

Peremption and Legal Malpractice:

Malpractice:

Does Civil Code Article 2315 Create Rights Subject to Peremption?

By Professor William E. Crawford



Peremption occurs upon the expiration of a peremptive period of time specified by law for the existence of a right when the right is not exercised timely. The occurrence of peremption extinguishes the right. The peremptive life of the right cannot be interrupted or suspended nor can the occurrence of peremption be renounced.¹

Simply put, a plaintiff's right to a claim of legal malpractice is delictual, arising from, created by, La. Civ.C. art. 2315. It is, therefore, not a right created for a specified, peremptive period of time, and the exercise thereof is subject only to prescription, not peremption.

In the recent case of *Naghi*,² the Louisiana Supreme Court held that an amendment to a pleading asserting a claim in legal malpractice after the peremptive period had lapsed was ineffective and could not under La. C.C.P. art. 1153 relate back to the original timely filed proceeding because peremption had occurred and the right asserted in the original pleading was extinguished, so that there was nothing there for the relation back of the amendment.³

But La. R.S. 9:5605 plainly deals only with the limitation of time for the filing of actions.⁴

A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or

neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

B. ***The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

Those provisions do not purport to create or extinguish the right to a claim in legal malpractice. They are rather a time-limitation on bringing the action, even though the limitation invokes the characteristics of peremption. While the attributes of peremption are that it cannot be interrupted, suspended or renounced, the time-bar of La. R.S. 9:5605, in its most basic character, is simply a doctored-up prescriptive limitation.⁵

Something similar has been pronounced by the Louisiana Supreme Court in *Borel*⁶ as to the medical malpractice prescription. *Borel* at first proclaimed that this prescriptive period was in reality peremption but on rehearing the court reaffirmed it as a prescriptive provision, though the court held explicitly that *contra non valentem* would not apply beyond the three years, so it is only a unique provision of prescription.

Because the right to a legal malpractice claim arises from La. Civ.C. art. 2315, it is not created for any specified period of time and is thus inherently not a peremptive right as set forth in art. 3458 of the Code, and the right is not extinguished by the mere passage of time.

The same analysis applies to the several statutes designed to limit the pursuit of claims for professional accounting liability, legal malpractice, professional insurance agent liability, professional engineers, and the liability of notaries public.⁷

Each of those statutes begins with the phrase "No action for damages . . ." None of those statutes purports to create or extinguish the right on which the action for damages is based, and are thus under La. Civ.C. art. 2315 subject only to prescription, not peremption.

This analysis does not seek to change the language of those statutes, but only suggests their correct interpretation.

FOOTNOTES

1. La. Civ.C. art. 3458.
2. 17 So.3d 919 (La. 2009).
3. See J. Kimball's dissent in *Naghi*.
4. La. C.C.P. art. 421 defines action as "... a demand for the enforcement of a legal right," through filing a pleading.
5. Put lipstick on prescription and it is still prescription.
6. *Borel v. Young*, 989 So.2d 42 (La. 2007), cited in Justice Kimball's dissent.
7. La. R.S. 9:5604, :5605, :5606, :5607, La. R.S. 35:200.

Professor William E. Crawford has been a member of the faculty of Louisiana State University Paul M. Hebert Law Center since 1965 and director of the Louisiana State Law Institute since 1978. (Louisiana State Law Institute, LSU Paul M. Hebert Law Center, Room W127, University Station, Baton Rouge, LA 70803-1016)

