PROFESSIONAL LIABILITY UPDATE

STATUTE OF LIMITATIONS
ACTUAL INJURY

By John Sullivan

***Callahan v. Gibson, Dunn & Crutcher* (2011) 194 Cal.App.4th 557**

The Second District holds that actual injury sufficient to trigger the statute of limitations did not occur at the time a partnership agreement was drafted, but sixteen years later, when the dissolution provision of the agreement was triggered or when plaintiffs began to incur legal fees in response to a third party's attempt to dissolve the partnership under the terms of that agreement.

Robert and Oliver Inge founded the Inge Realty Company. In 1988, they retained Gibson, Dunn & Crutcher to advise them regarding restructuring the company to minimize income tax liabilities and implement a succession plan that would ensure that Inge Realty remained a family-run enterprise after they could no longer run the business. Gibson, Dunn recommended a limited partnership and drafted the partnership agreement.

A dispute arose after Oliver died in 2003. The Bank of the West, as executor of Oliver's estate, initiated a probate action that ultimately sought, among other things, dissolution of the partnership under the terms of the partnership agreement because Robert was disabled or incompetent to run the business, leaving no general partner to run the business. The partnership agreement appeared to require dissolution of the partnership in such circumstances. The parties to that action reached a settlement in November 2005 that was confirmed by the court in December 2006.

After entering into multiple tolling agreements beginning in 2004, the Robert Inge family members sued Gibson, Dunn for legal malpractice arising out of the firm's drafting of the partnership agreement. The trial court granted Gibson, Dunn's motion for summary judgment, ruling that statute of limitations expired no later than 1992, four years after the legal services were completed.

The Court of Appeal disagreed with the trial court's conclusion that actual injury under Code of Civil Procedure § 340.6, the statute of limitations applicable to legal professionals, occurred upon execution of the partnership agreement. The agreement lacked a succession plan in the event of the retirement or incapacity of the surviving partner. This created only a potential for harm, not actual injury. Actual injury occurred either when Robert's disability triggered the dissolution provisions of the agreement, or when plaintiffs incurred legal fees to respond to Bank of the West's attempt to dissolve the partnership. Because of the tolling agreements, it was immaterial which of these events constituted the first instance of actual injury.

The Court of Appeal also rejected Gibson, Dunn's argument that the payment of fees by Inge Realty to Gibson Dunn at the time the agreement was drafted, without more, was sufficient to trigger the running of the limitations period. The clients received substantial value from the firm's work, and the theoretical cost of hiring a new attorney to draft a succession plan was merely hypothetical rather than "actual" injury. At a more fundamental level, it would nullify the tolling provisions of CCP § 340.6(a)(1) to hold that actual injury is sustained at the time legal fees are paid to the allegedly negligent attorney.

Finally, whether or not the plaintiff seeks to recover an item of damages, such as fees paid to the negligent attorney, does not change the date it sustained actual injury for purpose of the statute of limitations.

Comment: Although the Court reiterated that the statute of limitations begins to run as soon as the plaintiff suffers actual injury, it makes clear that potential harm does not constitute actual injury. This decision could have significant impact on transactional attorneys drafting documents designed to be effective for many years.