



MALPRACTICE ALERT!

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Ohio Bar Liability Insurance Company

“Non-Business” Absences from State Tolls Statute

The Ohio Supreme Court issued a decision of relevance to personal injury and other actions, in Johnson v. Rhodes(2000), 89 O.S. 3d 540. This decision resolves a conflict that has existed between various Ohio appellate courts.

In Johnson, the plaintiff brought suit for injuries sustained in an auto accident. The suit was filed several days beyond the two-year statute of limitations. The defendant was out of Ohio for vacation during the two-year period for a number of days exceeding the number of days by which the statute of limitations was missed.

Courts that have held that such absences do not toll the Statute relied upon Bendix Autolite Corp. v. Midwesco Enterprises, Inc.(1988), 486 U.S. 888, 108 S.Ct. 2218, 1000 L.Ed.2d 896. In Bendix, the U.S. Supreme Court ruled that O.R.C. section 2305.15 imposed an impermissible burden on interstate commerce, where the defendant was not a resident of Ohio, had no agent for service of process in Ohio, and was subject in perpetuity to various claims arising in Ohio under 2305.15. Chief Justice Moyer noted in Johnson that Bendix “stops far short of declaring R.C. 2305.15 unconstitutional in any other application.”

Unresolved by the decision is whether a temporary business absence from the state tolls the statute against an Ohio resident. Bendix is distinguishable from such a fact pattern, since the statute would only be tolled against an Ohio individual resident for the length of time he or she had left the state...and not in perpetuity, as concerned the U.S. Supreme Court in Bendix.

Just days after Johnson was decided, the Court of Appeals for Athens County ruled that the dismissal of a

complaint under 12(B)(6) was appropriate, where the plaintiff failed to allege that the defendant had been out-of-state for a time period sufficient to toll the statute of limitations, Noe v. Smith, (Sept. 12, 2000), 4th App.No. 00CA004. Although it appears to be a question of fact as to whether a defendant had been outside of Ohio for any length of time under Johnson, the Court of Appeals believed that such an issue had to be raised by the plaintiff. The plaintiff in Noe was never allowed to proceed with discovery. The 4th District is the same court that was reversed in Johnson. Even more recently, the 10th District ruled that a motion to dismiss was not appropriate in such a situation, Burkholder v. Doe, (September 28, 2000), 10th App.No. 00AP-407.

Under the rational in Noe, a plaintiff filing a complaint after the statutory date must allege that the defendant had (or may have?) been absent from the state for the requisite period of time in which to toll the statute, otherwise, the complaint may still be dismissed by the court under C.R. 12(B)(6).

If a client’s case appears barred by the applicable statute, and the defendant is an individual resident of Ohio, attorneys may proceed to file the action, and do discovery regarding the defendant’s out-of-state activities during the statutory period. A case that, at first review, appears barred by the relevant statute may still be viable.

Co-Counsel and Fee Arrangements Can Create Liability

There are forms of lawyer association which can lead to unanticipated liability for the acts or omissions of another lawyer. These forms of association include “co-counsel” situations fee-sharing arrangements, and “of counsel” designations. The following discussion covers “co-counsel” arrangements between otherwise independent lawyers.

There is no formal definition to "co-counsel" in the Disciplinary Rules. Such an arrangement can be entered-into when two lawyers who are not part of the same firm work together on a client's case or legal matter. (Lawyers who are in the same firm may appear as co-counsel for a client, as well.) If both lawyers are responsible for the same work for the client, then each may be liable for negligent acts or omissions of the other.

However, there are instances where both lawyers enter into a fee agreement with the client, but the duties of each are clearly defined, even to the client. In such instances, the fee arrangement between the client and the lawyers may resolve any question regarding joint liability.

DR 2-107(A) "Division of Fees Among Lawyers" states that "Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply: (1) the division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation." (Subsections 2 and 3 not included).

In recent OBLIC-defended cases, this DR has been used as an argument to hold a lawyer potentially responsible for an act or omission of a "co-counsel," even

though "co-counsel" was solely responsible for the act or omission giving rise to the claim. Unless an agreement regarding a division of fees was in proportion to the services performed by each lawyer, it will be difficult to convince a judge to dismiss a lawyer who was not responsible for the negligent act or omission, even if the client also understood and was aware of the division of duties between the lawyers.

Before entering into a co-counsel or referral fee arrangement with another lawyer, consider the following:

Does co-counsel have adequate malpractice insurance to cover a claim if that counsel's conduct gives rise to a claim? Even if a fee arrangement exist creating liability to the client for both lawyers, a contribution claim against the negligent lawyer may be possible. See Costin v. Wick (Jan. 24, 1996), 9th App. No. 95CA006133, unreported. Thus, although both lawyers may be liable to the client, the non-negligent lawyer has a cause of action against the negligent lawyer. Can a fee arrangement be reached with co-counsel and the client which clearly defines the lawyers' responsibility, and for which payment is proportionate to the services performed on behalf of the client? Such an arrangement may shield a lawyer from liability for the negligent acts or omissions of co-counsel.

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