CARLTON FIELDS

The Continuing Representation Doctrine Does Not Apply to Fraud Allegations

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In *Messmer v. KDK Fin. Serv. Inc.,* an individual action involving alleged fraud in connection with the sale and surrender of deferred annuities to a senior, the Indiana Court of Appeals refused to extend the doctrine of continuous representation to cases involving fraud and brokers of financial services. The plaintiff, an elderly purchaser of five annuity products, alleged that defendants – agents and marketing organizations (the issuers were not parties to the action) – were liable for fraud because they did not advise her of the charges she would face when surrendering her annuities. Plaintiff Messmer, who had filed her complaint approximately nine months after the expiration of the six-year statute of limitations applicable to her fraud claims, attempted to refute the defendants' contention that her claims were time-barred by arguing that the statute of limitations was tolled by application of the continuous representation doctrine. The court disagreed. In its September 14 ruling affirming the trial court's grant of the defendants' summary judgment motion, the appellate court recognized that the continuous representation doctrine provides that the applicable statute of limitations does not commence until the end of a professional's representation of a client in the same matter in which the alleged malpractice occurred. Explaining that the purpose of the rule is to allow representatives an opportunity to remedy their errors, the court also recognized that although the doctrine has been applied to accountants and lawyers, no state has applied it to the financial services industry. Ultimately, contrasting such claims with those for fraud, the court held that the doctrine is "simply incompatible" with cases alleging fraud because it is not reasonable for a client to continue to maintain confidence in the professional's good faith after a fraud is discovered; rather, the client, upon discovery of the fraud, is required to investigate and access the facts. The court also affirmed the trial court's grant of summary judgment for the defendants regarding the plaintiff's claim for constructive fraud, predicated on the defendants' alleged breach of fiduciary duty that left her without an "understanding of the effect of the surrender," as to one of the five annuities. As the court recognized, the plaintiff's deposition testimony revealed she could not recall the details necessary to establish the "groundwork for a fraud contention," *e.g.,* "what she was told, by whom, and when." The court also cited evidence that the plaintiff had actual knowledge of the surrender charges.

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