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Litigating in Florida: Updates and Recent Decisions

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Tolling the Statute of Limitations in Civil Cases During Natural Disasters

When hurricanes, tropical storms, wildfires, and other natural disasters strike, the Florida Supreme Court has the constitutional administrative authority to close the courts in the affected areas. Art. V, s.2, Fla. Const. But does the Court have the lawful authority to "toll" the statute of limitations in civil cases as well? And if so, must a litigant prove that he was adversely impacted by the emergency conditions in order to add extra time to his claim filing window? These are the questions that were pending before the Court in *Ramirez v. McCravy*, SC09-490. The Court issued a split decision last week. The dissent, written by Justice Lewis, contains this admonition: "Litigants beware!" *Ramirez v. McCravy*, 2010 WL 1994654 (Fla. May 20, 2010).

Petitioner Roman Ramirez and Respondent Charles McCravy were in an automobile crash in Miami-Dade County on March 3, 2003. During the four year statute of limitations period for personal injury claims arising from the incident, the Florida Supreme Court issued four administrative orders, pursuant to Article V, Section 2 of the Florida Constitution, by which "all time limits authorized by rule and statute" applicable to civil cases in Miami-Dade County were "tolled" during the courthouse closures precipitated by dangerous weather events. Thirty-one days after the expiration of the statute of limitations, Ramirez filed his lawsuit for damages arising from the crash. The last emergency court closure order had expired six months earlier. McCravy raised the statute of limitations as an affirmative defense and moved for summary judgment. Ramirez countered that the cumulative effect of the tolling provisions in the emergency orders gave him the extra time in which to file his complaint. The trial court ruled in favor of McCravy and Ramirez appealed. In *Ramirez v. McCravy*, 4 So. 3d 692 (Fla. 3d DCA 2009), the Third District Court of Appeal affirmed the lower court.

The Third DCA found no evidence that the emergency court closures caused the delay in filing Ramirez's claim, or that he was lulled into inaction by the administrative orders. The appellate court also "strictly construed" the orders in light of Section 95.051 of the Florida Statutes, which specifically authorizes tolling in certain situations but prohibits it for any other "disability or other reason...." Emergency court closures are not among the approved tolling provisions of Section 95.051. The appellate court essentially held that the statute of limitations trumps the administrative authority of the Supreme Court.

The Florida Supreme Court granted review of the Ramirez opinion based on alleged conflict with one of its own prior opinions. Ramirez argued that "tolling" means what the Court has previously said it means: "to suspend," quoting *Hankey v. Yarian*, 755 So. 2d 93 (Fla. 2000), and further asserted that he was able to add the court closure dates to his calculation of the statute of limitations for his claim, whether he was affected by the emergency or not. He also argued that the District Courts have upheld the tolling of speedy trial rules in criminal cases based on emergency court closings, so extensions of statutes of limitations should also be a valid exercise of power. McCravy countered that the speedy trial cases are distinguishable because they involve the Court's procedural rules, not a legislative mandate. He also argued that

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the natural disasters were not the cause of Ramirez' filing delay.

When the Florida Supreme Court heard argument on March 3, 2010, some of the justices expressed concern that the Third District Court's opinion undermined the power of the high court to enter effective emergency orders as they relate to the statute of limitations. From another angle, more than one of the justices asked why its orders should result in a windfall to litigants who did not prove a nexus between the court closure and the delayed filing. Yet another justice questioned whether the wording of the Court's administrative orders should be amended to mirror the procedural rules on computation of time, so that the days the courthouse is closed are not to be counted when calculating filing deadlines.

On May 20, 2010, the Court dismissed the review proceeding as "improvidently granted." By its ruling, the Court let the result of the Third DCA opinion stand without addressing the apparent conflict between the statutory limitations language and the constitutional grant of administrative authority over the courts. The dismissal order contains a concurring opinion and a dissenting opinion. Justice Pariente explained that the decision simply upholds that portion of the Third District's opinion finding that there must be a "connection between the litigant's failure to timely file the lawsuit in a timely manner and the emergency that gave rise to the tolling order." Justice Lewis wrote in his stinging dissent that the lower court's decision was in "express and direct conflict with every Florida decision that has previously upheld any extension of a statutory time period . . .." He asserts that the opinion of the Third DCA "may or may not be correct but it must be resolved to avoid the destabilizing effect of its application." (Emphasis in original).

The *Ramirez v. McCravey* lesson is this: If a litigant wishes to rely on the tolling provisions of an emergency court closure order to justify missing a deadline, he needs to be prepared to prove a connection between the emergency and his delay. The longer the time period between the emergency conditions and the filing, the greater this need will be. As hurricane season approaches, litigators should be specially mindful of these issues.

When Can you Bring a Lawsuit in Florida Against a Non-Resident?

The Fourth District Court of Appeal recently determined that you may not be able to sue that non-resident company you entered a contract with in Florida. According to *Biloki v. Majestic Greeting Card Co, Inc.*, 35 Fla. L. Weekly D940A (4th DCA April 28, 2010), a forum selection clause designating Florida as the forum for litigation will not be enough to get you into a Florida Court. You need something more, especially if the business activity that you contract with the non-resident company to perform is done out-of- state. In that case, you will need to establish that the non-resident company engages in other substantial activity within Florida.

In *Biloki*, the plaintiff Florida corporation created, manufactured, sold and distributed greeting cards. The defendant non-resident corporation distributed greeting cards to customers in five Midwestern states. The defendants traveled to Florida and entered an agreement to sell their company's assets to plaintiff, as well as entered employment agreements with plaintiff. The relationship between the parties quickly deteriorated, and plaintiff Florida company filed a lawsuit alleging defendants breached the purchase and employment agreements, and in particular the non-compete provisions of the employment agreements by competing with plaintiff outside Florida under a new name. Defendants filed a Motion to Dismiss arguing they could not be sued in Florida.

The Court conducted the standard two-prong analysis for determining whether the suit could remain in a Florida Court. First the Court examined whether the Complaint contained sufficient jurisdictional facts to fall within Florida's long-arm statute, Section 49.193. And second the Court looked at whether there were sufficient "minimum" contacts" to satisfy the Federal Constitution's due process requirements.

In examining Florida's long arm

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statute, the court looked at whether the defendants in this case submitted themselves to the jurisdiction of Florida courts by either failing to perform acts required by the contract to be performed in Florida or, to the extent the contract was to be performed interstate, that defendants had otherwise engaged in substantial activity within Florida.

First, the Court rejected the plaintiffs' argument that the forum selection clause together with the breach of the non-compete clause in the employment agreement met the first prong of the test for personal jurisdiction. The Court held that a breach by conduct in Florida had to be alleged. The forum selection clause did not change that, and the plaintiffs had only alleged that defendants breached the non-compete provision by soliciting customers outside Florida.

The Court next looked at whether, although the claim did not arise out of Florida, the defendants had otherwise engaged in activity that brought them under the Florida courts' umbrella. To meet the first prong of the test, Florida courts have required a "showing of 'continuous and systematic general business contacts' with the forum state." *Id.* (citations omitted). This requirement is met if a company's business operations or revenue come from established commercial relationships in the state, or the company has continuous and substantial sales in Florida. In this case, the Court found that the defendants' submission of orders to and receipt of shipments from plaintiff in Florida was not enough to meet this requirement.

The Court, similarly, found that the defendants' conduct in Florida did not establish the "minimum contacts" that must be demonstrated before a defendant can be haled into a Florida court. Accordingly, the Court found the plaintiffs did not meet the second prong of the test for jurisdiction either.

This case demonstrates that in drafting contracts with out-of-state or foreign companies, Florida companies cannot simply rely on a forum selection clause to preserve their right to sue in Florida when disputes arise. There are other factors that are relevant to where the suit must be filed, and while the Florida company cannot necessarily control those factors, potential litigants should be mindful of them.

**Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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