

DELAWARE BUSINESS COURT INSIDER

Chancery Decision Seeks to Further Clarify Operation of Del. Borrowing Statute

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By **Barry M. Klayman and Mark E. Felger** | July 01, 2020



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In *Saudi Basic Industries v. Mobil Yanbu Petrochemical*, 866 A.2d 1 (Del. 2005), the Supreme Court held that there were certain situations in which the borrowing statute did not apply, notwithstanding the literal language that would seem to make it applicable. The *Saudi Basic* case has led to some confusion regarding when the borrowing statute will not be applied according to its terms. In 2015, we noted a decision by Vice Chancellor Donald Parsons, in which he wrote, "the *Saudi Basic* decision appears to have engendered some uncertainty as to when the borrowing statute applies." *TrustCo v. Mathews*, (Del. Ch. Jan. 22, 2015). See Klayman & Felger, "Court Adopts Narrow View of Exception to Borrowing Statute," Delaware Business Court Insider (Mar. 10, 2015). As illustrated by a recent decision from Vice Chancellor Kathleen McCormick, "the dueling reasonable interpretations of *Saudi Basic*" still beg for greater clarity, whether in the form of legislative action or binding judicial authority.

In *Saudi Basic*, a Saudi corporation sought a declaratory judgment in Delaware that certain payments to it by a joint venture partnership were valid and did not violate their contract; the

corporation's partners counterclaimed to recover the payments, which they alleged were improper. The cause of action arose in Saudi Arabia, which had no applicable statute of limitations, but the applicable limitations period under Delaware law had run. If the borrowing statute were strictly applied, the counterclaims would have been barred. Instead, the Supreme court affirmed the Superior Court's determination that the counterclaims were not barred by the borrowing statute. The court stated that applying the borrowing statute literally to require the use of Delaware's shorter limitations period would "subvert the statute's fundamental purpose by enabling [the Saudi corporation] to prevail on a limitations defense that would never have been available to it had the overcharge claims been brought in the jurisdiction where the cause of action arose, i.e., Saudi Arabia." The court explained that the borrowing statute was designed to address a specific kind of forum-shopping (which the court termed the "standard scenario") where a plaintiff brings a claim in a Delaware court that arises under the law of another jurisdiction, and is barred by that jurisdiction's statute of limitations, but would not be time-barred in Delaware because it has a longer statute of limitations. The borrowing statute operates to prevent a plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose, which was not this case.

Subsequent decisions have not consistently interpreted the holding in *Saudi Basic*. Some cases have interpreted *Saudi Basic* broadly, holding that the borrowing statute does not apply if it would enable the party seeking dismissal to prevail on a limitations defense that would not have been available to it had the claim been brought in the jurisdiction where the cause of action arose. Other cases have interpreted *Saudi Basic* more narrowly, holding that the borrowing statute does not apply when a litigant engages in the precise practice the statute sought to prevent—i.e., forum-shopping—and would benefit unjustly from the borrowing statute's application. In *TrustCo*, Parsons adopted the narrower view, holding that the borrowing statute presumptively applies when a plaintiff's cause of action arises out of state, regardless of whether the plaintiff is forum-shopping. "Only on a set of facts similar to *Saudi Basic*, where an absurd outcome or a result that subverts the borrowing statute's fundamental purpose otherwise would occur, will a party be able to avoid the borrowing statute's unambiguous language," the vice chancellor wrote. "Any greater alteration to the statute, such as limiting its application solely to situations where there is evidence of forum-shopping, is the province of the legislature." According to Parsons, this reading recognized that courts have a duty to apply statutes faithfully and the literal language of a statute will be set aside only in extraordinary circumstances.

McCormick faced a similar situation in *CHC Investments v. FirstSun Capital Bancorp*, C.A. No. 2018-0353-KSJM (Del. Ch. Mar. 23, 2020). More than three years before commencing the litigation, plaintiff CHC invested \$25 million in a predecessor of the entity defendant. CHC made this investment after a weekend of informational meetings with two company officers, the individual defendants. CHC alleged that the defendants made misrepresentations at those meetings, and brought two claims for fraud, one under Texas common law and the other under a Texas statute. The defendants argued that the claims were time-barred. The parties agreed that the fraud claims arose under Texas law, but disagreed over which state's law—Texas or Delaware—supplied the relevant statute of limitations. The applicable statute of limitations under Texas law was four years; the applicable limitations period under Delaware law was three years.

As McCormick explained, the broad approach interprets *Saudi Basic* to hold that the borrowing statute does not apply whenever the Delaware limitations period is shorter than the limitations period of the foreign jurisdiction where the claim arose. This approach focuses on the anti-forum shopping policy rationale discussed in *Saudi Basic*. It also provides the benefit of a bright-line rule, in that the limitations period of the foreign forum always applies. Under the broad approach, CHC's claims would not be time-barred. However, the broad approach ignores the plain language of the borrowing statute, which calls for the application of whichever limitations period is shorter, in all circumstances, not just when absurdity would result. It also departs from the common law rule that the forum state applies the relevant limitations period, since it never applies the forum's limitations period.

The narrow approach, on the other hand, interprets *Saudi Basic* to hold that the plain meaning of the borrowing statute governs unless the party asserting the underlying claim was forced into a Delaware forum. The forced claims in *Saudi Basic* were compulsory counterclaims, but the reasoning applies equally to creditors forced to file claims in a debtor's chosen forum. The narrow approach can be reconciled with principles of statutory construction by operation of the "absurd results" principle.

Acknowledging the absence of any authoritative binding authority, McCormick chose to adopt the narrow interpretation of *Saudi Basic*, which she believed least offends principles of statutory construction and best upholds the statute's purpose. Under this approach, the court first applies the plain language of the borrowing statute. If Delaware's limitations period applies, the court next determines whether the party asserting the underlying claim was forced to file in Delaware. If it was, then the court applies the foreign limitations period.

In the case before McCormick, the question then became whether CHC was forced to file in Delaware, since Delaware's three-year limitations period was shorter than Texas's four-year limitations period. CHC filed in Delaware pursuant to a forum selection clause in a subscription agreement in which it voluntarily consented to file claims arising out of the agreement in Delaware. CHC did not argue that the forum selection clause was procured fraudulently, nor did it seek to invalidate the forum selection clause on other grounds. The vice chancellor found that the forum selection clause did not cause CHC to file in Delaware involuntarily, and thus CHC was not forced to file in Delaware. Accordingly, Delaware's three-year statute of limitations applied.

As *CHC Investments* shows, the debate over the scope of the holding in *Saudi Basic* continues more than 15 years after the case was decided. McCormick's opinion is significant, not only because it succinctly summarizes the positions that have developed over time, but also because, in throwing her lot in with those who would give *Saudi Basic* a narrow interpretation, she has articulated a clear and easily applied test with a transparent and well-reasoned rationale to displace the uncertainty of the "absurd results" standard.

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