NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0507

TRANS PACIFIC INTERACTIVE, INC.

VERSUS

U.S. TELEMETRY CORPORATION; U.S. TELEMETRY NETWORK, INC.; U.S. TELEMETRY-BAKERSFIELD, LLC; DATEX SPECTRUM, LLC; THOMAS L. SIEBERT, K. STEVEN ROBERTS, ROBERT S. MILLER, DON M. CLARKE, JAMES K. GABLE, CHARLES M. BRUCE; JOHN J. BROUSSARD; HENRY (HANK) MILLS; CLAY M. ALLEN; AND STEPHEN D. GAVIN

Judgment rendered DEC 29 2010

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C507714
Honorable William A. Morvant, Judge

* * * * * *

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* * * * * *

BEFORE: KUHN, PETTIGREW, and HUGHES, JJ.

Kuhn, J. Concurs

PETTIGREW, J.

In this action alleging fraud, legal malpractice, and other causes of action, plaintiff, Trans Pacific Interactive, Inc. ("TPI"), a Nevada corporation, challenges a trial court judgment sustaining peremptory exceptions filed on behalf of several defendants raising objections of no cause of action and prescription. For the reasons that follow, we reverse and remand.

FACTS

In July 1994, TPI allegedly paid the Federal Communications Commission ("FCC") $450,000.00 for an Interactive Video and Data Services ("IVDS") license to utilize the wireless radio bandwidth between 218 and 219 Megahertz ("MHz") in and around Bakersfield, California (the "Bakersfield license"). At the time of the FCC auction, the technology available to use the license was inadequate.

In 1998 and 1999, defendant U.S. Telemetry Corporation ("USTC") began working with Axonn Corporation, a New Orleans, Louisiana company, to convert remote telemetry monitoring technology previously developed by Axonn for other radio spectra for use by USTC. Anticipating its use of the 218-219 MHz spectrum at relatively little cost, USTC signed an agreement with Axonn for the exclusive use of the Axonn technology. Due to USTC's exclusive relationship with Axonn, licensees such as TPI were barred from contracting with Axonn except through USTC.

In 1999, USTC, through its wholly-owned subsidiary, defendant U.S. Telemetry Network, Inc. ("USTN"), entered into contracts with IVDS license holders known as System Development Agreements ("SDAs"). The SDAs anticipated that license holders would contribute their licenses to a market-specific entity or "MSE" (the market being the geographic market covered by the license). Although the license holder and USTN would share ownership of the MSE, the MSE would be a new subsidiary of USTN that would be controlled by USTN, which had the authority to appoint a majority of the MSE's board. It was further anticipated that in return for receiving control of the license holder's license, USTN would provide access to the Axonn technology that would allegedly provide commercial applications for radio bandwidths covered by the licenses. The SDAs

anticipated a "merging event" at some point in the future, in which all of the MSEs would eventually be merged into a single company, with the ownership thereof determined by the formulas set forth in the SDAs.

TPI executed an original SDA on July 12, 1999, with Adtel, Inc., a predecessor of USTC, and subsequently signed a revised SDA with USTN effective May 23, 2000.

In February 2001, the Texaco defendants, a potential investor in USTC, became interested in using USTC's technology to monitor data from its wellheads and other equipment situated in remote locations. Texaco was especially interested in the possibility of using USTC's technology to monitor its Kern River Oil Fields situated near Bakersfield, California, a geographic area covered by the Bakersfield license. On March 15, 2001, USTC applied for, and later obtained from the FCC, an Experimental Special Temporary Authorization ("STA"). The STA granted by the FCC on June 20, 2001, authorized USTC to test equipment at Texaco's Bakersfield facility. TPI claimed that it did not learn of the STA application until July 2001.

TPI later entered into an Act of Exchange Agreement with defendant Datex Spectrum L.L.C. ("Datex") on December 1, 2001. The Exchange Agreement between TPI and Datex provided for the transfer of TPI's rights under the SDA to Datex in exchange for 14,360 shares of USTC stock from USTC; 14,360 shares of USTC stock from Datex; together with $28,000.00 in cash representing a reimbursement for an earlier installment payment TPI made to the FCC for the Bakersfield license.

Ultimately, TPI no longer owned its valuable FCC license or its 50 percent joint venture interest in the MSE formed to develop the Bakersfield market. Additionally, TPI no longer had any right to the revenues that might have been generated from the arrangement with Texaco. TPI was left with worthless stock in USTC.

ACTION OF THE TRIAL COURT

On May 15, 2003, TPI filed suit in the 19th Judicial District Court naming four corporate entities, all domiciled in Louisiana, and ten individuals as defendants therein. Four of the individual defendants were Louisiana residents and all ten individual defendants served as officers, directors, or outside counsel of the Louisiana corporate

defendants. TPI alleged in its petition that defendant USTC, its wholly-owned subsidiary, defendant USTN, and defendant Datex breached their contracts with TPI with respect to TPI's wireless communications license; committed violations of Louisiana's "Blue Sky" laws (La. R.S. 51:701, *et seq.*) in connection with an exchange agreement whereby TPI was induced to transfer its FCC telecommunications license for Bakersfield, California to Datex in exchange for USTC stock; made negligent and intentional misrepresentations to TPI; and wrongfully converted TPI's FCC license. TPI alleged that the individual defendants were participants and co-conspirators in the same scheme. TPI also alleged that defendant Stephen D. Gavin, a Washington, D.C. attorney with the law firm of Patton Boggs, L.L.P. ("Patton Boggs"), breached his fiduciary obligations by acting as counsel for TPI, while also acting as counsel for defendants herein, USTC and USTN. TPI further alleged that Gavin conspired with the other defendants in making misrepresentations, committing breaches of contract, and wrongfully converting TPI's license, in violation of his fiduciary obligations as TPI's attorney.

Prior to filing suit in Louisiana in 2003, TPI filed an earlier suit in federal court against most of the same defendants, including attorney Gavin. TPI filed suit previously on September 16, 2002, in U.S. District Court in Nevada, alleging fraud, breach of contract, violations of federal securities laws, negligence, misrepresentation, breach of covenant of good faith and fair dealing, conversion, deceptive trade practice, racketeering, tort, outrage, and conspiracy. In addition to general and special damages, including attorney fees, costs, and expenses, TPI prayed for a trial by jury and an award of exemplary and punitive damages from each defendant.

In response to TPI's federal court lawsuit, defendants, USTC, K. Steven Roberts, Thomas L. Seibert, Donald M. Clarke, and Gavin filed motions to dismiss for lack of personal jurisdiction. Said defendants argued that while TPI was a Nevada corporation, the alleged wrongful conduct did not take place in Nevada, and that defendants, most of whom were Louisiana residents or did business principally in Louisiana, did not have the requisite minimum contacts with Nevada. Defendants, including Gavin, argued that Louisiana, where the corporate defendants and most of the individual defendants were

domiciled and where the face-to-face discussions took place; Delaware, where some of the corporate defendants were incorporated; or California, where TPI's telecommunications license applied; would be more appropriate venues in which to file this action. TPI followed defendants' suggestion and instituted the present litigation in Louisiana while the Nevada suit was still pending. The Nevada suit was later dismissed by the court due to TPI's failure to serve its amended complaint.

TPI amended its Louisiana petition three times, partly in response to exceptions that raised objections of vagueness due to TPI's failure to plead its fraud allegations with particularity. On August 2, 2004, TPI amended its original petition to name two additional individual defendants, and two additional corporate defendants affiliated with Texaco[1]. On November 19, 2007, TPI filed its second amended petition to allege with greater particularity its claims against the new defendants. On January 16, 2009, TPI filed its third amended petition to name attorney Gavin's law firm, Patton Boggs, as an additional defendant, and, in response to the court's order of December 8, 2008, to allege with more particularity, the fraud and conspiracy claims against attorney Gavin.

On July 14, 2009, Gavin and Patton Boggs filed peremptory exceptions raising objections of no cause of action and prescription. Following a hearing in the trial court on October 26, 2009, the exceptions were granted and pursuant to a judgment entered on November 30, 2009, TPI's claims against Gavin and Patton Boggs were dismissed. Said judgment was made final and immediately appealable pursuant to La. Civ. Code art. 1915(B). From this judgment, TPI now appeals.

ISSUES PRESENTED FOR REVIEW

In connection with its appeal in this matter, TPI presents the following issues for review and consideration by this court:

1. Did TPI state a cause of action against Gavin and Patton Boggs for legal malpractice?

[1] Defendants, Texaco Group, LLC and Texaco Development Corporation, hereinafter referred to collectively as "Texaco," were dismissed from this litigation through a trial court judgment sustaining an exception raising an objection of no cause of action that was subsequently affirmed by this court. See **Trans Pacific Interactive, Inc. v. U.S. Telemetry Corporation**, 2008-2174 (La. App. 1 Cir. 5/8/09) (unpublished), writ denied, 2009-1287 (La. 9/25/09) 18 So.3d 75.

2. Did TPI state a cause of action against Gavin and Patton Boggs for fraud and conspiracy?
3. Are TPI's claims against Gavin and Patton Boggs barred by one-year prescription or peremption under Louisiana law?
4. Do the choice of law provisions of the Louisiana Civil Code and the parties' stipulation compel the application of District of Columbia substantive law to TPI's claims against Gavin and Patton Boggs?
5. Is the application of the District of Columbia three-year statute of limitations to TPI's malpractice and fraud claims against Gavin warranted under the Louisiana choice of law provisions, assuming *arguendo* that TPI's claims are prescribed under Louisiana law?
6. Was the prescription of TPI's claim against Patton Boggs interrupted under the fraud exception to La. R.S. 9:5605, and/or the choice of law provisions of La. Civ. Code art. 3549(B)(2)?

STANDARD OF REVIEW

The initial issues raised by TPI in connection with its appeal in this matter challenge the trial court's finding that TPI failed to state a cause of action against Gavin and Patton Boggs.

The function of an exception that raises the objection of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. **Ramey v. DeCaire**, 2003-1299, p. 7 (La. 3/19/04), 869 So.2d 114, 118. No evidence may be introduced to support or controvert the exception raising the objection of no cause of action. La. Code Civ. P. art. 931. In addition, all facts pled in the petition must be accepted as true. **Rebardi v. Crewboats, Inc.**, 2004-0641, p. 3 (La App. 1 Cir. 2/11/05), 906 So.2d 455, 457. Thus, the only issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. **Ramey**, 2003-1299 at 7, 869 So.2d at 118; **Rebardi**, 2004-0641 at 3, 906 So.2d at 457. In reviewing the petition to determine whether a cause of action has been stated, the court must, if possible, interpret it to maintain the cause of action. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. **Livingston Parish Sewer Dist. No. 2 v. Millers Mut. Fire Ins. Co. of Texas**, 99-1728, p. 5 (La. App. 1 Cir. 9/22/00), 767 So.2d 949, 952, writ denied, 2000-2887 (La. 12/8/00), 776 So.2d 1175.

If the grounds of the objection of no cause of action can be removed by amendment, the plaintiff should be given an opportunity to amend the petition. However,

if the grounds of the objection cannot be so removed, the action should be dismissed. See La. C.C.P. art. 934; **United Teachers of New Orleans v. State Board of Elementary and Secondary Education**, 2007-0031, p. 9 (La. App. 1 Cir. 3/26/08), 985 So.2d 184, 193. The decision whether to allow amendment is within the sound discretion of the trial court. **Stroscher v. Stroscher**, 2001-2769, p. 4 (La. App. 1 Cir. 2/14/03), 845 So.2d 518, 523.

Appellate courts review a judgment sustaining a peremptory exception raising the objection of no cause of action *de novo*. This is because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. **Ramey**, 2003-1299 at pp. 7-8, 869 So.2d at 119; see also **Fink v. Bryant**, 2001-0987, p. 4 (La. 11/28/01), 801 So.2d 346, 349.

Accepting all of the allegations set forth in the petitions filed by TPI as true, and applying the principles set forth above, we find, contrary to the conclusions of the trial court, that TPI has alleged facts sufficient to state a timely cause of action against Gavin and Patton Boggs for legal malpractice.

ANALYSIS AND DISCUSSION

The first two issues raised by TPI are: (1) whether TPI stated a cause of action against Gavin and Patton Boggs for legal malpractice; and (2) whether TPI stated a cause of action against Gavin and Patton Boggs for fraud and conspiracy.

In discussing the claims set forth against Gavin and Patton Boggs, the trial court in its oral reasons for judgment, stated, in pertinent part:

> The only real allegation as to fraud is in paragraph 48a., that says that Mr. Gavin, as attorney for Patton Boggs, LLP, illegally and fraudulently signed an application for STA without knowledge or consent of TPI. And I noted on the petition then and I made the same note today when the argument was made is that fraud has to be pled with particularity, specific acts and specific facts set forth in support; and here, again, it appears that [TPI] is alleging a conclusion of law without any factual support. And the question that kept coming to my mind as I read through the new amending paragraphs that were in bold is whether or not counsel reread the old petition because 48a. is a clear contradiction to the allegations of paragraphs 14 and 15 of the original, first and second, and third amending petition that alleges that Mr. Gavin didn't file this application, it was filed by K. Stephen Roberts, and Mr. Gavin only signed as attorney. Now it's turning around and saying, well, despite the fact that we've alleged that Gavin was acting as attorney, we're going to throw in that he illegally and fraudulently

signed the application; therefore, fraud is pled. That's not sufficient. When I look at that allegation in connection with all of the allegations of the petition, I don't think there's been a cause of action for fraud adequately pled in this petition because when it was amended and restated, it didn't change any of the original allegations. They're still in there. Conspiracy. Paragraph 48 alleges that defendant Gavin and Patton Boggs conspired with other defendants in misrepresentation, breach of contract, conversion, all in violation of a fiduciary duty as counsel. Again, in addition to this being a mere conclusion of law, this is the same allegation this Court found to be insufficient to state a cause of action against Mr. Gavin back on December 8 of 2008. The only difference between then and now is the words "Patton Boggs, LLP," was inserted in addition to Mr. Gavin. All of the facts of conspiracy, as you read through these 269 paragraphs, address actions of USTC and the other defendants. Gavin and Patton Boggs are not party to any contract or agreement alleged to have been breached, you know, misrepresented. At all times throughout, they're alleged in this petition to be acting as attorneys. Absolutely no factual allegations that either of these defendants, Mr. Gavin or the firm Patton Boggs, conspired to defraud plaintiff or to breach any fiduciary obligation other than, as I indicated, the mere conclusions of law that are contained in paragraph 48. We now turn to the attorney malpractice action, and this is based solely on plaintiff's allegations that Gavin and Patton Boggs were counsel for TPI at the time the application for the SDA was filed and when this November and December 2001 act of exchange agreement with Datex was entered. First of all, it's a fact that's disputed by defendant, but I can't consider that dispute. . . . But I also have to look at again, all of the allegations contained in the petition, and in this premise that Gavin and/or Patton Boggs were counsel for TPI at this time is contradicted by some of the prior assertions by plaintiff in its petition. I look at paragraph 15k. On June 4 of 2001, they hired Datex's attorney, Mr. Van Mayhall, to represent them. Paragraph 17r., prior to September 12 of 2001, they allege they hired a second attorney, Mr. Morrison. Throughout this third amended petition, as I read through it, it looks like plaintiff interchangeably calls Gavin and Patton Boggs USTC's attorney sort of when it's convenient, and then TPI's attorney when it's necessary. The dates and times set forth in plaintiff's petition I don't think support the claim that plaintiffs were represented by Gavin or Patton Boggs during this time; that the defendants committed any form of malpractice; that they violated the Rules of Professional Conduct, with the possible exception of a conflict of interest; and that they owed any duty, fiduciary or otherwise, to plaintiff absent that attorney-client relationship. . . .

Plaintiff's Exhibit 15, which is probably one of the single most important pieces of paper that I looked at, as of November 8, 200[1], Ms. Monahan [counsel for TPI], by the language in this letter, is fully aware of the fact that defendants [Gavin and Patton Boggs] were representing USTC and not TPI. And as I indicated, the petition has already alleged that prior to this date [TPI] had hired two other attorneys in connection with the proposed act of exchange agreement with Datex, Mr. Mayhall in June and, subsequent to Mr. Mayhall withdrawing, Mr. Morrison. In addition to paragraph 15k., plaintiff's Exhibits 11, 13, and 15 all reflect Mr. Mayhall's involvement. And in fact, this Plaintiff's 11 [sic] from Mr. Roberts to Ms. Monahan with a cc to Mr. Gavin specifically says that they have "sent information to your attorney, Van Mayhall, who is now in possession of this form of operating agreement." Not only does the petition allege that Mr. Mayhall was TPI's attorney, the exhibits attached to the petition, which since they're incorporated and annexed to it I can consider for a no cause of

> action, likewise reflect that USTC and others considered, and, more importantly, Patton Boggs considered, Van Mayhall to be their attorney. Plaintiff also knew prior to the November and 2000 [sic] dates of the act of exchange with Datex that Patton Boggs was representing USTC and not TPI. Paragraph 15, 15a., 17y., aa., cc., and ee. And during this time – and mine was attached to Exhibit 15. It's been introduced as a separate exhibit, but the correspondence to Ms. Monahan from Mr. Gavin – and I'm looking to get my hands on the exact language – and I think it's dated November 7. [sic]Dear Laura, [T]here needs to be a clarification of some important errors in your most recent memoranda. First, Patton Boggs, LLP[sic] – and it's underlined – [sic]does not now and has never represented [TPI] regarding the acquisition of [TPI's] Bakersfield license.[sic] Clearly indicates at that time they're taking the position, and this is November, that they don't represent the plaintiff. And her response, which was read to the Court, being extremely upset, but . . . [p]ointing out to Mr. Gavin, "You've got a potential conflict of interest, you've got – this constitutes gross negligence and possible collusion with USTC." But I'm now asked to consider that it was not until June of 2002 that they first became aware of this alleged conflict of interest or that a possible cause of action arose, when plaintiff's own correspondence shows that November of '01 they're clearly aware. And she's telling them, "You've got a conflict of interest. Your representation of USTC constitutes gross negligence and it's possible collusion." I don't know how much clearer it's got to be to discover facts. They may not have discovered that USTC was tanking financially, but as far as a potential malpractice claim against Patton Boggs and/or Mr. Gavin, Ms. Monahan spells it out November 8 of 2001, you know, "I've got a cause of action against you, I can sue you." Based on all of the allegations, and plaintiff's own allegation that they knew as of that date prior to the execution of this agreement with Datex that the defendants did not represent them, the fact that they've alleged repeatedly that they were represented by other counsel other than Gavin or Patton Boggs during the period of time in question, and looking at all of the allegations contained in the third amended and restated petition, the Court is of the opinion that the plaintiff has failed to state a cause of action against either Gavin or Patton Boggs for malpractice. . . . [T]he elements of a malpractice action, the first thing is you've got to establish the existence of a relationship of an attorney-client privilege. Prior to the Datex agreement, the date that they were signed, they're clearly, with that November 7 and November 8 exchange of correspondence, put on notice there is no relationship. The billing had stopped in July. They were not doing any work for TPI at that time, and they flat out say, "We don't represent you, we've never represented you." Assuming solely for the sake of argument that this petition would state a claim for legal malpractice, I think that based on the allegation of the petition, the exhibits attached thereto, and the testimony that the Court heard today, that this claim for malpractice is clearly – and I think plaintiff acknowledged that in brief – is clearly prescribed under R.S. 9:5605(A.), one year from the date of alleged act or omission or one year from discovery.

As can be seen in the foregoing transcribed excerpt of the trial court's oral reasons for judgment, the trial court held that no attorney-client relationship existed between Gavin and/or Patton Boggs and TPI. The court determined that dates and times set forth in TPI's petition did not support its claim (1) that TPI was represented by Gavin or Patton

Boggs during the relevant time; (2) that Gavin and/or Patton Boggs had committed malpractice; (3) that Gavin and/or Patton Boggs violated the Rules of Professional Conduct "with the possible exception of a conflict of interest"; and (4) that Gavin and/or Patton Boggs owed a fiduciary duty to TPI absent an attorney-client privilege. Relying upon Gavin's November 7, 2001 letter to TPI wherein Gavin stated he was not TPI's attorney, and TPI's allegations in its amended petition to the effect that TPI had retained other counsel, the trial court opined that "[TPI] has failed to state a cause of action against either Gavin or Patton Boggs for malpractice." The trial court further concluded that assuming, *arguendo*, that TPI's petition stated a claim for legal malpractice, said claim was clearly prescribed pursuant to La. R.S. 9:5605(A)[2], as this action was brought more than one year from the date of the alleged act, omission, or neglect, and more than one year from the date of the alleged act, omission, or neglect was discovered.

The standard of care that an attorney must exercise in the representation of a client is that degree of care, skill, and diligence that is exercised by prudent practicing attorneys in his locality. **Teague v. St. Paul Fire and Marine Insurance Company**, 2006-1266, p. 19 (La. App. 1 Cir. 4/7/09), 10 So.3d 806, 821, writ denied, 2009-1030 (La. 6/17/09), 10 So.3d 722. A claim for legal malpractice is stated when the plaintiff alleges that (1) there was an attorney-client relationship, (2) the attorney was guilty of negligence or professional impropriety in his relationship with the client, and (3) the attorney's misconduct caused the client some loss. **Teague**, 2006-1266 at p. 19, 10 So.3d at 821 citing **Prestage v. Clark**, 97-0524, p. 9 (La. App. 1 Cir. 12/28/98), 723 So.2d 1086, 1091, writ denied, 99-0234 (La. 3/26/99), 739 So.2d 800. The proper method of determining whether an attorney's malpractice is a cause-in-fact of damage to his client is whether the performance of that act would have prevented the damage. **Id.** Thus, simply establishing that an attorney was negligent, whether based upon the failure

[2] Louisiana Revised Statute 9:5605 sets forth a one-year prescriptive period for the filing of an action for legal malpractice running from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

to conform to an ethical rule or some other standard, would not be sufficient to state a cause of action for legal malpractice. **Teague**, 2006-1266 at p. 19, 10 So.3d at 821 citing **Executive Recruitment, Inc. v. Guste, Barnett & Shushan**, 533 So.2d 129, 131 (La. App. 4 Cir. 1988), writ denied, 535 So.2d 742 (La. 1989).

In the present case, TPI has alleged in Paragraphs 1k., 1p., 17m., and 17y. of its Third Amended and Restated Petition for Damages that Gavin and Patton Boggs provided legal representation to TPI, and stated specifically, in Paragraph 17r. that Gavin and Patton Boggs "represented TPI on all matters relating to its Bakersfield license and the FCC." TPI also alleged in Paragraphs 1k. and 1p. that Gavin was an attorney and Patton Boggs was a law firm, which at all times pertinent to this litigation, represented both TPI and USTC despite the fact that the interests of these parties were clearly adverse.

TPI alleged in Paragraphs 21 and 22 of said petition that based upon false representations made to it by representatives of USTC, USTN, and/or Datex, TPI was induced to exchange its IVDS license for shares of stock in USTC. In Paragraph 23, TPI set forth the facts regarding USTC's dire financial condition at the time of its exchange with TPI. TPI further alleged in Paragraph 24 of its Third Amended and Restated Petition for Damages that it "did not discover the falsity of the representations set forth in Paragraph 21 . . . and the actual facts . . . until after the June 12, 2002 USTC stockholders' meeting held in Baton Rouge, Louisiana."

The trial court, in its oral reasons, determined that TPI had been placed on notice through an exchange of correspondence in November 2001, of Gavin and Patton Boggs' position that "We don't represent [TPI], we've never represented [TPI]." Said claim is patently false. It is obvious from the numerous invoices for legal services performed by Gavin and Patton Boggs on behalf of TPI (copies of which were attached as Exhibits 3 and 4 to TPI's Third Amended and Restated Petition that was introduced herein as "Exhibit J-1"), that Gavin and Patton Boggs had a longstanding attorney-client relationship with TPI through at least May 30, 2001. There is no document evidencing a withdrawal of legal representation by Gavin and Patton Boggs, and although the trial court found TPI had retained additional legal counsel, there is no indication said counsel was hired to

represent TPI on "matters relating to its Bakersfield license and the FCC." As our supreme court has stated, "the existence of an attorney-client relationship 'turns largely on the client's subjective belief that it exists.'" **In re LeBlanc**, 2004-0681, p. 8 (La. 10/14/04), 884 So.2d 552, 557, citing **Louisiana State Bar Association v. Bosworth**, 481 So.2d 567, 571 (La. 1986).

It is evident from the record before this court that there existed an attorney-client relationship between TPI, Gavin, and Patton Boggs, and that Gavin and Patton Boggs simultaneously provided legal representation to both TPI and USTC despite the fact that the interests of these parties were clearly adverse. When TPI agreed to transfer to Datex its rights under the SDA together with its Bakersfield license in exchange for 14,360 shares of USTC stock on December 1, 2001, TPI had knowledge that there existed an improper conflict of interest, and perhaps an impermissible ethical violation as a result of Gavin and Patton Boggs' dual representation of both TPI and USTC.

It must be assumed that TPI would not have entered into the exchange agreement with Datex had TPI been aware of USTC's true financial condition. As a result, TPI had no knowledge it had been damaged "until after the June 12, 2002 USTC stockholders' meeting" when it learned the truth of USTC's precarious financial position. Thereafter, TPI filed the instant litigation setting forth various claims, including legal malpractice, in the 19th Judicial District Court on May 15, 2003. TPI filed this action for malpractice within one year of the date it discovered it had been damaged, and within three years from the date of the alleged dual representation of both TPI and USTC by Gavin and Patton Boggs. The filing date was therefore timely pursuant to La. R.S. 9:5605.

Accepting as true the well-pleaded allegations of fact contained in TPI's petitions, we are satisfied that it has sufficiently stated a timely cause of action for recovery against

Gavin and Patton Boggs due to legal malpractice.[3] Accordingly, it was error for the trial court to sustain the peremptory exceptions raising the objections of no cause of action and prescription. We further pretermit discussion of all other issues.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court sustaining the peremptory exceptions filed by Gavin and Patton Boggs that raised the objections of no cause of action and prescription are reversed. We hereby remand this matter to the trial court for further proceedings in accordance with law. All costs associated with this appeal shall be assessed against defendants Gavin and Patton Boggs.

REVERSED AND REMANDED.

[3] If there are two or more items or theories of recovery which arise out of the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss one item of damages or theory of recovery. In such a case, there is truly only one cause of action, and a judgment partially maintaining the exception is generally inappropriate. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1239 (La. 1993). Thus, because we have concluded the petition alleges a cause of action insofar as legal malpractice, it is unnecessary to discuss whether the same operative facts of this occurrence avers a cause of action in fraud.