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# Legal Malpractice: A Tort or Contract Prescriptive Period? *Cherokee Restaurant v. Pierson*

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## LEGAL MALPRACTICE: A TORT OR CONTRACT PRESCRIPTIVE PERIOD? *Cherokee Restaurant v. Pierson*

Lyn Ezell, plaintiff-lessee, and William McLendon, lessor, retained Pierson, a practicing attorney, in 1973 for the purpose of drafting a lease between the two for a tract of land. Following their request to draft the "longest lease allowed by law,"<sup>1</sup> Pierson drafted a lease with a one-year term, but with "an infinite number of annual options to renew this lease for additional periods of one year each."<sup>2</sup> In March 1978, McLendon brought suit to annul the lease due to alleged deficiencies; however, the parties settled prior to trial, amending the lease to expire in 1989. Over one year later, in November 1979, Ezell and Cherokee Restaurant brought a legal malpractice claim against Pierson. Ezell claimed that Pierson had breached his contract by negligently drafting the lease, while Pierson argued that the action had prescribed. The trial court agreed with Pierson, finding the claim to be in tort and applying a one-year prescriptive period. The First Circuit Court of Appeal affirmed, and *held* that a claim of legal malpractice is *ex delicto* in nature and that a one-year prescriptive period would apply unless the attorney had expressly warranted a specific result, which would give rise to a breach of contract claim with a ten-year prescriptive period. *Cherokee Restaurant v. Pierson*, 428 So. 2d 995 (La. App. 1st Cir.), *cert. denied*, 431 So. 2d 773 (La. 1983).

The question of whether a claim of legal malpractice lies in a contract theory or a tort theory has led to a split of authority among Louisiana appellate courts. So uncertain is the Louisiana jurisprudence on legal malpractice that the United States Fifth Circuit Court of Appeals at one time certified the question to the Louisiana Supreme Court.<sup>3</sup> The jurisprudence dealing with the basis for legal malpractice reveals the conflict among the circuits and indicates two basic views on whether a legal malpractice claim sounds in tort or breach of contract.

The earliest Louisiana case discussing the prescriptive period of legal malpractice was *Marchand v. Miazza*,<sup>4</sup> decided in 1963. The client in *Marchand* sued her attorney for allegedly neglecting to "properly represent her and protect her property rights."<sup>5</sup> Although the court in *Marchand* found that the one-year prescriptive period had not run, it stated in dicta that the claim could be filed in either contract or tort,<sup>6</sup> despite the fact that the issue in *Marchand* was whether or not the attorney's conduct

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1. *Cherokee Restaurant v. Pierson*, 428 So. 2d 995, 996 (La. App. 1st Cir. 1983).
2. *Id.*
3. *Sincox v. Blackwell*, 672 F.2d 423 (5th Cir. 1982).
4. 151 So. 2d 372 (La. App. 4th Cir. 1963).
5. *Id.* at 374.
6. *Id.* at 375.

was negligent. The *Marchand* decision is representative of one view in the jurisprudence which allows a claim of legal malpractice to proceed upon either a tort or breach of contract foundation. This view is currently followed by the Louisiana Third Circuit Court of Appeal.<sup>7</sup>

The alternate view on the basis of liability for legal malpractice first appeared in *Vessel v. St. Paul Fire & Marine Insurance Co.*,<sup>8</sup> where the Louisiana First Circuit Court of Appeal considered whether the direct action statute applied to an attorney's professional liability insurer. In *Vessel*, it was argued that the attorney-client relationship is a contractual one, and that the direct action statute applies solely to tort claims. The first circuit noted the *Marchand* decision and acknowledged that under certain circumstances an attorney may be held under a contract or tort theory of liability. The court in *Vessel* departed from the broad rule in *Marchand*, however, and found that where the issue is solely whether the attorney was negligent by failing to meet the required standard of professional care, the action is one in tort. If the attorney's conduct constitutes a breach of a specific guarantee in the attorney-client contract, then the action is one for breach of contract.<sup>9</sup> The language in *Vessel* is representative of the second jurisprudential theory on legal malpractice, which allows a breach of contract claim only if a specific provision of the contract was breached by the attorney; otherwise the claim must proceed in tort. Prior to the instant case, only the fourth circuit firmly adhered to the view expressed in *Vessel*.<sup>10</sup> Despite the decision in *Vessel*, the first circuit's position remained unsettled as is illustrated by its decisions subsequent to that case.

The first circuit in *Jackson v. Zito*,<sup>11</sup> contrary to its prior opinion in *Vessel*, stated that legal malpractice contains elements both *ex contractu* and *ex delicto*,<sup>12</sup> and the client may proceed upon either. The attorney in *Jackson* allegedly was negligent in allowing his client's claim to prescribe. The court, after noting that "one set of circumstances can give rise to more than one cause of action,"<sup>13</sup> remanded for the trial court to determine if the attorney had breached a contractual duty arising from the attorney-client relationship. Curiously, the court cited both *Marchand* and *Vessel* for the same proposition: a legal malpractice claim contains elements both *ex contractu* and *ex delicto*.<sup>14</sup> Clearly, however, the two cases do not stand for the same proposition.

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7. See *Ambrose v. Roberts*, 393 So. 2d 132 (La. App. 3d Cir.), writ denied, 394 So. 2d 1234 (La. 1980); *Johnson v. Daye*, 363 So. 3d 940 (La. App. 3d Cir. 1978).

8. 276 So. 2d 874 (La. App. 1st Cir. 1973).

9. *Id.* at 877.

10. See *Corceller v. Brooks*, 347 So. 2d 274 (La. App. 4th Cir.), writ denied, 350 So. 2d 1223 (La. 1977).

11. 314 So. 2d 401 (La. App. 1st Cir.), writs denied, 320 So. 2d 551, 553 (La. 1975).

12. *Id.* at 404.

13. *Id.* at 408.

14. *Id.* at 404.

Against this backdrop of conflicting views the federal courts for the first time considered the proper basis for legal malpractice in Louisiana. In *Sincox v. Blackwell*,<sup>15</sup> the United States District Court considered Sincox's complaint that due to the negligence of his attorney, he was convicted of obstruction of justice. The district court held that the client's tort claim of legal malpractice had prescribed. Relying on *Vessel*, the court found that the contract did not guarantee a specific result, and so there could be no claim for a breach of contract based upon either a special or implied warranty.<sup>16</sup>

On appeal, the district court's ruling in *Sincox* was certified to the Louisiana Supreme Court by the United States Fifth Circuit Court of Appeals on the issue of whether legal malpractice sounds in tort or contract.<sup>17</sup> Certification was withdrawn, however, after the parties settled, and the question remained unanswered.<sup>18</sup>

In 1981, the Louisiana Supreme Court did provide guidance as to the correct analysis in determining whether malpractice should proceed in tort or contract. In *Sciacca v. Polizzi*,<sup>19</sup> the Louisiana Supreme Court finally settled the issue of whether a claim of *medical* malpractice sounded in tort or breach of contract. The supreme court held that due to the unique role of a physician, an action for medical malpractice will always lie in tort unless the physician expressly warrants a specific result. This decision reversed the first circuit, which had held that a medical malpractice claim could sound in either tort or breach of contract whether or not an express warranty was made.<sup>20</sup> Essentially, the supreme court adopted the common law approach to medical malpractice, which is based upon public policy and the view that no implied warranties can be inferred from a contract with a physician for treatment since a doctor has no real control over a patient's recovery.<sup>21</sup> Under the common law approach, the law will not read anything into a contract between doctor and patient other than what is specifically provided in the contract itself. According to the Louisiana Supreme Court:

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15. 525 F. Supp. 96 (W.D. La. 1981).

16. *Id.* at 100.

17. 672 F.2d 423 (5th Cir. 1982).

18. 678 F.2d 585 (5th Cir. 1982).

19. 403 So. 2d 728 (La. 1981).

20. Prior to the supreme court's opinion in *Sciacca*, the first circuit had held that a malpractice action against a physician could proceed in tort or contract. See *Henson v. St. Paul Fire & Marine Ins. Co.*, 354 So. 2d 612 (La. App. 1st Cir. 1977), *aff'd*, 363 So. 2d 711 (La. 1978).

21. The court cites W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 92, at 613 (4th ed. 1971); 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 316 (1981), as authority for finding medical malpractice to be a tort. 403 So. 2d at 731. See also Litvinoff, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Contracts in Particular*, 36 LA. L. REV. 417, 421 (1976) ("Such no doubt is the common law approach."); Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 413.

[U]nlike engineers, mechanics and shipbuilders, a physician does not, simply by undertaking the treatment of a case, contract with a patient for a specific result. When a patient is injured by the negligence of his physician, his action against that physician is one in tort, unless the physician has contracted with the patient for a specific cure or result.<sup>22</sup>

This rationale indicates that a physician cannot be held on an implied contract when a result is not achieved; however, an engineer, whose actions are result-oriented, is expected to achieve a specific result whether or not the contract so stipulates.

Attorneys were quick to apply the reasoning of *Sciacca*,<sup>23</sup> asserting that physicians and attorneys occupy analogous positions and should be treated similarly. The first court to address such an argument, however, rejected the analogy. The first circuit, in *Cummings v. Skeahan Corp.*,<sup>24</sup> specifically rejected the reasoning of *Sciacca* as being applicable to attorneys, stating that a malpractice action against an attorney is both *ex contractu* and *ex delicto*.<sup>25</sup> The majority opinion in *Cummings*, while rejecting the analogy of *Sciacca* as to attorneys, noted that should it adopt the *Sciacca* rule and apply it to attorneys, the facts of the case would fit within the express guarantee exception of the medical malpractice rule.<sup>26</sup> The attorney in *Cummings* was being sued for failing to include a mineral lease in a title opinion, "the correctness of which can be warranted or guaranteed."<sup>27</sup> Thus, the claim fell within *Sciacca*'s exception to the general rule that such claims are in tort.

The majority in *Cummings* did not address the conflict between the first circuit's opinions in *Vessel* and *Jackson*; however, Judge Edwards' concurrence in *Cummings* did consider the discrepancy.<sup>28</sup> Judge Edwards concluded that the application of the *Sciacca* rule to legal malpractice would be entirely consistent with the holding in *Vessel* that legal malpractice is usually *ex delicto* in nature. He concurred with the majority opinion, however, realizing that the decision would remain the same whether *Vessel* or *Jackson* were followed, no doubt anticipating a case such as the instant case where the two divergent views of the first circuit on legal malpractice would come head to head.

In *Cherokee Restaurant*, the plaintiffs brought their claim both in tort (negligence of the attorney) and in contract (breach of an implied

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22. 403 So. 2d at 731.

23. *Sciacca* was decided September 8, 1981. It was considered in *Cummings v. Skeahan Corp.*, 405 So. 2d 1146 (La. App. 1st Cir. 1981), which was decided October 12, 1981.

24. 405 So. 2d 1146 (La. App. 1st Cir. 1981).

25. *Id.* at 1147.

26. *Id.*

27. *Id.*

28. *Id.* at 1148 (Edwards, J., concurring).

contract to perform at a professional level). Since the plaintiffs' claim was filed over one year from when they were put on notice of a problem with the lease,<sup>29</sup> the defendant raised the exception of prescription under Civil Code article 3536.<sup>30</sup> The trial court ruled that the "gravamen selected by the plaintiff is similar in theory to *Sciacca versus Polizzi*,"<sup>31</sup> *i.e.*, tort theory. The defendant's plea of prescription was sustained and the action dismissed.

The first circuit affirmed the trial court's finding that the prescriptive period of one year should apply. In reaching that conclusion, the first circuit analogized the supreme court decision in *Sciacca* dealing with medical malpractice, stating:

Conceptually, the action for legal malpractice is not different than the action for medical malpractice. Both entail a deviation from the accepted standard of care of the profession. Although the attorney-client relationship gives rise to an implied warranty of the attorney to use his best professional skill and judgment, this duty is legal rather than contractual in nature, and a breach of this duty amounts to a tort. . . . Only when an attorney breaches an express warranty of result does an action for breach of contract arise.<sup>32</sup>

The *Cherokee Restaurant* court found that *Sciacca* cast doubt on its earlier rulings that a malpractice action could proceed either in tort or contract and reversed these decisions "insofar as they recognize a ten year prescriptive period for the 'negligent breach of contract' by an attorney."<sup>33</sup> Instead, the court adopted the rule enunciated in *Sciacca* that malpractice is by its nature a tort, and unless an attorney guarantees a specific result, legal malpractice is subject to a one-year prescriptive period.

Applying the rule of *Sciacca* to the facts in *Cherokee Restaurant*, the court found the defendant had not expressly guaranteed any result, but had used his own discretion in determining what was the law. Such use of discretion, the court stated, was foreign to the concept of contracting for a specific result.<sup>34</sup> The court, in essence, refused to imply any condi-

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29. Also at issue in *Cherokee Restaurant* was when the prescriptive period began to run. The court held it began when the plaintiff was put on notice of a problem with the lease. 428 So. 2d at 999.

30. Article 3536 (as it appeared prior to its repeal by 1983 La. Acts, No. 173, § 1) read in part: "The following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses." New Civil Code article 3492 replaces 3536 in part and reads: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

31. No. 52,833, slip op. at 1 (21st La. Jud. Dist. Ct. Dec. 2, 1981).

32. 428 So. 2d at 998 (citations omitted).

33. *Id.* at 999.

34. *Id.*

tions in an attorney-client contract, instead reading the contract strictly and finding a breach of that contract only when the attorney guarantees a specific result. Judge Ponder, in his dissent, stated that this rule "has effectually eliminated contractual claims against attorneys. The distinguishing factor of the exercise of judgement will almost always be present in the attorney-client relationship and, by their reasoning, will inevitably result in the malpractice being a tort."<sup>35</sup>

The majority holding, however, does not say that a claim for breach of contract may never be brought when the action upon which it is based involved the discretion of the attorney. An attorney may still guarantee a result even though it may require his discretion in handling the case. Absent this specific guarantee, however, Judge Ponder seems correct in his dissent.<sup>36</sup> The majority finds the element of discretion to be indicative of an intent not to guarantee a specific result; thus, practically speaking, most malpractice actions under the *Cherokee Restaurant* rationale will be in tort.

The decision in *Cherokee Restaurant* sets out a simple test for determining the basis of a legal malpractice action, and finally clears up the conflict between earlier decisions of the first circuit. However, a closer examination of *Cherokee Restaurant* is necessary to determine if its rationale is consistent with the law and jurisprudence of Louisiana.

As with any legal examination in a civilian jurisdiction, the proper point of beginning is with the substantive law. The *Cherokee Restaurant* court, by allowing a contract claim only on express contractual stipulations, disallowed any claim based upon implied contractual conditions. The Civil Code articles providing for implied conditions in contracts were well summarized by the Louisiana Supreme Court in *National Safe Corp. v. Benedict & Myrick, Inc.*,<sup>37</sup> in which the court stated:

Article 1901 of the Civil Code requires good faith performance of all agreements. A principle of implied obligations in contracts is also stated in Article 1903 of the code in these words: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect." The effect of equity on implied obligations is expressed in Article 1964 in these terms: "Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they

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35. *Id.* at 1000 (Ponder, J., dissenting).

36. Regarding the prophecies of Judge Ponder, see Mengis, *Developments in the Law, 1982-1983—Professional Responsibility*, 44 LA. L. REV. 489, 492 (1983).

37. 371 So. 2d 792 (La. 1979). The supreme court read into a contract between two corporations an implied stipulation not to hire each other's employees.

would be supplied from one of these sources." Insofar as pertinent here, the "equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us . . . ." La. Civil Code art. 1965.

From these pronouncements we are reminded that not all obligations arising out of contract need be explicitly stated. Into all contracts, therefore, good faith performance is implied:<sup>38</sup>

The language of the Civil Code articles leads to an opposite conclusion than that reached in *Cherokee Restaurant*: that an implied condition of due care may exist in every contract. Civil Code article 1903 makes this clear since the obligation created by contract includes the implied stipulation of maintaining a certain standard of care because "by law, equity or custom, [it] is considered as incidental to the particular contract, or necessary to carry it into effect."<sup>39</sup> That an implied guarantee of competence is considered by law, equity, or custom to be incidental in every attorney-client contract cannot be in doubt. Attorneys hold themselves out to be professionals and experts on the law. For this reason alone they are sought out by clients. Certainly the competency and ability of the attorney is "incidental to the particular contract," since the attorney's skill is the client's underlying "cause" for contracting with the attorney. By holding himself out for hire as a professional, the attorney impliedly guarantees that he possesses the expert skills of an attorney, and by obligating himself by contract to perform a service, he impliedly contracts to operate at a level commensurate with his profession.

An implied condition of due care is also reasonably supposed by both the attorney and the client to be present in the contract. Each client must fully expect the attorney to render good faith performance at a level of skill equal to that of his peers in the legal community. Likewise, an attorney is aware that he is expected to represent his clients with a high degree of care.

The Civil Code thus suggests that it is possible for an unspoken guarantee to arise out of the attorney-client contract, namely, an implied contractual condition to exercise due care. The jurisprudence provides support for this finding since in analogous situations, implied conditions of due care have been found to exist. Louisiana courts have generally held that in every contract for work or services, there is an implied stipulation in the contract that it will be performed in a workmanlike and competent fashion. Already mentioned are those cases holding that an implied stipulation of due care exists in every attorney-client contract.<sup>40</sup> Other Louisiana

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38. *Id.* at 795.

39. LA. CIV. CODE art. 1903.

40. *See, e.g., Cummings v. Skeahan Corp.*, 405 So. 2d 1146 (La. App. 1st Cir. 1981);

courts have found implied stipulations of due care in contracts in other similar situations,<sup>41</sup> and there are a number of Louisiana appellate court decisions, prior to *Sciacca*, finding an implied condition of due care in contracts between physicians and patients.<sup>42</sup> The jurisprudence seems settled that any contract for services involves an implied stipulation to perform in a competent manner. It is difficult to logically distinguish this line of jurisprudence from a contract for services with an attorney or a physician. An attorney is contractually obligated to provide services to a client, just as an engineer, mechanic or shipbuilder is bound to provide services. All are hired to perform a specialized task for a client or customer.

In *Sciacca*, however, the Louisiana Supreme Court differentiates physicians from other professionals when it states that "[u]nlike engineers, mechanics and shipbuilders, a physician does not, simply by undertaking the treatment of a case, contract with a patient for a specific result."<sup>43</sup> Likewise, Professor Litvinoff, in his treatise on obligations, states that a warranty or guarantee by an attorney of a particular result of a litigious claim is foreign to the nature of the legal profession.<sup>44</sup> This is a logical, but narrow, distinction. When a client hires an attorney, there is not an implied stipulation that the attorney will win the case. This is true because implied conditions in a contract must be reasonably supposed between the parties,<sup>45</sup> and it would be absurd to think that an attorney and client reasonably suppose that success is guaranteed. That there cannot be an

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Ambrose v. Roberts, 393 So. 2d 132 (La. App. 3d Cir.), writ denied, 394 So. 2d 1234 (La. 1980); Johnson v. Daye, 363 So. 2d 940 (La. App. 3d Cir. 1978); Jackson v. Zito, 314 So. 2d 401 (La. App. 1st Cir.), writs denied, 320 So. 2d 551, 553 (La. 1975).

41. See Hogan Exploration, Inc. v. Monroe Eng'g Ass'n, 430 So. 2d 696 (La. App. 2d Cir. 1983) (engineer had an implied obligation in the contract to perform his services with the same degree of skill as like engineers); Dillon v. Hospital Affiliates, 407 So. 2d 493 (La. App. 1st Cir. 1981), writ denied, 409 So. 2d 663 (La. 1982) (an agreement with a hospital to provide hospital care held to create an implied contract to use the usual degree of care; thus, a ten-year prescriptive period applied); Grather v. Tipery Studios, Inc., 334 So. 2d 758 (La. App. 4th Cir. 1976) (found that a photographer, by contracting to photograph a wedding, impliedly contracted that the work would be performed in a skillful and good workmanlike manner); Hebert v. Pierrotti, 205 So. 2d 888 (La. App. 3d Cir. 1968) (homemover impliedly contracted to perform in a skillful and good workmanlike manner); Wilson v. T.L. James & Co., 14 La. App. 593, 122 So. 137 (La. App. 2d Cir. 1929) (painter had an implied obligation incident to the contract to perform in a skillful and diligent manner).

42. See Henson v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 612 (La. App. 1st Cir. 1977), aff'd, 363 So. 2d 711 (La. 1978); Barrios v. Sara Mayo Hosp., 264 So. 2d 792 (La. App. 4th Cir. 1972); Creighton v. Karlin, 225 So. 2d 288 (La. App. 4th Cir.), writ denied, 254 La. 842, 227 So. 2d 590 (1969); Brooks v. Robinson, 163 So. 2d 186 (La. App. 4th Cir.), writ denied, 246 La. 583, 165 So. 2d 481 (1964). But see, *Sciacca v. Polizzi*, 403 So. 2d 728 (La. 1981); Phelps v. Donaldson, 243 La. 1118, 150 So. 2d 35 (La. 1963); Ferlito v. Ceceloa, 419 So. 2d 102 (La. App. 2d Cir.), writ denied, 422 So. 2d 157 (La. 1982).

43. 403 So. 2d at 731.

44. 1 S. LITVINOFF, OBLIGATIONS § 182 in 7 LOUISIANA CIVIL LAW TREATISE 343 (1969).

45. LA. CIV. CODE art. 1964.

implied guarantee of success in a contract with an attorney or physician, however, should not mean that there can be no implied conditions at all in an attorney-client or physician-patient contract.<sup>46</sup> The Civil Code recognizes implied obligations insofar as the parties reasonably supposed the obligation to exist. With this in mind, it can be said that by entering into a contract to perform services, an attorney is contractually obligated to exercise due care by virtue of an implied stipulation to that effect, even though he has not guaranteed success.

This implied obligation may additionally support a claim of legal malpractice based upon a breach of contract.<sup>47</sup> A claimant will thus have two remedies in his legal malpractice claim: tort and contract. This is so because by contracting with the client, the attorney assumes a special duty to the client in addition to the general duty owed to society at large as established by Civil Code article 2315; thus, the attorney has two sources of his duty, one contractual and one legal. A client should be allowed to sue for breach of either. The Louisiana Supreme Court expressed this view in *Illinois Central Railroad Co. v. New Orleans Terminal Co.*,<sup>48</sup> a suit for damages involving a train collision, where it stated:

Because a certain act of omission or commission violates the general duty which a person owes to society not to injure another is no reason why it should not, at the same time, violate a special duty owing to this other by virtue of a contract to do or not to do that particular thing, and why the violation of the latter duty should not furnish a cause of action.<sup>49</sup>

There are two objections to this conclusion. First, attorneys, for policy reasons, should not be subjected to a ten-year prescriptive period for liability. And second, malpractice has traditionally been viewed as tortious in nature, not contractual.

Arguably, ten years is too long a prescriptive period for malpractice of any type. Being held accountable ten years from now for poor deci-

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46. See *Brooks v. Robinson*, 163 So. 2d 186, 188 (La. App. 4th Cir.), writ denied, 246 La. 583, 165 So. 2d 481 (1964). Note that the holding in *Brooks* has been overruled by *Sciacca*. See also *Steel v. Aetna Life & Casualty*, 315 So. 2d 144 (La. 1975). In *Steel* Justices Tate and Barham concurred in a writ denial dealing with medical malpractice and stated: "This contract can be breached by negligent acts as well as intentional acts. A part of the doctor's contractual obligation was to use care, prudence and skill in his performance. . . . This constitutes a suit for breach of contract. Any other conclusion is difficult to reach intellectually."

47. Such an implied condition may sustain a cause of action under Civil Code article 1930, which reads: "The obligations of contract [contracts] extending to whatsoever is incident to such contracts, the party who violates them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default."

48. 143 La. 467, 78 So. 738 (1918).

49. 143 La. at 472, 78 So. at 740.

sions made today seems distasteful.<sup>50</sup> However, the answer lies in amending Civil Code article 3499<sup>51</sup> to allow for a shorter prescriptive period, rather than in ignoring the contractual roots of the attorney-client relationship. The courts should defer such a policy decision to the legislature, rather than allow concern over the ten-year prescriptive period to alter their analysis of the law. Thus, the court's view toward the ten-year prescriptive period should not influence whether legal malpractice may proceed in tort or breach of contract.<sup>52</sup>

The major argument for applying the one-year prescriptive period is that traditionally malpractice has been considered *ex delicto* in nature since the attorney's negligence is really what is at issue.<sup>53</sup> The negligence of an attorney, whether presented on a tort or a contract basis, is determined by the traditional negligence standard of whether the attorney has acted as a reasonably prudent attorney.<sup>54</sup> Thus, it would appear legal malpractice is like any other negligence action and should prescribe in one year.

The concepts of due care and the "reasonably prudent attorney," however, are only standards by which it is determined if a duty has been breached. It is the origin of the obligation itself which should be determinative of whether malpractice is "delictual" under Civil Code article 3492, or a breach of a personal obligation falling under Civil Code article 3499. An attorney's obligation may arise from two sources: as an implied condition in the contract of employment, or by operation of law as part of the general obligation owed to society under Civil Code article 2315.<sup>55</sup> To determine if either of these duties has been breached, the same standard may be applied—the reasonably prudent attorney standard. Because the same standard is used to determine if an attorney's duty has been breached, however, should not mean that the two obligations are also the same. A separate obligation may arise out of the attorney-client contract which when breached is not delictual in nature; thus, the one-year prescriptive period of Civil Code article 3492 should not apply.

Since *Cherokee Restaurant*, three Louisiana appellate decisions and a United States Fifth Circuit decision have considered the basis of liabil-

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50. See *Steel v. Aetna Life & Casualty*, 315 So. 2d 144 (La. 1975). In *Steel* Justices Tate and Barham concurring in a writ denial stated: "While a ten-year prescriptive period for personal injuries received because of the negligent performance of a contract may appear to be an exceedingly long period for such a case, the law makes no distinction."

51. Article 3499 reads: "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years."

52. See *Mengis*, *supra* note 36, at 494.

53. See *Corceller v. Brooks*, 347 So. 2d 274, 277 (La. App. 4th Cir.), writ denied, 350 So. 2d 1223 (La. 1977).

54. *Ramp v. St. Paul Fire & Marine Ins. Co.*, 263 La. 774, 269 So. 2d 239 (1972).

55. See *Pickels v. Brown*, 431 So. 2d 880, 883 n.5 (La. App. 2d Cir. 1983).

ity in legal malpractice. The Louisiana Third Circuit Court of Appeal in *Wingate v. National Union Fire Insurance Co.*<sup>56</sup> specifically rejected the rationale of *Cherokee Restaurant*, choosing instead to follow its prior jurisprudence allowing legal malpractice to proceed either *ex delicto* or *ex contractu*. The Louisiana Fourth Circuit Court of Appeal in *Sturm v. Zelden & Zelden*<sup>57</sup> adopted the rationale of *Cherokee Restaurant*, although this is not inconsistent with its prior decision on legal malpractice.<sup>58</sup> In *Sturm*, the attorney neglected to include an "as is" clause in a contract of sale. The court cited *Sciacca* and *Cherokee Restaurant* for authority that unless the attorney expressly warrants a result, the action will be delictual in nature. The Louisiana Second Circuit Court of Appeal in *Knighten v. Knighten*<sup>59</sup> also adopted the rule of *Cherokee Restaurant*. The court stated that the "claim in essence is that [the attorney] negligently gave [the plaintiff] bad advice;"<sup>60</sup> thus, no express guarantee was made, and the claim was an action in tort. Most recently, the United States Fifth Circuit addressed the prescriptive period for legal malpractice in *McLaughlin v. Herman & Herman*.<sup>61</sup> The court adopted the rule of *Cherokee Restaurant*, reasoning that *Sciacca*, while dealing with physicians, is applicable to attorneys as well. The court in *McLaughlin* further stated that the Louisiana Third Circuit Court of Appeal erred in *Wingate* and "did not properly consider the effect of . . . *Sciacca*,"<sup>62</sup> and that a one-year prescriptive period should apply to legal malpractice.

Although other Louisiana writers have considered many of the same points discussed herein and have reached much the same conclusion,<sup>63</sup>

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56. 435 So. 2d 594, 596 n.2 (La. App. 3d Cir.), writ denied, 440 So. 2d 762 (La. 1983).

57. 445 So. 2d 32 (La. App. 4th Cir. 1984). It is interesting to note that on the same day *Sturm* was handed down, the fourth circuit also decided *Martin v. Southern Baptist Hosp.*, 444 So. 2d 1309 (La. App. 4th Cir. 1984), which involved a breach of contract claim against a hospital for not having a doctor available. The court remanded finding that if the plaintiff's injuries resulted from physician's negligence, the claim had prescribed in one year, but if the injuries resulted from the hospital's failure to provide adequate care *i.e.*, negligence, then the ten-year prescriptive period would apply. The court was willing to find an implied contractual stipulation to provide competent health care by the hospital, but not by the physician.

58. See *Corceller v. Brooks*, 347 So. 2d 274 (La. App. 4th Cir.), writ denied, 350 So. 2d 1223 (La. 1977).

59. 447 So. 2d 534 (La. App. 2d Cir. 1984).

60. *Id.* at 542.

61. 729 F.2d 331 (5th Cir. 1984).

62. *Id.* at 333.

63. See Litvinoff, *supra* note 21, at 422 ("From a civilian standpoint, a negligent act of an obligor may engage his contractual liability even when the contract contains no stipulation for a specific result."); Comment, *Prescription, Classification and Concurrence of Obligations*, 36 TUL. L. REV. 556 (1962); Note, *Indemnity—Tort and Contract Theories Under Louisiana Law*, 44 TUL. L. REV. 408, 413-15 (1970); Note, *Obligations—Doctor-Patient Suits—Possibility of Contractual Recovery for Malpractice*, 39 TUL. L. REV. 142 (1964); Note, *Prescription—Malpractice Suits*, 34 TUL. L. REV. 414 (1960).

the Louisiana courts are still not in agreement. Either the courts or the legislature should resolve the conflict among the Louisiana appellate circuits as to the correct prescriptive period for legal malpractice. Unless the legislature indicates otherwise, the courts should recognize claims of legal malpractice as both *ex delicto* or *ex contractu*, rather than the rule expressed in *Cherokee Restaurant*. Alternatively, action could be taken by the legislature specifically limiting the prescriptive period for legal malpractice, such as was done for medical malpractice.<sup>64</sup> Other states faced with a similar dilemma have enacted such statutes in order to define and limit the prescriptive period for malpractice.<sup>65</sup> Such a statute was introduced during the 1980 Louisiana legislative session and would have statutorily limited the prescriptive period for legal malpractice to one year;<sup>66</sup> unfortunately, this bill died in committee. It is suggested that in light of the current confusion in this area, it would be an appropriate and necessary step for the legislature to again consider legislation to define the prescriptive period for legal malpractice should the courts decline to do so.

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64. LA. R.S. 9:5628 (1983) establishes a one-year prescriptive period for medical malpractice suits, "whether based upon tort, or breach of contract, or otherwise."

65. See CAL. CIV. PROC. CODE § 340.6 (West 1982); CONN. GEN. STAT. ANN. § 52-584(b) (West Supp. 1984); FLA. STAT. ANN. § 95:11(4) (West 1982); N.Y. CIV. PRAC. LAW § 214(6) (Consol. 1983-1984); TENN. CODE ANN. § 28-3-104 (1980).

66. La. H.R. 720, 6th Reg. Sess. (1980). It read:

No action for damages against any attorney at law arising out of the practice of law shall be brought unless filed within one year from the date of the alleged act, omission, or neglect; or within one year from the date the alleged act, omission, or neglect is discovered; or within one year from the date a court of competent jurisdiction renders a final judgement resulting in damage to a claimant arising out of an attorney's act, omission, or neglect.

In no event shall a claim for legal malpractice be filed after ten years from the date of the alleged act, omission, or neglect.