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Continuous Representation Doctrine

Why Minnesota Should Say No

By Matthew Sloneker and Paul Peterson

A 2013 order in Hennepin County District Court revived calls for the state to adopt a continuous representation standard for legal malpractice akin to the continuing treatment standard that applies to medical malpractice in Minnesota. But a comparison of our law to that of states that embrace continuous representation suggests it would be a bad policy choice.

The statute of limitations for a legal malpractice claim in Minnesota is six years.[1] When the statute of limitations begins to run, however, has been the subject of some debate. In the last decade, the Minnesota Supreme Court has ruled that the limitations period for a legal malpractice claim begins to run when a plaintiff can allege facts sufficient to survive a motion to dismiss. Such a cause of action can survive a motion to dismiss when "some damage" has occurred as the result of the alleged malpractice. As such, legal malpractice claims are generally understood to accrue when a plaintiff has sustained some damage as the result of the attorney's negligence.

In recent years, attempts have been made to alter this bright line rule through the continuous representation doctrine, which would either toll the statute of limitations or defer the accrual of the cause of action while the attorney continues to represent the client and the representation relates to the same transaction or subject matter as the allegedly negligent acts. Bolstered by a 2013 order in Hennepin County District Court, proponents of the continuous representation doctrine argue that it should be adopted in Minnesota just as the similar continuing treatment doctrine has been adopted in medical malpractice actions in this state. However, the doctrine has not yet been adopted by any published decision of the Minnesota appellate courts, and a recent unpublished decision of the Minnesota Court of Appeals suggests that it should not be applied in most cases.

The "Some Damage" Rule

Since at least the 1970s, Minnesota courts have often held that a cause of action for legal malpractice accrues when an attorney's negligence results in damage sufficient for the client's claim to survive a motion to dismiss for failure to state a claim upon which relief can be granted. In *Grimm v. O'Connor*, for example, the clients' cause of action against their attorney accrued when they signed a contract for deed that did not include an interest escalation provision.[2] Likewise, in *Sabes & Richman, Inc. v. Muenzer*, the statute of limitations began to run when an attorney's negligent failure to include a copyright notice when a competitor first began printing substantially similar brochures, not when the client lost its subsequent infringement action against the competitor.[3] These decisions and many others clearly established that the damage rule of accrual applied to legal malpractice cases in Minnesota.[4]

In *Herrmann v. McMenomy & Severson*, the Minnesota Supreme Court reiterated that a cause of action for legal malpractice accrues, and the statute of limitations begins to run, when the plaintiff has sustained some damage sufficient to survive a motion to dismiss for failure to state a claim upon which relief can be granted.[5] The Court rejected the notion that the running of the statute depends on the plaintiff's ability to ascertain the exact amount of damages. Specifically rejecting the "discovery" rule of accrual, the Court held that the running of the statute is not tolled by the plaintiff's ignorance of his cause of action in the absence of fraudulent concealment.

Rejection of Alternatives

In *Antone v. Mirviss*, the Minnesota Supreme Court reaffirmed Minnesota's adherence to the damage rule of accrual in legal malpractice cases, specifically considering and rejecting alternative rules of accrual.[6] In *Antone*, the plaintiff claimed his attorney was negligent in drafting an antenuptial agreement that failed to protect the plaintiff's interest in any marital appreciation of premarital property. The district court dismissed the complaint because the plaintiff signed the agreement, got married, and the premarital property appreciated more than six years before he commenced suit. The Minnesota Court of Appeals reversed, however, finding that the cause of action did not accrue until the plaintiff's wife was awarded a portion of the marital appreciation of the plaintiff's premarital property in the dissolution proceeding, which occurred less than six years before the action was commenced.

The Supreme Court analyzed the three rules of accrual applied in legal malpractice actions across the country. Under the restrictive "occurrence" rule, damage is essentially assumed and the statute of limitations begins to run at the time the negligent act or omission occurs. However, most jurisdictions have abandoned this rule of accrual, because it "encourages speculative litigation that can involve the client, the attorney and the courts in wasteful economic behavior." Because Minnesota has long adhered to the rule that damages are required before a cause of action for legal malpractice accrues, the Court rejected the occurrence rule of accrual. *Antone* also considered and rejected the plaintiff-friendly "discovery" rule, under which a cause of action accrues only when a plaintiff knows or should know of the injury, because it could lead to open-ended liability. Instead, *Antone* strengthened Minnesota's adherence to the damage rule of accrual by holding that the statute of limitations begins to run on the occurrence of *any* compensable damage, whether identified in the complaint or not.

The Court in *Antone* held that the plaintiff passed the point of no return when he got married and his wife's entitlement to marital appreciation of the premarital property was established. The plaintiff's cause of action therefore accrued on the date he was married, and his claims against the attorney were time-barred.

Cases Considering the Doctrine

In an effort to save claims otherwise time-barred by the damage rule of accrual, plaintiffs have attempted to gain acceptance for the continuous representation doctrine in Minnesota, albeit without much success. This doctrine, which would either toll the statute of limitations or defer the accrual of a claim while the attorney continues to represent the client

in the same transaction or subject matter, has been mentioned in precious few appellate cases in Minnesota and analyzed in even fewer. While a few unpublished appellate decisions approved of the application of the doctrine, most rejected it as inconsistent with the damage rule of accrual followed in Minnesota.

Two published Minnesota cases have applied at least a variation of the continuous representation doctrine. In *Bonhiver v. Graff*, the Minnesota Supreme Court used the date of the last act of negligence as the accrual date for the plaintiff's cause of action, since the negligence was ongoing throughout the course of the representation.[7] Similarly, in *May v. First National Bank*, the Court of Appeals could not determine the specific date of the defendant's last act of negligence, so it used the date of the end of the representation to determine when the claim for legal malpractice accrued.[8]

In *Anoka Orthopedic Assocs., P.A. v. Mutschler*, the court noted that, while "no Minnesota court ha[d] explicitly adopted the continuous representation doctrine," both *Bonhiver* and *May* had reached the same result that would have been reached had the doctrine been explicitly applied.[9] The federal district court in *Anoka Orthopedic* followed suit, finding fact questions on the accrual date of a legal malpractice claim due to ongoing representation and damage, and possible fraudulent concealment. However, these cases were all decided before *Antone* held that a claim for legal malpractice accrues when a plaintiff has sustained *any* compensable damage.

An unpublished Minnesota case decided the year after *Anoka Orthopedic* vaguely approves of the continuous representation doctrine, though it also pre-dates *Antone*. In *Schuster v. Magee*, the Court of Appeals reversed the trial court's dismissal of the plaintiff's legal malpractice claim on statute of limitations grounds, holding that "the trial court improperly resolved whether a genuine issue of material fact exists as to whether" the plaintiff knew of the attorney's alleged negligence.[10] The court also suggested, without any discussion or analysis, that the trial court had properly applied the continuous representation doctrine. In support of that statement, the court cited only *Wall v. Lewis*, a North Dakota case on continuous representation in legal malpractice cases, and *Swang v. Hauser*, a Minnesota case on the "continuing treatment" rule in medical malpractice jurisprudence.[11]

Any support the unpublished *Schuster* decision lends to the application of the continuous representation doctrine in Minnesota is dubious at best. First, *Schuster* reversed the district court's dismissal on statute of limitations grounds because it found fact questions as to whether the plaintiff knew of his attorney's negligence. The court was ostensibly applying the discovery rule of accrual, which was soundly rejected years later in *Antone*. The *Schuster* court merely cited *Wall*, and no Minnesota law, for the proposition that the continuous representation doctrine applies to legal malpractice claims in Minnesota. As set forth below, whether the rationale for the continuous representation doctrine in North Dakota applies with equal force in Minnesota has been called into question in more recent decisions, and the "continuing treatment" rule described in *Swang* is not necessarily the analogue of the continuous representation doctrine, despite *Schuster*'s suggestion to the contrary. Because *Schuster* applied the since-rejected discovery rule of accrual, its usefulness as support for the application of the continuous representation doctrine in Minnesota is suspect.

Despite these cases either noting approval of the continuous representation doctrine in legal malpractice cases, or at least applying its principles, the majority of the Minnesota courts to consider the doctrine's application in legal malpractice actions have rejected it. Even before *Antone*, Minnesota courts were wary of adopting the continuous representation doctrine. In *Fletcher v. Zellmer*, the court declined to apply the continuous representation doctrine, because its review of Minnesota appellate cases revealed that "the continuous representation doctrine is not controlling in all legal malpractice cases."[12] Because the facts of *Fletcher* established a clear date on which the plaintiffs incurred damage, the court declined to apply the doctrine in that case.

Similarly, in *Reid Enters., Inc. v. Deloitte & Touche, L.L.P.*, the Court of Appeals noted that "Minnesota has not yet recognized the tolling of the limitations statute by 'continuous representation' in situations such as this."[13] The court also found that the continuous representation doctrine is a companion of the discovery rule of accrual, which was rejected a year earlier in *Herrmann* (and later in *Antone*). Instead, *Reid Enterprises* held that "[t]he law in Minnesota is that a cause of action accrues for limitations purposes when it would first survive a dismissal motion, not at the end of a continuous representation."

Fletcher and *Reid Enterprises* are by no means anomalies. Several additional cases–both before and after *Antone*–have either explicitly rejected or failed to endorse the continuous representation doctrine in legal malpractice cases.[14]

Opposite Conclusions

Despite the generally unfavorable view of the continuous representation doctrine taken by Minnesota's appellate courts, attempts to gain recognition for the doctrine at the district court level continue. In a recent case before the Honorable Philip D. Bush in Hennepin County District Court, *Gapinski v. Gray, Plant, Mooty, Mooty & Bennett, P.A., et al.,* the plaintiff alleged that her attorney was negligent in several respects in 2006, in connection with the plaintiff's divorce proceedings.[15] The plaintiff did not commence suit against the attorney until 2013, but argued that the statute of limitations was tolled while the attorney continued to represent her in the dissolution proceedings. The court concluded that there was no binding precedent on the issue of the continuous representation doctrine's applicability in Minnesota, and cited *Reid Enterprises* and *Schuster* to suggest that "the unpublished decisions cut both ways."

Based on three conclusions, the court rejected the argument that the continuous representation doctrine is a companion of the discovery rule of accrual and therefore inconsistent with the damages rule of accrual, as the Court of Appeals held in *Reid Enterprises*. First, the court noted that jurisdictions like Connecticut, New York, and South Dakota apply the continuous representation doctrine but do not follow the discovery rule of accrual. Second, the court concluded that the doctrine is not incompatible with the "damages" rule of accrual, because it does not change the date of accrual but merely tolls the limitations period during the pendency of representation. Finally, the court cited cases suggesting that the reasons for applying the continuing representation doctrine have the least weight in jurisdictions where the discovery rule of accrual is followed.

Finding no binding precedent, the court held "on its own accord, that the continuous representation doctrine applies in Minnesota."[16] In support of this holding, the court noted that medical malpractice cases apply the analogue of the continuous representation doctrine: the continuing course of treatment doctrine. The court found that the continuous representation doctrine is the majority rule, and that *Schuster* was more persuasive than *Reid Enterprises* because the latter unpersuasively characterized the doctrine as a companion of the discovery rule of accrual.

Only four months after Judge Bush concluded that the continuous representation doctrine applies in Minnesota, the Honorable John B. Van De North, Jr. reached the opposite

conclusion in *Carlson v. Houk*.[17] In *Carlson*, the court declined to apply the continuous representation doctrine, noting that it "has not been embraced in any binding Minnesota state court decision." In addition, the Court set forth reasons why the continuous representation doctrine is not the analogue of the continuing treatment doctrine. First, the court concluded that legal and medical malpractice cases differ with respect to a plaintiff's ability to discern the triggering damage-causing events. In the medical malpractice context, the accrual trigger has long been recognized as the last day of treatment, because it is difficult for a patient to determine what specific negligence of a doctor may have caused an injury while still actively receiving treatment. In a legal malpractice action, on the other hand, the court noted that it is typically easier to ascertain specific acts causing damage. For these reasons, the court found that "well-developed case law and good policy supports application of the continuous treatment rule in medical malpractice cases but rejection of the continuous representation rule in legal malpractice cases."

On November 17, 2014, the Court of Appeals affirmed Judge Van De North's order in *Carlson*.[18] After reviewing the relevant Minnesota case law concerning the continuous representation doctrine, the court concluded that "[n]o published case in Minnesota has ever explicitly applied the continuous-representation doctrine to toll the statute of limitations in a legal-malpractice lawsuit." *Carlson* also discussed several policy reasons "that may explain why Minnesota has remained among the states that have not adopted the doctrine."

First, the court noted that the doctrine developed in medical malpractice cases, where the applicable limitations period (two years until 1999, then four years thereafter) is much shorter than the six-year statute of limitations for legal malpractice claims.[19] The court reasoned that the longer statute of limitations in legal malpractice cases in Minnesota already affords sufficient protection to clients, whereas other states that have adopted the doctrine have shorter limitations periods. *Carlson* also noted that the adoption of the continuous representation doctrine would have the potential to undermine the purpose of the statute of limitations by extending the already lengthy period a plaintiff has to bring suit. Finally, *Carlson* rejected the notion that the doctrine should be adopted because it is the analogue to the continuing treatment doctrine in the medical malpractice context.

Importantly, however, *Carlson* left the door open for the future application of the doctrine based on the specific facts of a legal malpractice case. Citing *Anoka Orthopedic*, *May*, and *Bonhiver*, the court suggested that "Minnesota courts may apply the continuous-representation doctrine equitably—without contradicting the current Minnesota some-damage accrual rule—by using the end-of-representation date as the accrual date in rare situations where no other accrual date is available."[20] Though the Minnesota Supreme Court has yet to weigh in on the doctrine of continuous representation since *Antone*, *Carlson* suggests that it will apply in cases in which distinct accrual dates for legal malpractice claims cannot be determined.

Public Policy Considerations

Antone and *McMenomy* indicate that a legal malpractice cause of action accrues when *any* damage occurs that would enable a plaintiff to survive a motion to dismiss for failure to state a claim upon which relief can be granted. Neither *Antone* nor any other Minnesota Supreme Court decisions even mention the continuous representation doctrine. Before the unpublished decision in *Carlson*, the few Minnesota Court of Appeals cases that mention the doctrine failed to analyze it in any detail. There remains no binding precedent in Minnesota either requiring or prohibiting the application of the doctrine in legal malpractice cases.

Cases from other jurisdictions that have adopted the continuous representation doctrine suggest the reasons it may not be suitable in Minnesota. In *Wall v. Lewis*, a case cited favorably in both *Schuster* and *Gapinski*, the North Dakota Supreme Court adopted the continuous representation doctrine because it "protects the integrity of the attorney-client relationship and affords the attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay."[21] But North Dakota follows the discovery rule of accrual, under which the statute of limitations commences to run when the plaintiff knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence. The North Dakota Supreme Court was obviously concerned with the prospect of an attorney delaying a client's discovery of malpractice during continuing representation, particularly given North Dakota's short two-year statute of limitations for legal malpractice actions.[22]

Under the damage rule of accrual followed in Minnesota, however, a client's discovery of the malpractice is irrelevant. Furthermore, fraudulent concealment already tolls the statute of limitations in Minnesota,[23] alleviating the concerns expressed in *Wall*, and Minnesota's lengthy six-year statute of limitations for legal malpractice claims allows ample time for a client to bring suit after being damaged by legal malpractice while still serving the purpose of providing finality. The reasons for the adoption of the continuous representation doctrine in *Wall*, given North Dakota's adherence to the discovery rule of accrual and its two-year statute of limitations for legal malpractice claims, simply do not apply in Minnesota.

Nor do the foreign cases cited in *Gapinski* support the adoption of the continuous representation doctrine in Minnesota. *DeLeo*, *Shumsky*, and *Schoenrock* were cited as proof that some jurisdictions that do not follow the discovery rule of accrual nevertheless employ the continuous representation doctrine.[24] But Connecticut, New York, and South Dakota all follow the harsh "occurrence" rule of accrual, under which a cause of action accrues when the negligent act is committed regardless of whether the client is aware or whether any actual damage has occurred.[25] *DeLeo* plainly states that the "continuous representation doctrine was

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developed primarily in response to the harsh consequences of the occurrence rule."[26] In addition, all three of these jurisdictions have three-year statutes of limitations, half that of Minnesota.[27] The need to protect plaintiffs from the potentially harsh consequences of the occurrence rule is not a factor in Minnesota, with its six-year statute of limitations and its adherence to the damage rule of accrual, which *Antone* described as the "middle ground" between the occurrence rule and the discovery rule.

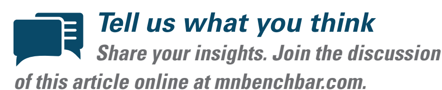
Finally, the most-cited reason jurisdictions across the country have adopted the continuous representation doctrine–that it is analogous to the continuing treatment doctrine in the medical malpractice arena–is neither accurate nor persuasive. The continuing treatment doctrine, which delays the date of accrual of a medical malpractice claim until the doctor's treatment of the patient for the condition at issue ceases, is an exception to the general rule that tort actions accrue when negligence combines with some damage.[28] The very case that adopted the continuing treatment doctrine demonstrates why its application is and should be limited to medical malpractice actions.

In *Schmitt v. Esser*, the plaintiff sought medical treatment "to set, adjust, care for, and heal" her broken and dislocated ankle.[29] She alleged that the doctor falsely told her that it would take two years for her ankle to heal, and that as a result she did not learn of his alleged negligence until more than two years after he negligently set her broken ankle. The Court noted the difficulty in medical malpractice cases "in determining the precise moment when the act or omission which caused the damage took place." On the other hand, "if there be but a single act of malpractice," as is often the case in a legal malpractice context, "subsequent time and effort to merely remedy or cure that act could not toll the running of the statute." The Court therefore announced the rule that "the treatment and employment should be considered as a whole, and, if there occurred therein malpractice the statute of limitations, begins to run when the treatment ceases."

In contrast, when an attorney's negligently drafted contract is signed by the client, for example, the client's legal rights are affected and damage is done. The bell often cannot be un-rung, and there is no practical reason why continuing representation should toll the statute of limitations, particularly given the generous six-year statute of limitations for legal malpractice actions. When the continuing treatment rule was first adopted in Minnesota, the statue of limitations for medical malpractice actions was just two years. While it has since been extended to four years, there was and is a legitimate concern that treatment for a particular medical issue can extend for years and make it difficult for a patient to bring a claim for malpractice while treatment is ongoing. Similar concerns carry less weight in a legal malpractice context, where it is often far easier to determine the date on which a client's legal rights have been compromised by an attorney's negligence.

Conclusion

While the continuous representation doctrine in legal malpractice cases has not been adopted in Minnesota, proponents will undoubtedly continue to advocate for its adoption in order to avoid statute of limitations defenses based on Minnesota's damage rule of accrual. However, the rationale for applying the doctrine in Minnesota, with its generous six-year statute of limitations and adherence to the damage rule of accrual, are not compelling. Adding an additional tolling doctrine to an already lengthy limitations period could undermine the purpose of the statute of limitations and increase the risk of the kind of open-ended litigation that *Antone* cited in rejecting the discovery rule of accrual. ▲



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Notes

[1] Minn. Stat. § 541.05, subd. 1(5) (2014).
[2] *Grimm v. O'Connor*, 392 N.W.2d 40, 43 (Minn. App. 1986).
[3] *Sabes & Richman, Inc. v. Muenzer*, 431 N.W.2d 916, 918-19 (Minn. App. 1988).
[4] See also *Henning v. Krahmer and Bishop, P.A.*, C4-92-2372, 1993 WL 140869 (Minn. App. May 4, 1993); *Hoffman v. Guzinski*, C5-93-2553, C7-93-2554, 1994 WL 396328 (Minn. App. Aug. 2, 1994); *Litherland v. Meshbesher Law Office, Ltd.*, C4-94-1534, 1995 WL 1467 (Minn. App. Jan. 3, 1995).
[5] *Herrmann v. McMenomy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999).
[6] *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006).
[7] *Bonhiver v. Graff*, 248 N.W.2d 291, 296 (Minn. 1976).
[8] *May v. First National Bank*, 427 N.W.2d 285, 288-89 (Minn. App. 1988).
[9] *Anoka Orthopedic Assocs., P.A. v. Mutschler*, 773 F.Supp. 158, 169 (D. Minn. 1991).
[10] *Schuster v. Magee*, C1-92-501, 1992 WL 213566 at *1 (Minn. App. Sept. 8, 1992).
[11] *Id.*
[12] *Fletcher v. Zellmer*, 909 F.Supp. 678, 684-85, *aff'd,* 105 F. 3d 662 (8th Cir. 1997) (D. Minn. 1995).
[13] *Reid Enters., Inc. v. Deloitte & Touche, L.L.P.*, C8-99-1801, 2000 WL 665684 at *3 (Minn. App. May 23, 2000).
[14] See *Sabes & Richman, Inc. v. Muenzer*, 431 N.W.2d 916, 918 (Minn. App. 1988); *Devereaux v. Stroup*, A7-0103, 2008 WL 73712 at *5 (Minn. App. Jan. 8, 2008); *Shapiro v. Stern*, No. C2-01-1214, 2002 WL 47039 at *2 (Minn. App. Jan. 15, 2002); *Hellman v. Hertogs*, No. C6-97-1467, 1998 WL 8461 at *4 (Minn. App. Jan. 13, 1998).
[15] *Gapinski v. Gray, Plant, Mooty, Mooty & Bennett, P.A., et al.*, Court File No. 27-CV-13-9842 (Minn. Dist. Ct. Oct. 8, 2013) (order denying motion for summary judgment).
[16] *Gapinski*, at 6.
[17] *Carlson v. Houk*, Court File No. 62-CV-13-6902 (Minn. Dist. Ct. Feb. 10, 2014) (order granting summary judgment).
[18] *Carlson v. Houk*, No. A14-0633, 2014 WL 6090685 (Minn. App. Nov. 17, 2014).
[19] *Carlson*, 2014 WL 6090685 at *4-5.
[20] *Id.* at *8-9.
[21] *Wall*, 393 N.W.2d at 763.
[22] N.D. Cent. Code §28-01-18(3) (2014).
[23] *Herrmann*, 590 N.W.2d at 643.
[24] *Gapinski*, at 5.
[25] *DeLeo*, 821 A.2d at 746; *Shumsky*, 750 N.E.2d at 69; *Schoenrock*, 419 N.W.2d at 199.
[26] *DeLeo*, 821 A.2d at 748.
[27] *DeLeo*, 821 A.2d at 746; *Shumsky*, 750 N.E.2d at 69; *Schoenrock*, 419 N.W.2d at 199.
[28] See *Fabio v. Bellomo*, 504 N.W.2d 758, 762; *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580, 584 (Minn. 1968); *Schmit v. Esser*, 236 N.W. 622, 625 (Minn. 1931).
[29] *Schmitt v. Esser*, 226 N.W. 196 (Minn. 1929).