

## Time-barred in Virginia? Look to the North!

More than once, cases have come into our office where either an attorney has allowed the statute of limitations in Virginia to expire, or the prospective client has simply not been diligent in pursuing a claim. The mere fact that a claim which arose in Virginia is time-barred under the Virginia statute of limitations does not mean that it is time-barred everywhere.

One need only look north to the state of Maryland. Maryland Rule 2-101(b) states:

Except as otherwise provided by statute, if an action is filed in a United States District Court or a court of another state within the statute of limitations prescribed by Maryland law and that court enters an order of dismissal (1) for lack of jurisdiction, (2) because the court declines to exercise jurisdiction, or (3) because the action is barred by the statute of limitations required to be applied for that court, an action filed in a circuit court within 30 days after the entry of the order or dismissal shall be treated as timely filed in this State.

The effect of this Rule is to revive claims that were ruled dead in other jurisdictions. As long as that claim was not time-barred under the Maryland limitation as of the date it was filed in Virginia or elsewhere, then the claim may be brought to Maryland and properly pursued there. As a prerequisite, however, the Maryland courts must, of course, have jurisdiction over the defendant.

In Maryland, the general statute of limitations is three years. That is significant particularly in regard to tort claims since in Virginia, personal injury claims are typically governed by a two-year statute of limitations. Further, Maryland applies the "discovery rule" as to the date of accrual in all actions.<sup>1</sup> Virginia limits the discovery rule to very few claims, *i.e.*, fraud and certain medical malpractice claims.

This saving provision does not apply to time limitations imposed as a condition to the waiver of sovereign immunity. For example, in Maryland Code, State Government §12-201, the Maryland legislature has waived sovereign immunity as to breach of contract claims. In State Gov't §12-202, however, this waiver is conditioned on suit being filed within one year. The Maryland Court of Appeals in *State v. Sharafeldin*, 382 Md. 129, 854 A.2d 1208 (2004) ruled that the one-year period is not a statute of limitation, and thus could not be extended by Rule 2-101(b).

If, for whatever reason, you cannot find jurisdiction over the defendant in the state of Maryland, then you may have one other potential forum that is also nearby, the District of Columbia. The District of Columbia likewise follows a three-year statute of limitations for negligence actions. In the District of Columbia, statute of limitations issues are deemed to be procedural and therefore typically governed by D.C. law as opposed to the law of the jurisdiction where the claim may have arisen. See *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361 n.41 (D.C.Cir. 1982). An exception to that, however, exists where the statute of limitations is part of the cause of action. In that circumstance, the statute of limitations becomes substantive and the D.C. courts may apply the law of the place of the wrong in terms of applying the statute of limitations. See *Jaffe v. Pollotta Teamworks*, 276 F.Supp.2d 102 (D.D.C. 2003), *rev'd* and remanded on other grounds, 374 F.3d 1223 (D.C.Cir. 2004).

Keep in mind that the District of Columbia does not have any rule that is the equivalent of Maryland Rule 2-101. As such, if you have a judicial determination from Virginia that a claim is time-barred, then a D.C. court may recognize that.

If you should file in Maryland or the District of Columbia in a circumstance such as this, you may be met with a *forum non conveniens* argument.<sup>2</sup> However, neither Maryland nor the District of Columbia courts will dismiss a case under *forum non conveniens* if the claim is time-barred in all other jurisdictions. See *Chang v. Hung*, 699 A.2d 1133 (D.C. 1997) (clear abuse of discretion to dismiss suit on basis of *forum non conveniens* is abuse of discretion where claim is likely time-barred in alternative forum). Any such dismissal would therefore be conditioned on the defendant's waiver of the defense of statute of limitations. *Future View, Inc. v. Criticom, Inc.*, 755 A.2d 431, 434 (D.C. 2000) ("where the court has approved or ordered dismissal on *forum non conveniens* grounds, it has conditioned dismissal on the waiver of the statute of limitations in the alternative forum.") quoting *Guevara v. Reed*, 598 A.2d 1157, 1161 (D.C. 1991).

The point to be made here is that even though your claim may be time-barred in Virginia, do not give up! There may be hope for you either in the state of Maryland or the District of Columbia.

### Endnotes

1. See *Bank of New York v. Sheff*, 382 Md. 235, 854 A.2d 1269 (2004). Under the discovery rule, "the statute of limitations begins to run when the plaintiff has knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged cause of action." *Sheff*, 382 Md. At 244, 854 A.2d at 1275 (internal quotations omitted).
2. Both Maryland and the District of Columbia apply the private and public interest factors articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). See *Rolinski v. Lewis*, 828 A.2d 739 (D.C. 2003); *Johnson v. G.D. Searle & Co.*, 314 Md. 521, 552 A.2d 29 (1989).

submitted by Brien A. Roche and Eric D. Kessel  
*Johnson & Roche, McLean*