IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

AMERICAN MUSHROOM COOPERATIVE f/d/b/a EASTERN MUSHROOM MARKETING COOPERATIVE, INC., et al.	:	MARCH TERM, 2020
	:	NO. 02211
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	1780 EDA 2022
	:	1783 EDA 2022
SAUL EWING ARNSTEIN & LEHR LLP,	:	
Defendant.	:	

OPINION

Plaintiffs filed two appeals[1] from this court's Order entered on June 13, 2022. In that Order, the court reconsidered its initial ruling on defendant's Motion for Judgment on the Pleadings and granted the Motion on the grounds that plaintiffs' claims for legal malpractice in this action are time barred under the applicable Statutes of Limitations.

For the reasons set forth in this court's Opinion accompanying the Order, a copy of which is attached hereto, the court respectfully requests that its June 13th Order be affirmed on appeal.

Dated: August 17, 2022

NINA W. PADILLA, J.

OPFI D-American Mushroom Cooperative Etal Vs Saul Ewing

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[1] Plaintiffs Giorgi Mushroom Company and Giorgio Foods, Inc., represented by Bochetto & Lentz, P.C., filed appeal 1780 EDA 2022. Plaintiff American Mushroom Cooperative and the remaining plaintiffs, represented by Haines & Associates, P.C., filed appeal 1783 EDA 2022.

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	:	NO. 02211
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control Nos.: 21082699, 21124890, 21125479
SAUL EWING ARNSTEIN & LEHR LLP,	:	
Defendant.	:	

OPINION

Plaintiffs in this action include the American Mushroom Cooperative ("AMC") formerly known as the Eastern Mushroom Marketing Cooperative, Inc. ("EMMC"), a number of its members, and its former president (collectively, "AMC/EMMC"). For over 18 years, since its formation, AMC/EMMC was represented by the law firm of Saul Ewing Arnstein & Lehr LLP ("Saul Ewing"). During the course of that representation, Saul Ewing provided AMC/EMMC with several instances of legal advice that plaintiffs claim was incorrect and caused them harm. In March, 2020, plaintiffs filed this legal malpractice action against Saul Ewing asserting claims sounding in both breach of contract and negligence based on that erroneous advice. Saul Ewing filed a Motion for Judgment on the Pleadings on the basis that all of plaintiffs' claims against it are barred by the applicable Statutes of Limitations.

The court previously granted Saul Ewing's Motion for Judgment on the Pleadings in part and denied it in part. In doing so, the court found that the claims based on some of the incorrect legal advice given by Saul Ewing to EMMC were clearly time-barred, but that there were issues of fact as to when the statute began to run with respect to the other claims based on Saul Ewing's other allegedly erroneous advice. Both parties filed Motions for Reconsideration of that Order,

which Motions are presently before the court. For the reasons that follow, the court is reconsidering its initial ruling on the Motion for Judgment on the Pleadings to find that all of plaintiffs' claims are time-barred.

EMMC was formed in 2000 as an agricultural cooperative under the purview of the federal Capper-Volstead Act, which states:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
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> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
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> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
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> And in any case to the following:
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> Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.[1]

Plaintiffs maintain that the statute "was intended to exempt farmers and direct producers of agricultural products from prohibitions against fixing prices which is otherwise prohibited by the Sherman Antitrust Act.... [T]he Capper-Volstead Act allows farmers of agricultural commodities to join together in associations, or cooperatives, to go to market and counterbalance the overwhelming market power of the buyers."[2] As alleged by the plaintiffs, "[t]he members of the EMMC relied on Saul Ewing's advice and counsel to ensure that the cooperative met the strict requirements of the Capper-Volstead Act."[3]

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[1] 7 U.S.C.A. § 291.

[2] Complaint, ¶¶ 30-31, filed on April 24, 2020, in the present action (hereinafter "AMC Complaint").

[3] *Id.* at ¶ 39.

One of Saul Ewing's alleged breaches of its duties as AMC/EMMC's law firm was in advising and approving the inclusion of certain mushroom distributors as members of EMMC, when they were not mushroom "growers" as required under the Capper-Volstead Act (hereinafter the "Membership Approvals.")[4] Another of Saul Ewing's alleged breaches of its duties to AMC/EMMC was in advising and assisting EMMC in the purchase and re-selling of former mushroom farms using deeds that prohibited their future use as mushroom farms (referred to as the "Supply Control Program.")[5] All of this allegedly erroneous advice was apparently given in the 2000-2002 time period.[6] The question for purposes of the Statute of Limitations is when AMC/EMMC first knew or should have known that Saul Ewing's incorrect antitrust advice regarding the legality of certain policies and practices of EMMC injured AMC/EMMC and its members.

In 2003, the United States Department of Justice ("DoJ") began to inquire into EMMC's business practices.[7] In December, 2004, EMMC and the DoJ entered into, and filed in federal court, a Judgment by Consent that required EMMC "to nullify the deed restrictions" from the Supply Control Program "for the purpose of remedying the loss of competition alleged in the [DoJ's] Complaint."[8] The DoJ's investigation apparently ended once EMMC agreed in the

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[4] *Id.*, Introduction, p. 4 ("First, Saul Ewing approved allowing members into the co-op, who were not mushroom producers, but rather were distribution entities with related family-owned mushroom growing businesses and some owners who were engaged in multiple businesses other than purely mushroom growing."); *id.* at ¶¶ 40-45.

[5] *Id.* at ¶¶ 46-51.

[6] *See id.* at ¶¶ 32-51; In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 278-279 (E.D. Pa. 2009).

[7] AMC Complaint, ¶ 52.

[8] Consent Judgment, p. 1, filed on December 20, 2004, in U.S. v. [EMMC], 04-CV-05829 (E.D. Pa.). "On September 9, 2005, final judgment was entered" with respect to the Consent Judgment. In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d at 280.

Judgment to reverse and dismantle the Supply Control Program. EMMC necessarily incurred costs and attorneys' fees in connection with the DoJ investigation and the invalidation of the Supply Control Program.

During 2005 and 2006, multiple lawsuits were filed against EMMC by a number of mushroom purchasers.[9] The cases were consolidated, and a Consolidated Amended Class Action Complaint was filed in June 2006 (the "Antitrust Litigation.")[10] In that Complaint, the mushroom purchasers alleged as follows:

> Starting in January 2001, the EMMC and its members undertook a wide-ranging scheme to inflate the average prices for Agaricus mushrooms by at least 8 percent around the country. As part of this overarching scheme, in May 2001, the EMMC and its members began to collectively conduct a "Supply Control" campaign to impede and forestall competition from independent, non-EMMC farmers, thereby eliminating the restraints on inflated prices that result from unfettered competition. . . . By imposing deed restrictions on [a number of properties], the EMMC and its members were able to substantially reduce the amount of land that was available in the United States for mushroom production. . . . In addition to the property transactions and deed restrictions to restrain mushroom supply, the EMMC members supported and reinforced their scheme by: (a) collectively interfering with any non-EMMC growers that sought to sell at prices that were below the artificially-inflated prices set by the EMMC; and (b) using collective and conspiratorial acts to pressure independent growers to join the EMMC and defendants' anti-competitive scheme.[11]

In his 2009 Opinion in the Antitrust Litigation, United States District Judge O'Neill described the mushroom purchasers' claims as follows:

> [P]laintiffs assert that defendants allegedly launched a "supply control" campaign by using membership funds collected during 2001 and 2002 to acquire and subsequently dismantle non-EMMC mushroom growing operations in order to support and maintain artificial price increases. Plaintiffs allege that the EMMC repeatedly would purchase a mushroom farm or a parcel of farmland and then sell

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[9] *See* AMC Complaint, ¶53.

[10] *See id.* at ¶ 54.

[11] Consolidated Amended Class Action Complaint, ¶¶ 3-6, filed on June 26, 2006, in In re Mushroom Direct Purchaser Antitrust Litig, 06-CV-00620 (E.D. Pa.).

> or exchange that farm or parcel at a loss, attaching a permanent or long-term deed restriction to the land prohibiting the conduct of any business related to the growing of mushrooms. Plaintiffs cite several specific examples of this alleged practice during 2001 and 2002.
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> Plaintiffs further allege that defendants collectively interfered with non-EMMC growers that sought to sell at prices below those set by the EMMC and pressured independent growers to join the EMMC. The pressure and coercion tactics alleged include threatening and/or implementing a group boycott in which EMMC members would not sell mushrooms to assist independent growers in satisfying their short-term supply needs and/or selling mushrooms to independent growers at inflated prices.[12]

Judge O'Neil phased discovery in the case to focus on defendants' primary defense to the antitrust claims asserted against them, namely that EMMC and its members were part of an agricultural cooperative exempt from antitrust liability under the Capper-Volstead Act and therefor immune from suit by plaintiffs.[13] The parties cross-moved for summary judgment on that issue. Due to certain mushroom distributors having been included as initial members of the EMMC, rather than just mushroom growers, Judge O'Neil concluded, in March, 2009, that EMMC and its members were not entitled to the Capper-Volstead exemption.[14] As plaintiffs admit, "[t]he District Court found errors in the formation of the cooperative and early operation of it, recognizing some of the same issues the Department of Justice had raised in the first lawsuit."[15]

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[12] In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d at 279.

[13] *See id.* at 281-282.

[14] In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d at 286. Judge O'Neill also held that "[e]ven if all EMMC members satisfied the requirements to qualify the [EMMC] for the Capper-Volstead exemption, the exemption does not extend to protect cooperatives that conspire with non-cooperatives" to fix prices, which EMMC apparently did. *Id.* at 286, 291.

[15] AMC Complaint, Introduction, pp. 4-5.

Defendants in the Antitrust Litigation, who are now plaintiffs in this action, claim that it was Saul Ewing's incorrect legal advice that led to the improper Membership Approvals of those distributors, which caused AMC/EMMC to lose its claimed exemption. As a result of losing its defense and of having engaged in the Supply Control Program and other alleged anti-competitive activities, AMC/EMMC claims that for the next 13 years, up to the present, it has had to enter into costly settlements with the plaintiffs in the Antitrust Litigation, as well as having to incur attorneys' fees in that litigation and during the preceding DoJ investigation.[16] Those are the malpractice damages AMC/EMMC and its members claim in this action.

Saul Ewing asserts that all of plaintiffs' malpractice claims are long since time-barred despite the fact that AMC/EMMC continues to incur damages allegedly arising out of their attorneys' incorrect advice regarding the Membership Approvals and the Supply Control Program. The Statute of Limitations for legal malpractice claims sounding in tort is two years; the Statute of Limitations for legal malpractice claims sounding in contract is four years.[17]

> A claim of legal malpractice requires that the plaintiff plead the following three elements: employment of the attorney or other basis for a duty; the failure of the attorney to exercise ordinary skill and knowledge; and that the attorney's negligence was the proximate cause of damage to the plaintiff.
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> [T]he trigger for the accrual of a legal malpractice action, for statute of limitations purposes, is not the realization of actual loss, but the occurrence of a breach of duty. Pennsylvania law provides that the occurrence rule is used to determine when the statute of limitations begins to run in a legal malpractice action. Under the occurrence rule, the statutory period commences upon the happening of the alleged breach of duty. An exception to this rule is the equitable discovery rule which will be applied when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause.[18]

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[16] *See id.*, Introduction, p. 5 ("[T]he AMC, as successor in interest to EMMC, found itself mired in litigation for almost 18 years, where adverse rulings led AMC and its members and former members to enter into settlements, costing them millions of dollars in legal fees, litigation expenses, and damages paid to the class. The amounts continue to accrue[.]")

[17] 42 Pa. C.S. §§ 5524, 5525.

[18] Commc'ns Network Int'l, Ltd. v. Mullineaux, 187 A.3d 951, 960-961 (Pa. Super. 2018).

It appears from the pleadings that Saul Ewing's breaches of its duty to AMC/EMMC and its members, occurred in 2000-2002 when it allegedly gave its clients inaccurate legal advice in connection with the Membership Approvals and the Supply Control Program. [19] If the limitation period commenced at that time, then plaintiffs would have had to file their legal malpractice claims against, or enter into a tolling agreement with, Saul Ewing by 2006, at the latest. Plaintiffs did not. However, they assert the discovery rule and claim that they did not know, and could not have known, in 2000-2002 that Saul Ewing's advice was wrong, nor that they had been injured by it.

> The discovery rule is an exception to the requirement that a complaining party must file suit within the statutory period. The discovery rule provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible. **The statute begins to run in such instances when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress. The party seeking to invoke the discovery rule bears the burden of establishing the inability to know that he or she has been injured by the act of another despite the exercise of reasonable diligence.**
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> [T]he question of when a statute of limitations runs is a matter typically decided by the trial judge as a matter of law. [The Superior] Court has held that the determination of when the statute of limitations has run on a claim for legal malpractice is usually a question of law for the trial judge, unless the issue involves a factual determination.
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> Therefore, when a court is presented with the assertion of the discovery rule's application, it must address the ability of the damaged party, exercising reasonable diligence, to ascertain that he has been injured and by what cause. Since this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause, ordinarily, a jury is to decide it. **Where, however, reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the**

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[19] *See* AMC Complaint, ¶¶ 32-51; In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d at 278-279.

discovery rule does not apply as a matter of law.[20]

In this case, reasonable minds would not differ in finding that, in December, 2004, when EMMC executed the Consent Judgment in which EMMC was "ordered and directed . . . to file Nullifying Documents in each jurisdiction where [EMMC] has filed any Mushroom Deed Restrictions,"[21] EMMC knew or should have known that it had been injured by Saul Ewing's previous, erroneous, antitrust advice regarding the legitimacy of those deed restrictions and the Supply Control Program based upon them.[22] Therefore, the Statute of Limitations on AMC/EMMC's malpractice claims against Saul Ewing commenced, at the latest, in December, 2004,when EMMC executed and filed the Consent Judgment with the court.[23]

The costs and fees EMMC paid in connection with the DoJ investigation necessarily pale in comparison to the more than $50 million that AMC/EMMC and its members have paid in legal fees and as damages to the purchaser-plaintiffs in the Antitrust Litigation. However, for Statute of Limitations purposes, a client cannot wait until its injuries become overwhelming before bringing suit. The clock starts ticking when the clients' "discovery of the injury is

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[20] Commc'ns Network, 187 A.3d at 961-962 (emphasis in original).

[21] Consent Judgment, p. 3, filed on December 20, 2004, in U.S. v. [EMMC], 04-CV-05829 (E.D. Pa.).

[22] Plaintiffs request leave to amend their Reply to New Matter to include allegations that Saul Ewing "concealed certain information from them, or lulled them into a false belief in order to dissuade them from filing suit against Saul Ewing." Plaintiffs' Motion for Reconsideration, ¶ 6. Specifically, AMC/EMMMC asserts "that treating the DOJ Judgment as a limitations trigger is directly contradicted by contemporaneous emails from Saul Ewing's partner, Michael Finio, Esquire, who represented to Plaintiffs that the proposed DOJ Judgment – which the group was then considering – was a 'tremendous outcome' and it 'essentially [was] a blessing of 99.99% of the legal advice given to you about the conduct of the EMMC's affairs over the last few years.' *Id.* at ¶ 8. However, such puffery, which necessarily admits that at least .01% of the advice given was wrong, cannot overcome the cold hard fact that AMC/EMMC consented to a public judgment that overturned the entire Supply Control Program, which was allegedly undertaken based on Saul Ewing's advice.

[23] *See* Consent Judgment, filed on December 20, 2004, in U.S. v. [EMMC], 04-CV-05829 (E.D. Pa.).

reasonably possible" and the clients possess "sufficient critical facts to put [them] on notice that a wrong has been committed and that [they] need investigate to determine whether [they are] entitled to redress."[24] Those triggering events in this case necessarily occurred on or before December, 2004, when EMMC consented to a judgment against it and incurred attorneys' fees and agreed to pay costs, all to reverse the Supply Control Program which EMMC allegedly undertook based upon Saul Ewing's erroneous legal advice.

Since AMC/EMMC and its members were on notice of their legal malpractice claims in December, 2004, at the latest, the Statute of Limitations on plaintiffs' negligence claims against Saul Ewing ran in December, 2006, and on their contract claims in December, 2008. The Tolling Agreement between the parties to this action was not entered into until May, 2009,[25] so it had no effect on such already stale claims.

If, as alleged here, a client's known injury caused by a lawyer's incorrect advice is later found to have been compounded by additional erroneous advice the lawyer gave, the latter does not give rise to a new or separate cause of action for malpractice.

> Under the occurrence rule, the statute of limitations period is triggered by the first act of alleged malpractice, not the last. There is no "re-set" button to start the limitations period all over again. In fact, to do so would defeat the fundamental purpose of the statute of limitations scheme, which is to avoid stale claims. Over time, memories fade, witnesses may disappear or die, and evidence may be lost.[26]

Therefore, it is irrelevant that a second separate lawsuit, the Antitrust Litigation, was filed against AMC/EMMC arising out of Saul Ewing's erroneous antitrust advice. That second suit was premised in large part upon the same incorrect advice regarding the Supply Control Program as gave rise to the DoJ investigation and Consent Order, so it does not reset the Statute of

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[24] Commc'ns Network, 187 A.3d at 961.

[25] *See* AMC Complaint at ¶¶ 59-60.

[26] Commc'ns Network, 187 A.3d at 965.

Limitations clock on plaintiffs' malpractice claims against Saul Ewing. Nor was the clock reset when the court in the Antitrust Litigation ruled against plaintiffs on their primary defense, which ruling arose out of the additional, inaccurate antitrust advice Saul Ewing allegedly gave to plaintiffs regarding the Membership Approvals.

CONCLUSION

For all the foregoing reasons, AMC/EMMC's Motion for Reconsideration is denied, Saul Ewing's Motion for Reconsideration is granted, Saul Ewing's Motion for Judgment on the Pleadings is granted, and judgment must be entered in favor of Saul Ewing on all of plaintiffs' claims.

Dated: June 13, 2022

BY THE COURT:

NINA WRIGHT PADILLA, SJ.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

AMERICAN MUSHROOM COOPERATIVE f/d/b/a EASTERN MUSHROOM MARKETING COOPERATIVE, INC., et al.	:	MARCH TERM, 2020
	:	NO. 02211
Plaintiffs,	:	COMMERCE PROGRAM
v.	:	Control Nos.: 21082699, 21124890, 21125479
SAUL EWING ARNSTEIN & LEHR LLP,	:	
Defendant.	:	

ORDER

AND NOW, this 13th day of June, 2022, upon consideration of both plaintiffs' and defendant's Motions for Reconsideration of the court's Order entered on December 15, 2021, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Plaintiffs' Motion for Reconsideration is **DENIED**;
2. Defendant's Motion for Reconsideration is **GRANTED**, and the Order docketed in this action on December 15, 2021 is **VACATED**; and
3. Upon reconsideration, Defendant's Motion for Judgment on the Pleadings is **GRANTED** and **JUDGMENT** is entered in favor of defendant Saul Ewing Armstrong and Lehr, LLP and against plaintiffs on all of plaintiffs' claims asserted in this action because those claims are time barred.

BY THE COURT:

NINA WRIGHT PADILLA, J.