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97-0729
KPMG PEAT MARWICK V. HARRISON COUNTY HOUSING FINANCE CORP.

LAWYER: We've placed before the court a chronology of key dates in this case along with an outline of points on I intend to address.

1980, is when the First Interstate Bank was retained as the trustee of a 1980 Series Bond issued by the respondent. In 1985, Peat Marwick performed an audit. In 1989, the bank acting as trustee sold some treasury notes that were contained in the capital reserve fund for the respondent. In 1991, the respondent refinanced all the 1980 Series Bonds, and it claimed that it should have received the proceeds from the sale of the treasury notes in the capital reserve fund at that time, although it claimed that they had been wrongfully sold by the bank back in 1989. Accordingly, in Feb. 1993, the respondent sued the bank for $621,000 and that amount was what it calculated as the amount that the treasury notes would have appreciated in the capital reserve fund between 1989 and 1991. A few months later in Oct. 1993, the respondent says it learned that Peat Marwick knew about the premature sale of the treasury notes in the capital reserve fund. But the respondent didn't sue Peat Marwick in 1993, or in 1994 when summary judgment was rendered in favor of the bank, a decision from which the respondent did not appeal.

ABBOTT: How do you propose entities like Harrison County to discover Peat Marwick's conduct? What should they have done and how could they have done it to find out what Peat Marwick did?

LAWYER: What they did was they filed the lawsuit against the bank and then they said that they learned of Peat Marwick's conduct some 8 months later in October of 1993.

ABBOTT: So that's one way. They could file a lawsuit against someone else and through pretrial discovery find out this information about Peat Marwick. Other than that scenario, what other way would this particular party or any other party have the ability to learn of Peat Marwick's conduct?

LAWYER: Of course this is a matter relating to the respondent's own financial affairs and of course it would be in the best position of anyone to know what transactions have taken place with respect to the capital reserve fund and the other matters relating to these bonds.

ABBOTT: How would they learn that Peat Marwick was also advising the bank?

LAWYER: What they did here is they filed suit against the bank.

ABBOTT: So again, other than filing suit against the bank, there is no other way that they

could learn about it?

LAWYER: I think that hypothetically there are other ways that perhaps they could have learned about it. But what happened in this case and on the facts that are in this record, is that they did learn about it in Oct. 1993. The rule worked the way that it is supposed to work in this case because assuming that limitations began to run when they filed the bank lawsuit in Feb. 1993 and they had two years from that point to discover the identity of any other alleged tort feasors, that's what happened.

HANKINSON: Did the injury occur in 1989 when the banks sold the notes or did the injury occur in 1991 when then the plaintiff failed to receive the benefit of the appreciation it would have had had the notes not been sold in 1989?

LAWYER: I think the injury occurred in 1989, although even the respondent admits for purposes of this record that it suffered the loss in 1991. And it doesn't make any difference which date this court selects for purposes of deciding this case, because the claims would be barred by limitations under either date.

HANKINSON: So if the discovery rule does not apply, then the statute began to run at the latest in 1991 when plaintiff experienced some injury?

LAWYER: At the absolute latest. With respect to the negligence claim, if the discovery rule is not applied under the legal injury rule, the limitations would have began to run perhaps in 1985, but certainly no later.

HANKINSON: Well that's when the alleged negligent act occurred in connection with the audit?

LAWYER: That's correct.

HANKINSON: But nothing occurred with respect to these particular assets that caused any kind of a loss. So there would not have been an injury in 1985?

LAWYER: That's correct at least according to the way that the respondent has pled the case. They said that the wrongful act that caused their injury was the premature sale by the bank of the treasury notes in this capital reserve fund in 1989. And then they say that they learned of that when they refinanced all of the bonds. They say they would have received the proceeds from the notes in that capital reserve fund in 1991 and when they didn't receive them at that time, of course, they would have been aware of that and presumably that's what caused them to file the lawsuit against the bank in Feb. 1993.

This lawsuit, at least the first lawsuit against Peat Marwick, was not filed until

July 1995, which was some 2½ years after the first lawsuit had been filed against the bank. And the claim that was made in this lawsuit against Peat Marwick is for the exact same amount of damages - $621,000, which they calculated in the exact same way.

SPECTOR: The bank was successful in that lawsuit?

LAWYER: That's correct. Summary judgment was rendered in favor of the bank in that case. Peat Marwick was not a party to that case. According to the respondent it learned of Peat Marwick's involvement in all these matters in Oct. 1993, which was almost 1 year before summary judgment was rendered in favor of the bank.

HANKINSON: Who hired Peat Marwick to do the audit?

LAWYER: The respondent. The Texarkana court held that this court has recently announced a new formulation of the discovery rule, and it applied what it called that new formulation to reverse the summary judgment on limitations grounds. The Texarkana court is wrong and while we believe that at least some of the claims in this case are barred by the legal injury rule, even if the discovery rule is applied limitations is a bar to all of these claims as a matter of law. We principally rely upon two decisions of this court: *Marino v. Sterling Drug*; and *Russell v. Ingersoll Rand*.

In *Marino*, this court noted that limitations are not tolled under the discovery rule until the plaintiff discovers the specific cause of action against a specific defendant.

BAKER: What about their assertion that they also have a fraudulent concealment assertion there that likewise tolls the statute on separate grounds?

LAWYER: Fraudulent concealment doesn't apply in this case. And of course, they would have the burden to plead for fraudulent concealment and come forward and...

BAKER: Whose burden under summary judgment is that to negate the fraudulent concealment claim?

LAWYER: They would have the initial burden of pleading fraudulent concealment. I would refer the court for example to the *Bayou Bend* decision, which this court cited approvingly in the *Child's* decision. The *Bayou Bend* while it's a decision from the 14th CA, this same issue was raised. And that court noted that where it was not raised by the other side in response to the summary judgment...

BAKER: So your answer is that they didn't plead fraudulent concealment?

LAWYER: They didn't plead it and they waived it. But there is more to it than that.

Because even the estoppel effect with respect to fraudulent concealment ends when the plaintiff either knew or should have known of the nature of its injury, and that we think was conclusively established in the facts of this record as being outside the limitations period. So the first answer is that it doesn't apply, it wasn't pled, and they waived it. The second answer to that is, that it simply doesn't apply because the estoppel effect would end.

Fraudulent concealment would require a showing that Peat Marwick knew that there was a cause of action out there and that it took affirmative steps to conceal it, and there is absolutely nothing in this record to support that.

BAKER: They had a duty to tell Harrison county about it. Wasn't Peat Marwick Harrison county's accountant in connection with the bonds during the entire chronology of this case?

LAWYER: Yes.

BAKER: Were they auditing and giving audits to Harrison County on some periodic basis?

LAWYER: They were performing annual audits of - and I hesitate here because the record is less than clear, but there were annual audits performed by Peat Marwick of the respondent. Peat Marwick was the independent auditor of the Harrison County Housing Finance Corp.

ABBOTT: Regardless of whether the discovery rule applies with regard to the negligence claim, you concede don't you that the discovery rule applies to the DTPA claim?

LAWYER: Absolutely. There is no question, we have never taken any other position.

ABBOTT: It is just a matter of when the time period starts?

LAWYER: That's correct. What this court has said as recently in the *Murphy v. Campbell* case from last term, the court noted that the discovery rule in the DTPA is the same as the discovery rule as it's otherwise been applied in certain areas. There's no daylight between the discovery rule and the DTPA and in other contexts. But the discovery rule certainly would have applied to the DTPA claim.

ABBOTT: Going back to the fraudulent concealment issue. There is no evidence in the record concerning Peat Marwick's destruction of documents?

LAWYER: The only evidence that is in the record is in the briefing before this court the respondent has referred to a supplemental affidavit of Mr. Richard Anderson, which is not in this record. In fact, that supplemental affidavit was filed more than 2 weeks after the summary judgment hearing in this case. There was a summary judgment hearing, and on Sept. 16, the supplemental

affidavit was filed without obtaining leave of court on Oct. 3, and then on Oct. 6, the summary judgment order was entered. So, yes, there is a reference to a supplemental affidavit, but it's not in the record.

ENOCH: I may have misunderstood. I understood you to argue that the discovery rule applies under the DTPA, or applies to a DTPA cause of action just like in other context, but then you said you concede that the discovery rule applies to this DTPA action?

LAWYER: Yes.

ENOCH: But aren't you arguing that the discovery rule does not apply to the other causes of action?

LAWYER: Absolutely. We're arguing that it does not apply to the negligence claim, but even if it does apply or if it were applied under the facts of this case, that that claim would still be barred by limitations.

ENOCH: But in the DTPA context, you're just saying that it does apply but they knew or should have known more than 2 years before the _____?

LAWYER: Absolutely. The first lawsuit was filed a few weeks before the statutory enactment became effective, which exempts professionals from the DTPA. Since this lawsuit was filed in the summer of 1995, the discovery rule and the DTPA as it was written at that time is applicable.

The other ground on which the Texarkana court went awry is that it completely brushed aside and virtually ignored the should have known standard under the discovery rule. Of course, the discovery rule only operates to toll limitations until a party either knew or in the exercise of reasonable care and diligence should have known of facts given rise to his cause of action or the nature of his injury.

On this record, that standard was conclusively established as a matter of law. What we have is a situation where the respondent files suit against the bank in Feb. 1993, and it claimed in that pleading, which is in the record before the court, that the bank had violated the terms of the trust indenture by the premature sale of the treasury notes in the capital reserve fund in 1989. And it's just axiomatic that the respondent had to know that Peat Marwick as its auditor had not either prevented that premature sale, or informed the respondent of that premature sale at that time.

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RESPONDENT

ABBOTT: Would you mind answering that very last comment, that it is axiomatic that

at the time that the lawsuit was filed against the bank, you had all the information that you needed in order to determine that you should be prosecuting a lawsuit against Peat Marwick also?

LAWYER: That's simply not the case. The conclusion is drawn on incorrect interpretation of the pleadings and facts. We need to keep in mind that this is a summary judgment case. The petitioner received a summary judgment by the TC. To do so they have the burden of proving as a matter of law every element of their cause of action. In this case they brought forward no summary judgment evidence other than the pleadings in the prior case. And they pointed to those pleadings and said, you should have known at that point.

I point out that in the pleading before this court in this case, the respondent Harrison County Finance Corporation specifically pled: they did not know. They specifically pled that the information in Peat Marwick's possession was not disclosed.

HANKINSON: Where did the duty to disclose arise in this case?

LAWYER: Peat Marwick was retained by Harrison County. Harrison County Finance Corp. is a governmental entity without staff or employees. It has a board of directors established by the county commissioners to provide income for low and moderate income housing. To fulfill their function, they authorized a bond issue of $23 million; hired a trustee to handle the bond issue. Then to supervise that bond issue they hired a professional accounting firm.

HANKINSON: They hired them as their auditors, their independent auditors correct?

LAWYER: Harrison county takes the position: we hired them as our professional accountants.

HANKINSON: What does the audit report say? Does it not have the usual disclosures that are required under accounting practice stating that Peat Marwick was independent?

LAWYER: That is not in the record. It's not before the court in any way. What is in the record is the pleadings of Harrison County alleging that Peat Marwick was hired as our professional accounting firm to offer us accounting advice, to offer us management and oversight of this trust as well as to audit the trust indenture. It is that professional relationship that we depended on exclusively...

HANKINSON: Doesn't a failure to disclose typically arise in the context of a fiduciary relationship?

LAWYER: I would contend that that is the first place that a failure to disclose relationship would arise.

HANKINSON: And you're not contending in this case that Peat Marwick was in a fiduciary relationship?

LAWYER: We clearly are contending they are in a fiduciary relationship.

HANKINSON: Where in the law do you find the basis for contending that this accounting firm who is providing auditing services was in a fiduciary relationship?

LAWYER: This court nor any other that we have been able to find have found that that is in fact the case. There is nothing in the law at this point that says an auditor - and Peat Marwick is religiously trying to draw a line between what they did as auditing only as opposed to professional accounting services. Professional accounting services carry with them greater duties. There are some types of cases that discussed auditing as a separate accounting function.

HANKINSON: But your complaints about Peat Marwick arise out of the 1985 audit in the pleadings?

LAWYER: That is when the improper advice was given, yes.

HANKINSON: And it arises out of the 1985 audit service that was provided by Peat Marwick?

LAWYER: That's correct.

HANKINSON: When did the legal injury occur in this case?

LAWYER: That would be in 1985. At that point the improper advice was given to the trustee, the improper advice was taken by the trustee and the capital reserve fund was underfunded at that point. At that point, the injury had occurred and the quantity of that injury was not determined. It wouldn't be determined until 5-6 years later when the capital reserve fund was prematurely sold, and the bonds were renewed.

HANKINSON: So if the legal injury then occurred in 1985 and the discovery rule does not apply, when did the statute of limitations run?

LAWYER: 1987. Clearly if the legal injury rule applies and the discovery rule doesn't, we're out, we're gone, we might as well go home. The problem is, that everything that would give us any information or notice or knowledge that there was a cause of action was hidden from us, was kept from us.

BAKER: Did you plead fraudulent concealment, and if so, where can we find it?

LAWYER: You can find it on page 4 of the plaintiff's first amended petition where there are two paragraphs under Heading 4. We first pled that the existence of material financial accounting regularities was negligently failed to be disclosed to us by Peat Marwick; and then subsequently, that it was intentionally failed to be disclosed to us by Peat Marwick.

ENOCH: The $600,000 loss did Harrison consider that an injury? Did they understand that to be an injury at the time of the refinancing in 1991?

LAWYER: And here I think it's important to understand the difference between loss and injury. We knew we had a loss in 1991 of $621,000. There was a shortfall of $621,000. At that point, we began investigating, determining. We talked to Peat Marwick. We talked to the trustee. We talked to everybody and all we could find was that the trustee prematurely sold that bond of the capital reserve fund...

ENOCH: But you viewed the $600,000 as being the result of something?

LAWYER: We felt there had to be a reason for it. Now it could have been that there was just a shortfall. That's part of what could happen.

ENOCH: I guess I don't understand what a premature selling of bonds amounts to.

LAWYER: And this was an extremely complex set up that was being handled by a trustee, and managed by Peat Marwick. But there were certain accounts set up that were accruing interest and from that income it was to redeem these bonds as they came due. The capital reserve fund was primary for that function.

ENOCH: They sold bonds to raise capital to help low income housing. As those housings paid off on their debt, then the money that came in was used to retire the bonds?

LAWYER: Some of it.

ENOCH: So over a period of time some bonds would be sold, and then later some bonds would be sold, and later some bonds would be sold, and you're arguing that at the 1989 era, the trustee should not have sold some bonds because they basically incurred a lower interest rate or a higher interest rate?

LAWYER: I don't know enough about the accounting end of this to tell you why it was improper to do so, other than our experts tell us it was improper to do so. But it was not the fact that the bonds were sold so much as that the capital reserve fund was underfunded. Therefore, there wasn't enough money in there to cover the needed income to cover all the things the capital reserve fund was supposed to cover.

ENOCH: Your argument it seems to me is that until you have come to the conclusion that this loss was the result of somebody's improper action that the discovery rule has not been engaged, that the wrongful conduct is your issue here. We knew we had lost $600,000 and we went out and started looking for it but we didn't find it was really the result of wrongful conduct, and _____ some other period.

LAWYER: I think the biggest distinction between petitioner and respondent is if the discovery rule applies. The discovery rule then accrues from when the petitioner knew or should have known the nature of the injury. The nature of the injury requires two things: not only that you know you've been injured; but you know the wrongful conduct that caused that injury, or that wrongful conduct caused that injury. The petitioner takes the position that: well you knew wrongful conduct caused it because you sued the bank Well, we thought the bank had committed wrongful conduct that caused injury to us. The courts have told us: no, that's not true.

ENOCH: *Marino*, really takes the position that once you have identified that you had an injury, the statute of limitations gives you two years to find the defendant to sue for your wrongful injury. But using the argument of just the opposite, that once you know you've got an injury, you're not limited in any amount of time until you actually identify the defendant, and then you've got two years to sue that defendant.

LAWYER: First and foremost, I don't think *Marino* applies to this case or *Campbell Russell* for that matter. Both of those cases deal with statutory accrual dates, and this court specifically held in both those cases that the discovery rule doesn't apply. Because the legislature determined when accrual applies, and therefore, the discovery rule would not apply to those dates. This court has though significant case law on the discovery rule and the accrual date running from the determination of when the nature of the injury occurred. I think it's important to distinguish between injury and loss, because not every loss entitles somebody to walk into a courthouse and file a lawsuit. Now you can do so if you want to, but you're simply filing in courts unjustifiably in my opinion.

ENOCH: But you had determined though that you had had an injury in 1991?

LAWYER: We had presumed we had an injury and that the wrongful conduct of the bank caused it. If you look at the bank summary judgment evidence it's interesting to note that their defense was and the court bought that defense, properly I think, is that the bank relied on Peat Marwick's advice and Peat Marwick is our auditor or agent; therefore, bound us to that advice even though it was bad.

HANKINSON: Even if Texas law, which I'm not saying it does, requires that you know the identity of the wrongdoer, you're telling us that the respondent in this case hired Peat Marwick in fact to supervise, keep watch, act like a watchdog and do all of this, then why when they sued the bank would they have not been on notice that Peat Marwick should be a party, too?

LAWYER: Because when we asked Peat Marwick about this, they are the ones that focused on the underfunded capital reserve in the premature selling. They are the ones that destroyed the records; and therefore, had nothing to show us about their relationship.

HANKINSON: Your opponent says that's not part of the summary judgment record?

LAWYER: It is part of the pleadings though.

BAKER: But pleadings aren't summary judgment evidence.

LAWYER: It's part of the pleadings. Since they offered no summary judgment evidence they have to live with the pleadings, they have to be presumed to be true unless they conclusively establish otherwise.

BAKER: Your pleadings?

LAWYER: Our pleadings in this case. And they have failed to do so. And our pleadings make it clear that they failed to disclose to us any piece of information either about their wrongful conduct, or abut their duplicity in dealing with two sides on this issue and giving advice to one side, which was relied upon, which that party then got out of...

BAKER: But those pleadings you're talking about go to the merits of your lawsuit, not whether it's barred or not.

LAWYER: They go to the question of whether or not the discovery rule should apply, and if so, when the cause of action accrued. We have to establish on trial of this case, if it's sent back, when we knew or should have known of the nature of our injury; when we knew or know that we suffered a loss, and that it was caused by wrongful conduct of some party. We did not know that information according to the pleadings and according to the record before the TC until Oct. 1993, when the bank provided us Peat Marwick's records that they had. Only at that point did we first know that Peat Marwick had been engaged in conduct harmful to us without disclosing that information to us that they were engaged in the conduct that was actually duplicitous, that they were advising the bank and were being paid by the bank to do so, and then covered up irregularities that they determined in working for the bank even though they were hired by us to provide us with that information. It's that type of conduct that prevented us from discovering even though we diligently attempted to for two years plus until Oct. 1993, that Peat Marwick's conduct was what was the actual root cause of all of the damages suffered by Harrison county in this case.

BAKER: Let me go back to your fraudulent concealment. Did you raise that in your summary judgment response to the Peat Marwick's motion for summary judgment; and if so, where can we find it?

LAWYER: Well you can find it in the clerk's records of the TC in Harrison county. It was not brought forward as part of the record in this case. And that is really the only issue with the Texarkana court that we disagree with. They say that there was no evidence that evidence was filed. There is evidence that the response was filed. There is evidence that evidence was offered. It was just not brought up on appeal. And that evidence is the fact that Peat Marwick did bring up their reply to Harrison County summary judgment evidence. They did reply to our evidence and they brought that document forward but did not bring the other documents.

BAKER: But you didn't ask for a supplement to the record in the Texarkana court?

LAWYER: No, that was not brought forward. The counsel at that time attached a copy of the affidavit to their brief...

BAKER: My next question was going to be, did you provide summary judgment evidence to raise a fact question on that, but that's not in the record even if you did?

LAWYER: The answer to the question is, yes, we did, but it's not before the court.

BAKER: So the only thing we have is page 4 of your first amended petition to look at to see if that defense of limitations was raised?

LAWYER: I would contend that more than just page 4. I believe that the petition itself should be looked at as a whole, because there are several paragraphs they are discussing...

BAKER: But under our law isn't fraudulent concealment a specific defense to limitations raised by the party against whom limitations is asserted, and you have certain proof you have to make under that defense?

LAWYER: And at the time of trial there is specific proof you would have to make. You're correct. But for the pleading aspect of this, the pleadings must be fairly interpreted and broadly interpreted at that stage of the proceeding when they came forward for summary judgment evidence. At that point it was their burden because we had raised the issue in our pleadings fairly to refute it, which they have not. They have concentrated solely on the discovery aspect arguing that first it shouldn't apply, and second that if it does, when we filed the lawsuit against the bank that that was the end of the inquiry. They never did discuss or delve into the question of the fraudulent concealment part of this case, or try to explain why they failed to disclose that information, other than there is, I believe, one statement that it was part of their typical retention or document retention procedure to destroy these records after two years. So short of that, they gave no explanation of the other failure to disclose or arguments that we have raised in our pleadings, which are there for the court to review.

The court must be concerned with an individual or an entity who has been

wronged having an avenue to redress that wrong.

ABBOTT: Speaking of such things as that, there is one curious fact involved in this case and that is didn't you wait to sue Peat Marwick until you lost the bank case?

LAWYER: The summary judgment had already been entered in that case, yes.

ABBOTT: It seems as though, the appearance is such that: well we're going to take our first strike at the bank and we've lost there so where else can we aim our guns at. In other words, you're preaching some policy and that is that parties need to have evidence of redress and it seems as though you have the evidence of redress and took it against the bank, and decided only after you lost against the bank, well maybe we need to redirect the aim of our gun.

LAWYER: And quite honestly, if we aimed wrong in the first place, that's what we should be doing is reaiming. The question is, did we know or have reason to believe prior to the time we filed this lawsuit or 2 years prior to the time we filed this lawsuit, that we were aiming at the wrong party. We would contend the record establishes, no. We would contend that we did not know. All we had at that point was a trustee who had brought us information about a loss that we did not believe we should have incurred. It was only during the discovery of that case, the diligence we used we filed timely against the party of whom we thought caused that loss. We did discovery. It was only during that discovery that we found out that our prior efforts to discover who was responsible had been fruitless because the party responsible had destroyed those records. It was only during that time that we discovered that the loss actually occurred when the expert that we were relying on to make sure it didn't occur, had misled us, had failed to disclose to us what they had done wrong, and then pointed the finger in the wrong direction. It's kind of like you're out hunting with an environmentalist and the deer is over here, and they tell you there is movement over here, so you're looking over here. Well once we found out there was nothing over here, and we finally started to look around, we finally found out that it was actually over here where that deer was standing.

If they had not pointed us over here, possibly there would be a diligence argument. But the fact that they pointed us over here when the deer was standing over here means that they should not be able to at that point take advantage of their misdirection and bar us from bringing suit at this point when we did not know that information.

HANKINSON: If you learned that information in October 1993, the specific information that Peat Marwick had done something wrong, why did you wait till July 1995 to sue Peat Marwick?

LAWYER: I can't answer that question other than to say that the discovery rule does not say you have to file it within 30 days of when you found out or 6 days when you find out. It's at that point that the cause of action accrues. Clearly if the cause of action accrued at that point, we timely filed. And that's all I can tell you on that point.

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REBUTTAL

LAWYER: The Texarkana CA expressly found that the respondent had not come forward with any summary judgment evidence in this case, and a fact which is set out in its opinion, which was never challenged by the respondent, no motion to supplement the record was ever made.

What happened in the DC is that the amended petition and a response to the motion for summary judgment were filed on the 7th day before the hearing. The amended petition is what has come up in the record and what the respondent put into the record for purposes of appeal.

While I don't want to go beyond what is in the record before this court, the affidavit attached to the initial response that is not in this record does not go beyond any of the matters which are set forth in the first amended petition.

The fact of the matter is, the respondent did not plead breach of fiduciary duty in this case at all. It certainly knew how to do it. The court can see that in the lawsuit that was filed by the respondent against the bank it did plead a breach of fiduciary duty against the bank as trustee of the bond indenture. But it never did plead either breach of fiduciary duty or any claim relating to fraudulent concealment in this case.

With respect to what the effect of the CA's holding is, we would submit that it's relatively clear. The effect would be to apply the rule of the court below would be to reverse the application of the discovery rule and to extend it indefinitely. Because what it would do in an ordinary commercial case, such as this one, which does not present some of the same considerations as the application of the discovery rule in other contexts, it would allow a plaintiff to indefinitely extend the discovery rule by first filing suit against this particular defendant, taking discovery perhaps at the plaintiff's leisure, 3-years later or some later time determining that there is another potential wrongdoer here. According to the Texarkana CA limitations begins to run all over again because that's a brand new separate independent wrongful act according to the Texarkana court, and therefore, there would be two more years to file a lawsuit against the newly discovered party. That has never been the way the discovery rule has been applied in Texas. And the effect of it would be to have the discovery rule, which is an exception to the general principles of accrual, and it is an exception which this court has reiterated on numerous occasions should be that exceptions should be few and narrowly drawn. In this case the exception would swallow the rule. According to the Texarkana court it would be applied in any case involving the rendition of professional advice involving complex financial services or complex financial matters, whatever that means, and the end effect of it would be that the discovery rule exception would apply in virtually each and every commercial case in which any type of a failure to disclose was ever alleged against a professional. And for that reason, as well as the reasons that we set forth in our briefs, we respectfully request that this court reverse the judgment of the Texarkana CA and render judgment in favor of the petitioner, KPMG Peat Marwick.