NEW YORK COURT OF APPEALS ROUNDUP:

"CONTINUOUS REPRESENTATION" DOCTRINE, COMPTROLLER'S AUTHORITY, AND SPECIFICITY OF CRIMINAL CHARGES

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Last month, the Court of Appeals addressed for the first time application of the "continuous representation" doctrine to accounting malpractice claims, and was guided, in part, by the "continuous treatment" doctrine applicable to medical malpractice claims. Because the continuous representation doctrine is applied similarly to legal malpractice claims, the Court's decision is of particular interest to the bar. The Court also addressed for the first time last month the State Comptroller's authority to supervise the accounts of public corporations. Also, in a criminal case, the Court found that the People's failure to specify when, during the seven-month period alleged in the information, the accused's conduct took place, violated his constitutional rights. These decisions are discussed below.

Accounting Malpractice

The Court, in an opinion by Judge Theodore T. Jones, Jr., set forth the standard for invoking the continuous representation doctrine to toll the statute of limitations for accounting malpractice, in *Williamson v. PricewaterhouseCoopers LLP*. The decision indicates that the terms of a written contract should play a "key role" in determining whether the parties contemplated the type of continuing relationship necessary to invoke the doctrine.

The action was commenced by the Liquidating Trustee for a hedge fund. The fund had been dissolved after a portfolio review, undertaken due to a manager's unexpected resignation, revealed that the manager had been using an improper method for valuing securities holdings, causing the fund's assets to be materially overstated. Plaintiff sued PwC, which had audited the fund's financial statements for the period at issue, 1995-2000, each year furnishing an unqualified, or "clean," opinion. As part of the annual audits, the accounting firm had rendered opinions on the fund's internal control structure, as well.

Defendant conceded that the suit was timely with respect to its audit for fiscal year 2000, but moved to dismiss the claims directed to prior audits, invoking the three-year

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limitations period for malpractice actions. Plaintiff responded that each PwC audit of the fund had built on the audit preceding it, taking the prior year's inflated asset valuation as its starting point, and that PwC's services were continuous is nature. Although the motion court agreed with defendant that claims for audits prior to 2000 were untimely, the Appellate Division, First Department, reversed (3-2), concluding that plaintiff should at least have been afforded the opportunity to develop facts in discovery to support its position on tolling. The Court of Appeals unanimously reversed.

A malpractice claim accrues when malpractice is committed, not discovered, in the accounting context when the client receives the accountant's work product, the Court observed. When an accountant (or lawyer) provides "continuous representation," however, the statute of limitations is tolled, just as it is tolled when a physician provides "continuous treatment." In fact, the opinion relied heavily on precedents applying the continuous treatment doctrine, which arose to promote trust in the physician-patient relationship that would be undermined if a patient were required to interrupt corrective medical treatment in order to commence a lawsuit. But it does not apply to an ongoing doctor/patient relationship of a general nature, such as when a physician performs regular examinations.

The Court also drew upon authority from the legal malpractice context, in particular its decision in *Shumsky v. Eisentein*, 96 N.Y.2d 164 (2001), in which the Court had found that a retainer agreement "essentially established a 'course of representation' for continuous representation purposes," and demonstrated that the parties "reasonably intended" their professional relationship to continue. In *Williamson*, by contrast, the parties entered into a series of annual contracts to provide "separate and discrete" audit services relating to the fund's financial statements. After those services were performed, PwC did not undertake additional consulting or other work for that year, and the complaint had failed to allege facts that would suggest both parties contemplated that PwC would provide further services with respect to a completed audit. Thus, the statute of limitations for malpractice in performing an audit began to run as soon as the audit report was delivered to the client.

Comptroller's Authority

Matter of Worth Construction Co. v. Hevesi, an Article 78 proceeding, arose out of the cancellation of a contract for the rehabilitation of certain portions of the New York State Thruway, and challenged the authority of the State Comptroller to review and approve contracts of public corporations. The Comptroller's authority is found in article X, § 5 of the New York Constitution, which provides that the "accounts" of public corporations "shall be subject to the supervision of the state comptroller." The Court rejected petitioner's challenge, holding that the review and approval of contracts was "incidental" to the Comptroller's constitutional authority to supervise the accounts of such corporations.

State law requires the New York State Thruway Authority to award contracts to the "lowest responsible bidder." Petitioner Worth Construction was the low bidder for a Thruway rehabilitation project, but investigation revealed that the company allegedly had ties to organized crime, and that one of its principals was the target of a federal criminal investigation. After Worth retained an independent monitoring service to oversee its activities on the project, the Authority determined that the entity was "responsible," and furnished Worth with a contract that stated it was not valid or binding until approved by the Comptroller.

Pursuant to a 1950 resolution of the Thruway Authority, the Comptroller reviews and "approves" contracts over a certain dollar amount; the Authority, however, has retained for itself the right to proceed with a contract that the Comptroller had disapproved, should it elect to do so. The Comptroller determined that Worth was a "non-responsible bidder," and thus did not approve the contract. The Authority thereafter rescinded its award of the work to Worth.

The opinion by Judge Eugene F. Pigott, Jr., for a unanimous Court, noted that the Court was not addressing the Comptroller's authority in the absence of a request from a public corporation. The Court also did not need to determine whether it would be permissible for a corporation to cede to the Comptroller authority to make a final decision on a contract. Rather, the decision held that, based upon the circumstances, the Comptroller did not exceed his constitutional authority in reviewing (at the request of the Thruway Authority) and disapproving the contract.

Due Process – Narrowing the Time Frame of the Crime

The Sixth Amendment to the United States Constitution and Article I, § 6 of the New York Constitution obligate the prosecution to inform one who is criminally charged of the nature of the accusation. The purpose of this disclosure is to enable the accused to prepare a defense and to prevent double jeopardy. In most cases, this imposes a requirement to provide some specificity or particularization as to when the alleged crime was committed, and failure to meet the disclosure requirement may result in the dismissal of the information or indictment. That is precisely what happened in *People v. Sedlock,* where a unanimous Court, in an opinion by Judge Carmen Beauchamp Ciparick, dismissed an information because it and the bill of particulars later served by the prosecution only fixed the single incident at issue as occurring sometime within a seven-month period, and the People had failed to demonstrate that they were unable to provide an exact date.

Sedlock was a scoutmaster and the complainant was a boy in his troop. The two had a close relationship, and for a time the complainant lived in the home of Sedlock and his wife. In May 2004, the complainant told the police that Sedlock had touched his intimate parts. This resulted in one charge against Sedlock under Penal Law § 130.52, a class A misdemeanor. The conduct was alleged to have occurred sometime in the period between December 2002 and June 2003.

Sedlock moved to dismiss the information on the ground that the time frame of this single incident was "so expansive that [he could not] possibly defend against the charges and prepare a defense." The motion was denied, a jury found him guilty, and he was sentenced to one year in jail. An intermediate appellate court sustained the conviction but stayed imprisonment pending appeal, and the Court of Appeals granted leave to appeal, also staying the sentence.

In dismissing the information, the Court made clear that it was not adopting a "bright line rule" in terms of time frame; rather, the determination of whether sufficient specificity is provided in the charging instrument and bill of particulars to provide an accused a fair opportunity to prepare a defense should be made on a case-by-case basis, giving due consideration to all relevant circumstances. Here, the Court found the circumstances rendered a seven month time frame unreasonable, and dismissed the information.