

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.

Overview of the *Hughes* Tolling Rule

The *Hughes* tolling rule tolls certain legal malpractice claims until all appeals in the underlying litigation are exhausted. The rule prevents a plaintiff from having to take contradictory positions in two separate cases, because the viability of the malpractice claim often depends on the outcome of the underlying suit. Courts of appeals have grappled with the application and scope of *Hughes* since 1991, and the following cases are recent opinions applying the rule.

***JC Project Management Services, Inc. v. Kitchens*, No. 12-17-00130-CV, 2018 WL 3203437 (Tex. App.—Tyler June 29, 2018, pet. filed) (mem. op.).**

Case Summary: JC Project Management Services, Inc. and Jack Carpenter (collectively “Carpenter”) sued their former attorney Travis Kitchens (“Kitchens”) for legal malpractice arising out of a libel and slander case against Carpenter. Carpenter initially engaged Kitchens to litigate a real property dispute against Charles Von Schmidt (“Von Schmidt”), among others. During the initial litigation involving alleged trespass and violation of deed restrictions, Von Schmidt sent letters to neighboring property owners regarding the litigation.

In an attempt to counter Von Schmidt’s letter, Carpenter drafted a letter that Kitchens reviewed and revised. Carpenter’s letter included several alleged defamatory statements, including an assertion that Von Schmidt had committed fraud. On January 6, 2012, Von Schmidt sued Carpenter for libel and slander. Kitchens represented Carpenter in the libel suit, and the case settled in 2014.

In 2015, Carpenter sued Kitchens for legal malpractice alleging Kitchens provided erroneous legal advice regarding the letter. Kitchens argued the suit was barred because it was filed more than two years after the cause of action accrued and because the *Hughes* tolling rule did not apply.

The Court defined the *Hughes* tolling rule as requiring the following elements: (1) a claim; (2) the prosecution of or defense against that claim by the client; (3) the client’s attorney committing malpractice in the prosecution of or defense of that claim; and (4) the malpractice causing or resulting in a third-party suing the client. In this case, the issue was whether the alleged malpractice (i.e. advice about the Carpenter letter) occurred “in the prosecution” of the Von Schmidt lawsuit. Kitchens argued that, as a matter of law, the alleged malpractice was actually transactional work, which falls outside the scope of the *Hughes* tolling rule.

The Court disagreed and held Kitchens failed to prove the *Hughes* tolling rule did not apply *as a matter of law*, but held a fact issue remained as to whether the alleged malpractice was within the scope of the *Hughes* tolling rule.

Practice Point: The Tyler Court of Appeals adopted the four prong test for the *Hughes* tolling rule. These distinct elements may provide for a more uniform application of the tolling rule to legal malpractice claims.

***American Realty Trust, Inc. v. Andrews Kurth, LLP*, No. 05-16-01433-CV, 2018 WL 2126819 (Tex. App.—Dallas May 8, 2018, pet. filed) (mem. op.).**

Case Summary: American Realty Trust, Inc. and Art Midwest, Inc. (collectively “ART”) appealed from the trial court’s summary judgment dismissing ART’s legal malpractice claim against Andrews Kurth, LLP (“Andrews Kurth”). Andrews Kurth was granted summary judgment based on its affirmative defense of limitations. The Court of Appeals affirmed the judgment.

In 1997, ART retained Andrews Kurth to represent it in acquiring several apartment complexes. The transaction was consummated in 1998, but, in March 1999, ART sought advice about possibly terminating the deal. Andrews Kurth advised ART that it could terminate the transaction without breaching the contract because of the other party’s pre-existing breach. On March 22, 1999, ART sent the termination letter, which Andrews Kurth drafted. The letter led to litigation. In January 2001, ART and Andrews Kurth signed a tolling agreement with respect to certain legal malpractice claims ART might potentially assert against Andrews Kurth.

On March 24, 2005, ART filed an amended petition against Andrews Kurth asserting legal malpractice in its handling of the

transaction. However, ART did not specifically raise an issue as to Andrews Kurth’s advice regarding termination until the underlying litigation concluded in August 2014. Andrews Kurth filed a motion for summary judgment as to limitations. ART argued the language in its amended petition was broad enough to include the March 1999 termination and, in the alternative, the *Hughes* tolling rule applied to its claim.

The Court of Appeals rejected ART’s argument that the 2005 complaint was broad enough to include claims relating to the termination letter. The Court held ART’s petition did not give Andrews Kurth fair and adequate notice of a claim arising from the termination letter, even when the petition was construed liberally in favor of ART.

ART also argued the *Hughes* tolling rule applied because: (1) the 1999 termination letter was a letter sent “in the prosecution of a claim”; or (2) the *Hughes* tolling rule should be extended to include transactional malpractice. The Court rejected the first argument because Andrews Kurth’s advice regarding the termination letter did not equate to “prosecuting or defending a claim of breach of contract.” In fact, the termination letter expressed a desire to possibly restructure the transaction.

Further, the Court rejected ART’s invitation to expand the *Hughes* tolling rule to transactional legal malpractice despite at least one recent federal case supporting an expansion of the rule.

Practice Point: The Dallas Court of Appeals reaffirmed that the *Hughes* tolling rule does not apply to claims of transactional legal malpractice. In applying *Hughes*, courts should closely examine whether the alleged malpractice occurred in the context of “the prosecution or defense of a claim that resulted in litigation.”