

# PROFESSIONAL LIABILITY UPDATE

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*This newsletter is intended to summarize significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every recent case involving professional liability issues nor of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the authors and do not necessarily reflect the views of Harris, Finley & Bogle, P.C.*

***Erikson v. Renda***, 590 S.W.3d 557 (Tex. 2019).

## Brief Case Summary:

In this case, the Texas Supreme Court examined the reach of the equitable tolling rule originally adopted in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991). The Hughes Tolling Rule generally provides that “when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations of the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted.”

Oscar Renda, president of Renda Marine (“Marine”), sued his former attorney, Brian Erikson, and Erikson’s firm (collectively “Erikson”), for legal malpractice stemming from Erikson’s alleged “blessing” of Marine’s asset-transfer plan.

The claim arose out of extended litigation between Marine and the government. Marine had contracted with the U.S. Government to dredge the Houston-Galveston shipping channel. Marine later became involved in two claims arising out of the work (the “Marine Litigation”): (1) Marine’s claim for additional compensation and (2) the U.S. Government’s claim against

Marine for incomplete and deficient dredging work.

Between the time the Marine Litigation began and the final disposition, Marine’s accountant contacted Erikson for legal advice regarding Marine’s financial situation. Erikson allegedly “blessed” an asset transfer option that was discussed with the accountant. The asset transfer was eventually completed, which allegedly left Marine unable to satisfy its liabilities to the government.

Years later, Renda discovered that the asset transfer plan violated a federal statute requiring prioritizing debt payments to the government (“Priority Statute”). In 2008, the government sued Renda under the Priority Statute, alleging Renda was personally liable for authorizing the asset transfers (“Priority Suit”). The court entered judgment against Renda.

After exhausting all appeals in the Priority Suit, Renda paid the judgment. Renda then filed a malpractice suit against Erikson eleven years after Erikson had allegedly “blessed” the asset transaction, nearly five years after being served in the Priority Suit, and seven months after exhausting all appeals in the Priority Suit.

In determining whether to apply the Hughes Tolling Rule, the Texas Supreme Court weighed whether Erickson’s asset transfer “advice pertained to merely transactional work or the prosecution or defense of claims.” The Court reaffirmed its holding in *Apex Towing* stating that courts should only look to the strict articulation of the rule, as opposed to the motivating policies behind the rule, to determine its application. The Court held the asset transfers were not sufficiently related to the prosecution or defense of the Marine Litigation claims; therefore, the statute of limitations was not tolled under *Hughes*.

Ultimately, the Court held that the Hughes Tolling Rule is categorical and only intended to apply to alleged attorney malpractice that was committed “in the prosecution or defense of a claim.”

Practice Point: The Hughes Tolling Rule is limited in its application to only malpractice “in the prosecution or defense of a claim,” and does not apply to legal work that is only incidentally related to activities undertaken to prosecute or defend a claim.

*NFTD, LLC v. Haynes & Boone, LLP*, 591 S.W.3d 766 (Tex. App.—Houston [14th Dist.] 2019, pet. filed).

#### Brief Case Summary:

The dispute arose following a series of transactions involving three consecutive owners of the Bernardo Women’s Footwear Company (“Bernardo”). Haynes & Boone, LLP (“H&B”) represented the first owners of Bernardo in the sale to the second owners.

The first owners retained H&B to represent Bernardo in all business, financial and legal matters related to Bernardo. Notably, H&B was not retained for any litigation purposes.

As part of a complex multi-party lawsuit, the second owners asserted claims for breach of contract and breach of warranty against the first owners. Additionally, the second owners filed a third-party petition against H&B for negligence, negligent misrepresentation, fraud, and fraud in the inducement.

In response, H&B asserted that attorney immunity applied to the transactional work it provided to the first owners and that the statements at issue were “within the scope of representation and a part of the discharge of [H&B’s] duties to their client.”

Under Texas law, “attorneys are immune from civil liability to non-clients ‘for actions taken in connection with representing a client in litigation.’” *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

The Court analyzed the scope of *Cantey Hanger* and held that the *Cantey Hanger* holding “did not extend attorney immunity beyond the litigation context.” The Court reasoned that litigation carries with it remedies for attorney misconduct, including sanctions, contempt, and disciplinary proceedings. The sanctions and contempt remedies do not exist for misconduct in the transactional process.

The Court held that “Texas state courts have applied the attorney immunity doctrine only to conduct that occurred in litigation and in proceedings that are akin to litigation, are related to underlying litigation, or are adversarial and have procedural safeguard....We conclude that attorney immunity does not apply in a purely business/transactional context.”

Practice Point: Transactional lawyers should be aware they are likely not protected by the attorney immunity rule that protects attorneys from liability for actions taken in representing a client in litigation.