
Regional Litigation Summaries

Northeast Region

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NEW YORK

New York Clarifies Its "Borrowing Statute"

New York's highest court recently laid to rest what it characterized as the "long-simmering" question of where a non-resident's contract claim should be deemed to have accrued for statute of limitations purposes. *Global Financial Corp. v. Triarc Corp.*, 1999 WL 382393 (N.Y. June 10, 1999). As many an unwary plaintiff has discovered, such a determination is no trifling matter when New York's limitations period is more generous than that applicable in a sister jurisdiction. This is so because Section 202 of the Civil Practice Law and Rules ("CPLR") requires the courts to "borrow" and apply the limitations period of the sister jurisdiction in which a nonresident's claim accrued if that period is shorter than the New York period. Specifically, CPLR 202 provides:

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

This "borrowing statute" is intended to prevent nonresidents from flocking to New York courts to obtain the advantage of limitations periods more favorable than those available elsewhere.

Observing that the rule had been the subject of considerable "guesswork" in the past, the New York Court of Appeals clarified the operation of the borrowing statute. In *Global Financial*, defendant retained plaintiff in 1988 to perform certain consulting services. Plaintiff was a Delaware corporation maintaining its principal place of business in Pennsylvania. The contract was negotiated, executed and substantially performed in New York. Claiming that it performed its obligations, plaintiff in 1989 sought in excess of \$9 million in compensation under the terms of its contract. Defendant refused to pay. In 1995, plaintiff brought breach of contract and *quantum meruit* claims against defendant.

Defendant moved to dismiss, arguing that the claims were time-barred regardless of whether the Delaware limitations period or the Pennsylvania period was applied. Plaintiff coun-

tered that New York's more generous six-year period controlled "because most of the events relating to the contract took place in New York...." Plaintiff argued that for purposes of the limitations issue the court should apply this "grouping of contacts" or "center of gravity" analysis more typically encountered in choice of law analyses. The trial court rejected plaintiff's position. It held that under New York's borrowing statute, the contract claims accrued where plaintiff suffered its injury—i.e., in Pennsylvania, its place of residence. Under the Pennsylvania limitations period, the court concluded, plaintiff's claims were barred. The Appellate Division affirmed, as did the Court of Appeals.

In affirming, the Court of Appeals concluded that plaintiff's choice-of-law analysis had no place in the determination of legislative intent with respect to the term "accrued" used in CPLR 202. The court favored "the traditional definition of accrual" over plaintiff's overly elaborate analysis of the matter. For Chief Judge Judith S. Kaye, "a cause of action accrues at the time and in the place of the injury...." When an alleged injury is purely economic, she reasoned, "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss...." The court noted that CPLR 202 is designed to promote clarity and certainty. "This goal," the court concluded, "is better served by a rule requiring the single determination of a plaintiff's residence than by a rule dependent on a litany of events relevant to the 'center of gravity' of a contract dispute."

NEW JERSEY

New Jersey's "New Business" Rule Declared Alive and Well

An intermediate appellate court in New Jersey has confirmed that the "new business" rule, which holds that prospective profits of a new business enterprise are too speculative to support a damage award for lost profits, is alive and well under the laws of that state. Reports of the demise of that long-standing rule, the court concluded, are greatly exaggerated. In *Bell Atlantic Network Services, Inc. v. P.M. Video Corp.*, 322 N.J. Super. 74 (App. Div. 1999), the Appellate Division noted that the Third Circuit's contention that "New Jersey no longer adheres to its new business judgment rule." Acknowledging the modern trend toward rejection of the rule and commenting that the arguments for abandonment of the rule "appear to be persuasive," the Appellate Division nonetheless concluded that there was no decision of the state's Supreme Court that would support such a move.

The new business rule was articulated in *Weiss v. Revenue Building & Loan Association*, 116 N.J.L. 208, 212, 182 A. 891 (E&A 1936), where the Court of Errors and Appeals stated:

There is a well established distinction, in respect of the ascertainment of future profitable profits, between a new business or venture and one in actual operation. In the first, the prospective profits are too remote, contingent and speculative to meet the legal standard of reasonable certainty; while in the second, the provable data furnished by actual experience provides the basis for estimation of the quantum of such profits with a satisfactory degree of definiteness.

The Appellate Division in *Bell Atlantic* reaffirmed the continued validity of the new business rule notwithstanding the New Jersey Supreme Court's statement in *Perini Corp. v. Grete Bay Hotel & Casino, Inc.*, 129 N.J.479, 610 A.2d 364 (1992), that:

[T]he trend in recent cases has been to award lost profits for a new business when they can be proved with reasonable certainty.... Given that recent trend, the arbitrators cannot be said to have acted in manifest disregard of the law. Thus, because the arbitrators were presented with enough evidence to decide that Sands had proved its lost profits damages with reasonable certainty, the damage award does not fall.

In *Bell Atlantic*, the Appellate Division downplayed the significance of this passage, underscoring the fact that it was authored by a mere three-justice plurality of the Supreme Court. Further, the Appellate Division noted that *Perini* only involved the review of an arbitration award and that the decision itself ultimately was overruled. In short, the court concluded that subject to further pronouncements from the New Jersey Supreme Court, the new business rule still stands.

SECOND CIRCUIT COURT OF APPEALS

Second Circuit Finds Former Corporate Executives Entitled to Fifth Amendment Privilege

In a criminal case that may have a significant impact on who can and cannot invoke the Fifth Amendment in civil matters, the Second Circuit recently found that former officers of a corporation may invoke the protection of the privilege against self-incrimination and thus may not be compelled to respond to a grand jury subpoena for corporate documents still in their possession. *In re Three Grand Jury Subpoenas Duces Tecum*, 1999 WL 692023 (2d Cir. Sept. 7, 1999). The case involved a federal investigation into allegations of improprieties at an unidentified corporation, including the falsification of its books and records and misapplication of funds. The corporation pled guilty and agreed to cooperate in the ongoing investigation of individuals suspected of being involved in the criminal activities. Doe I, Doe II and Doe III were corporate officers at the corporation when a grand jury subpoena was served upon the company. Further, they were officers both during the period of the alleged wrongdoing and at the time the corporation responded to the subpoena. Subsequent to their departure from the corporation, Doe I, Doe II and Doe III were served with subpoenas demanding "[a]ny and all

records, documents, instructions, memoranda, notes and papers... in your case, custody, possession or control, that were created during the course of, or in connection with, your employment" at the corporation.

Doe I, Doe II and Doe III declined to produce documents, invoking their Fifth Amendment privilege. The government moved to compel production. The government argued that the subject documents were corporate documents and that Doe I, Doe II and Doe III remained corporate custodians of those documents even after their departure from the company. Thus, the government argued, any claim of privilege by these former officers was tantamount to a claim of privilege by the corporation, which enjoys no such privilege. The District Court denied the government's motion, holding that the act of production on behalf of a person no longer with a corporation "is self-incrimination in its classic sense of the word."

The Second Circuit affirmed. The court acknowledged the Supreme Court's decision in *Braswell v. United States*, 487 U.S. 99 (1988). There, the Supreme Court held that a current employee of a corporation could not invoke the Fifth Amendment privilege, reasoning that "the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege." The court reasoned that to adopt the government's position "would require an extension of *Braswell* to the former employee based upon a conception that the former corporate employee who has corporate records holds them solely in a representative capacity, and acts as the corporation's agent when he or she produces them, even though the employment relationship has ended." The court declined to do so, writing, "In the absence of legal authority to the effect that a former employee remains an agent of the corporation, or any evidence that the corporation and the individual intended to maintain an agency relationship, the foundation upon which *Braswell* rests—that one who is currently employed by the corporation holds documents as an agent in a custodial capacity so that it is actually the corporation that is producing the records—is removed."