

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE-CHANCELLOR

29
COURT HOUSE
WILMINGTON, DELAWARE 19801

April 6, 2000

Judith Nichols Renzulli, Esquire
Duane, Morris & Heckscher
1201 Orange Street, Suite 1001
Wilmington, DE 19801-0195

Edward P. Welch, Esquire
Skadden, Arps, Slate, Meagher & Flom
One Rodney Square
P.O. Box 636
Wilmington, DE 19899

Re: Cochran v. Stifel Financial Corp., C.A. No. 17350

Dear Counsel:

The defendant, Stifel Financial Corp., seeks certification of my order of March 8, 2000 denying its motion to dismiss plaintiff Robert M. Cochran's complaint on the ground that Cochran's indemnification claims were barred by the relevant statute of limitations.' In its motion to dismiss, Stifel Financial contended that the one-year statute of limitations contained in 10 Del. C. § 8111, as interpreted by the United States District Court of the District of Delaware in *Sorensen v. The Overland Corp.*² and by the state

¹ See *Cochran v. Stifel Financial Corp.*, Del. Ch., C.A. No. 17350, mem. op., Strine, V.C. (Mar. 8, 2000).

² 142 F.Supp. 354 (D.Del. 1956), *aff'd*, 242 F.2d 70 (3d Cir. 1957).

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courts of Delaware,³ applied to Cochran's indemnification claims. For his part, Cochran argued that the three-year statute of limitations of 10 Del. C. § 8106 applied to his indemnification claims, per this court's decision in *Scharf v. Edgcomb Corp.*⁴

In my decision on the motion to dismiss, I held that the three-year statute of limitations of § 8106 applied to Cochran's indemnification claims. The primary basis for that ruling was the substantial doubt that existed regarding which of the two suggested limitation periods applied and the need in view of that doubt to accord Cochran the benefit of the longer limitations period.⁵ In so ruling, I noted the tension between the decision in *Scharf* and the *Sorensen/Goldman* line of cases.⁶

My prior ruling did not hinge at all on disputed questions of fact. Both Stifel Financial and Cochran agreed that his indemnification claims

³ In particular, the case of *Goldman v. Braunstein's, Inc.*, Del. Supr., 240 A.2d 577 (1968), and its progeny.

⁴ Del. Ch., C.A. No. 15224, mem. op., 1997 Del. Ch. LEXIS 169, Steele, V.C. (Dec. 2, 1997), *appeal denied*, Del. Supr., No. 1. 1998,705 A.2d 243, 1998 Del. LEXIS 9 (Jan. 14, 1998) (unpublished order).

⁵ *Cochran*, mem. op. at 19-22.

⁶ *Cochran*, mem. op. at 10-22.

were timely under a three-year statute of limitations but were untimely under a one-year statute of limitations. The prior ruling therefore turned solely on a question of law: is a claim for indemnification governed by § 8 106 or § 8111 of Title 10?

Stifel Financial contends that this question (the “Indemnification Limitations Issue”) is of sufficient importance that I should certify an interlocutory appeal of the question under Supreme Court Rule 42(b). Under Rule 42(b), an interlocutory appeal is inappropriate unless the trial court’s order: (1) determines a substantial issue; (2) establishes a legal right; and (3) satisfies one or more of the criteria set forth in subsection (b)(i)-(v) of the Rule.⁷ Stifel Financial argues that my decision on the Indemnification Limitations Issue satisfies the first two requirements and meets at least two of the criteria in Rule 42(b)(i)-(v), to wit, that the decision involve a “question of law [that] relates to the . . . application of a statute of this State which has not been, but should be, settled by the [Supreme] Court” and that a decision by the Supreme Court on the Issue “may terminate the litigation . . . or otherwise serve the interests of justice.”⁸ Cochran, unsurprisingly,

⁷ Supr. Ct. R. 42(b).

⁸ Stifel Financial Br. at 4 (*quoting* Del. Supr. Ct. Rules 41(b)(iii) (~~w/ hC 13~~) incorporated into Rule 42(b) by subsection (b)(i) thereof) and 42(b)(iii)).

contends that my ruling on the Indemnification Limitations Issue does not meet the standards for certification. The following discussion addresses the parties' respective positions on certification.

The first question that must be answered is whether the Indemnification Limitations Issue determined a "substantial issue" and "established a legal right" for purposes of Rule 42(b). There is case law going both ways as to whether a denial of a motion to dismiss on limitations ground meets those criteria. On the one hand, the Supreme Court has stated that the denial of a limitations defense does not establish a "legal right between the parties" but simply involves the denial of an affirmative defense and imposes the obligation on the defendant to proceed to a trial on the merits." On the other hand, other Supreme Court cases take the view that a trial court's decision not to dismiss claims as time-barred can involve a substantial issue establishing a legal right. As former Chancellor Allen noted, "[t]he Supreme Court has in the past appeared to accept the argument that the 'right' to be free of the expense of a trial defense to a claim is a legal right that is determined by denial of a motion to dismiss or for summary

⁹ *Levinson v. Cordon*, Del. Supr., 385 A.2d 717, 720 (1978) (quoting *Gardinier, Inc. v. Cities Service Co.*, Del. Supr., 349 A.2d 744,745 (1975)).

judgment.” Thus the Supreme Court has accepted interlocutory appeals requiring the review of trial court decisions on statute of limitations issues on several occasions.”

Frankly, I am not sure that one can honestly reconcile the cases on this point. The best way to do so, in my view, is to recognize that a denial of a motion to dismiss on statute of limitations grounds does in fact determine a substantial issue and establish a legal right but that those factors alone do not justify interlocutory review under Rule 42(b). Rather, whether interlocutory review of a denial of a dispositive motion premised on a statute of limitations defense is appropriate really turns on whether the limitations issue at stake otherwise warrants Supreme Court review under the factors set

¹⁰ *Price v. Wilmington Trust Co.*, Del. Ch., C.A. No. 12476, order at 4, 1996 Del. Ch. LEXIS 124, at *4-5, Allen, C. (Sept. 3, 1996) (citing *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, Del. Supr., 372 A.2d 168 (1976)); see also *Myer v. Dyer*, Del. Super., C.A. No. 86C-MY-96, let. op., Martin, J. (May 27, 1987) (certifying order dismissing claims against defendants as time-barred).

¹¹ E.g., *Christiana Hospital v. Fattori*, Del. Supr., 714 A.2d 754 (1998) (interlocutory review of denial of motion to dismiss complaint as barred by statute of limitations); *Smith v. Wallace*, Del. Supr., 701 A.2d 86 (1997) (interlocutory review of denial of motion for summary judgment asserting that claims were time-barred); *Mullen v. Alarmguard of Delmarva, Inc.*, Del. Supr., 625 A.2d 258 (1993) (interlocutory review of decision by trial judge that an amended complaint adding a new defendant did not relate back under Super. Ct. R. 15(c) and that the claims against the new defendant were therefore time-barred); *Parker v. Breckin*, Del. Supr., 620 A.2d 229 (1993) (interlocutory review of decision by trial judge that an amended complaint related back under Super. Ct. R. 15(c) and that a claim against an executor raised in the amendment was therefore not barred by the statute of limitations); *Benge v. Davis*, Del. Supr., 553 A.2d 1180 (1989) (interlocutory review of a decision by trial judge to deny motion for summary judgment based on statute of limitations grounds); *Bendix Corp. v. Stagg*, Del. Supr., 486 A.2d 1150 (1984)

forth in Supreme Court Rule 42(b)(i)-(v) --- in particular whether the trial court's resolution turned on an unsettled question of law of sufficient importance to merit interlocutory review by the Supreme Court.

Were I to approach the Rule 42(b)(i)-(v) factors in this case without knowledge of the Supreme Court's relatively recent denial of the attempt to certify the Indemnification Limitations Issue in the *Scharf* case, I would be inclined to find that the Indemnification Limitations Issue is a "question of law relat[ing] to the . . . construction or application of. . . statute[s] of this State which has not been, but should be, settled by the [Supreme] Court."¹² Although the decision in *Sorensen* was rendered by the U.S. District Court for the District of Delaware and not by a Delaware state court,¹³ the venerable *Sorensen* decision takes an approach that is largely in keeping with the *Goldman* line of cases. Indeed, *Goldman* built on *Sorensen* to some extent. Given the contradiction between *Sorensen* and *Scharf* and the lack of any specific language regarding indemnification claims in the relevant statutes, there remains some doubt about the limitations period that applies

(same); *Laventhol*, 372 A.2d 168 (interlocutory review of denial of motion to dismiss complaint as time-barred).

¹² Supr. Ct. R. 41(b)(iii).

¹³ *Cf.* Supr. Ct. R. 41(b)(ii).

to indemnification claims brought under 8 Del. C. § 145. Absent legislative action, the best way to eliminate this doubt and provide guidance to corporate practitioners is for the Supreme Court to render a binding decision on the Indemnification Limitations Issue. This case presents an ideal opportunity to address that question because there are no disputed issues of fact to muddy the waters; rather, a pure question of law is presented.

Moreover, a ruling by the Supreme Court that the shorter statute of limitations applies would, in fact, terminate the current litigation. Although Cochran says he will soon state other indemnification claims as to which no limitations defense can be asserted, the reality is that he has not done so yet and the only claims now before me will go away if the Supreme Court determines that I was wrong in applying the longer limitations period. As a result, review of my order “may terminate the litigation[.]”¹⁴

Although certification may pose some threat of delay, my sense is that that any delay will be manageable. If Cochran files a new suit alleging additional indemnification claims, discovery on those claims can proceed while the interlocutory appeal in this case is pending. And if interlocutory review is granted by the Supreme Court and Cochran eventually prevails on

¹⁴ Supr. Ct. R. 42(b)(v).

the interlocutory appeal, I would require Stifel Financial (which, after all, requested the appeal) to respond to discovery on the claims now in the case on a tight schedule that would enable Cochran to obtain a trial on all his indemnification claims soon after the appeal is concluded.

The problem with this approach is that I cannot square it with the Supreme Court's decision to reject the application for an interlocutory appeal of the Indemnification Limitations Issue in the *Scharf* case. This court did not certify the Indemnification Limitations Issue in *Scharf*, in part because it regarded itself as having "made no final determination of a substantial issue but merely [as having] declined to rule affirmatively that one specific issue raised by an affirmative defense could without a resolution of all the facts dispose of the substantive contentions of the parties."¹⁵ The Supreme Court reached a similar conclusion, finding that the Indemnification Limitations Issue did not "meet the requirements of Supreme Court Rule 42."¹⁶ In so ruling, the Court emphasized that interlocutory appeals "are accepted only in extraordinary circumstances" and that a determination that a specific affirmative defense, such as a statute of

¹⁵ *Scharf v. Edgcomb Corp.*, Del. Ch., C.A. No. 15224, order at 2, Steele, V.C. (Dec. 31, 1997).

¹⁶ *Edgcomb Corp. v. Scharf*, Del. Supr., order at 3, 1998 Del. LEXIS 9, at *2.

limitations defense, was not available does not, as a general matter, establish a legal right between the parties.¹⁷

A careful review of this court's decision in *Scharf* reveals that the issue sought to be certified in that case was a pure issue of law. Although there was a dispute about when the statute of limitations began to run in the *Scharf* case, this court accepted the facts in the complaint as true in denying the defendant's motion to dismiss. As a result, the question of whether the plaintiffs claims were time-barred in *Scharf* turned entirely on the statutory issue.

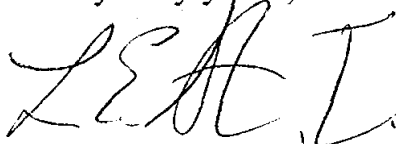
When the Supreme Court considered whether to accept certification in *Scharf*, it therefore had the opportunity to weigh whether the Indemnification Limitations Issue was important enough to justify interlocutory review, it knew that the Issue was purely one of law, and it knew that a decision contrary to the trial court's could result in the termination of the litigation. Yet, it decided that the Indemnification Limitations Issue did not merit such review.

Because I do not see how one can distinguish the Supreme Court's refusal to accept an interlocutory appeal in *Scharf*, I will not certify the

¹⁷ *Id.*, order at 2-3, 1998 Del. LEXIS 9, at *2.

Indemnification Limitations Issue. Ultimately, the Supreme Court must decide which questions of law are important and compelling enough to justify the inefficiencies and disruptions that attend interlocutory appeals. Having recently decided that the Indemnification Limitations Issue does not rise to the necessary level to warrant interlocutory review, the Supreme Court — rather than this court — is in the best position to decide whether the Issue as presented in the particular context of this case merits such review.

Therefore, Stifel Financial's request that I certify the Indemnification Limitations Issue for interlocutory review is DENIED. IT IS SO ORDERED.

Very truly yours,

Leo E. Strine, Jr.

oc: Register in Chancery