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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

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THE PRACTICE PAGE

UNPACKING THE "BORROWING STATUTE," CPLR 202

HON. MARK C. DILLON *

Litigators recite statutes of limitations in their sleep. Attorneys representing plaintiffs are keenly aware that claims must be timely brought to be entertained on the merits. Conversely, defense attorneys savor a good statute of limitations defense, as such defenses are objective in nature whenever the date of accrual, the nature of the claim, and the absence of a toll, are known.

The "borrowing statute" of CPLR 202 can trip up plaintiffs. It is one of those poorly-worded statutes that we see from time to time, which must be read two or three times to absorb its true meaning. It provides that if a non-New York plaintiff sues a New York defendant, and the cause of action accrued outside of New York, our courts must apply either the statute of limitations of New York or the state of accrual, whichever is shorter (GML, Inc. v Cinque & Cinque, P.C., 35 AD3d 195, aff'd., 9 NY3d 949). CPLR 202 will have no effect if New York's statute of limitations is the same as that of the state of accrual. Its impact is felt if the foreign state has a limitations period shorter than New York's. CPLR 202 represents a statutory version of "choice of law," but is limited by definition to the statute of limitations. Its purpose is to discourage forum shopping in New York (Eaton v Keyser, 53 AD3d 640, 641-42).

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THE PRACTICE PAGE

UNPACKING THE "BORROWING STATUTE," CPLR 202

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A simple example is where a Connecticut plaintiff incurs personal injury as a result of an unfortunate encounter with a defective premises condition at a Connecticut premises. The Connecticut premises is owned by a New York corporation. The statute of limitations in New York for negligence is three years (CPLR 214[5]), but under Connecticut law, is only two years (C.G.S. 52-584). Let us further suppose that the plaintiff brings the personal injury action in New York, in the creditable belief that verdict values in New York are generally higher than those of Connecticut. If the action is commenced in New York during year 1 or 2 from its accrual, there is no problem as it is clearly timely. However, if the action is commenced in New York in year 3, the borrowing statute would require that the timeliness of the action be measured against the shorter foreign statute of limitations, in this instance, Connecticut's statute.

A New York court "borrowing" Connecticut's 2 year limitations period would be required to dismiss the action as untimely, even though the action would be otherwise timely under New York's own statute of limitations.

New Jersey is another state in the northeast region that also has a two year statute of limitations for negligence, and where the same scenario described above could play out in a given case (N.J.S.A. 2A:14-2).

CPLR 202 only applies if the plaintiff is a non-New Yorker, as it does not apply in reverse where the defendant is the non-New Yorker party subject to our state's jurisdiction (Insurance Co. of North America v ABB Power Generation, Inc., 91 NY2d 180, 186). Also, CPLR 202 only applies if the cause of action accrued outside of New York. There is no requirement that the plaintiff's state of residence and the accrual state be the same — New York must use the statute of limitations of the foreign state where the cause accrued.

Application of a foreign statute of limitation includes application of that state's tolling provisions as well (Childs v Brandon, 60 NY2d 927, 929). Therefore, it is actually the "net" statute of limitations of the foreign state that must be compared to the "net" of New York. It should be pleaded by defendants as an affirmative defense in their answers so that it is not waived (CPLR 3018; 3211[a][5]).

The borrowing statute raises its head more often in the federal courts sitting in our state than it does in our state courts, as federal litigations based on diversity of citizenship involve, by definition, a plaintiff and a defendant from different states, and at least one of them is from New York (28 U.S.C. 1332). In some percentages of those actions, the plaintiff is the out-of-state party and the cause of action accrued outside New York as well.

The borrowing statute applies to all causes of action, and a review of Westlaw reveals its relevance over the years to actions sounding in negligence, intentional torts, wrongful death, contract, fraud, breach of warranty, divorce, conversion, real property disputes, and accounting proceedings. It is an issue that attorneys should red flag whenever plaintiffs and defendants are from different states and the cause of action accrued outside of New York. The courts have no discretion to ignore the borrowing statute when it applies. For plaintiffs, non-sensitivity to the borrowing statute can lead to a fateful doom. For defendants, it may provide a knock-out blow against those plaintiffs' complaints without having to even reach their merits.

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* Mark C. Dillon is a Justice of the Appellate Division, Second Department, an Adjunct Professor of New York Practice at Fordham Law School, and an author of CPLR Practice Commentaries in McKinney's.

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM HIGGINS, ESQ. of LEMIRE & HIGGINS, LLC

Summary judgment in death cases.

Damphier v. Brasmeister (Aarons, J., 7/16/20)

Plaintiffs were the mothers of two teenagers who were shot and killed in 2012, and brought this action against the grandparents/parent of the shooters; alleging claims for negligent supervision and negligent entrustment of the rifles used in the killings. Supreme Court (Aulisi, J., Montgomery Co.) granted the defendants' motions for summary judgment which the Third Department found was proper as the record evidence established that the rifle in the grandparents' home was kept under lock and key and they did not consent to or permit its use by their grandson, and the second rifle (used by Defendant Brasmeister) was stolen from a third party, a fact unknown to the shooter's father. Affirming the trial court, the Appellate Division found the plaintiffs failed to raise a triable issue of fact on either cause of action, including its reliance (on the negligent supervision claim) on one of the shooter's social media postings or text messages which discussed guns and songs with violent-themed lyrics.

Smith v. Park (Devine, J., 6/25/20)

This death action, by the mother of a 14-year old killed in an accident while operating a skid steer owned by the defendant Park Family Farm, was dismissed by Supreme Court (Guy, J., Cortland Co.), which found the suit was prohibited by the "exclusive remedy" provision of Workers' Compensation ("WC") Law §11. Plaintiff admittedly received accidental injury and death benefits in the WC claim but premised her opposition to the summary judgment motion on her 8th cause of action – an exception to the §11 bar - alleging the defendant engaged in criminal conduct which led to the boy's death. The Third Department affirmed the trial court's dismissal of the action, concluding that the defendant's guilty pleas to child endangerment and prohibited employment of a minor might infer negligence or recklessness by the defendant but not a "willful intent to harm" the decedent, as required to show an exception under §11.

Plaintiffs survive summary judgment motions.

O'Keefe v. Wohl (Garry, P.J., 6/25/20)

The plaintiff motorcyclist, injured in a collision with a car at an intersection, sued the other driver and the Town of Northumberland, alleging the municipality negligently constructed and maintained the roadway. The Town, relying on both drivers' familiarity with the intersection, opposed plaintiff's claim that more devices, signs or road markings were needed to warn of the intersection. Supreme Court (Nolan, J., Saratoga Co.) agreed with the Town and granted summary judgment but the Third Department reversed and reinstated the municipal claim, concluding that the conflicting opinions offered by expert witnesses "creates a question of credibility to be resolved by the finder of fact", and that the drivers' familiarity with the intersection does not preclude liability as a matter of law.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

(Continued from Page 3)

Cole v. Chun (Colangelo, J., 7/9/20)

The plaintiff alleged causes of action for lack of informed consent and medical malpractice after ophthalmology treatment for vision changes in his left eye – a corneal transplant that later "fell apart" – left him with a retinal detachment and a significant, permanent loss of vision. Supreme Court (Cahill, J., Ulster Co.) denied the ophthalmology defendants' motion for summary judgment and the Third Department affirmed. Defendants did not dispute the existence of a triable issue of fact regarding malpractice; but argued that the plaintiff could not prove a causal connection to his injuries. The Appellate Division rejected the argument, noting plaintiff's expert witness opined that the defendants' failure to prescribe antibiotic therapy led to an infection which caused plaintiff's vision loss.

Post-settlement proceedings.

DeLap v. Serseloudi (Per Curiam, 6/18/20)

The plaintiffs (wife and husband) agreed to settle their dental malpractice action for $150,000 and their attorney agreed to reduce the fee to which he was entitled. But when they later refused to sign the settlement documents, their attorney moved for confirmation of the settlement and leave to withdraw as counsel (which relief was "So Ordered" by Supreme Court after the attorney reduced his fee even further). Plaintiffs later failed to sign the $150K settlement check, after which counsel moved for an order directing that the defendants' malpractice insurer issue separate checks to plaintiffs and the attorney. Supreme Court (Hartman, J., Albany Co.) denied counsel's motion and permitted plaintiffs to vacate the settlement agreement. On counsel's appeal, the Third Department ruled that the filing of a stipulation of discontinuance of the malpractice action (after the revised settlement was "So Ordered") removed Supreme Court's authority to decide the motions that followed and "a plenary action was required…to enforce (or set aside) the settlement".

Lamela v. Verticon, Ltd. (Pritzker, J., 7/23/20)

Plaintiff's multi-defendant construction site accident-injury action premised on a violation of Labor Law §240(1) was settled for $3.2-million; with payments split (but not evenly) amongst the defendants. Plaintiff's employer (Lamela), brought into the action as a third-party defendant, did not contribute to the settlement and objected to its terms. Post-settlement, two defendants filed an amended third-party complaint seeking contractual indemnity from Lamela, which cross-claimed seeking common-law indemnity and contribution. Motion practice by all parties followed and on this appeal, Lamela sought to reverse the ruling by Supreme Court (Gilpatric, J., Ulster Co.) dismissing Lamela's cross-claims. The Third Department, recognizing that Lamela's cross-claims "stems from its belief that the insurance carrier [for the defendants who contracted with Lamela] acted in bad faith by apportioning the larger share of the settlement" to the defendant who was only vicariously liable under §240(1), affirmed the lower court and noted that "we cannot fashion a common-law indemnity right where none exists".

ELECTION 2020

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

I started writing for this newsletter in 2013. I've actually enjoyed writing (just about) every article. It gives me time to step away from my daily practice, put "pen to paper", and educate some of you on the complexities of my world (i.e., my law practice).

Since 2016, this article has also given me the opportunity to vent, perhaps a lot, and maybe even too much. Many of you have noticed. As if the practice of immigration law is not complex enough, it became unbelievably more so, unnecessarily in my opinion, when Donald Trump was elected as our 45th U.S. President.

Right now, the field for 2020 is narrowed down to two. The race has been fully joined. Donald Trump versus Joe Biden. What does that mean for "immigration"? A lot!

Let's reflect back to the President's inaugural speech. "We, the citizens of America, are now joined in a great national effort to rebuild our country and to restore its promise for all of our people." These were just about the first words uttered by President Trump in his inaugural address. Almost four years later, given the President's rhetoric on the campaign trail (both then and now), I continue to find it ironic that he in the same sentence speaks how "the citizens of America" would restore our country's promise "for all of our people."

Hindsight is 20/20. "All of our people" does not mean everyone that's here. Nope, citizens only for our President. "Every decision on … immigration … will be made to benefit American workers and American families." Well he's held true to that statement. Fewer (and in some case almost no) rights for almost everyone else, whether they are lawfully living in the United States or not.

You might recall that President Trump quoted the Bible in his inaugural speech; specifically, "how good and pleasant it is when God's people live together in unity." I agree. "All of our people" should be able to remain here and live here in unity.

Joe Biden strikes me as a person of profound compassion. Among other things, his platform advocates for immediately reversing the Trump Administration's cruel and senseless policies that separate parents from their children at our border. His platform also advocates for ending President Trump's detrimental asylum policies, reversing Trump's public charge rule, ending the so-called "national emergency" that bleeds federal dollars from real national security concerns to build a wall (that Mexico was supposed to pay for),[1] and protecting Dreamers and their families. Mr. Biden also advocates for rescinding the President's travel and refugee bans, commonly referred to as "Muslim bans." He also advocates for restoring sensible enforcement priorities (at our border and within the U.S.).

Equally as important, Mr Biden's platform calls for modernizing America's immigration system, including creating a roadmap to citizenship for the nearly 11 to 13 million people who are present in the United States, have been living in the country for years, but are without status and often are here through no fault of their own. I'm all for that.

Of course, he cannot do it alone. He'll need lots of congressional support in order to accomplish any of this. For starters, though, we must do our part. We need to vote. We need to vote like our country depends on it. Because it does.

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[1] Although it is an ironic twist that one of the President's previously trusted advisors, Steven Bannon, has been arrested on federal charges that he defrauded those who donated to a nonprofit called "We Build The Wall".

LOCAL LAW FIRM GROWS BY 40% AND EXPANDS ITS PRESENCE IN THE NORTHEAST

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ALBANY, N.Y. (September 8, 2020) – The Towne Law Firm ("TLF'), an Albany-based Law Firm, announces a major expansion of its professional team and its geographic reach to accommodate increasing client needs in multiple jurisdictions throughout the Northeast. TLF welcomes several new attorneys to its team, increasing the total number of attorneys at the Firm to 24. The TLF Team now has attorneys barred in New York; Connecticut; New Jersey; Pennsylvania; Vermont; Massachusetts; and Washington, D.C. Additionally, the Firm now has new office locations in Glens Falls, NY; Arlington, MA; and Sparta, New Jersey.

Attorney John A. Musacchio, a former TLF associate, has become a Partner in the firm, continuing his services representing both individuals and businesses in many diverse practice areas across the Northeast, including New York, Vermont, Massachusetts, and Pennsylvania.

Attorney Jessica E. Stover has joined the firm as a Partner and focuses her practice in Real Estate Law, which includes Residential and Commercial Purchase and Sales; Leases; Bank Representation; Homeowners' Associations/Condo Associations; Title Examination and Title Insurance Law; as well as Estate Planning: Trusts & Wills.

Attorney Matthew R. Kobelski also joins the Firm's Real Estate practice; Matt has assisted the Firm in expanding its reach into Massachusetts, with the addition of an Arlington, Massachusetts location.

Previously, a Co-Founder of Key Holdings LLC, Attorney Joshua D. Koss joins the TLF team with a background in business law and real estate law, dealing with business transactions and estate planning. Joshua attended law school at the University of Virginia School of Law, where he received his J.D.

Attorney John P. Mastropietro joins the TLF Team with a practice focusing on Construction Law. John has over 25 years of experience in the industry and is also a registered architect, which allows him to provide the Firm with industry experience and knowledge within the construction business sector.

Broadening TLF's Dealership practice group, Attorney Stuart A. Rosenthal joins TLF providing representation and counseling to automotive dealers. The Firm welcomes Mr. Rosenthal and his 35 years of experience in Automobile Dealership Law with an emphasis on Regulatory Law and Compliance.

Focusing primarily on Residential and Commercial Real Estate transactions, wills and trusts, General Business advice and guidance, Attorneys Robert E. Cummings, Jr. and Thomas J. Dailey have also joined TLF. Their diverse legal experience provides the Firm with additional expertise and allows TLF to expand its reach in the Bennington, Vermont area.

Expanding TLF's geographic reach to satisfy client needs living in New Jersey, Attorney Linda A. Peoples joins the TLF team with her practice focusing on Real Estate Law, Business Law, and Litigation.

Krista K. Porter, who joined the firm as a law clerk in 2018, has since been authorized by the Appellate Division of the Supreme Court, Third Judicial Department to temporarily engage in supervised practice of law at The Towne Law Firm, P.C., pending her admission to the New York State Bar.

James T. Towne, Jr., founding Principal of the Firm says, "The Towne Law Firm looks forward to our future as we continue to expand our reach throughout the Northeast to meet our clients' expanding geographic and practice needs, while advancing our internal growth through our team's enhanced knowledge in our practice areas and specialty industries."

TULLY RINCKEY CONTINUES EXPANSION WITH NEW SARATOGA SPRINGS OFFICE

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September 18, 2020 – Albany, NY – Maintaining a focus on growth and expansion despite the COVID-19 pandemic, Tully Rinckey PLLC is very pleased to announce that it has opened an office in Saratoga Springs.

The new office, located at 125 High Rock Avenue in Saratoga Springs, offers clients a range of legal services covering family and matrimonial, trusts and estates, corporate, and criminal law. The lead attorney for the Saratoga Springs office is Tully Rinckey Partner Michael J. Belsky. Mr. Belsky has over 20 years of experience practicing law in Saratoga County, and has fought for the rights of Capital Region clients in virtually every aspect of family and matrimonial law. Mr. Belsky has extensive experience serving as an Attorney for the Child for Saratoga County Family and Supreme courts and understands the nuances and processes related to all matters related to divorce, adoption, child custody and support.

Additional Tully Rinckey attorneys that service the firm's Saratoga Springs location include Derrick Hogan, who leads the Capital Region criminal defense practice, and Jennifer J. Corcoran, who handles a wide range of legal matters, including those relating to trusts and estates, matrimonial and family law, and real estate law.

"Our expansion into Saratoga Springs is a testament to Tully Rinckey's commitment to growth, even during these challenging times during the COVID-19 pandemic," said Michael Macomber, Tully Rinckey PLLC's Chief Executive Officer. "We have been considering a Saratoga office for years while opening up offices throughout the country and throughout the world. The last few months have provided us with an opportunity to strategically review our business model and how we can better service Capital Region individuals and businesses" said Macomber.

The firm's Saratoga Springs office provides clients with ample free parking and has begun booking consultations. The Saratoga Springs location is Tully Rinckey's seventh office in New York State, joining Albany, Manhattan, Syracuse, Rochester, Buffalo and Binghamton. The Firm also has office locations in Washington, D.C., Austin, TX, Houston TX, San Diego, CA, and internationally in Dublin, Ireland and London, England.

GLENS FALLS LAW FIRM SEEKING LEGAL ASSISTANT/SECRETARY

Seeking Legal Assistant/Secretary for law firm in Glens Falls – Real Estate and Estate Administration experience preferred – Contact dlefton@mmshlaw.com

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