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## Attorney's Failure to Pursue Enforcement of Judgment Was Actual Injury That Stopped Tolling of Statute of Limitations

November 7, 2012

[\*Croucier v. Chavos\*, 207 Cal. App. 4th 1138, 144 Cal. Rptr. 3rd 180 \(Cal. App. July 18, 2012\)](#)

### **Brief Summary**

The Court of Appeals of California, Fourth District, held that plaintiff clients suffered "actual injury" sufficient to trigger the legal malpractice statute of limitations when defendant attorney failed to competently pursue enforcement of a judgment, rather than when the clients discovered evidence that the judgment was collectible at the time of the alleged malpractice.

### **Complete Summary**

The attorney represented the clients in a breach of contract and fraud action and on April 26, 2006, obtained a default judgment in excess of \$1 million. The attorney left his law firm in December 2006 and established a new firm. He did not, however, file a substitution of attorney until June 5, 2008, when the clients hired a new attorney to pursue fraudulent conveyance actions and conduct post-judgment discovery in the underlying case.

The clients alleged that debtor examinations conducted by successor counsel from August 2008 through December 2008 developed the evidentiary record that supported the allegations in the fraudulent conveyance actions. They sued the attorney on August 13, 2009, alleging professional negligence, breach of fiduciary duty, and fraud relative to the attorney's failure to competently seek enforcement of the judgment.

The trial court granted the attorney's motion for judgment on the pleadings in September 2010, with leave to amend, based on the statute of limitations. The clients then filed a first amended complaint, to which the court sustained a demurrer without leave to amend. The issue on appeal was whether the trial court had properly applied the statute of limitations.

In pertinent part, Cal. Code Civ. Proc. § 340.6 provides:

An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first . . . [I]n no event shall the time for commencement of legal



action exceed four years except that the period shall be tolled during the time that any of the following exist:

- (1) The plaintiff has not sustained actual injury.
- (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred...

In assessing whether the one-year limitations period precluded the clients' action, the court examined three issues: (1) whether the clients discovered the attorney's wrongful acts or omissions more than one year prior to the date of suit, August 13, 2009; (2) if discovery occurred, whether the statute of limitations was tolled because the attorney continued to represent the clients; and (3) if discovery occurred, whether the statute of limitations was tolled because the clients had not sustained actual injury at the time they discovered the attorney's wrongful acts or omissions.

Determining that the second question was easiest to answer, the court observed that the earliest the statute of limitations could be deemed to have started running was June 5, 2008, the date the attorney was substituted out of the case. Thus, the clients could not prove that the period of continuous representation extended beyond that date.

The court then addressed the first question – when the clients discovered the attorney's allegedly wrongful acts or omissions. The court noted that as of June 2008, when he substituted out as counsel, the attorney had not succeeded in enforcing the judgment. New counsel immediately filed the fraudulent conveyance action and began conducting post-judgment discovery. Consequently, the clients were clearly aware as of that time of alleged omissions by the attorney in failing to take those same steps. This established that the clients had discovered by June 2008 that the attorney had committed allegedly wrongful acts and omissions.

Finally, the court examined whether the statute of limitations was tolled between June 2008 (when the substitution was filed), and August 2008 (one year before plaintiffs filed suit), because the clients had not yet suffered any "actual injury." Quoting the seminal case of *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 76 Cal. Rptr. 2d 749 (1998), the court noted that the test for "actual injury" under Cal. Code Civ. Proc. § 340.6 "is whether the plaintiff has sustained any damages . . ." "[O]nce the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period." *Jordache Enterprises*, 18 Cal. 4th at 752.

The clients argued that the statute of limitations should have continued tolling until they confirmed that the judgment was collectible at the time of the alleged malpractice. The court disagreed, finding that the attorney's alleged failure to enforce the judgment between April 2006 (when it was entered) and June 2008 (when he substituted out of the case) caused actual injury sufficient to support a legal malpractice claim. "The factual question of whether the judgment was actually collectible goes to the merits of the malpractice action, not the question of whether the statute of limitations tolled." Thus, the suit was untimely since it was not brought within one year of the attorney's alleged negligence, and the judgment of dismissal was affirmed.



## Significance of Opinion

This decision is significant because it examines three different tolling provisions. It also clarifies the distinction between the concepts of “actual injury” required to trigger the running of the statute of limitations and the ability to prove recoverable and compensable damages. A client may very well be found to have suffered “actual injury” even though further proceedings could reduce or eliminate altogether the damages suffered.

For further information, please contact [Terrence P. McAvoy](#) or [David L. Winnett](#).

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