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Determining the Appropriate Time Limitations on Attorney Malpractice Lawsuits in West Virginia: A Brief Overview

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DETERMINING THE APPROPRIATE TIME LIMITATIONS ON ATTORNEY MALPRACTICE LAWSUITS IN WEST VIRGINIA: A BRIEF OVERVIEW

VINCENT PAUL CARDI*

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I. INTRODUCTION

When an attorney disserves a client or a third party so as to give rise to a cause of action against the attorney, one, or more, of a number of statutes of limitations or other time limitations might apply to limit the right to bring the lawsuit against the attorney. In West Virginia these time periods appear to range from one year after discovery of the injury,¹ two years after discovery of the injury,² five years,³ or ten years⁴ after the relevant attorney-client contract was breached, or an indefinite time as determined by the common law doctrine of laches.⁵ This Article provides a brief overview of the issues commonly arising in statutes of limitations problems, and then briefly examines the West Virginia statutes and case law in an attempt to clarify which statutory period applies, or if none then whether laches applies, when a claimant brings a suit against an attorney for loss caused by the attorney’s wrongful conduct.

II. STATUTES OF LIMITATIONS GENERALLY

Statutes of limitations are legislative⁶ time limitations within which a person with a cause of action must bring suit or forever lose

⁴. Harrison, 271 S.E.2d at 776.
⁶. Statutes of limitations have always been statutory, not existing at common law. H.G. WOOD & D.C. MOORE, A TREATISE ON THE LIMITATION OF ACTIONS 4 (1916). Statements to the contrary by Lord Bracton are extremely doubtful, “as doubtful as the Latinity.” Id. (citing H.T. BANNING, LAW OF THE LIMITATION OF ACTIONS (1906)).
the right to invoke judicial redress.\textsuperscript{7} The basic purposes of statutes of limitations are to encourage promptness in instituting actions, to suppress stale demands, to defeat fraudulent claims, to avoid inconvenience which may result from delay in asserting rights or claims when it is practical to assert them,\textsuperscript{8} and to allow a person to rest, at peace, without worrying about mistakes made long ago.\textsuperscript{9}

\textsuperscript{7} Statutes of limitations are distinguished from "presumptions" in that they are a complete bar to suit, not just a presumption of payment arising from passage of time. Clendenning's Adm'r. v. Thompson's Ex'r., 22 S.E. 233 (Va. 1895). They differ from "prescription," which terminates the substantive right to recovery, in that they only terminate the remedy. Although statutes of limitations are a kind of "statute of repose" in that they are designed in part to allow a person after time to no longer worry about past problems, they differ from a pure statute of repose in that the repose limitation runs from the occurrence of the event and is absolute, while the statute of limitations runs from the accrual of the cause of action, which might arise after the damage causing event, and can be tolled by intervening disabilities. The obligation still exists after the statute of limitations has run, and may be revived by certain acts such as new promises. See Sudreski v. State Compensation Comm'r, 181 S.E. 545 (1935) (statute gave a dependent a right to workers' compensation benefits if claim filed within six months of injury; the court held that where the statute creates a special right that did not exist without the statute, a time limitation in the statute which qualifies the right is generally not tolled by disabilities and excuses which alloy ordinary statutes of limitations, and the right created does not survive the limitation). State ex rel. Battle v. Demkovich, 136 S.E. 2d 895 (W. Va. 1964) (where the statute provided that action to collect taxes must be brought within five years, but the tax debtor later made a promise to pay the taxes, the court held the time period began anew upon the promise, stating that the statute does not extinguish the debt, but merely bars the recovery); see also United States v. Polan Indus., Inc. 196 F. Supp. 333 (S.D. W. Va. 1961), discussed in 64 W. VA. L. REV. 228 (1962).

For a pure statute of repose applying to architects, engineers and contractors, see W. VA. CODE § 55-2-6(a) (1981), applied in Gibson v. West Virginia Dep't of Highways, 406 S.E. 2d 440 (W. Va. 1991) (plaintiffs, alleging their injuries were caused by an improperly constructed highway, apparently timely brought their suit within the tort statute of limitation period, but more than ten years after the road had been constructed; however, in an opinion mainly discussing the constitutionality of the statutes, the court held the action was barred by the West Virginia construction statute of repose).

\textsuperscript{8} Morgan v. Grace Hosp., Inc., 144 S.E. 2d 156, 161 (W. Va. 1965) (plaintiff did not discover the sponge left in her abdomen by the defendant physician until some time after the operation.), discussed in 68 W. VA. L. REV. 220 (1966); Gray v. Johnson, 267 S.E. 2d 615 (W. Va. 1980) (defendant's absence from the state does not toll the limitations statute where defendant can be served under nonresident motorist statute, but only where defendant has a mailing address).

Statutes of limitations were promulgated at least as early as 1236. A later comprehensive statute enacted under James I in 1623 was generally adopted by the American colonies. Some statutes of limitations are very general in their scope, while others are very specific. The West Virginia Code contains more than seventy individual statutes of limitations or related provisions.

10. See 2 Frederick Pollock & Frederic W. Maitland, The History of the English Law 81 (2d ed. 1898).

11. "An Acte for lynytacon of Accons, and for avoyding of Suite in Lawe." 21 James J. C. 16, IV The Statutes of the Realm 1222 (1819). This statute provided in part:

For quieting of Mens Estates and avoiding of Suits, Be it enacted by the Kings most excellent Majestie, the Lords Spiritual and Temporall and Comons in this present Parliament assembled, That all Writts of Formedon in Descender, Formedon in Remainder and Formedon in Reverter, at any tyme hereafter to be sued or brought of or for any Mannors Lands Tenements or Hereditaments whereunto any prson or prsons now hath or have any Title, or cause to have or pursue any such Writt, shall be sued and taken within Twentie yeares next after the end of this present Session of Parliament; and after the said Twentie yeares expired, no prson or prsons, or any of their heires, shall have or mayntayne any such Writt of or for any of the said Mannors Lands Tenements or Hereditaments.

Id.


15. Although the major statutes of limitations are found in Chapter 55, Article 2, of the West Virginia Code, dozens are distributed throughout the West Virginia Code. Some (but not all) of these statutes are:

<table>
<thead>
<tr>
<th>TORT</th>
<th>LENGTH</th>
<th>W. VA. CODE §</th>
</tr>
</thead>
<tbody>
<tr>
<td>whistle blower discharge</td>
<td>180 days</td>
<td>6C-1-4</td>
</tr>
<tr>
<td>actions not surviving death</td>
<td>1 year</td>
<td>55-2-12</td>
</tr>
<tr>
<td>personal injury or property damage</td>
<td>2 years</td>
<td>55-2-12</td>
</tr>
<tr>
<td>same against local government</td>
<td>2 years</td>
<td>29-12A-6</td>
</tr>
<tr>
<td>wrongful death</td>
<td>2 years</td>
<td>55-7-6</td>
</tr>
<tr>
<td>medical malpractice</td>
<td>2 years</td>
<td>55-7B-4</td>
</tr>
<tr>
<td>injury from chemical defoliants during war</td>
<td>2 years</td>
<td>16-28-10</td>
</tr>
<tr>
<td>violation of wage statute</td>
<td>2 years</td>
<td>21-5-8</td>
</tr>
<tr>
<td>injury from oil or gas well explosion</td>
<td>3 years</td>
<td>22B-1-27</td>
</tr>
<tr>
<td>misappropriation of trade secret</td>
<td>3 years</td>
<td>47-22-6</td>
</tr>
<tr>
<td>violation of antitrust laws</td>
<td>4 years</td>
<td>47-18-11</td>
</tr>
<tr>
<td>injury from design or construction</td>
<td>10 years</td>
<td>55-2-6a</td>
</tr>
</tbody>
</table>
The first step in determining the time period in which an action must be brought is to determine which statute or statutes apply, if any. In some cases where the lawsuit is brought to enforce a traditionally equitable right, courts have held that no statute of limitations applies, and that the action is governed by laches.\textsuperscript{16} The character of the statute of limitations is significant for its impact on the assertion of a claim. The legal system recognizes the importance of time in the enforcement of rights and obligations, and statutes of limitations are designed to protect the interests of both parties by establishing a reasonable period within which actions must be brought.

### CONTRACT
- Recovery of a paid gambling debt: 3 months, 55-9-2
- Sale of goods: 4 years, 46-2-725
- Against copartner on partnership accounts: 5 years, 55-2-6
- Trade accounts between merchants: 5 years, 55-2-6
- Unwritten or unsigned contract: 5 years, 55-2-6
- Signed written contract: 10 years, 55-2-6

### REAL PROPERTY
- Mechanics lien: 6 months, 38-2-34
- Distain rent: 1 year, 37-6-12
- Challenge condominium declaration: 1 year, 36B-2-117
- Redeem tax sale after disability: 1 year, 11A-3-35
- Redeem tax sale after disability: 1 year, 11A-4-34
- Damages for unlawful entry: 3 years, 55-3-1, 2
- Breach of condominium warranty: 6 years, 36B-4-116
- Recover land from adverse possession after disability: 10 years, 55-2-1
- Expiration of lien on realty: 5 years, 55-2-3
- Challenge condominium declaration: 1 year, 36B-2-117

### GOVERNMENT ACTIONS
- Health service regulation violations: 3 years, 16-20-14
- Tax liens: 5 years, 55-2-19a
- Personal liability on property taxes: 5 years, 11A-2-2
- Wrongly received unemployment benefits: 5 years, 21A-10-8
- Fraudulently induced unemployment benefits: 10 years, 21A-10-8

### OTHER
- Fraudulent transfers: 1 year, 40-1A-9(e)
- Fraudulent transfers: 4 years, 40-1A-9
- New action after abatement: 1 year, 39-3-5
- New action after abatement: 1 year, 55-2-18
- Creditor actions against heirs: 2 years, 44-2-26,27
- Judgment against representative of decedent: 5 years, 38-3-18
- Action on foreign judgment: 10 years, 55-2-13
- Execution of judgment: 10 years, 38-5-18
- Reappearing supposed decedent action to set aside distribution of estate: 15 years, 44-9-12

\textsuperscript{16} No statute of limitations applies to a purely equitable action. Instead, the issue of...
ed cause of action will usually determine which statute applies. Because a single event may give rise to more than one cause of action (for example, tort and contract), more than one statute of limitations might apply to any happening, and the claimant might have a choice of two or more different statutory time periods. The cause of action relates to a contract made between the parties, the contract might effectively provide a limitation period different than that in the applicable statute.

The second step is to determine the date on which the limitation period in the applicable statute begins to run. The statute of limitations ordinarily begins to run the day after the day when the right to bring an action accrues. For a personal injury, the cause of action generally accrues when the injury is inflicted. A breach of contract action accrues when the contract performance is due, but not performed.

The third step is to determine if some fact or occurrence will delay, or toll, the beginning of the running of the statutory time.

timeliness is governed by the common-law doctrine of laches. Felsenfeld v. Bloch Bros. Tobacco Co., 192 S.E. 545, 549 (W. Va. 1937) (corporate directors are viewed as trustees of the corporation, and a shareholder derivative suit is an action in trust against the trustees (at least in 1937); courts of equity have exclusive jurisdiction in cases of trusts, and statutes of limitations never run against the exclusive jurisdiction of the equity court).


19. The day on which the cause of action accrues is not computed in calculating the limitations period. Steeley v. Funkhouser, 169 S.E.2d 701, 705 (W. Va. 1969). The lawsuit itself is deemed to begin when "a civil action is commenced by filing a complaint with the court." See W. VA. R. CIV. P. 3.


22. This could mean when a promised installment payment is missed, G.T. Fogel & Co. v. King, 51 S.E.2d 776 (W. Va. 1948), when a promised performance is not performed, Aamon v. Lucas, 185 S.E.2d 343 (W. Va. 1971), when an agent terminates employment, Wren v. Wehn, 12 S.E.2d 809 (W. Va. 1940), and when goods which do not conform to contract warranties are delivered to the buyer. W. VA. CODE § 46-2-725 (1966).

23. "Tolling" is a term used variously to denote delaying the beginning of the running
period or interrupt it after it has started. Some conditions of the plaintiff, such as infancy or insanity, delay the beginning of the limitation period by statute.\textsuperscript{24} Some actions of the defendant, such as leaving the jurisdiction\textsuperscript{25} or fraudulently concealing the harm,\textsuperscript{26} will delay the beginning of the limitation period. Similarly, some actions or omissions of the plaintiff, such as failing to discover the injury (the discovery rule), will either delay the beginning of the limitation period, or delay the accrual of the cause of action with like effect.\textsuperscript{27} Some actions taken by both parties, such as continuing their attorney-client relationship past the occurrence date of the wrongful act (the continuous representation rule), will delay the beginning of the limitation period.\textsuperscript{28} After the limitation period has begun to run, it can be interrupted and suspended by the onset of a statutory condition such as insanity of the statute until sometime later than the cause of action arises, delaying the arising of the cause of action itself until sometime later than the occurrence of the wrongful act which precipitates the loss giving rise to the cause of action, interrupting the running of the statute once it has begun, and beginning anew the running of the statute. See \textit{BLACK'S LAW DICTIONARY} 1488 (6th ed. 1990).

\textsuperscript{24} W. VA. CODE § 55-2-15 (1981).
\textsuperscript{25} W. VA. CODE § 55-2-17 (1981).
\textsuperscript{26} Hundley v. Martinez, 158 S.E.2d 159 (W. Va. 1967), \textit{discussed} in 70 W. VA. L. REV. 438 (1968) (patient alleged that during visits to the operating physician after the eye operation the defendant physician repeatedly assured patient that his eye was all right, even though it was permanently damaged with more than one-half of the iris missing.)

\textsuperscript{27} This discovery rule was first applied in West Virginia to underground coal mining encroachment. Petrelli v. West Virginia-Pittsburgh Coal Co., 104 S.E. 103 (W. Va. 1920). It was later applied to a sponge left in the abdomen by defendant physician in Morgan v. Grace Hosp., Inc. 144 S.E.2d 156 (W. Va. 1965), and then to attorney malpractice in Family Savings & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W. Va. 1974). Unless otherwise provided by statute, the discovery rule applies to all torts in West Virginia. Cart v. Marcum, 423 S.E.2d 644, 648 (W. Va. 1992). The discovery rule is also part of the equitable doctrine of laches. Bank of Mill Creek v. Elkhorn Coal Corp., 57 S.E.2d 736, 746 (W. Va. 1950).

A recent case casts some uncertainty over the discovery rule in West Virginia. The West Virginia Supreme Court held that "The 'discovery rule' applies only when there is a strong showing by the plaintiff that some action of the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Cart v. Marcum, 423 S.E.2d 644, 648 (W. Va. 1992).

ty,\textsuperscript{29} or by conduct of the parties such as agreement,\textsuperscript{30} or by actions constituting estoppel\textsuperscript{31} or waiver.\textsuperscript{32}

In some cases when the statute of limitations has already expired, a plaintiff may still file a lawsuit if a previous timely filed suit has been dismissed for a reason not related to the merits ("saving" statutes),\textsuperscript{33} or file an amended complaint starting a new cause of action (the relation back doctrine).\textsuperscript{34} In some classes of cases, the statutory

\begin{itemize}
  \item \textsuperscript{29} W. VA. CODE § 55-2-4 (1981).
  \item \textsuperscript{31} Humble Oil Co. v. Love, 165 S.E.2d 379, 384 (W. Va. 1969) (prescribing a detailed test for determining whether estoppel exists).
  \item \textsuperscript{32} See Young v. State Compensation Comm'r., 3 S.E.2d 517 (W. Va. 1939) (holding that while a party might waive its limitations defense by conduct, a government official generally cannot so waive it). Some courts have held that the attorney-client relationship itself will estop the attorney from raising the statute of limitations as a defense. Bornstein v. Poulos, 793 F.2d 444, 448 (1st Cir. 1986); Allen E. Korpela, Annotation, \textit{Fiduciary or Confidential Relationship as Affecting Estoppel to Plead Statute of Limitations}, 45 A.L.R.3d 630 (1972).
  \item \textsuperscript{34} The test for allowing a post limitation period amendment to the complaint stating a new legal theory is whether the new cause of action arises out of the same conduct, transaction, or occurrence alleged in the original complaint as the basis for the original cause of action. If the new theory would not cause unfair surprise or prejudice causing injustice, and the defendant has an adequate opportunity to prepare a defense, then the new cause of action would "relate back" to the date of the original filing for purposes of the statute of limitations. In Bennett v. Owens, 378 S.E.2d 850 (W. Va. 1989), the plaintiff originally sued the defendant for battery, but after deposing the defendant and apparently discovering that the defendant was not the person who assaulted the plaintiff (and after the statute of limitations had run), amended the complaint to allege that the defendant was negligent in supervising the high school graduation party at the defendant's home and in encouraging other guests to behave aggressively. In Jones v. Jones, 400 S.E.2d 305 (W. Va. 1990), the plaintiff filed for divorce in Jan. 1983 on grounds of cruel and inhuman treatment, and amended the complaint in 1985, alleging grounds of living apart for one year. In May 1983, the West Virginia Supreme Court adopted the doctrine of equitable distribution (later codified at W. VA. CODE § 48-2-1 (Supp. 1992)) and applied it prospectively to all cases filed after May 1983. The court held that the plaintiff's amendment stated a new cause of action, thus entitling the defendant to equitable distribution.

\end{itemize}
period can begin running anew where the obligor makes a new promise on, or acknowledgement of, the debt.\textsuperscript{35} Finally, it must be kept in mind that the statute of limitations is an affirmative defense and must be pleaded by the defendant or it is deemed waived.\textsuperscript{36}

Although any of the above can become major issues when the question of limitations arises, this Article focuses on the first step, determining which limitation statute applies to attorney malpractice, and identifying those purely equitable causes of actions which courts find are not subject to any statute of limitations, but which are governed instead by laches.

III. STATUTE OF LIMITATIONS AND ATTORNEY MALPRACTICE

A. Generally

Some states have special statutes of limitations for legal malpractice,\textsuperscript{37} or a general professional malpractice statute which is held by

When the amended complaint adds a new party defendant, it will not relate back unless the new defendant (1) received notice of the original action before the running of the statute, (2) knew or should have known that the original action would have been brought against her but for a mistake concerning identity of the proper party, and (3) will not be prejudiced in maintaining her defense on the merits. In Maxwell v. Eastern Assoc. Coal Corp., 394 S.E.2d 54 (W. Va. 1990), the plaintiff was injured by a fall from a train and originally sued the wrong railroad companies. After the limitations period had run, the plaintiff unsuccessfully attempted to amend the complaint to substitute the involved railroad as defendant. The court, citing West Virginia's reliance on federal cases interpreting similar Federal Rules of Civil Procedure, relied heavily on Schiavone v. Fortune, 477 U.S. 21 (1986). Marks Constr. Co. v. Board of Educ., 408 S.E.2d 79 (W. Va. 1991).

35. This most commonly occurs when a debtor makes a partial payment on a debt in circumstances indicating the debtor is liable on the whole debt. See W. VA. CODE § 55-2-8 (1981).


courts to cover attorney malpractice.\textsuperscript{38} West Virginia has neither. This means that malpractice actions against attorneys are covered by the general statutes of limitations covering the general causes of actions available to claimants injured by their attorneys.\textsuperscript{39}

Because the nature of the particular stated cause of action will usually determine which particular statute of limitations will apply in a given case, it is necessary to understand the possible different causes of action a claimant might have against an attorney based upon the attorney’s professional misconduct. There are a number of theoretical legal bases for such actions. The most common of these is the tort action for negligent provision of legal services. This view characterizes attorney malpractice as a tortious breach of the duty to exercise ordinary knowledge and skill in the service of the client, which duty is created (implied) by, or arises out of, the attorney-client relationship. A second common theoretical basis of liability is breach of an express contract promise.\textsuperscript{40} A third and related theoretical basis of liability is breach of implied contract promise. A fourth class of attorney malpractice claims arise from breaches of fiduciary obligations such as disclosures of confidential information, conflicts of interest and self-dealing by a fiduciary.\textsuperscript{41} A fifth group could be classified as intentional torts, including actual fraud.\textsuperscript{42}

\textsuperscript{38} Long v. Bowersox, 8 Ohio N.P. 249 (1909); Muir v. Hadler Real Estate Management Co., 446 N.E.2d 820 (Ohio 1982) (applying what is now OHIO REV. CODE ANN. § 2305.11 (Anderson 1981)).

\textsuperscript{39} A number of states have a “hybrid” statute of limitations applying to actions “on contract, obligation, or liability,” which are held to apply to both contracts and torts. Such statutes have been held to cover attorney malpractice. See Higa v. Mirikitani, 517 P.2d 1 (Haw. 1973); Sorenson v. Pavlikowski, 581 P.2d 851 (Nev. 1978).

\textsuperscript{40} Technically the failure to perform an express contract promise could be distinguished from legal malpractice in that the failure to perform the express promise is not necessarily related to any deficiency in the quality of legal services rendered, but is merely the failure to do what one promised to do. Lindner v. Eichel, 232 N.Y.S.2d 240 (Sup. Ct.), aff’d, 233 N.Y.S.2d 238 (App. Div. 1962). The West Virginia Supreme Court has expressly stated that “a malpractice action against an attorney . . . may be brought on contract.” Harrison v. Casto, 271 S.E.2d 774, syl pt. (1980). In this Article, such contract breaches are included as simply another form of attorney malpractice.

\textsuperscript{41} See Bank of Mill Creek v. Elk Horn, 57 S.E.2d 736 (W. Va. 1950) (setting aside sale of trust certificate collateral where the sale was conducted by the corporation’s receiver and the purchaser was the attorney representing the receiver).

\textsuperscript{42} Other torts would include malicious prosecution, abuse of process, false arrest or
In West Virginia, if a court were to find that one of these claims exist, it would also find that the claim is covered by one of the general West Virginia statutes of limitations or by laches. An action for a breach of an oral or unsigned written contract must be brought within five years, and within ten years if it is for a breach of a signed written contract.\textsuperscript{43} An action based upon a negligent or intentional tort or other "personal actions" must be brought within two years if it is for damage to property or person, and within one year if it is for any other matter of a kind which at common law could not have been brought by or against his personal representative.\textsuperscript{44} Purely equitable causes of action, such as rescission of a contract or deed, are not governed by any statute of limitations in West Virginia. They are covered by the equitable doctrine of laches.\textsuperscript{45} Presumably, when a claimant

\begin{quote}

imprisonment, interference with contracts, intentional infliction of mental distress, invasion of privacy, wrongful recording of liens or lis pendens, and defamation.
\end{quote}

\textsuperscript{43} The West Virginia Code states:

\begin{quote}

Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years after the right to bring the same shall have accrued, that is to say: If the case be upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within ten years; if it be upon any other contract in writing under seal, within ten years; if it be upon an award, or upon a contract in writing, signed by the party to be charged thereby, or by his agent, but not under seal, within ten years; and if it be upon any other contract, express or implied, within five years, unless it be an action by one party against his copartner for a settlement of the partnership accounts, or upon accounts concerning the trade or merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after.
\end{quote}


\textsuperscript{44} The West Virginia Code states:

\begin{quote}

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and; (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.
\end{quote}


\textsuperscript{45} Laurie v. Thomas, 294 S.E.2d 78 (W. Va. 1982); see also Felsenheld v. Bloch
seeks an equitable remedy such as an injunction for a claim which is fundamentally a legal claim based on contract or tort, the appropriate contract or tort statute of limitations applies, not the common-law doctrine of laches.\textsuperscript{46}

It is clear that a single course of conduct by an attorney might give rise to two or more independently recognized causes of action against the attorney.\textsuperscript{47} Each separate cause of action might offer different advantages and disadvantages for the plaintiff, including the fact that one might invoke a short statute of limitations of only one or two years (torts) while another might involve a relatively long statute of limitations of five or ten years (contracts).\textsuperscript{48}

B. Action Against Attorneys for Breach of Contract

1. The Main Problem: Is the Malpractice Claim Based in Contract or Tort?

One of the main problems arising in malpractice limitations cases is determining whether the plaintiff’s claim is a contract or a tort claim, or more importantly, whether the claim (no matter how characterized for other purposes) is covered by the contract or tort statute of limitations. A contract almost always exists where the malpractice complainant is a client of the attorney.\textsuperscript{49} When as part of the contract-

\textsuperscript{46} B. Tobacco Co., 192 S.E. 545 (W. Va. 1937).

\textsuperscript{47} Condy v. Pope, 166 S.E.2d 167 (W. Va. 1969) (statute of limitations applied to a request for an injunction to prevent trespasser from drilling for and taking oil from land owned by plaintiff).


\textsuperscript{49} W. Va. CODE §§ 55-2-12, 55-2-6 (1981). The longer statute of limitations is not necessarily an advantage to the plaintiff as it might begin running upon the breach of the contract promise, while the shorter tort statute of limitations will begin running when the plaintiff discovered, or should have discovered, the injury. In some cases the longer contracts statute of limitations will have expired before the expiration of the shorter tort statute of limitations.

\textsuperscript{49} An attorney-client relationship can exist without traditional forms of consideration. Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967). Even where the malpractice claimant was never a client, the claimant may have a third party beneficiary claim based upon a contract, Stowe v. Smith, 441 A.2d 81 (Conn. 1981),
tual agreement with the client, an attorney specifically promises to do a certain thing or achieve a specific result for the client and fails to do that specific thing or achieve that specific result, courts have had little trouble finding that the client has a cause of action for breach of an express contract. This is true even if the attorney used the standard knowledge and skill common to attorneys in the trade, so that there is no negligence and therefore no cause of action in tort.

But the problem becomes particularly knotty where the malpractice does not relate to an express promise by the attorney to do a specific thing or achieve a specific result. Where there is no breach of a specific promise, the problem arises when the attorney’s conduct is a breach of obligations implied in and arising out of the contract, and


The Supreme Court of Appeals of West Virginia has held that even without privity of contract, an accountant is liable for the negligent preparation of a financial report to third parties that she knows will be receiving and relying on the report. First Nat’l Bank of Bluefield v. Crawford, 386 S.E.2d 310 (W. Va. 1989) (adopting the position of § 552 of the Restatement (Second) of Torts (1977)). But see Weaver v. Union Carbide Corp., 378 S.E.2d 105 (W. Va. 1989), a case decided nine months before Crawford where the West Virginia Supreme Court held that the lack of privity between a marriage counselor and the spouse of the counselor’s patient foreclosed a claim in malpractice. Id. at 109; Rand v. Miller, 408 S.E.2d 655 (W. Va. 1991) (where employer hired physician to inspect prospective employee’s medical records, there was insufficient professional relationship between the physician and the prospective employee to support a malpractice action, although defamation might stand); Sisson v. Seneca Mental Health Council, 404 S.E.2d 425 (W. Va. 1991) (basis of malpractice action against counselor is trust relationship, and a single counseling session does not establish such).


51. At the time the attorney makes the arrangement with the client, the attorney reasonably infers, and the client implies, that the client will pay the attorney fees within a reasonable time after receiving the bills. This expectation and duty arises out of and is implied by the contractual understanding of the parties. At the same time, the client reason-
at the same time a tortious breach of legal duties implied by law upon
the contractually created attorney-client relationship.\textsuperscript{52} When forced to
identify the nature or gravamen of the claim, for a variety of reasons
both known and unknown,\textsuperscript{53} courts have often preferred to find that
the claim was either one or the other (and not both) and have often
come down on the side of holding it to be a tort.\textsuperscript{54}

The uncertainty as to the basic character of the claim usually
causes little problem. The claimant generally needs only to allege a
duty arising from the basic surrounding circumstances (either from law
or from promise), a breach of that duty, a reasonable causal relation-
ship between the breach and the unfortunate result, and actual loss
from the unfortunate result.\textsuperscript{55} But some rules of law, which are occa-

\textsuperscript{52} The traditional elements of a cause of action in tort are:
1. A duty, or obligation, recognized by the law, requiring the person to con-
form to a certain standard of conduct, for the protection of others against unre-a-
sonable risks.
2. A failure on the person’s part to conform to the standard required: a
breach of the duty . . . .
3. A reasonably close causal connection between the conduct and the resulting
injury . . . .
4. Actual loss or damage resulting to the interests of another.


\textsuperscript{53} It might be that early claims for defective professional services were either in
construction or design contracts where the damages were usually economic losses easily han-
dled by contract principles and medical contracts where the damages were personal injuries,
not readily handled by contract principles. The former were viewed as routine contract prob-
lems and not even described as malpractice problems, just breach of contract problems. The
latter, although arising out of contract, involved the type of physical injuries usually ad-
dressed by tort law. They were therefore treated as tort, but because the special duty of
care arose only out of the special physician-patient relationship, they were treated as a sub-
class of torts called malpractice, logically treated by the tort statutes of limitations. Thus
evolved a practice of treating malpractice as a tort for statutes of limitations purposes.

One school of thought is that malpractice is as much a separate area of law as it is a
subclass of tort law. Thus we have “contract” law, “torts” law, and “malpractice” law.
That many states have a separate statute of limitations for malpractice supports this idea.
Where there is none, courts have often turned to the torts limitation statutes.

\textsuperscript{54} But see Oleyar v. Kerr, 225 S.E.2d 398 (W. Va. 1976) (holding that an action for
attorney negligence, while sounding in tort, is an action for breach of contract and thus
governed by the contract statute of limitations).

\textsuperscript{55} See Rich v. New York Central & H.R. Co., 87 N.Y. 382 (1882). In Rich, the
sionally called upon to settle issues ancillary to the basic question of liability for the conduct, are sometimes not so amorphous and are labeled rules of “contract” or rules of “tort.” When they offer one of the disputing parties a chance of an absolute defense, as do statutes of limitation, there is strong incentive to grab the rule and force a determination of whether it applies to the claim.

Although this issue will be discussed further in this Article, the general rule in West Virginia can be summed up as follows. Where an attorney causes loss to a client by failing to exercise the knowledge, skill, and ability ordinarily exercised by members of the legal profession, the attorney has committed the tort of legal malpractice, to which the tort statute of limitations applies. If the attorney makes a specific, express promise to perform a specific act or achieve a specific result, and then fails to do so, the resulting claim also can be characterized as a contract claim and the contract statute of limitations will apply to that claim. Otherwise, the attorney’s failure to perform her undertaking with the requisite knowledge and skill expected of those in the trade will create only a malpractice cause of action in tort. One of the results of this judicial policy is that the shorter tort statute of limitations will apply in most instances because attorneys are generally careful not to make an express promise to take a specific action or to achieve a specific result. Another result of this policy might mean

court stated:

We have been unable to find any accurate and perfect definition of a tort. Between actions plainly ex contractu and those clearly ex delicto there exists what has been termed a borderland, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical distinction somewhat difficult. A tort is described in general as a wrong independent of a contract. And yet, it is conceded that a tort may grow out of, or make a part of, or be coincident with, a contract, and that precisely the same set of facts, between the same parties, may admit of an action either ex contractu or ex delicto.

id. at 390.

58. Id.
59. Those express promises more commonly made by attorneys usually involve the more easily and clearly performable acts such as “I will file a lawsuit” and “I will deliver a title search to the bank by Friday.” It is also these kinds of promises that support suc-
that purely economic consequential losses resulting from the attorney's malpractice might not be recoverable. Finally, this policy means that the same occurrence can constitute both a contract breach and a tort, and each cause of action is governed by its respective statute of limitations.

2. Action for Breach of an Express Contract Promise

The Supreme Court of Appeals of West Virginia has on several occasions expressly stated that a legal malpractice action can lie in contract, but has apparently only once specifically found such a

cessful malpractice actions based upon express contract promises.

60. One real problem in holding that the attorney's breach of duty to use knowledge and skill common to the trade creates only a tort cause of action is the traditional rule that economic loss cannot be recovered in tort. This is not a statute of limitations issue but a generic negligent tort issue. It peculiarly arises in service contracts where usually no property damage or personal injury is at stake, but where the focus of the relationship between the parties is on business and economic affairs and economic loss is clearly foreseeable, unavoidable, and often capable of proof with sufficient certainty. These problems are generally dealt with by breach of contract law. But where negligent performance of implied contract duties in service contracts have been viewed as negligent malpractice torts, recovery of such economic losses has been problematic. For example, where a client hires an attorney to draft a contract and both parties know that a negligently drafted contract might cause the client to lose a business opportunity worth $100,000 in profits, it is only fair to compensate the client if the $100,000 is lost as a result of the attorney's negligent drafting of the contract. But in some jurisdictions, such purely economic losses are recoverable only in contract. Blanche M. Manning, Legal Malpractice: Is It Tort or Contract?, 21 LOY. U. CHI. L.J. 741 (1990) (discussing the problem in Illinois, a problem which may have been since settled by Collins v. Reynard, 607 N.E.2d 1105 (Ill. 1993)). If the client's malpractice action sounds only in tort, this can mean that the only possible loss is not recoverable.

West Virginia has traditionally held that where there has been no injury to person or property, economic loss is recoverable only in contract and not in tort. But the Supreme Court has apparently created an exception to this rule for malpractice, allowing liability in tort for purely economic loss in a string of cases beginning in the mid-1980s. See Bramer v. Taylor, 338 S.E.2d 207, 213 (W. Va. 1985); Wells v. Tennant, 375 S.E.2d 798, 802 (W. Va. 1988); First Nat'l Bank of Bluefield v. Crawford, 386 S.E.2d 310, 312 (W. Va. 1989) (adopting the Restatement position that a professional (here an accountant) is liable for pecuniary loss if he fails to exercise reasonable care or competence).


contract action to exist.\textsuperscript{63} Unfortunately, in holding that the client had a contract cause of action against his attorney in \textit{Harrison v. Casto},\textsuperscript{64} the court failed to reveal the underlying facts upon which it based the finding of the contract promise and resulting liability. In \textit{Harrison}, the client hired the defendant second attorney specifically to sue the first attorney for failing to bring suit against an airline for injuries. The second attorney failed to sue the first attorney before the tort statute of limitations had expired on the right to sue the first attorney, so the client sued the second attorney for malpractice in failing to timely bring the suit against the first attorney. In dismissing the case, the court held that “such malpractice action can be brought either on contract or in tort”\textsuperscript{65} and since the client’s “action on a breach of contract then survived against [the attorney]”\textsuperscript{66} the client had suffered no injury. In deciding that the client had a breach of contract malpractice claim against the first attorney (which therefore still survived) the court cited only facts underlying the client’s cause of action against the second attorney, not any facts related to the client’s cause of action against the first attorney. The failure or confusion may not be so meaningful in that both suits were based upon a similar basic occurrence, the hiring of an attorney to bring suit and the failure of the attorney to bring the suit. But as the following discussion shows, the specific language used by the attorney in the engagement agreement is now used by the court to determine whether the attorney made an express contract promise.

\textsuperscript{63} In at least two other West Virginia cases, both in federal court, the court might well have found an express contract promise was made and breached by the attorney. In Maryland Casualty Co. v. Price, Smith, Spilman & Clay, 224 F. 271 (S.D. W. Va. 1915), the attorney was directed to make an appearance and defend the client and failed to so appear. In stating that the total failure to defend the client might entitle the client to nominal damages, the court implied that there was a breach of contract. \textit{Id.} at 273. Otherwise there was no discussion of contract and the court used negligence language in its opinion. The case was dismissed because even nominal damages would not have satisfied the federal diversity jurisdictional requirements. In Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961), the attorney’s failure to timely file an appeal might possibly have been a breach of an express promise to the client’s agent to do so. This issue was not discussed and the case was dismissed on other grounds.

\textsuperscript{64} 271 S.E.2d 774 (W. Va. 1980).

\textsuperscript{65} \textit{Id.} at 776.

\textsuperscript{66} \textit{Id.}
Nevertheless, Harrison could be read to stand for the following two propositions: (1) where an attorney is engaged to bring suit against another, failure to bring suit constitutes a malpractice breach of contract, and, (2) where the complaint alleges that inaction of an attorney constitutes a breach of the contract of employment, a cause of action in contract is stated.67

But where there is no additional specific promise to perform a particular act or achieve a specific result, then many courts seem to view the breach not so much as a breach of contract promise, but a breach of a duty implied by law and imposed upon the attorney by the attorney-client relationship, not by the contract itself. These courts find this legal duty is best handled, at least as a malpractice issue, by tort law and therefore apply the tort statute of limitations where there is not also an independent contract cause of action based upon a specific contract promise.

In 1990, the Supreme Court of Appeals of West Virginia directly addressed this question in Hall v. Nichols.68 The plaintiff in Hall owned certain real property and gave a bank a lien on the property to finance a new building being built on the property. The plaintiff hired an attorney to prepare a certificate of title covering the property and deliver the certificate to the bank, and the attorney did so.69 It was later discovered that the title certificate failed to reveal an existing prior lien on the property. The existence of the prior lien created a dispute between plaintiff and the bank regarding the proceeds from the sale of the condominium units, causing a delay in the sale of those units. The bank then sued to enjoin the plaintiff from renting any of the condominium units, using the same attorney (who had prepared the title certificate for the plaintiff) to prepare and file the complaint. At this point, the plaintiff dismissed the attorney as its counsel and the attorney continued to represent the bank.70 Twenty-six months later,

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67. But, as the court subsequently indicated in Hall v. Nichols, the complaint must probably also allege that the attorney specifically promised to take the action which the attorney failed to take. Hall v. Nichols, 400 S.E.2d 901, 904 (W. Va. 1990).
68. 400 S.E.2d 901 (W. Va. 1990).
69. The attorney was also retained to provide legal counsel concerning the development, to help with several other loan transactions, and to represent client at the loan closing. Id. at 903.
70. The lawsuit forced the plaintiff into bankruptcy and the bank eventually foreclosed.
the plaintiff sued the attorney for malpractice based upon the failure to discover the prior lien during preparation of the certificate of title, for negligently failing to have a survey performed in connection with the title search (which evidently would have somehow revealed the problem),\textsuperscript{71} and for improperly representing the bank against the plaintiff in the same matter.\textsuperscript{72} The attorney successfully raised the tort statute of limitations as a defense and was granted a summary judgment. On appeal the client argued that his complaint had stated a contract claim in addition to tort.

While acknowledging that a legal malpractice action may sound in tort and in contract,\textsuperscript{73} the court focused on the basic agreement of the parties, the nature of the attorney's failure, and the language in the complaint. Apparently having little beyond the facts alleged in the complaint upon which to base its decision, the court focused on the essential complaint language:

\begin{quote}
The foregoing conduct of the defendant \ldots was willful, wanton, and gross negligence, in reckless disregard of the rights of the plaintiffs and in violation of his contractual, fiduciary and ethical obligations to the plaintiffs as his clients.\textsuperscript{74}
\end{quote}

The court found that "[n]otwithstanding the inclusion of the term 'contractual' in the amended complaint, the essence of the appellant's cause of action is various breaches of duties imposed by law and not by contract."\textsuperscript{75} The court emphasized that there was no evidence that the attorney made any specific promise to the plaintiff that he would conduct the title search in any particular manner, or that he would hire a surveyor to survey the property, or that he would refrain from repre-

\textsuperscript{71} The opinion does not reveal how a survey during the title search would have caused discovery of the problem. \textit{See} Hall v. Nichols, 400 S.E.2d 901, 903 (W. Va. 1990).

\textsuperscript{72} Importantly, the court did not mention laches, or the possible inapplicability of any statute of limitations to the equitable ramifications of the alleged breach of fiduciary duty. \textit{See infra} notes 106-07 (discussing laches and Rodgers v. Rodgers).

\textsuperscript{73} Hall, 400 S.E.2d at 903.

\textsuperscript{74} Id. at 903.

\textsuperscript{75} Id. at 904 (emphasis supplied by the court).
senting the bank in any related lawsuits. The court then stated its holding:

Only when the breach pertains specifically to the "terms of the contract without any reference to the duties imposed by law upon the [attorney/client] relationship . . ." is the cause of action contractual in nature.  

The court's statement in syllabus point 2 of the case uses slightly different wording:

Where the act complained of in a legal malpractice action is a breach of specific terms of the contract without reference to the legal duties imposed by law on the attorney/client relationship, the action is contractual in nature. Where the essential claim of the action is a breach of duty imposed by law on the attorney/client relationship and not of the contract itself, the action lies in tort.  

Concluding its discussion, the court held that because the complaint contained no allegations regarding a breach of the "obligations of [the attorney's] employment as counsel" and because "the claims at issue are grounded in tort since they arise as breaches of [the attorney's] duty to perform legal services in a non-negligent fashion—duties which are implied by law—we conclude . . . that the tort statute of limitations controls."  

But although the court states that the complaint contained no allegations of breach of the obligations of the attorney's employment as counsel, in fact the complaint did, at least in general terms. The plaintiff alleged that the attorney's actions were "in violation of his [the attorney's] contractual . . . obligations." Therefore, the court must have meant that there were no allegations regarding a breach of specific promises made by the attorney to the client as part of their employment contract. It is this lack of a contract promise to do a

76. Id. at 904 (quoting Pancake House, Inc. v. Redman, 716 P.2d 575, 578 (Kan. 1986)) (alteration in original).
77. Id. at 902.
78. Id. at 904.
79. Id. at 903.
80. The court also uses puzzling language in its dismissal of the client's second cause
specific thing (that which was not done) that apparently leads the court to find the duty arises by law and not out of the contract, and is therefore an action in tort, not contract.

3. Determining Whether a Specific Contract Promise Has Been Made (And Breached)

This of course focuses on a main question addressed in this Article: which kind of promise will be specific enough to raise a contract cause of action invoking the contract statute of limitations of five or ten years? The Supreme Court of Appeals of West Virginia apparently found that such a promise was made in Harrison v. Casto when the attorney agreed to bring suit for the client and then failed to do so. But in Harrison we are left to guess whether the attorney specifically promised to bring the lawsuit because we do not have knowledge of the underlying facts (nor did the court by all indications).

It is likely that if the court follows its rule in Hall, it will require evidence that the attorney specifically promised to perform the specific act and that the attorney either took no steps to perform the act or failed to complete the technical steps of the act. If the promised act was technically completed, even if completed in a grossly negligent manner, there would be no breach of contract, merely a negligent performance of the contract giving rise to a negligence malpractice action in tort.

of action. The attorney allegedly improperly represented the bank in a suit against the client in the same matter in which the attorney was representing the client. The court stated this cause of action “concerns [the attorney’s] negligence” in representing the bank in its suit against the client. Id. at 905. In fact, the client’s claim stated that the attorney “improperly represented the National Bank” and later “in violation of his . . . fiduciary and ethical obligations” seem to be clear allegations of the attorney’s breach of fiduciary obligations, actions which are quite different from professional negligence. It is also puzzling why the court did not discuss why the alleged breach of fiduciary duties in this case did not invoke laches instead of statutes of limitation, especially coming only one month after it so held in Rodgers v. Rodgers. See infra notes 106-07 and accompanying text. Although in Harrison, the attorney’s clear breach of fiduciary duty most likely did not cause the loss complained of, it might have supported a finding of punitive damages.

81. See discussion supra text accompanying notes 58-59.

82. And the court might also require that the specific promise was made as part of the employment contract, so that it could be viewed as a contract promise.
In other states, courts have found a variety of contract promises to have created contract causes of action, therefore calling for the application of the contract statute of limitations. But a good many courts have held in similar situations that no malpractice contract cause of action arose, and therefore some other statute of limitations, usually tort, applied to the malpractice lawsuit.  

4. Other Factors Considered by Courts in Determining Whether the Contract or Tort Statute of Limitations Applies

The nature of the injury has also been important in determining whether a contract cause of action arose. Courts have held that personal injury or property damage is best covered by tort law as the rules of contract law are not well suited to govern the rights and responsibilities of the parties, and actions for such injuries are covered by tort and not contract statutes of limitations. The West Virginia Supreme Court has so held in a recent case not involving professional malpractice, stating:

Where a person suffers personal injury as a result of a defective product and seeks to recover damages for these personal injuries based on a breach of an express or implied warranty, the applicable statute of limitations is the two year provisions [in tort] contained in W. Va. Code, 55-2-12 (1959), rather than the four year [contract] provision contained in our Uniform Commercial Code, . . . 46-2-725.

The court applied the two-year tort statute despite the fact that the underlying transaction was clearly a transaction covered by the Uniform Commercial Code in that there was a breach of warranty in a defective purchased automobile.

86. The claim was based upon a defective purchased automobile, and was therefore a transaction in goods covered by Article 2 of the Uniform Commercial Code. W. VA. CODE §§ 46-2-102, 46-2-105 (1966).
contract for the sale of goods therefore encompassing a cause of action under the Uniform Commercial Code. 87

In determining whether the complaint sounds in tort or contract, the court will also be influenced by the type of damages requested. Where the complaint asks for punitive damages, the court is more likely to view the action as tort, as punitives are rarely recoverable in contract. 88

The court will also look at the specific allegations contained in the complaint to determine whether a cause of action lies in contract or in tort. In Family Savings & Loan, Inc. v. Ciccarello, 89 the complaint charged that the attorney "negligently, carelessly, and unskillfully conducted his title examination . . . and did not use proper diligence." 90 Although the court found the complaint implied that a contract was made, "there was no express charge of breach of contract or any further references to the contract in the complaint." 91 The court held that the very basis for the action was the charge of negligence against the attorney and sounded exclusively in tort. The court pointed out that the plaintiff could have chosen an action in tort or contract, but chose to allege tort. Therefore, the tort statute of limitations applied under section 55-2-12(c) of the West Virginia Code, and the malpractice suit was time-barred. 92

87. See W. Va. Code §§ 46-2-314 & 46-2-315 (1966) (creating implied warranties), § 46A-2-107 (making these warranties non-disclaimable in consumer transactions), §§ 46-2-711 & 46-2-715 (making the seller liable for personal injuries arising out of breach of the contract), and § 46-2-725 (providing that the statute of limitations for a breach of warranty under the U.C.C. is four years).
88. See Hillhouse v. McDowell, 410 S.W.2d 162 (Tenn. 1966); Bland v. Smith, 277 S.W.2d 377 (Tenn. 1954).
89. 207 S.E.2d 157 (W. Va. 1974).
90. Id. at 160.
91. Id.
92. For a discussion of the liberal rule allowing amendment of pleadings to assert the statute of limitations during or even after the trial is over, see Nellas v. Loucas, 191 S.E.2d 160 (W. Va. 1972). The court did not address amending the complaint to assert a new cause of action, but amending an answer to assert the affirmative defense of the statute of limitations.
5. Where the Action Lies in Contract, Determining the Proper Period

Where a cause of action in contract is found, the court will apply the five-year period of section 55-2-6 if the contract was oral, or written and not signed, and the ten-year period if it is written and signed or made under seal.93 If the contract is written and signed but the specific promise that is breached is an oral promise, it is not clear whether the five-year or ten-year statutory period applies.94

C. Torts

The West Virginia Supreme Court recently held that “[a]n attorney who undertakes to perform professional services for a client is required to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.”95 It went on to quote with favor an earlier test for actionable legal malpractice: “In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney’s employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.”96

When the malpractice is grounded in tort, the tort limitation period applies.97 The court then has to determine whether the two-year or one-year limitation period of section 55-2-12 applies. In Hall, the court referred favorably to the Harrison court’s “determination that the nature of the underlying tort—personal damages or property damages—should be the controlling factor when resolving this issue . . . .”98

94. See Schmulbach v. Williams, 120 S.E. 600 (W. Va. 1900).
96. Id. (citing Maryland Casualty Co. v. Price, 231 F. 397, 401 (4th Cir. 1916)).
98. Id. at 905.
Then, in an interesting use of the term “property damages,” the court held that the underlying tort action in Hall involved property damage “given the obvious diminution of the value of the condominium complex which resulted from appellant’s inability to sell certain units once the lien dispute arose.” Accordingly, the court found the action controlled by the two-year period set forth for personal injury or property damage.\(^\text{100}\)

This expressly overruled the court’s previous decision in Family Savings, where the attorney’s title certificate did not reveal the subject property was subject to a prior deed stipulation requiring the removal of all structures on the property, thus making the property less valuable as security for the plaintiff bank’s loan. In Family Savings, the court held, “Insomuch as the damages alleged to have been suffered in this case cannot be characterized as personal injuries or property damages, it follows that the action falls into the second category [not bringable after death by the injured party’s representative at common law].”\(^\text{101}\) The Family Savings court did not examine the question of whether the action was one which could not have been brought after the death of an injured party.

D. Laches

Courts traditionally held that the statute of limitations did not apply to actions in courts of equity, but that time considerations were governed by the equitable doctrine of laches.\(^\text{102}\) Over time, as courts

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99. Id.

100. Id. The court specifically noted that its decision was overruling its decision in Family Savings & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W. Va. 1974), which held that a negligently prepared title certificate which drastically reduced the value of the realty was governed by the one-year period set forth in the same statute.


102. Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived her right. The basis for laches presupposes the want of diligence and activity by a party litigant, which has wrought a change of position by, or disadvantage to, his adversary. But this lack of activity and diligence does not affect the rights of a party, when such party had no reason to be aware of facts establishing his rights. Bank of Mill Creek v. Elkhorn Coal Corp., 57 S.E.2d 736, 746 (W. Va. 1950); Baker v. Shofield, 243 U.S. 114, 121
of law and legislatures created more and more legal causes of actions, litigants began to pursue equitable remedies for claims which were basically legal and not equitable actions. The result was overlapping jurisdiction of courts of law and courts of equity. As courts of equity began to hear more claims based upon legal causes of action, they began to apply the usual statutes of limitations to these equity cases, first by analogy, and then directly. West Virginia courts have consistently applied statutes of limitations to equitable actions which are based upon legal claims.103

Yet the courts continually held onto the rule that statutes of limitations did not apply to purely equitable causes of actions. Although the distinction between courts of law and courts of equity has been abolished in West Virginia,104 the distinction remains, at least as to the application of statutes of limitations and laches.105 In Rodgers v. Rodgers,106 an attorney represented his parents in their legal affairs during their lifetime, and upon their deaths acted as attorney for their estates. In this role, the attorney approved an appraisal of the estate which did not list shares of stock which had been treated by his deceased parents as their own property for many years, but which turned out had been originally purchased by the parents in the names of the attorney and the attorney’s sister. The administrator of the estate sued the attorney, alleging conversion of stock and asking the court to order the stock returned to the estate. When the attorney asserted the statute of limitations as a defense, the court found that the timeliness of the

(1917); see Harrison v. Miller, 21 S.E.2d 674 (W. Va. 1942).


103. Bank of Mill Creek, 57 S.E.2d at 748-49.
105. “The fact that Rule 2 of our Rules of Civil Procedure states that ‘all procedural distinctions between actions, suits and other judicial proceedings at law or in equity and in the forms of action are abolished’ does not mean the distinction between our various statutes of limitations and the equitable doctrine of laches are also abolished.” Laurie v. Thomas, 294 S.E.2d 78, syl. pt. 2 (W. Va. 1982)
action was not governed by any statute of limitations, but was instead governed by the equitable doctrine of laches. In so holding, the court emphasized that as attorney for his parents and for his parents estate, the attorney was in the highest fiduciary position, and therefore the challenged actions bore substantial equitable overtones. The claim was therefore a purely equitable action controlled by laches and not by the statute of limitations. The court stated its rule as:

Statute of limitations are not applicable in equity to subjects of exclusively equitable cognizance. Matters pertaining to fiduciary relationships come within this rule.\(^\text{107}\)

It must be pointed out that the court in *Rodgers* did not use the word "malpractice," nor did it speak in terms of attorney misconduct. Instead it spoke in terms of fiduciary relationships and fiduciary obligations. Although the court would have clearly reached the same result had the defendant been a nonattorney fiduciary of this estate, the court stressed that it was the defendant's role as attorney for the decedents and attorney for the decedents' estates that created the fiduciary relationship, the breach of which gave rise to a purely equitable claim and not a legal claim subject to the statute of limitations. This decision is precedent for holding that breaches of fiduciary duties will invoke laches in West Virginia. It must be kept in mind however that the plaintiff in *Rodgers* was also requesting an equitable remedy in the form of reconveyance of stocks to the estate. If the lawsuit was based upon some other breach of fiduciary duty and was requesting an award of monetary damages, it might not be so easily predicted that the court would reject possible statutes of limitations and apply laches instead.

In *Bank of Mill Creek v. Elkhorn Coal Corp.*,\(^\text{108}\) shareholders of a corporation in receivership brought a shareholder derivative suit against attorneys of the receiver for reconveyance of collateral held by the corporation but sold to the attorneys at a receivers sale. The court,

\(^{107}\) *Id.* at 670 (quoting *Felsenheld v. Block Bros. Tobacco Co.*, 192 S.E. 545 (W. Va. 1937)); see also Annotation, Statute of Limitations in Stockholder's Derivative Suit Against Director or Officer, 123 A.L.R. 346 (1937).

\(^{108}\) 57 S.E.2d 736 (W. Va. 1950). In *Mill Creek*, the court did not discuss the possibility of applying a statute of limitations.
emphasizing that the attorney-client relationship is of the highest fiduciary nature, held that laches was not available as a defense to a breach of the attorney-client confidence unless it was plainly apparent therefrom, and that laches was not regarded with favor in a suit between parties in a confidential relationship.\textsuperscript{109}

\section*{IV. CONCLUSION}

The Supreme Court of Appeals of West Virginia has adopted a clear rule providing that an attorney’s failure to use the knowledge and skill common to the trade in performing his undertakings for the client will be covered by the tort statute of limitations, and the two-year period contained in that statute will apply at least to negligence relating to real property title certificates. The longer contracts statute of limitations will apply only where the client can show that the attorney specifically promised to perform a particular act which was not performed or to achieve a specific result which was not achieved, and even then maybe only if the specific promise was part of the attorney’s contractual undertaking. Because attorneys are very unlikely to promise specific results, the application of the contract statute of limitations will likely be limited to attorney promises to produce and deliver certain documents by a stated date, such as promises to file a lawsuit, file an appeal, prepare and deliver a contract or articles of incorporation, and like matters. The more commonly occurring malpractice, that which occurs when an attorney technically carries out the specifically requested task, but just carries it out in a negligent or ineffective way, will likely be left to the shorter tort statute of limitations.

This is not particularly undesirable. What is important in the application of a statute of limitations to attorney malpractice, no matter which statute is applied, is to (1) prevent the statute from expiring before the client knows, or has reason to know, of the injury, (2) prevent the statute from running while the client is still under the influence of the attorney or is waiting for the attorney to solve the problem that has been created by the attorney’s malpractice, and

\textsuperscript{109} \textit{Id.} at 747.
(3) provide a cause of action which allows recovery for the kinds of losses (generally economic) which would naturally arise out of the attorney-client relationship.\textsuperscript{110}

West Virginia seems to have solved the first problem by adopting the discovery rule.\textsuperscript{111} The string of cases on point include tolling the statute on conversion of underground coal from a mine located on adjacent property until the coal owner had occasion to discover the coal was missing,\textsuperscript{112} tolling the statute on leaving a sponge in a patient's abdomen until the patient had reason to discover its presence,\textsuperscript{113} and tolling the statute for negligently failing to refer to a severely limiting deed restriction in a title certificate until the client had reason to learn of the deed restriction.\textsuperscript{114} In these cases, the West Virginia Supreme Court has ensured that the statute of limitations will not run before the claimant has reason to know of the injury.

The second problem should be solved by adopting the continuous representation rule. This rule delays the running of the statute as long

\begin{itemize}
\item \textsuperscript{110} In a thoughtful article on statutes of limitations and attorney malpractice, Koffler identifies the aspects of the application of statutes of limitations to attorney malpractice that are particularly unfair and unjust, and proposes the adoption of the following rules (summarized):
\begin{enumerate}
\item The defendant attorney has the burden of proving by clear and convincing evidence, that the plaintiff former client knew or had reason to know, taking into account plaintiff former client's intelligence, education, and experience:
\begin{enumerate}
\item The existence of facts supporting each and every element of the cause of action including damage, and
\item that the attorney's representation in the particular matter was terminated.
\end{enumerate}
\item Where the plaintiff former client was also negligent, comparative negligence should apply.
\item Both tort and contract causes of actions should lie where appropriate, each with its respective statute of limitations.
\item The tort statute of limitation should be three years but not less than two years.
\item In no event shall the statute of limitations expire until one year after all of the above facts come into being.
\end{enumerate}

\item \textsuperscript{111} But see the question raised in Cart v. Marcum, supra note 27.
\item \textsuperscript{112} Petrelli v. West Virginia-Pittsburgh Coal Co., 104 S.E. 103 (W. Va. 1920).
\item \textsuperscript{113} Morgan v. Grace Hosp., Inc., 144 S.E.2d 156 (W. Va. 1965).
\item \textsuperscript{114} Family Savings & Loan, Inc. v. Ciccarello, 207 S.E.2d 157 (W. Va. 1974).
\end{itemize}
as the malpracticing attorney is representing the claimant, and thereby both leading the client to believe that there is no problem or that the attorney is taking care of the problem, or influencing the client through embarrassment, intimidation, or even fear to not seek redress for the injury. There are indications that the West Virginia Supreme Court will apply this rule to legal malpractice at the appropriate opportunity.

The West Virginia Supreme Court seems to be well on its way to solving the third problem by allowing the recovery of economic losses under a tort cause of action in service contracts.115

The court does need to clarify its position on whether breaches of fiduciary duties, including conflicts of interests, revealing confidential information, and other actions which are particularly susceptible to attorney misconduct, are governed by statutes of limitations or by laches. The court indicated that they are covered by laches in the Rodgers case, but obfuscated the matter by not characterizing the conduct as legal malpractice, but simply wrongful conduct by a fiduciary. They had a chance to clarify the position in the Hall case where the attorney represented both the plaintiff and the adverse party in the same matter, but did not raise the issue, and dismissed the allegations of conflict of interest in Hall as simply attorney negligence.

115. See discussion supra note 60.