



News & Types: Commercial, Competition & Trade Update

Breach of Contract and Interference Claims Fail Due to Statute of Limitations

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Practices: Commercial, Competition & Trade, Corporate, Finance & Acquisitions, Litigation

In a recent update, we discussed a topical 7th Circuit Court of Appeals case in which an unpaid law firm successfully fended off a defense that its claims were beyond the statute of limitations. (*Blanchard & Associates v. Lupin Pharmaceuticals, Inc. and Lupin, Ltd.*, 7th Circuit Court of Appeals, No. 17-1903, August 20, 2018 discussed at “Unsigned Contract Still a Written Contract”) In that case, the court held that a written, but unsigned, contract was subject to the ten year statute of limitations for a written contract, rather than the five year statute of limitations for an unwritten contract.

Just 10 days later, the 7th Circuit issued another opinion that hinged on the applicable statute of limitations. This time the claimant could not overcome a statute of limitations defense. (*John Heiman and JTE, Inc. v. Bimbo Foods Bakeries Distribution Co. f/k/a Bestfoods Baking Distribution Co.*, 7th Circuit Court of Appeals, No. 17-366, August 30, 2018)

John Heiman and later JTE, Inc. (a company created by Mr. Heiman for this purpose) was a long time distributor for Bimbo Foods Bakeries Distribution Company. Bimbo Foods sold baked goods under a number of well-known brands, such as Brownberry. For eleven years, JTE successfully distributed Bimbo Foods' products throughout suburban Chicago.

JTE and Bimbo Foods had a written agreement, but it was apparently not very elaborate. It had no duration, but permitted either party to terminate in case of a non-curable breach or a breach that was not cured.

JTE alleged some egregious misconduct by Bimbo Foods that began in 2008. JTE claimed that Bimbo Foods began a series of dishonest acts all intended to force the termination of the distributorship so Bimbo Foods could use another distributor. Among these acts were:

- In the spring of 2008, Bimbo Foods' employees filed false reports of poor customer service and out-of-stock products.
- Bimbo Foods' employees removed JTE-delivered products from store shelves and then photographed the empty shelves as “proof” of a breach.
- In January, 2011 JTE refused to sell its distribution rights. Bimbo Foods then breached the distribution agreement by unilaterally terminating it, citing the fabricated breaches.
- In September and October, 2011, Bimbo Foods forced JTE to sell its rights to new distributors.

Would Bimbo Foods actually get away with this terrible conduct? Would JTE be defeated on a technicality, such as a statute of limitations defense? The answer to both of these questions is yes. (Of course, at the stage in the proceedings in JTE, the court took all allegations of JTE as true. So the allegations stated above don't include any of Bimbo Foods' responses or defenses.)

The district court dismissed JTE's claims as beyond the statute of limitations. The 7th Circuit affirmed.

Judge Wood, writing the opinion for the 7th Circuit, first discussed which state's law applies. The agreement applied New York law but the case was brought in a district court in Illinois. While Illinois honors choice-of-law provisions in an agreement, Illinois considers statutes of limitations to be procedural issues governed by the law of the forum, here Illinois. So Illinois law governed the applicable statute of limitations, not New York.

So what was the applicable statute of limitations? There were two possibilities. The statute of limitations in Illinois for a written contract is 10 years. But, as an exception, under the Uniform Commercial Code Section 2-725, an action for breach of contract for the sale of goods must be commenced "within 4 years after the cause of action has accrued." Both parties agreed that the latest time the claim accrued was October 21, 2011, the final sale under the distribution agreement. JTE sued Bimbo Foods on May 30, 2017. So the applicable statute of limitations was critical. If four years, JTE loses. If ten years, JTE's claim could at least survive.

The threshold issue was whether the distribution agreement was primarily an agreement for the sale of goods or primarily an agreement for the sale of services. If primarily for the sale of goods, the UCC limitations period would be applicable. If primarily for the sale of services, then the UCC would not apply and JTE could argue for the 10 year limitation period.

The court applied Illinois law to determine that the distribution agreement was primarily for the sale of goods, even in the face of a different choice of law in the agreement. Even if JTE had been successful in its argument to apply New York law to determine the agreement's primary purpose, the result would be the same. Both states look to the "primary purpose" of the agreement and Judge Wood viewed the primary purpose as clearly the sale of goods. Any services were incidental to the sale of bakery products to consumers. The UCC's four year statute of limitations controlled and JTE was out of luck.

JTE had an additional claim – tortious interference with contract. Judge Wood noted that the claim failed based on the principal in Illinois law (as in most other states) that a party cannot tortiously interfere with its own contract. "[T]o allow such claims to be litigated would invite tort law to absorb contract law." But, apparently neither JTE nor Bimbo Foods raised this point.

So the court again had to analyze the statute of limitations period and its application to this case. Both JTE and Bimbo Foods agreed that the limitations period for tortious interference is five years. But when did the statute of limitations start to run?

JTE claimed that it did not discover the full extent of Bimbo Foods' terrible conduct until 2013 or 2014. But accrual does not depend on actual discovery, rather it depends on when the claimant knew or reasonably should know of the claim. Judge Wood agreed with Bimbo Foods' assertion that JTE knew that Bimbo Foods' allegations of breach were false in 2011. JTE admitted knowing in 2011 about the removal of products that made it appear JTE was not performing satisfactorily. This was sufficient to put JTE on notice of Bimbo Foods'

alleged wrongful conduct and begin the running of the statute of limitations. So the five year statute of limitations defeated JTE's claim of tortious interference.

Both the *Blanchard* and the *JTE* cases have very interesting discussions of the applicable statute of limitations and the date of accrual that starts the running of the applicable statute of limitations. Neither case discusses the reasons why a potential claimant waited for such a long period. Was it ignorance, neglect or procrastination? In one case, *Blanchard*, the claimant overcame the statute of limitations defense. But the claimant likely wasted time and money to answer a defense created by its delay before the court even reached the merits of the claim. As noted above, the claimant in the *JTE* case lost altogether in spite of what could have been a sympathetic claim.

Perhaps this is the biggest lesson from these cases. A claimant that feels wronged and waits to pursue its rights before filing a claim does so at its own risk.