

By Kevin G. Faley and Andrea M. Alonso  
*Applying the 1996 Three-Year Limit  
In Professional Malpractice Cases*

The New York State Legislature amended CPLR Section 214(6) effective September 4, 1996 to repeal the rule enunciated by the Court of Appeals in *Santulli v. Englert, Reilly & McHugh, P.C.*<sup>1</sup> that the statute of limitations to be applied in actions for professional malpractice (other than medical, dental or podiatric) is not solely the three-year negligence limitation, but can also be the expanded six year contract limitation.

In *Santulli*, a claim involving legal malpractice, the Court of Appeals found that the choice of the applicable statute of limitations was properly related to the remedy rather than to the theory of liability. Thus, "an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interest recoverable in a contract action is governed by the six year contract statute of limitations [CPLR 213(1)]."<sup>2</sup>

Whereas the pre 1996 CPLR 214(6) simply provided that an action to recover damages for non-medical malpractice "must be commenced within three years," the new amendment, with *Santulli* clearly in mind, now provides that such an action must be commenced within three years "regardless of whether the underlying theory is based in contract or tort."<sup>3</sup>

As with most new statutes, two questions that are of immediate concern are whether or not the statute is retroactive and, if it is not, then how is the statute to be applied prospectively. This prospective application is especially important when a statute of limitations is shortened since there will be an issue of whether or not the application will result in an abrogation of a vested right of a party.

The question of retroactivity appears to have been answered with a resounding no; however, the more important question is how the statute is to be applied to cases filed after September 4, 1996. Does the six year statute of limitations apply to cases which have accrued before the date the statute was enacted, but filed after? Will the three year statute of limitations apply? Or will the court fashion some sort of reasonable time frame in which to file a professional malpractice claim that was viable on September 3, 1996, but extinguished on September 4, 1996?

This article will discuss those cases which have had to deal with professional malpractice claims filed after CPLR 214(6) was enacted and for which the application of the new three year statute of limitations would have immediately extinguished otherwise viable claims.

CLAIMS FILED AFTER SEPTEMBER 4, 1996

Since the courts have essentially put to rest the question of whether the statute will be applied retroactively to cases pending as of the effective date of the statute, the remaining question concerning CPLR 214(6) is what happens to claims filed after September 4, 1996, but which had accrued before that date.

Specifically, what happens to cases where the professional malpractice occurred more than three years but less than six years before September 4, 1996?

If the statute had not been amended, the six year statute would have applied to these cases. However, once the statute was amended, these cases became immediately time barred.

The courts that have dealt with this issue all agree that the immediate extinguishment of these claims is unconstitutional and that a party should be afforded "some reasonable opportunity and period following enactment within which to pursue a claim."<sup>4</sup> The question then becomes what is a "reasonable time" to commence an action which would have been timely before the amendment of the statute of limitations.

The initial Appellate Division to decide this issue was the First Department in *Coastal Broadway Associates v. Rafael*.

*Coastal Broadway Associates v. Rafael*.

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Unfortunately, the First Department merely issued a memorandum decision which did not discuss the facts of the case but simply held that "due process requires that plaintiff be given a reasonable period of time after September 4, 1996 to pursue a claim therefore existing but immediately barred upon the immediately effective enactment of the amendment "... Based upon the record before us, we find that the commencement of the action five and one-half months after September 4, 1996 was reasonable." (Emphasis supplied).

The Fourth Department in *Shirley v. Danziger*<sup>5</sup> decided that the institution of a legal malpractice claim within 20 days after the effective date of the amendment was a reasonable time, but, as in *Coastal Broadway*, there is no detailed treatment of the reasoning behind the decision.

For a discussion of the issues involved in the prospective application of 214(6), it is necessary to examine three lower court decisions.

*Davis v. Isaacson, Robustelli*,<sup>6</sup> a lower court case decided on November 12, 1997, (two months before *Coastal Broadway Associates*) deals with a claim that was commenced five months after the effective date of the statute. *Davis*, another legal malpractice action, involved a claim which accrued in November of 1991, and, accordingly, under the *Santulli* case, the statute of limitations would have expired in November 1997. The claim was filed on January 29, 1997, approximately five months after the effective date of the statute, but within the *Santulli* time period.

Under the new three-year period, the action would be barred and the court had to determine whether or not to allow the malpractice claim to stand. Judge Gans noted that this was a case of first impression and that "no court has determined on the merits the precise question of retroactivity presented in this case, where the action was commenced after enactment of the amendment, based on claims which accrued beforehand and became time barred immediately upon the effective date of the amended statute."<sup>7</sup>

The court held that the amendment "must be treated as *technically retroactive* in this situation" but decided that "under the facts of this case, overriding constitutional prohibitions controlled the ultimate outcome." (Emphasis supplied).

Judge Gans then noted that both the United States Supreme Court and the New York Court of Appeals "have long recognized the Legislature's power to create a new or curtail an existing statute

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of limitations intended as a retrospective law ... That power is restricted only to the extent that it be exercised within ... constitutional parameters."<sup>11</sup>

Under these situations, the court continued, it is essential that such statutes allow a "reasonable time after they take effect for the commencement of suits upon existing causes of action: though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."<sup>12</sup>

The lower court stated that while it was up to the Legislature to determine what a "reasonable time" would be, that the Legislature, in this case, abrogated this responsibility and it was up to the court to determine what a reasonable time would be.

The court found that in a case "such as this one, where in shortening the statute of limitations, the Legislature affords plaintiff no time to prosecute his claim, and no time whatever remains for him to sue under the shortened statute, as a matter of law plaintiff is deprived of a reasonable time to bring suit, which violates the constitutional provision that no person shall be deprived of property without due process of law."

The court not only found that five months was a "reasonable time" to bring the suit, but went further and stated that plaintiff's action is "subject to the six year statute of limitations previously enforced and untimely."<sup>13</sup> (Emphasis supplied.)

Accordingly, *Davis* not only found that five months was a reasonable time in which to bring a lawsuit that was viable prior to the enactment of the statute, but further opined that the claim was governed by the six year statute of limitations; in effect, there was no prospective application of 214(6). Although that precise question was not before the Court, this reasoning would mean that the plaintiffs would have been able to bring suit until November 1997, thirteen months after the statute had been amended.

Is then a thirteen-month period a "reasonable time" to bring a claim after a shortened statute of limitations has been enacted? Not according to a later lower court case of *Kelly v. Cesarano, Haque & Kahn, P.C.* That lower court case was decided by Judge David Goldstein on July 24, 1998 and came to the exact opposite conclusion of the court in *Davis*.

In *Kelly*, Judge Goldstein noted that the plaintiff's claims accrued on April 14, 1994 and were viable as of September 4, 1996. Accordingly, the plaintiff had until April 14, 1997 under the three year statute of limitations. However, suit was not filed until October 29, 1997, thirteen months after the new statute was passed.

The court noted that the amendment did not have retroactive application to cases filed before September 4, 1996, but that it would apply in "some way" to cases filed after September 4, 1996.

The court held that "in this case, it is clear that had plaintiff instituted suit on or before April 14, 1997, 7 months after the amendment and within three years after the accrual of the claim, the action would have been timely. Here, however, plaintiff waited until October 29, 1997, more than thirteen

months after the effective date of the amendment to CPLR 214(6) and more than six months after the expiration of the three year statute of limitations... To institute suit some thirteen months after September 4, 1996 ... was unreasonable in terms of time."<sup>14</sup>

Kelly appears to hold that while the shortened statute of limitations will not apply to cases which were filed before the effective date of the statute, claims accruing before but filed after the effective date of the statute, will not get the total benefit of the *Santulli* six year statute of limitations but must be filed within a "reasonable time". Thirteen months is not a reasonable time.

The same reasoning was applied by the Federal Court in *Panigon v. Alliance Navigation Lines, Inc.*<sup>15</sup> a situation where the malpractice accrued as early as October 18, 1993, but, in any event, no later than December 31, 1993. However, plaintiffs filed their Complaint in March 1997, six months after the statute was enacted.

The court concluded that "the amended three year statute of limitations governing malpractice claims should apply to claims accruing prior to the 1996 amendment's effective date, but not filed until a reasonable time after its passage."

The court found that the malpractice claims before it were subject to a three year statute of limitations and therefore the statute expired no later than December 31, 1996. As noted above, the claim was not filed until March 1997.

In a footnote the Court addressed whether or not the plaintiff filed the action within a reasonable time after the shortened statute. The court stated that it need not "address the issue of how to define the term reasonable time in this context because ... plaintiffs had at least forty-four days --- and as many as one hundred eighteen days --- in which to file timely their malpractice claim after the enactment of the 1996 amendment. Plaintiffs therefore cannot argue that they did not have a reasonable time in which to file their claims after the statute of limitations was amended."<sup>16</sup>

Finally, in the Federal Court case of *Middle Market Financial Corporation v. D'Oranzio*,<sup>17</sup> Judge Kram held that a legal malpractice action commenced 56 days after the statute was instituted timely.

Accordingly, what appears to be the trend is that for all claims filed after September 4, 1996, the three year statute of limitations will apply. However, the courts will consider how much time elapsed between the effective date of the statute and the filing of the summons and complaint in order to determine whether or not the plaintiff had a reasonable time to file the summons and complaint. Apparently, this will have to be done on a case by case basis as what constitutes a reasonable time is *sui generis*.

The *Panigon* case strictly construed the statute and what constitutes a reasonable time. *Kelly* refrained from defining what a reasonable time would be, but found that thirteen months was unreasonable. *Coastal Broadway* decided that five and one-half months was reasonable. *Davis* held that five months was reasonable, but, in dicta, can be interpreted to hold that the six year *Santulli* statute of limitations applies to claims accruing before the statute was amended. *Shirley* held that

20 days was reasonable and *Middle Market* found 56 days to also be appropriate.

As these cases have illustrated, courts will be divided as to what constitutes a reasonable time. Certainly, any claim which accrued before September 4, 1996 and filed as of the date of this article would probably be untimely. It also appears clear that such claims filed within six months after the new amendment would be timely, except, perhaps, in Federal Court. It is those cases that fall between these two boundaries which will be the subject of future litigation.

For plaintiffs, their strong suit is the *Davis* case which can be read as holding that the six year statute of limitations still applies to cases accruing before September 4, 1996.

To temper defense arguments that this will give plaintiffs more than three years to file a claim after September 4, 1996, plaintiffs should concede that the statute of limitations should be the shorter of either six years from the date of accrual or three years from the effective date of the amendment.

This will avoid another inequity, that is, a case which accrued on September 3, 1996 would be governed by a six year statute of limitations, while a case which accrued the next day would be subject to a three year limitation.

Defendants, on the other hand, should argue that the statute is effective immediately and applies to all cases filed after September 4, 1996 and that, at most, a reasonable period of time to commence a suit is up to six months.

While professionals such as accountants, architects, and engineers still do not enjoy the two and one-half year statute of limitations that physicians have, they have certainly closed the gap with CPLR 214(6).

1. 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992)  
2. 78 N.Y.2d at 707, 579 N.Y.S.2d at 327, 586 N.E.2d at 1017. (high/low caps)  
3. New York Civil Practice Law and Rules Section 241(6) (McKinney's 1997).  
4. The following cases held that the statute was not retroactive.

*White of Lake George, Inc. v. Bell*, 173 Misc.2d 423, 662 N.Y.S.2d 362 (Sup. Ct. Albany County 1997); *Garcia v. Director, N.Y.L.J.*, January 1, 1997, p. 26, col. 2 (Sup. Ct., N.Y. County); *Federal Deposit Insurance Corp. v. Pelletreau & Pelletreau*, 965 F.Supp. 381 (E.D.N.Y. 1997); *Keller v. Lev*, 1997 WL218435 (S.D.N.Y. April 30, 1997); *Auson Tenders District Council Pension Fund v. Messera*, 958 F.Supp. 869 (S.D.N.Y. 1997); *Durkin v. Shea*, 957 F.Supp. 1360 (S.D.N.Y. 1997); *Keni v. Brojman*, 1997 WL 305254 (S.D.N.Y.); *Romeo v. Schmidt*, 244 A.D.2d 861, 668 N.Y.S.2d 113 (4th Dept. 1997); *Ruffalo v. Garbarini & Seher*, 239 A.D.2d 8, 668 N.Y.S.2d 169 (4th Dept. 1998); *Dowd v. Law Firm Hyatt Legal Services*, \_\_\_ A.D.2d \_\_\_, 671 N.Y.S.2d 344 (2d Dept. 1998); *Martin v. Canale*, \_\_\_ A.D.2d \_\_\_, 676 N.Y.S.2d 349 (3rd Dept. 1998); *Togel v. Lynam*, 246 A.D.2d 422, 668 N.Y.S.2d 162 (1st Dept. 1998); *Amateur Hockey Association of the U.S. v. Purson*, 244 A.D.2d 222, 664 N.Y.S.2d 919 (1st Dept. 1997).

In *Russo v. Walker*, 171 Misc.2d 707, 655 N.Y.S.2d 313 (Sup. Ct., Nassau County 1997) held that CPLR 214(6) did not change the six-year statute of limitations, but clarified that the period of limitations as intended by the Legislature was and always had been three years. However, as *Russo* applied a three-year statute of limitations to pending claims, the Court, in essence, gave the statute retroactive effect.

One Court found that it was the Legislature's intent for the statute to be retroactive (*Estate of Joseph Re v. Karstein Feisz & Wexler*, 958 F.Supp 907 (S.D.N.Y. 1997), but refused to give it retroactive effect.

5. See *Panigon v. Alliance Navigation Line, Inc.*, 1997 WL 473385 (S.D.N.Y.); *Coastal Broadway Associates v. Raphael*, \_\_\_ A.D.2d \_\_\_, 668 N.Y.S.2d 586 (1st Dept. 1998); *Davis v. Isaacson Robustelli, Fox, Fine, Curvo & Fongomoren, P.C.*, 175 Misc.2d 40, 667 N.Y.S.2d 608 (Sup. Ct., N.Y. County 1997); *Kelly v. Cesarano, Haque & Khan, P.C.*, 678 N.Y.S.2d 708 (Sup. Ct., N.Y. County 1998); *Shirley v. Danziger*, 676 N.Y.S.2d 369 (4th Dept. 1998); *Middle Market Financial Corporation v. D'Oranzio*, 1998 WL 397867 (S.D.N.Y. 1998).  
6. *Constal, supra*, note 20 246 A.D. 2d at 445, 668 N.Y.S. 2d at 586.  
7. *Shirley v. Danziger, supra*.  
8. *Davis, supra*, note 20.  
9. 175 Misc.2d at 43-44, 667 N.Y.S.2d at 610.  
10. 175 Misc.2d at 44, 667 N.Y.S.2d at 610.  
11. 175 Misc.2d at 45, 667 N.Y.S.2d at 612.  
12. 175 Misc.2d at 45, 667 N.Y.S.2d at 612.  
13. 175 Misc.2d at 46, 667 N.Y.S.2d at 613.  
14. 175 Misc.2d at 46, 667 N.Y.S.2d at 613.  
15. *Kelly, supra*, 678 N.Y.S.2d at 709.  
16. *Panigon, supra*, note 20 1997 WL 473385, at 3.  
17. *Id.* at 3.  
18. *Id.* at 4.  
19. *Middle Market Financial Corporation, supra*.  
20. This "solution" has been suggested by Professor Vincent C. Alexander in *The Supplementary Practice Commentaries for 1997, CPLR 214(a) McKinney's Book 7B Cumulative Pocket Part*, p.p.p. 153-4.