Professional Responsibility

Illinois Supreme Court Applies Time Limits for Malpractice Suits to All Other Professional Claims Against Lawyers

The Illinois Supreme Court recently delivered positive news for law firms and lawyers who face suits by non-clients related to the lawyers' provision of legal services. The court in *Evanston Insurance Company v. Riseborough*, 2014 IL 114271, gave an expansive interpretation to the time limits in section 13-214.3 of the Illinois Code of Civil Procedure. That provision sets a two-year statute of limitations and six-year statute of repose for "[a]n 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."[1] 735 ILCS 5/13-214.3. In *Riseborough*, the Supreme Court resolved a split among Illinois appellate courts by holding that the statute applies to any type of claim against a lawyer, whether asserted by a client or non-client, concerning the lawyer's provision of professional services.

I. The *Riseborough* Decision

The defendants in Riseborough, the law firm Johnson & Riseborough and two of its attorneys, represented Kiferbaum Construction Company in a personal injury lawsuit. 2014 IL 114271 ¶ 3. Kiferbaum and its insurers agreed to settle the suit in October 2000, but they disagreed about who should pay for the settlement. *Id.* ¶ 5. Kiferbaum and four insurers signed a "Fund and Fight Agreement" under which the settlement was funded, but the parties would later litigate the question of coverage. *Id*. Evanston Insurance Company paid $1 million toward the settlement. *Id.* Kiferbaum and its primary insurer, Statewide Insurance Company, paid nothing, but the agreement provided that they would reimburse the excess insurers, including Evanston, in the event that a court found the insurers' defenses to be valid. *Id.*

In the midst of the subsequent coverage dispute, Statewide went into liquidation, and Kiferbaum successfully defended itself by alleging that its attorneys executed the Fund and Fight Agreement without authorization. *Id.* ¶¶ 6-7. At the end of that litigation in December 2009, Evanston filed a complaint against Kiferbaum's attorneys for breach of implied warranty of authority, fraudulent misrepresentation, and negligent misrepresentation based on their execution of the Fund and Fight Agreement. *Id.* ¶¶ 8-9. The Circuit Court of Cook County dismissed the complaint as untimely under the six-year statute of repose. *Id.* ¶ 9. The Illinois Appellate Court reversed, holding that section 13-214.3 applied only to malpractice claims brought by former clients of the defendant attorneys. *Id.*

In a 5-2 decision, the Supreme Court reversed the Appellate Court. The Court ruled that the suit should be dismissed as untimely because it was filed after the expiration of the repose period in section 13-214.3. The majority reasoned that "under the express language of the statute, it is the nature of the act or omission, rather than the identity of the plaintiff, that determines whether the statute of repose applies to a claim brought against an attorney." *Id*. ¶ 19. The Court rejected decisions from Illinois appellate courts and federal district courts that had refused to apply section 13-214.3 to cases where the defendant attorney owed no professional duty to the plaintiff because the plaintiff was not a former client. *Id.* ¶¶ 20-23. In doing so, the Court observed that the language of section 13-214.3 is similar to provisions setting limitation periods for actions against physicians (735 ILCS 5/13-212(a)), public accountants (735 ILCS 5/13-214.2(a)), and construction professionals (735 ILCS 5/13-214(b)). *Id.* ¶ 24. The Court explained that Illinois courts have interpreted each of these statutes broadly to include suits by non-clients, and the legislature likely intended that section 13-214.3 be interpreted to be "consistent and harmonious" with similar statutes. *Id*.

The dissent agreed with the majority that section 13-214.3 is "unambiguous" but disagreed on the proper interpretation. *Id.* ¶ 50. In the dissent's view, "the phrase 'in the performance of professional services,' clearly indicates legislative intent to limit the applicability of the statute of repose to legal malpractice claims by clients." *Id.* ¶ 62. The legislative history also suggested that the legislature, in enacting section 13-214.3, was solely concerned with setting a statute of limitations and statute of repose in attorney malpractice cases, not in protecting lawyers from other types of lawsuits. *Id.* ¶ 67.

II. Implications For Lawyers & Law Firms

The *Riseborough* decision should bring a measure of certainty to lawyers and law firms that otherwise may question whether they could be subject to lawsuits based on work performed years earlier. Non-clients may bring malpractice claims against attorneys only in very limited circumstances—where "the primary purpose and intent of the attorney-client relationship itself was to benefit or influence" the non-client. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982). However, non-clients may sometimes sue attorneys on other theories of liability, including aiding and abetting, fraud, or the torts at issue in the *Riseborough* decision. Absent the protection of section 13-214.3, these claims could be subject to various statutes of limitations. For example, a five-year statute of limitations applies to claims for fraud and many other actions for damages in Illinois. 735 ILCS 5/13-205. And given Illinois's discovery rule, such limitation periods may begin running only after "the plaintiff knows or reasonably should know that he has been injured and that this injury was wrongfully caused." *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). As a result, before *Riseborough*, some courts held that non-clients could sue lawyers on a variety of legal theories without having to satisfy the repose period in section 13-214.3. *See, e.g.*, *Ganci v. Blauvelt*, 294 Ill. App. 3d 508, 515 (4th Dist. 1998) (contribution claim); *Wilbourn v. Advantage Fin. Partners, LLC*, No. 09-CV-2068, 2010 WL 1194950, at *10 (N.D. Ill. Mar. 22, 2010) (fraud claim); *Bova v. U.S. Bank, NA.,* 446 F. Supp. 2d 926, 934 (S.D. Ill. 2006) (fraud claim); *Cotton v. Private Bank & Trust Co.*, No. 01 C 1099, 2004 WL 526739, at *3-4 (N.D. Ill. Mar. 12, 2004) (tortious interference, inducement, and conversion).

After *Riseborough*, however, the rule is clear: no matter the tort or the identity of the plaintiff (as a former client or a non-client), a claim against a lawyer that "aris[es] out of an act or omission in the performance of professional services" must be filed within two years and in no event later than six years after the lawyer's alleged conduct at issue in the suit. *See* 735 ILCS 5/13-214.3. The six-year statute of repose is particularly significant because it "begins to run when a specific event occurs, regardless of whether an action has accrued," and the discovery rule does not toll this period. *Snyder v. Heidelberger*, 2011 IL 111052 ¶ 10. The only exception to *Riseborough's* clear rule appears to be claims against lawyers that do not "aris[e] out of an act or omission in the performance of professional services," see 735 ILCS 5/13-214.3(b), but the Supreme Court's broad language—focusing on whether the "nature of the act or omission" alleged involves professional services, *Riseborough*, 2014 IL 114271 ¶ 19— seems to limit such claims to those that truly are unrelated to the practice of law.

---

[1] Section 13-214.3(d), however, contains a narrow exception for certain claims against lawyers related to actions in which "the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered"—usually, probate-related legal services.

Contact Us

April A. Otterberg, Partner, Jenner & Block

Phone: 312.840.8646 Email: aotterberg@jenner.com Download V-Card

Practices: Professional Responsibility; ERISA Litigation; Litigation; Trademark, Advertising and Unfair Competition Practice

Jason F. Krigel, Associate, Jenner & Block

Phone: 312.840.7639 Email: jkrigel@jenner.com Download V-Card

Practices: Professional Responsibility; Class Action; Litigation; Markets and Trading