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CPLR 203(a): Continuous Treatment Doctrine Applied to Liability Insurer's Refusal to Defend

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given to *Paver & Wildfoerster v. Catholic High School Association,* wherein the Court of Appeals was confronted with a time-bar challenge to a demand for arbitration. The *Paver* Court held that arbitration will be time barred only when on no view of the facts could the claim withstand such a challenge had it been an action at law.

Another significant case discussed in *The Survey* is *Basso v. Miller,* wherein the Court of Appeals abandoned use of the common law distinctions between trespassers, licensees, and invitees in determining the duty owed by a landowner to an injured party. Instead, the Court adopted a single duty of reasonable care under the circumstances of each case.

Other cases of significant import discussed in this issue of *The Survey* include *Seligson v. Chase Manhattan Bank,* wherein the Appellate Division, First Department, extended the statute of limitations tolling provisions of CPLR 203(c) to cross-claims. In *Menefee v. Floyd & Beasley Transportation Co.,* the Supreme Court, Nassau County, permitted a *Seider* attachment to stand although several of the plaintiffs were not New York residents. Also discussed is *O'Sullivan v. State,* wherein the Court of Claims held that the 6-month notice requirement of section 10 of the Court of Claims Act applies to apportionment claims brought pursuant to *Dole v. Dow Chemical Corp.,* and that an apportionment action against the state accrues on the date of judgment. Unfortunately, because of limitations of space, many other significant cases could not be discussed. It is hoped, however, that the present installment of *The Survey* offers the practitioner a valuable guide to New York procedure.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(a): Continuous treatment doctrine applied to liability insurer's refusal to defend.

CPLR 203(a) provides that the period within which an action must be commenced is to be computed from the time the cause of action accrues.[1] In actions for breach of contract it is generally held that the cause of action accrues, and thus the statute of limitations begins to run, at the time of initial breach.[2] In order to mitigate the

[1] CPLR 203(a) provides that "[t]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."

[2] It is the breach itself that gives rise to the cause of action. Thus, the statute of limitations begins to run regardless of whether plaintiff had knowledge of the breach or whether damages have accrued. *See, e.g.,* French Evangelical Church v. Borst, 22 App. Div.

harsh consequences of this rule in cases involving an undiscovered breach,[3] courts have developed various ameliorative doctrines.[4] One such device is the doctrine of continuous treatment. Usually employed in the area of malpractice, this doctrine provides that when a professional renders continuing services related to the same problem or complaint, the statute of limitations[5] for a particular act of negligence committed in the course of these professional activities will be tolled until termination of the services.[6]

In *Colpan Realty Corp. v. Great American Insurance Co.*,[7] the Supreme Court, Westchester County, applied the continuous treatment doctrine to an insurance company's breach of a covenant to defend. Colpan had been sued for intentional property damage in 1966. Judgment was rendered against it in 1968, and final

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2d 511, 256 N.Y.S.2d 805 (1st Dep't 1965); Varga v. Credit-Suisse, 5 App. Div. 2d 289, 171 N.Y.S.2d 674 (1st Dep't), *aff'd mem.*, 5 N.Y.2d 865, 155 N.E.2d 865, 182 N.Y.S.2d 17 (1958); Edlux Constr. Corp. v. State, 252 App. Div. 373, 300 N.Y.S. 509 (3d Dep't 1937), *aff'd mem.*, 277 N.Y. 635, 14 N.E.2d 197 (1938); 11 S. WILLISTON, CONTRACTS § 1339A (3d ed. W. Jaeger 1968).

[3] The running of the statute of limitations will preclude access to the courts by a potential plaintiff who does not discover that he has been injured until after the limitation period has run. *See* 1 WK&M ¶ 213.10.

[4] *See, e.g.*, Ryan Ready Mixed Concrete Corp. v. Coons, 25 App. Div. 2d 530, 267 N.Y.S.2d 627 (2d Dep't 1966) (mem.) (cause of action for failure to obtain effective liability insurance accrued when insurer disclaimed liability rather than at breach), *criticized in* 7B MCKINNEY'S CPLR 203, commentary at 112-14 (1972); Lewis v. Lewis, 59 Misc. 2d 525, 299 N.Y.S.2d 755 (N.Y.C. Civ. Ct. N.Y. County 1969) (cause of action accrued at occurrence of harm rather than at breach in action for cancellation of insurance policy in violation of separation agreement), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 315 (1969).

[5] Although the statute of limitations for medical malpractice is 2½ years, CPLR 214-a, and the period for other categories of malpractice is 3 years, CPLR 214(6), contract actions are governed by a 6-year limitation. CPLR 213(2). In an effort to invoke this longer period in causes of action based upon professional treatment, litigants will frequently allege breach of contract rather than plead the action in tort. Courts, however, normally apply the shorter malpractice statute of limitations unless the action is based on breach of a contract imposing a greater duty than the implied contractual obligation to use due care. The 6-year contract statute of limitations is most often used when the professional had undertaken to achieve a specific result. *See* 1 WK&M ¶¶ 214.20, 214-a.07. *Compare* Carr v. Lipshie, 8 App. Div. 2d 330, 187 N.Y.S.2d 564 (1st Dep't 1959) (per curiam), *aff'd mem.*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961) (three-year malpractice statute applies in action for breach of promise to perform accounting services), *with* Di Pietro v. Hecker, 43 Misc. 2d 630, 251 N.Y.S.2d 704 (Westchester County Ct. 1964) (six-year contract statute of limitations applicable in action against attorney alleging failure to obtain a specific result).

[6] Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (medical malpractice). The doctrine of continuous treatment in the area of medical malpractice is codified in CPLR 214-a. Moreover, the doctrine has been judicially extended to actions for malpractice in other professions. *See* Siegel v. Kranis, 29 App. Div. 2d 477, 288 N.Y.S.2d 831 (2d Dep't 1968) (law); Stern v. Hausberg, 22 App. Div. 2d 669, 253 N.Y.S.2d 447 (1st Dep't 1964) (per curiam) (dentistry); County of Broome v. Vincent J. Smith, Inc., 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. Broome County 1974) (architecture), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 792, 794 (1975); Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (Sup. Ct. Allegany County 1973) (public accounting).

[7] 83 Misc. 2d 730, 373 N.Y.S.2d 802 (Sup. Ct. Westchester County 1975).

appeal therefrom was dismissed in 1972.[8] Despite repeated requests by Colpan, its insurer, Great American, refused to provide legal representation, contending that the claim was not covered by its policy.[9] When the insurance company was subsequently held liable for the entire judgment,[10] Colpan brought the instant action to recover attorney's fees incurred in the earlier suit.[11]

Defendant moved to dismiss the complaint on the ground that the 6-year statute of limitations period for breach of contract[12] had expired, contending that the cause of action for attorneys' fees had accrued either when it had originally refused to defend the action in 1966, or when the defense was terminated by judgment in 1968. The court, however, reasoned that the liability insurer was in effect an "institutionalized substitute" for an attorney.[13] The obligation to

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[8] McGroarty v. Colpan Realty Corp., 159 N.Y.L.J. 53, Mar. 18, 1968, at 25, col. 5 (Sup. Ct. Westchester County), *appeal dismissed,* 167 N.Y.L.J. 15, Jan. 21, 1972, at 17, col. 5 (2d Dep't Jan. 19, 1972).

[9] Colpan was insured only against accidental damage. Although the original complaint alleged intentional property damage, it was thereafter amended to include allegations of negligence. *See* note 10 *infra.*

[10] McGroarty v. Great American Ins. Co., 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975), *aff'g* 43 App. Div. 2d 368, 351 N.Y.S.2d 428 (2d Dep't 1974). McGroarty had won a judgment against Colpan and thereafter brought an action against Great American pursuant to N.Y. INS. LAW § 167(1)(b) (McKinney 1966). This statute requires that all liability insurance policies issued or delivered in the State contain a provision permitting a judgment creditor to maintain an action against the insurer in the event that a judgment against the insured remains unsatisfied more than 30 days after service of notice. *Id.*

Great American argued that the intentional damage alleged by McGroarty in the original complaint was not within the coverage of its policy, and thus it properly had disclaimed liability. Moreover, although the complaint was amended to include allegations sounding in negligence, the insurer was not informed of the change until several months after the trial. 43 App. Div. 2d at 371, 351 N.Y.S.2d at 431. The Appellate Division, Second Department, reversed the trial court's judgment for Great American, finding that the property damage was an "unintended and fortuitous" result of Colpan's intentional acts, and therefore an accidental injury within the coverage of the insurance policy. *Id.* at 374, 351 N.Y.S.2d at 434. The broad duty to defend under a liability insurance policy extends to all actions in which the complaint alleges facts which, if proved, would render the insurer liable. *Id.* at 378, 351 N.Y.S.2d at 438; *accord,* Prashker v. United States Guar. Co., 1 N.Y.2d 584, 592, 136 N.E.2d 871, 875, 154 N.Y.S.2d 910, 916 (1956). In this case, although the original complaint did not expressly allege negligence, it stated facts which provided Great American with notice that an aspect of the action was within the policy coverage, thereby invoking the duty to defend. 43 App. Div. 2d at 378-79, 351 N.Y.S.2d at 438.

[11] 83 Misc. 2d at 730, 373 N.Y.S.2d at 803.

[12] CPLR 213(2).

[13] 83 Misc. 2d at 732, 373 N.Y.S.2d at 804. Such reasoning serves to legitimize the adoption of the continuous treatment doctrine in this case by incorporating into the insured-insurer relationship the same quality of reliance which is a major consideration in justifying tolling of the statute during the course of a professional relationship. The court found support for this analogy in Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965), *discussed in The Biannual Survey,* 40 ST. JOHN'S L. REV. 122, 154 (1965), wherein the Appellate Division, First Department, indicated that automobile liability insurance, because it is litigation insurance, is an "institutionalized substitute" for the attorney-client relationship. Thus, the *Kandel* court held that in appropriate situations communications between insurer and insured are entitled to protection from discovery as a type of work product in preparation of litigation. 22 App. Div. 2d at 517-18, 256 N.Y.S.2d at 902. Such

provide legal representation, according to the court, continued until the action met with final disposition, "for until such event defendant could have assuaged plaintiff's grief, sealed the breach and redeemed its wrong by taking up the cudgels of the action."[14] The court ruled, therefore, that the action accrued when the breach was completed by final dismissal of the appeal, thus invoking the continuous treatment doctrine to toll the statute of limitations until termination of the course of wrongful conduct. Since, under the *Colpan* reasoning, the 6-year limitation period did not begin to run until the final appeal was dismissed in 1972, the plaintiff's action was not time barred.[15]

In applying the continuous treatment doctrine to the insurer's wrongful refusal to defend, the court has used a tolling device, heretofore primarily utilized in malpractice cases, in an action for breach of a contract not based upon a professional-client relationship. The doctrine has been justified in malpractice actions as a means of protecting patients and clients who have a right to rely upon professional judgment during a continuing course of treat-

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issues are not reached, however, when the insurer immediately disclaims responsibility for the conduct of the litigation. Under such circumstances "litigation insurance" has failed of its purpose and should not be considered a substitute for the attorney-client relationship. *Cf.* Rautine v. Preston, 84 Misc. 2d 156, 374 N.Y.S.2d 280 (Sup. Ct. Chemung County 1975) (no confidential relationship between insurer and insured recognized).

[14] 83 Misc. 2d at 732, 373 N.Y.S.2d at 804. The *Colpan* court appears to suggest that because the obligation to afford representation continued, the breach was not complete until final dismissal of the action, and the cause of action did not accrue until that time. It is clear, however, that an action for breach of contract accrues at the moment of breach. *See* 7B McKINNEY'S CPLR 203, commentary at 113 (1972), *citing* 5 A. CORBIN, CONTRACTS § 1001 (1964). In *Colpan,* the breach occurred when defendant refused to represent plaintiff in the initial action.

Application of the continuous treatment doctrine to contract actions would not require a finding that the cause of action accrues only when the breach becomes final. The doctrine does not affect substantive principles regarding accrual of actions, despite the tendency of courts to express the consequences of its use as delaying accrual until the termination of treatment or representation. Rather, it tolls the running of the statute. *See* 31 FORDHAM L. REV. 842, 844-45 (1963), *discussing* Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). For a discussion of the specific consequences of an unjustified refusal to defend, see 14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 51:52 to :73 (2d ed. R. Anderson 1965).

[15] 83 Misc. 2d at 732, 373 N.Y.S.2d at 804-05. The court offered an alternative rationale for dismissing the limitations defense, viewing each refusal to defend the action as a continuing breach of the insurance contract. According to this theory, the refusals became final and the "breach" occurred when the appeal was ultimately terminated by dismissal; thus, an action instituted within 6 years of the dismissal was timely. *Id.* at 372-73, 373 N.Y.S.2d at 805. This reasoning, however, appears to lack merit. If each refusal to provide legal representation is viewed as a new breach of contract, only those breaches occurring within the 6-year limitation period would be actionable. *Cf.* General Precision, Inc. v. Ametek, Inc., 20 N.Y.2d 898, 232 N.E.2d 862, 285 N.Y.S.2d 867 (1967) (mem.) (only those breaches within 6 years actionable where contract was continually breached over an 8-year period).

ment or representation.[16] In a relationship based upon trust and confidence, it is manifestly unfair that the patient or client should be forced to choose between immediate inquiry into the effectiveness of the measures taken by the professional, with the concomitant disruption of the relationship, and the risk of being lulled "into sleeping on his rights."[17] The same policy considerations,

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[16] *See* note 17 *infra*. The doctrine has not met with universal approval, however, for it is a half measure, one of the devices used in the law of time limitations to mitigate some of its more inequitable results. Although commentators have recommended a statute of limitations running from the discovery of the malpractice, *see* N.Y. LAW REVISION COMM'N, REPORT, N.Y. LEG. DOC. No. 65(c), at 6, 15, 38 (1962), and the Law Revision Commission has proposed legislation to similar effect, *id.* at 3-7, the proposal was not enacted; instead, the general malpractice limitations period was lengthened from 2 to 3 years. Ch. 308, § 214, [1962] N.Y. Laws 1310 (codified at CPLR 214). Actions for medical malpractice now must be commenced within a period of 2½ years. CPLR 214-a; *see* 1 WK&M ¶ 214.21. In view of the apparent legislative hostility toward the postponement of accrual of a cause of action until discovery, the Court of Appeals, in Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714, *cert. denied*, 374 U.S. 808 (1963), weighed the policy considerations involved:

> Considering the function of the Statute of Limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in the one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the Statute of Limitations in the first place. . . . [P]erhaps . . . society is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases. Whatever the policy considerations, the recent amendment of the malpractice statute from two to three years makes it clear that the legislative choice was deliberately made in the face of strenuously advocated alternatives.

Id. at 218-19, 188 N.E.2d at 145, 237 N.Y.S.2d at 718-19 (citations omitted).

Another tolling device is the foreign object doctrine, whereby accrual of the cause of action is postponed until the injured party discovers or should have discovered the injury. Thus, when a physician negligently leaves a foreign object in a patient's body, the statute of limitations is tolled until the patient could reasonably have discovered the malpractice. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (surgical clamps left in patient's abdomen). The courts have been reluctant, however, to extend such a discovery rule to other professions. *See, e.g.*, Gilbert Properties, Inc. v. Millstein, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972), *aff'd mem.*, 33 N.Y.2d 857, 307 N.E.2d 257, 352 N.Y.S.2d 198 (1973).

Legislative opposition to accrual upon discovery is evidenced by section 214-a of the CPLR. That section, which shortened the period of limitation for medical malpractice from 3 to 2½ years, expressly excluded from the foreign object doctrine any "chemical compound, fixation device or prosthetic aid or device," and excepted from the continuous treatment doctrine "examinations undertaken for the sole purpose of ascertaining the state of the patient's condition." CPLR 214-a. Thus it appears that "there is no likelihood that a rule similar to the Law Revision Commission's 1962 recommendation will be adopted in the near future." 1 WK&M ¶ 214.21, at 2-314.

[17] N.Y. LAW REVISION COMM'N, REPORT, N.Y. LEG. DOC. No. 65(c), at 38 (1962). The grounds upon which the continuous treatment doctrine is justified are applicable to all professional-client relationships. Every professional relationship is one of trust in which the client depends exclusively on the professional's judgment. Upon the commission of a negligent act, it is unjust to require a client to choose between instituting a suit and allowing the professional to undertake corrective efforts. Moreover, a different rule would encourage professionals to prolong a course of treatment or representation, corrective or otherwise, until the expiration of the statutory period in order to insulate themselves from suit. *See* 7B MCKINNEY'S CPLR 214, commentary at 38 (Supp. 1975).

however, do not apply in the absence of a professional relationship.[18] Moreover, in a case such as *Colpan,* wherein the insurer denied responsibility for the conduct of the litigation from the outset, the concept of reliance upon a continuing course of representation is misplaced.[19] No injustice is done by requiring that the insured assert his claim within 6 years of the purported breach.

It is submitted, therefore, that the *Colpan* court's application of the continuous treatment doctrine to an insurance company's covenant to defend is an erroneous extension of the doctrine. The decision burdens insurers with substantially extended potential liability, and yet is not supported by the policy considerations which justify application of the doctrine of continuous treatment in malpractice actions.

CPLR 203(c): Tolling provisions for defenses and counterclaims extended to cross-claims.

CPLR 203(c) permits the interposition of a defense or counterclaim even though such defense or counterclaim would be barred by the applicable statute of limitations were it to be prosecuted as an independent cause of action.[20] This provision codifies the doctrine of relation back, whereby any time-barred defense or counterclaim is maintainable so long as it is not time barred when the plaintiff commences his cause of action.[21] Moreover, even if the

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[18] *See* note 17 *supra.* One recent case has extended the continuous treatment exception to actions in contract against an attorney. Grago v. Robertson, 49 App. Div. 2d 645, 370 N.Y.S.2d 255 (3d Dep't 1975) (mem.) (cause of action accrued at termination of representation in action for breach of contractual obligation to preserve legal interests). Since the justification for the doctrine is based upon the nature of the professional relationship, it is appropriate to apply it to all wrongs committed within the framework of that relationship, whether the allegations sound in tort or contract.

[19] *See* note 13 *supra.*

[20] CPLR 203(c) provides:

> A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim 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 notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

[21] Under the CPA, the statute of limitations on a counterclaim continued to run until service of the answer containing the counterclaim. *See* CPA § 11. Plaintiffs who feared counterclaims based on the same occurrence were encouraged to delay commencement of a lawsuit until it would be difficult or impossible for the defendant to timely interpose his counterclaim. 7B McKinney's CPLR 203(c), commentary at 119 (1972). The doctrine of relation back, as codified in the CPLR, has been readily accepted and applied by the courts. *See, e.g.,* Styles v. Gibson, 27 App. Div. 2d 784, 277 N.Y.S.2d 245 (3d Dep't 1967); Ornter v. Booth, 21 App. Div. 2d 663, 249 N.Y.S.2d 946 (1st Dep't 1964); Star Credit Corp. v. Ingram, 170 N.Y.L.J. 1, July 2, 1973, at 2, col. 1 (App. T. 1st Dep't).