A Timely Reminder: The Three-Year Limitations Period for Legal Malpractice Claims Is Not an Absolute Shield for Practitioners Seeking to Recover Legal Fees

By Andrew R. Jones and Dara Lebwohl

Most practitioners know that there is a three year limitations period to commence a legal malpractice action. However, many are unaware that an action to recover unpaid legal fees opens the door to limited counterclaims for legal malpractice, regardless of the timing. Two recent decisions from the Appellate Division, Second Department serve as practical reminders that commencing a legal action to recover unpaid legal fees should be the practitioner's remedy of last resort. *Balanoff v. Doscher*, 2016 NY Slip Op. 04896 (App. Div. 2d Dept. June 22, 2016) and *Lewis, Brisbois, Bisgard Smith, LLP v. Law Firm of Howard Mann*, 2016 NY Slip Op. 05484 (App. Div. 2d Dept. July 13, 2016) underscore the risks of collections actions for legal fees.

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The best way to avoid having to pursue fees via litigation is to maintain scrupulous accounting practices; sending invoices on a regular basis and promptly addressing delinquent accounts minimizes an attorney's exposure in the long run.[1] Nevertheless, the realities of the profession warrant that every practicing attorney know the fundamentals of legal malpractice claims *vis-à-vis* actions to recover unpaid legal fees.

Limitations Period for Legal Malpractice Claims

The three-year limitations period for legal malpractice claims is set forth in CPLR 214(6). The period is calculated from the date of the alleged malpractice, irrespective of the date of discovery. *See Farage v. Ehrenberg*, 996 N.Y.S.2d 646 (2d Dept. 2014); *Landow v. Snow Becker Krauss, P.C.*, 111 A.D.3d 795, 975 N.Y.S.2d 119 (2d Dept. 2013). The only circumstance which will have a "tolling effect" on a legal malpractice claim is where the attorney provides continuous representation to the client"…with respect to the matter underlying the malpractice claim." *See Debevoise & Plimpton, LLP v. Candlewood Timber Group LLC*, 102 A.D.2d 571, 959 N.Y.S.2d 43 (1st Dept. 2013). In such cases, the limitations period is tolled until the ongoing representation of a client with the particular matter is completed. *Id*. It is irrelevant if the matter underlying the alleged malpractice has not been resolved. *Id*.; *see also Farage v. Ehrenberg supra*; *see also McCormick v. Favreau*, 82 A.D.2d 1537, 919 N.Y.S.2d 572 (3d Dept. 2011). Once the attorney and the client asserting the malpractice claim are released from the underlying action, the period begins to run. This is because the relevant factor is the attorney-client *relationship*, not the certainty of quantifiable damages.

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These cases suggest an absolute bar for any legal malpractice claim asserted after the three-year limitations period closes. Consequently, many practitioners hold the misapprehension that they bear little-to-no risk if they commence an action to collect unpaid legal fees more than three years after the representation ended. This is incorrect.

The Decisions

Balanoff is fairly straightforward in its facts and its holding. Plaintiff sued to collect legal fees, and the defendant counterclaimed, asserting legal malpractice. The lower court granted Plaintiff's motion to dismiss the counterclaims. The Appellate Division reversed, finding that the counterclaim for legal malpractice should not have been dismissed"…to the extent that counterclaim seeks to offset any award of legal fees…". This counterclaim, which ordinarily would be time-barred by limitations period imposed by CPLR 214(6), is afforded the benefit of the relation-back doctrine, as codified in CPLR 203(d). The *Balanoff* Court unambiguously sets forth the limitations of counterclaims pursuant to CPLR 203(d), holding that the provision may serve"…only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief…".

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Lewis Brisbois, conversely, treads in murkier waters. The facts are procedurally convoluted, and the wording of the decision is somewhat ambiguous. In an action to recover unpaid legal fees, defendant asserted nine counterclaims. Plaintiff moved to dismiss the counterclaims.

Plaintiff's motion was granted only with respect to the first counterclaim. On appeal, the Appellate Division affirmed the lower court's decision that counterclaim alleging "professional negligence" was timely.[2]

The difficulty arises when considering the damages sought in the legal malpractice counterclaim. Rather than demand a "refund," "recoupment," or "offset," defendant demanded "an amount to be determined at trial, plus interest." *Lewis Brisbois.* The Appellate Division held that the legal malpractice counterclaim was timely" …to the extent of the demand in the complaint." *Id*. The decision does not address the counterclaim demands whatsoever.

"Again, the Court gave no rationale behind the determination."

Taken out of context, one could conceivably argue that a party asserting an otherwise untimely malpractice claim may now seek affirmative recovery. However, read in the context of this area of law, it is apparent that the Court was performing a cursory analysis of the counterclaims to see if they satisfied the requirements of CPLR 203(d).

Pursuant to CPLR 203(d), an otherwise untimely counterclaim is permissible only if it "…arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint." Counterclaims are limited to the extent of the demand in the original complaint. *See Goldberg v. Sitomer, Sitomer & Porges*, 97 A.D.2d 114, 469 N.Y.S.2d 81 (App. Div. 1st Dept. 1983), *aff'd,* 63 N.Y.2d 831, 472 N.E.2d 44 (1984). As such any counterclaim to an action to collect a sum certain of legal fees is necessarily limited to recoupment. *See Alvarez v. Attack Asbestos Inc.*, 287 A.D.2d 349, 731 N.Y.S.2d 431 (App. Div. 1st Dept. 2001) (counterclaim for specific performance was impermissible where demand in complaint was payment on promissory note).

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There is a well-established body of case law holding that—as long as they arise out of the same transaction alleged in the complaint—counterclaims asserted pursuant to CPLR 203(d) limit damages to recoupment or "offset" of any recovery by Plaintiff. The law is very clear that a defendant may not seek affirmative relief by this means. *See Rothschild v. Industrial Test Esquip. Co.*, 203 A.D.2d 271, 610 N.Y.S.2d 58 (App. Div. 2d Dept. 1994); See also *Carlson v. Zimmerman*, 63 A.D.3d 772, 882 N.Y.S.2d 139 (App. Div. 2d Dept. 2004).

Here, the Court summarily held that the "subject counterclaims…all arise from the transactions and occurrences upon which the complaint depends," noting that the appellant failed to address the CPLR 203(d) issue—leaving little for the Court to deliberate. The decision did give the basis of its finding. The Court also held that the counterclaim for legal malpractice was timely "to the extent of the demand in the complaint." Again, the Court gave no rationale behind the determination.

At first glance, *Lewis Brisbois* may indicate a change in this area of practice. However, a closer reading suggests that the Court was simply stating legal conclusions and terms of art in the absence of argument from the appellant. It seems unlikely that the Court would break with decades of legal precedent on an issue that was not disputed.

Conclusion

These cases are of interest to legal malpractice practitioners. Although neither *Balanoff* nor *Lewis Brisbois* appear to be signaling a sea change in the law governing counterclaims for legal malpractice brought pursuant to CPLR 203(d), they exemplify the prudence of good accounting practices.

Dereliction of regular and consistent accounting can result in irregular invoices and large, outstanding balances. Failing to diligently follow up on non-payments results in similarly large amounts owing. In the event a client does refuse to pay, the necessity of litigation is directly proportional to the outstanding balance. The larger the amount outstanding, the greater exposure you face for recoupment.[3]

Endnotes

1. For a more in-depth discussion of the limitations period for legal malpractice actions, *see* Andrew R. Jones, Esq, *How to Avoid Being Sued When Collecting Legal Fees*, *Professional Liability Defense Quarterly*, 7:2:pp 8-12 (Spring 2015).
2. Although the counterclaim for legal malpractice was found to be timely, the Appellate Division dismissed a number of the other counterclaims as duplicative. When concurrent claims are based upon the same set of operative facts as the legal malpractice claim, the concurrent claims will be properly dismissed as redundant. *See Ullman-Schneider v. Lacker & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 944 N.Y.S.2d 72 (1st Dept 2014).
3. *See* Footnote 1.

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