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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE DEVELOPMENTS

On Certified Question, New York State Court of Appeals Recognizes Cross-Jurisdictional Tolling of the Statute of Limitations for Absent Class Action Members

Concluding That to Rule Otherwise Would Subvert CPLR Article 9

In *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974), the United States Supreme Court held that the commencement of a class action tolls the running of the statute of limitations for all purported class members "who make timely motions to intervene after the court has found the suit inappropriate for class action status." Subsequently, in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the Court extended *American Pipe* to toll the limitation period for putative class members who choose to bring *individual* actions after denial of class certification. Finally, in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), the Court limited the tolling to individual claims and not subsequent class actions.

In *Chavez v. Occidental Chem. Corp.*, 2020 N.Y. Slip Op. 05839 (October 20, 2020), answering a certified question from the Second Circuit, the New York State Court of Appeals ruled that New York recognizes the tolling of the statute of limitations for absent class members of a putative class action filed in *another* jurisdiction. The Court was also asked about issues relating to when the toll terminated, which we will discuss separately below.

We will attempt to distill a rather complicated fact pattern to its essentials: A 1993 Texas state court class action asserting identical claims to those advanced in this litigation was removed to federal court under the Sovereign Immunities Act of 1979 (FSIA). The plaintiffs alleged injuries based upon the manufacturing of a nematicide called dibromochloropane (DBCP) by the defendant. Before the court addressed the class certification issue, however, the defendant moved to dismiss on forum non conveniens grounds. In conditionally granting the motion, the court included a return jurisdiction clause

> which stated that the 1993 plaintiffs could test the jurisdiction of their home countries and, in the event of a dismissal for lack of jurisdiction, "plaintiff[s] may return to [the federal district] court and, upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed for [forum non conveniens]."

Id. at *4.

Following the District Court's entry of a "final judgment," certain 1993 plaintiffs sought reinstatement under the return jurisdiction clause, but because issues relating to the "final judgment" were still not resolved by the Fifth Circuit, the District Court denied the motion without prejudice. Eventually, based on a 2003 Supreme Court decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Texas action was remanded to state court; in 2006, the Texas state court granted the motion to reinstate; and in 2010, the court denied the class certification motion and granted the motion to voluntarily dismiss the action.

In 2011 and 2012, certain absent class members of the Texas action's putative class, including the lead plaintiff here, brought two parallel federal actions in Louisiana and this action in Delaware. The Louisiana action was dismissed on statute of limitations grounds; the Delaware action was transferred to the Southern District of New York, where defendant is incorporated. The defendant moved for judgment on statute of limitations grounds, and the District Court granted the motion. It then certified an interlocutory appeal to the Second Circuit, noting the conflict in the District as to whether New York permits cross-jurisdictional tolling.

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In recognizing cross-jurisdictional tolling here, the Court of Appeals stressed several factors, including:

- New York's CPLR Article 9 is modeled after FRCP 23.
- Ruling to the contrary "would subvert article 9—the primary function of which is to allow named plaintiffs to bring truly representative lawsuits without necessitating a multiplicity of litigation that squanders resources and undermines judicial economy, while still ensuring that defendants receive fair notice of the specific claims advanced against them." *Chavez*, 2020 N.Y. Slip Op. 05839 at *14–15.
- The same "animating" policies discussed in *American Pipe* and its progeny apply to Article 9, in that they "were intended to permit the named plaintiffs in a putative class action to act as placeholders, fully representing absent class members who have the same claims"; and they were designed to avoid duplicative and wasteful litigation "by eliminating the need—during the pendency of the class action—for putative class members to initiate individual claims to protect their rights, while simultaneously providing notice to defendants of the claims not only of the named plaintiffs, but also of potential absent class members who could advance those same claims." *Id*. at *15.
- Ruling otherwise would compel putative class members to bring individual claims in New York and elsewhere before the statute of limitations expires, fearing a denial of class certification. "For that category of putative class members, the representative role of named plaintiffs would be illusory until class certification was granted." *Id*. at *16.

The Court rejected the defendant's argument that CPLR 201's prohibition against courts extending the time to commence an action prevented the recognition of cross-jurisdictional tolling:

> Our recognition of *American Pipe* tolling cross-jurisdictionally does not run afoul of the statute or its purposes because it is predicated on the express legislative design of CPLR article 9. CPLR 201 makes clear that courts do not have discretion to excuse late filings by plaintiffs who slept on their rights. Cross-jurisdictional tolling does not implicate this concern because injured individuals who rely on a representative class action have not slept on their rights and such tolling involves no exercise of judicial discretion—it turns entirely upon the existence of a class action. Moreover, our statute of limitations doctrines are intended to promote repose, not undermine other significant statutory schemes. Our recognition of American Pipe cross-jurisdictional tolling harmonizes any tension between two statutory schemes adopted by the legislature, CPLR articles 2 and 9, and is not an exercise of judicial discretion (citations omitted).

Id. at *17–18.

The Court emphasized that the tolling only applies if the defendant received fair notice of all claims that could arise under New York law and that the class action must be timely and comport with CPLR 202. Finally, the Court took the opportunity to recognize *American Pipe* tolling intra-jurisdictionally.

Court Unanimous That Toll Can Terminate Upon a Non-Merits Dismissal of Class Certification

But It Divides as to Type of Dismissal That Qualifies

The Court in *Chavez* was not done. It was also asked by the Second Circuit whether the toll ends upon a non-merits dismissal of class certification and whether the orders in this case did so. The Court held that a non-merits dismissal of a class action can terminate the class action. Up to this point, the Court of Appeals was unanimous. However, agreeing on a concrete rule as to when the non-merits dismissal applied divided the Court. The majority noted that there was agreement that the tolling ceased "when it is no longer objectively reasonable for the absent class members to rely upon a putative class action to vindicate their rights." It then applied a "bright line" rule that the tolling ends as a matter of law

> when there is a clear dismissal of a putative class action, including a dismissal for forum non conveniens, or denial of class certification for any reason. Under those circumstances, future plaintiffs are on notice that they must take steps to protect their rights because the litigation no longer compels the court to address class certification or the named plaintiffs to advance absent class members' interests. At that point, it is no longer objectively reasonable for absent class members to rely upon the existence of a putative class action to vindicate their rights, and tolling is extinguished. Thus, in this case, the 1995 Texas orders that dismissed that action on forum non conveniens grounds ended tolling, as a matter of law (citation omitted).

Id. at 20–21.

The dissent took issue with the majority's bright line rule, stating instead that the tolling should terminate only where the dismissal is "unconditional, meaning that the court leaves potential plaintiffs without any expectation of an opportunity for future class certification." *Id*. at *22. The dissent noted that the dismissal here, with a return jurisdiction clause, was *conditional*, and did not end the cross-jurisdictional tolling:

> Certainly the District Court did not understand its dismissal as a final rejection of class certification. The court acknowledged that it "conditionally granted defendants' motion to dismiss under the doctrine of forum non conveniens," and that the forum-non-conveniens "dismissal entered in this case was 'final' only for purposes of appealing the court's [forum-non-conveniens] decision." The district court order made clear that if another forum was not available in their home country, the plaintiffs could return to federal court, picking up exactly where they had left off. When the plaintiffs then returned to Texas, the District Court noted that the return-jurisdiction clause was "an express statement of the court's intent to retain jurisdiction," and that the reinstated suit was "a direct continuation of the prior proceedings[.]" The plaintiffs, and thus the potential class members, had every reason to rely on the District Court's representations (citations omitted).

Id. at *28.

Vicious Propensity Notice Rule Does Not Apply to Veterinary Clinic Owner

Negligence Claim May Lie Notwithstanding Lack of Notice of Propensity

In *Hewitt v. Palmer Veterinary Clinic, PC*, 2020 N.Y. Slip Op. 05975 (October 22, 2020), a pit bull (Vanilla) treated at the defendant's (Palmer) veterinary clinic, attacked the plaintiff in the defendant's waiting room. The plaintiff alleged that Palmer knew of the dog's vicious propensity, that it had notice that the pit bill was dangerous, that Palmer's office manager had advised her that the "dog had a history of being vicious," and that Palmer breached its duty to provide a safe waiting room by not exercising due care and for allowing an "agitated, distressed" dog into the waiting room.

Palmer moved for summary judgment, arguing that it had no prior notice of the dog's vicious propensities and that such knowledge was a condition precedent to establish liability against it. The plaintiff opposed the motion and cross-moved for partial summary judgment, asserting that Palmer could be liable under a negligence theory even without knowledge of the dog's vicious propensities. The trial court granted the defendant's motion, and the Appellate Division affirmed, concluding that Palmer could not be held liable without notice of the dog's vicious propensities, relying on precedent applicable to animal owners.

The Court of Appeals modified the order. The Court noted that the vicious propensity notice rule has been applied *to animal owners* under a strict liability theory and to non-pet owners, like landlords renting to pet owners, under a negligence standard. Here, the Court concluded that Palmer did not need the protection of the vicious propensity notice requirement and that the absence of that notice did not require plaintiff's claim to be dismissed:

> It is undisputed that Palmer owed a duty of care to plaintiff—a client in its waiting room. . . . [H]ere, a veterinarian introduced Vanilla into a purportedly crowded waiting room, where the dog was in close proximity to strangers and their pets—allegedly creating a volatile environment for an animal that had just undergone a medical procedure and may have been in pain. Palmer is in the business of treating animals and employs veterinarians equipped with specialized knowledge and experience concerning animal behavior—who, in turn, may be aware of, or may create, stressors giving rise to a substantial risk of aggressive behavior. With this knowledge, veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate this risk.

Id. at *6–7.

The Court emphasized that it was not suggesting that Palmer would be liable under the strict liability theory applicable to domestic animal owners. However, it believed a negligence claim could lie, and questions of fact existed as to whether the injury was foreseeable and whether Palmer took reasonable steps to discharge its duty. Thus, both parties' summary judgment motions should have been denied.

The concurrence agreed with the majority's holding but maintained that the rule established in *Bard v. Jahnke*, 6 N.Y.3d 592 (2006), that an injured party can bring a claim in strict liability *only* against the owner of domestic animals should *not* be extended to persons other than the animal's owner. The concurrence noted that prior to *Bard*, a person injured by a domestic animal could sue the owner under an ordinary negligence or strictly liability theory. Under the former, the plaintiff would have to prove that the defendant failed to use due care in discharging its duty. Under the latter, if the owner knew of the animal's vicious propensities, he or she could be held strictly liable and could not avoid liability by showing the exercise of due care. The decision in *Bard*

> radically altered New York's settled law allowing negligence actions against animal owners. It shifted the burden away from owners of domestic animals, who previously had to comply with a duty of care, to parties injured by those animals. Though *Bard* correctly stated the rule, affirmed in *Collier v Zambito*, that an owner who knows or has reason to know of an animal's dangerous propensities faces strict liability, it introduced the novel holding that strict liability was the only type of liability that an owner of a domestic animal may face. After *Bard*, unless owners had knowledge of their domestic animals' vicious propensities—established by prior acts, behaviors of the animal, or behaviors of its owner which lead to an inference of viciousness—those owners were insulated from liability. However, *Bard* neither altered nor established any rule as to the liability of non-owners responsible for injury-causing animals (citations omitted).

Hewitt, 2020 N.Y. Slip Op. 05975 at *14.

The concurrence emphasized that the Court has declined to extend *Bard* to non-owners and that the decision does not "immunize others from liability for their own negligence," and "[t]he inequity of the *Bard* rule in the context of pet-owner liability sharply cautions against extending that rule a whit." *Id*. at *15–16. The concurrence agreed with the majority that there were issues of fact as to whether Palmer properly exercised its duty of care to persons waiting in its clinic, under ordinary negligence rules.

You Cannot Raise a New Theory of Liability in a Supplemental Bill of Particulars

Lack of (Different Type of) Notice in Complaint Is Fatal

A subsidiary issue in *Hewitt* was plaintiff's allegation first asserted in a supplemental bill of particulars that Palmer was negligent "in not giving an effective pain medication and/or anesthesia to the dog" and "in not following the standard of care [for] dogs after surgery." The trial court struck the new theory, concluding that there was no notice in the complaint. Following the Appellate Division affirmance, the Court of Appeals affirmed, noting that

> [t]hose allegations, raised for the first time several years after commencement of the action, introduced a new theory of liability into the case relating to Palmer's medical treatment of Vanilla and the standard of care owed to the patient dog and its owner, as compared with the duty that Palmer owed to plaintiff. Palmer was not on notice of these claims based upon the original allegations of the complaint and, on this record, the striking of such allegations did not constitute an abuse of discretion (citations omitted).

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Id. at *8.

This would be a good time to emphasize the difference between a supplemental bill of particulars and an amended bill of particulars, particularly in the area of personal injury litigation. Under CPLR 3043(b), a party can serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities at any time without leave of court, but not less than 30 days before trial. Significantly, however, a supplemental bill cannot include a new cause of action or new injury. The party served with a supplemental bill is entitled to disclosure on seven days' notice, with respect to such continuing special damages or disabilities.

In contrast, a party can amend his or her bill of particulars once as of course *prior* to the filing of the notice of issue. CPLR 3042(b). Such an amendment can include new grounds or theories. *See* Weinstein, Korn & Miller ¶ 3042.15 (David L. Ferstendig, ed. LexisNexis Matthew Bender).

Update Regarding Conflict Among Appellate Division Departments

Fourth Department Switches Sides

In the April, 2020 edition of the *Law Digest*, we referred to the Second Department decision in *Evans v. New York City Tr. Auth.*, 179 A.D.3d 105 (2d Dep't 2019). There, the court held that an appellant need not make a post-verdict motion for a new trial to preserve a contention that the verdict was contrary to the weight of the evidence. We noted that the Third and Fourth Departments had held to be contrary, imposing a preservation requirement.

Well, the Fourth Department has since joined the Second Department. In *DeFisher v. PPZ Supermarkets, Inc.*, 186 A.D.3d 1062, 1063 (4th Dep't 2020), the court held that

> we conclude that plaintiffs were not required to preserve their contention that the jury verdict was contrary to the weight of the evidence by making a postverdict motion for a new trial. Inasmuch as the trial court is authorized to order a new trial "on its own initiative" when the verdict is contrary to the weight of the evidence (CPLR 4404 [a]) and "the power of the Appellate Division . . . is as broad as that of the trial court," "this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court." To the extent that our prior decisions hold otherwise, they should no longer be followed (citations omitted).

Update and Caution Concerning Scope of Governor's Executive Orders with Respect to CPLR Time Limits

In the August 2020 edition of the *Law Digest*, we attempted to deal with the implications of the Governor's Executive Orders with respect to various deadlines. We characterized Executive Order 202.8 as a toll and described the impact and effect of the toll. It is important to note that an argument has been raised as to whether a pure toll exceeds the Governor's powers under the Executive Law and that the Executive Orders "suspended," rather than tolled, the applicable procedural deadlines. *See, e.g.*, Judge Thomas E. Whelan, *Executive Orders: A Suspension, Not a Toll of the Statute of Limitations*, New York Law Journal, October 6, 2020.

We believe the language of the Executive Order is clear that a toll was intended. Nevertheless, if it were to be determined that the Executive Law does not permit the Governor to toll the deadlines, a suspension would be similar to those issued in connection with 9/11 and Superstorm Sandy. Most significantly, and of concern, would be any deadlines falling between March 20, 2020 and November 3, 2020, the last day of any "suspension" (*see* Executive Order 202.67 dated October 4, 2020). If the Executive Orders resulted in a suspension rather than a toll, anything with a deadline during that period would become due on November 4, 2020.

Thus, in an excess of caution, and in line with our words of caution in the *Digest*, a practitioner in that predicament should probably file any claims or actions or meet *any prior* deadlines on or before November 4, 2020. Moreover, any deadlines after November 3, 2020, should be treated as firm and not subject to a toll. Repeating Professor Siegel's sage advice: "Let this issue ultimately be decided in someone else's case."

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