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CPLR 213(2), Judicial Breach of Public Policy, Legislative Amendment Required: Part I

This two-part article provides a deep analysis of cases that ran afoul of legislative intent and held there is no statutory tolling of the limitations period when enforcement of a spousal agreement, which has been incorporated into and survived a judgment of divorce, is initiated by motion rather than by plenary action; effectively, thereby indefinitely extending the time to enforce.

By **Elliott Scheinberg** | October 13, 2021

Elliott Scheinberg. Courtesy photo

Legislative policy and societal interests underlying Article 2 of the CPLR require every claim to have an expiration date. The Court of Appeals has historically applied the principles of contract construction and interpretation to marital agreements (*Graev v. Graev*, 11 N.Y.3d 262 (2008); *Meccico v. Meccico*, 76 N.Y.2d 822 (1990); *Rainbow v. Swisher*, 72 N.Y.2d 106 (1988)), which includes the six-year limitations period in CPLR 213(2), "an *action* upon a contractual obligation or liability, express or implied."

Furthermore, a claim for equitable distribution also has a firm six-year limitations period, per CPLR 213(1): "an *action* for which no limitation is specifically prescribed by law." *Marshall v. Bonica*, 86 A.D.3d 595, 596 (2d Dept. 2011). "An action seeking a judgment declaring rights in property subject to equitable distribution is subject to a six-year statute of limitations. '[T]he six-year statute [begins] to run from the date of entry of the ... equitable distribution judgment, which determined the plaintiff's rights in the property.'" *Ricca v. Valenti*, 24 A.D.3d 647, 648-49 (2d Dept. 2005); *Walter v. Starbird-Veltidi*, 78 A.D.3d 820, 822 (2d Dept. 2010).

The foregoing notwithstanding, within a four-month period a decade ago, based on a hyper-technical reading of CPLR 213(2) that runs afoul of legislative intent, the Second Department, in *Fragin v. Fragin*, 80 A.D.3d 725 (2d Dept. 2011), *Bayen v. Bayen*, 81 A.D.3d 865 (2d Dept. 2011), and *Denaro v. Denaro*, 84 A.D.3d 1148 (2d Dept. 2011), held that there is no statutory tolling of the limitations period when enforcement of a spousal agreement, which has been incorporated into and survived a judgment of divorce, is initiated by *motion* rather than by *plenary action*; effectively, thereby indefinitely extending the time to enforce. See E. Scheinberg, Three Matrimonial Decisions Unsettle Contractual Limitations Periods (https://www.law.com/newyorklawjournal/almID/1202540007604/Three-Matrimonial-Decisions-Unsettle-Contractual-Limitations-Periods/), NYLJ (Jan. 26, 2012). This article provides a deeper analysis.

'Fragin'

In *Fragin*, the Second Department declared: "Although we affirm the order of the Supreme Court [which "denied that branch of defendant's motion to enforce certain provisions of the parties' separation agreement, regarding graduate school payments] we do so on a ground different from that articulated by that court, *as only actions are subject to a six-year statute of limitations* pursuant to CPLR 213(2). Here, that branch of the defendant's motion which was to enforce the parties' separation agreement is not subject to a statute of limitations defense."

'Bayen'

In *Bayen*, the former-wife appealed from an order denying her motion to enforce a provision contained in the parties' surviving stipulation of settlement. The Second Department ruled: "An *action* to enforce a distributive award in matrimonial action is governed by the six-year statute of limitations set forth in CPLR 213(1) and (2) ... [H]owever, *motions* to enforce the terms of a stipulation of settlement are not subject to statutes of limitation." 81 A.D.3d at 866.

'Denaro'

Denaro, citing *Bayen* and *Fragin*, held: "*Motions* to enforce the terms of a stipulation of settlement are not subject to statutes of limitation."

'Brewster v. Anthony-Brewster'

The agreement, in *Brewster v. Anthony-Brewster*, 174 A.D.3d 566 (2d Dept. 2019), was incorporated, but not merged, into the judgment of divorce, dated Feb. 27, 2009. Citing *Fragin*, *Bayen* and *Denaro*, the Supreme Court granted defendant's 2017 motion to enforce the agreement. The Appellate Division affirmed because the motion "[wa]s not subject to the statute of limitations applicable to breach of contract actions."

'Schnee' and 'Holsberger'

In 2013, the First Department, in *Schnee v. Schnee*, 110 A.D.3d 427 (1st Dept. 2013), joined the Second Department and, in 2017, the Third Department, in *Holsberger v. Holsberger*, 154 A.D.3d 1208 (3d Dept. 2017), followed.

In *Schnee*, the First Department, citing *Bayen* and *Fragin*, held: "a *motion* to enforce a right to a QDRO pursuant to a stipulation of settlement is not subject to a statute of limitation defense." 110 A.D.3d at 429.

In *Holsberger,* the Third Department, citing, the *Fragin*-triptych, joined ranks with the First and Second Departments: "In general, a statute of limitations defense applies to *actions* and special proceedings (CPLR 105(b); 201) ... [A]n *action* to enforce a distributive award in a matrimonial action is subject to the six-year statute of limitations set forth in CPLR 213(1) and (2) ... [H]owever, the wife's *motion* to enforce the terms of the separation agreement pursuant to Domestic Relations Law §244 *is not an action* and thus not subject to the statute of limitations set forth in CPLR 213(2)."

Holsberger is contrary to Third Department precedent that it has "consistently rejected" an argument "that would create an infinite period of challenge which would vitiate the purpose underlying the statute of limitations." *Beneke v. Town of Santa Clara*, 36 A.D.3d 1195, 1197 (3d Dept. 2007); see also *Entergy Nuclear Indian Point 2 v. New York State Dept. of Envtl. Conservation*, 23 A.D.3d 811 (3d Dept. 2005), lv. dismissed, lv. denied, 6 N.Y.3d 802 (2006). "To allow an alleged continuing harm which flows from a fully completed, separate, discrete act to infinitely extend the statute of limitations *** would vitiate the purpose underlying the limitations period ...." *McCarthy v. Zoning Bd. of Appeals of Town of Niskayuna*, 283 A.D.2d 857, 858 (3d Dept. 2001).

Legislative Power To Establish Public Policy

"[T]he New York Constitution gives each branch of government specific functions, powers, and limitations. The Legislature has been given the law making and public policy setting function (N.Y. Const. art. III, §1)." *New York State Ass'n of Nurse Anesthetists v. Novello*, 189 Misc.2d 564, 569 (Sup. Ct. 2001), aff'd, 301 AD2d 895 (3d Dept. 2003), rev'd, 2 N.Y.3d 207 (2004). "The legislative power of this state shall be vested in the senate and assembly ...." *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985); see also NY Statutes §126.

In *Messersmith v. Am. Fid. Co.*, 232 NY 161, 163 (1921), Judge Benjamin Cardozo stated: "The public policy of this state when the legislature acts is what the legislature says that it shall be." See also *Slayko v. Sec. Mut. Ins. Co.*, 98 N.Y.2d 289, 295 (2002). "In our tripartite form of government, the Legislature determines the public policy of this State, recalibrating rights and changing course when it deems such alteration appropriate as it grapples with enduring problems and rises to meet new challenges facing our communities." *Regina Metro. Co. v. New York State Div. of Hous. and Community Renewal*, 35 N.Y.3d 332, 348 (2020).

"The power to determine what the policy of the law shall be rests with the Legislature within constitutional limitations, and when it has expressed its will and established a new policy, courts are required to give effect to such policy." *F. A. Straus & Co. v. Can. Pac. R. Co.*, 254 NY

407, 413-14 (1930); *Farrington v. Pinckney*, 1 N.Y.2d 74, 82 (1956). "*This Court has repeatedly declined to interfere with the Legislature's policy choices as beyond the realm of judicial authority ... Where the Legislature has spoken, indicating its policy preferences, it is not for courts to superimpose their own.*" *Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (1999).

NY Statutes §126 cautions courts "not [to] change and rewrite[e] [public policy] to satisfy [their] own private notion of what such policy should be."

Cause of Action Accrues at the Time of the Breach

"A breach of contract cause of action accrues at the time of the breach." *Ely-Cruikshank v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). See also *Britt v. Legal Aid Soc'y*, 95 N.Y.2d 443 (2000); *John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544 (1979). "The statutory period of limitations begins to run from the time when liability for the wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury. This is so even though the result may at times be 'harsh and manifestly unfair, and creates an obvious injustice' because a contrary rule would be entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules that have long governed this aspect of commercial repose." *ACE Sec. v. DB Structured Products*, 25 N.Y.3d 581, 594 (2015). Otherwise stated, enforcement is extremely time sensitive.

Statute of Limitations Merely Bars the Remedy

"In New York, statutes of limitation are generally considered procedural because they are "[v]iewed as pertaining to the remedy rather than the right. The expiration of the time period prescribed in a statute of limitations does not extinguish the underlying right, but merely bars the remedy." *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 54-55 (1999). In *Johnson v. Albany & S.R. Co.*, 54 N.Y. 416 (1873), the Court of Appeals stated: "The statute of limitations [has] never paid a debt, although it [has] barred a remedy .... The moral obligation to pay always remains, although the remedy cannot be enforced in the courts." "A moral obligation, however, is not in and of itself 'debt'—although it may constitute sufficient consideration to support a promise to pay." *Schulz v. State*, 84 N.Y.2d 231 (1994). See also *Wagner v. Pegasus Capital Advisors, L.P.*, 196 A.D.3d 410 (1st Dept. 2021) ("[T]he expiration of the statute of limitations for suing on the parties' note did not extinguish the underlying obligation.")

In *Hulbert v. Clark*, 128 N.Y. 295, 297-98 (1891), the Court of Appeals explained that while "the statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, it simply bars a remedy thereon," that its enforceability is Legislature-dependent: "The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. *The legislature could repeal the statute of limitations*, and then the payment of a debt, upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation."

The late Prof. David D. Siegel, the dean of civil procedure, wittily summarized the net effect of statutes of limitation: "The application of the statute of limitations usually dismisses the action as permanently as a final judgment on the merits, at least insofar as further suit in New York is concerned. Clients told that they've lost only their remedy, not their right, have not been known to embrace their attorneys in tearful relief." Siegel, N.Y. Prac. §34 (6th ed.).

Courts Sentinel Limitations Periods; Substance of the Claim

Historically, courts have zealously deterred machinations calculated to circumvent policy-saturated limitations periods, thus rendering *Fragin* incomprehensible. (The Legislature also stands firm guard over limitations periods, Part II.) As the case law from the Court of Appeals and the First Department establishes, it is the "substance" of the claim that determines the corresponding limitations period; *courts focus on "the essential nature of a proceeding [which] may not be changed, [to] lengthen the statute of limitations, merely by denominating it as something other than what it actually is." ABC Radio Network, Inc. v. State of New York Dept. of Taxation and Fin.*, 294 A.D.2d 213, 214 (1st Dept. 2002); see also *Blackman v. New York City Hous. Auth.*, 280 A.D.2d 324, 325 (1st Dept. 2001). In *Rosenthal v. City of New York*, 283 A.D.2d 156, 157-58 (1st Dept. 2001), the Appellate Division, quoted the Court of Appeals in *Solnick v. Whalen,* 49 N.Y.2d 224 (1980), which involved a declaratory judgment action:

"The Court of Appeals has instructed that to determine the appropriate limitations period for a declaratory judgment action, "*it is necessary to examine the substance of [the] action to identify the relationship out of which the claim arises and the relief sought*" (Solnick v. Whalen, 49 N.Y.2d 224, 229, 425 N.Y.S.2d 68, 401 N.E.2d 190). *If "the rights of the parties sought to be stabilized ... are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action*" (id. at 229-230, 425 N.Y.S.2d 68) ...).

Further, "*if [a] claim could have been made in a form other than an action for a declaratory judgment and the limitations period for an action in that form has already expired, the time for asserting the claim cannot be extended through the simple expedient of denominating the action one for declaratory relief*" (*New York City Health and Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 201, 616 N.Y.S.2d 1)."

In *New York City Health and Hosps. v. McBarnette*, 84 N.Y.2d 194, 200-01 (1994), the Court of Appeals had applied *Solnick* to determine the applicable limitations period in a declaratory judgment action that had no specific limitations period. Citing *Koerner v. State of New York*, 62 N.Y.2d 442, 447 (1984), *McBarnette* added: "Solnick does not govern when 'a specific limitations period is clearly applicable to a given action, (and) there is no need to ascertain whether another form of proceeding is available.'" In *Fragin,* not only was there a proper method by which to seek relief, commencement of an action, but there was also a specific corresponding six-year limitations period.

Statutes of Limitations 'Force' Timeliness

The histories of statutory and common law defenses to contract actions, to wit, statutes of limitations, waiver, abandonment, equitable estoppel, and laches, represent parallel legislative and judicial policy values that creditors' diligently manage and not delay the prosecution of their financial affairs. Statutes of limitations "serve the ... objectives of finality, certainty and predictability." *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, n. 6 (2019).

"The purpose of the statute of limitations is to force a plaintiff to bring his claim within a reasonable time, set out by the Legislature, so that a defendant will have timely notice of a claim against him, and so that stale claims, and the uncertainty they produce, will be prevented." *Vastola v. Maer*, 48 A.D.2d 561, 564 (2d Dept. 1975), aff'd, 39 N.Y.2d 1019 (1976).

'Public Policy' and 'Societal Interest'

"Public policy" is "embodied in the legislature's selection of limitations period[s]." *Lohnas v. Luzi*, 30 N.Y.3d 752, 760 (2018). Quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), the Court of Appeals explained how statutes of limitations are "vital to the welfare of society":

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs.

An important public policy lies at their foundation. *They stimulate to activity and punish negligence*. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Zumpano v. Quinn*, 6 N.Y.3d 666, 684, n. 4 (2006).

In *ACE* (at 593), the Court of Appeals, quoting *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979), emphasized: "Statutes of limitation not only save litigants from defending stale claims, but also 'express a societal interest or public policy of giving repose to human affairs.'" See also *Lyles v. State*, 3 N.Y.3d 396, 400 (2004) ("It is well settled that statutes of limitations are designed to promote justice by preventing the revival of stale claims."); *Blanco v. Am. Tel. & Tel. Co.*, 90 N.Y.2d 757, 773 (1997); *Perez v. Paramount Commc'ns*, 92 N.Y.2d 749, 754 (1999).

"Statutes of limitation were 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared' (*Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 ...). Other considerations include 'promot[ing] repose by giving security and stability to human affairs' (*Wood v. Carpenter*, 101 U.S. 135, 139 (1879)), judicial economy, discouraging courts from reaching dubious results, recognition of self-reformation by defendants, and the perceived unfairness to defendants of having to defend claims long past." *Blanco*, 90 N.Y.2d 757 at 773; *Britt v. Legal Aid Soc.*, 95 N.Y.2d 443, 448 (2000).

"The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Walker v. Armco Steel*, 446 U.S. 740 (1980), cited in *Cook v. Deloitte & Touche USA*, 13 Misc.3d 1203(A) (Sup.Ct., N.Y. Co. 2006); see also *Blanco*, 90 N.Y.2d at 773.

In *Hernandez v. New York City Health & Hospitals*, 78 N.Y.2d 687, 698 (1991), the Court of Appeals echoed: "Statutes of Limitation are 'statutes of repose' representing 'a legislative judgment that ... occasional hardship is outweighed by the advantage of barring stale claims." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 404 (1993), quoting *Hernandez*, added: "[T]he 'difficulties' and 'injustice' conjured up by the dissent do not overcome important policy considerations." (Part II addresses the legislative rejection of injustice or hardship as factors in the implementation of the legislative intent.)

Sympathy and Hardship

Judicial sympathy for the late-filing spouse likely figures in these matters. However, *Blessington v. McCrory Stores*, 198 Misc. 291, 299 (Sup. Ct. 1950), aff'd, 279 A.D. 807 (2d Dept. 1952), aff'd, 305 N.Y. 140 (1953), noted: "We cannot allow sympathy and the exigencies of a particular case to give the statute of limitations any effect other than that which the Legislature intended it should have. The controlling statute in this, as in any other case is 'a declaration of public policy governing the right to litigate; it came into our law by way of the Legislature, not through the judicial process.' *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 119, 125. 'At times, it may bar the assertion of a just claim. Then its application causes hardship."

Part II examines the principles of statutory construction and decisional authority regarding legislative policy as it pertains to limitations periods.

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Part I discussed the First, Second and Third Departments' construction of CPLR 213(2), which indefinitely extends enforcement of marital agreements contrary to legislative policy and decisional authority.

Legislative Prohibitions Against Extending Limitation Periods

The Legislature prohibits judicial extensions of limitations periods. CPLR 213(2) is component of the broader scheme of Article 2. "When a statute is part of a broader legislative scheme, we construe its language in context and in a manner that harmonizes the related provisions and renders them compatible.'" *Regina Metro. Co. v. New York State Div. of Hous. and Community Renewal,* 35 N.Y.3d 332, 352 (2020); *Kosmider v. Whitney*, 34 N.Y.3d 48, 55 (2019); *Soto v. J. Crew*, 21 N.Y.3d 562, 566 (2013). NY Statutes amplify mandatory, unwavering obedience to legislative intent and purpose:

CPLR 201, "application of article": An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

NY Statutes §73, in pertinent part: "*[C]ourts may not create exceptions to the running of time limited by statute*, enlarge a statutory ban, or change the scope of a legislative enactment."

NY Statutes §92, in pertinent part: "Since the intention of the Legislature, embodied in a statute, is the law, in the construction of statutes the basic rule of procedure and the primary consideration of the courts is to ascertain and give effect to the intention of the Legislature. *Hence the legislative intent is said to be the 'fundamental rule,' 'the great principle which is to control,' 'the cardinal rule' and 'the grand central light in which all statutes must be read.'*

So it is the duty of courts to adopt a construction of a statute that will bring it into harmony with the Constitution and with legislative intent, and *no narrow construction of a statute may thwart the legislative design*.

The intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result. *Indeed the Legislature's intent must be ascertained and effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute, and whatever excesses or omissions may be found in the statute*. The courts do not sit in review of the discretion of the Legislature and may not substitute their judgment for that of the lawmaking body ....

... *no statute may be construed so strictly as to result in perversion of the legislative intent*."

NY Statutes §96, in pertinent part: "A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute.

Thus it is frequently held that the words of a statute are construed with reference to its subject-matter and the object sought to be obtained; and that construction is to be preferred which furthers the object, spirit and purpose of the statute. To avoid an unintended result a statute should be given a rational interpretation consistent with achieving its purpose and with justice and common sense. In all cases the legislative intent is to be effectuated; not frustrated, and *a particular provision of a statute is not to be given a special meaning at variance with the general purpose, unless it is clear that the Legislature so intended*.

* * *

[A] court in construing a law will sometimes be guided more by its purpose than its phraseology. Language of a statute is not to be accepted in all of its sheer literalness without regard to the object which the statute was designed to accomplish; and a statute is not to be

read with a literalness that kills meaning, intention, purpose, or beneficial end for which the statute has been designed.

NY Statutes §97, in pertinent part: "A statute or *legislative act* is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.

In construing a statute the court must take the entire act into consideration, or look to the act as a whole, and all sections of a law must be read together to determine its fair meaning. Statutory language, however strong, must yield to what appears to be intention and that is to be found not in the words of a particular section alone but by comparing it with other parts or provisions of the general scheme of which it is part.

Statutory words must be read in their context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section.

A general expression or a single sentence detached from its context does not reveal the purpose of the statute as a whole, and particular provisions, therefore, should not be torn from their places and, so isolated, be given a special meaning at variance with the general purpose and spirit of the enactment.

In seeking the legislative intent, words absolute in themselves and the broadest and most comprehensive language may be qualified and restricted by reference to other parts of the statute or to other acts on the same subject, or by the facts to which they relate, and though a statute is divided into many sections, each section is to be construed in connection with the others, and each is to be kept in subservience to the general intent of the whole enactment ... [S]ections of an act must be construed in view of all of the provisions of the act as well as the general purpose and manifest policy intended by the Legislature in the enactment."

NY Statutes §111: "*While [legislative] intention is first to be sought from a literal reading of the act itself, and the words and language used, giving such language its natural and obvious meaning, it is generally the rule that the literal meaning of the words used must yield when necessary to give effect to the intention of the Legislature. In the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered and given effect, and the literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted.*

The letter of a statute is not to be slavishly followed when it leads away from the true intent and purpose of the Legislature or leads to conclusions inconsistent with the general purpose of the statute or to consequences irreconcilable with its spirit and reason; and statutes are not to be read with literalness that destroys meaning, intention, purpose or beneficial end for which the statute has been designed (emphasis provided.)

Whenever the intention of the Legislature can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction be contrary to its letter; for a thing which is within the letter of the statute is not within the

statute unless it be within the intention of the lawmakers, but a case within the intention of a statute is within the statute, though an exact literal construction would exclude it."

In *Gregoire v. G. P. Putnam's Sons*, 298 NY 119, 126 (1948), the Court of Appeals, citing the U.S. Supreme Court, *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 351 (1937), declined to lift the bar of the statute of limitation: "To do so would disregard the clear purpose which the Legislature has conceived to be imperative to outlaw stale claims. 'The Legislature has the power to decide what the policy of the law shall be, and *if it has intimated its will, however, indirectly, that will should be recognized and obeyed.*'"

Public Policy Against Infinite Periods of Challenge

As noted in Part I, a theory "that would create an infinite period of challenge would vitiate the purpose underlying the statute of limitations." *Beneke v. Town of Santa Clara*, 36 A.D.3d 1195, 1197 (3d Dept. 2007); *Entergy Nuclear Indian Point 2, LLC v. New York State Dept. of Envtl. Conservation*, 23 A.D.3d 811 (3d Dept. 2005), lv. dismissed, lv. denied, 6 N.Y.3d 802 (2006).

"To allow an alleged continuing harm which flows from a fully completed, separate, discrete act to infinitely extend the Statute of Limitations * * * would vitiate the purpose underlying the limitations period ...." *McCarthy v. Zoning Bd. of Appeals of Town of Niskayuna*, 283 A.D.2d 857, 858 (3d Dept. 2001). In *Bayridge Air Rights v. Blitman Const.*, 80 N.Y.2d 777, 779-80 (1992), the Court of Appeals held unenforceable an "agreement [that] purported to extend the limitations period to an indefinite date in the future."

In *Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr. v. Flagstar Capital Markets*, 32 N.Y.3d 139, 154 (2018), the Court of Appeals ruled on the clash of two public policies: "When the public policy favoring freedom to contract and the public policy prohibiting extensions of the limitations period before accrual of the cause of action come into conflict ... the latter must prevail, inasmuch as 'the parties to a contract are basically free to make whatever agreement they wish' only '[a]bsent some violation of law or transgression of a strong public policy.'"

'Anonymous v. Anonymous'

In 1979, in *Anonymous v. Anonymous*, 71 A.D.2d 209 (1st Dept. 1979), the First Department soundly defeated the reasoning in *Fragin*, et al., regarding the procedural mechanism, action or motion, as the determinant of the limitations period. In *Anonymous*, the wife moved for an order directing recovery of items in the husband's possession. During a hearing, the husband raised the three-year limitations period applicable to an action for the recovery of a chattel (CPLR 214(3)):

"In holding that the three-year Statute of Limitations is inapplicable because CPLR 214(3) refers to an 'action' to recover a chattel whereas only a motion is involved here, Special Term unduly focused on the term 'action.' *While it is true that all statutory limitations of time refer to the commencement of an 'action,' courts should 'look for the reality, and the essence of the action and not its mere name.*' 'The classification and nature of a proceeding for purposes of

statute of limitations do not turn upon the appellation attributed thereto by the pleader or even upon the artificial guise in which the pleader would garb the proceeding to gain the advantage of a longer statutory period.'

* * *

We fail to see why a [Domestic Relations Law] section 234 motion, which lacks an existence independent of the main matrimonial action, is insulated from the restrictions of the Statute of Limitations, *since the rationale underlying them is as applicable to motions as to plenary actions.* The statutes 'are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.' (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142). They represent a legislative judgment that the occasional hardship engendered by the barring of a justified claim 'is outweighed by the advantage of outlawing stale claims.' (*Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 302). Thus, it seems clear that the various Statutes of Limitation are applicable to proceedings within an action, including a motion pursuant to section 234 of the Domestic Relations Law (emphasis provided.)"

CPLR 211(e), Legislature Extends the Limitations Period to 20 Years

"When the Legislature has intended to revive time-barred claims, it has typically unambiguously done so, providing a limited window when stale claims may be pursued." *Regina Metro. Co. v. New York State Div. of Hous. and Community Renewal*, 35 N.Y.3d 332, 371 (2020). In 1987, the Legislature enacted CPLR 211(e) to extend support arrears enforcement to 20 years, which concretely proves that the Legislature will extend a limitations period when policy so demands: "For support, alimony or maintenance. An action or proceeding to enforce any temporary order, permanent order or judgment of any court of competent jurisdiction which awards support, alimony or maintenance, regardless of whether or not arrears have been reduced to a money judgment, must be commenced within twenty years from the date of a default in payment."

General Obligations Law §17-103(1)

In General Obligations Law (GOL) §17-103(1), the Legislature saw fit to establish parameters, which allow parties, not the court, to *privately* extend limitations periods: "A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise."

However, in *John J. Kassner & Co., Inc. v. City of New York*, 46 N.Y.2d 544, 550-51 (1979), which involved GOL §17-103, the Court of Appeals noted that "due to the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense": "[P]arties may cut back on the statute of limitations by agreeing that any suit must be commenced within a shorter period than is prescribed by law. Such an agreement does not conflict with public policy but, in fact, "more effectively secures the end sought to be attained by the statute of limitations" (*Ripley v. Aetna Ins. Co.*, 30 N.Y. 136, 163). Thus an agreement which modifies the statute of limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable." See also *Deutsche Bank*, 32 N.Y.3d 139.

Legislative Inaction

Notwithstanding CPLR 211(e), the Legislature's inaction to amend CPLR 213(2) to include *motions* for the enforcement of marital agreements is not indicative of a legislative determination to break from the larger scheme and public policy of the six-year statute of limitations. In *Clark v. Cuomo*, 66 N.Y.2d 185, 190-91 (1985), the Court of Appeals, quoting the U.S. Supreme Court, in *United States v. Price*, 361 U.S. 304, 310-11 (1960), emphasized: "Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences.'" In *New York State Ass'n of Life Underwriters v. New York State Banking Dept.*, 83 N.Y.2d 353, 363 (1994), the petitioner's reliance on the Legislature's failure to include a specific provision in the Banking Law was "unpersuasive": "It is settled that inaction by the Legislature is inconclusive in determining legislative intent."

Conclusion

Fragin and its progeny effectively subverted rigid legislative policy and placed the throttle in the hands of slumbering creditors based on no more than a procedural device. Although, *Holsberger v. Holsberger*, 154 A.D.3d 1208, 1210 (3d Dept. 2017), states, "Where an agreement is incorporated within a judgment of divorce, the judgment may be enforced by 'application' ..." and *Anderson v. Anderson*, 153 A.D.3d 1627, 1628 (4th Dept. 2017) held "it is well settled that a party to a stipulation that is incorporated but not merged into a judgment of divorce cannot challenge the enforceability of the stipulation by way of motion but rather must do so by commencement of a plenary action ... *Conversely, a party seeking to enforce the terms of such a stipulation may do so either by a motion to enforce the judgment or by a plenary action*," they may have no impact on governing limitations periods.

Absent a legislative amendment to CPLR 213(2), the six-year limitations period must apply to all methods of contract enforcement, irrespective of the initiating procedural mechanism, action or motion; legislative policy and intent are rigid and suffer no such distinction.

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