Supreme Court of Florida

CASE NO: SC15-740
On Certified Question From
The United States Court of Appeals for the Eleventh Circuit
(Case No. 14-11959)
(District Court Case No. 13-CV-23998-CMA)

BARRY MUKAMAL, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF DONALD KIPNIS, and KENNETH A. WELT, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF LAWRENCE KIBLER,

Petitioners,

v.

BAYERISCHE HYPO-UND VEREINSBANK, AG, a corporation, now known as UNICREDIT BANK AG; HVB U.S. FINANCE, INC., now known as UNICREDIT U.S. FINANCE, INC.,

Respondents.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The United States Court of Appeals for the Eleventh Circuit certified the following question concerning the accrual of a claim when injury turns on the outcome of an underlying dispute between the taxpayer and the Internal Revenue Service:

> UNDER FLORIDA LAW AND THE FACTS IN THIS CASE, DO THE CLAIMS OF THE PLAINTIFF TAXPAYERS RELATING TO THE CARDS TAX SHELTER ACCRUE AT THE TIME THE IRS ISSUES A NOTICE OF DEFICIENCY OR WHEN THE TAXPAYERS' UNDERLYING DISPUTE WITH THE IRS IS CONCLUDED OR FINAL?

Plaintiffs/Appellants Barry Mukamal, as Chapter 7 Trustee of the Bankruptcy Estate of Donald Kipnis, and Kenneth A. Welt, as Chapter 7 Trustee of the Bankruptcy Estate of Lawrence Kibler, submit that the claims accrue at the time a hypothetical injury becomes real: when the IRS dispute is final. This Court has repeatedly held that where injury is speculative prior to the conclusion of an underlying case, a claim accrues only upon final resolution of the case. The United States District Court for the Southern District of Florida attempted to distinguish Florida's "bright line" rule in dismissing Plaintiffs' claims based on the statute of limitations. Plaintiffs seek confirmation from this Court that Plaintiffs' lawsuit, filed after the conclusion of the tax court case, timely asserted their claims against Defendants under Florida law.

STATEMENT OF FACTS

Plaintiffs/Appellants Barry Mukamal and Kenneth A. Welt[1] represent the bankruptcy estates of Donald Kipnis and Lawrence Kibler, respectively. Kipnis and Kibler were the victims of a conspiracy between Defendants-Appellants, the law firm of Sidley Austin, an investment advisory group Chenery, and others to devise and implement fraudulent tax shelters, including the Custom Adjustable Rate Debt Structure ("CARDS") marketed to Plaintiffs. (A010 ¶ 1).[2]

Defendants and their co-conspirators admitted to their fraud. In plea agreements with the DOJ and IRS, HVB and HVB managing director Dominick DeGiorgio admitted to criminal acts in the promotion of illegal tax shelters. *Id*. In connection with HVB's deferred prosecution agreement, HVB paid the U.S. Government over $29 million in restitution, disgorgement and "promoter penalty." (A026 ¶ 69). Sidley, who provided Plaintiffs a legal opinion in support of CARDS, separately entered into a plea agreement and the opinion's author (R.J. Ruble) was convicted of tax evasion. (A025 - A026 ¶¶ 64-67).

A. Kipnis and Kibler's CARDS Transaction.

Larry Kibler and Donald Kipnis were general contractors. (A027¶ 74). Their

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[1] On May 1, 2014, the district court granted Barry Mukamal's motion to substitute for plaintiff Kipnis. On March 20, 2015, the Eleventh Circuit granted Kenneth Welt's motion to be substituted for plaintiff Kibler.

[2] Citations herein are to Plaintiffs' Appendix, filed with this brief.

company, Miller & Solomon ("M & S"), oversaw major South Florida projects including a five-building medical school complex, the Huizenga Business School at Nova Southeastern, and the Miami Dolphins' training facility. (A027 ¶ 74). M&S also constructed high-rise condo and apartment buildings. (A027 ¶ 74).

Plaintiffs' long-time accountant, Michael DeSiato of CBIZ, proposed using a CARDS transaction to secure additional bonding capacity. (A028 ¶ 76). DeSiato pointed out that, in the short term, CARDS also created substantial tax savings. Unbeknownst to Plaintiffs, however, CARDS was a sham – its promoters, including HVB, knew it would never survive IRS scrutiny because it was predicated on the appearance of "loans" that were illusory. (A024 ¶ 58). HVB never disclosed to Plaintiffs the facts it later admitted in the DPA; nor did HVB ever advise Kipnis and Kibler to abandon the CARDS strategy. (A014 ¶ 16).

Because HVB and its co-conspirators failed to disclose the sham nature of the transaction, Kipnis and Kibler implemented the CARDS strategy and continued to believe the tax savings were legitimate. (A027 - A030 ¶¶ 74-85).

B. The IRS Challenges the CARDS Transaction; the Tax Court Rules Against Kipnis and Kibler.

In 2007, the IRS issued notices that proposed adjustments to Kipnis and Kibler's tax returns by disallowing claimed deductions from the CARDS strategy.

Because they had sought the CARDS transaction to increase bonding capacity and, therefore, had a non-tax purpose to support the legitimacy of their

CARDS transaction, Kipnis and Kibler challenged the adjustments proposed by the IRS Notice. (A028, A038 ¶¶ 76, 121). They did so on the advice of counsel, and their accountant DeSiato testified at trial on their behalf. After the tax court denied the IRS's motion for summary judgment, the matter proceeded to trial. *Kipnis, et al., v. IRS*, tax court Docket Nos. 30370-07, 30373-07 (Sept. 13, 2011).

On November 1, 2012, the tax court ruled against Kipnis and Kibler. (A012 ¶ 8); *see also Kipnis and Kibler v. Commissioner of Internal Revenue*, T.C. Memo 2012-306, Nos. 30370-07, 30373-07, 2012 WL 5371787 (Nov. 1, 2012)).

C. The District Court Proceedings.

On November 4, 2013, Kipnis and Kibler filed a seven-count complaint against HVB. Kipnis and Kibler asserted claims for a violation of Florida's RICO statute, fraud, aiding and abetting Sidley and Chenery's tax fraud, conspiracy, breach of fiduciary duty, aiding and abetting Sidley and Chenery's breaches of fiduciary duty, and negligent supervision. (A010).

On April 3, 2014, the district court dismissed Plaintiffs' complaint, holding that the statute of limitation barred all of Plaintiffs' claims. The court found that Plaintiffs were damaged by HVB in 2000 and 2001, and the claim accrued six years before the IRS even challenged the transaction. (A057). The court further held that Plaintiffs were obligated to bring suit once they discovered HVB's fraud, which occurred either: (i) in November of 2001, when HVB terminated the loan

(*id*.), (ii) in February of 2006, when HVB entered into the deferred prosecution agreement (*id*.), (iii) on October 4, 2007, when Plaintiffs received Notices of Deficiency from the IRS (A057 - A058), or (iv) by December 31, 2007, when Plaintiffs filed their Petition to challenge the IRS Notices of Deficiency. The district court employed "a liberal application of the discovery rule" to find Plaintiffs' claims were time-barred. (A058 - A059).

The district court held that the injury accrual rule adopted by this Court in *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990) and *Blumberg v. USAA Casualty Insurance Compan*y, 790 So.2d 1061 (Fla. 2001) did not apply to Plaintiffs' claims against HVB. (A060 - A063). The district court held that *Peat, Marwick* did not apply because Plaintiffs' claims are not dependent "on a finding by the tax court that the CARDS transactions at issue lacked economic substance." (A063). Plaintiffs appealed.

D. The Eleventh Circuit Proceedings.

On April 17, 2015, after oral argument, the United States Appellate Court for the Eleventh Circuit issued a per curium opinion certifying to this Court a question of Florida law.

The Eleventh Circuit discussed Florida authority governing accrual of claims, including *Peat, Marwick* and *Blumberg*. (A078 - A083). The Eleventh Circuit certified the following question to this Court:

> UNDER FLORIDA LAW AND THE FACTS IN THIS CASE, DO THE CLAIMS OF THE PLAINTIFF TAXPAYERS RELATING TO THE CARDS TAX SHELTER ACCRUE AT THE TIME THE IRS ISSUES A NOTICE OF DEFICIENCY OR WHEN THE TAXPAYERS' UNDERLYING DISPUTE WITH THE IRS IS CONCLUDED OR FINAL? (A089)

On April 23, 2015, this Court accepted the certified question.

SUMMARY OF ARGUMENT

Plaintiffs were defrauded into entering a tax shelter that, unbeknownst to them, lacked economic substance. Plaintiffs defended their tax treatment by focusing on their anticipated use of the CARDS transaction to permit greater leverage in bidding on large-scale construction projects; a defense that was not advanced by other CARDS participants. Plaintiffs defeated summary judgment sought by the IRS. Though their accountant testified in support of their economic motive, the tax court held that the CARDS strategy lacked economic substance.

Plaintiffs sued Defendants one year after judgment was entered against Plaintiffs, well within Florida's four and five year statutes of limitations governing their claims. The issue before this Court is whether Plaintiffs suffered cognizable or redressable injury, and therefore accrued claims, before the IRS's proposed adjustments were confirmed by a final ruling against Plaintiffs.

Based on the wording of the certified question, the Eleventh Circuit asks this Court to decide which of two events first triggered the accrual of Plaintiffs' claims: the taxpayers' receipt of the notice of deficiency containing the IRS' "proposed

adjustments," or the tax court's final determination that the IRS' proposed adjustments were correct. The Appellate Court thus appears to have rejected the arguments advanced by the District Court and Defendants for earlier accrual dates.

This Court's jurisprudence on the certified question is clear. Plaintiffs' claims first accrued when the tax court's decision became final. In *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323, 1326 (Fla. 1990), this Court rejected the defendants' contention that accrual should begin on "receipt of a Ninety-Day Letter," also referred to as a notice of deficiency. Rather, the limitations period "commenced when the United States tax court entered its judgment." *Id*. at 1327. At that point – and no earlier – the plaintiffs suffered cognizable injury.

Following *Peat, Marwick*, this Court has consistently held that claims do not accrue "until the conclusion of the litigation." *Fremont Indemnity v. Carey, Dwyer, Echart, Mason & Spring, P.A.*, 796 So. 2d 504, 506 (Fla. 2001). This is so because, until that point, plaintiffs may yet prevail and suffer no "redressable harm." *Id*.; *Larson & Larson v. TSE Indus.*, 22 So. 3d 36, 42-43 (Fla. 2009) (finding a bright line rule that claims only accrue when avoidance of injury is no longer possible); *Silvestrone v. Edell*, 721 So. 2d 1173, 1175-1176 (Fla. 1998) (holding that a claim is "hypothetical" and damages are speculative until the "underlying action is concluded," when the "final judgment becomes final"); *Blumberg v. USAA Casualty Insurance Compan*y, 790 So.2d 1061, 1065 (Fla. 2001) ("[A] cause of

action accrues when the client incurs damages at the conclusion of the related or underlying judicial proceedings…."). No support exists in this Court's jurisprudence for holding that the claim accrued before the tax case was final.

Requiring plaintiffs to file suit upon the issuance of a notice of deficiency, when the IRS's adjustments are merely "proposed," as is the case when the notice of deficiency issues, would undermine Florida's long-standing policy goals. In particular, this Court has sought to avoid forcing parties "to take directly contrary positions in the two actions." *Perez-Abreu, Zamora & De La Fe, P.A.* v. *Taracido*, 790 So. 2d 1051, 1054 (Fla. 2001). Had they been forced to sue HVB after the notice of deficiency, but before resolution, Kipnis and Kibler would have been forced to argue in tax court that the CARDS transactions were entirely legitimate, and in the district court that they were purely fraudulent.

Nor should this Court give credence to Defendants' contention that the profession of a defendant should govern when the statute of limitations begins to run, *i.e.*, that accrual awaits final judgment in the underlying action only if the claims are against attorneys or accountants. This Court has never held that the rule set forth in *Peat, Marwick* and its progeny is limited to those professions. To the contrary, the finality accrual rule has been applied in many circumstances involving neither a lawyer nor an accountant, nor any fiduciary duty. All of the policy reasons for the rule, including avoiding unnecessary litigation and avoiding

forcing parties into advocating inconsistent positions to different tribunals, apply equally outside of the malpractice context.

The facts here illustrate additional reasons this Court should not create such a rule. Under Defendants' proposed rule structure, the statute of limitations would not only have started to run, but actually elapsed, for Plaintiffs' claims against HVB for aiding and abetting the breaches of fiduciary duty committed by Sidley and other professionals, before Plaintiffs' claims for breach of fiduciary duty were even ripe. Defendants assert that this absurd result is the law, even though the existence of a primary breach of fiduciary duty is an element of aiding and abetting. Needless to say, no court has ever held that a claim against co-conspirators or abetters in the same conspiracy should accrue at different times, depending on each defendant's profession. This result alone demonstrates that Defendants' attempt to distinguish Florida precedent is flawed at its foundation.

As outlined above, and explained below, this Court should answer the Eleventh Circuit's certified question consistently with its longstanding precedent, that Plaintiffs' claims accrued only when the tax court judgment became final, and are therefore timely.

ARGUMENT

I. Plaintiffs Suffered No Cognizable Injury Until the Tax Court Ruling Was Final.

In Florida, a "cause of action accrues when the last element constituting the cause of action occurs." Fla. Stat. § 95.031(1). Each claim asserted by Plaintiffs requires the element of "injury."[3] Thus, none of Plaintiffs' claims accrued prior to the time Plaintiffs suffered an injury. *Kelly v. Lodwick*, 82 So.3d 855, 857 (Fla. 4th DCA 2011) ("The last element constituting a cause of action for negligence or breach of fiduciary duty …."); *Bloom v. Alvareze*, 498 F. App'x 867, 876 (11th Cir. 2012) ("[A] conspiracy cause of action in Florida 'accrues when the plaintiff suffers damages performed pursuant to the conspiracy.'").[4]

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[3] *Palmas y Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So.2d 565, 571 (Fla. 3d DCA 2004) (state RICO requires "plaintiff suffered injury") (Count I); *Gandy v. Trans World Computer Technology Group*, 787 So.2d 116, 118 (Fla. 2nd DCA 2001) ("essential elements of common-law fraud" requires "resulting damage to the other person") (Count II); *Koch v. Royal Wine Merchants, Ltd.*, 907 F. Supp. 2d 1332, 1348 (S.D. Fla. 2012) (aiding and abetting claims require proof of the underlying "violation" including that "this fraud harmed Plaintiff") (Counts III, VI), *Charles v. Florida Foreclosure Placement Center, LLC*, 988 So.2d 1157, 1160 (Fla. 3d DCA 2008) (civil conspiracy requires "damage to plaintiff as a result of the acts done under the conspiracy") (Count IV), *Crusselle v. Mong*, 59 So.3d 1178, 1181 (Fla. 5th DCA 2011) (elements of breach of fiduciary duty include "damages flowing from the breach") (Count V), and *Collins v. School Bd. of Broward County*, 471 So.2d 560, 563 (Fla. 4th DCA 1985) (elements require proximate causation of injury by negligence) (Count VII).

[4] Because fraud and civil RICO claims incorporate the discovery rule directly into the accrual analysis, cases evaluating the timeliness of such claims often address when plaintiffs "discovered" their claim. The relevant "discovery" is not

The question, therefore, is when were Plaintiffs injured – upon receipt of the notice of deficiency or upon the final resolution of their tax case? Kipnis and Kibler suffered no injury on account of the notice of deficiency, given that Florida law holds that any costs incurred defending the underlying action are not considered "injury" for accrual purposes. Rather, the notice containing the IRS' proposed adjustments only established the possibility of later injury, should Plaintiffs fail to successfully defend their tax treatment. Even after Plaintiffs learned that HVB and others had pled guilty to a general tax shelter scheme, the existence of any redressable injury remained contingent upon the entry of judgment against Plaintiffs in tax court based on the specific facts of their atypical case.

The contingent nature of Plaintiffs' injury, despite HVB's admissions of wrongdoing, is highlighted by the fact that the tax court denied summary judgment to the IRS in the underlying action. It found that there was a "material fact in dispute" concerning the economic substance analysis, *i.e.*, whether Plaintiffs "had a nontax business purpose in entering into the CARDS transaction involved herein." *Kipnis, et al., v. IRS*, tax court Docket Nos. 30370-07, 30373-07 (Sept. 13,

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knowledge of the underlying conduct, but rather the existence of an injury that demands remediation. So, like the other claims above, there can be no accrual prior to injury, because prior to injury plaintiffs have no claim. *See e.g., Lehman v. Lucom*, 727 F.3d 1326, 1330 (11th Cir. 2013) (RICO statute of limitations "begins to run 'when the injury was or should have been discovered'").

2011). The tax court heard testimony from Plaintiffs' accountant and others that Kipnis and Kibler entered the CARDS transaction to make a profit, and not simply for the tax savings. Had the tax court credited this testimony, Plaintiffs would have prevailed, leaving them with no claim against HVB.

Under such circumstances, Florida law is clear: if injury is contingent on a later court ruling, the statute of limitations does not accrue until that ruling is final.

A. No Injury Accrued Until the Tax Court Ruling was Final.

This Court first applied Florida's injury accrual rule to a tax-related claim in *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla. 1990). In *Peat, Marwick*, the plaintiffs employed a limited partnership tax shelter on the advice of defendant Peat, Marwick. 565 So.2d at 1324. The IRS later sent a notice of deficiency challenging the use of the tax shelter. Plaintiffs challenged the IRS determination in tax court. The plaintiffs subsequently settled and agreed to pay a tax deficiency. Within two years of the tax court's stipulated order, the plaintiffs sued Peat, Marwick. *Id*. at 1324-25. Like HVB here, Peat, Marwick argued that the statute of limitations barred the claim because the IRS notice of deficiency (or some earlier action) established accrual of injury. Peat, Marwick prevailed in the trial court, but this Court definitively rejected the contention that an IRS notice of deficiency constitutes an injury that begins accrual of the statute of limitations:

> We reject Peat Marwick's contention that an IRS deficiency determination conclusively establishes an injury upon which to base a

> professional malpractice action. If we were to accept that argument, the Lanes would have to have filed their accounting malpractice action during the same time that they were challenging the IRS's deficiency notice in their tax court appeal. Such a course would have placed them in the wholly untenable position of having to take directly contrary positions in these two actions. … To require a party to assert these two legally inconsistent positions in order to maintain a cause of action for professional malpractice is illogical and unjustified.

Id. at 1326.

Eleven years later, in *Blumberg v. USAA Casualty Insurance Compan*y, 790 So.2d 1061, 1065 (Fla. 2001), this Court reaffirmed and expanded the holding of *Peat, Marwick* in a non-accounting, non-legal malpractice context. In *Blumberg*, the dispute was between an insured and an insurance agent. The Court held that the plaintiffs' "cause of action accrues when the client incurs damages at the conclusion of the related or underlying judicial proceedings." *Id*.[5]

This Court once again held that an injury that is contingent upon the result of underlying litigation ripens into a cognizable claim only upon conclusion of that litigation in *Larson & Larson, P.A. v. TSE Industries, Inc.*, 22 So.3d 36, 44 (Fla.

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[5] The insurance agent had argued that *Peat, Marwick* was inapposite because Blumberg "had reason to know that the agent had acted negligently long before the final disposition of the case by this Court." *Id.* at 1064. This Court held that plaintiff's knowledge of the claim was irrelevant. *Id*. at 1065 ("[A] client should not be forced to bring a claim against an accountant prior to the time that the client has incurred damages. A rule that would mandate simultaneous suits would hinder the defense of the underlying claim and prematurely disrupt an otherwise harmonious business relationship.").

2009). There, two separate injuries flowed from the defendant's alleged legal malpractice in a patent dispute: (i) the loss of a claim at trial, and (ii) the entry of sanctions by the trial court against plaintiff after the trial. This Court held that the plaintiff's claims for each injury accrued separately, as each of the respective judgments became final, and that the later-accruing sanctions claim was timely. *Id*. at 47. The Court explained that the plaintiffs' claim accrued upon the entry of an agreed sanctions order, because only then "was the existence of any harm to TSE arising from the sanctions claim determined with sufficient certainty to justify commencement of the limitations period." *Id*. at 47-48.

Consistent with this Court's reasoning and holdings, courts in tax shelter cases have held that, under Florida law, no claim is ripe until the conclusion of the tax dispute. For example, in *Loftin v. KPMG, LLP*, 2003 WL 22225621 (S.D. Fla. Dec. 30, 2002), HVB's co-conspirators (KPMG and Sidley) argued that a claim based on a "FLIP" tax shelter (a CARDS predecessor) was not ripe because the taxpayer had not been injured. There, in response to an audit, KPMG – unlike HVB with Plaintiffs here – expressly disavowed its advice to the plaintiff, and actively encouraged him to settle. *Id*. at *3. While settlement discussions were ongoing, the plaintiff filed suit against KPMG and others who conspired to sell him the fraudulent tax shelter—including attorneys, investment advisors, promoters and banks. The court held that, under Florida law, none of Loftin's

claims, including for recovery of transaction fees, were ripe until the plaintiff reached a final resolution of his claims against the IRS:

> Until and unless Loftin and the IRS reach a final resolution of the dispute, it is impossible to determine whether Loftin actually suffered damages from Defendants' alleged misconduct. Even if Loftin is anticipating having to make a large payment to the IRS, the *amount* and *nature* of the payment remain unknown.

Id. at *7-9.

Loftin demonstrates why the finality accrual rule must be applied. Were it otherwise, as Defendants urge, a plaintiff's claim would be unripe if filed before resolution with the IRS, and untimely if filed afterwards. As much as tax fraud defendants like HVB might prefer this heads-I-win-tails-you-lose rule, there must be a time when a claim may be brought, and this Court's holding that claims accrue at the conclusion of the tax challenge best serves the policy goals set by this Court.

Under Florida law, the statute did not accrue until the tax court ruled against Plaintiffs. Plaintiffs' claims were timely filed.

B. Florida Jurisprudence Rejects Fees and Costs As Injuries for Purposes of Accrual of the Statute of Limitations.

Under established Florida law, the expenditure of legal fees and costs does not become a redressable injury until the contingent litigation has concluded. In *Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So.2d 504, 505 (Fla. 2001), this Court answered a certified question from the Eleventh

Circuit regarding statute of limitations accrual. The plaintiff's claim was premised on legal counsel's negligence in rejecting settlement offers without consultation. *Id.* When the client "discovered the negligence," it "retained new counsel and terminated" the defendant. *Id*. Even though the plaintiff was *fully informed* of the alleged malpractice, and had even hired new counsel, the Court held that "the statute of limitations began to run in this case when the underlying litigation was final," not when the plaintiff learned of the existence of malpractice or hired and paid for replacement counsel. *Id*. at 507.

This Court specifically rejected the defendants' argument that the plaintiffs had suffered injury "in the form of attorney's fees and costs that it had paid because it had lost the opportunity to settle." *Id*. at 506. This Court further held that the existence of redressable harm could only be known at the conclusion of the underlying suit:

> Moreover, the present case is a classic example of why redressable harm cannot be determined until the conclusion of the litigation. Carey, Dwyer alleges that Fremont had to pay attorney's fees and costs to defend a lawsuit that it otherwise could have settled. The settlement would have cost Fremont two million dollars. As Fremont points out in its brief, prior to the conclusion of the litigation, there was the potential of a lower settlement or judgment. Hence, even including the additional costs and fees, the possibility existed that Fremont would not suffer any redressable harm.

Id. Thus, even the fees and costs that Plaintiffs incurred in defending the tax treatment of their CARDS transactions do not constitute an injury for purposes of the statute of limitations.[6]

II. The Public Policy Underlying This Court's Prior Jurisprudence Supports The Conclusion That Plaintiffs' Claims Accrued Only After the Tax Dispute Concluded.

In a long line of decisions reaffirming Florida's accrual rule, this Court has identified a central policy consideration of applying this rule: "prevent[ing] clients from having to take directly contrary positions in the two actions." *Perez-Abreu,* 790 So. 2d at 1054. Holding that the statute of limitations commenced running at the issuance of the notice of deficiency would have required Plaintiffs to have simultaneously argued to the tax court that CARDS had economic substance, and to the district court that CARDS was fraudulent, without economic substance.

In contrast, the policy concerns underlying application of the statute of limitations do not support Defendants' position here. This Court has previously

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[6] The holding in *Fremont* that knowledge of underlying bad acts does not trigger the statute of limitations until there is injury further supports Plaintiffs' position here that its claims against Defendants did not accrue until the underlying tax case was final. *See id.* at 505-507 (plaintiff fired counsel and retained new attorneys, yet "the statute of limitations began to run in this case when the underlying litigation was final" rather than when the plaintiff learned of the malpractice); s*ee also Spivey v. Trader,* 620 So.2d 212, 213-15 (Fla. 4th DCA 1993) (knowledge of malpractice did not start running of statute of limitations because the "existence of damages is an essential element to the accrual of a cause of action for legal malpractice").

identified the intertwined goals of protecting "defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution." *Nardone v. Reynolds*, 333 So.2d 25, 36 (Fla. 1976), *modified on other grounds, Tanner v. Hartog*, 618 So.2d 177, 181 (Fla. 1993). These rationales are not implicated when there is a prerequisite underlying lawsuit. That suit will – as it has here – ensure that evidence and testimony are preserved, and put defendants on notice that claims may be brought against them if there is an adverse result. Indeed, Defendants here entered into a deferred prosecution agreement and had their personnel called for depositions in the underlying tax action. They were fully aware that Plaintiffs were vigorously defending their tax treatment, and that civil litigation was likely – if not inevitable – if Plaintiffs lost there. Defendants cannot claim to have been "thrown off guard" by this case.

In sum, this is not the manner of delay that the statute of limitations seeks to prevent. Delay here served all parties' interests. It ensured that Plaintiffs did not have to take contradictory positions, allowed the tax court case to conclude so there was no risk of unnecessary litigation in the district court, and created the possibility that, through a successful defense of their tax treatment, Plaintiffs would have no claim to assert against Defendants.

III. The Finality Accrual Rule Is Not Limited to Attorneys and Accountants.

This Court should reject Defendants' invitation to change Florida law to limit the application of the finality accrual rule to malpractice claims. Such a rule would be contrary to existing Florida law, not to mention the fairness and public policy reasons that this accrual rule exists in the first place.

A. Florida Courts Regularly Apply the Finality Accrual Rule to Claims Not Involving Attorneys, Accountants, or Fiduciary Duty.

Defendants' entire argument below depended on limiting the application of *Peat, Marwick* to claims governed by the malpractice statute of limitations contained in Fla. Stat § 95.11(4)(a). However, Florida courts regularly apply the very same injury accrual rule to non-malpractice claims. *See, e.g., Loftin*, 2003 WL 22225621, at *7 (finding claims for negligent misrepresentation, fraud, breach of fiduciary duty premature); *Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504, 505 (Fla. 2001) (finding that claims for professional negligence, breach of contract and breach of fiduciary duty did not accrue until conclusion of underlying litigation); *Steele v. Mid-Continent Cas. Co.*, 07-60789-CIV, 2007 WL 3458543, *3 (S.D. Fla. Nov. 14, 2007) (finding negligence and fraud in the inducement claims premature).

The Florida authority applying *Peat, Marwick's* accrual rule to insurance agents (including *Blumberg*) further demonstrates Defendants' incorrect

application of the accrual rule. The plaintiffs in these insurance cases assert negligence and fraud claims—just as Plaintiffs assert here. *See, e.g.*, *Blumberg*, 790 So.2d 1061, 1065.[7] In fact, Florida courts apply the finality accrual rule even when the defendant was not in privity with the plaintiff. *Medical Data Systems, Inc. v. Coastal Insurance Group, Inc.*, 139 So.3d 394, 396-97 (Fla. 4th DCA June 26, 2014). In *Medical Data Systems*, the defendant to whom the accrual rule was applied had been hired by one of the other defendants, and was not alleged to have a direct relationship with the plaintiff. *Id*. at 397. Nevertheless, the court held that the claim was not ripe until the underlying Fair Debt Collection Practices Act claim was resolved. *Id*. at 396-97 (noting that the "last element of a cause of action based on negligence is actual loss or damage," and holding that the plaintiffs were not injured until the underlying claim was lost and the plaintiff lacked insurance to cover the judgment). The application of the accrual rule, thus, is not limited to situations in which there is a professional relationship between a plaintiff and a defendant.

[7] Defendants argued below that the insurance agent cases do not disprove their distinction because insurance agent claims are analogous to malpractice. But that misses the point. These cases establish that the accrual rule is not limited to malpractice cases arising under Fla. Stat. § 95.11(4)(a), which does not apply to insurance agent claims. Moreover, if Defendants' argument by analogy is credited, then Plaintiffs' conspiracy, aiding and abetting and negligence claims are likewise "analogous" to malpractice claims, in that Defendants played an essential role in validating the legitimacy of the actions taken by Sidley and other professionals.

The rule is widely applied in many other areas of Florida law; if the existence of a claim depends on the outcome in a legal or administrative proceeding, the claim does not accrue until the underlying issues are finally concluded. *See, e.g., Park v. City of West Melbourne*, 999 So. 2d 673, 677 (Fla. 5th DCA 2008) (holding that a claim for reinstatement and back pay accrued when the underlying appeals and orders were final, despite the officer's prior knowledge that the "City was repudiating his claim for reinstatement."); *Fireman's Fund Ins. Co. v. Rojas*, 409 So. 2d 1166 (Fla. 3d DCA 1982) (holding that an insurance company's indemnity claim did not accrue until the insurer had settled or has been held liable on its insured's claim); *Canete v. Florida Dep't of Corrections*, 967 So. 2d 412, 415 (Fla. 1st DCA 2007) (holding that a prisoner was required to exhaust his administrative remedies, so that his claim accrued only upon exhaustion). Rather than a special rule for tax cases, *Peat, Marwick* and *Loftin* are simply the application of this general rule to tax shelter claims.

Moreover, *Peat, Marwick* is closely related to the black letter Florida law that requires actual injury, as opposed to knowledge of potential injury, for a claim to accrue. *See* e.g., *Penthouse N. Ass'n, Inc. v. Lombardi*, 461 So. 2d 1350, 1352 (Fla. 1984) (applying the rule to a fiduciary duty claim against a condominium association); *Stokes v. Huggins Const. Co., Inc.*, 626 So. 2d 327, 330 (Fla. 1st DCA 1993) (applying the rule to a homeowner's claim for a construction defect);

Petroleum Prods. Corp. v. Clark, 248 So. 2d 196, 199 (Fla. 4th DCA 1971) (holding that a claim against an oil refiner accrued when "it becomes obvious such damage is of a permanent character"); *Estate of Johnston v. TPE Hotels. Inc.*, 719 So. 2d 22 (Fla. 5th DCA 1998) (applying the rule to the denial of an easement); *Airport Sign Corp. v. Dade County*, 400 So. 2d 828, 829 (Fla. 3d DCA 1981) (holding that a claim against Dade County for failing to clear shrubbery blocking a billboard did not accrue when the shrubs were planted, because "[u]ntil damages are actually incurred, a party cannot state a cause of action and the statute of limitation does not begin to run"). Further, the court in *Haghayegh v. Clark*, 520 So. 2d 58, 59 (Fla. 3d DCA 1988), a malpractice case cited by *Peat, Marwick*,[8] cited *Airport Sign*, demonstrating that Florida does not distinguish between accrual in malpractice cases and all other causes of action.

Defendants relied on *Nale v. Montgomery*, 768 So. 2d 1166, 1167-68 (Fla. 4th DCA 2000) to draw a distinction between accrual of malpractice claims and other claims. In *Nale*, however, the court held that a negligence claim for voluntarily dismissing plaintiffs' claim with prejudice was untimely because "the damage of the loss of the cause of action was complete when the notice of voluntary dismissal was filed." *Id*. at 1167 n. 1. *Nale* thus applies the finality accrual rule, because the claim accrued on the underlying final judgment. While

[8] 565 So. 2d at 1325.

the court purported to distinguish malpractice authority, it applied the same logic and reached the same result. *Id*.

Thus, it is well-settled that there is no special accrual rule in Florida for malpractice cases; in malpractice cases, courts apply the same rule that accrual occurs only once plaintiffs have been injured. In tax shelter litigation, Florida has determined that injury occurs only upon a resolution with the IRS or a final judicial order. Plaintiffs' claims, therefore, did not accrue until 2012, and are timely.

B. Limiting the Finality Accrual Rule to Attorneys and Accountants Would Be Inefficient and Inject Uncertainty Into the Rule.

Defendants' argument should also be rejected on policy grounds. First, the policy concerns identified in *Peat, Marwick* and its progeny – *i.e.*, protecting parties from having to assert contradictory positions to different tribunals, and avoidance of unnecessary litigation – apply with equal force to non-malpractice claims.[9] The concern that plaintiffs could be left with no time when their claims would be both ripe and timely is likewise not limited to the malpractice context. In addition to those concerns, a new rule distinguishing between attorneys, accountants, and others, would mean that plaintiffs' injuries would ripen against different defendants on different dates for the same claim, forcing serial case

[9] *Peat, Marwick*, 565 So. 2d at 1326; *Blumberg*, 790 So. 2d at 1065; *Perez-Abreu*, 790 So. 2d at 1054; *Silvestrone v. Edell*, 721 So.2d 1173, 1176 ((Fla. 1998); Diaz v. Piquette, 496 So. 2d 239, 240 (Fla. 3d DCA 1986).

filings—a result abhorred by Florida law.

The facts here illustrate well several of these policy issues. Plaintiffs have asserted claims against Defendants for aiding and abetting fraud and breach of fiduciary duty, including the torts of Sidley, and other professionals. According to Defendants, claims against HVB for aiding and abetting would be stale and untimely before the claims against Sidley and the other professionals were even ripe. Such an accrual structure is intellectually indefensible and will promote seriatim lawsuits arising out of the very same facts.[10]

In addition to overloading the courts with litigation that would not need to be brought if the plaintiff prevails at tax court, accrual "defendant-by-defendant" is contrary to the well-settled doctrine of Florida's statute of limitations, which provides for accrual on an "injury-by-injury" basis. *Larson & Larson v. TSE Indus., Inc.*, 22 So.3d 36, 44 (Fla. 2009) (tying accrual to injury); *see also Whitlock Corp. v. Deloitte & Touche LLP*, 233 F.3d 1063, 1066 (7th Cir. 2000) (holding that the statute of limitations "start[s] running with respect to *all* potentially responsible persons" at the same time, emphasis in original).

Moreover, because accrual would depend on the nature of work done by any

[10] Alternatively, if claims against all potential defendants that are related to malpractice, negligence and fiduciary duty are subject to the injury accrual rule, then—at a minimum—Counts III and VI, which relate to conspiracy and aiding and abetting in connection with malpractice and breach of fiduciary duty, are timely.

given defendant, such a rule structure would invite fact-intensive litigation over whether a defendant's misconduct was sufficiently "malpractice-like" to avoid the statute of limitations. This is contrary to Florida's express preference for a bright line accrual rule, and avoidance of tangential litigation. *Silvestrone*, 721 So. 2d at 1176 ("This bright-line rule will provide certainty and reduce litigation over when the statute starts to run.").

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court answer the Eleventh Circuit's certified question consistently with its longstanding precedent, that Plaintiffs' claims accrued only when the tax court judgment became final, and are therefore timely.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael G. Dickler, certify that on July 8, 2015, I caused a true and correct copy of **Appendix** to be served upon the following *via eFiling Portal and Email*:

Ann M. St. Peter-Griffith
Mark Ressler
Michael Hanin
Henry Brownstein

/s/ Michael G. Dickler

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in Petitioners' Initial Brief On The Merits is Times New Roman 14-point.

/s/ Michael G. Dickler