



Alerts

Fraudulent Concealment and/or Equitable Estoppel Tolloed the Statute of Repose in a Legal Malpractice Claim

October 23, 2023

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Comprehensive Marketing, Inc. v. Huck Bouma, P.C., et al., 2023 IL App (1st) 220694-U

Brief Summary

The plaintiff, Comprehensive Marketing, Inc. ("plaintiff"), filed a lawsuit against its former attorneys ("defendants") for legal malpractice related to legal advice the defendants provided regarding opt-out notice ("Notice") requirements under the Telephone Consumer Protection Act of 1991 ("TCPA"). In Illinois, a legal malpractice claim has a two-year statute of limitations and a six-year statute of repose. The statute of repose begins accruing as soon as the event triggering the liability occurs and separately from the discovery or existence of injury.

However, a statute of repose may be extended through tolling. One way to toll the statute of repose is by proving fraudulent concealment or equitable estoppel such that it would be inequitable to allow a defendant to benefit from their concealments or misrepresentations. In this case, the appellate court held that although the statute of repose would have expired for the plaintiff's claims, the statute was tolled based on the defendants' constant reassurances that the opt-out Notice was compliant with the TCPA.

Complete Summary

Around 2010, the plaintiff sought legal advice from the defendants to ensure compliance with TCPA's opt-out Notice requirements in its promotional faxes. The defendants provided the requested legal advice, and the plaintiff used the opt-out Notice language vetted by the defendants from 2010 onward.

Defendants then constantly reassured the plaintiff that the Notice was legally sufficient. In 2010, an attorney representing a recipient of the plaintiff's promotional faxes made a claim against the plaintiff, alleging the Notice was statutorily insufficient. The defendants assured the plaintiff the Notice was legally sufficient and compliant, advised the plaintiff to defend and not settle, and advised the plaintiff to take no action on the claim.

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The 2010 claim was then dropped, with the defendants representing the plaintiff that the claim was dropped due to a written defense made by the defendants regarding the Notice's compliance. The defendants and the plaintiff continued their attorney-client relationship until 2017. Throughout this period, the defendants never advised the plaintiff to modify the Notice and provided annual compliance reviews that did not mention the Notice being statutorily deficient.

In 2017, the plaintiff was again notified that the Notice was legally deficient; the plaintiff informed the defendants of this complaint. The plaintiff was then sued in two federal court class action lawsuits over the alleged violations in the Notice. The defendants did not recommend replacing the plaintiff's opt-out Notice language until May 2017, after the lawsuits were filed. In October 2019, the plaintiff entered its first settlement agreement for the 2017 lawsuits. In December 2019, the plaintiff filed a complaint against the defendants, alleging legal malpractice, fraudulent concealment, and equitable estoppel.

In Illinois, a legal malpractice claim has a two-year statute of limitations and a six-year statute of repose. A statute of repose functions to cut off the "long tail" of liability that may arise, given that the statute of limitations does not begin to accrue until the plaintiff knows or reasonably should know of their injury (the "discovery rule").

The statute of repose begins accruing as soon as the event triggers the liability and functions separately from the discovery or existence of injury. Here, the court found that the event that triggered the statute of repose was the defendants' 2010 legal advice regarding the TCPA opt-out Notices. Thus, the statute of repose would have cut off the plaintiff's claims in 2016. The plaintiff did not file its lawsuit until 2019.

The Court's Decision

The defendants filed a section 2-619 motion to dismiss the plaintiff's complaint based on the statute of repose. The trial court found the defendants' favor and dismissed the plaintiff's complaint. However, the appellate court reversed, holding that the plaintiff pled sufficient facts to support its argument that fraudulent concealment and equitable estoppel tolled the statute of repose.

To demonstrate fraudulent concealment, a plaintiff must show that a defendant engaged in "affirmative acts or representations designed to prevent discovery of the cause of action or to lull or induce a claimant into delaying the filing of his claim." While silence is typically not enough to prove fraudulent concealment, it may be enough when there is a fiduciary relationship, like an attorney-client relationship, and where the attorney fails to fulfill his duty to disclose material facts concerning the existence of a cause of action. Equitable estoppel works parallel to fraudulent concealment to toll a statute of repose.

Here, the court held that the plaintiff pled sufficient facts supporting the argument that the statute of repose was tolled based on fraudulent concealment and equitable estoppel. The court found this case similar to *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240 (1994), where the Illinois Supreme Court held that the defendants were equitably estopped from raising the statute of limitations as a defense when the defendant caused the delay in filings by constantly reassuring the plaintiff that its legal position was sound.

Here, the appellate court concluded that the defendants constantly reassured the plaintiff that the TCPA opt-out Notice was legally sufficient and compliant. And, taking the plaintiff's allegations as true as they must be taken at the pleading stage of litigation, the defendants knew about the erroneous advice. They decided not to inform the plaintiff to prevent a legal malpractice action.

The defendants' actions, conduct, and assurances caused the plaintiff not to file a lawsuit against them until 2019. The defendants could not justly benefit from their concealment and misrepresentations. Thus, the court held that the statute of repose was tolled, and the plaintiff's claim was not time-barred.



Significance of the Decision

While a statute of repose commences once the event that supports the claim occurs—and is not dependent on the discovery of an injury or accrual of an action—the statute of repose may still be tolled if a plaintiff can plead facts sufficient to show fraudulent concealment and equitable estoppel.

To do so, a plaintiff must plead sufficient facts to demonstrate that the plaintiff delayed filing suit based on a defendant's constant reassurances of the legal soundness, sufficiency, and compliance of the plaintiff's actions despite the defendant's knowledge to the contrary.