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4th Dep't, Limitations Period of Enforcement of Marital Agreements: Part I

The Fourth Department continues to stand alone, albeit this time on unstable and contradictory reasoning, in correctly restricting enforcement to six years where enforcement has been sought by motion.

By **Elliott Scheinberg** | March 30, 2022

Elliott Scheinberg. Courtesy photo

Legislative policy and societal interests underlying Article 2 of the CPLR, Limitations of Time, require every claim to have an expiration date. CPLR 213(2) states, in pertinent part: "The following actions must be commenced within six years: (2) "an action upon a contractual obligation or liability, express or implied ..."

In *CPLR 213(2), Judicial Breach of Public Policy, Legislative Amendment Required, Part I* (https://www.law.com/newyorklawjournal/2021/10/13/cplr-2132-judicial-breach-of-public-policy-legislative-amendment-required-part-i/), NYLJ (Oct. 14, 2021) and *Part II* (https://www.law.com/newyorklawjournal/2021/10/14/cplr-2132-judicial-breach-of-public-policy-legislative-amendment-required-part-ii/) (Oct. 15, 2021), this column studied the cases from the First (*Schnee v. Schnee*, 110 A.D.3d 427 (1st Dep't 2013)), Second (*Fragin v. Fragin*, 80 A.D.3d 725 (2d Dep't 2011), *Bayen v. Bayen*, 81 A.D.3d 865 (2d Dep't 2011), *Denaro v. Denaro*, 84 A.D.3d 1148 (2d Dep't 2011), and *Brewster v. Anthony-Brewster*, 174 A.D.3d 566 (2d Dep't 2019)), and Third (*Holsberger v. Holsberger*, 154 A.D.3d 1208 (3d Dep't 2017)) Departments,

which, based on a hypertechnical reading of the Article 2 of the CPLR, ran afoul of legislative intent, the statutory scheme and social policy by annulling the statutory six-year limitation period thereby indefinitely extending enforcement of spousal agreements, which were incorporated into and survived a judgment of divorce, where enforcement is initiated by motion rather than by plenary action. The reasoning behind these cases is anchored in *Fragin:* "*[O]nly 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."

The Fourth Department. This issue reemerged on Dec. 23, 2021 in *Mussmacher v. Mussmacher*, 200 A.D.3d 1702 (4th Dep't 2021), wherein the Fourth Department continues to stand alone, albeit this time on unstable and contradictory reasoning, in correctly restricting enforcement to six years where enforcement has been sought by motion.

Treatment of this issue in the Fourth Department was inadvertently omitted from Parts I and Part II of the October 2021 articles. *Mussbacher* and the Fourth Department are studied in Part II of this article.

Foundational Principles That Contradict the 1st, 2d and 3d Departments. A review of settled law and public policy regarding limitation periods, albeit discussed in the October 2021 articles, will facilitate the understanding of *Mussbacher*:

Legislative power to establish public policy. "Public policy" is embodied in the legislature's selection of limitations period[s]." *Lohnas v. Luzi*, 30 N.Y.3d 752, 760 (2018). "[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 A.D.2d 895 (3d Dep't 2003), rev'd, 2 N.Y.3d 207 (2004); *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985). Also, NY Statutes §126.

"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); *Messersmith v. Am. Fid. Co.*, 232 NY 161, 163 (1921) ("The public policy of this state, when the Legislature acts, is what the Legislature says that it shall be."); *Slayko v. Sec. Mut. Ins. Co.*, 98 N.Y.2d 289, 295 (2002).

"The power to determine what the policy of the law shall be rests with the Legislature ... 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 N.Y. 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).

Accrual of breach of contract cause of action. "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). "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).

'A statute of limitations does not extinguish the underlying right but merely bars the remedy.' 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); *Wagner v. Pegasus Capital Advisors, L.P.*, 196 A.D.3d 410 (1st Dep't 2021).

"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." *Johnson v. Albany & S.R. Co.*, 54 N.Y. 416 (1873). "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).

Debt enforcement is Legislature-dependent, *Hulbert v. Clark*, 128 N.Y. 295, 297-98 (1891): "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."

Courts sentinel limitation 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 vigilant over limitation periods, Part II.)

Case law from the Court of Appeals and the First Department establishes that "*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 v. State of New York Dept. of Taxation and Fin.*, 294 A.D.2d 213, 214 (1st Dep't 2002); see also *Blackman v. New York City Hous. Auth.*, 280 A.D.2d 324, 325 (1st Dep't 2001). *Rosenthal v. City of New York*, 283 A.D.2d 156, 157-58 (1st Dep't 2001) quoted the Court of Appeals in *Solnick v. Whalen,* 49 N.Y.2d 224 (1980), 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). *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 ...).
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> 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).

In *New York City Health and Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 200-01 (1994), the Court of Appeals 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.'"

Anonymous v. Anonymous, 71 A.D.2d 209 (1st Dep't 1979) soundly defeats 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."
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> We fail to see why a [Domestic Relations Law] §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 ...)

> 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.

The roots of *Fragin* and its progeny are inextricably entwined in contract law, which may, therefore, only correspond to the six-year limitations period in CPLR 213(2).

Statutes of limitations 'force' parties to timely manage their claims; 'finality, certainty and predictability'. The histories of statutory and common law defenses to contract actions, 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 Dep't 1975), aff'd, 39 N.Y.2d 1019 (1976).

'Public policy,' 'the societal interest of promoting repose to human affairs,' justice, hardship, 'legislative judgment'. In *Zumpano v. Quinn*, 6 N.Y.3d 666, 684, n.4 (2006), the Court of Appeals, quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), 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."

In *ACE*, 25 N.Y.3d 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); *Blanco v. Am. Tel. & Tel. Co.*, 90 N.Y.2d 757, 773 (1997).

"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, 348-349 ...). 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 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); *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, hardship as impermissible factors. 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 AD 807 (2d Dep't 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: legislative prohibitions against extending limitation periods; public policy against infinite periods of challenge supersedes the public policy of freedom to contract; CPLR 211(e); GOL §17-103(1); legislative inaction; and the Fourth Department, *Mussbacher*, et al.

Elliott Scheinberg *is a member of the NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of The New York Civil Appellate Citator (NYSBA, 2 vols., 2019) and Contract Doctrine and Marital Agreements in New York (NYSBA, 2 vols., 4th ed. 2020). He is a Fellow of the American Academy of Matrimonial Lawyers.*

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4th Dep't, Limitations Period of Enforcement of Marital Agreements: Part II

In 'Mussbacher v. Mussmacher', the Fourth Department preserved its uniqueness amongst the Departments, albeit on unstable, contradictory reasoning without any reference to CPLR 213(2), in properly restricting enforcement of a marital agreement to six years of retroactive claims, irrespective of whether pursued by action or by motion.

By **Elliott Scheinberg** | March 31, 2022

Elliott Scheinberg. Courtesy photo

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

Legislative prohibitions against extending limitation periods: CPLR 201; NY Statutes Law §§73, 92, 96, 97, 111. The statutory scheme prohibits judicial extensions of limitations periods. "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.'" CPLR 213(2) is a component of the broader scheme, Article 2. *Kosmider v. Whitney*, 34 N.Y.3d 48, 55 (2019).

NY Statutes emphasize unfaltering obedience to legislative intent:

CPLR 201: "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.*

... 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, in pertinent part: "*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."

NY Statutes §126: 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."

In *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 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.*'"

Policy against infinite periods of challenge supersedes the policy of freedom to contract. "To allow a 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 Dep't 2001); *Beneke v. Town of Santa Clara*, 36 A.D.3d 1195, 1197 (3d Dep't 2007).

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.'"

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). CPLR 211(e) is such a concrete instance where the Legislature, in 1987, extended enforcement of support arrears to 20 years: "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 GOL §17-103(1), the Legislature saw fit to establish parameters to 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. 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* and *Bayridge*, above.

Legislative inaction. Notwithstanding CPLR 211(e), the Legislature's inaction to amend 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 limitations period. In *Clark v. Cuomo*, 66 N.Y.2d 185, 190-91 (1985), the Court of Appeals, quoting *United States v. Price*, 361 U.S. 304, 310-311 (1960), emphasized: "Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences.'"; *New York State Ass'n of Life Underwriters v. New York State Banking Dept.*, 83 N.Y.2d 353, 363 (1994) ("It is settled that inaction by the Legislature is inconclusive in determining legislative intent.")

'Mussmacher'. In *Mussbacher v. Mussmacher*, 2021 NY Slip Op 07413 (4th Dep't 2021), the Fourth Department preserved its uniqueness amongst the Departments, albeit on unstable, contradictory reasoning without any reference to CPLR 213(2), in properly restricting enforcement of a marital agreement to six years of retroactive claims, irrespective of whether pursued by action or by motion.

The Mussbacher's 1994 judgment-of-divorce incorporated but did not merge their written stipulation regarding the wife's share in the husband's pension plan. Although a qualified domestic relations order (QDRO) was entered shortly after the judgment, it was never sent to the husband's employer, Niagara Mohawk Power Corporation.

Upon retirement, in 2003, the husband's pension was in the "National Grid Incentive Thrift Plan II," with an option of "a maximum 10-year distribution period to commence at the election of, and in amounts determined by, the participant." In 2010, the husband commenced receiving distributions in approximately $25,000 increments until depletion at the end of 2018.

On July 29, 2019, the wife *filed a motion* seeking "retroactive arrearages". Following a hearing, Supreme Court issued a judgment awarding her $75,804.08. The Fourth Department reduced the award to $52,325.93: "[T]he court improperly calculated the amount owing to plaintiff because *the statute of limitations applies to plaintiff's motion* seeking arrearages for her share of defendant's pension ... It is well settled that '[a] stipulation of settlement that is incorporated, but not merged, into the judgment of divorce is a contract subject to the

principles of contract construction and interpretation' ... and an action seeking money damages for violation of a separation agreement is subject to the six-year statute of limitations for breach of contract actions."

So far so good.

However, in the very next paragraph, the Fourth Department puzzlingly made seriatim contradictions to the above paragraph, which references *Fragin* and *Denaro* as authoritative.

"Contrary to the court's determination, it is irrelevant that plaintiff sought the arrearages by way of motion rather than by commencement of a plenary action. Although motions to enforce the terms of a stipulation are not subject to the statute of limitations (*Denaro*, 84 A.D.3d at 1149; *Fragin v. Fragin*, 80 A.D.3d 725 ...), in this case plaintiff was seeking arrearages, or money damages, for the amounts that she did not receive because the QDRO was never received by Niagara Mohawk. When a party is seeking arrearages or a money judgment, the statute of limitations applies whether a party commences a plenary action ... or, as here, simply moves for that relief.

Thus, we conclude that plaintiff's claim is timely only to the extent that she seeks her share of pension payments made within six years prior to her motion filed on July 29, 2019."

'Bielecki'. In *Bielecki v. Bielecki*, 106 AD3d 1454 (4th Dep't 2013), cited in *Mussbacher*, defendant appealed from an order granting plaintiff's motion for a money judgment representing her share of defendant's pension benefits "when defendant starts to obtain his pension"—which occurred in 1991. Plaintiff, however, was unaware that defendant had been receiving benefits and only began to receive her share in October 2005, when she obtained a QDRO. Plaintiff's *motion*, filed Oct. 21, 2010, sought her benefits from 1991 until October 2005: "[P]laintiff's claim for retroactive pension benefits was subject to the six-year statute of limitations in CPLR 213(1).

The statute began to run when defendant began receiving his pension in March 1991 ... Because defendant's obligation to pay plaintiff her share of the pension was ongoing, the statute began to run anew with each missed payment ... Thus, plaintiff's claim is timely to the extent that it seeks payments missed within six years prior to her motion filed on October 21, 2010. To the extent that plaintiff sought her share of pension payments made more than six years prior to October 21, 2010, however, plaintiff's claim is untimely. We, therefore, modify the order accordingly (at 1455)."

Motions to amend QDRO's in the Fourth Department. The Fourth Department allows untimely vacatur and amendments of QDRO's to accurately reflect the underlying stipulations: *Santillo v. Santillo*, 155 A.D.3d 1688 (4th Dep't 2017), *Beiter v. Beiter*, 67 A.D.3d 1415 (4th Dep't 2009). See also *Taberski v. Taberski*, 197 A.D.3d 871 (4th Dep't 2021)).

'Santillo'. The parties' agreement was incorporated but not merged into the 1994 judgment-of-divorce. Plaintiff was entitled to a share of defendant's pension benefits "until, [inter alia,] her remarriage." Plaintiff remarried in 1995. Defendant's attorney executed an erroneous

QDRO, entered in 1996, which failed to provide the termination upon her remarriage. In 2016, defendant filed his retirement documents and discovered the QDRO. Defendant moved for an order vacating the QDRO grounded on its inconsistency with the agreement.

The Fourth Department held that Supreme Court erred in denying that branch of defendant's motion as it conferred rights greater than those in the agreement "regardless whether the parties or their attorneys approved the QDRO without objecti[on]."

'Beiter'. *Beiter* stated (67 A.D.3d at 1416): "[T]hose parts of [the wife's] *motion* to vacate and amend the QDRO did not in effect constitute commencement of an action for breach of contract, and thus those parts of the motion were not barred by the six-year statute of limitations applicable to breach of contract actions.

'Where a QDRO is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits' ... Moreover, 'because a QDRO is derived from the bargain struck by the parties at the time of the judgment of divorce, there is no need to commence a separate 'action' in order for the court to formalize the agreement between the parties in the form of a QDRO.'"

Conclusion. While an agreement surviving a judgment of divorce may be enforced by motion, such motion may not alter limitations periods. *Fragin* and its progeny effectively subvert rigid legislative and judicial policy based on no more than an improper hypertechnical judicial read.

Absent a legislative amendment to CPLR 213(2), the six-year limitations period applies to all methods of contract enforcement, irrespective of the initiating mechanism; legislative policy and intent inflexibly suffer no distinctions.

Elliott Scheinberg *is a member of the NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of The New York Civil Appellate Citator (NYSBA, 2 vols., 2019) and Contract Doctrine and Marital Agreements in New York (NYSBA, 2 vols., 4th ed. 2020). He is a Fellow of the American Academy of Matrimonial Lawyers.*