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CPLR 214: "Continuing Practice" Theory Applied in Attorney Malpractice Cases

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ARTICLE 2 — LIMITATIONS OF TIME

CPLR 204(b): Toll will not be granted where colorable basis for arbitration is lacking.

CPLR 204(b) tolls the statute of limitations for the period between a demand for arbitration and a final determination that there is no obligation to arbitrate. Section (b) is not explicitly qualified to apply only to well-founded, controvertible, demands for arbitration, but reason dictates that there be some such qualified use of the provision.

In *Watkins v. Holiday Drive-Ur-Self, Inc.*,[1] the court, since it found that there was no basis for believing that arbitration was available, refused to toll the statute of limitations. The plaintiff's actions, in demanding arbitration, are probably explained by a mistaken belief that the defendant's insurance carrier was a signatory to an agreement providing for arbitration.

The bar should thus note that a demand for arbitration must be made with care for if it is legally an empty request, made either through mistake or as a tactic to increase one's time to deal with a case, it will have no effect on the running of the statute of limitations. Thus, an attorney who allows the statute to expire during such a course of action may be subject to the danger of a malpractice suit.

CPLR 214: "Continuing practice" theory applied in attorney malpractice cases.

Generally, in a malpractice case, the statute of limitations runs from the time that the malpractice occurs [2] rather than from the time when it is discovered. However, various exceptions to the general rule have evolved.[3] For example, in the medical field, the "continuing practice" theory has received Court of Appeals' endorsement.[4] According to this theory, if treatment continues after the actual malpractice, the statute runs from the date of the last treatment. The rationale is that, where treatment occurs on more than an occasional visit and extends over a period of time, the relationship between patient and doctor must

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[1] 29 App. Div. 2d 810, 287 N.Y.S.2d 730 (3d Dep't 1968).

[2] Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't), *aff'd without opinion*, 254 N.Y. 620, 173 N.E. 892 (1930); *see* 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 214.18 (1966) for a discussion of the problems raised when there are unknown injuries.

[3] *See* McLaughlin, *Annual Survey of New York Law: Civil Practice*, 14 SYRACUSE L. REV. 347, 353-54 (1962).

[4] Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

be one of trust and confidence. It would be detrimental to such a relationship for the patient to question the doctor's every action at the moment of execution.

Courts in the first and second departments have recently employed this exception in attorney malpractice suits.[5] In the first department case of *Wilson v. Econom*,[6] suit was brought against an attorney when it was discovered that he had failed to institute the plaintiff's action within the short one year and thirty day period of limitations applicable to suits against the Transit Authority. The attorney's office repeatedly assured the plaintiff that his case was proceeding properly. A Bar Association investigation subsequently revealed a contrary state of affairs.

In the second department a similar situation arose in *Siegel v. Kranis*,[7] but the appellate division, in deciding the case, gave no indication that it was aware of the prior treatment of the problem in *Wilson*. The malpractice suit arose from a failure to file a timely MVAIC claim. In both cases the courts felt that the similarity of a doctor-patient and an attorney-client relationship was more than superficial. Both necessitate continued trust, confidence and attention.

With sound authority in two departments for an extension of the "continuing practice" theory, a malpractice suit can not now be evaded by merely giving a client meaningless reassurances or by futile attempts to remedy the situation.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(1): Making promissory note payable in New York not deemed a transaction of business here.

The appellate division, first department, in *Wirth v. Prenyl*,[8] recently held that personal jurisdiction will not be obtained in New York by merely making a promissory note payable here. In *Wirth*, the underlying contract involved the shipment of machinery from the United Kingdom, by the plaintiff, a New York resident, to the defendant, an Argentine domiciliary. Disputes under the contract were to be arbitrated by the Argentine Stock Exchange. Suing on the promissory note alone, plaintiff sought

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[5] It is especially significant to note the second department's use of the theory, for it, originally, was somewhat restrictive even in the medical area. Borgia v. City of New York, 16 App. Div. 2d 927, 229 N.Y.S.2d 318 (2d Dep't), *rev'd*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962).

[6] 56 Misc. 2d 272, 288 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1968).

[7] 29 App. Div. 2d 447, 288 N.Y.S.2d 831 (2d Dep't 1968).

[8] 29 App. Div. 2d 373, 288 N.Y.S.2d 377 (1st Dep't 1968).