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## Santulli v. Englert, Reilly & McHugh, P.C.: The New York Court of Appeals Pounds Another Nail in the Coffin of CPLR Section 214(6)

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# Note

## ***Santulli v. Englert, Reilly & McHugh, P.C.:* The New York Court of Appeals Pounds Another Nail in the Coffin of CPLR Section 214(6)<sup>1</sup>**

### I. Introduction

At common law, there was no fixed time period within which a lawsuit was required to be commenced.<sup>2</sup> Personal actions were simply confined to the joint lifetimes of the parties.<sup>3</sup> Statutes of limitations were enacted<sup>4</sup> to ameliorate the heavy burden placed on defendants that existed under the common law approach of maintaining the viability of an action until the death of one of the parties.<sup>5</sup> Such statutes reflect legislative

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1. See *infra* note 246.

2. *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969).

3. *Id.*

4. See RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE*, § 18.1, at 66 (3d ed. 1989) (statutes of limitations are legislative enactments whose origins derive from equity, primarily the doctrine of laches).

5. See *Flanagan*, 24 N.Y.2d at 429, 248 N.E.2d at 872, 301 N.Y.S.2d at 25 (holding that the statute of limitations was enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action). See also Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83, 84-85, (1972) which reviews the rationale behind statutes of limitations. The author explains:

First, the primary purpose of [statutes of limitations] is to compel the exercise of a right of action within a reasonable time so that a defendant will have a fair opportunity to prepare an adequate defense. Otherwise, the belated institution of an action might prejudice defendant's preparation of evidence. Such prejudice would commonly result, for example, where critical evidence is lost or where the facts have been obscured by the passage of time or faulty memories. The death or

judgments that proper investigation and preparation of a defense cannot be undertaken after the expiration of the period of limitation.<sup>6</sup> The statutes also serve the important function of giving repose to human affairs.<sup>7</sup> A valid statute of limitations defense operates as a bar regardless of the merits of the claim.<sup>8</sup>

The statute of limitations defense has been one of the most effective defenses against legal malpractice actions,<sup>9</sup> and virtually the only effective affirmative defense.<sup>10</sup> Legal malpractice consists of the failure of an attorney to exercise that degree of skill commonly exercised by an ordinary member of the legal profession, that proximately results in damages to the client.<sup>11</sup> If it can be proved that an attorney's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by members of the profession, he is liable in malpractice.<sup>12</sup>

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removal from the jurisdiction of witnesses is a further problem. Second, the statute relieves the defendant from the otherwise endless psychological fear of litigation based upon events in the distant past. Third, it frees the judicial system from stale claims which make resolution of fact issues both difficult and arbitrary. Fourth, the courts are relieved of the additional caseload which would result if old causes of action were permitted, thus promoting efficient judicial administration. Finally, a limitations period avoids the disruptive effect of unsettled claims upon commercial intercourse.

*Id.* at 84-85 (citations omitted).

6. See *Brock v. Bua*, 83 A.D.2d 61, 63-64, 443 N.Y.S.2d 407, 409 (2d Dep't 1981). See also *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations which 'are found and approved in all systems of enlightened jurisprudence', represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them'" (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) and *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944))).

7. *Kubrick*, 444 U.S. at 117 (1979); *Schwartz v. Heyden Newport Chem. Co.*, 12 N.Y.2d 212, 218, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714, 718 (1963).

8. See *Mallen & Smith*, *supra* note 4, § 18.1, at 67 (citing *Fischer v. Browne*, 586 S.W.2d 733, 736 (Mo. Ct. App. 1979)).

9. *Id.* See, e.g., *Bergman v. Fingerit*, 177 A.D.2d 448, 576 N.Y.S.2d 544 (1st Dep't 1991); *Muller v. Sturman*, 79 A.D.2d 482, 437 N.Y.S.2d 205 (4th Dep't 1981); *Johnson v. Gold*, 71 A.D.2d 1056, 420 N.Y.S.2d 816 (4th Dep't 1979).

10. See *Mallen & Smith*, *supra* note 4, § 18.1, at 67. An affirmative defense is a matter asserted by a defendant, which, assuming the complaint to be true, constitutes a defense to it. It is a response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of the claim. *BLACK'S LAW DICTIONARY* 60 (6th ed. 1990).

11. See *Saveca v. Reilly*, 111 A.D.2d 493, 494, 488 N.Y.S.2d 876, 877 (3d Dep't 1985).

12. See *Grago v. Robertson*, 49 A.D.2d 645, 646, 370 N.Y.S.2d 255, 258 (3d Dep't

Prior to *Santulli v. Englert, Reilly & McHugh, P.C.*,<sup>13</sup> there was inconsistency and confusion among New York courts regarding the applicable statute of limitations in actions alleging legal malpractice.<sup>14</sup> Because legal malpractice actions generally involve elements of both tort and contract,<sup>15</sup> courts variously applied either the three-year malpractice (tort) statute of limitations of New York Civil Practice Law and Rules (CPLR) section 214(6)<sup>16</sup> or the six-year statute of limitations of CPLR section 213(2)<sup>17</sup> for actions on a contract (or their respective predecessor statutes).<sup>18</sup> In *Santulli*, the New York Court of Appeals held that in an action alleging legal malpractice, to the extent recovery is sought for damages to property or pecuniary interests that arose from a contractual relationship, the applicable statute of limitations is the six-year period of CPLR section 213(2) for actions on a contract.<sup>19</sup> The *Santulli* decision makes it clear that virtually any action alleging legal malpractice that had its genesis in a contractual relationship will be governed by the six-year contract statute of limitations, rather than the three-year malpractice statute of limitations.<sup>20</sup> This decision is tantamount to indirect judicial repeal of CPLR section 214(6)<sup>21</sup> which prescribes a three-year statute of limitations for malpractice actions other than medical, dental or podiatric.<sup>22</sup> *Santulli* also clarified that the reasoning of two prior Court of Appeals decisions that had determined the proper statute of limitations in professional malpractice actions against an insurance broker and an architect, was fully applicable to malpractice actions against attorneys.<sup>23</sup>

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1975).

13. 78 N.Y.2d 700, 586 N.E.2d 1014, 579 N.Y.S.2d 324 (1992).

14. See *infra* notes 43-101 and accompanying text.

15. See *infra* notes 31-35 and accompanying text.

16. N.Y. CIV. PRAC. L. & R. § 214(6) (McKinney 1990).

17. N.Y. CIV. PRAC. L. & R. § 213(2) (McKinney 1990).

18. See *infra* notes 43-101 and accompanying text.

19. *Santulli*, 78 N.Y.2d at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327.

20. *Id.*

21. See Vincent C. Alexander, N.Y. CIV. PRAC. L. & R. § 214, Supplementary Practice Commentary at 52-54 (McKinney Supp. 1993). Professor Alexander was commenting on the *Santulli* decision in the Appellate Division (*Santulli v. Englert, Reilly & McHugh, P.C.*, 164 A.D.2d 149, 563 N.Y.S.2d 548 (3d Dep't 1990)).

22. N.Y. CIV. PRAC. L. & R. § 214(6) (McKinney 1990).

23. See *Video Corp. of Am. v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d

Prior to the *Santulli* decision, there was also inconsistency among the different departments of the Appellate Division, and even within the same department, as to whether an attorney had to have made an express promise to achieve a specific result in order for a client to maintain an action for breach of contract against the attorney.<sup>24</sup> *Santulli* held that there need not be an express promise by the attorney to achieve a specific result.<sup>25</sup> It explained that the breach of the attorney's implied promise to exercise due care in the performance of services required by the contract is sufficient foundation for the client to maintain an action for breach of contract.<sup>26</sup>

Part II of this note will review the development of two theories of liability in professional malpractice actions, specifically, a tort-based theory and a contract-based theory. A review of these theories shows that what appeared to be a clear statement of the rule for selecting the proper statute of limitations in malpractice actions was inconsistently applied and confusion persisted.<sup>27</sup> Various approaches to the statute of limitations problem in other

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1350, 462 N.Y.S.2d 439 (1983) (holding that the six-year contract statute of limitations applied to an action alleging professional malpractice against an insurance broker); *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977) (holding that the six-year contract statute of limitations applied in an action for professional malpractice against an architectural firm). Both *Video Corp.* and *Sears* held that actions alleging professional malpractice that seek recovery for injury to property or pecuniary interests arising from a contractual relationship are governed by the six-year contract statute of limitations of CPLR § 213(2). *Video Corp.*, 58 N.Y.2d at 1028, 448 N.E.2d at 1350, 462 N.Y.S.2d at 439; *Sears*, 43 N.Y.2d at 395, 372 N.E.2d at 558, 401 N.Y.S.2d at 770. See *infra* notes 77-86 and accompanying text.

24. See, e.g., *Santulli v. Englert, Reilly & McHugh, P.C.*, 164 A.D.2d 149, 563 N.Y.S.2d 548 (3d Dep't 1990) (holding that an express promise by the attorney to achieve a specific result is required in order for a client to maintain an action against the attorney for breach of contract); *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D. 2d 505, 560 N.Y.S.2d 787 (2d Dep't 1990) (holding that an express promise by the attorney to achieve a specific result is not required in order for a client to maintain an action for breach of contract against the attorney); *Pacesetter Communications Corp. v. Solin & Breindel, P.C.*, 150 A.D.2d 232, 541 N.Y.S.2d 404 (1st Dep't 1989) (holding that an express promise by the attorney to achieve a specific result is required for a client to maintain a breach of contract action the attorney); *Bloom v. Kernan*, 146 A.D.2d 916, 536 N.Y.S.2d 897 (3d Dep't 1989) (holding that an express promise by the attorney to achieve a specific result is not required for a client to maintain a breach of contract action against the attorney).

25. *Santulli*, 78 N.Y.2d at 705, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326.

26. *Id.*

27. See *infra* notes 87-101 and accompanying text.

jurisdictions, as well as the policy reasons for two tolling<sup>28</sup> provisions similar to those used in medical malpractice actions are also examined. Part III reviews the *Santulli* decision by examining the facts of the case, its procedural history, and Judge Alexander's opinion for a unanimous Court of Appeals.

The remaining sections analyze the *Santulli* decision, concluding that although it provided a clear standard for determining the applicable statute of limitations in legal malpractice actions, it did not announce a new standard. The note concludes that the *Santulli* court usurped legislative authority by effectively repealing CPLR section 214(6). To restore significance to this section, the legislature should take affirmative steps to amend CPLR section 214(6) to provide for a three-year statute of limitations regardless of whether an action alleging malpractice is grounded in tort or in contract. Additionally, this amendment should include a discovery exception<sup>29</sup> which would toll the accrual<sup>30</sup> of a cause of action until the plaintiff discovers, or through exercise of reasonable diligence should have discovered, the facts constituting the wrongful act or omission by the attorney.

## II. Background

A legal malpractice action combines elements of both tort and contract.<sup>31</sup> One legal scholar has described such actions as at

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28. A "toll" is a suspension or a temporary halt of the running of a statute of limitations. BLACK'S LAW DICTIONARY 1488 (6th ed. 1990).

29. See *infra* notes 142-47 and accompanying text.

30. "A cause of action accrues when a suit may be maintained thereon." BLACK'S LAW DICTIONARY 21 (6th ed. 1990).

31. See MALLIN & SMITH, *supra* note 4, §18.3 at 69 (the hybrid nature of legal malpractice is such that the action may sound in either tort or contract). See also John W. Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 756-57 (1959). The author explains the tort-contract dichotomy:

The attorney's liability for negligence arises out of the attorney-client relationship. This relationship is created through a contract. Is the action for damages one for breach of contract or one for tort? . . . If the action is treated as one in tort, the court is concerned to find present the various elements of a cause of action in negligence, and the fact that the duty to use care arises out of a contract normally has no immediate significance. If the action is treated as one in contract, the court simply declares that the attorney "impliedly contracts" to exercise the degree of care, skill and knowledge which would be required by the negligence standard. . . . There are several statements to the effect that an action can be brought on either

"the borderland of tort and contract".<sup>32</sup> One concept of the legal malpractice action is grounded in negligence.<sup>33</sup> Under this theory, the breach of the attorney's duty to the client to exercise due care in the performance of services gives rise to an action sounding in tort.<sup>34</sup> An alternative view is a contract theory, which holds that the attorney's breach of either an express contractual provision, or of an implied promise to exercise due care in the performance of professional services, states a cause of action for malpractice that is based on a breach of contract.<sup>35</sup>

### A. *The New York Approach*

Prior to *Santulli*, whether a malpractice action sounded in tort or in contract could determine if the suit was time-barred by the applicable statute of limitations.<sup>36</sup> In New York, an action for malpractice other than medical, dental or podiatric, must be commenced within three years of the accrual of the cause of action.<sup>37</sup> An action for breach of contract must be com-

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basis. . . .

*Id.* at 756-57 (citations omitted); see also *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 491 P.2d 421 (Cal. 1971). In *Neel*, the court stated:

Legal malpractice consists of the failure of an attorney "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." When such failure proximately causes damage, it gives rise to an action in tort. Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. Thus legal malpractice constitutes both a tort and a breach of contract.

*Id.* at 422-23 (footnotes and citations omitted).

32. WILLIAM PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 380 (1954). "In 1826 it was said that an attorney might be liable on the case for negligently handling his client's affairs, but when the situation arose in 1939 it was held that the client's remedy was exclusively on the contract." *Id.* at 407 (footnotes omitted).

33. See Wade, *supra* note 31, at 757; Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751, 752-53 (1979); Jonathan M. Albano, Note, *Contorts: Patrolling the Borderland of Contract and Tort in Legal Malpractice Actions*, 22 B.C. L. REV. 545, 545 (1981).

34. See Wade, *supra* note 31, at 756; Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, *supra* note 33 at 752-53; Albano, *supra* note 33, at 545.

35. See *Neel*, 491 P.2d at 422-23.

36. See *infra* notes 43-101 and accompanying text.

37. N.Y. CIV. PRAC. L. & R. § 214 (McKinney 1990). The statute provides in perti-

menced within six years of accrual of the cause of action.<sup>38</sup> Because CPLR section 214(6) applies not only to legal malpractice, but to all types of malpractice, with the exception of medical, dental or podiatric,<sup>39</sup> the cases leading to the *Santulli* decision

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nent part: "The following actions must be commenced within three years: . . . (6) an action to recover damages for malpractice, other than medical, dental or podiatric malpractice . . . ." N.Y. CIV. PRAC. L. & R. § 214(6). The statute does not specify, however, when the cause of action accrues, e.g. when an injury is caused or when an injury is discovered. See *infra* notes 128-32 and accompanying text. Section 214(6), which replaced section 50(1) of the Civil Practice Act, was originally enacted by Act of April 4, 1962, ch. 308, § 214(6), 1962 N.Y. Laws 609 (codified as amended at N.Y. CIV. PRAC. L. & R. § 214(6)). In its original form it stated only that an action to recover damages for malpractice must be commenced within three years. It was amended by Act of May 21, 1975, ch.109, § 5, 1975 N.Y. Laws 136 (codified as amended at N.Y. CIV. PRAC. L. & R. § 214(6)) to add the phrase "other than medical malpractice". The Act of Aug. 1, 1985, ch. 760, § 2, 1985 N.Y. Laws 1851 (codified as amended at N.Y. CIV. PRAC. L. & R. § 214(6)) added "or dental", and the Act of July 21, 1986, ch. 485, § 2, 1986 N.Y. Laws 997 (codified as amended at N.Y. CIV. PRAC. L. & R. § 214(6)) substituted "dental or podiatric" for "or dental".

The legislature, when drafting § 214(6) had contemplated extending the statute of limitations on malpractice actions to include contract actions, as evidenced by the legislative history of the statute (e.g., N.Y. LEGIS. DOC. 1961, No. 15; Advisory Committee on Practice and Procedure, Fifth Preliminary Report, § 214, subd. 6, par. 55; N.Y. LEGIS. DOC. 1962, No. 8; Advisory Committee on Practice and Procedure, Sixth Preliminary Report, p.93). Such language did not appear in the statute as eventually enacted, however. Similarly, the Law Revision Commission's proposal that the statute specifically refer to "an action to recover damages for malpractice, whether based on tort, contract or any other theory" was never adopted. See *Sears, Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 395 n.1, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 770 (1977).

Malpractice first became a distinct cause of action by passage of 1900 N.Y. Laws, ch. 117, § 1, which amended § 384(1) of the Code of Civil Procedure. Prior to this amendment, such actions were governed by Code of Civil Procedure § 383(5), 1877 N.Y. Laws, ch. 416, § 1, which prescribed that "an action to recover damages for personal injury, resulting from negligence" must be commenced within three years. Prior to 1900, the term "malpractice" was used by the New York Court of Appeals to refer to the professional negligence of medical doctors. See, e.g., *Pike v. Honsinger*, 155 N.Y. 201, 209, 49 N.E. 760, 762 (1898); *Carpenter v. Blake*, 75 N.Y. 12, 15-16 (1878). See Richard B. Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 339 n.1 (1962).

38. N.Y. CIV. PRAC. L. & R. § 213 provides in pertinent part: "The following actions must be commenced within six years: . . . (2) an action upon a contractual obligation or liability, express or implied . . . ." N.Y. CIV. PRAC. L. & R. § 213(2) (McKinney 1990). Section 213(2) was originally enacted by Act of April 4, 1962, ch. 308, § 213(2), 1962 N.Y. Laws 608. There have been various amendments to § 213(2) that are not relevant to this discussion.

39. Medical, dental, and podiatric malpractice actions are subject to a two-year and six-month statute of limitations. N.Y. CIV. PRAC. L. & R. § 214-a (McKinney 1990). See *infra* note 144 and accompanying text.



are not grounded solely in legal malpractice.<sup>40</sup>

The New York decisional law regarding the applicable statute of limitations for actions alleging professional malpractice has been remarkably inconsistent.<sup>41</sup> The cases, predictably, are divided on applying either a tort statute of limitations or a contract statute of limitations.<sup>42</sup>

### 1. *Development of Tort-Based Theory and Application of Three-Year Statute of Limitations*

The early case of *Webber v. Herkimer & Mohawk St. R.R.*,<sup>43</sup> an action against a street-railroad company, held that where damages resulting from the breach of a contractual obligation are in reality due to a failure to exercise due care in performing that obligation, a negligence or malpractice statute of limitations applies rather than a contract statute of limitations.<sup>44</sup> Similarly, other early decisions held that regardless of the name given to a theory of recovery, courts will look to the "reality" and the "essence" of the action, and not its form, to determine the proper statute of limitations.<sup>45</sup> More recent cases have relied on this "essence of the action" theory, as well.<sup>46</sup>

In *Johnson v. Gold*,<sup>47</sup> the plaintiff alleged that the defendant attorney failed to keep the proceeds of a real estate transaction in safekeeping until the plaintiff recovered from a stroke; that the attorney had converted the money to his own use; and that the attorney defrauded the plaintiff and negligently per-

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40. See *infra* notes 43-101 and accompanying text.

41. See *infra* notes 43-101 and accompanying text.

42. See *infra* notes 43-101 and accompanying text.

43. 109 N.Y. 311, 16 N.E. 358 (1888).

44. *Id.* at 314-15, 16 N.E. at 359-60. See also *Calhoun v. Gale*, 29 A.D.2d 766, 767, 287 N.Y.S.2d 710, 711 (2d Dep't), *aff'd*, 23 N.Y.2d 756, 244 N.E.2d 468, 296 N.Y.S.2d 953 (1968); *Alyssa Originals, Inc. v. Finkelstein*, 22 A.D.2d 701, 701, 254 N.Y.S.2d 21, 23 (2d Dep't 1964), *aff'd*, 24 N.Y.2d 976, 250 N.E.2d 82, 302 N.Y.S.2d 599 (1969); *Carr v. Lipshie*, 8 A.D.2d 330, 332, 187 N.Y.S.2d 564, 566, (1st Dep't 1959), *aff'd*, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961); *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 147-48, 111 N.E.2d 421, 423 (1953).

45. See *Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936).

46. See *infra* notes 47-63 and accompanying text.

47. 71 A.D.2d 1056, 420 N.Y.S.2d 816 (4th Dep't 1979).

formed his fiduciary duty.<sup>48</sup> As the action against the defendant-attorney was not commenced until five years after the alleged acts of malpractice had been committed,<sup>49</sup> the plaintiff attempted to benefit from the six-year statute of limitations by drafting his complaint such that the cause of action sounded in either contract or fraud.<sup>50</sup> The court held, however, that it must look to the "reality, and the essence of the action and not its mere name".<sup>51</sup> The court found that despite the retainer agreement between the plaintiff and the defendant-attorney, the reality of the claim was that the attorney failed to use due care, which gave rise to an action in either malpractice or negligence, each of which was already time-barred by the three-year statute of limitations.<sup>52</sup>

Similarly, in *Adler & Topal, P.C. v. Exclusive Envelope Corp.*,<sup>53</sup> the court, while recognizing the existence of an agreement between the parties, nevertheless, applied the malpractice, rather than the contract statute of limitations.<sup>54</sup> In *Adler*, the plaintiff accounting firm brought suit to recover unpaid fees for services rendered.<sup>55</sup> The defendant envelope corporation counterclaimed, alleging that the plaintiff accounting firm failed to exercise ordinary care in performing its services and had com-

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48. *Id.* at 1056, 420 N.Y.S.2d at 817.

49. *Id.*

50. *Id.* An action based upon fraud must be commenced within six years. N.Y. Civ. PRAC. L. & R. § 213(8) (McKinney 1990).

51. *Johnson*, 71 A.D.2d at 1056, 420 N.Y.S.2d at 817 (quoting *Brick v. Cohen-Hall-Marx Co.*, 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937)). See also *Sosnow v. Paul*, 43 A.D.2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974) (plaintiff commenced an action against architects for professional malpractice and breach of contract wherein both parties agreed that a three-year statute of limitations applied since the defendants' alleged malpractice was the true basis for the claim sounding in breach of contract); *Brainard v. Brown*, 91 A.D.2d 287, 458 N.Y.S.2d 735 (3d Dep't 1983) (holding that the essence of a legal malpractice action brought in contract was actually negligence, thus, the three-year malpractice statute of limitations applied rather than the six-year contract statute of limitations); *Albany Savings Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, P.C.*, 95 A.D.2d 918, 463 N.Y.S.2d 896 (3d Dep't 1983) (holding that where the plaintiff alleged tort and contract causes of action against the defendant law firm, the essence of the action was the defendant's failure to use reasonable care in exercising professional skill, which is grounds for liability in malpractice, but not in contract).

52. *Johnson*, 71 A.D.2d at 1056, 420 N.Y.S.2d at 817.

53. 84 A.D.2d 365, 446 N.Y.S.2d 337 (2d Dep't 1982).

54. *Id.* at 367-68, 446 N.Y.S.2d at 339.

55. *Id.*

mitted breach of contract by not exercising the ordinary care required of accountants.<sup>56</sup> All counterclaims were brought more than three years but less than six years after the last services were performed by the plaintiff accountants for the defendant.<sup>57</sup> The court held that the counterclaims were ordinary malpractice claims that were time-barred by the three-year statute of limitations.<sup>58</sup> The court distinguished *Sears, Roebuck & Co. v. Enco Assocs.*,<sup>59</sup> by noting that the parties in that case had entered into a detailed, written agreement requiring specific services.<sup>60</sup> Here, however, there was an "informal, underlying oral agreement".<sup>61</sup> The court observed that in virtually every accountant-client relationship there is at least a "bare bones" agreement, but such an agreement cannot convert all ordinary malpractice actions into actions for breach of contract.<sup>62</sup> The court reasoned that to do so would effectively nullify the specific malpractice provisions of CPLR section 214(6), "thus, making the statutory provisions surplusage".<sup>63</sup>

In determining the applicable statute of limitations, courts have also looked at the nature of the injury.<sup>64</sup> In personal injury actions where the gravamen of the action is the defendant's misconduct and damage, the action sounds essentially in tort.<sup>65</sup> Where an action is for damages to property or pecuniary interests only, however, the tendency is to let the plaintiff elect his form of recovery.<sup>66</sup> Different elements and measures of damages

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56. *Id.* at 366, 446 N.Y.S.2d at 338.

57. *Id.*

58. *Id.* at 367, 446 N.Y.S.2d at 339.

59. 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977). In *Sears*, the Court of Appeals held that in a malpractice action against an architect, where damages that arose out of a contractual relationship were to property or pecuniary interests, the six-year contract statute of limitations applied, regardless of the theory of liability pled. *Id.* at 395, 372 N.E.2d at 557-58, 401 N.Y.S.2d at 770. See *infra* notes 77-80 and accompanying text.

60. *Adler & Topal*, 84 A.D.2d at 367-68, 446 N.Y.S.2d at 339.

61. *Id.* at 368, 446 N.Y.S.2d at 339.

62. *Id.* at 367, 446 N.Y.S.2d at 339.

63. *Id.*

64. See *In re Paver & Wildfoerster*, 38 N.Y.2d 669, 675, 345 N.E.2d 565, 568, 382 N.Y.S.2d 22, 25 (1976).

65. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 666-67 (5th ed. 1984); *Kozan v. Comstock*, 270 F.2d 839, 845 (5th Cir. 1959).

66. See KEETON, *supra* note 65, at 666.

may lead a plaintiff to prefer one cause of action over the other.<sup>67</sup> In the majority of legal malpractice actions, however, the measure of damages will be the same under either theory of recovery.<sup>68</sup> Therefore, a longer statute of limitations for one theory of recovery than for the other may well be the decisive factor in electing a form of action; where the statute of limitations has already expired on one form of action but not on the other, it will certainly be the decisive factor.<sup>69</sup>

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67. *Id.* at 664-66. See also *infra* text accompanying note 108. Contract damages are generally restricted to those within the contemplation of the parties at the time the contract was made, see, e.g., *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), while damages for negligence are recoverable for all injuries proximately caused. See WILLIAM PROSSER, *TORTS* §§ 47-50 (4th ed. 1971); See PROSSER, *supra* note 32, at 422-29 for a discussion on the differences between contract damages and negligence damages. Consequential damages are recoverable for breach of contract if such damages were reasonably foreseeable when the contract was made. See generally RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (1981). See also *Hadley*, 156 Eng. Rep. at 151; *Bogner v. General Motors Corp.*, 117 Misc. 2d 929, 930-31, 459 N.Y.S.2d 679, 680 (Civ. Ct. Bronx County 1982).

Damages for breach of contract are allowed as compensation for the injury suffered as a result of the breach, rather than as punishment. As such, the general rule in breach of contract actions is that damages are limited to the pecuniary loss suffered and punitive damages are not appropriate. See RESTATEMENT (SECOND) OF CONTRACTS § 355 cmt. a (1981). Punitive (or exemplary) damages are penal in nature and are different in nature and purpose from compensatory damages. See generally *W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 746 F.2d 215 (3d Cir. 1984); *First Nat'l State Bank of N.J. v. Commonwealth Fed. Sav. & Loan Ass'n*, 455 F. Supp. 464 (D. N.J. 1978), *aff'd*, 610 F.2d 164 (3d Cir. 1979). However, punitive damages may be recoverable in a breach of contract action where the defendant has manifested gross, wanton or willful fraud or high moral culpability. See, e.g., *Giblin v. Murphy*, 73 N.Y.2d 769, 772, 532 N.E.2d 1282, 1284, 536 N.Y.S.2d 54, 56 (1988); *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 491 (1961). See also RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) (stating that punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable). Punitive damages are awarded for the good of society as punishment of the defendant for a wrong in the particular case, to protect the public against similar acts by the defendant and others, and to serve as a warning to others who may be disposed to act similarly. See *LeMistral, Inc. v. Columbia Broadcasting Sys.*, 61 A.D.2d 491, 494, 402 N.Y.S.2d 815, 819 (1st Dep't 1978).

68. See *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 42, 555 N.E.2d 611, 613, 556 N.Y.S.2d 239, 241 (1990); *infra* note 215.

69. But see *infra* text accompanying notes 103-09.

## 2. *Development of Contract-Based Theory and Application of Six-Year Statute of Limitations*

In 1976, the Court of Appeals in *In re Paver & Wildfoerster*,<sup>70</sup> signalled the erosion of the "essence of the action" theory.<sup>71</sup> The plaintiff in *Paver* demanded arbitration pursuant to a construction agreement, alleging breach of contract and failure to exercise reasonable care in the performance of the contract by the architects who designed and supervised the construction of a high school.<sup>72</sup> The court held that in determining the applicable statute of limitations in an action for property damage, it should not be constrained by special rules, such as the "essence of the action" rule<sup>73</sup>, which evolved primarily in personal injury actions and which "depart from the general principle that time limitations depend upon, and are confined to, the form of the remedy."<sup>74</sup> It determined that when a claim is "substantially related to matters encompassed by the substantive agreement", it makes no difference for statute of limitations purposes whether the action is in contract or in tort.<sup>75</sup> The court, therefore, held that the six-year contract statute of limitations applied.<sup>76</sup>

The following year, in *Sears, Roebuck & Co. v. Enco Assocs.*,<sup>77</sup> the Court of Appeals reaffirmed its holding in *Paver* that claims by owners against architects arising out of a performance or non-performance of contractual obligations are governed by the six-year contract statute of limitations.<sup>78</sup> It stated:

All obligations of the architects here, whether verbalized as in tort for professional malpractice or as in contract for nonperformance of particular provisions of the contract, arose out of the contractual relationship of the parties - i.e., absent the contract be-

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70. 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976).

71. See *supra* notes 43-63 and accompanying text.

72. *Paver*, 38 N.Y.2d at 672-73, 345 N.E.2d at 566-67, 382 N.Y.S.2d at 23. The school developed serious leakage problems shortly after the owner took occupancy. *Id.* at 673, 345 N.E.2d at 566, 382 N.Y.S.2d at 23.

73. *Id.* at 672, 674-75, 345 N.E.2d at 566, 568, 382 N.Y.S.2d at 23, 24-25.

74. *Id.* at 672, 345 N.E.2d at 566, 382 N.Y.S.2d at 23. The court provided no support for the statement that the general principle is that time limitations depend upon and are confined to the form of the remedy. *Id.*

75. *Id.*

76. *Id.*

77. 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977).

78. *Id.* at 394-95, 372 N.E.2d at 557, 401 N.Y.S.2d at 770.

tween them, no services would have been performed and thus there would have been no claims. It should make no difference then how the asserted liability is classified or described, or whether it is said that, although not expressed, an agreement to exercise due care in the performance of the agreed services is to be implied; it suffices that all liability alleged in this complaint had its genesis in the contractual relationship of the parties.<sup>79</sup>

*Paver* and *Sears* appear to stand for the proposition that in actions seeking recovery for damages to property or pecuniary interests that arose out of a contractual relationship, the six-year contract statute of limitations applies regardless of the theory of liability pleaded, at least in actions against architects.<sup>80</sup>

If *Paver* and *Sears* could be interpreted as applying only to actions against architects,<sup>81</sup> such a restriction was removed by the Court of Appeals in *Video Corp. of Am. v. Frederick Flatto Assocs.*<sup>82</sup> *Video Corp.* involved an action against an insurance broker alleging negligence and breach of contract for failure to procure full and adequate insurance coverage.<sup>83</sup> The court held<sup>84</sup>

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79. *Id.* at 396, 372 N.E.2d at 558, 401 N.Y.S.2d at 770-71.

80. See *supra* notes 70-79 and accompanying text. See also *Steiner v. Wenning*, 43 N.Y.2d 831, 832, 373 N.E.2d 366, 367, 402 N.Y.S.2d 567, 568 (1977) (decided by the Court of Appeals with the *Sears* case, holding that the six-year statute of limitations applied to an action against an architect alleging negligent and careless performance of contractual obligations, where the recovery sought was limited to a contract measure of damages).

81. In actions decided after *Paver* and *Sears*, but before *Video Corp. of Am. v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983) (see *infra* notes 82-86 and accompanying text), alleging malpractice by professionals other than architects, New York courts continued to apply the three-year statute of limitations. See, e.g., *Boorman v. Bleakley, Platt, Schmidt, Hart & Fritz*, 88 A.D.2d 942, 451 N.Y.S.2d 179 (2d Dep't 1982) (legal malpractice); *Lazzaro v. Kelly*, 87 A.D.2d 975, 450 N.Y.S.2d 102 (4th Dep't) (legal malpractice), *aff'd*, 57 N.Y.2d 630, 439 N.E.2d 868, 454 N.Y.S.2d 59 (1982); *Chemical Bank v. Louis Sternbach & Co.*, 91 A.D.2d 518, 456 N.Y.S.2d 392 (1st Dep't 1982) (accountant malpractice); *Glamm v. Allen*, 57 N.Y.2d 87, 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982) (legal malpractice); *Yandel v. Loeb & Troper*, 84 A.D.2d 710, 443 N.Y.S.2d 959 (1st Dep't 1981) (accountant malpractice); *Bunker v. Bunker*, 80 A.D.2d 817, 437 N.Y.S.2d 326 (1st Dep't 1981) (legal malpractice); *Citibank v. Suthers*, 68 A.D.2d 790, 418 N.Y.S.2d 679 (4th Dep't 1979) (legal malpractice); *Central Trust Co., Rochester v. Goldman*, 70 A.D.2d 767, 417 N.Y.S.2d 359 (4th Dep't 1979) (legal malpractice); *Douglas v. Arthur Andersen & Co.*, 70 A.D.2d 542, 416 N.Y.S.2d 751 (1st Dep't 1979) (accountant malpractice); *Lacks v. Marcus*, 68 A.D.2d 815, 414 N.Y.S.2d 139 (1st Dep't 1979) (unspecified malpractice).

82. 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983).

83. *Id.* at 1027, 448 N.E.2d at 1350, 401 N.Y.S.2d at 439.

84. The decision of the court was a two-paragraph memorandum opinion. *Id.* at

that where an action seeks recovery for damages to property or pecuniary interests for failure to exercise due care in the performance of a contract, the six-year contract statute of limitations is controlling.<sup>85</sup> The court did not limit or qualify its holding to apply only to architects and insurance brokers, but appeared to be stating a rule of general applicability.<sup>86</sup>

### 3. *Property and Pecuniary Interest Cases After Video Corp.*

Although *Video Corp.* appeared to create a "bright line rule"<sup>87</sup> for selecting the proper statute of limitations in property or pecuniary interest cases, confusion as to the rule's application persisted among the departments of the Appellate Division and even within departments.<sup>88</sup> Only three months after *Video Corp.* was decided, the Third Department held that an action for legal malpractice which sought recovery for damages to property or pecuniary interests that arose from a contractual relationship was time-barred by the three-year statute of limitations.<sup>89</sup> In that case the court returned to the "essence of the action" analysis, holding that the alleged wrong was, in reality, the defend-

1026-28, 448 N.E.2d at 1350, 401 N.Y.S.2d at 439.

85. *Id.* at 1028, 448 N.E.2d at 1350, 462 N.Y.S.2d at 439. The court explained that Justice Sandler's partial dissent in *Video Corp.* at the Appellate Division correctly analyzed the *Sears* holding. *Id.* (citing *Video Corp.*, 85 A.D.2d 448, 457, 448 N.Y.S.2d 498, 504 (1st Dep't 1982) (Sandler, J., dissenting in part)). The court also expressly overruled *Adler & Topal, P.C. v. Exclusive Envelope Corp.*, 84 A.D.2d 365, 446 N.Y.S.2d 337 (2d Dep't 1982), which had held that the three-year malpractice statute of limitations applied in an action against accountants alleging breach of contract and failure to exercise ordinary care in the performance of accounting services. *Video Corp.*, 58 N.Y.2d at 1028, 448 N.E.2d at 1350, 462 N.Y.S.2d at 439. See *supra* notes 53-63 and accompanying text.

86. *Video Corp.*, 58 N.Y.2d at 1028, 448 N.E.2d at 1350, 462 N.Y.S.2d at 439; See also *Baratta v. Kozlowski*, 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dep't 1983). In *Baratta*, the court applied the rule of *Video Corp.* to an action against a bank president for failure to exercise due care in the performance of a contract. *Id.* at 462, 464 N.Y.S.2d at 809. In holding that the six-year statute of limitations applied, the court declared "*Video Corp.* seems to draw a bright line which will ease selection of limitations periods for property or pecuniary interest cases, a process previously described as a 'snarl of utter confusion'." *Id.* (quoting WILLIAM L. PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS* 310, 434 (1953)).

87. See *supra* note 86.

88. See *infra* notes 89-101 and accompanying text.

89. See *Albany Savings Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, P.C.*, 95 A.D.2d 918, 919, 463 N.Y.S.2d 896, 897 (3d Dep't 1983).

ant's failure to use reasonable care in exercising professional skill,<sup>90</sup> which was cognizable in legal malpractice but not in breach of contract.<sup>91</sup> The court did not mention either *Video Corp.* or *Sears* in its memorandum decision. Subsequent Third Department decisions did, however, apply the rule of *Video Corp.* and the six-year limitations period to legal malpractice actions.<sup>92</sup>

Less than a year after *Video Corp.* was decided, the Fourth Department applied the three-year statute of limitations to a legal malpractice action that sought recovery for damage to pecuniary interests arising from a contractual relationship.<sup>93</sup> The following year, the First Department also applied the three-year limitation period to an action alleging legal malpractice that

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90. *Id.* at 919, 463 N.Y.S.2d at 897. The plaintiff alleged that the defendant law firm failed to properly examine the title to real property. *Id.* at 918, 463 N.Y.S.2d at 897. After a member of the defendant law firm had advised that title to the subject property was free and clear of any liens, encumbrances or defects that would affect marketability, the title was discovered to be unmarketable. *Id.* The plaintiff grounded its causes of action in both legal malpractice and breach of contract. *Id.*

91. *Id.*

92. See *Bloom v. Kernan*, 146 A.D.2d 916, 536 N.Y.S.2d 897 (3d Dep't 1989); *Santulli v. Englert, Reilly & McHugh, P.C.*, 164 A.D.2d 149, 563 N.Y.S.2d 548 (3d Dep't 1990); *Canavan v. Steenburg*, 170 A.D.2d 858, 566 N.Y.S.2d 960 (3d Dep't 1991). *Canavan* applied the *Video Corp.* rule, although it cited to *Santulli* at the Appellate Division to support its holding that the six-year contract statute of limitations applied to a legal malpractice action. *Id.* at 859, 566 N.Y.S.2d at 961. Each of these cases involved damages to property or pecuniary interests that arose from a contractual relationship. See also *Krouner v. Koplovitz*, 175 A.D.2d 531, 572 N.Y.S.2d 959 (3d Dep't 1991). In *Krouner*, the plaintiff did not allege legal malpractice, but the court found that the facts alleged successfully stated a cause of action for breach of fiduciary duty. *Id.* at 532, 572 N.Y.S.2d at 961. The court held that the six-year statute of limitations applied, citing *Video Corp.* *Id.*

93. See *Peduto v. Durr*, 97 A.D.2d 959, 468 N.Y.S.2d 953 (4th Dep't 1983). See also *Johnson v. Phillips*, 115 A.D.2d 299, 495 N.Y.S.2d 824 (4th Dep't 1985). In *Johnson*, an action for legal malpractice, the court did not explicitly hold that the three-year period of CPLR section 214(6) was the applicable statute of limitations, but referred to the amended complaint being filed more than three years after the alleged negligence. *Id.* at 300, 495 N.Y.S.2d at 825. It is thus apparent that the court considered the three-year period to be the governing statute.

In two subsequent cases the Fourth Department did apply the six-year statute of limitations to malpractice actions. See *Banks v. DeMillo*, 145 A.D.2d 903, 536 N.Y.S.2d 284 (4th Dep't 1988); *Ralston Purina Co. v. Arthur G. McKee & Co.*, 158 A.D.2d 969, 551 N.Y.S.2d 720 (4th Dep't 1990). However, both of these cases were malpractice actions against contractors alleging faulty construction, in which the courts relied on *Sears*, but did not mention *Video Corp.* See *Banks*, 145 A.D.2d at 903, 536 N.Y.S.2d at 284-85; *Ralston Purina*, 158 A.D.2d at 970, 551 N.Y.S.2d at 722.



sought recovery for damages to pecuniary interests.<sup>94</sup>

The Second Department, after applying *Video Corp.* to legal malpractice actions in *Sinopoli v. Coccozza*,<sup>95</sup> *Kramer v. Belfi*,<sup>96</sup> and *Drab v. Baum*,<sup>97</sup> inexplicably applied the three-year statute of limitations in three subsequent legal malpractice actions.<sup>98</sup> Then, in *Sager v. DeRiggi*,<sup>99</sup> another legal malpractice/breach of contract action, the Second Department, citing to *Sears* and *Video Corp.*, declared "[i]t is now well settled" that the six-year contract statute of limitations applies to claims for damages to property or pecuniary interests that arose out of the contractual obligations of the parties, regardless of whether pled in contract or in tort.<sup>100</sup>

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94. See *Schleidt v. Stamler*, 106 A.D.2d 264, 482 N.Y.S.2d 481 (1st Dep't 1984). In *Schleidt*, the plaintiff's action was held to be timely because it was commenced two days short of three years after the accrual of the cause of action. *Id.* at 265-66, 482 N.Y.S.2d at 483. When the defendant attorney argued that the cause of action had actually accrued earlier and, therefore, had been commenced more than three years from its accrual, neither the court nor the plaintiff mentioned the applicability of § 213(2). *Id.*

95. 105 A.D.2d 743, 481 N.Y.S.2d 177 (2d Dep't 1984).

96. 106 A.D.2d 615, 482 N.Y.S.2d 898 (2d Dep't 1984).

97. 114 A.D.2d 992, 495 N.Y.S.2d 684 (2d Dep't 1985).

98. See *Mazzei v. Pokorny, Schrenzel & Pokorny*, 125 A.D.2d 374, 509 N.Y.S.2d 100 (2d Dep't 1986); *Stampfel v. Eckhardt*, 143 A.D.2d 184, 531 N.Y.S.2d 814 (2d Dep't 1988); *Winkler v. Messinger, Alperin & Hufjay*, 147 A.D.2d 693, 538 N.Y.S.2d 299 (2d Dep't 1989). *Stampfel* is primarily concerned with the application of the continuous representation doctrine. *Stampfel*, 143 A.D.2d at 185, 531 N.Y.S.2d at 815. See *infra* notes 131-41 and accompanying text. The memorandum of the court does not explicitly say that it is applying the three-year malpractice statute of limitations, however, this can be discerned from the dates of the pertinent events. The last act of alleged malpractice by the attorney occurred at a real estate closing on January 26, 1981. *Stampfel*, 143 A.D.2d at 185, 531 N.Y.S.2d at 814-15. The plaintiffs commenced the action on or about September 5, 1986, approximately five years and seven months later. *Id.* If the court was applying the six-year contract statute of limitations, the action would have been timely and there would have been no need to consider the applicability of the continuous representation doctrine. It is, therefore, apparent that the court applied the three-year malpractice statute of limitations.

Each of these cases involved damages to property or pecuniary interests that arose from a contractual relationship. *Mazzei*, 125 A.D.2d at 374, 509 N.Y.S.2d at 101; *Stampfel*, 143 A.D.2d at 185, 531 N.Y.S.2d at 815; *Winkler*, 147 A.D.2d at 693, 538 N.Y.S.2d at 299. The courts did not mention *Sears* or *Video Corp.* in any of the three cases.

99. 161 A.D.2d 571, 555 N.Y.S.2d 148 (2d Dep't 1990).

100. *Id.* at 572, 555 N.Y.S.2d at 149. Apparently, it was not "well settled" for very long, as this same court only fifteen months earlier applied the three-year malpractice statute of limitations to an action for legal malpractice that involved damages to property or pecuniary interests that arose from a contractual relationship. See *Winkler v.*

The First Department apparently did not think the rule concerning the proper statute of limitations in malpractice actions was well settled, because in the year following the Second Department's decision in *Sager*, it held that the three-year malpractice statute of limitations applied in a pecuniary interest legal malpractice action.<sup>101</sup> In light of the confusion and inconsistency among New York courts in determining the applicable statute of limitations in legal malpractice actions, it is appropriate to briefly examine the approach to the problem taken in other jurisdictions.

### B. Other Jurisdictions

Other jurisdictions take a variety of approaches in determining the applicable statute of limitations in legal malpractice actions.<sup>102</sup> California, for example, has enacted legislation attempting to clarify the proper statute of limitations in actions alleging legal malpractice.<sup>103</sup> The actual language of the Califor-

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Messinger, Alperin & Hufjay, 147 A.D.2d 693, 538 N.Y.S.2d 299 (2d Dep't 1989).

101. See *Bergman v. Fingerit*, 177 A.D.2d 448, 576 N.Y.S.2d 544 (1st Dep't 1991). *Bergman* concerned the applicability of the continuous representation doctrine. *Id.* at 449, 576 N.Y.S.2d at 545. See *infra* notes 131-41 and accompanying text. The defendant law firm's representation of plaintiffs' interests ended following a certain real estate closing and mortgage acquisition. *Bergman*, 177 A.D.2d at 449, 576 N.Y.S.2d at 545. The court noted that the parties did not have a retainer agreement or a contract for legal services related to the real estate transactions. As such, the statute of limitations was not tolled pursuant to the continuous representation doctrine. *Id.* But the court failed to address the issue of whether a contractual relationship existed between the parties at the time when the defendant law firm was representing plaintiffs' interests. It would seem that at least an implied contractual relationship must have existed. See *infra* note 247 and accompanying text. The court held the action was time-barred by the three-year statute of limitations of CPLR § 214(6) without mentioning *Sears* or *Video Corp. Bergman*, 177 A.D.2d at 449, 576 N.Y.S.2d at 545.

Only fourteen months earlier, the First Department did apply *Video Corp.* to an action for accounting malpractice, holding that the genesis of the action was in the contractual relationship of the parties and the remedy sought was a contractual remedy. See *Behren v. Blumstein*, 165 A.D.2d 657, 658, 560 N.Y.S.2d 768, 769 (1st Dep't 1990).

102. This section does not attempt to make an exhaustive analysis of how every state determines the proper statute of limitations in legal malpractice actions. Instead, it shows a representative sample of approaches used in other jurisdictions. See *infra* notes 103-27 and accompanying text.

103. See California Code of Civil Procedure § 340.6, which provides in pertinent part:

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be com-

nia statute, however, does not expressly state whether it applies to actions against attorneys for breach of contract.<sup>104</sup> The California Court of Appeal in *Southland Mechanical Constructors Corp. v. Nixen*,<sup>105</sup> after an extensive review of the legislative history of the statute, held that the legislature intended section 340.6 of the Code of Civil Procedure to include contract actions.<sup>106</sup> The court explained that its holding would not eliminate the right of plaintiffs to choose to bring an action for attorney malpractice in either tort or breach of contract.<sup>107</sup> It noted that as both theories remain viable, plaintiffs will consider different elements and measures of damages in choosing one theory over the other.<sup>108</sup> The decision will, however, eliminate the statute of limitations as a factor to be considered in deciding which cause of action to pursue.<sup>109</sup>

A number of other states take a similar approach to that taken in California on the question of which statute of limitations to apply in legal malpractice actions.<sup>110</sup> These states, some

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menced 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. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled . . . .

CAL. CIV. PROC. CODE § 340.6(a) (West 1982).

104. *Id.*

105. 173 Cal. Rptr. 917 (1981). *Southland* was overruled on other grounds in *Laird v. Blacker*, 7 Cal.Rptr. 2d 550, 557 (1992). *Laird* dealt with whether California's statute of limitations for legal malpractice, CAL. CIV. PROC. CODE § 340.6 (West 1982), is tolled during the period the client appeals from the adverse judgment which precipitated the malpractice action. *Id.* at 551. *Laird* does not discuss whether § 340.6 applies to actions against attorneys for breach of contract. See *infra* notes 106-09 and accompanying text.

106. *Southland*, 173 Cal. Rptr. at 924.

107. *Id.* at 926-27.

108. *Id.* at 927. But see *supra* text accompanying note 68; *infra* note 215.

109. *Southland*, 173 Cal. Rptr. at 927.

110. See *Zakak v. Broida and Napier, P.A.*, 545 So. 2d 380, 381 (Fla. Dist. Ct. App. 1989) (holding that an action for professional malpractice, other than medical malpractice, whether founded on contract or tort must be commenced within two years (citing FLA. STAT. ANN. § 95.11(4) (West 1982))); *Griggs v. Nash*, 775 P.2d 120, 124 (Idaho 1989) (holding that an action against one's attorney concerning the adequacy of representation, whether pled in contract or tort, is governed by the malpractice statute of limitations (citing IDAHO CODE § 5-219(4) (1990))); *Hibbard v. Taylor*, 837 S.W.2d 500, 501 (Ky. 1992) (holding that any civil action based on the rendering of, or failure to render professional services, must be commenced within one year of the accrual of the action, whether pled in contract or tort (citing KY. REV. STAT. ANN. § 413.245 (Michie 1992))); *Herzog v. Yuill*, 399 N.W.2d 287, 291 (N.D. 1987) (the term "malpractice" in N.D. CENT. CODE

by explicit statutory language, and some by judicial interpretation of statutory language, have held that all actions for legal malpractice, whether based on tort or contract, are governed by the same statute of limitations.<sup>111</sup> The Supreme Court of Hawaii, in *Higa v. Mirikitani*,<sup>112</sup> explained why the limitations period should be the same regardless of whether an action for legal malpractice is pled in tort or in breach of contract:

In the absence of a legal malpractice statute, most jurisdictions permit a plaintiff the choice between the contract or tort limitations periods depending on how the complaint is framed. These jurisdictions seem to recognize that in most cases the difference between a contractual breach of the oral agreement between an attorney and his client, in which the attorney expressly or impliedly promises to exercise his best efforts on his client's behalf, and a tortious breach by an attorney of his duty of due care in handling a client's affairs turns on the phraseology employed in the complaint.

This court should avoid applications of the law which lead to different substantive results based upon distinctions having their source solely in the niceties of pleading and not in the underlying realities. We agree with the reasoning of Justice Tobriner, writing for a unanimous California Supreme Court in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*,<sup>113</sup> that regardless of the nomenclature used by the plaintiff in a legal malpractice suit, all such actions should be governed by the same statute of limitations. This follows from the proposition that, in reality, a claim of injury resulting from the professional incompetence of an attorney is actionable under theories which are an amalgam of both tort and contract.<sup>114</sup>

The *Higa* court clearly and cogently states the argument for a uniform statute of limitations in legal malpractice actions, re-

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§ 28-01-18(3) (1974) refers to the "nature of the subject matter of the action and not to the form of remedial procedure, whether it be in tort or contract" (quoting *Johnson v. Haugland*, 303 N.W.2d 533, 538 (N.D. 1981)); *National Mortgage Co. v. Washington*, 744 S.W.2d 574, 578 (Tenn. Ct. App. 1987) (holding that actions against attorneys for malpractice, whether in contract or tort, must be commenced within one year of accrual of the cause of action (citing TENN. CODE ANN. § 28-3-104 (1980))).

111. See *supra* note 110.

112. 517 P.2d 1 (Haw. 1973).

113. 491 P.2d 421, 424 (Cal. 1971).

114. *Higa v. Mirikitani*, 517 P.2d at 4-5 (citations omitted).

ardless of whether the action is framed as one for malpractice or for breach of contract.<sup>115</sup>

The majority of states, however, do not follow the reasoning of the *Higa* court and have varying approaches to the statute of limitations problem.<sup>116</sup> In Georgia, for example, a cause of action for legal malpractice alleging negligence or unskillfulness, sounds in contract, and if there is an oral agreement, it is subject to the four-year statute of limitations of the Official Code of Georgia Annotated (OCGA) section 9-3-25.<sup>117</sup> A legal malpractice action, however, can also sound in tort and be subject to the two-year limitation of OCGA section 9-3-33.<sup>118</sup> The applicable statute of limitations is determined based on how the plaintiff pleads his cause of action.<sup>119</sup>

A number of states apply the "essence of the action" rule, declaring that even though a complaint is pled as breach of contract against an attorney, the essence of the underlying cause of action is the attorney's negligence, and, therefore, a tort statute of limitations applies.<sup>120</sup> Other states hold that an action against

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115. *See id.*

116. *See infra* notes 117-27 and accompanying text.

117. GA. CODE ANN. § 9-3-25 (Michie 1982). *See Ballard v. Frey*, 346 S.E.2d 893, 896 (Ga. Ct. App. 1986).

118. GA. CODE ANN. § 9-3-33 (Michie 1982). *See Ballard*, 346 S.E.2d at 896.

119. *Ballard*, 346 S.E.2d at 896. *See also* *Heritage Square Associates v. Blum*, No. CV 91 0117855, 1992 WL 175072 (Conn. Super. Ct. July 21, 1992) ("there is an implicit promise in the attorney-client contract that the attorney will perform his services . . . in a competent and professional manner and a breach of that promise supports a valid breach of contract claim, even though the negligent performance of service may also give rise to a tort action"). *Id.* at \*5.

120. *See W.C. Jones v. Wadsworth*, 791 P.2d 1013, 1016 (Alaska 1990) (holding that where the essence of complaint is negligence, the tort statute of limitations applies (citing *Van Horn Lodge, Inc. v. White*, 627 P.2d 641 (Alaska 1982))); *Barnat v. John and Jane Doe Partners A-D*, 747 P.2d 1218, 1222 (Ariz. 1987) (en banc) (holding that where the law imposes certain duties on an implied contractual relationship, breach of these duties gives rise to an action in tort, not in contract); *Shideler v. Dwyer*, 417 N.E.2d 281, 286 (Ind. 1981) (holding that "the number and variety of Plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact - apparent even to a layman - that this is a malpractice case, and hence is governed by the statute of limitations applicable to such actions" (citing IND. CODE ANN. § 34-1-2-2 (Burns 1986))); *Aldred v. O'Hara-Bruce*, 458 N.W.2d 671, 672-73 (Mich. Ct. App. 1990) (holding that a cause of action pled in contract was in reality an action for legal malpractice, which was time-barred (citing MICH. COMP. LAWS § 600.5805(4) (1987))); *Hickox v. Holleman*, 502 So. 2d 626, 636 (Miss. 1987) (holding that notwithstanding an oral contract between the attorney and client, the cause of action is based on the attorney's negligence, and a tort statute of limitations therefore applies (citing MISS. CODE ANN. § 15-1-49 (1972)));

an attorney for legal malpractice is tortious in nature unless the attorney has made an express promise to achieve a particular result and then fails to obtain that result.<sup>121</sup> When the attorney has made such an express promise, an action for breach of contract may properly be maintained and the contract statute of limitations will apply.<sup>122</sup> The Supreme Court of Kansas modified this rule by holding that in a legal malpractice action where the conduct of the attorney constitutes a breach of specific contractual provisions, as opposed to a breach of the legal duties imposed by law on the attorney-client relationship (such as the duty to use due care and to act in the best interests of the client), the contract statute of limitations applies.<sup>123</sup> Where the gravamen of the claim, however, is the breach of a duty imposed by law on the attorney-client relationship and not of the contract itself, the claim is tortious in nature, and the tort statute of limitations governs.<sup>124</sup> The Supreme Court of Appeals of West Virginia has also adopted this method of analysis.<sup>125</sup> Still other states hold that actions for legal malpractice are always tortious in nature and, therefore, a tort statute of limitations will always

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Northern Mont. Hosp. v. Knight, 811 P.2d 1276, 1278 (Mont. 1991) (holding that if the essence of the action is tortious, a tort statute of limitations applies; if the essence of the action is contractual, a contract statute of limitation applies, regardless of how the action is characterized by the plaintiff (citing MONT. CODE ANN. §§ 27-2-202, 27-2-206 (1991))); Werschky v. Moore, 706 P.2d 572, 574 (Or. Ct. App. 1985) (holding that an action pled in contract which implied a standard of care that an attorney would be held to regardless of any contract, was governed by the tort statute of limitations (citing OR. REV. STAT. § 12.110(1) (1991))); Stevers v. E.T. & H.K. Ide, Co., 527 A.2d 658, 659 (Vt. 1987) (holding that the nature of the harm, not the plaintiff's theory of liability, determines the proper statute of limitations).

121. See *W.C. Jones v. Wadsworth*, 791 P.2d 1013, 1016-17 (Alaska 1990) (holding that in order to maintain action for breach of contract, there must be an express promise to achieve a particular result); *Towns v. Frey*, 721 P.2d 147, 149 (Ariz. Ct. App. 1986) (holding that to assert a breach of contract claim against an attorney, the contract itself must "contain an undertaking to do the thing for the nonperformance of which the action is brought"); *Lima v. Schmidt*, 595 So. 2d 624, 628 & n.2 (La. 1992) (holding that generally an action for legal malpractice is tortious and governed by a one-year statute of limitations, but if an attorney expressly promises a specific result and fails to achieve that result or agrees to do certain work and does nothing at all, the action is governed by the ten-year statute of limitations for actions on a contract).

122. *W.C. Jones*, 791 P.2d at 1016-17; *Towns*, 721 P.2d at 149; *Lima*, 595 So.2d at 628 n.2.

123. See *Pancake House, Inc. v. Redmond*, 716 P.2d 575, 578 (Kan. 1986).

124. *Id.*

125. See *Hall v. Nichols*, 400 S.E.2d 901, 904 (W. Va. 1990).

apply.<sup>126</sup> Yet, other states hold that legal malpractice is always contractual in nature and, thus, a contract statute of limitations will always apply.<sup>127</sup> It is apparent that determining the applicable statute of limitations in legal malpractice actions lends itself to many methods of analysis and a variety of approaches are used in states across the country.

### C. *The Continuous Representation and Discovery Exceptions*

CPLR section 214(6) provides that an action for malpractice must be commenced within three years.<sup>128</sup> However, the statute does not specify when a cause of action accrues.<sup>129</sup> New York courts have, by necessity, interpreted CPLR section 214(6), holding that a malpractice cause of action generally accrues at the time the alleged act of malpractice occurs.<sup>130</sup>

With respect to legal malpractice, there is an exception to this rule where the attorney continues to represent the client

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126. See *Knauber v. Smith and Schnacke*, 536 N.E.2d 403, 407 (Ohio Ct. App. 1987) (holding that any action against an attorney for professional misconduct sounds in malpractice because Ohio does not recognize a distinct contract cause of action against attorneys who have negligently performed the services for which they were hired); *Funnell v. Jones*, 737 P.2d 105, 107 (Okla. 1985) (holding that an action for legal malpractice, though predicated on a contract of employment, is an action in tort and governed by the two-year tort statute of limitations (OKLA. STAT. ANN. tit. 12, § 95(3) (West 1988))), *cert. denied*, 484 U.S. 853 (1987); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988) (holding that a "cause of action for legal malpractice is in the nature of a tort and is thus governed by the two-year limitations statute" (TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 1986))).

127. See *Hendrickson v. Sears*, 310 N.E.2d 131, 133 (Mass. 1974) (holding that the traditional view of a legal malpractice action based on an attorney's negligence is that the gist of the action, regardless of the theory pled is the attorney's breach of contract); *Oleyar v. Kerr*, 225 S.E.2d 398, 400 (Va. 1976) (holding that the statute of limitations applicable to breach of contract governs actions for legal malpractice even though the action may be pled in tort, because were it not for the contract, no duty would have existed); *Schirmer v. Nethercutt*, 288 P. 265, 268 (Wash. 1930) (holding that legal malpractice actions are based on breach of contract and governed by the statute of limitations applicable to breach of contractual relations).

128. See *supra* note 37 and accompanying text.

129. See *supra* notes 30, 37. In other words, the statute does not specify what the "triggering event" is that the action must be commenced within three years of.

130. See *Naetzker v. Brockton Cent. Sch. Dist.*, 50 A.D.2d 142, 148, 376 N.Y.S.2d 300, 307 (4th Dep't 1975) (stating that "[t]he rule in cases where the gravamen of the action is professional malpractice is and has always been that the cause of action accrues upon the performance of the work by the professional"), *rev'd on other grounds*, 41 N.Y.2d 929, 363 N.E.2d 351, 394 N.Y.S.2d 627 (1977).

concerning the matter which gave rise to the malpractice claim.<sup>131</sup> This exception is known as the continuous representation doctrine.<sup>132</sup> The continuous representation doctrine had its origin in the "continuous treatment" doctrine that has been applied to toll the statute of limitations in medical malpractice actions.<sup>133</sup> The theory behind the continuous treatment doctrine is that a medical patient will receive the most effective care when the same physician attends to the patient from the initial treatment through eventual discharge.<sup>134</sup> Furthermore, if a doctor has committed an act of malpractice, by remaining on the case he may be more likely to discover and remedy his own error, than would another doctor taking over the case in the middle of treatment.<sup>135</sup> Thus, under the continuous treatment exception, a patient would not be required to interrupt ongoing, corrective treatment by initiating a lawsuit against his physician prior to the expiration of the statute of limitations.<sup>136</sup>

The same rationale has been extended to other areas of professional malpractice, including the legal profession.<sup>137</sup> As it applies to attorneys, the rule acknowledges that a person who seeks professional legal assistance is justified in placing confidence in the attorney's ability and good faith, and cannot realistically be expected to question and evaluate the methods utilized or the manner in which services are rendered.<sup>138</sup> In cases where the continuous representation exception has been applied to toll the statute of limitations in legal malpractice actions, there has been manifest evidence of an "ongoing, continuous, developing and dependent relationship"<sup>139</sup> between the attorney and client that often involved attempts by the attorney to cor-

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131. See *Muller v. Sturman*, 79 A.D.2d 482, 484, 437 N.Y.S.2d 205, 207-08 (4th Dep't 1981).

132. *Id.* at 484, 437 N.Y.S.2d at 208. See *infra* notes 133-41 and accompanying text.

133. *Muller*, 79 A.D.2d at 484, 437 N.Y.S.2d at 207. See *infra* notes 134-36 and accompanying text.

134. See *McDermott v. Torre*, 56 N.Y.2d 399, 408, 437 N.E.2d 1108, 1112, 452 N.Y.S.2d 351, 355 (1982).

135. *Id.*

136. See *Borgia v. City of New York*, 12 N.Y.2d 151, 156, 187 N.E.2d 777, 779, 237 N.Y.S.2d 319, 321-22 (1962).

137. See *Greene v. Greene*, 56 N.Y.2d 86, 94, 436 N.E.2d 496, 500, 451 N.Y.S.2d 46, 50 (1982).

138. *Id.*

139. *Muller*, 79 A.D.2d at 485, 437 N.Y.S.2d at 208.



rect a prior wrongful act or omission.<sup>140</sup> Thus, to invoke the tolling provision of the continuous representation doctrine, the relationship between the client and attorney must be one based on trust and confidence, and embody a continuation of the professional services from which the alleged malpractice arose.<sup>141</sup>

Persuasive arguments can be made that the statute of limitations should also be tolled until the client discovers that he has sustained injury.<sup>142</sup> There may be a considerable period of time between the occurrence of the wrongful act or omission and the discovery that such an act or omission occurred and thereby caused injury. As an example, an attorney may make an error in drafting a will. It is quite possible that the error may not be discovered until many years later when the decedent's estate is settled and the statute of limitations has long since expired.<sup>143</sup>

The New York state legislature has recognized such a "discovery" exception to toll the statute of limitations in actions for medical malpractice where a "foreign object" has been left in the patient's body as well as in so called "toxic tort" actions.<sup>144</sup> At

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140. *Id.* See also *Citibank v. Suthers*, 68 A.D.2d 790, 795, 418 N.Y.S.2d 679, 682 (4th Dep't 1979).

141. *Muller*, 79 A.D.2d at 486, 437 N.Y.S.2d at 208.

142. See Paul F. Mahaffey, *Legal Malpractice: An Overview*, 61 N.Y. St. B.J. 32, 36 (Jan. 1989).

143. *Id.* at 36. Of course, in this situation, the client himself never learns of the attorney's error. It is the client's heirs who eventually discover the wrongful act or omission and are thereby injured. In New York, "[t]he firmly established rule . . . with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties not in privity for harm caused by professional negligence." *Viscardi v. Lerner*, 125 A.D.2d 662, 663-64, 510 N.Y.S.2d 183, 185 (2d Dep't 1986). The *Viscardi* court declined to depart from the firmly established privity requirement to carve out a specific exception for negligence by an attorney in drafting a will. *Id.* at 664, 510 N.Y.S.2d at 185. See also *Spivey v. Pulley*, 138 A.D.2d 563, 565, 526 N.Y.S.2d 145, 146-47 (2d Dep't 1988).

In other jurisdictions, however, courts have held that an attorney may be liable to intended beneficiaries of a will who lose testamentary rights because of improper drafting of the will by the attorney, despite the lack of privity. See, e.g., *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984); *Auric v. Continental Casualty Co.*, 331 N.W.2d 325, 327 (Wis. 1983); *Needham v. Hamilton*, 459 A.2d 1060, 1062-63 (D.C. 1983); *Licata v. Spector*, 225 A.2d 28, 29-31 (Conn. C.P. 1966); *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

144. See N.Y. CIV. PRAC. L. & R. § 214-a (McKinney 1990). Section 214-a provides in pertinent part:

An action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of . . . provided, however, that where the action is based upon the discovery of a foreign

least in these contexts, the legislature has realized that the policies served by statutes of limitations do not outweigh the interest of a plaintiff in not being foreclosed from a judicial remedy before he is aware that he has been injured and can discover the cause of his injury.<sup>145</sup> Considerations similar to those that informed the legislature in enacting discovery exceptions in "foreign object" medical malpractice actions and in "toxic tort" actions, apply to legal malpractice actions as well. Two commentators have explained the rationale for applying the discovery rule to legal malpractice actions:

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object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

*Id.*; see also N.Y. CIV. PRAC. L. & R. § 214-c (McKinney 1990). Section 214-c provides in pertinent part:

(2) Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier. . . . (4) . . . where the discovery of the *cause* of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized. . . .

*Id.* (emphasis added). Section 214-c is commonly referred to as the "toxic tort" discovery rule. See Joseph M. McLaughlin, N.Y. CIV. PRAC. L. & R. § 214-c, Practice Commentaries at 630-39 (McKinney 1990). The toxic tort discovery exception, thus makes the further distinction between discovery of the injury and discovery of the *cause* of the injury. CPLR § 214-c(4). New York also has a specific discovery exception for actions to recover damages for injury caused by contact with or exposure to phenoxy herbicides ("Agent Orange") while serving as a member of the United States armed forces in Indo-China. N.Y. CIV. PRAC. L. & R. § 214-b (McKinney 1990).

145. See generally, *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969). The Court of Appeals holding in *Flanagan* was later codified as the foreign object discovery exception of CPLR § 214-a. See Joseph M. McLaughlin, N.Y. CIV. PRAC. L. & R. § 214-a Practice Commentaries, at 603 (McKinney 1990). See also *Prego v. City of New York*, 147 A.D.2d 165, 168, 541 N.Y.S.2d 995, 998 (2d Dep't 1989).

A lawyer is a legal expert; the client is not and cannot be expected to recognize substandard professional conduct. Requiring the client to ascertain malpractice at the moment of its occurrence casts upon him the unfair and impractical burden of either knowing as much about the law as does his attorney or hiring a second attorney to scrutinize the work of the first.<sup>146</sup>

The Texas Supreme Court, in *Willis v. Maverick*,<sup>147</sup> concluded that "any burden placed upon an attorney by application of the discovery rule is less onerous than the injustice of denying relief to unknowing victims."<sup>148</sup>

While *Santulli* did not address the issue of the discovery exception to toll the statute of limitations, it involved a complex set of issues that had divided the various appellate departments.<sup>149</sup> Specifically, the Court of Appeals considered whether the three-year malpractice statute of limitations of CPLR section 214(6) or the six-year contract statute of limitations of CPLR section 213(2) applied in an action alleging legal malpractice,<sup>150</sup> and whether an attorney had to make an express promise to achieve a specific result in order for a client to maintain an action against the attorney for breach of contract.<sup>151</sup> The Court of Appeals agreed to review the case in the hope of resolving these vexing questions.

### III. The Case

#### A. Facts

Plaintiff Martin Santulli contacted the defendant law firm Englert, Reilly & McHugh, P.C. (hereinafter "Englert Reilly") in October 1980 with respect to representing him in the sale of his

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146. Mark R. Friend & Joseph H. Hartzler, Comment, *New Developments in Legal Malpractice*, 26 AM. U. L. REV. 408, 439 (1977) (citations omitted). See also *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988). In *Willis*, the court also recognized that in the absence of a discovery rule, in order to fully protect himself, the client would have to hire a second attorney to observe the work of the first. The court realized that this would be a costly and impractical solution that would only serve to undermine the confidential attorney-client relationship. *Id.*

147. 760 S.W.2d 642 (Tex. 1988).

148. *Id.* at 646.

149. See *supra* part II.A.

150. *Santulli*, 78 N.Y.2d at 707-08, 586 N.E.2d at 1017-18, 579 N.Y.S.2d at 327-28.

151. *Id.* at 706, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326.

hardware business.<sup>152</sup> Santulli was to sell the business to Daniel White for \$75,000.<sup>153</sup> The purchase price was to consist of \$40,000 in cash with the balance of \$35,000 to be secured by a first mortgage on certain property owned by Samuel White, Daniel White's father.<sup>154</sup> Englert Reilly was retained to perform all services in connection with the sale of the business, including, according to Santulli's allegations, preparing and recording a first mortgage covering the entire property owned by Samuel White located at 609 Verona Avenue in Schenectady, New York.<sup>155</sup> Rather than preparing the mortgage itself, however, Santulli alleged that Englert Reilly allowed White's attorney to draw the mortgage.<sup>156</sup> A mortgage was prepared and recorded with the local County Clerk in February 1981.<sup>157</sup>

After making approximately twenty monthly payments on the mortgage, Daniel White defaulted.<sup>158</sup> Subsequently in May 1983, Santulli requested Englert Reilly's help to recover the past due mortgage payments.<sup>159</sup> When this collection attempt was unsuccessful, Santulli checked the mortgage himself and found that the most valuable part of the White property, the part on which a house was located, had been excluded as security for the mortgage debt.<sup>160</sup>

Santulli brought the faulty mortgage to Englert Reilly's attention and foreclosure was considered.<sup>161</sup> In August 1983, however, Englert Reilly informed Santulli that it was unable to act as counsel in a foreclosure action due to a potential conflict of interest.<sup>162</sup> Santulli retained new counsel, but rather than initi-

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152. *Id.* at 703, 586 N.E.2d at 1015, 579 N.Y.S.2d at 325.

153. *Id.*

154. Record on Appeal, p. 34.

155. *Id.* at 34-35.

156. *Id.*

157. *Santulli*, 78 N.Y.2d at 704, 586 N.E.2d at 1015, 579 N.Y.S.2d at 325.

158. *Id.*

159. *Id.*

160. *Id.* The portion of the property that was encumbered contained only two vacant lots and a shed. *Id.*

161. *Id.*

162. *Id.* Englert Reilly notified Santulli that because the partner (Reilly) who had handled the sale of the business and was responsible for preparing the mortgage would undoubtedly be called as a witness in a foreclosure action, Englert Reilly was disqualified from acting as Santulli's counsel in any such proceeding. Record on Appeal, p. 210.

ating foreclosure proceedings,<sup>163</sup> he brought an action against Englert Reilly in September 1985 alleging legal malpractice and breach of contract.<sup>164</sup>

### B. *Procedural History*

Englert Reilly moved for summary judgment on grounds of failure to state a cause of action and that the claims were barred by the statute of limitations.<sup>165</sup> Santulli argued that the continuous representation doctrine<sup>166</sup> tolled the accrual of the action until August 9, 1983, the date Englert Reilly notified him that it was unable to represent him due to a conflict of interest.<sup>167</sup> If Santulli was correct in this assertion, his malpractice action would be timely commenced within the three year period of CPLR section 214(6). The trial court denied the motion for summary judgment, holding that triable issues of fact existed.<sup>168</sup> Englert Reilly appealed.<sup>169</sup>

The Appellate Division, Third Department, held that the complaint did not state a cause of action for breach of contract because there was not an express promise by Englert Reilly to achieve a specific result.<sup>170</sup> But, nevertheless, following the rule of *Sears and Video Corp.*,<sup>171</sup> the court applied the six-year contract statute of limitations to the malpractice action, because recovery was sought for damages to property or pecuniary interests that arose from a contractual relationship.<sup>172</sup> The court expressly overruled two of its earlier decisions, *Albany Savings Bank v. Caffry, Pontiff, Stewart, Rhodes & Judge, P.C.*,<sup>173</sup> and

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163. A foreclosure action would have been pointless, as the problem was that the mortgaged property did not provide proper security for the debt. See *Santulli*, 78 N.Y.2d at 704, 586 N.E.2d at 1015, 579 N.Y.S.2d at 325.

164. *Id.* The suit also sought treble damages pursuant to Judiciary Law § 487. *Id.*

165. Record on Appeal, p. 14.

166. See *supra* notes 131-41 and accompanying text.

167. *Santulli*, 164 A.D.2d at 150, 563 N.Y.S.2d at 549.

168. Record on Appeal at 15. The court also dismissed Santulli's claim for treble damages under Judiciary Law § 487. *Id.* at 18.

169. *Santulli*, 164 A.D.2d at 150, 563 N.Y.S.2d at 549.

170. *Id.* at 151, 563 N.Y.S.2d at 550.

171. See *supra* notes 77-86 and accompanying text.

172. *Santulli*, 164 A.D.2d at 151, 563 N.Y.S.2d at 549.

173. 95 A.D.2d 918, 463 N.Y.S.2d 896 (3d Dep't 1983). See *supra* notes 89-91 and accompanying text.

*Brainard v. Brown*,<sup>174</sup> which had each held that if the essence of the action is negligence, the three-year statute of limitations applied.<sup>175</sup> The court also held that the continuous representation doctrine was not applicable because "[t]here was not an uninterrupted course of reliance and services related to the particular duty breached."<sup>176</sup>

One justice dissented in part, arguing that the three-year malpractice statute of limitations applied when "the theory of liability is based upon a breach of the traditional duties arising out of the attorney-client relationship, not a breach of any particular contractual obligation."<sup>177</sup> In the dissenting justice's view, an even stronger argument for application of the three-year statute of limitations was that the purpose of damages here was to "make the client whole," rather than to allow the client to obtain the benefit of his bargain.<sup>178</sup> These circumstances combined to make the action tortious in nature, thereby placing it under the three-year malpractice statute of limitations.<sup>179</sup> Both parties appealed, by leave of the Appellate Division.<sup>180</sup>

### C. Judge Alexander's Opinion for a Unanimous Court of Appeals

Initially, the court reviewed the Appellate Division's dismissal of the breach of contract action.<sup>181</sup> Englert Reilly argued that for a client to maintain a breach of contract action against his attorney, the attorney must have either promised to achieve a specific result and failed to obtain that result, or promised to

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174. 91 A.D.2d 287, 458 N.Y.S.2d 735 (3d Dep't 1983). See *supra* note 51 and accompanying text.

175. *Santulli*, 164 A.D.2d at 151, 563 N.Y.S.2d at 549.

176. *Id.* at 150-51, 563 N.Y.S.2d at 549 (quoting *National Life Ins. Co. v. Frank B. Hall & Co. of N.Y.*, 67 N.Y.2d 1021, 1023, 494 N.E.2d 449, 450, 503 N.Y.S.2d 318, 319 (1986)).

177. *Id.* at 153-54, 563 N.Y.S.2d at 551 (Casey, J.P., concurring in part and dissenting in part).

178. *Id.* at 154, 563 N.Y.S.2d at 551 (Casey, J.P., concurring in part and dissenting in part).

179. *Id.* (Casey, J.P., concurring in part and dissenting in part).

180. *Santulli*, 78 N.Y.2d 700, 703, 586 N.E.2d 1014, 1015, 579 N.Y.S.2d 324, 325 (1992).

181. *Id.*

provide services and completely failed to perform.<sup>182</sup> The court, however, disagreed with both Englert Reilly and the Appellate Division below, holding there need not be an express promise to achieve a specific result in order for a client to maintain an action for breach of contract against his attorney.<sup>183</sup> It explained that the breach of the attorney's implied promise to exercise due care in performing the services required by the contract is sufficient basis to support a breach of contract action.<sup>184</sup> Applying this standard, the court held that Santulli had sufficiently pled a cause of action for breach of contract.<sup>185</sup>

The court next addressed the question of the applicable statute of limitations in a legal malpractice action.<sup>186</sup> Englert Reilly argued that the "essence of the action" rule<sup>187</sup> applied, and that the "essence" here was its alleged negligence in the performance of duties that derived from the attorney-client relationship, not the breach of any contractual obligations.<sup>188</sup> It therefore asserted that the action was in tort and that the three-year malpractice statute of limitations applied.<sup>189</sup>

The court explained, however, that many of the earlier cases that employed the essence of the action rule were cases that involved personal injuries and thus "involved policy considerations significantly different from those policy considerations involved where the action seeks to recover damages to property or pecuniary interests only."<sup>190</sup> The court therefore rejected the essence

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182. *Id.* at 706, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327.

183. *Id.* at 705, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326. *See supra* text accompanying note 170.

184. *Santulli*, 78 N.Y.2d at 705, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326. The court cited to the Third Department case of *Bloom v. Kernan*, 146 A.D.2d 916, 536 N.Y.S.2d 897 (3d Dep't 1989) and to its own decision in *Video Corp.* to support this proposition. *Santulli*, 78 N.Y.2d at 705, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326.

185. *Id.* at 706, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326. The complaint alleged that Englert Reilly "agreed to do all services relative to the sale of plaintiff's hardware business, including the preparation of the first mortgage," and that defendant breached the agreement of retainer by "failing to properly draw and record such a first mortgage." *Id.* at 705-06, 586 N.E.2d at 1016, 579 N.Y.S.2d at 326.

186. *Id.* at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327.

187. *See supra* notes 43-63 and accompanying text.

188. *Santulli*, 78 N.Y.2d at 707-08, 586 N.E.2d at 1017-18, 579 N.Y.S.2d at 327-28.

189. *Id.* at 708, 586 N.E.2d at 1017-18, 579 N.Y.S.2d at 327-28.

190. *Id.* at 708, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328. The court did not explain what these different policy considerations are nor did it distinguish or discuss any of the cases that applied the essence of the action rule that did not involve personal injuries,

of the action argument.<sup>191</sup>

An additional reason for not applying the six-year statute of limitations, Englert Reilly argued, is that "traditional contract principles" should not apply in the context of an attorney-client relationship.<sup>192</sup> Such relationship, it asserted, is "unique," "much more than a contractual relationship," and "founded in principle upon the elements of trust and confidence."<sup>193</sup> Thus, Englert Reilly asserted that claims against an attorney for malpractice should not be regarded as stemming from a contractual relationship, as malpractice claims against architects and insurance brokers have been so construed.<sup>194</sup>

The court rejected each of these arguments and held that the six-year contract statute of limitations applies to actions alleging failure to exercise due care in the performance of a contract where recovery is sought for damages to property or pecuniary interests.<sup>195</sup> It cited to its earlier decisions in *Sears*, *Video Corp.*, and *Paver* to reaffirm that "the choice of applicable Statute of Limitations is properly related to the remedy rather than to the theory of liability."<sup>196</sup> The court explained that whether the action here is pled in contract as breach of contract or in

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but where damages were to property or pecuniary interests. See *supra* notes 43-63 and accompanying text. See also KEETON, *supra* note 65, at 666-67.

191. *Santulli*, 78 N.Y.2d at 708, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328.

192. *Id.* at 708-09, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328. Englert Reilly relied on *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990), to support this proposition. The *Campagnola* court stated "[b]ecause of the uniqueness of the attorney-client relationship, traditional contract principles are not always applied to govern disputes between attorneys and clients." *Id.* at 43, 555 N.E.2d at 614, 556 N.Y.S.2d at 242.

193. *Santulli*, 78 N.Y.2d at 708, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328. See *Demov, Morris, Levine & Shein v. Glantz*, 53 N.Y.2d 553, 556, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55, 57 (1981) (explaining the unique relationship between an attorney and client).

194. *Santulli*, 78 N.Y.2d at 708, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328. Englert Reilly was referring to the *Sears* and *Video Corp.* decisions. *Id.*

195. *Id.* at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327. The court cited to *Video Corp.*, *Sager v. DeRiggi*, 161 A.D.2d 571, 555 N.Y.S.2d 148 (2d Dep't 1990), *Sinopoli v. Cocozza*, 105 A.D.2d 743, 481 N.Y.S.2d 177 (2d Dep't 1977), and *Baratta v. Kozlowski*, 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dep't 1983) to support its conclusion. *Santulli*, 78 N.Y.2d at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327. It is noteworthy that *Sager* and *Sinopoli* are both legal malpractice actions. See *supra* notes 95, 99 and accompanying text.

196. *Santulli*, 78 N.Y.2d at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327 (quoting *Sears*, 43 N.Y.2d 389, 394-95, 372 N.E.2d 555, 557, 401 N.Y.S.2d 767, 770).



tort as legal malpractice, without the contractual relationship between Santulli and Englert Reilly, no legal services would have been rendered and neither party would be aggrieved.<sup>197</sup> Thus, any liability flowed from the contractual relationship.<sup>198</sup> The court stated that, as it held in *Sears*, the description of the cause of action is not significant because "an agreement to exercise due care in the performance of the agreed services is to be implied."<sup>199</sup>

The court also rejected Englert Reilly's argument that applying the six-year statute of limitations to the facts of this case would effectively nullify the three-year malpractice statute of limitations of CPLR section 214(6).<sup>200</sup> It noted that the same arguments were made and similarly rejected in both *Sears* and *Video Corp.*<sup>201</sup>

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197. *Id.*

198. *Id.*

199. *Id.* (quoting *Sears*, 43 N.Y.2d 389, 396, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 771).

200. *Id.* at 709, 586 N.E.2d at 1018, 579 N.Y.S.2d at 328.

201. *Id.* The reported opinions of *Sears*, *Roebuck & Co. v. Enco Assocs.*, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977), and *Video Corp. of Am. v. Frederick Flatto Assocs.*, 58 N.Y.2d 1026, 448 N.E.2d 1350, 462 N.Y.S.2d 439 (1983), do not reveal that such arguments were made and rejected. The *Video Corp.* majority at the Appellate Division, however, made the same argument as Englert Reilly. It stated:

The proposed extension of the rule pronounced in the *Sears*, *Roebuck* case does not pay due deference to the legislative pronouncement of CPLR 214, subd. 6, establishing a three-year limitations period for "an action to recover damages for malpractice." Viewed from a practical perspective, the difference between tort damages and contract damages will not usually be substantial. If a six-year statute of limitations is then to be applied to all actions arising out of contractual obligations which seek to redress injuries to property or pecuniary interests only . . . there would be virtually no cases remaining within the scope of CPLR 214, subd. 6, though that subdivision is broadly phrased. Nearly all "malpractice" actions against attorneys, accountants, architects, surveyors, and perhaps insurance brokers would fall within the rule providing for the six-year limitations period as these actions regularly arise out of a contractual relationship and involve injury to property or pecuniary interests only. . . . What role is left for the three-year limitations period of CPLR 214, subd. 6, other than malpractice actions against architects arising from the collapse of structures which result in personal injuries? If CPLR 214, subd. 6, were to be assigned such a curtailed scope, it would appear to us that we would merely be giving lip service to "acknowledging the Legislature's general address to malpractice claims (CPLR 214, subd. 6)."

*Video Corp. of Am. v. Frederick Flatto Assocs.*, 85 A.D.2d 448, 451-52, 448 N.Y.S.2d 498, 501 (1st Dep't 1982) (citation omitted). The Court of Appeals, however, modified that part of the Appellate Division's judgment that applied the three-year statute of limitations to an action against an insurance broker alleging negligence and breach of contract,

The court then discussed the measure of damages available in a malpractice action that is commenced more than three but less than six years from its accrual.<sup>202</sup> It held that damages recoverable would be limited to those damages that normally would be recoverable in a contract action.<sup>203</sup> Damages that are not normally recoverable in a contract action would be governed by the three-year statute of limitations.<sup>204</sup>

The last issue the court addressed was whether the continuous representation doctrine acted to toll the statute of limitations.<sup>205</sup> It agreed with the judgment of the Appellate Division that Englert Reilly's representation of Santulli ended in April 1981 when payment was made for services rendered in connection with the sale of Santulli's business.<sup>206</sup> Thus, the continuous representation doctrine did not apply.<sup>207</sup>

#### IV. Analysis

The *Santulli* decision presents a clear standard for determining the applicable statute of limitations in legal malpractice actions. The standard is that when an asserted liability arises out of a contractual relationship and the recovery sought is for damages to property or pecuniary interests, the six-year contract statute of limitations of CPLR section 213(2) applies.<sup>208</sup> Although *Santulli* does not announce a new standard, it clarifies the standard for determining the proper statute of limitations in legal malpractice actions.<sup>209</sup> While *Santulli* represents the first time the Court of Appeals has explicitly applied the rationale of

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holding that the six-year contract statute of limitations applied. *Video Corp.*, 58 N.Y.2d at 1028, 448 N.E.2d at 1350, 462 N.Y.S.2d at 439. Thus, one may infer that the Court of Appeals in *Video Corp.* rejected the argument that application of the six-year statute of limitations effectively nullifies § 214(6). The *Sears* opinion at the Appellate Division does not reveal that such argument was made. *Sears, Roebuck & Co. v. Enco Assocs.*, 54 A.D.2d 13, 385 N.Y.S.2d 613 (3d Dep't 1976).

202. *Santulli*, 78 N.Y.2d at 709, 586 N.E.2d at 1018-19, 579 N.Y.S.2d at 328-29.

203. *Id.* at 709, 586 N.E.2d at 1019, 579 N.Y.S.2d at 329.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 707, 586 N.E.2d at 1017, 579 N.Y.S.2d at 327. See *supra* notes 195-99 and accompanying text.

209. See *supra* notes 195-99 and accompanying text.

*Video Corp.* to a legal malpractice action, lower New York courts have, albeit inconsistently, applied *Video Corp.* to legal malpractice actions since 1984.<sup>210</sup> Moreover, federal district courts applying New York law have held that *Video Corp.* and *Sears* apply to actions for legal malpractice.<sup>211</sup>

It is clear that the criteria for selecting the applicable statute of limitations in legal malpractice actions needed clarification. Not only was there nothing even remotely approaching a consensus among the different states with respect to statute of limitation selection in malpractice actions,<sup>212</sup> but there was not even consensus among the four departments of the Appellate Division in New York.<sup>213</sup> This clarification was provided by the Court of Appeals in *Santulli*. Perhaps *Santulli* will serve as the "bright line rule"<sup>214</sup> that *Video Corp.* never quite became for selecting statutes of limitations in legal, as well as other types of professional malpractice actions.

*Santulli* also makes it clear that when an action for legal malpractice is commenced more than three years but less than six years after the accrual of the cause of action, recovery will be limited to a contract measure of damages.<sup>215</sup> This could have the effect of limiting the recovery one would otherwise be entitled to

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210. See *Sinopoli v. Cocozza*, 105 A.D.2d 743, 488 N.Y.S.2d 177 (2d Dep't 1984); *Bloom v. Kernan*, 146 A.D.2d 916, 536 N.Y.S.2d 897 (3d Dep't 1989); *Sager v. DeRiggi*, 161 A.D.2d 571, 555 N.Y.S.2d 148 (2d Dep't 1990); *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 560 N.Y.S.2d 787 (2d Dep't 1990); *Golub v. Baer, Marks & Upham*, 172 A.D.2d 489, 567 N.Y.S.2d 843 (2d Dep't 1991).

211. See *Cohen v. Goodfriend*, 665 F. Supp. 152, 159 (E.D.N.Y. 1987); *Schur v. Porter*, 712 F. Supp. 1140, 1147 (S.D.N.Y. 1989).

212. See *supra* notes 102-27 and accompanying text.

213. See *supra* notes 43-101 and accompanying text.

214. See *supra* note 86. But see also *infra* notes 220-28 and accompanying text.

215. *Santulli*, 78 N.Y.2d at 709, 586 N.E.2d at 1018-19, 579 N.Y.S.2d at 328-29. CPLR § 214(6) will still govern with respect to damages that are different from or greater than a contract measure of damages. See *supra* notes 203-04 and accompanying text. However, these qualifications "are not likely to provide much solace for attorneys," since the measure of damages is usually the same whether an action is brought in tort or contract. Alexander, *supra* note 21, at 52. For example, consequential damages for emotional distress, usually not available in a contract action, would be governed by CPLR § 214(6). But even if a legal malpractice action was commenced within three years, such damages would be difficult to recover. See generally *Green v. Leibowitz*, 118 A.D.2d 756, 757-58, 500 N.Y.S.2d 146, 148-49 (2d Dep't 1986) (stating requirements for recovery for intentional infliction of emotional distress and negligent infliction of emotional distress). See also *supra* note 67.

under a tort theory of liability.<sup>216</sup> In the majority of legal malpractice actions, however, the measure of damages under a contract theory of liability will be equal to the damages under a tort theory.<sup>217</sup> Thus, limiting recovery to a contract measure of damages will not reduce the available damages in most cases.

#### A. *Post-Santulli*

Four Appellate Division cases have been decided since *Santulli* that have relied on its holding.<sup>218</sup> It is submitted, however, that any one of the four cases could have reached the same result without any reliance on *Santulli*. Three of the four cite to other cases in addition to *Santulli* to support the proposition that the six-year contract statute of limitations applies to malpractice actions where recovery is sought for damages to property or pecuniary interests arising from a contractual relationship.<sup>219</sup> Thus, while *Santulli* does not announce a new standard,

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216. See *supra* note 67 and accompanying text. But see also *supra* text accompanying note 68.

217. See *supra* text accompanying note 68; *supra* note 215.

218. See *Nate B. & Frances Spingold Foundation v. Wallin, Simon, Black and Co.*, 184 A.D.2d 464, 465, 585 N.Y.S.2d 416, 417 (1st Dep't 1992) (holding that in an action for accounting malpractice, negligence, and breach of contract, all claims are governed by the six-year statute of limitations based on the remedy sought rather than the theory of liability alleged); *Miguel Padilla v. New York City Transit Authority*, 184 A.D.2d 760, 762, 585 N.Y.S.2d 491, 493 (2d Dep't 1992) (holding that where a legal malpractice claim seeks recovery for damages to property or pecuniary interests arising from the contractual relationship, the six-year statute of limitations applies); *MTG Enters., Inc. v. Berkowitz*, 182 A.D.2d 388, 388-89, 582 N.Y.S.2d 130, 130-31 (1st Dep't 1992) (holding that an action against an accountant for malpractice and breach of contract was governed by the six-year contract statute of limitations); *Barth v. Barth, Sullivan & Lancaster*, 179 A.D.2d 1049, 1050, 579 N.Y.S.2d 283, 283 (4th Dep't 1992) (holding that an action for legal malpractice is governed by the six-year contract statute of limitations). One federal court has also relied on *Santulli*. See *Cuccolo v. Lipsky, Goodkin & Co.*, 826 F. Supp. 763, 768 (S.D.N.Y. 1993) (holding that an action for accounting malpractice that seeks contract remedies is governed by New York's six-year statute of limitations for actions on a contract).

219. *Nate B.* also cites to *Golub v. Baer, Marks & Upham*, 172 A.D.2d 489, 567 N.Y.S.2d 843 (2d Dep't 1991). *Nate B.*, 184 A.D.2d at 465, 585 N.Y.S.2d at 417. *Miguel Padilla* also cites to *Golub*, *Sager v. DeRiggi*, 161 A.D.2d 571, 555 N.Y.S.2d 148 (2d Dep't 1990), and *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 560 N.Y.S.2d 787 (2d Dep't 1990). *Miguel Padilla*, 184 A.D.2d at 762, 585 N.Y.S.2d at 492. *Barth* also cites to *Golub*, *Luk Lamellen*, *Sager*, *Bloom v. Kernan*, 146 A.D.2d 916, 536 N.Y.S.2d 897 (3d Dep't 1989), and *Video Corp. Barth*, 179 A.D.2d at 1050, 579 N.Y.S.2d at 283.

it clarifies and reinforces the rule promulgated in *Video Corp.*

Even after *Santulli*, however, New York courts have at times applied the three-year statute of limitations to actions alleging legal malpractice.<sup>220</sup> In *Bass & Ullman v. Chanes*,<sup>221</sup> a client sued his law firm for malpractice claiming it was negligent in its review and approval of advertising copy related to the client's mail order business.<sup>222</sup> Although *Bass & Ullman* concerned the applicability of the continuous representation doctrine,<sup>223</sup> the court twice referred to the three-year period of CPLR section 214(6) as the relevant limitation period.<sup>224</sup> The court must have been aware that the client was seeking recovery for damages to property or pecuniary interests, as it explained, "[t]he claim here is that the law firm's negligence in reviewing advertising copy directly injured the clients in their business."<sup>225</sup>

The *Bass & Ullman* court made no mention of *Santulli*, which had been decided seven months earlier. There is no indication that the relationship between the client and the law firm in *Bass & Ullman* was not a contractual relationship.<sup>226</sup> Moreover, the client sought recovery for injury to a pecuniary interest.<sup>227</sup> Thus, the *Santulli* criteria for application of the six-year contract statute of limitations appear to have been satisfied. In light of *Santulli*, it appears that the court's references to the three-year statute of limitation period were incorrect.<sup>228</sup>

In *Hirsch v. Weisman*,<sup>229</sup> a post-*Santulli* case, the First Department held that the three-year statute of limitations gov-

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220. See *infra* notes 221-44 and accompanying text.

221. 185 A.D.2d 750, 586 N.Y.S.2d 610 (1st Dep't 1992).

222. *Id.* at 750, 586 N.Y.S.2d at 610.

223. See *supra* notes 131-41 and accompanying text.

224. *Bass & Ullman*, 185 A.D.2d at 750, 586 N.Y.S.2d at 610-11.

225. *Id.* at 750, 586 N.Y.S.2d at 611.

226. See *infra* note 247 and accompanying text.

227. See *supra* text accompanying note 225.

228. Because the court agreed with the plaintiff that the continuous representation doctrine applied to toll the accrual of the action such that it was timely commenced, even with a three-year statute of limitations, see *Bass & Ullman*, 185 A.D.2d at 750, 586 N.Y.S.2d at 610-11, the plaintiff was not harmed by application of the shorter statute.

The reported opinion does not disclose when the client's cause of action accrued. It therefore is unclear whether the client would have benefitted from application of the six-year statute of limitations, had the continuous representation doctrine been held inapplicable.

229. 189 A.D.2d 643, 592 N.Y.S.2d 337 (1st Dep't 1993).

erned an action against an attorney for malpractice.<sup>230</sup> In *Hirsch*, the plaintiffs retained an attorney, Weisman, to represent them in a personal injury action.<sup>231</sup> Weisman then retained the law firm of Zuller & Bondy to act as trial counsel.<sup>232</sup> At the outset of the trial, a partner in Zuller & Bondy negotiated a settlement for \$80,000.<sup>233</sup> The plaintiffs agreed to the settlement in the mistaken belief that the defendants in the underlying action carried only \$100,000 of liability insurance.<sup>234</sup> When the plaintiffs subsequently learned that the defendants in the underlying action carried liability insurance of \$500,000, they initiated a legal malpractice action against Weisman.<sup>235</sup> More than three years after the settlement in the underlying action had been entered in the record, the trial court granted a motion by the plaintiffs requesting leave to serve an amended summons and complaint on Zuller & Bondy alleging legal malpractice.<sup>236</sup> The motion was granted on the ground that the action was governed by the six-year contract statute of limitations.<sup>237</sup>

On appeal, the Appellate Division, First Department held that there was no contractual relationship between the plaintiffs and Zuller & Bondy.<sup>238</sup> It explained that the plaintiffs were in privity only with Weisman, their retained counsel, and at best, Zuller & Bondy had an "of counsel" relationship to the plaintiffs.<sup>239</sup> Because there was no contractual relationship between the plaintiffs and Zuller & Bondy, the court held that the three-year malpractice statute of limitations applied rather than the six-year contract statute of limitations.<sup>240</sup>

The facts of *Hirsch* are unusual in that when the alleged act

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230. *Id.* at 645, 592 N.Y.S.2d at 339.

231. *Id.* at 643, 592 N.Y.S.2d at 337.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 643-44, 592 N.Y.S.2d at 338.

237. *Id.*

238. *Id.* at 644, 592 N.Y.S.2d at 338. The court cited and explained *Santulli* before concluding there was no contractual relationship. *Id.*

239. *Id.* The court also explained that the plaintiffs could not be considered third-party beneficiaries of the contract between Weisman and Zuller & Bondy without showing knowledge of such contract, which they were apparently unable to do. *Id.* at 644, 592 N.Y.S.2d at 338.

240. *Id.* at 645, 592 N.Y.S.2d at 339.

of malpractice (the negotiated settlement of \$80,000) occurred, the clients apparently were unaware that another attorney in addition to their retained counsel, Weisman, was working on their case.<sup>241</sup> As the court held, in such a situation no contractual relationship exists between the client and the other attorney.<sup>242</sup> The result reached in *Hirsch*, thus, is not inconsistent with the teachings of *Santulli*. *Santulli* instructs that in order for a plaintiff to receive the benefit of the six-year statute of limitations, recovery must be sought for injury to property or pecuniary interests that *arose out of a contractual relationship between the parties*.<sup>243</sup> Because there was no contractual relationship between the plaintiff and the Zuller & Bondy firm, the court properly held that the three-year malpractice statute of limitations governed.<sup>244</sup>

### B. A Proposal

Although the *Santulli* court rejected the argument that its holding effectively nullifies the three-year statute of limitations for malpractice actions under CPLR section 214(6),<sup>245</sup> in reality it does exactly that, when there is a contractual relationship between the parties.<sup>246</sup> As almost any conceivable action brought by a client against an attorney concerning the attorney's conduct in representing the client can be said to arise from the contractual relationship, where indeed there is such a relationship,<sup>247</sup> and since damages will be almost exclusively to property or pecuniary interests, the six-year statute of limitations will apply in

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241. See *supra* note 239.

242. See *supra* notes 238-39 and accompanying text.

243. See *supra* notes 195-99 and accompanying text.

244. The *Hirsch* case is an example of the rare situation where an action against an attorney for malpractice does not arise from a contractual relationship between the parties. Cf. *Syms v. Syms*, 191 A.D.2d 340, 595 N.Y.S.2d 406 (1st Dep't 1993) (holding that the three-year statute of limitations governed where the plaintiff brought suit for legal malpractice against the defendant's attorney).

245. See *supra* notes 200-01 and accompanying text.

246. See Alexander, *supra* note 21, at 52. Commenting on the *Santulli* decision, Professor Alexander writes "[a]nother nail has been driven into the coffin in which the Court of Appeals is inexorably burying CPLR 214(6)." *Id.*

247. A contractual relationship can be express, implied, oral, or written. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1-12 (3d ed. 1987); *RESTATEMENT (SECOND) OF CONTRACTS* §§ 1, 4 (1981).

virtually every malpractice action against an attorney.<sup>248</sup> This result is equivalent to indirect judicial repeal of section 214(6).<sup>249</sup> It is not the purpose of courts to functionally repeal statutes that have been duly enacted by state legislatures as the elected representatives of the citizens of a state, absent a showing that the statute is unconstitutional.<sup>250</sup> Notwithstanding that generally, the longer statute of limitations benefits the public,<sup>251</sup> the court has overstepped its function of an interpreter of law by doing indirectly what it can not do directly.<sup>252</sup> With its decision, the court has effectively rendered a constitutional legislative enactment null and void. The legislature, by enacting CPLR section 214(6), explicitly proclaimed that the statute of limitations for malpractice actions, other than medical, dental, or podiatric malpractice, is three years. *Santulli*, however, makes clear that the courts of New York State, as well as other courts applying New York law, are to treat the statute of limitations for legal malpractice actions and for other types of professional malpractice to which CPLR section 214(6) presumably applied, as being six years when recovery is sought for damages to property or pe-

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248. See Alexander, *supra* note 21, at 52-54. Of course, in a malpractice action where there is no contractual relationship between the plaintiff and the attorney, the three-year statute of limitations will still apply. See *Hirsch*, 189 A.D.2d at 645, 592 N.Y.S.2d at 339. But in the typical situation where a malpractice action is brought by a client against an attorney that was hired by the client to perform services, *Santulli* dictates that the six-year statute of limitations will govern in virtually every case.

249. See Alexander, *supra* note 21, at 52-54.

250. See *In re Mark Indus.*, 751 F.2d 1219 (Fed. Cir. 1984). The *Mark Indus.* court explained that "[a] statute is by definition the law to be followed - not disregarded, effectively repealed, rewritten, or overruled (unless unconstitutional) . . . . This court has noted not only the truism that courts are not at liberty to repeal a statute but also the impropriety of judicial legislation diminishing a statute's effect." *Id.* at 1224. While the *Mark Indus.* court was speaking in the context of a federal court, the principle is equally applicable to state courts. See also *People ex rel. Gordon v. Ashworth*, 9 Misc. 2d 449, 450, 172 N.Y.S.2d 309, 311 (Sup. Ct. Bronx County 1942) (holding that "[j]udicial pronouncements should not supersede or render legislative enactments ineffectual"). See generally 16 AM. JUR. 2D. *Constitutional Law* § 316 (1979).

251. A longer time period in which to commence an action would be particularly desirable when a client has not, and could not reasonably have discovered that he has been injured, prior to the expiration of the statute of limitations. In such a circumstance, without a discovery exception or some other tolling provision, the client is left without a remedy. See *supra* notes 142-47.

252. See Alexander, *supra* note 21, at 52-54. See also *supra* note 250 and accompanying text.



cuniary interests that arose from a contractual relationship.<sup>253</sup>

While the result of providing the public with a longer time in which to commence a malpractice action may be desirable,<sup>254</sup> the proper method of achieving this result is through legislative enactment. In order to ensure that its objectives are achieved, the legislature should take affirmative steps to amend CPLR section 214(6).

The legislature should adopt the reasoning of the Supreme Courts of California and Hawaii,<sup>255</sup> by amending CPLR section 214(6) to provide for one uniform statute of limitations for legal malpractice actions, regardless of whether an action is brought in tort or in contract. The approach taken in California and Hawaii is the most rational and equitable solution to the malpractice statute of limitations dilemma. Since injury resulting from the wrongful act or omission of an attorney is actionable under theories that are a combination of both tort and contract,<sup>256</sup> the reasoned approach is to specifically provide by statute that actions against attorneys, *whether brought in tort or contract*, shall be commenced within one uniform period. The legislature should specifically amend CPLR section 214(6) to provide that all actions against attorneys for wrongful acts or omissions, other than for fraud,<sup>257</sup> arising from the performance of professional services, *whether brought in tort or contract*, shall be commenced within three years of the date of occurrence of the alleged wrongful act or omission.<sup>258</sup> This amendment would restore significance to CPLR section 214(6), in the wake of its functional abrogation by *Santulli*, and eliminate a result that obviously was not intended by the legislature.<sup>259</sup> For reasons of public policy, however, the amendment should also include a

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253. See *supra* notes 195-99 and accompanying text. It is difficult to imagine a situation where the three-year statute of limitations would apply when there is a contractual relationship between the plaintiff and the attorney. See *supra* note 201.

254. See *supra* note 251 and accompanying text.

255. See *supra* notes 102-15 and accompanying text.

256. See *supra* notes 31-35, 114 and accompanying text.

257. Fraud involves a *deliberate* breach of a fiduciary duty and is, therefore, viewed as a distinct cause of action from legal malpractice. See MALLIN & SMITH, *supra* note 4, § 18.4, at 71.

258. The continuous representation exception would still toll the statute of limitations in appropriate circumstances. See *supra* notes 131-41 and accompanying text.

259. See Alexander, *supra* note 21 at 52-54.

provision that would toll the accrual of a cause of action until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the facts constituting the wrongful act or omission.<sup>260</sup> In the contexts of medical patients who have had "foreign objects" left inside their bodies and "toxic tort" victims, the legislature has recognized the unfairness of denying plaintiffs the opportunity to have a judicial determination of their grievances when they could not reasonably have known that they have been injured until after the statute of limitations has run.<sup>261</sup> It is time the legislature recognized that it is equally unfair to deny the legal client the opportunity to "have his day in court" when the client could not reasonably have known that he has been injured by the conduct of his attorney until after the statute of limitations has run.

### V. Conclusion

The *Santulli* decision provided a badly needed clarification of the applicable statute of limitations in legal malpractice actions. Now it is clear that an action for legal malpractice that seeks recovery for damages to property or pecuniary interests arising from a contractual relationship is governed by the six-year statute of limitations of CPLR section 213(2).<sup>262</sup> Lower New York courts and federal courts applying New York law have applied this same rule, albeit on an inconsistent basis, since 1984, after the *Video Corp.* decision.<sup>263</sup> In addition to providing this clarification, the court held that an express promise to achieve a specific result is not required in order for a client to maintain an action for breach of contract against his or her attorney.<sup>264</sup> An action for breach of contract may be based on the breach of the attorney's implied promise to exercise due care in the performance of services required by the contract.<sup>265</sup>

The *Santulli* decision effectively nullifies the three-year malpractice statute of limitations of CPLR section 214(6).<sup>266</sup>

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260. See *supra* notes 142-47 and accompanying text.

261. See *supra* notes 144-45 and accompanying text.

262. See *supra* notes 195-99 and accompanying text.

263. See *supra* note 210 and accompanying text.

264. See *supra* note 183 and accompanying text.

265. See *supra* note 184 and accompanying text.

266. See Alexander, *supra* note 21, at 52-54.

The six-year contract statute of limitations of CPLR section 213(2) now applies in virtually every legal malpractice action where there is a contractual relationship between the plaintiff and the attorney, as well as in other types of non-medical malpractice actions based on a contractual relationship.<sup>267</sup> The state legislature, however, by enacting CPLR section 214(6), explicitly proclaimed that the statute of limitations for non-medical malpractice actions is three years.<sup>268</sup> To ensure that its objectives are accomplished, the legislature should take affirmative steps to amend CPLR section 214(6) to provide that all actions against attorneys for wrongful acts or omissions, other than for fraud, arising from the performance of professional services, whether brought in tort or in contract, shall be commenced within three years of the alleged act of malpractice. This amendment would restore significance to a statute that was functionally repealed by *Santulli*. In addition, the legislature should adopt a discovery exception to toll the accrual of a legal malpractice cause of action until the plaintiff discovers or through the exercise of reasonable diligence should have discovered the attorney's wrongful act or omission.<sup>269</sup> The unfairness of foreclosing the possibility of recovery before a plaintiff has even an opportunity to learn he has been injured outweighs any unfairness to the attorney in having to defend an otherwise time-barred action.<sup>270</sup>

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267. *Id.*

268. See *supra* note 37 and accompanying text.

269. See *supra* notes 142-47 and accompanying text.

270. See *supra* notes 142-47 and accompanying text.