

Resurrection from Repose: Forum Shopping, Law Borrowing and Defense Strategizing

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Litigation Alert

8.31.22

Litigation strategy is a dynamic process from pre-suit through the appellate systems. For parties initiating an action, choosing the most advantageous court or “forum” is key. Attorneys and their clients consider many factors about different courts which could impact the case outcome. Everything from the quality of the bench, jury pool composition, substantive law, and a forum’s procedural and discovery rules have potential to tip the scales in favor or against a particular forum and likewise dictate defense strategy. In a recent decision, *Kornfeind v. New Werner Holding Co.*, 2022 Pa. LEXIS 1172 (Aug. 16, 2022), the Pennsylvania Supreme Court illustrated the importance of one element of a comprehensive choice of forum analysis: understanding which state’s laws will likely apply to the case and how the “choice of law” may compel a certain outcome.

Where Can a Corporate Defendant Be Sued?

Litigants and their attorneys do not have an unfettered right to sue anyone anywhere. The U.S. Supreme Court has ruled that the U.S. Constitution imposes limits on where an out-of-state company might have to defend itself. A plaintiff may sue a corporate defendant — for-profit or non-profit — in courts located: (1) in the company’s home state, meaning the state of incorporation or in which the company maintains its principal place of business; and (2) in those states where the company systematically served that state’s market for a specific company product or service that gives rise, in-state, to the lawsuit. However, even the two-factor test for where a company may be sued is more nuanced than meets the eye. It is essential to defense strategy to stay up to date on changes or new interpretations of the law. What was once considered a basis for jurisdiction, may not always hold true.

Which Jurisdiction’s Law Will Benefit Defense? Choices of Law, “Borrowing Statutes,” and the *Kornfeind v. New Werner Holding Co.* Decision

In addition to evaluating the implications of whether a particular court has jurisdiction, defense attorneys must be prepared to advocate for which state’s law should apply to a case or even to specific issues within the same case. This requires deep analyses of many potential issues. Every state has its own statutory, common law, and regulatory body of law. The laws of each of the fifty states vary from one another in ways subtle, substantive, and significant. Moreover, suits brought in federal court operate by different rules. Add in that many states have “Borrowing Statutes,” which allow a court to “borrow” a statute of limitations from another jurisdiction the question becomes: “which body of law applies to which *part* of any given dispute?”

Pennsylvania’s *Kornfeind* decision exemplifies the legal complexity. The case involved the question of whether Pennsylvania would “borrow” Illinois’ statute of repose. The *Kornfeind* plaintiff, an Illinois resident, fell at home from an allegedly defective ladder purchased in Illinois. The plaintiff sued the Pennsylvania-based successor to the ladder-manufacturer in Pennsylvania, where venue rules allowed the action to be brought in Philadelphia County. Pennsylvania has what’s called a “Borrowing Statute,” the Uniform Statute of Limitations on Foreign Claims Act, 42 Pa.C.S. § 5521. The Borrowing Statute provides, that for action arising out-of-state, like in *Kornfeind*, if the law of the state where the action arose has a shorter statute of limitations than Pennsylvania’s, the shorter statute will apply. The *Kornfeind* court had to determine whether the Pennsylvania Borrowing Statute would require invoking the Illinois statute of repose, which would have barred the entire lawsuit. [1]

Pennsylvania does not have a statute of repose that would be applicable to the claims the plaintiff pursued. By contrast, the Illinois statute of repose would bar the *Kornfeind* lawsuit because more than 12 years had passed (the time limit set by the statute of repose) since the product was sold. The *Kornfeind* manufacturer argued that the Borrowing Statute should encompass statutes of repose so that the Pennsylvania court could apply the 12-year frame to the suit, which would cause plaintiff's case to fail as matter of law. The *Kornfeind* court ruled in favor of the plaintiff. It held that the Pennsylvania Borrowing Statute was not to be read as borrowing the Illinois statute of repose.

A Law by Any Other Name Is *Not* as Sweet: What Does It Mean if a Law Is Considered "Procedural" Versus "Substantive?"

When issues emerge regarding which jurisdiction's law should be applied, how a law is characterized by the court hearing the case can have a significant impact on strategy. Generally, courts will apply their host-state's procedural laws or rules. However, if the law is characterized as "substantive," courts must undertake a "choice of law" analysis to determine which state's substantive law should apply. By way of example, in Pennsylvania, statutes of limitation are considered procedural in nature. Therefore, Pennsylvania courts would ordinarily apply its statute of limitations to a given cause of action (but the legislature has adopted the Borrowing Statute to dissuade litigants from filing suit in Pennsylvania for the purpose of extending the statute of limitations). Even though statutes of limitations and statutes of repose are both defenses that involve arguing that a cause of action cannot proceed based on a specified length of time, the *Kornfeind* court explained in its analysis that statutes of repose are *substantive*. This means that the decision of which state's law to apply is subject to an additional analysis for "choice of law." These "choice of law" analyses also differ by jurisdiction.

In short, The *Kornfeind* court held that the plain text of the Borrowing Statute did not encompass the statute of repose. Therefore, even though the case would be dismissed if Illinois law controlled, it is not shut out as a matter of law in Pennsylvania. When it comes to forum-specific strategy, the devil is in all the details.

Key Takeaways

- Where a lawsuit is filed is not always in the plaintiff's home state or the state where an accident or injury occurred. The plaintiff may file in a different state, but the court must have personal jurisdiction over the defendants. Attention to jurisdictional jurisprudence is essential.
- Litigation requires familiarity with the procedural and substantive rules of the court in which the action is brought.
- Defense strategy should include analysis of the laws of any state related to the cause of action, regardless of where plaintiff filed suit. Counsel should identify differences in among the state's law and compare which is favorable.
- It is important to not only identify differences among states, but also identify whether the specific legal issue is a matter of procedural or substantive law and how that informs choice of law analyses.
- Changes in the law should be closely followed, including legislative action as well as appellate case law applying statutes.
- Do not assume an issue is procedural or an issue is substantive; make the determination state-by-state and review new case law on the issue. Then, evaluate whether any statutes would apply to change the expected application (like the Borrowing Statute).

If you have any questions or would like additional information, please contact William D. Kennedy (kennedyw@whiteandwilliams.com; 215. 864.6816) or Kimberly M. Collins (collinskm@whiteandwilliams.com; 856.317.3655).

[1] Statutes of repose are similar but distinct from statutes of limitations. A statute of limitations bars a plaintiff from suing anyone too long after the injury or harm occurred, a statute of repose likewise bars actions against defendants that are brought too long from the date of the last culpable act or omission of the defendant. Therefore, at the close of the statute of repose there can be no action against the defendant- even if the injury had yet to occur.

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