Repose in Peace

The enactment of Illinois Senate Bill 2179 makes the six-year statute of repose for legal malpractice claims applicable to estate planning.

WITH THE ENACTMENT OF SB 2179, IF A LAW FIRM WROTE A WILL IN 1970 FOR A CLIENT WHO DIED IN JULY 2028, AND A MISTAKE IN THE 1970 WILL WAS ALLEGED AFTER THE CLIENT'S DEATH, THE STATUTE OF REPOSE WOULD PRECLUDE THE FILING OF A LAWSUIT AGAINST THE ESTATE PLANNING ATTORNEY.

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ON AUG. 13, GOV. PRITZKER SIGNED into law Senate Bill 2179, which effectively repeals the current exception to the statute of repose for legal malpractice claims in section 13-214.3 of the Illinois Code of Civil Procedure (735 ILCS 5/13-214.3), subject to a safe harbor period of up to six years to ensure judicial approval. Senate Bill 2179 (SB 2179) takes effect on Jan. 1, 2022.

The six-year statute of repose relating to actions for alleged legal malpractice by Illinois lawyers has been generally inapplicable to the work of Illinois estate planners. The uncertainty caused by the lack of this defense to such claims of malpractice has discouraged the orderly development and transition of Illinois estate planning practices and, as such, has been detrimental to the interests of the public. The Illinois State Bar Association recognized the long-term negative impact this has had on the public and the legal profession and for years has encouraged the adoption of the newly enacted legislation. (For more about the history behind efforts to amend the statute of repose, look for an article to be published in the September 2021 Trusts & Estates newsletter.)

The current law

Section 13-214.3 establishes a two-year statute-of-limitations period and a six-year statute of repose for legal malpractice actions. The two-year statute of limitations period incorporates the discovery rule. The action "must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." However, the limitations period is stayed if a person entitled to bring an action under this statute is not under a legal disability at the time the cause of action accrues but becomes under a legal disability before the period of limitations otherwise runs.

The statute of repose acts to bar any action—whether the damage is known or not—six years after the act takes place. However, under subsection (d), if the damage from the alleged malpractice does not occur until the client's death, the two-year statute of limitations begins to run at the client's death. (If letters of office are issued or the client's will is admitted to probate within that two-year

period, the malpractice action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the client, whichever is later.)

In such a case, the statute of repose applicable to the work of any other lawyer in Illinois would not apply. Consequently, under subsection (d), firms and attorneys with significant estate planning practices could be subject to significant potential liability from work performed decades ago. For example, if a law firm wrote a will for a client who died in July 1970 and a mistake was alleged as late as July 2023, the statute of repose would not apply.

New changes to the law

The enactment of SB 2179 eliminates the exception to the statute of repose by adding the following to subsection (d): "An action may not be commenced in any event more than 6 years after the date the professional services were performed."

Under the legislation, the statute of repose will operate to bar any action alleging malpractice by an Illinois lawyer filed more than six years after the completion of the work without regard for the date the damage occurs or is known. It should be noted, however, that new subsection (g) also includes a safe-harbor period to allow all actions to be brought within a reasonable time that could have been brought under the prior version of the statute, not to exceed six years after the statute's effective date on Jan. 1, 2022.

The safe-harbor period addresses the argument that the statute might be held unenforceable to causes of actions that now exist under the current law. After the six-year safe-harbor period passes on Jan. 1, 2028,—and perhaps before under the reasonableness standard included in the safe-harbor provision—the statute of repose will disallow malpractice claims based on estate planning documents prepared more than six years before a lawsuit is commenced, even when the damage from the alleged malpractice does not occur until the client's death.

Consequently, with the enactment of SB 2179, if a law firm wrote a will in 1970 for a client who died in July 2028, and a mistake in the 1970 will was alleged after the client's death, the statute of repose would preclude the filing of a lawsuit against the estate planning attorney.

Suggested actions for estate planning attorneys

Even with the removal of the exception to the statute of repose for legal malpractice claims, estate planning attorneys should continue to take precautions to minimize the likelihood of being targeted for malpractice claims. For the next six years, the safe harbor will operate to allow malpractice actions to be brought based on estate planning that was performed many years ago. Consequently, it would be a good idea for estate planning attorneys and law firms to audit estate planning files—particularly older files.

If the clients for the audited estate planning documents are still living, there is an opportunity to reach out to those clients. By reaching those clients, it might be possible to make changes to existing estate planning documents or, at least, to paper the files with any missing information as to what the desires of the client are and possibly why. Files of retired estate planning attorneys should be reviewed by the remaining attorneys in the firm.

In general, when working with new or existing clients, estate planning attorneys should carefully document the client's wishes, who the client wants to be direct beneficiaries of the work, and the scope of engagement. To do so, it is important to have clear and well-written engagement letters in place and provide termination letters when appropriate. Thorough record keeping is important as well. If significant time constraints are involved, it may also be best to limit the scope of representation in writing to a manageable set of tasks.

Estate planning attorneys also should be on alert and wary of new clients who request major changes to estate planning documents and of situations that could generate conflict-of-interest allegations. If there is a question of capacity or of undue influence, some additional actions might be needed before estate planning is completed. The estate planning attorney might consider: requesting a statement from a client's treating physician (with the client's permission) about the client's competency to make decisions; seeking a court determination about client's mental health; videotaping meetings with the client; and/or asking the client to explain the changes he has requested in his own words in the presence of witnesses.

Another option might be to have the client complete and sign a listing of his or her current assets and a biography identifying the client's living relatives and any close friends that are to be beneficiaries under the client's estate planning documents at the same time that the estate planning documents are executed.

When the client is requesting major revisions to existing estate planning documents, drafting a detailed statement of the changes and their consequences and discussing such statement with the client are also important. The estate planning attorney might also consider having the client read the statement in the presence of witnesses and then have it signed by the client and witnesses when the estate planning documents are executed.

Finally—and perhaps most importantly—clients should be encouraged to return to the drafting lawyer periodically to have their estate plan reviewed and, as necessary, updated. The client should be aware of this need and of his or her responsibility to take action as circumstances and laws change. IBJ