IT MUST BE A DUCK:

HONORING THE ATTORNEY PROFESSIONAL NEGLIGENCE STATUTE OF LIMITATIONS

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I. INTRODUCTION

Michigan courts have long held that a plaintiff cannot title his true cause of action as another simply to benefit from a longer statute of limitations.[1] A medical malpractice plaintiff cannot call her claim for professional negligence (two-year statute of limitations) a breach of contract claim (six-year statute of limitations),[2] or a general negligence claim (three-year statute of limitations).[3] Similarly, a client cannot sue

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1. *See generally* Penner v. Seaway Hosp., 427 N.W.2d 584 (Mich. Ct. App. 1988); Adkins v. Annapolis Hosp., 323 N.W.2d 482 (Mich. Ct. App. 1982), *aff'd*, 360 N.W.2d 150 (Mich. 1984); Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C., 449 N.W.2d 673 (Mich. Ct. App. 1989); Barnard v. Dilley, 350 N.W.2d 887 (Mich. Ct. App. 1984).

2. *Penner*, 427 N.W.2d at 586-87.

3. *Adkins*, 323 N.W.2d at 486.

his attorney for breach of contract or fraud (six-year statute of limitations) when his claim is based on professional negligence (two-year statute of limitations).[4]

Traditionally, courts have determined the applicable statute of limitations by focusing on the source of the duty giving rise to the claim.[5] In a legal malpractice action, the source of the duty is, of course, the attorney-client relationship.[6] However, some recent decisions ignore this "duty" analysis, suggesting the viability of a distinct cause of action by clients against their lawyers for common law breach of fiduciary duty (three-year statute of limitations) based solely on a heightened degree of scienter—a "more culpable state of mind"—purportedly necessary to prove a breach of fiduciary duty.[7]

If this trend continues, the courts might effectively abrogate the two-year statute of limitations applicable to attorney malpractice claims, as well as the recently enacted statute of repose.[8] Because every attorney owes a fiduciary duty to the client, clients bringing legal malpractice claims might successfully avoid the two-year statute of limitations and six-year statute of repose by simply pleading "breach of fiduciary duty."[9]

II. THE DUTY ELEMENT OF THE CLAIM DETERMINES THE STATUTE OF LIMITATIONS

A client must commence an action charging malpractice within two years after it accrues.[10] A legal malpractice cause of action accrues at the time the attorney "discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim . . .

4. *Seebacher*, 449 N.W.2d at 675 (stating that a two-year statute of limitations applies to a claim against a lawyer for incorrect tax advice "even when phrased as a breach of contract to render competent legal services"); *Barnard*, 350 N.W.2d at 887 (holding that an engagement agreement was "not a contract to perform a specific act, but one to exercise appropriate legal skill in providing representation in a lawsuit").

5. *See Seebacher*, 449 N.W.2d at 675.

6. *Barnard*, 350 N.W.2d at 888.

7. Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900 (Mich. Ct. App. 2005); Pukke v. Hyman Lippitt, No. 265477, 2006 WL 1540781 (Mich. Ct. App. June 6, 2006).

8. MICH. COMP. LAWS ANN. § 600.5838b (West 2012) (amending the limitations scheme applicable to legal malpractice actions by, among other things, enacting a six-year statute of repose).

9. *See Prentis Family Found.*, 698 N.W.2d at 908; *Pukke*, 2006 WL 1540781, at *11-12.

10. MICH. COMP. LAWS ANN. § 600.5805(6) (West 2013).

arose."[11] The statutory discovery rule preserves a client's ability to sue beyond the termination of the attorney-client relationship if the client sues within the earlier of (a) six months after it "discovers or should have discovered the claim"[12] or (b) "[s]ix years after the act or omission that is the basis for the claim."[13] A plaintiff bringing an action for breach of fiduciary duty, however, enjoys a longer three-year statute of limitations with no statute of repose,[14] with the claim accruing when the plaintiff "knew or should have known of the breach."[15]

When the operative facts comprising a cause of action arise from an attorney's representation of a client, the client may not circumvent the attorney malpractice statute of limitations by asserting a different cause of action.[16] In *Brownell v. Garber*, the court of appeals recognized that "[i]f a client attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form."[17] In *Barnard v. Dilley*, the court of appeals employed a "duty" test, ruling that a client's claim against an attorney is treated as a malpractice claim if the attorney-client relationship supplies the duty element of the claim.[18]

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11. MICH. COMP. LAWS ANN. § 600.5838(1) (West 2013); Bauer v. Ferriby & Houston, PC, 599 N.W.2d 493, 495 (Mich. Ct. App. 1999). Precisely when a representation ends can be a complex analysis and is beyond the scope of this article.

12. MICH. COMP. LAWS ANN. § 600.5838(2).

13. *Id.* §§ 600.5838(2), .5838b.

14. *Id.* § 600.5805(10). *See generally* Miller v. Magline, Inc., 256 N.W.2d 761 (Mich. Ct. App. 1977).

15. Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908 (Mich. Ct. App. 2005); Bay Mills Indian Cmty. v. Michigan, 626 N.W.2d 169, 176 (Mich. Ct. App. 2001); Horvath v. HRT Enters., No. 292304, 2011 WL 165409, at *13-14 (Mich. Ct. App. Jan. 18, 2011); *In re* Estate of Underwood, No. 291852, 2010 WL 4977911, at *6 (Mich. Ct. App. Dec. 7, 2010).

16. *See, e.g.*, Brownell v. Garber, 503 N.W.2d 81 (Mich. Ct. App. 1993); Barnard v. Dilley, 350 N.W.2d 887 (Mich. Ct. App. 1984); Aldred v. O'Hara, 458 N.W.2d 671 (Mich. Ct. App. 1990).

17. *Brownell*, 503 N.W.2d at 87.

18. *Barnard*, 350 N.W.2d at 888. *See also Aldred*, 458 N.W.2d at 672 (ruling that breach of contract action against attorneys was properly dismissed as untimely because "although the complaint is worded in the form of a breach of contract claim, the gravamen of the action is one for legal malpractice"); Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C., 449 N.W.2d 673, 675 (Mich. Ct. App. 1989) (holding that when a lawyer allegedly gave inaccurate tax advice, the "two-year statute applies . . . even when phrased as a breach of contract to render competent legal services"); Dreilich v. Nicoletti & Assocs., P.C., No. 258945, 2006 WL 1628203 (Mich. Ct. App. June 13, 2006) (finding client's fraud and negligence claims against attorneys properly dismissed as untimely because she did "not allege any duty independent of the attorney-client relationship").

There is no question that in every attorney-client relationship, the attorney owes a fiduciary duty to the client.[19] The Michigan Supreme Court recognizes that a legal malpractice action is *founded* on an injury to that fiduciary relationship.[20] If there is no attorney-client relationship to sustain a claim for breach of fiduciary duty, a plaintiff must establish an independent ground for the fiduciary duty.[21] Thus, absent an additional fiduciary relationship independent of the attorney-client relationship (such as service as trustee of a trust), a lawyer's fiduciary duty arises solely from the attorney-client relationship itself, rendering any claim for breach of that duty subject to the two-year statute of limitations for malpractice under *Barnard*, regardless of how it is titled.[22]

III. *PRENTIS* THREATENS THE DUTY TEST

Although *Barnard* should foreclose any attempt to apply the three-year statute of limitations to legal malpractice claims, recent decisions challenge that conclusion.[23] By suggesting that an independent cause of action for breach of fiduciary duty can arise from the same attorney-client relationship on which a malpractice claim would be based, these decisions create the very real danger that *Barnard*—and its focus on the duty element of the claim—will be ignored.[24] The effective result could be judicial abrogation of the two-year statute of limitations and six-year statute of repose for legal malpractice claims.

Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute presents the most significant departure from the traditional duty analysis.[25] In *Prentis*, the plaintiff family foundation sued the defendant cancer center for breaching a purported naming obligation in an endowment agreement.[26] The foundation also sued the law firm representing the cancer center on a breach of fiduciary duty theory.[27]

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19. *In re* Estate of Karmey, 658 N.W.2d 796, 799 n.2 (Mich. 2003). *See* Rippey v. Wilson, 273 N.W. 552, 555 (Mich. 1937).

20. Henry v. Dow Chem. Co., 701 N.W.2d 684, 691-92 (Mich. 2005) ("In a cause of action for legal malpractice, a plaintiff must show an injury to the fiduciary relationship between the attorney and client.").

21. Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645, 648 (Mich. Ct. App. 1981).

22. *Id. See also Barnard*, 350 N.W.2d at 888.

23. *See generally* Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900 (Mich. Ct. App. 2005); Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C., No. 265002, 2007 WL 1345870 (Mich. Ct. App. May 8, 2007).

24. *See Prentis Family Found.*, 698 N.W.2d 900; *Potter*, 2007 WL 1345870.

25. *See generally Prentis Family Found.*, 698 N.W.2d 900.

26. *Id.* at 906.

27. *Id.*

The court of appeals first confirmed that there was no attorney-client relationship between the plaintiff and the law firm and that the sole attorney-client relationship existed between the two defendants.[28] The court also affirmed the dismissal of the foundation's breach of fiduciary duty claim against the law firm, finding that there was no fiduciary relationship independent of an attorney-client relationship.[29] As a result of these rulings, the law firm was out of the case.[30]

In dicta, however, the *Prentis* court rejected the law firm's additional argument that the two-year statute of limitations for legal malpractice should apply to the foundation's fiduciary duty claim.[31] The court reasoned that a party could maintain a cause of action for breach of fiduciary duty against an attorney independently of a malpractice claim because the former requires "a more culpable state of mind" than negligence.[32]

There was no reason for the *Prentis* court to resort to an analysis of the degree of scienter required in order to differentiate the two causes of action.[33] As discussed, the court had already determined that there was no attorney-client or other fiduciary relationship between the foundation and the law firm.[34] By analyzing which statute of limitations applied to claims it dismissed for other reasons, the *Prentis* court engaged in an unnecessary analysis that has created potential conflicts with *Brownell* and *Barnard*.[35]

If adopted, the *Prentis* dicta would allow a longer statute of limitations to apply to a breach of fiduciary duty claim arising from the same duty on which a legal malpractice claim would be based, thereby impliedly overruling *Barnard*. Moreover, because such a breach of fiduciary duty claim would necessarily be recognized as distinct from a claim for malpractice, the recently enacted six-year statute of repose for "a legal malpractice action" would not apply.[36] As *Barnard* demonstrates, when determining which statute of limitations applies, the issue is not whether the malpractice and breach of fiduciary duty causes

28. *Id.* at 907-08.
29. *Id.* at 906-08.
30. *Id.*
31. *Prentis Family Found.*, 698 N.W.2d at 908 (dictum).
32. *Id.*
33. *See id.* at 908 (requiring a more "culpable state of mind").
34. *Id.* at 907-08.
35. *Compare Prentis Family Found.*, 698 N.W.2d 900, *with* Brownell v. Garber, 503 N.W.2d 81 (Mich. Ct. App. 1993), *and* Barnard v. Dilley, 350 N.W.2d 887 (Mich. Ct. App. 1984).
36. *See* MICH. COMP. LAWS ANN. § 600.5838b (West 2013).

of action require the same degree of scienter.[37] Rather, the issue is whether the duty element of the claim arises solely from the attorney-client relationship.[38] As discussed, Michigan law has repeatedly answered that if the duty arises from the attorney-client relationship, the two-year statute of limitations applies.[39]

The genesis of the duty is critical. Without an existing or prior attorney-client relationship, a party would have no standing to sue an attorney for breach of fiduciary duty (unless the duty arose from a distinct fiduciary relationship such as that imposed on the trustee of a trust).[40] The level of scienter necessary to prove the claim is simply not at issue with respect to the question of which statute of limitations should apply. Even assuming that "breach of fiduciary duty" requires a "more culpable state of mind" than malpractice, this is no different than the "fraud or other type of claim" addressed in *Brownell* that cannot be used to extend the two-year statute of limitations.[41] Nevertheless, based on the "degree of culpability" distinction in *Prentis*, other courts have since recognized the viability of a separate claim against attorneys for breach of fiduciary duty—even when the court has dismissed the companion malpractice claims as untimely under the two-year statute of limitations.[42]

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37. *Barnard*, 350 N.W.2d at 888.

38. *Id.*

39. Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C., 449 N.W.2d 642 (Mich. Ct. App. 1989).

40. *See* Beaty v. Hertzberg & Golden, P.C., 571 N.W.2d 716, 722-23 (Mich. 1997) (finding no action by decedent's wife against attorneys representing his company); Ginther v. Zimmerman, 491 N.W.2d 282, 284 (Mich. Ct. App. 1992) (finding no action against decedent's attorneys by unnamed, unintended beneficiaries); Scott v. Green, 364 N.W.2d 709, 716 (Mich. Ct. App. 1985) (finding no action against attorney for drafting allegedly false stock agreement; action would lie only against party to agreement for its nonperformance); Friedman v. Dozorc, 312 N.W.2d 585, 589 (Mich. 1981) ("[A]ttorney owes no actionable duty to an adverse party."); Schunk v. Zeff & Zeff, P.C., 311 N.W.2d 322, 328-39 (Mich. Ct. App. 1981) (dismissing plaintiff's negligence action against former adversary's attorney); Hamilton v. Bank One, No. 265062, 2006 WL 1084397, at *10 (Mich. Ct. App. Apr. 25, 2006); Parvez v. Bigelman, No. 255437, 2005 WL 3479824, at *2 (Mich. Ct. App. Dec. 20, 2005); Brodsky v. Sanom, No. 204320, 1999 WL 33435461, at *2 (Mich. Ct. App. Sept. 24, 1999) (dismissing plaintiff's gross negligence action brought against former adversary's attorney). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 (2000). *But see* Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996) (recognizing cause of action by named, intended beneficiary against drafter of will for failure to carry out expressed intent of testatrix).

41. Brownell v. Garber, 503 N.W.2d 81 (Mich. Ct. App. 1993).

42. *See, e.g.*, Burket v. Hyman Lippitt, P.C., No. 05-72110, 2005 WL 3556202 (E.D. Mich. Dec. 29, 2005).

Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C., is an example.[43] In an unpublished decision, the court of appeals, in dicta and citing *Prentis*, similarly concluded that the cause of action for breach of fiduciary duty against one of the defendant attorneys was distinct from the legal malpractice claim arising from the same legal representation.[44] With no citation to authority, the court first described breach of fiduciary duty as an intentional tort[45] and then distinguished the breach of fiduciary duty claim from the malpractice claim because the attorney "intentionally misled" the client that a lawsuit had been filed when it had not.[46]

Rather than focus on the source of the duty at issue (the attorney-client relationship) as required by *Barnard*, the *Potter* court adopted the heightened degree of scienter distinction suggested by the *Prentis* court, finding that "[p]laintiff's allegation that [the attorney] misled him into believing he had a pending case appears to satisfy the requirement of a culpable state of mind that is sufficient to support a cause of action for breach of fiduciary duty."[47] Presumably based on the allegations of misrepresentation (which also supported other claims in the plaintiff's complaint), the *Potter* court concluded that "the gravamen of plaintiff's count of breach of any fiduciary duty . . . does not sound in legal malpractice, and is therefore a cause of action distinct from plaintiff's malpractice claim."[48]

Regrettably, as in *Prentis*, this conclusion was not necessary to the result. The court dismissed the individual attorney from the case on appeal based on his discharge in bankruptcy[49] and dismissed the two law firms for want of vicarious liability.[50] No attorney parties to whom this decision could apply remained in the case.[51] Nor was there any justification for declaring the breach of fiduciary duty cause of action an intentional tort; the court held that the lawyer's actions supported a distinct cause of action for misrepresentation,[52] so the false statements

43. Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C., No. 265002, 2007 WL 1345870 (Mich. Ct. App. May 8, 2007).

44. *Id.* at *8.

45. *Id.* at *12-14.

46. *Id.* at *8.

47. *Id.* (citing Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908 (Mich. Ct. App. 2005)).

48. *Id.*

49. *Potter*, 2007 WL 1345870, at *1.

50. *Id.* at *12.

51. *See generally id.*

52. *Id.* at *7-9.

could have been pursued under that theory (had the lawyer remained a party to the case).[53]

In a similar case, *Pukke v. Hyman Lippitt, P.C.*, during the attorney-client relationship the defendant lawyer and law firm allegedly misrepresented to the plaintiff client facts regarding an offshore investment.[54] Among other claims, the trial court dismissed the legal malpractice claim as untimely and the breach of fiduciary duty claim (arising from the same attorney-client relationship) as duplicative of the malpractice claim.[55] In an unpublished decision, the court of appeals affirmed the dismissal of the malpractice claim but reversed the dismissal of the fiduciary duty claim, citing *Prentis*.[56]

In *Pukke*, every available indicator confirmed that the fiduciary duty claim merely duplicated the legal malpractice claim: the court held that the fiduciary duty at issue arose solely from the attorney-client relationship; the conduct at issue occurred during the attorney-client relationship; the court dismissed the legal malpractice claim as untimely under the malpractice statute of limitations; and the court acknowledged that the statute of limitations applicable to a claim depends on the theory actually pleaded when the same set of facts supports either of two different causes of action.[57] The court nevertheless held—based solely on the *Prentis* dicta that breach of fiduciary duty "requires a more culpable state of mind"—that the fiduciary duty claim was not duplicative of the dismissed malpractice claim.[58]

An attorney who commits fraudulent misrepresentation *should* be subject to that cause of action and its attendant statute of limitations period. The reason for that is simple: everyone owes a duty to refrain

53. *Id.* at *12. Determining that the actions of the individual lawyer were intentionally tortious was a prerequisite to a finding that the law firms that employed him were not vicariously liable for his actions. *Id.* at *3. Accordingly, the court's classification of breach of fiduciary duty as an intentional tort could be viewed as an outcome-determinative necessity to ensure the dismissal of the law firms.

54. Pukke v. Hyman Lippitt, P.C., No. 265477, 2006 WL 1540781, at *7-9 (Mich. Ct. App. June 6, 2006).

55. *Id.* at *13-14.

56. *Id.* at *38, *46.

57. *Id.* at *34-38.

58. *Id.* at *37-38. In a group of related cases, Judge Duggan of the Eastern District of Michigan similarly interpreted the *Prentis* "more culpable state of mind" dicta as establishing that "breach of fiduciary duty claims are not duplicative of legal malpractice claims." Adams v. Hyman Lippitt, P.C., No. 05-72171, 2005 WL 3556196, at *20-21 (E.D. Mich. Dec. 29, 2005) (citing Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908 (Mich. Ct. App. 2005)); Cliff v. Hyman Lippitt, P.C., No. 05-72221, 2005 WL 3556201, at *20-21 (E.D. Mich. Dec. 29, 2005); Burket v. Hyman Lippitt, P.C., No. 05-72110, 2005 WL 3556202, at *20-21 (E.D. Mich. Dec. 29, 2005).

from defrauding others. That duty does not arise solely from the attorney-client relationship.[59] *Brownell* expressly acknowledged this distinction, recognizing that if the duty at issue arises from a source other than the attorney-client relationship, a plaintiff may pursue a cause of action distinct from legal malpractice.[60] "Simply put, fraud is distinct from malpractice."[61] But a breach of fiduciary duty claim based solely on the fiduciary duty created by the attorney-client relationship is much different: the professional relationship itself is the sole source of the duty.[62] Any subsequent breach of that duty should always remain subject to the two-year statute of limitations for legal malpractice under *Barnard* and *Brownell*—regardless of whether a distinct cause of action for misrepresentation could also be sustained.[63]

Moreover, there does not appear to be any sound foundation for the *Prentis* court's conclusion that breach of fiduciary duty requires a "more culpable state of mind" than negligence.[64] *Prentis* offers no citation to fiduciary duty law for its conclusion that breach of fiduciary duty requires "a more culpable state of mind" than negligence,[65] and *Potter* and *Pukke* merely rely on *Prentis* to support the same conclusion.[66] Both *Prentis* and *Potter* also reference *Vicencio v. Ramirez*[67] for a definition of the fiduciary relationship and the "abuse" or "betrayal" of that relationship that forms the basis for the common law cause of action.[68] Nowhere does *Vicencio*, or any of the authorities it cites, suggest that breach of fiduciary duty is an intentional tort or that a higher degree of scienter than negligence is necessary to prove the cause.[69] These decisions do not suggest that a fiduciary could avoid liability by showing insufficient intent to breach his duty.[70] Accordingly, with respect to the

59. *Prentis*, 698 N.W.2d at 906.

60. Brownell v. Garber, 503 N.W.2d 81, 87 (Mich. Ct. App. 1993).

61. *Id.*

62. *See* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 302 (Mich. 1991).

63. *Id.*

64. *See Prentis*, 698 N.W.2d at 908 (stating that a breach of fiduciary duty claim requires proof of a "more culpable state of mind").

65. *See id.*

66. *See id.*; Pukke v. Hyman Lippitt, P.C., No. 265477, 2006 WL 1540781 (Mich. Ct. App. June 6, 2006); Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C., No. 265002, 2007 WL 1345870 (Mich. Ct. App. May 8, 2007).

67. Vicencio v. Ramirez, 536 N.W.2d 280, 284 (Mich. Ct. App. 1995).

68. *Prentis*, 698 N.W.2d at 908; *Potter*, 2007 WL 1345870, at *3.

69. *See generally Vicencio*, 536 N.W.2d 280.

70. *See generally Prentis*, 698 N.W.2d 900; *Potter*, 2007 WL 1345870; *Vicencio*, 536 N.W.2d 280.

"more culpable state of mind" distinction, the reasoning of *Prentis*,[71] *Potter*,[72] and *Pukke*[73] is at best unexplained.

Fortunately, most courts faced with simultaneous legal malpractice and breach of fiduciary duty claims arising out of the same attorney-client relationship have dismissed the latter as duplicative of the former.[74] This approach is sound because it forecloses any possibility of a breach of professional duty claim by a client against his attorney being brought more than two years after the termination of the attorney-client

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71. *Prentis*, 698 N.W.2d 900.

72. *Potter*, 2007 WL 1345870.

73. Pukke v. Hyman Lippitt, P.C., No. 265477, 2006 WL 1540781 (Mich. Ct. App. June 6, 2006).

74. Taylor v. Kochanowski, No. 289660, 2010 WL 2696675, at *6 (Mich. Ct. App. July 8, 2010) (holding that the lower court properly dismissed the breach of fiduciary duty claim as redundant to the legal malpractice claim because plaintiff did not allege "that defendants breached any duties that arise outside the attorney-client relationship"); Dreilich v. Nicoletti & Assocs., P.C., No. 258945, 2006 WL 1628203, at *3-4 (Mich. Ct. App. June 13, 2006) (affirming the lower court's dismissal of client's fraud and negligence claims against attorneys as untimely because they did not allege any duty independent of the attorney-client relationship); Danou v. Cummings, McClorey, Davis & Acho, P.L.C., No. 262871, 2006 WL 120369, at *4 (Mich. Ct. App. Jan. 17, 2006) (citing Aldred v. O'Hara-Bruce, 458 N.W.2d 671, 672 (Mich. Ct. App. 1990)) ("Because claims against attorneys brought on the basis of inadequate misrepresentation sound in tort and are grounded only in legal malpractice, plaintiffs' fiduciary duty claim cannot constitute a separate cause of action as it was subsumed by the malpractice claim."); Alken-Ziegler, Inc. v. George Bearup, Smith, Haughey, Rice & Roegge, P.C., No. 264513, 2006 WL 572571, at *4 (Mich. Ct. App. Mar. 9, 2006) (dismissing plaintiff's breach of fiduciary duty cause of action premised on an alleged breach of a power of attorney when the defendant already owed a duty as a result of the prior/existing attorney-client relationship); Sharma v. Giarmarco, No. 248840, 2004 WL 2176786, at *2 (Mich. Ct. App. Sept. 28, 2004) (dismissing breach of fiduciary duty and other claims because the "gravamen of plaintiff's claim is professional malpractice"); Fritz v. Monnich, No. 235262, 2003 WL 21186652, at *2 (Mich. Ct. App. May 20, 2003) (granting defendants' motion pursuant to MCR 2.116(C)(7), (8) and (10), and stating that "[p]laintiff alleged that defendants violated their fiduciary duties by failing to exercise reasonable care in representing plaintiff. The gravamen of plaintiff's allegations concerning the alleged breach of fiduciary duties sounded in legal malpractice; therefore, the fiduciary duty claim cannot constitute a separate cause of action and was subsumed by the malpractice claim"); Melody Farms, Inc. v. Carson Fisher, P.L.C., No. 215883, 2001 WL 740575, at *5 (Mich. Ct. App. Feb. 16, 2001) (affirming the lower court's holding that "plaintiffs' claims for breach of contract and breach of fiduciary duty were subsumed by the legal malpractice claim. The two breach claims merely allege negligence by defendants, stating that defendants failed to 'properly and adequately' perform the duties for which they had contracted"); McKenzie v. Berggren, 99 F. App'x 616, 621 (6th Cir. 2004) (holding that plaintiff's breach of contract and breach of fiduciary duty claims were duplicative of plaintiff's legal malpractice claim and finding that *Melody Farms, Inc.*, 2001 WL 740575, stands for the proposition that "a claim for breach of fiduciary duty is redundant with a claim for legal malpractice").

relationship, or the earlier of six months after discovery of the claim or six years after the causal act or omission.[75]

There is hope that the court of appeals may be moving toward further clarification of this issue. Recently, in *Taylor v. Kochanowski*, the court, in an unpublished decision, affirmed dismissal of the breach of fiduciary duty claim as duplicative of the legal malpractice claim.[76] The court analyzed the duplicative nature of the fiduciary duty claim under the duty analysis of *Barnard* rather than the "more culpable state of mind" dicta in *Prentis*[77]: "Where an alleged duty arises out of an attorney-client relationship, a claim for breach of that duty 'is one for malpractice and malpractice only.'"[78] Importantly, like *Potter* and *Pukke*, the complaint contained intent-based allegations of "material misrepresentations," "pressuring Plaintiff," and "discouraging Plaintiff"—rather than mere omissions or other negligence.[79] The court nevertheless focused on the genesis of the duty, holding that "[p]laintiff has not alleged that defendants breached any duties that arise outside the attorney-client relationship. Thus, plaintiff's allegations only state a claim for legal malpractice."[80]

IV. RECOGNIZING A DISTINCT BREACH OF FIDUCIARY DUTY CLAIM WOULD CREATE IRRECONCILABLE PROBLEMS

In Michigan, most causes of action carry longer limitations periods than the two-year malpractice statute of limitations.[81] This renders Michigan attorneys uniquely subject to creative attempts to avoid the two-year limitation period.[82] The judiciary should be wary of those attempts. In addition to ignoring established precedent mandating a duty analysis rather than a scienter analysis, allowing an independent cause of action against an attorney for breach of fiduciary duty—when the duty arises solely from the attorney-client relationship—would create a host of additional problems for both clients and lawyers.[83] All of these issues evaporate by respecting the two-year malpractice statute of limitations.

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75. *See* MICH. COMP. LAWS ANN. §§ 600.5838(2), .5838b (West 2013) (defining the applicable statute of limitations).

76. *Taylor*, 2010 WL 2696675, at *6.

77. *Id.* at *6.

78. *Id.* (quoting Barnard v. Dilley, 350 N.W.2d 887, 887-88 (Mich. Ct. App. 1984)).

79. *Id.* at *6.

80. *Id.*

81. *See supra* Part I.

82. *See infra* Part IV.A-G.

83. *See infra* Part IV.A-G.

A. Heightened Scienter

Although a seeming benefit to putative plaintiffs needing a longer statute of limitations to sustain their claims, the "more culpable state of mind" distinction suggested in *Prentis*[84] would saddle clients with a burden of proof they do not face in a malpractice action.[85] If the suggestion in *Prentis* that breach of fiduciary duty requires a "more culpable state of mind"[86] is followed, attorneys facing malpractice claims will assert that plaintiff clients must prove a higher degree of scienter — "a more culpable state of mind"—than that required for malpractice. Under *Prentis*, even if a client proves that an attorney has breached her professional fiduciary obligations, the attorney may yet defend by showing that she had insufficient intent to do so.[87] This has never been the standard of proof in a professional liability action.[88] By giving clients an "additional" cause of action with a potentially longer statute of limitations, the courts may inadvertently raise the burden of proof in attorney malpractice actions.

B. Standard of Care/Expert Testimony

A malpractice plaintiff normally must proffer attorney experts in order to establish the applicable standard of care, breach of that standard, and causation.[89] Plaintiffs bringing a "breach of fiduciary duty" claim will argue that expert testimony is not required because it has not been required in common law breach of fiduciary duty actions.[90] Yet, breach of the attorney's unique fiduciary duty to the client, arising solely from the attorney-client relationship, remains the basis for the action.[91] Lawyer experts should still be required to establish the standard of care

84. *See* Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908 (Mich. Ct. App. 2005).

85. *See* Coleman v. Gurwin, 503 N.W.2d 435, 437 (Mich. 1993) (defining the elements of a legal malpractice claim, which do not include proving a "more culpable state of mind").

86. *Prentis*, 698 N.W.2d at 908.

87. *Id.* (requiring a "more culpable state of mind").

88. *See, e.g., id.*

89. *See* Law Offices of Lawrence J Stockler, P.C. v. Rose, 436 N.W.2d 70, 87 (Mich. Ct. App. 1989); Beattie v. Firnschild, 394 N.W.2d 107, 109-11 (Mich. Ct. App. 1986).

90. *See, e.g.*, Shanks v. Morgan & Meyers, P.L.C., No. 302725, 2012 WL 1314094, at *6 (Mich. Ct. App. Apr. 17, 2012) (stating that the plaintiff cannot label her legal malpractice claim as a breach of fiduciary duty claim to avoid having to obtain expert testimony).

91. *See id.* (rendering plaintiff's claim "for malpractice and malpractice only" (quoting Barnard v. Dilley, 350 N.W.2d 887, 888 (Mich. Ct. App. 1984))).

applicable to that duty.[92] But if experts are required, doesn't that alone negate any assertion that a "breach of fiduciary duty" claim against an attorney is distinct from a legal malpractice action? If courts continue to follow *Prentis*, it will be interesting to see how they will wrestle with this dilemma.

C. Assignment of Claims

Under Michigan law, a client cannot assign a legal malpractice claim.[93] The main reason for this is the uniquely "personal nature of the attorney-client relationship."[94] But nowhere does Michigan preclude the assignment of a breach of fiduciary duty claim.[95] By characterizing a professional negligence claim as "breach of fiduciary duty," a claimant could effectively assign a cause of action that traditionally has been restricted to the original parties to the unique attorney-client relationship, sidestepping the assignment bar.

D. Prospective Limitation of Liability

In a similar vein, allowing a separate cause of action against attorneys for breach of fiduciary duty could allow lawyers to prospectively contract out of fiduciary duty liability, whereas they cannot ethically contract out of malpractice liability.[96] This would be an absurd result because the duty from which the two causes of action arise is identical. But that is the very reason why a distinct claim for breach of fiduciary duty—with an attendant longer statute of limitations—should not be recognized in the first place.

E. Accrual Confusion

Permitting a distinct cause of action by clients against attorneys for breach of fiduciary duty would also create confusion as to when the claim accrues. The two causes of action are subject to significantly

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92. *See id.* at *5-6.

93. Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 296 (Mich. 1991); Weston v. Dowty, 414 N.W.2d 165, 166 (Mich. Ct. App. 1987); Joos v. Drillock, 338 N.W.2d 736, 739 (Mich. Ct. App. 1983).

94. *Joos*, 338 N.W.2d at 739.

95. *See, e.g.*, Claire-Ann Co. v. Christenson & Christenson, Inc., 566 N.W.2d 4 (Mich. Ct. App. 1997).

96. MICH. RULES PROF'L CONDUCT R. 1.8(h) (prohibiting only the prospective limitation of "malpractice" claims).

different accrual rules.[97] A legal malpractice claim accrues upon the later of the termination of the attorney-client relationship, or when the client discovers or should have discovered the claim.[98] As discussed, a breach of fiduciary duty claim accrues when the plaintiff knew or should have known of the breach.[99]

Thus, if the courts recognize a distinct cause of action for breach of fiduciary duty in the attorney-client context, depending on when the breach occurs, a client may be forced to either sue her lawyer for breach of fiduciary duty *while the attorney-client relationship is continuing* or forego her claim altogether. This is precisely the Hobson's choice the legislature sought to avoid by granting a client two years to sue her lawyer *after* the attorney-client relationship ends.[100] The foundation for this policy is the "last treatment rule" developed in the medical malpractice context, which recognized the impropriety of requiring a patient to sue his doctor while treatment continues because the patient "relies completely on his physician and is under no duty to inquire into the effectiveness of the latter's measures."[101] The same rule continues to apply to the attorney-client relationship.[102]

Consider a breach of confidence (and therefore a breach of fiduciary duty) committed by an attorney more than three years prior to termination of the attorney-client relationship. Applying the *Barnard* duty standard would allow the client in that case to wait until the termination of the relationship and then bring the claim within two years thereafter under the malpractice statute of limitations.[103] But using the *Prentis* culpability standard—and the distinct cause of action for common law breach of fiduciary duty that it suggests—would require suits to be filed in the midst of the attorney-client relationship.[104] That is the very thing the legislature sought to avoid by accruing actions against professionals upon the termination of the relationship.[105]

Similarly, a client who misses the two-year statute for malpractice might argue that a breach of duty committed less than one year prior to the termination of the attorney-client relationship should be called breach

97. *See supra* notes 10-15 and accompanying text.
98. *See supra* notes 10-15 and accompanying text.
99. *See supra* notes 10-15 and accompanying text.
100. MICH. COMP. LAWS ANN. § 600.5805(6) (West 2013).
101. Morgan v. Taylor, 451 N.W.2d 852, 855 (Mich. 1990).
102. Sam v. Balardo, 308 N.W.2d 142, 150 (Mich. 1981).
103. Barnard v. Dilley, 350 N.W.2d 887, 888 (Mich. Ct. App. 1984).
104. Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908-09 (Mich. Ct. App. 2005).
105. *Id.*

of fiduciary duty, governed by the three-year statute.[106] Such a plaintiff would gladly accept the heightened scienter burden suggested in *Prentis*, since the alternative would be dismissal of the claim.[107]

In these examples, the attorney-client relationship is the same, the duty is the same, and the act of breach is the same. The only thing driving the plaintiff's choice of cause of action is the timing of the breach and its resulting impact on the statute of limitations. By focusing on *when* the breach occurs and the state of mind of the attorney, rather than the gravamen of the action and the genesis of the duty, the putative independent cause of action for breach of fiduciary duty suggested in *Prentis* creates a statute of limitations quandary that cannot be reconciled.[108] From the same type of breach arising from the same type of duty, some clients will enjoy longer limitations periods while others will not—dependent solely on when the breach happened to occur (and how the clients title their causes of action).

F. Post-Relationship Breaches of Duty

Although not addressed in *Prentis*[109] or otherwise in the appellate courts, in support of an independently-sustainable breach of fiduciary duty claim, some plaintiffs have suggested that a legal malpractice claim can only be advanced with respect to breaches of attorney duty that occurred while the attorney was actively providing legal services to the client.[110] Because the Michigan Supreme Court in *Simko v. Blake* recited one element of the cause of action for legal malpractice as "negligence in the legal representation,"[111] some courts have extrapolated this into a strict rule that an attorney can only commit an act of malpractice *during* the active attorney-client relationship.[112] A breach of fiduciary duty claim is therefore—under this reading of *Simko*—the only cause of action available for acts or omissions *after* termination of the attorney-client relationship (for example, engaging in an impermissible conflict of interest adverse to a former client).

This necessarily leads to the absurd result that an act or omission of an attorney constituting malpractice *during* the attorney-client relationship somehow ceases to constitute malpractice *after* the

106. *Id.* at 908 (stating the applicable statute of limitations for a breach of fiduciary duty claim).

107. *See id.*

108. *Id.* at 900.

109. *Id.* at 908-09.

110. Bauer v. Ferriby & Houston, P.C., 599 N.W.2d 493 (Mich. Ct. App. 1999).

111. Simko v. Blake, 532 N.W.2d 842, 846 (Mich. 1995).

112. *See, e.g.*, Klolan v. Schwartz, 725 N.W.2d 671, 677 (Mich. Ct. App. 2006).

relationship terminates—even though the duty element of the cause of action arises solely from the existence of the prior attorney-client relationship and the act of breach is identical. This is simply an argument to avoid application of the two-year statute, and it ignores the fact that the very duty upon which both the malpractice and breach of fiduciary duty claims depend—an attorney's fiduciary duty to the client—necessarily begins with and (to some extent) continues beyond the time during which the attorney is actually providing services to the client.[113]

Moreover, analysis of *Simko* itself, and the authorities on which it rests, belies the premise that attorney malpractice can occur only during the active attorney-client relationship.[114] With respect to its "negligence during the representation" element of a legal malpractice claim, *Simko* cites *Coleman v. Gurwin*.[115] *Coleman*, in turn, relies on *Basic Food Industries, Inc. v. Grant*.[116] And *Basic Food* relies on section 223, *Attorneys at Law*, of volume seven of the second edition of the American Jurisprudence legal encyclopedia.[117]

However, section 223 relates only to "Conduct of Litigation," which was the only attorney activity factually at issue in *Basic Food*.[118] Also, section 223 is only a subset of American Jurisprudence's "Liability of Attorneys for Malpractice" (Chapter V).[119] For example, section 213 of volume seven of American Jurisprudence, second edition, which also falls under "Liability of Attorneys for Malpractice," expressly addresses the circumstance of representing a client adverse to a former client—conduct necessarily occurring *after* the termination of the attorney-client relationship.[120] Consistently, in the seminal Michigan decision recognizing that claims for legal malpractice are subject to the two-year malpractice statute of limitations, the Michigan Supreme Court recognized a broader definition of legal malpractice as "an attorney's misfeasance or nonfeasance of professional duty"—without restricting it to events *during* the attorney-client relationship.[121]

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113. *See Bauer*, 599 N.W.2d at 495.

114. *See generally Simko*, 532 N.W.2d 842.

115. *Id.* at 846 (citing Coleman v. Gurwin, 503 N.W.2d 435, 436-37 (Mich. 1993)).

116. *Coleman*, 503 N.W.2d at 437 (citing Basic Food Indus., Inc. v. Grant, 310 N.W.2d 26, 28 (Mich. Ct. App. 1981)).

117. *Basic Food*, 310 N.W.2d at 28 (citing 7 AM. JUR. 2D *Attorneys at Law* § 223).

118. *Id.* at 30-31.

119. *See* 7 AM. JUR. 2D *Attorneys at Law* §§ 201-238 (2007).

120. 7 AM. JUR. 2D *Attorneys at Law* § 213.

121. Sam v. Balardo, 308 N.W.2d 142, 150 n.20 (Mich. 1981) ("'The word "malpractice" has long been used to describe an attorney's misfeasance or nonfeasance of professional duty. This was ordinary usage at common law.'" (quoting Sam v. Balardo, 270 N.W.2d 522, 524 (Mich. App. Ct. 1978) (Cavanaugh, J., dissenting))).

Thus, a restrictive reading of *Simko*[122] that an attorney can only breach his professional duties to a client *during* the attorney-client relationship is unfounded.[123] *Simko* addressed a particular factual circumstance involving attorney negligence during the attorney-client relationship and relied on authority addressing similar facts.[124] But *Simko* rests on a much broader temporal scope of attorney liability that is not limited to the time "during" the attorney-client relationship.[125] Although the duties owed to a former client are not as expansive as those owed to an existing client,[126] an attorney who breaches a duty to a client during the attorney client relationship is equally culpable as an attorney who breaches the same duty years after the relationship ends.[127] Both are acts of professional malpractice.[128]

However, breaches of professional duty occurring after termination of the attorney-client relationship present a unique accrual circumstance. Because a legal malpractice claim normally accrues upon termination of the relationship rather than the event of breach, former clients suing for post-relationship breaches of duty may not benefit from the full two-year limitation period.[129] The more time that passes between termination of the attorney-client relationship and the breach of duty in question, the less time that the client would have to bring a post-relationship claim.

On the other hand, by operation of the six-month discovery rule,[130] the client will retain the ability to bring a claim for a post-relationship breach of duty, albeit subject to a reduced limitation period and ultimately the six-year statute of repose.[131] Accordingly, there is no significant public policy problem with subjecting post-relationship claims to the two-year statute of limitations for legal malpractice. For example, a lawyer might breach a former client's confidence five years after they part ways. The client can still maintain an action for malpractice within six months of discovering the breach.[132]

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122. Simko v. Blake, 532 N.W.2d 842 (Mich. 1995).

123. *See generally id.*

124. *Id.* at 844-46.

125. *Id.* at 846 (stating the requirements for a legal malpractice claim).

126. *Compare* MICH. RULES PROF'L CONDUCT R. 1.7, *with* MICH. RULES PROF'L CONDUCT R. 1.9.

127. *See* MICH. COMP. LAWS ANN. § 600.5838b (West 2013) (showing that the law does not make any differentiation between an attorney's liability when a duty is broken to a current client or a former client).

128. *See id.*

129. *See supra* Part II.

130. *See* MICH. COMP. LAWS ANN. § 600.5838(2) (West 2013).

131. *See supra* Part II.

132. *See* MICH. COMP. LAWS ANN. §600.5838(2).

Although it results in a shorter limitations period for post-relationship claims, adherence to the six-month discovery rule in this context is consistent with the rule's purpose. When originally enacted (before its amendment by Public Act 142 in 1975), the discovery rule period equaled the underlying statute of limitations period—two years.[133] The legislature intended the 1975 amendment reducing the discovery period to six months to aid malpractice insurers in determining their losses within a given premium year "without violating the rights of injured patients who do not discover their injuries until after the period prescribed by the statute of limitations has elapsed."[134] Although the legislative history focused on medical malpractice insurers, the reasoning for the amendment applies equally to legal malpractice insurers.[135] The legislature made a policy decision in reducing the two-year discovery period to six months.[136] Absent further amendment, there is no justification for ignoring the statutory six-month discovery period for malpractice claims by permitting a client to sue under a breach of fiduciary duty theory. To do so would, in effect, re-enact the pre-1975 version of the discovery rule.

Moreover, post-relationship claims are not the only claims that often must rely solely on the six-month discovery rule.[137] For example, in the estate planning arena, drafting errors often go undiscovered until many years after the attorney-client relationship ends when dormant documents become operative upon the death of the client.[138] There is no exception to the two-year malpractice statute in this context, rendering the six-month discovery rule the effective governing statute of limitations (subject ultimately to the new six-year statute of repose).[139] Functionally, this is no different than a post-relationship claim arising many years after the termination of the relationship.

Finally, it is debatable whether the "knew or should have known" accrual date for common law breach of fiduciary duty claims, discussed above, survived *Boyle v. GMC*.[140] In *Boyle*, the Michigan Supreme Court held that, absent fraudulent concealment of the claim, a fraud claim

133. See Biberstine v. Woodworth, 265 N.W.2d 797, 798 (Mich. Ct. App. 1978), *aff'd*, 278 N.W.2d 41 (Mich. 1979).

134. Sam v. Balardo, 308 N.W.2d 142, 148 n.15 (Mich. 1981) (quoting MICH. H.R., ANALYSIS OF SENATE BILL 227 (June 25, 1975)).

135. *See id.*

136. *See* MICH. COMP. LAWS ANN. § 600.5838(2).

137. *Id.*

138. *See, e.g.*, Mieras v. DeBona, 550 N.W.2d 202, 209-10 (Mich. 1996).

139. *See* MICH. COMP. LAWS ANN. § 600.5838(2). *See also* MICH. COMP. LAWS ANN. § 600.5838b(2) (West 2013).

140. Boyle v. Gen. Motors. Corp., 661 N.W.2d 557 (Mich. 2003).

accrues at the time of the fraud rather than when the party "knew or should have known" of it.[141] The court reasoned that fraud is not subject to the statutory "discovery" rule of section 600.5827 of Michigan Complied Laws Annotated (MCLA)[142] because that rule applies only to claims falling under one of the specifically enumerated accrual rules contained in sections 600.5829 to 600.5838.[143] Under *Boyle* and MCLA section 600.5827, a fraud claim therefore "accrues at the time the wrong upon which the claim is based was done."[144]

At least one panel of the court of appeals (in an unpublished decision) and one federal district court have since ruled that breach of fiduciary duty claims are not subject to sections 600.5829 to 600.5838, either, and that such claims therefore accrue at the time of breach, regardless of when the injured party had notice.[145] If accepted, this means the legal malpractice discovery rule would preserve claims for post-relationship breaches even longer than the accrual statute applicable to common law fiduciary duty claims.[146]

Another way of viewing this is that the breach of fiduciary duty theory is either subject to the "malpractice" accrual rule of MCLA section 600.5838[147] or it is not. If it is, then by definition it must be a malpractice claim, rendering it subject to the malpractice statute of limitations. If it is not, then it is subject to the accrual rule of MCLA section 600.5827, rendering it accrued when the breach occurs, not when

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141. *Id.* at 560.

142. MICH. COMP. LAWS ANN. § 600.5827 (West 2013) ("Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.").

143. *Boyle*, 661 N.W.2d at 560. *See* MICH. COMP. LAWS ANN. §§ 600.5829–.5838 (providing accrual rules unique to specific causes of action: "right of entry or recovery of possession of land" (§ 600.5829), "mutual and open account current" (§ 600.5831), "breach of warranty of quality or fitness" (§ 600.5833), common carrier charges and overcharges (§ 600.5834), life insurance claims based on presumption of death (§ 5835), installment contracts (§ 600.5836), alimony (§ 600.5837), and malpractice (§ 600.5838)).

144. *Boyle*, 661 N.W.2d at 560 (quoting MICH. COMP. LAWS ANN. § 600.5827).

145. *In re* Jervis C. Webb Trust, Nos. 263759, 263900, 2006 WL 173172, at *3 (Mich. Ct. App. Jan. 24, 2006) (arguing that the "knew or should have known" accrual standard for breach of fiduciary duty was overruled and replaced with a "time of the breach" standard (in the absence of fraudulent concealment) by *Boyle*, 661 N.W.2d at 560); Roy v. Mich. Child Care Ctrs., Inc., No. 08-10217-BC, 2009 WL 648496, at *9 (E.D. Mich. Mar. 11, 2009).

146. *Contra* MICH. COMP. LAWS ANN. § 600.5827 (stating the traditional accrual method applicable to common law fiduciary claims).

147. MICH. COMP. LAWS ANN. § 600.5838.

the client discovers the breach.[148] The majority of clients would surely prefer to treat a breach of fiduciary duty as a malpractice claim and benefit from the discovery rule. Only the rare plaintiff who misses both the two-year statute of limitations for malpractice and the six-month discovery rule would prefer the *Prentis* result.[149]

G. Malpractice Statute of Repose

On January 2, 2013, Governor Snyder signed into law Public Act 582 of 2012, which amended the limitations scheme applicable to legal malpractice actions by, among other things, enacting a six-year statute of repose.[150] The amendment provides that "[a]n action for legal malpractice . . . shall not be commenced after whichever of the following is earlier: (a) [t]he expiration of the applicable period of limitations under this chapter . . . [or] (b) [s]ix years after the date of the act or omission that is the basis for the claim."[151] The amendment does not define "legal malpractice."[152] Nor does it expressly cover a cause of action for "breach of fiduciary duty."[153] Accordingly, a court applying the *Prentis* test would likely ignore this newly-enacted statute of repose and, depending on the accrual rule applied to the breach of fiduciary duty claim, potentially allow a breach of fiduciary duty claim against an attorney decades after the causal act or omission.

V. CONCLUSION

Most courts addressing the issue have dismissed breach of fiduciary duty claims as redundant to legal malpractice claims because the duty applicable to both causes of action arises from the same attorney-client

148. *See* MICH. COMP. LAWS ANN. § 600.5827.

149. Assuming that *Boyle* applies to breach of fiduciary duty claims, the three-year statute of limitations on a client's breach of fiduciary duty claim would begin to run when the client is injured, regardless of his notice of that injury. His claim might expire before he learns of it. By characterizing the claim as malpractice, however, even if the client has no early knowledge of the claim, he would still enjoy a far longer period in which to sue (subject to the new statute of repose), provided he sues within six months of discovering the claim. Thus, the *Prentis* breach of fiduciary duty scheme would benefit only the rare plaintiff who (a) knew of his claim but (b) failed to sue within two years after the conclusion of the attorney-client relationship.

150. 2012 PA 582 is codified at MICH. COMP. LAWS ANN. §§ 600.5805, .5838, .5838b (West 2013).

151. MICH. COMP. LAWS ANN. § 600.5838b(1).

152. *See id.*

153. *See id.*

relationship.[154] This reasoning is sound, because the Michigan Supreme Court has described a legal malpractice action as based on an injury to the fiduciary relationship,[155] and the courts have recognized that a distinct claim against an attorney for breach of fiduciary duty is preconditioned on a fiduciary relationship independent of the attorney-client relationship.[156]

Some recent decisions—notably *Prentis*—have suggested a different test for the viability of the breach of fiduciary duty claim by ignoring the genesis of the duty and focusing instead on a purported heightened level of scienter necessary to prove a breach of fiduciary duty.[157] There is scant support for this approach,[158] and its continued recognition would wreak havoc on the statute of limitations scheme applicable to legal malpractice actions.[159] It would also give rise to a host of irreconcilable problems that are avoidable by simply honoring the traditional statute of limitations analysis for legal malpractice claims.[160] Hopefully, the courts will clarify this issue at the earliest opportunity.

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154. *See supra* note 74 and accompanying text.

155. *See supra* note 20 and accompanying text.

156. *See supra* note 20-22 and accompanying text.

157. Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 908 (Mich. Ct. App. 2005).

158. *See supra* Part III (discussing cases supporting *Prentis*).

159. *See* MICH. COMP. LAWS ANN. § 600.5838b (West 2013).

160. *See id.* § 600.5827; *see also supra* note 5 and accompanying text (discussing how courts have traditionally determined the applicable statute of limitations by focusing on the source of the duty giving rise to the claim).