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Kyle C. Bisceglie on

Williamson v. PricewaterhouseCoopers LLP

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Annual Audits Alone Will Not Support Application of Continuous Representation Doctrine

In *Williamson v. PricewaterhouseCoopers LLP*, [9 N.Y.3d 1](#), [2007 N.Y.LEXIS 1455](#) (2007), the Court of Appeals addressed for the first time the continuous representation doctrine in the context of an accounting malpractice claim. By unanimous opinion, the Court found the doctrine inapplicable where the plaintiff alleged that the accountants performed only annual audit engagements. Each audit was done pursuant to a separate engagement letter "for the provision of separate and discrete audit services" for year-end financial statements, rather than there being on-going services that related back to the services in the years being challenged. The Court noted the plaintiff's fatal failure to allege "further representation regarding the audits" by reexamination audit or otherwise, and found the allegation of a "continuing professional relationship" insufficient to warrant application of the continuous representation doctrine.

The continuous representation doctrine has its origins in the continuous treatment doctrine from medical malpractice actions. Key to the application of that doctrine is the requirement that the plaintiff receive "continuous treatment for the same illness, injury or condition" which gave rise to the challenged conduct. The continuous treatment doctrine does not apply to periodic examinations or treatment of other conditions, nor does it apply where the continuing services are unrelated to the services being challenged.

As it did in its decisions in the legal malpractice area (*see, e.g., Shumsky v. Eisenstein*, [96 N.Y.2d 164](#), 750 N.E.2d 67, 726 N.Y.S.2d 365 (2001)), in *Williamson* the Court of Appeals applied these same principles in the accounting context. The Court looked in the pleadings for some indication of "mutual understanding" by the parties to the engagement that the auditors would provide further representation as to a past audit, or for an on-going cause or condition emanating from those past audits. Citing annual engagement letters and lack of remedial or advisory services, the Court of Appeals found "the purpose underlying the continuous representation doctrine would not be served by its application here."

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This case is significant for the definitiveness and breadth of its finding that annual audits alone will not support application of the continuous representation doctrine.

Williamson in Context of Non-medical Professional Malpractice Claims. [CPLR§ 214\(6\)](#) provides a three-year statute of limitations for non-medical professional malpractice claims whether pled as tort claims or as contract claims. The statute applies to lawyers, accountants and architects, but not to insurance agents, brokers or actuaries. See *Chase Scientific Research, Inc. v. NIA Group, Inc.*, [96 N.Y.2d 20](#), 725 N.Y.S.2d 592, 749 N.E.2d 161 (2001); *Castle Oil Corp. v. Thompson Pension Employee Plans, Inc.*, [299 A.D.2d 513](#), 750 N.Y.S.2d 629 (2d Dep't 2002). A malpractice claim accrues when the malpractice is committed, not when it is discovered. See *Glamm v. Allen*, [57 N.Y.2d 87](#), 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982); *McDermott v. Torre*, [56 N.Y.2d 399](#), 437 N.E.2d 1108, 452 N.Y.S.2d (1982). In the context of accounting malpractice, accrual occurs upon the client's receipt of the accountant's work. *Ackerman v. Price Waterhouse*, [252 A.D.2d 179](#), 683 N.Y.S.2d 179 (1st Dep't 1998).

The Court of Appeals first applied the continuous treatment doctrine to toll medical malpractice claims in *Borgia v. City of New York*, [12 N.Y.2d 151](#), 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). This was codified in 1975 in CPLR § 214-a. The Court of Appeals applied the continuous representation doctrine to legal malpractice claims in *Greene v. Greene*, [56 N.Y.2d 86, 95](#), 436 N.E.2d 496, 501, 451 N.Y.S.2d 46, 51 (1982); see also *Glamm*, [57 N.Y.2d at 93](#), 439 N.E.2d at 393, 453 N.Y.S.2d at 677. The Court has also made clear that the doctrine requires an expectation of continued representation on the specific subject matter supporting the malpractice claim. See *McCoy v. Feinman*, [99 N.Y.2d 295](#), 785 N.E.2d 714, 795 N.Y.S.2d 693 (2002).

Williamson squarely applies the rationale of the doctrine in unaltered form to audits. Unlike legal engagements or medical treatment, which can continue for years and may, unexpectedly, require further professional attention after substantial hiatus, auditing services are more regimented, annual engagements that end when the auditors sign and deliver the audit opinion. Refusal to apply the continuous representation doctrine to audits limits auditors' exposure to malpractice claims by eliminating the tolling of the limitations period.

How Far Does Williamson Go? Practitioners will naturally ask if there are any remaining circumstances that warrant application of the continuous representation doctrine to toll claims against auditors. The Williamson Court would permit tolling where the plaintiff challenged past audit services and the accountant was performing other on-going ac-

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counting services that relate to that audit. These are narrow circumstances. The Court of Appeals has already decided in the context of a legal malpractice claim that the continuous representation doctrine provides tolling "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice." *Shumsky*, [96 N.Y.2d at 168](#), 750 N.E.2d at 71, 726 N.Y.S.2d at 369. Just when those other on-going accounting services are related to the audits is the remaining question. In *Ackerman*, continuous representation was found where accountants were accused of repeatedly using an improper accounting method and were "handling" an apparently related IRS audit of partnerships in which the individual plaintiffs participated. *Ackerman*, [252 A.D.2d at 205](#), 683 N.Y.S.2d at 196. However, the rationale of *Williamson* brings into question the *Ackerman* Court's use of "repeated improper accounting" as well as what it meant by "handle" the IRS audit.

How to measure whether services are related for purposes of the continuous representation doctrine was inconclusively tested recently in the context of a legal malpractice claim pending before the NY Supreme Court in *Deep v. Boies*, [2007 N.Y. Misc. LEXIS 5688](#) (August 9, 2007). The defendants pointed out that they represented the plaintiff in a copyright litigation and in "separate and distinct" transactional matters. The plaintiff argued that there was a "mutual understanding" that defendants would represent him in a "comprehensive effort" to exploit his intellectual property. The Court relied on the lack of a specific engagement letter to deny the defendants' request for summary judgment.

Strategic Considerations for Accountants, Professionals and Insurers. *Williamson* reemphasizes the importance of annual engagement letters for audits, compilations, and review assignments, especially those involving high risk clients. To some extent, this is common practice and AICPA standards and professional liability policies encourage accountants to prepare engagement letters with clients annually. However, best practices dictate that any additional services should be engaged separately to further delineate between those services and the audit services. This is particularly true of services of an on-going nature, such as a dispute with the IRS that relates to an audit, or reaudit services where the accountant is re-examining prior years' work, or consulting services.

Strategic Considerations for Management and Plaintiffs. *Williamson* and the three-year statute of limitations in [CPLR § 214\(6\)](#) increase the difficulty of maintaining malpractice actions against professionals arising from long-percolating but recently discovered financial improprieties. However, where accountants are involved in fraud, the plaintiff is entitled to a statute of limitations of six years from commission

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of the fraud, or two years from the date the plaintiff discovered or should have discovered it. See *Linden v. Moskowitz*, [294 A.D.2d 114](#), 743 N.Y.S.2d 65 (1st Dep't 2002); *Cappelli v. Berkshire*, [276 A.D.2d 458](#), 713 N.Y.S.2d 756 (2d Dep't 2000). Additionally, a plaintiff may still have the six-year statute of limitations for contract claims that are truly independent of malpractice-related allegations, such as claims for excessive charges, indemnification (*In Re: Estate of Edward Hyman*, [2007 N.Y. Misc. LEXIS 5644](#) (July 25, 2007)), or other express breaches of the engagement letter that do not sound in malpractice.

Attorneys counseling companies that retain auditors should negotiate the engagement agreement to provide for extension of any statute of limitations to "upon discovery" rather than "accrual." The next line of defense is early engagement of forensic examiners and case theory development. The practitioner should consider use of a tolling agreement during investigation. Additionally, in every audit, accountants make substantial use of prior work that is carried forward into the most current audit engagement. This may include prior years' working papers, carry-forward or permanent files, past financial statements or auditor's reports. In particular, the carry-forward or permanent file may contain significant audit documentation from prior years. The Appellate Division opinion in *Williamson* barely touched on the argument that continuous representation may be shown by the auditor's use and reliance on this documentation in the current audit year's workpapers. *Williamson v. PricewaterhouseCoopers LLP*, [32 A.D.3d 179, 184](#), 817 N.Y.S. 2d 61, 65 (1st Dep't 2006).

For additional discussion of the continuous representation doctrine, see [New York Civil Practice: CPLR \(Weinstein, Korn & Miller\) P 214.25](#) (continuous representation doctrine and tolling limitations period in action against professional); [New York Civil Practice: CPLR \(Weinstein, Korn & Miller\) P 214.26](#) (who is a "professional" and preclusion of contract statute of limitations); [CPLR Manual § 2.18](#) (statutes of limitations for malpractice actions other than medical, dental or podiatric); [LexisNexis AnswerGuide New York Civil Litigation § 4.11](#) (determining the applicable limitations period); [Warren's Negligence in the New York Courts § 15.08](#) (application of the three-year statute of limitations for malpractice actions); [Warren's Negligence in the New York Courts § 12.26](#) (overview of professional malpractice and statute of limitations); [New York Practice Guide: Negligence § 6.02](#) (time periods for professional malpractice and when they begin to run).

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