purpose and intent in retaining the attorney was to benefit her. The contingent remainderman might not be able to prove the primary purpose and intent as that contingent remainderman does not receive a vested interest. Based on the law in this area, there are arguments to be made that a non-client contingent remainderman to a trust cannot establish the requisite standing or duty to assert a claim because she possesses no vested interest.[125]

Despite these potential additional arguments that might exist, the Supreme Court has determined that Section 13-214.3(d)'s phrase "does not occur until the death of the person for whom professional services were rendered" turns on the notion of when the third party beneficiary to the attorney-client relationship received a vested right. Further, when handling cases that implicate Section 13-214.3(d), it is important for the practitioner to ascertain when the third party beneficiary obtained the right to the property at issue, as the practitioner must determine whether that right vested before or at the client's death.

Conclusion

The cases in this area are intensely fact specific and the outcome will depend not only on the various dates involved, but the kind of transfers intended and those actually made. A careful review of the relatively small number of cases is critical to properly determining whether an argument under the Section 13-214.3 can be made and to properly craft the argument in order give the defendant attorney the optimum chance in succeeding on a limitation or repose argument.

(Endnotes)

1 2012 IL App (4th) 110070.

2 755 ILCS 5/1-1 *et seq*.

3 735 ILCS 5/13-214.3(b).

4 735 ILCS 5/13-214.3(c).

5 *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10.

6 198 Ill. 2d 439 (2002)

7 735 ILCS 5/13-214.3(d).

8 198 Ill. 2d at 442-443.

9 294 Ill. App. 3d 248 (3rd Dist. 1997)

[10] 198 Ill. 2d at 442-443.

[11] *Petersen v. Wallach*, 198 Ill. 2d 439, 441 (2002).

[12] *Id*. at 445.

[13] *Id*.

[14] *Id*. at 447-448.

[15] *Id*. at 446.

[16] 231 Ill. 2d 418 (2008).

[17] *Wackrow v. Niemi*, 231 Ill. 2d 418, 420 (2008).

[18] *Wackrow*, 231 Ill. 2d at 420.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 420-421.

[23] *Id*. at 421.

[24] *Id*.

[25] 328 Ill. App. 3d 791 (1st Dist. 2002).

[26] *Wackrow*, 231 Ill. 2d at 421-422.

[27] *Id*. at 424.

[28] *Id*. at 425.

[29] *Id*.

[30] *Id*. at 426-427.

[31] *Id*. at 427.

[32] *Id*.

[33] 401 Ill. App. 3d 1006 (2nd Dist, 2010).

[34] *Fitch v. McDermott, Will, & Emery, LLP*, 401 Ill. App. 3d 1006, 1008 (2nd Dist. 2010).

[35] *Fitch*, 401 Ill. App. 3d at 1008.

[36] *Id*.

[37] *Id*. at 1010.

[38] *Id*.

[39] *Id*. at 1012.

[40] *Id*. at 1020.

[41] *Id*.

[42] *Id*. at 1021.

[43] *Id*. at 1022-1023.

[44] 2011 IL 111052.

[45] *Snyder*, 2011 IL 111052, ¶ 3.

[46] *Id*. ¶ 3.

[47] *Id*. ¶ 2.

[48] *Id*. ¶ 4

[49] *Id*. ¶ 5.

[50] *Id*.

[51] *Snyder v. Heidelberger*, 403 Ill. App. 3d 974 (2nd Dist. 2010).

[52] *Snyder*, 403 Ill. App. 3d at 978.

[53] *Id*. at 978-979.

[54] *Id*. at 979.

[55] *Id*.

[56] *Snyder*, 2011 IL 111052, ¶ 20.

[57] *Id*. ¶ 12.

[58] *Id*. ¶ 14.

[59] *Id*.

[60] *Id*. ¶ 15.

[61] *Id*.

[62] *Id*. ¶ 17.

[63] *Id*.

[64] *Id*. ¶ 18.

[65] *Id*.

[66] *Id*. ¶ 31.

[67] *Id*.

[68] *Id*. ¶ 33

[69] 92 Ill. 2d 13 (1982).

[70] *Snyder*, 2011 IL 111052 at ¶¶ 36-38.

[71] *Id*.

[72] *Id*. ¶ 41.

[73] 677 F.3d 766 (7th Cir. 2012).

[74] There are multiple additional issues and claims raised in the *Ennenga* case, beyond the statute of limitations issues, that are not dealt with here.

[75] *Ennenga*, 677 F.3d at 770.

[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*. at 771.

[80] *Id*. at 772. The claims of the other plaintiff were not dismissed pursuant to the statute of limitation because that plaintiff was a minor and the statute as to her was accordingly tolled.

[81] *Id*. at 775.

[82] *Id*.

[83] *Id*. at 775-776.

[84] *Id*. at 776.

[85] *Id*. It is important to note that the court restricted its analysis to the dates of the deaths and did not analyze the timing of injury to the third party beneficiaries or whether the alleged malpractice could have been corrected during the time that the testators were alive. *Ennenga*, 677 F. 3d at 771. Accordingly, any citation to *Ennenga* must be done with caution as it may not accurately reflect Illinois law.

[86] 2012 IL App (4th) 110070.

[87] *Pusey*, 2012 IL (4th) 110070, ¶ 3.

[88] *Id*.

[89] *Id*. ¶ 4.

[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*. ¶¶ 3, 6.

[95] *Id*. ¶ 10.

[96] *Id*. ¶ 11.

[97] *Id*. ¶ 12.

[98] *Id*. ¶ 24.

[99] *Id*. ¶ 14.

[100] *Id*. ¶ 17.

[101] *Id*. ¶¶ 19-21.

[102] *Id*. ¶ 22.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*. ¶ 23.

[107] *Id*.

[108] *Id*.

[109] *Id*. ¶ 24.

[110] *Id*. ¶ 30.

[111] *Id*. ¶ 35.

[112] *Id*.

[113] *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 17.

[114] *Snyder*, 2011 IL 111052, ¶ 17.

[115] *Id*. ¶¶ 14-15.

[116] *Id*. ¶ 31.

[117] *Id*. ¶¶ 14-15.

[118] *Pugsley v. Tueth*, 2012 IL App (4th) 110070, ¶¶ 22-24.

[119] *Id.*

[120] *Wackrow v. Niemi*, 231 Ill. 2d 418, 424-425.

[121] *Wackrow*, 231 Ill. 2d at 424-425.

[122] *Snyder*, 2011 IL 111052, ¶¶ 14-16.

[123] *Fitch*, 401 Ill. App. 3d at 1028.

[124] See *Schlosser v. Schlosser*, 247 Ill. App. 3d 1044 (1st Dist. 1993); *Moushon v. Moushon*, 147 Ill. App. 3d 140, 146 (3d Dist. 1986); *Giagnorio v. Torkelson*, 292 Ill. App. 3d 318 (2nd Dist. 1997); *Barnhart v. Barnhart*, 415 Ill. 303, 323 (1953); *Burrows v. Palmer*, 5 Ill. 2d 434, 440 (1955).

[125] *Fitch*, 401 Ill. App. 3d at 1028.

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