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Callahan v. Gibson, Dunn & Crutcher LLP: Court of Appeal Reverses Summary Judgment in Favor of Law Firm Based on Statute of Limitations “Actual Injury” Issue

April 25th, 2011 by [Mark Hancock](#)

In a [published decision](#), the California Court of Appeal (Second Appellate District, Division Seven) has reversed a summary judgment obtained by a defendant law firm after concluding that the trial court had erred in its application of the “actual injury” provision of the one-year legal malpractice statute of limitations. The decision is *Callahan v. Gibson, Dunn & Crutcher LLP*, 2011 Cal. App. LEXIS 451, filed April 19, 2011.

The firm had prepared a limited partnership agreement for the plaintiff realty company which contained allegedly defective succession and termination provisions. More particularly, the agreement allegedly omitted any method for replacement of the general partners if they became incompetent or retired.

In California, a cause of action for legal malpractice must be filed “within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” (§ 340.6(a).) However, section 340.6(a) further provides, “[I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury”

The Court of Appeal identified the key issue as “whether in October 1988 the allegedly defective succession provisions in the partnership agreement caused an actual, existing injury that might be remedied or reduced in the future (for example, by amending the partnership agreement while both general partners were still alive) or a speculative or contingent injury that might or might not arise in the future. (See [*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998), 18 Cal.4th 739,] at 754 [“speculative and contingent injuries are those that do not yet exist, as when an attorney’s error creates only a potential for harm in the future”].)

The law firm contended that actual injury occurred when the allegedly defective limited partnership was signed in 1988. However, the Court of Appeal held that actual injury occurred later than that, either when the sole general partner’s disability triggered the dissolution provisions in the agreement or when the limited partnership incurred legal fees to respond to a third party’s attempts to terminate the partnership.

On the issue of legal fees, the Court of Appeal rejected the firm’s argument that its fee charged for preparing the allegedly defective partnership agreement constituted actual injury. The firm asserted

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that there was actual injury because "as a result of the firm's alleged negligence, the fees exceeded the value of the legal services provided." However, the court concluded that there was no California appellate authority to support this position.