

MEMORANDUM

At your request, we have prepared a memorandum exploring the issues surrounding Acme filing a lawsuit against Zeta.

FACTUAL BACKGROUND

While Acme did not buy the spare engine by the April 30, 1995 deadline, Acme was willing to assign its PlaneCo contract to Zeta, as it had promised to do in the event it was unable to purchase the engine or the planes. However, Zeta would not accept the assignment, and after refusing to accept the assignment as agreed, Zeta issued a “prepayment instruction” under the Reimbursement Agreement on August 21, 1995. On January 29, 1996, Zeta sent notice to XYZ that the prepayment instruction triggered a default under the Note Purchase Agreement and the Guaranty Agreement. In this notice, Zeta also informed XYZ that Zeta would exercise its rights under the Guaranty Agreement to purchase the ten notes from XYZ. After the alleged transfer of the notes to Zeta, Zeta sent a letter to Acme on January 30, 1996 informing Acme of an acceleration of the notes and demanding that Acme pay Zeta, the alleged new noteholder, the principal, interest, and costs and expenses it claimed were now due.

A week after sending that demand, Zeta commenced this action in the United States District Court for the Southern District of New York. Zeta did not dispute that the arrangements between it and Acme were an incentive to persuade Acme to purchase the spare engine and order its engines for the jets. Referring to the various financing agreements only, Zeta then claimed that Acme breached the Reimbursement Agreement by failing to order the spare engine by April 30, 1995, an event triggering Zeta’s right to purchase the notes under the Guaranty Agreement, in turn triggering its new right as alleged noteholder to demand payment of the accelerated notes. (App. *infra* A8-26).

CHOICE OF VENUE AND CHOICE OF LAW ISSUES

Because a separate suit by Acme would not be based on the contracts with XYZ and Zeta, which contained the New York law choice of law provision, Acme would not be limited to filing suit in New York state. Some of the documentation indicates that Zeta (at least the unit dealing with Acme in this transaction) is headquartered in Cincinnati, Ohio. Some Ohio limitations periods are longer than the comparable New York periods. If it is established that Zeta could be sued in Ohio, Acme may want to consider a suit in the state courts of Ohio. Therefore, some discussion of Ohio law is included as appropriate in this outline.

COLLATERAL ESTOPPEL ISSUES

Under New York law, “collateral estoppel, or issue preclusion, may be invoked in a subsequent action or proceeding to prevent a party from relitigating an issue decided against that party in a prior adjudication.” *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 153, 531 N.Y.S.2d 876, 527 N.E.2d 754 (1988) (citations omitted). To use the doctrine of collateral estoppel, a party must demonstrate that, between the two cases, “there was an ‘identity of issue[s]’ necessarily decided in the prior action or proceeding and ‘a full and fair opportunity’ to contest the decision now said to be controlling.” *Camperlengo v. Barell*, 78 N.Y.2d 674, 680, 578 N.Y.S.2d 504, 585 N.E.2d 816 (1991), *citing Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 467 N.E.2d 487 (1984), *Matter of Hee K. Choi v. State of New York*, 74 N.Y.2d 933, 936, 550 N.Y.S.2d 267, 549 N.E.2d 469 (1989). The collateral estoppel doctrine is flexible. “In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results.” *Staatsburg*, 72 N.Y.2d at 153. Ohio law adds a privity requirement to the doctrine. *Haley v. Haggard*, 1997 Ohio App. LEXIS 4438, *10 (1997), *citing Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943) (final judgment rendered by court of competent jurisdiction is complete bar to any subsequent action on the same claim or cause of action between the parties and those in privity with them).

The District Court, with the approval of the Second Circuit, effectively concluded that the current suit was about one thing – the loan transaction between Acme and XYZ. Using the parol evidence rule, the District Court excluded references to everything else involved in the transaction, including specifically the oral assurances and written promises regarding Zeta’s agreement to accept the PlaneCo contract in the event of difficulty, Zeta’s assurances that the “loan” documents were for show only. These issues were not adjudicated by the District Court, so there is no identity of issues and there was no full and fair opportunity to litigate. By crafting causes of action around these other promises, assurances, and actions, all of which were excluded by the District Court, Acme may avoid collateral estoppel issues.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

Tortious interference claims, while ostensibly strong claims, may run afoul of the applicable limitations periods in New York and would therefore be difficult to sustain. In Ohio, however, such claims may not be time barred.

Under New York law, tortious interference with an existing contract “requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge

of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996) (citations omitted). As the Court of Appeals has stated, "where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." *NBT Bancorp, Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 621, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996).

Tortious interference with prospective contracts/business relationships requires a showing of more culpable conduct on the part of a defendant. *NBT Bankcorp.*, 87 N.Y.2d at 621. A plaintiff must demonstrate that "the defendants acted with the sole purpose of harming the plaintiffs or engaged in any improper or unlawful conduct, a necessary element of a cause of action alleging interference with prospective contractual relations." *Glen Cove Assoc. v. North Shore Univ. Hosp.*, 240 A.D.2d 701, 702, 659 N.Y.S.2d 316 (2d Dep't 1997), citing *Nassau Diagnostic Imaging & Radiation Oncology Assocs. v. Winthrop-Univ. Hosp.*, 197 A.D.2d 563, 564, 602 N.Y.S.2d 650 (2d Dep't 1993). "A cause of action for prima facie tort or intentional interference with prospective economic advantage does not lie absent an allegation that the action complained of was motivated solely by malice or to inflict injury by unlawful means rather than by self-interest or other economic considerations." *Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 63, 603 N.Y.S.2d 439 (1st Dep't 1993), citing *Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 168, 521 N.Y.S.2d 672 (1st Dep't 1987).

In New York, the applicable limitations period for tortious interference causes of action is only three years. See *Williams v. Arpie*, 44 N.Y.2d 689, 691, 405 N.Y.S.2d 437, 376 N.E.2d 909 (1978). See also *Vanderminden v. Vanderminden*, 226 A.D.2d 1037, 1043, 641 N.Y.S.2d 732 (3d Dep't 1996) ("it is well settled that the appropriate period of limitations for causes of action alleging a tortious interference with contractual relations is three years"), citing CPLR 214; *Omega Indus. v. Chemical Bank*, 190 A.D.2d 843, 844-45, 593 N.Y.S.2d 1020 (2d Dep't 1993). If the action plaintiff claims constitutes tortious interference does not immediately cause any injury, the limitations period may not begin to run until that injury actually occurs. *Vanderminden*, 226 A.D.2d at 1043 (stock transfer did not immediately effectuate actual injury because of existence of voting trust and cause of action did not accrue until trust expired and actual injury occurred). Acme might argue that did not happen until it received notice of Zeta's acceleration in January of 1996, though that timing would still preclude a lawsuit in February of 1999 on that basis.

Ohio also recognizes claims for tortious interference with current and prospective business relationships. "A tortious interference with business relationship claim exists when

a person, without privilege to do so, induces or otherwise purposefully causes a third person not to enter into or continue a business relationship with another.” *Gruespan v. Seitz*, 1997 Ohio App. LEXIS 5103, *19 (1997). The elements of a claim for tortious interference with prospective business relationships require a showing that “one intentionally and improperly interfered with another’s prospective contractual relation and the plaintiff suffered pecuniary harm resulting from the loss of benefits to the relation, regardless whether the interference consists of inducing or causing another not to enter into a contract or preventing the other from acquiring or continuing a prospective relationship.” *Id.*, citing *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (1995).

Under Ohio law, tort claims in general are subject to a four year limitations period. Ohio Rev. Code sec. 2305.09.; *Taylor v. Lenio*, 1985 Ohio App. LEXIS 8095, *7 (1985) (tortious interference with contract claim subject to four year limitations period). This limitations period begins to run “after the cause of thereof accrued.” Ohio Rev. Code sec. 2305.09. If the tortious interference is found to have occurred in January of 1996, that would fall within the limitations period under Ohio law.

FRAUD IN THE INDUCEMENT

Acme could consider a claim for fraud in the inducement. For a fraud in the inducement claim, a party would have to show that "defendant failed to disclose a fact to plaintiff which he was under a duty to exercise reasonable care to disclose and by such failure to disclose such information defendant intended to deceive plaintiff." *MacNamara-Carroll Inc. v. Delaney*, 244 A.D.2d 817, 819, 666 N.Y.S.2d 264 (3d Dep't 1997). Ohio also recognizes a claim for fraud in the inducement. “A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation . . . In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment.” *BM Farms, Inc. v. Woods*, 81 Ohio St. 3d 498, 502, 692 N.E.2d 574 (1998), citing *Beer v. Griffith*, 61 Ohio St. 2d 119, 123, 399 N.E.2d 1227, 1231 (1980).

In New York, the limitations period for a fraud in the inducement claim is the CPLR 213(8) period of six years. *Held v. Kaufman*, 91 N.Y.2d 425, 431, 671 N.Y.S.2d 429 (1998). The documents were signed in December of 1992. The limitations period is measured, at the earliest, from the time of the fraud, but CPLR 213(8) has a discovery rule provision -- "an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it." This is arguably December of 1995. Ohio fraud claims are subject to the four year limitations period of Ohio Rev. Code sec. 2305.09.

Collateral estoppel issues may arise, however, with respect to any claim for fraud in the inducement. Such a claim would relate directly to the contracts that formed the basis of Zeta's claim in the District Court. Acme's response would center on the idea that the fraud claim is not related to the subject matter of the contract, only to the circumstances of the making of the contract, which involved fraud, and that this issue was not adjudicated. See *Haller v. Borrer Corp.*, 50 Ohio St. 3d 10, 14, 552 N.E.2d 207, 210 (1990) ("The fraud relates not to the nature or purport of the [contract], but to the facts inducing its execution."). It is difficult to predict how a court might respond to such an argument, but because the fraudulent inducement claim is so wrapped up with the entire contract transaction, it will be difficult to separate it for collateral estoppel purposes.

FORUM NON CONVENIENS

Both New York and Ohio recognize the doctrine of forum non conveniens. As the Court of Appeals has stated, "although a New York court may have jurisdiction over a claim, it is not, of course, compelled to retain jurisdiction if the claim has no substantial nexus with New York." *Banco Ambrosiano v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 73, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984) (citations omitted). CPLR 327 codifies the common law doctrine of forum non conveniens. Specifically, CPLR 32(a) states that "when a court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

The forum non conveniens analysis involves the balancing of an number of factors, including "the difficulties for defendant in litigating the claim in this State, the burden on the New York courts in entertaining the suit and the availability of another more convenient forum in which plaintiff may obtain redress." *Banco Ambrosiano*, 62 N.Y.2d at 73 (citations omitted). A court may also consider the residence of the parties and whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction, but no one factor is controlling, and the availability of an alternative forum is not an absolute prerequisite to applying the doctrine. *New York Civil Practice: CPLR § 327.01*. The doctrine is recognized by Ohio courts and is similarly based on a balancing the private interests of the litigants and public interest factors. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 126-27, 519 N.E.2d 370 (1988) ("Essentially, the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice").

The doctrine of forum non conveniens does not appear to be a significant bar in itself to a suit by Acme against Zeta either in New York, where most of the negotiations apparently

occurred and the documents were signed, or in Ohio, if it is true that the Zeta division involved is headquartered there.