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PROFESSIONAL MALPRACTICE—LIMITATION OF ACTIONS—ARKANSAS EXTENDS THE OCCURRENCE RULE TO ACCOUNTANTS AND RECOGNIZES A TOLLING PROVISION IN ATTORNEY MALPRACTICE ACTIONS. *Ford's Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989); *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989).*

In Arkansas the statute of limitations for attorney and physician malpractice begins to run, in the absence of concealment of the wrong, when the negligence occurs.[1] The Arkansas Supreme Court has extended this established "occurrence" rule[2] to professional malpractice claims against accountants.[3] Also, the court has created an exception to the occurrence rule and suspended the running of the statute of limitations when an injury ceases to exist for a period of time.[4]

In 1973 Ford's Inc.[5] (hereinafter "Ford's") hired the accounting firm of Russell Brown & Co.[6] (hereinafter "Russell Brown") for advice on the liquidation of its business on a tax-free basis.[7] Relying upon Russell Brown's recommendations given in August 1974, Ford's liquidated and distributed its company's assets.[8] Russell Brown prepared the final tax return which reflected a tax-free liquidation.[9]

In late 1976 or early 1977 the Internal Revenue Service (hereinafter "IRS") began auditing Ford's returns.[10] After several conferences and the filing of protests by Ford's, the IRS assessed additional taxes

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1. Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988); Riggs v. Thomas, 283 Ark. 148, 671 S.W.2d 756 (1984).

2. *See infra* notes 61-110 and accompanying text.

3. Ford's Inc. v. Russell Brown & Co., 299 Ark. 426, 773 S.W.2d 90 (1989).

4. Stroud v. Ryan, 297 Ark. 472, 763 S.W.2d 76 (1989).

5. Ford's Inc. was a family-owned-and-operated farming business in the Newport area of Arkansas. Telephone interview with Robert K. Walsh, Dean of the Wake Forest University School of Law (Mar. 9, 1990) (Dean Walsh, formerly with the law firm of Friday, Eldredge & Clark, served as counsel for Russell Brown & Co. in this lawsuit).

6. Russell Brown & Co. was acquired on January 1, 1982, by the accounting firm of Arthur Young (now Ernst & Young). Telephone interview with Denis D. Wewers, partner with the accounting firm of Ernst & Young (Mar. 30, 1990).

7. *Ford's Inc.*, 299 Ark. at 427, 773 S.W.2d at 91.

8. *Id.*

9. *Id.*

10. *Id.*

and interest with respect to the liquidation in the amount of $648,000 plus interest.[11]

In January 1978 the IRS notified Ford's that it owed a tax deficiency. Russell Brown recommended that Ford's accept a proposed settlement.[12] Later that same year, the IRS imposed additional taxes and interest.[13]

Ford's brought suit against Russell Brown on September 4, 1981, for damages incurred as a result of the accounting firm's erroneous advice.[14] The Circuit Court of Craighead County entered summary judgment in favor of Russell Brown on the grounds that the three-year statute of limitations[15] governing professional malpractice actions barred Ford's claim.[16] The Arkansas Supreme Court affirmed. The court held that the limitations period began to run in August 1974, when Russell Brown gave the advice, seven years before the plaintiff brought its claim.[17] *Ford's Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989).

On September 27, 1982, Richard A. Stroud handed his attorney, Jerry Ryan, a writ of garnishment which had been served on Stroud earlier that day.[18] Ryan failed to respond to the writ within the twenty-day time period allowed resident defendants,[19] and the trial court issued a default judgment against Stroud on November 3 for $22,674.01.[20] Two years later, on December 4, 1984, the trial court set aside the default judgment *nunc pro tunc*[21] following Ryan's motion on behalf of Stroud.[22] On February 19, 1986, the Arkansas Court of Ap-

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. ARK. CODE ANN. § 16-56-105 (1987) provides in pertinent part: "The following actions shall be commenced within three (3) years after the cause of action accrues: . . . (3) All actions founded on any contract or liability, expressed or implied . . . ."

16. *Ford's Inc.*, 299 Ark. at 426, 773 S.W.2d at 91.

17. *Id.* at 430, 773 S.W.2d at 93.

18. *Stroud*, 297 Ark. at 473, 763 S.W.2d at 77.

19. ARK. R. CIV. P. 12 provides in pertinent part: "(a) A defendant shall file his answer within twenty (20) days after the service of summons and complaint upon him . . . ."

20. *Stroud*, 297 Ark. at 473, 763 S.W.2d at 77.

21. *Nunc pro tunc* is a latin term meaning "now for then." BLACK'S LAW DICTIONARY 964 (5th ed. 1979). In this case, the summary judgment "shall have [the] same legal force and effect as if [it was] done at [the] time when it ought to have been done." *Id.* (citing State v. Hatley, 72 N.M. 377, 380, 384 P.2d 252, 254 (1963)).

22. *Stroud*, 297 Ark. at 473, 763 S.W.2d at 77.

peals reversed this order and reinstated the default judgment.[23] Following the appellate decision, the judgment creditor sought execution of the judgment against Stroud in the amount of $31,988.45.[24]

Ryan continued his representation of Stroud in this matter until March 1986.[25] Stroud received repeated assurances from Ryan that Ryan's malpractice insurance would pay for the judgment should the court refuse to set it aside.[26] However, Ryan failed to disclose to Stroud that the three-year statute of limitations[27] for professional negligence might bar any attempted recovery from Ryan.[28]

Stroud filed a complaint against Ryan on December 18, 1986, alleging attorney malpractice.[29] In his answer, Ryan asserted the statute of limitations as a defense.[30] The Circuit Court of Polk County found that the three-year statute of limitations barred the complaint and granted judgment on the pleadings in favor of Ryan.[31]

The Arkansas Supreme Court reversed. The court held that the running of the statute of limitations was tolled during the fourteen and one-half months the default judgment was set aside.[32] This tolling of the statute brought the complaint within the limitations period. *Stroud v. Ryan*, 297 Ark. 472, 763 S.W.2d 76 (1989).

It has been said that a dual policy operates in professional malpractice cases. This policy attempts to balance the protection of professionals from the danger of stale claims[33] against the protection of clients from types of negligence which may be difficult to determine within the statutory limitations period.[34] As a result of these competing

23. *Id.*

24. This amount represents the principal judgment plus interest accrued from the date of the default judgment. *Id.*

25. *Id.*

26. *Id.*

27. ARK. CODE ANN. § 16-56-105 (1987).

28. *Stroud*, 297 Ark. at 473, 763 S.W.2d at 77. Jerry Ryan was elected Municipal Judge in Mena, Arkansas, on May 1, 1989, and is serving a four-year term. Telephone interview with Municipal Court Clerk of Mena, Arkansas (Mar. 30, 1990).

29. *Stroud*, 297 Ark. at 474, 763 S.W.2d at 77.

30. *Id.* at 473, 763 S.W.2d at 77.

31. *Id.*

32. *Id.* at 474, 763 S.W.2d at 78.

33. 2 R. MALLEN & J. SMITH, LEGAL MALPRACTICE § 18.1, at 67 (3d ed. 1989) [hereinafter MALLEN & SMITH]. "Statutes of Limitation are intended to promote promptness and punctuality in business; the settlement of claims while parties are alive; before papers are lost and witnesses die; and he who will not take the hint, must take the consequences." *Id.* (quoting Glenn v. Cuttle, 48 Pa. 524, 2 Grant Cas. 273, 276 (1853)).

34. Annotation, *Application of Statute of Limitations to Damage Actions Against Public*

policies, courts have reached various conclusions as to when the statute of limitations begins to run in professional malpractice cases.[35]

Actions against accountants[36] and attorneys may lie in either contract or tort depending on the nature of the complaint and the interests[37] to be protected.[38] Because the statute of limitations has been one of the most effective defenses used by accountants and attorneys to defend against malpractice actions,[39] it is vital to know which statute applies, contract or tort, and when the applicable statute begins to run.[40]

In determining which cause of action applies, Arkansas courts look to the purposes surrounding the law of both contracts and torts.[41] "The purpose of the law of contracts is to see that promises are performed," while "the law of torts provides redress for various injuries."[42]

The hybrid nature of a cause of action for professional malpractice[43] has resulted in differing approaches in determining the applicable statute of limitations.[44] Regarding attorney malpractice claims, some courts disregard the tort aspects of the claim, finding instead the existence of an implied contract.[45] Other courts, focusing on the breach of

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Accountants for Negligence in Performance of Professional Services, 26 A.L.R.3d 1438, 1440 (1969). *See* MALLEN & SMITH, *supra* note 33, at 68. "Unlike plaintiffs in an ordinary negligence action, the client usually does not participate in the procedures in which the attorney's errors occurred and the client usually lacks the special skill and knowledge necessary to recognize negligence." *Id. See also* Williams v. Borden, Inc., 637 F.2d 731, 734 (10th Cir. 1980)("special rules apply in cases involving particular hardship or other circumstances justifying different accrual rules").

35. Annotation, *supra* note 34, at 1440; *see* MALLEN & SMITH, *supra* note 33, at 92-93.

36. Courts have used the term "accountant" to include "certified public accountants, public accountants, auditors, bookkeepers, and other independent contractors whose primary responsibility is to record, report, analyze, verify, or summarize business and financial transactions in books and accounts." Annotation, *supra* note 34, at 1439 n.1.

37. W. PROSSER, THE LAW OF TORTS § 92, 613 (4th ed. 1971). "Tort actions are created to protect the interest in freedom from various kinds of harm . . . . Contract actions are created to protect the interest in having promises performed." *Id.*

38. MALLEN & SMITH, *supra* note 33, at 69.

39. *See id.* at 67 (attorneys); Annotation, *supra* note 34(accountants).

40. F. Bowman, The Ten Most Common Causes of Lawyer Malpractice Claims and How to Avoid Them 41 (April 20, 1989) [hereinafter Bowman] (reprinted for use by the Arkansas Institute for Continuing Legal Education).

41. L. L. Cole & Son, Inc. v. Hickman, 282 Ark. 6, 9, 665 S.W.2d 278, 281 (1984).

42. Atkins Pickle Co. v. Burrough-Uerling-Brasuell Consulting Eng'rs, Inc., 275 Ark. 135, 138, 628 S.W.2d 9, 11 (1982) (citing Seaver, Book Review, 45 HARV. L. REV. 209 (1931)).

43. Legal malpractice actions are said to have a hybrid nature because of the involvement of both "implied contract and tort theories." MALLEN & SMITH, *supra* note 33, at 68.

44. Topical Survey, *Legal Malpractice - Court Holds Legal Malpractice Actions Subject to Contract Statute of Limitations*, 21 SUFFOLK U.L. REV. 423, 425 (1987).

45. *See, e.g.*, Harrison v. Casto, 165 W. Va. 787, 271 S.E.2d 774 (1980); Juhnke v. Hess,

a duty implied by law, state that an action against an attorney lies in tort.[46]

Although the reported cases involving accountant malpractice are not as numerous as those involving attorneys or physicians, commentators note that the principles involved in the legal and medical areas of professional malpractice may similarly apply to accountants.[47] One commentator states that the accountant's situation is more applicable to a contract statute of limitations.[48] For instance, accountants often perform specific tasks for a client such as the preparation of an income tax return.[49] On the other hand, some courts reason that an accountant's negligent performance gives rise to a tort cause of action for which the tort statute of limitations should apply.[50]

An Arkansas federal district court provided some clarification on this issue. In *Robertson v. White*[51] a trustee in bankruptcy brought a breach of contract action against an accounting firm for its alleged misfeasance in the performance of a services contract. In a motion to dismiss, the accounting firm argued that Arkansas law establishes that no breach of contract action could be maintained against it when the complaint alleged that the accounting firm performed the services "badly."[52] The court noted that "the failure to perform a promise im-

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211 Kan. 438, 506 P.2d 1142 (1973).

46. Pancake House, Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986); Cherokee Restaurant, Inc. v. Pierson, 428 So. 2d 995 (La. Ct. App. 1983). "Where the gravamen of the action is a breach of a duty imposed by law upon the relationship of attorney/client and not of the contract itself, the action is in tort." Bowman v. Doherty, 235 Kan. 870, 879, 686 P.2d 112, 120 (1984).

47. Sanbar and Pataki, *Professional Liability: Malpractice of Attorneys, Accountants, Architects, and Engineers*, 3 OKLA. CITY U.L. REV. 689, 708 (1979).

48. Note, *Limitations in Professional Malpractice Actions*, 28 MD. L. REV. 47, 54 (1968). *See* L.B. Laboratories, Inc. v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952) (an action brought against a certified public accountant for negligently failing to prepare and file a corporation's tax returns on time was one in contract; consequently, the four-year statute of limitations for contract actions based upon an instrument in writing was applicable).

49. Many times there exists in the accountant-client relationship an engagement letter or other document giving rise to a written contract. In such a situation, whether an action for malpractice lies in tort or contract will depend on the nature of the wrongdoing giving rise to the complaint. *See infra* notes 54-55 and accompanying text.

50. Wilkin v. Dana R. Pickup & Co., 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (N.Y. Sup. Ct. 1973) (three-year tort statute of limitations, and not six-year statute relating to breach of contract actions, applied to action for negligence against accountants in connection with preparation of tax returns for plaintiffs, because complaint contained allegations grounded in tort); Carr v. Lipshie, 9 N.Y.2d 983, 176 N.E.2d 512, 218 N.Y.S.2d 62 (1961) (although the action claimed was one for breach of contract, the wrong was tortious and nothing else).

51. 633 F. Supp. 954 (W.D. Ark. 1986).

52. *Id.* at 971-72.

plied in a professional relationship sounds in contract, rather than in tort."[53] However, since the *Robertson* plaintiff did not allege failure to perform, but rather alleged that the accounting firm had performed its duty badly, the court held that the complaint sounded in tort and granted the motion to dismiss the contract cause of action.[54] Thus, the court distinguished between nonfeasance and misfeasance in determining whether the action lay in contract or tort.[55]

The distinction between contract and tort claims becomes important when the statutes of limitations vary in length.[56] In Arkansas, for example, the period of limitations for an action based on a written contract is five years after the cause of action accrues.[57] However, the limitations period for negligence and implied contracts is three years.[58] Arkansas courts have declined to apply the limitations period for written contracts to accountant or attorney malpractice cases.[59]

After the initial determination of which statute of limitations applies, the crucial issue is determining when the statute begins to run.[60] Historically, courts have used three methods. The traditional view is that the statute begins to run when the defendant commits a wrongful or negligent act or omission.[61] Commonly called the occurrence rule,

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53. *Id.* at 973.

54. *Id.* at 974. The court noted that had the contracts between the accounting firm and the plaintiff contained "any special engagements beyond the promise to audit the books and prepare the tax returns," the question of whether tort or contract law applied would have been treated differently. *Id.* at 972.

55. *See also* L. L. Cole & Son, Inc., 282 Ark. at 9, 665 S.W.2d at 281 ("a breach of contract is not treated as a tort if it consists merely of a failure to act (nonfeasance) as distinguished from an affirmatively wrongful act (misfeasance)").

56. Bowman, *supra* note 40, at 44.

57. ARK. CODE ANN. § 16-56-111 (1987) provides in pertinent part: "(a) Actions on . . . instruments in writing . . . shall be commenced within five (5) years after the cause of action shall accrue, and not thereafter."

58. ARK. CODE ANN. § 16-56-105 (1987).

59. *Id. See* Cotton v. Mosele, 738 F.2d 338 (8th Cir. 1984); Ford's Inc. v. Russell Brown & Co., 299 Ark. 426, 773 S.W.2d 90 (1989); Stroud v. Ryan, 297 Ark. 472, 763 S.W.2d 76 (1989); Rhoades v. Sims, 286 Ark. 349, 692 S.W.2d 750 (1985); Riggs v. Thomas, 283 Ark. 148, 671 S.W.2d 756 (1984).

60. This article focuses on when the statute of limitations begins to run for negligence actions. ARK. CODE ANN. § 16-56-105 (1987). Assuming a cause of action against an accountant or attorney was properly brought under ARK. CODE ANN. § 16-56-111 for breach of a *written contract*, the Arkansas Court of Appeals has held that the statute of limitations would begin to run when a breach of any obligation under the agreement occurs. Rice v. McKinley, 267 Ark. 659, 664, 590 S.W.2d 305, 309 (1979).

61. MALLEN & SMITH, *supra* note 33, at 94. According to Mallen and Smith, pursuant to the occurrence rule, "a statute of limitations commences to run upon occurrence of the essential facts constituting the cause of action, regardless of whether these facts are discovered by the

this view applies to malpractice actions against professionals whether the claim is based on contract or tort theory.[62] The occurrence rule first appeared in the 1830 case of *Wilcox v. Plummer.*[63] In *Wilcox* the plaintiffs hired an attorney named Plummer to recover upon a promissory note.[64] Plummer sued Banks, the drawer of the note, but failed to sue Hawkins, an endorser.[65] When Banks proved insolvent, Plummer brought an action against Hawkins. However, the plaintiffs were misnamed in the writ, resulting in a judgment of nonsuit against the plaintiffs.[66] By this time, the statute of limitations had run, barring further action against Hawkins.[67] Subsequently, Plummer died and the plaintiffs brought a legal malpractice action against his estate.[68] The executors of Plummer's estate asserted that the three-year statute of limitations barred the claim.[69] The United States Supreme Court determined that the cause of action against Plummer accrued at the time of his negligence even though the plaintiffs suffered no actual damage at that time.[70] The Court reasoned that once the attorney acted negligently the contract was violated and an action could be maintained immediately.[71] Actual damage was irrelevant in determining when the cause of action accrued.[72] Therefore, the Court concluded that the statute of limitations began running when Plummer issued the writ naming the wrong plaintiffs.[73]

Arkansas follows the occurrence rule regarding professional malpractice claims when fraud or concealment are absent.[74] While *Ford's Inc.* is the first case construing when the statute of limitations begins running on actions against accountants,[75] Arkansas has followed the occurrence rule with respect to attorneys since 1877. In *White v. Rea-*

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client." *Id.*

62. *Id.* at 94 n.1 and 98.
63. 29 U.S. (4 Pet.) 172 (1830).
64. *Id.* at 173.
65. *Id.* at 180.
66. *Id.*
67. *Id.*
68. *Id.* at 173, 180.
69. *Id.* at 174.
70. *Id.* at 182-83.
71. *Id.* at 182.
72. *Id.*
73. *Id.* at 183.
74. Ford's Inc. v. Russell Brown & Co., 299 Ark. 426, 773 S.W.2d 90 (1989) (accountants); Rhoades v. Sims, 286 Ark. 349, 692 S.W.2d 750 (1985) (attorneys).
75. 299 Ark. 426, 773 S.W.2d 90 (1989).

gan[76] an attorney was negligent in drafting a mortgage document.[77] The Arkansas Supreme Court, relying on the United States Supreme Court's reasoning in *Wilcox*,[78] held that the right of action arose when the attorney failed to properly draft the mortgage document. The court stated that "the misconduct or negligence of the attorney constituted the cause of action, and . . . the statute of limitations began to run from the time, when the defendant had been guilty of such misconduct, and not from the time when it was discovered . . . ."[79]

In *Riggs v. Thomas*[80] the court continued to follow the occurrence rule in attorney malpractice cases. The Riggs brought an action against their attorney more than four years after he approved title to land they were purchasing.[81] The Riggs claimed damages because the attorney failed to include in his title opinion the seller's inability to convey title to the mineral rights.[82] Plaintiffs asked the court to overrule prior case law, claiming an injustice occurs when the statute has run before the error is discovered. The court responded that a "contrary rule would allow a plaintiff to bring suit many years after the damage had occurred and at a time when witnesses might no longer be available."[83] Thus, the three-year statute of limitations[84] began running on the date the attorney negligently prepared the title opinion.[85]

That same year, the Eighth Circuit Court of Appeals affirmed an Arkansas district court decision holding that the three-year statute of limitations governing attorney malpractice claims begins when the negligent act occurs, not when the client discovers it. In *Cotton v. Mosele*[86] the plaintiff was injured in an automobile collision on September 5, 1973. He retained an attorney to handle his claims arising from that collision.[87] The attorney failed to pursue those claims on the plaintiff's

76. 32 Ark. 281 (1877).

77. *Id.* at 283. The mortgage contained no relinquishment of dower. *Id.*

78. 29 U.S. (4 Pet.) 172 (1830).

79. White v. Reagan, 32 Ark. 281, 291 (1877) (quoting Howell v. Young, 5 Barn. & Cress. 259 (1826)).

80. 283 Ark. 148, 671 S.W.2d 756 (1984).

81. *Id.* at 149, 671 S.W.2d at 756.

82. *Id.*

83. *Id.* at 149, 671 S.W.2d at 757. *See supra* notes 33-34 and accompanying text.

84. ARK. CODE ANN. § 16-56-105 (1987).

85. *Riggs*, 283 Ark. at 149, 671 S.W.2d at 757. In dicta, the court announced that if there was to be such a marked change in interpreting statutes that have long been the law, such change should occur through the legislature and not the courts. *Id.*

86. 738 F.2d 338 (8th Cir. 1984).

87. *Id.*

behalf before the expiration of the three-year statute of limitations.[88] In 1983 the plaintiff filed an action for legal malpractice.[89] The Eighth Circuit Court of Appeals held that the attorney's negligence occurred on September 5, 1976, when the time period for bringing an action based upon the collision ended.[90] The statute of limitations began running on that day for the attorney malpractice claim.[91] Thus, the malpractice action brought in 1983 was time-barred.[92]

In 1985 the Arkansas Supreme Court decided *Rhoades v. Sims*.[93] In *Rhoades* an attorney failed to contact his clients regarding his receipt of a motion for summary judgment and the notice that a hearing on the motion would be held.[94] He also failed to respond to the motion, resulting in a judgment against his clients in 1979.[95] Substitute counsel entered the litigation which was the subject of the summary judgment and finally concluded the suit in 1983.[96] The first attorney did not represent the plaintiffs after May 16, 1979.[97] Plaintiffs filed the malpractice suit in February 1984.[98] Relying on earlier decisions, the court held that the conduct triggering the statute of limitations occurred more than four years before the plaintiffs brought the claim. Therefore, the plaintiffs' claim was barred.[99]

While there is no prior case law in Arkansas construing the appropriate time when the statute of limitations begins running for accountant negligence, other jurisdictions have considered and applied the occurrence rule. In *Lincoln Grain, Inc. v. Coopers & Lybrand*[100] a grain company sued its accountants for malpractice in rendering audits of the company for three successive years.[101] The plaintiff alleged that the accountants were negligent in failing to discover and report certain mis-

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88. *Id.* The applicable statute of limitations for the personal injury claims expired on September 5, 1976, three years after the collision. *Id.*

89. *Id.*

90. *Id.* at 339.

91. *Id.* at 338.

92. *Id.* at 339.

93. 286 Ark. 349, 692 S.W.2d 750 (1985).

94. *Id.* at 350, 692 S.W.2d at 750.

95. *Id.*

96. *Id.* at 350, 692 S.W.2d at 751.

97. *Id.*

98. *Id.*

99. *Id.* at 352, 692 S.W.2d at 752.

100. 215 Neb. 289, 338 N.W.2d 594 (1983).

101. *Id.* at 290, 338 N.W.2d at 595.

representations regarding operations of the company.[102] The Nebraska Supreme Court held that the statute of limitations began running at the time the accountants delivered the audit reports or financial statements to the plaintiff.[103]

In *Holsman Neon & Electric Sign Co. v. Kohn*[104] the plaintiff retained the defendant accounting firm in 1964 to supervise, keep, prepare, and audit its books, records, journals, and ledgers.[105] In October 1981 the plaintiff discovered that one of its employees had embezzled approximately $50,000 since April 1978.[106] The plaintiff sued the accounting firm for negligence and the accounting firm asserted the statute of limitations as a defense.[107] The Ohio Court of Appeals held that "[a] cause of action based on an accountant's negligence accrues at the time of the negligent conduct."[108] The complaint was filed on November 12, 1982, alleging negligence from April 1978 through October 1981.[109] The court held that the negligent acts which occurred within four years of the filing of the complaint were actionable. The acts occurring outside this period were properly dismissed.[110]

Commentators criticize the occurrence rule for denying a client's remedy before the wrong can be discovered.[111] They also note that the rule requires the client to promptly file suit irrespective of whether the client has or ever will incur actual damages.[112] Many states have adopted other rules to mark the beginning of the limitations period which ameliorate the effect of, or abandon entirely, the occurrence rule.[113]

An alternative approach, the damage rule, was developed in response to problems that arose under the occurrence rule.[114] Under the damage rule, the statute of limitations commences at the time the

102. *Id.* at 293, 338 N.W.2d at 596.

103. *Id.* at 296, 338 N.W.2d at 598.

104. 34 Ohio App. 3d 53, 516 N.E.2d 1284 (1986).

105. *Id.* at 54, 516 N.E.2d at 1285.

106. *Id.*

107. *Id.*

108. *Id.* at 55, 516 N.E.2d at 1286.

109. *Id.*

110. *Id.*

111. Comment, *Legal Malpractice*, 27 ARK. L. REV. 452, 473 (1973); MALLEN & SMITH, *supra* note 33, at 98.

112. MALLEN & SMITH, *supra* note 33, at 98.

113. Comment, *Legal Malpractice, supra* note 111, at 473. For jurisdictions that have used the occurrence rule, see MALLEN & SMITH, *supra* note 33, at 94 n.1.

114. MALLEN & SMITH, *supra* note 33, at 100.

plaintiff incurs actual damages.[115] This rule first appeared in *Fort Myers Seafood Packers, Inc. v. Steptoe & Johnson.*[116] In *Fort Myers* the defendant attorney negligently prepared a contract which resulted in the seizure of his client's boats by the Venezuelan government.[117] The disgruntled client brought a malpractice action within three years of the seizure, but more than three years after the negligent act occurred. The district court applied the occurrence rule, and held that the three-year statute of limitations for legal malpractice barred the action.[118] The United States Court of Appeals for the District of Columbia Circuit reversed and adopted the damage rule.[119] The court reasoned that the statute of limitations in malpractice actions (as in other negligence actions) should not begin to run until a plaintiff actually suffers an injury.[120]

Courts have also applied the damage rule in actions for accountant malpractice.[121] In *Atkins v. Crosland*[122] the plaintiff brought an action against his accountant for negligent preparation of tax returns.[123] The court rejected the accountant's contention that the action was barred by the two-year statute of limitations even though the negligent acts occurred more than two years prior to the commencement of the suit.[124] The court held that the statute of limitations did not commence

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115. *Id.*

116. 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968).

117. *Id.* at 262.

118. *Id.*

119. *Id.* The court stated:

> With exceptions not pertinent here, the District of Columbia statute requires actions to be brought within three years 'from the time the right to maintain the action accrues.' In ordinary negligence actions, this means the time when the plaintiff suffers injury . . . . We see no good reason for drawing such a distinction between malpractice suits and other negligence actions. The impounding of the boats might have been found to be an injury that resulted from appellees' erroneous legal advice. Since the suit was filed within three years [of the impounding], we think it was timely.

Id. (citations omitted).

120. *Id.* For a list of jurisdictions applying the damage rule to malpractice actions against attorneys, see MALLEN & SMITH, *supra* note 33, at 100 n.1.

121. Annotation, *supra* note 34, at 1444-45 & Supp.

122. 417 S.W.2d 150 (Tex. 1967).

123. *Id.* at 152. The accountant allegedly was negligent by originally using the cash receipts and disbursements method and then switching to the accrual method for the next year without obtaining the consent of the Commissioner of Internal Revenue. The accountant also failed to warn his client of the tax problem this caused, resulting in a tax deficiency being assessed against the plaintiff. *Id.*

124. *Id.*

until the IRS assessed the tax deficiency.[125] The court stated that before the deficiency was assessed the plaintiff had not been injured, nor had he sustained damages. Therefore, he did not have a cause of action.[126]

A third method applied by courts to determine when a statute of limitations begins to run is the discovery rule. Under this rule, the statute of limitations for professional malpractice commences when the client discovers or, through the use of reasonable diligence, should have discovered the negligent act of the attorney or accountant.[127] This rule was first adopted in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*.[128] In *Neel* the defendant attorneys of the Magana law firm failed to timely serve a summons after filing the plaintiff's wrongful death suit. As a result, the plaintiff's case was dismissed on December 10, 1965.[129] The plaintiffs did not learn of the dismissal until December 21, 1967.[130] Following the occurrence rule, the trial court held that the claim was barred by the statute of limitations.[131] The California Supreme Court reversed. It rejected the occurrence rule and adopted the discovery rule for all professional malpractice actions.[132] The court noted that because of the high degree of knowledge and skill possessed by an attorney, a client may be unable to detect a negligent act even if he sees it.[133] Also, the court reasoned that the client is often unable to detect attorney malpractice since attorneys work out of the view of their clients.[134] Accordingly, the court held that in attorney malpractice claims, the statute of limitations begins when the client discovers, or should have discovered, the facts establishing the cause of action.[135] Today, the discovery rule is the doctrine most often used in legal malpractice actions to determine when the statute of limitations begins.[136]

Courts use the discovery rule in accountant malpractice actions as

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125. *Id.* at 153.
126. *Id.*
127. MALLEN & SMITH, *supra* note 33, at 137.
128. 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).
129. *Id.* at 179-80, 491 P.2d at 422, 98 Cal. Rptr. at 838.
130. *Id.*
131. *Id.*
132. *Id.* at 179, 491 P.2d at 422, 98 Cal. Rptr. at 838.
133. *Id.* at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.
134. *Id.*
135. *Id.* at 194, 491 P.2d at 433, 98 Cal. Rptr. at 849.
136. For a list of jurisdictions adopting the discovery rule in legal malpractice cases, see MALLEN & SMITH, *supra* note 33, at 132 n.21.

well. In *Moonie v. Lynch*[137] the court held that the statute of limitations in accountant malpractice claims for negligent preparation of a tax return begins running when the negligent act is discovered.[138] The court refused to follow the occurrence rule which existed in California at that time for legal malpractice claims.[139] The court stated that until the client learned of the government's penalty assessed against him, he had no way of knowing that his tax return had been improperly prepared.[140] The penalty assessed for the accountant's alleged negligence gave the client his cause of action.[141] Several other jurisdictions now follow the discovery rule with respect to malpractice actions against accountants.[142]

Along with the three previously mentioned rules for determining when statutes of limitations commence, there is an exception known as the continuous representation or continuous treatment rule.[143] This rule tolls or defers the accrual of the statute of limitations.[144] With regard to legal malpractice claims, the continuous representation rule tolls the statute of limitations as long as the attorney continues to represent the client.[145] This rule protects the attorney-client relationship. The client need not immediately seek other counsel because the limitations period does not accrue as long as the attorney represents the client on the matter that was allegedly mishandled.[146] Arkansas recently recognized the continuous representation rule in medical malpractice actions, but

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137. 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1975).

138. *Id.* at 365-66, 64 Cal. Rptr. at 58.

139. *Id. Neel*, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971), was the first case to apply the discovery rule.

140. *Moonie*, 256 Cal. App. 2d at 364, 64 Cal. Rptr. at 57.

141. *Id.*

142. Meinhard-Commercial Corp. v. Sydney, 109 A.D.2d 678, 487 N.Y.S.2d 7 (1985) (the statute of limitations did not commence until the plaintiff received the financial statements upon which it relied (citing Credit Alliance v. Arthur Andersen & Co., 101 A.D.2d 231, 476 N.Y.S.2d 539 (1984)); Brower v. Davidson, Deckert, Schutter & Glassman, P.C., 686 S.W.2d 1 (Mo. Ct. App. 1984) (discoverability of the accountant's damage could no longer be denied as of the date of the IRS's report which calculated the tax deficiency); Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972) (the oончept that the statute of limitations begins to run when the negligence is discovered, or when with due diligence should have been discovered, applies to all cases involving malpractice); Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969) (statute of limitations began to run when the taxpayer received notice of the tax deficiency, rather than when it was assessed).

143. MALLEN & SMITH, *supra* note 33, at 115.

144. *Id.*

145. *Id.*

146. *Id. See* Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (N.Y. App. Div. 1968).

has yet to do so in attorney or accountant malpractice cases.[147]

A New York court applied the continuous representation rule to a legal malpractice claim in *Wilson v. Econom*.[148] The cause of action arose when an attorney failed to file the plaintiff's personal injury action within the limitations period.[149] When the client questioned the attorney regarding the status of the case, her inquiries were answered evasively. She eventually learned that her attorney had left the state.[150] The plaintiff brought a legal malpractice action against the attorney. As a defense, the attorney asserted the three-year statute of limitations.[151] The court expressed concern that an attorney could defeat a malpractice claim by appearing to represent the client while running out the statute of limitations. Accordingly, the court applied the continuous representation rule and allowed the plaintiff's claim to be brought against the attorney.[152]

The running of the limitations period for professional malpractice claims is also tolled when the attorney or accountant conceals the misconduct or resulting injury.[153] Arkansas recognizes this tolling doctrine.[154] However, there are no attorney or accountant malpractice cases in Arkansas where the court actually tolled the statute of limitations because of concealment of the wrong.[155] Case law in Arkansas outside of professional malpractice suits establishes that affirmative action to conceal the misconduct would be required on the part of the person charged in order to toll the statute of limitations.[156]

Despite various accrual rules which have developed over the years in other jurisdictions regarding when the statute of limitations begins,

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147. Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988). For a discussion of the case, see Note, *Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions*, 11 U. ARK. LITTLE ROCK L.J. 405 (1988-89) (authored by John D. Nichols).

148. 56 Misc. 2d 272, 288 N.Y.S.2d 381 (N.Y. Sup. Ct. 1968).

149. *Id.* at 273, 288 N.Y.S.2d at 382.

150. *Id.*

151. *Id.*

152. *Id.* at 274, 288 N.Y.S.2d at 383-84.

153. MALLEN & SMITH, *supra* note 33, at 122.

154. Riggs v. Thomas, 283 Ark. 148, 149, 671 S.W.2d 756, 757 (1984). "[I]t has long been the law in Arkansas that the statute of limitations in an action against an attorney for negligence begins to run, *in the absence of concealment of the wrong*, when the negligence occurs, not when it is discovered by the client." *Id.* (emphasis added).

155. For a collection of cases where courts have tolled the statute for an attorney's fraudulent concealment, see Annotation, *When Statute of Limitations Begins to Run Upon Action Against Attorney for Malpractice*, 32 A.L.R.4TH 260, 327-31 (1984).

156. Hughes v. McCann, 13 Ark. App. 28, 678 S.W.2d 784 (1984).

Arkansas courts continue to follow the occurrence rule. In *Ford's Inc. v. Russell Brown & Co.*[157] the Arkansas Supreme Court extended this rule to malpractice actions against accountants. With Justice Hickman speaking for the majority, the court held that in accounting malpractice cases, the statute of limitations begins running, in the absence of concealment of the wrong, when the negligence occurs and not when it is discovered.[158] While noting that the Arkansas rule is considerably more restrictive than any of the cases cited by Ford's, the Arkansas Supreme Court specifically rejected Ford's contentions that the limitations period commenced when the IRS assessed a tax deficiency.[159] Relying upon the long line of Arkansas cases dealing with attorney and physician malpractice,[160] the court saw no compelling reason to adopt a different rule for accountant malpractice actions.[161] The court reiterated its conviction that if such a marked change in the law is to be made in professional malpractice actions, the legislature, not the court, should make that change.[162]

Justice Purtle dissented, stating that "common sense and ordinary reasoning power" should be used to commence the running of the statute of limitations on the date that Russell Brown conceded that the IRS was correct and admitted that Ford's owed money.[163] Justice Purtle's approach would have brought the suit within the three-year limitations period.[164] The dissent appears to agree with the discovery rule, stating that Ford's was not harmed until it received a demand for additional taxes.[165]

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157. 299 Ark. 426, 773 S.W.2d 90 (1989).

158. *Id.* at 429, 773 S.W.2d at 92-93.

159. The court in *Ford's* relied on Moonie v. Lynch, 256 Cal. App. 2d 361, 64 Cal. Rptr. 55 (1975) (see notes 137-41 and accompanying text), along with Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969) (see note 142), for this proposition, which is consistent with the damage rule. However, as the court noted, these cases adhere to the discovery rule. Consequently, the statute would begin to run when the client received notice of the tax deficiency, rather than assessment. Using the discovery rule, the court noted that the plaintiff's claim would still have expired since "it could be concluded that appellants knew, or reasonably should have known, of appellee's negligent conduct by January 1978—which was more than three years prior to the date the appellants filed suit." 299 Ark. at 429, 773 S.W.2d at 92.

160. Stroud v. Ryan, 297 Ark. 472, 763 S.W.2d 76 (1989); Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988); Riggs v. Thomas, 283 Ark. 148, 671 S.W.2d 756 (1984).

161. *Ford's Inc.*, 299 Ark. at 429, 773 S.W.2d at 92.

162. *Id.* at 429, 773 S.W.2d at 93.

163. *Id.* at 430, 773 S.W.2d at 93 (Purtle, J., dissenting).

164. *Id.* (Purtle, J., dissenting).

165. *Id.* "There was no way appellants should have or could have learned . . . that they would owe additional taxes." *Id.* at 430-31, 773 S.W.2d at 93 (Purtle, J., dissenting).

Justice Purtle also found that Russell Brown deliberately and intentionally concealed its error or miscalculation in the liquidation plan until it conceded the IRS was correct in its deficiency assessment.[166] The majority opinion noted, however, that Ford's never alleged fraudulent concealment in its complaint, and even if it had, the only time the record might have suggested concealment by Russell Brown was when the parties met with the IRS in January 1977.[167] Any concealment attributed to Russell Brown would have ended in September 1978 when it admitted the IRS was correct.[168] Therefore, following the majority's reasoning, fraudulent concealment would not have brought this action within the limitations period.

In *Stroud v. Ryan*[169] the Arkansas Supreme Court applied a tolling provision to the traditional occurrence rule during a period in which no claim could have been made. The court first reiterated the rule that the limitations period begins when the negligent act occurs.[170] But, after considering the issue for the first time, the court added that the statute of limitations should be suspended during a period when the party alleging malpractice could not have brought a claim because the injury ceased to exist for a period of time.[171] The court recognized that, as a general rule in other jurisdictions, the running of a statute of limitations is tolled during the time a plaintiff is prevented from bringing the action to which the statute applies.[172]

In support, the court cited *Fidelity Union Casualty Co. v. Texas Power & Light*.[173] The Texas Court of Civil Appeals decided to toll the limitations period when an insurance carrier waited until after a favorable entry of final judgment in an employee's suit for personal injuries before bringing a cause of action against the party who injured the employee.[174] In another case,[175] a North Carolina court tolled the statute of limitations when a creditor lost the ability to sue a municipal corporation, which had its charter repealed, until a successor corpora-

166. 299 Ark. at 431, 773 S.W.2d at 93.

167. *Id.* at 429, 773 S.W.2d at 93. At that time, Russell Brown defended its position and advised plaintiffs that there was nothing to worry about. *Id.*

168. *Id.*

169. 297 Ark. 472, 763 S.W.2d 76 (1989).

170. *Id.* at 474, 763 S.W.2d at 77.

171. *Id.*

172. *Id.*, 763 S.W.2d at 77-78.

173. 35 S.W.2d 782 (Tex. Civ. App. 1931).

174. *Id.*

175. Broadfoot v. City of Fayetteville, 124 N.C. 478, 32 S.E. 804 (1899).

tion was organized.

Based on this general rule, the court in *Stroud* did not hesitate to toll the statute of limitations for the one year and seventy-seven days during which the default judgment was set aside.[176] During that time, Stroud had no claim against Ryan, even though the alleged negligent act had occurred, because Stroud could not have shown injury.[177]

Until the decision in *Ford's*, the Arkansas Supreme Court had not determined what would trigger the running of the applicable statute of limitations in accountant malpractice actions. This case brings accountant malpractice cases in line with attorney and physician malpractice decisions in Arkansas.[178] It is probable that the occurrence rule would also apply in actions against other professionals such as engineers and architects.

The court could have opted for a more liberal accrual rule as has been the trend in most jurisdictions.[179] However, while recognizing the possible harshness of the occurrence rule, the court left any such change to the legislature.[180] This suggests that a more complex fact situation might present a problem for the court in following a strict occurrence rule.

The tolling provision recognized in *Stroud* is a logical exception to the occurrence rule. There are other theories, however, that the court could have employed to reach the same result. By using such theories, the court could have liberalized Arkansas' accrual rule for attorney malpractice claims as it has done in actions against physicians.[181] The court could have adopted the continuous representation rule since Ryan continued to represent Stroud after the negligent act occurred until nine months before Stroud filed the claim against Ryan.[182] This rule would have the same equitable effect in attorney malpractice actions as it does in actions against physicians.[183] It would also give the attorney a

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176. 297 Ark. at 474, 763 S.W.2d at 76.

177. *Id.*

178. *See* White v. Reagan, 32 Ark. 281 (1877), and progeny of cases discussed in notes 76-99 and accompanying text. *See also* Williams v. Edmondson & War, 257 Ark. 837, 520 S.W.2d 260 (1975).

179. *See* notes 114-42 and accompanying text.

180. *Ford's Inc.*, 299 Ark. at 429, 773 S.W.2d at 90 (1989).

181. Lane v. Lane, 295 Ark. 671, 752 S.W.2d 25 (1988). *See* Note, *supra* note 147.

182. *Stroud*, 297 Ark. 472, 473, 763 S.W.2d 76, 77 (1987); *see, e.g.*, Wall v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986) (in all malpractice actions, the statute of limitations does not begin to run until the client knows or with reasonable diligence should know of the injury, its cause, and the attorney's possible negligence).

183. *Lane*, 295 Ark. at 675-76, 752 S.W.2d at 27.

chance to correct his errors before harm results.

In addition, the court could have tolled the statute based on a theory of estoppel. In a Florida case the court applied the estoppel theory where a lawyer induced his clients not to file a lawsuit against him based on assurances that either he or his malpractice insurer would make the clients whole.[184] In *Stroud* the court did not address the fact that Ryan repeatedly assured Stroud not to worry because Ryan's malpractice insurance would pay for the judgment. Therefore, had the setting aside of the default judgment not tolled the statute of limitations, Stroud would have had no recourse against the negligence of Ryan. The rule as adopted in *Stroud* could allow an attorney or accountant to extinguish a client's claim against him through delay. *Ford's* and *Stroud* leave unanswered what the Arkansas Supreme Court would recognize as fraudulent concealment that would toll the statute of limitations in professional malpractice claims.

With the decision in *Ford's*, the occurrence rule becomes further entrenched in professional malpractice cases. The exception announced in *Stroud* is a logical extension of this rule. Whether Arkansas will change its rule concerning the accrual of professional malpractice actions remains to be seen. The Arkansas Supreme Court has decided that the answer to that question rests with the legislature.

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184. Marholin v. Kaye, 503 So. 2d 950 (Fla. App. 1987); *accord* Gill v. Warren, 751 S.W.2d 33 (Ky. Ct. App. 1988) (if facts are such that attorney promised that further litigation would cure client's problems and lulled the client into inaction, the attorney would be estopped from asserting the statute of limitations as a defense).