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# CPLR 213(1): Six-Year "Catch-All" Statute of Limitations Provision Is Applicable to a Claim Under the Taylor Law Alleging the Breach of a Public Union's Duty of Fair Representation

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clause is enforced, it is urged that the court, looking beyond the plain meaning of the arbitration provision to the intent of the drafters, deny multiple proceedings.

The *Assael* court reaffirmed the common law rule that participation in a court action does not necessarily constitute a waiver of the right to arbitrate separate issues.[24] In so doing, the court has reiterated the importance of distinguishing the issues addressed in the court action from distinct issues that arise from the same agreement.[25] As the majority noted, New York follows a "flexible and balanced approach to the issue of waiver."[26] Therefore, it seems that a case-by-case determination of what constitutes "separate" issues is necessary in similar cases involving waiver of arbitration rights.

Moreover, the practitioner would be well advised to recognize that the *Assael* holding is limited to its unique factual setting. It is suggested that in the absence of a similar contractual provision, specifically providing for injunctive relief in addition to arbitration, the court should advance the intent of the parties to curtail costs by consolidating proceedings that involve related issues even if it results in the waiver of a remedy.

*Michele R. Pistone*

## Civil Practice Law and Rules

### *CPLR 213(1): Six-year "catch-all" statute of limitations provision is applicable to a claim under the Taylor Law alleging the breach of a public union's duty of fair representation*

Article 2 of New York's CPLR provides the applicable statute

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ing arbitration favorable treatment. *See, e.g.*, J.F. Inc. v. Vicik, 99 Ill. App. 3d 815, 820, 426 N.E.2d 257, 261 (1981) (rejecting right to arbitrate issues factually similar to those being litigated because arbitration would increase cost and delay); Prestressed Concrete, Inc. v. Adolsfson & Peterson, Inc., 308 Minn. 20, 24, 240 N.W.2d 551, 553 (1976) (arbitration not favored because it increases cost and delay).

[24] *Assael*, 132 App. Div. 2d at 8, 521 N.Y.S.2d at 228.

[25] *Id.* at 9, 521 N.Y.S.2d at 229.

[26] *Id.* at 8, 521 N.Y.S.2d at 228.

of limitations for commencing an action.[1] Since the CPLR does not consolidate all limitation periods into one statute, the article 2 period of limitations may be subordinated to other statutory provisions.[2] Additionally, if a particular cause of action has not been given a specific limitation provision, a court is directed to apply the "catch-all" six-year statutory period of CPLR 213(1).[3] The Public Employees' Fair Employment Act, commonly referred to as

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[1] *See* CPLR 201-218 (McKinney 1972). CPLR 201 provides:

> 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.

*Id.* In addition, statutes of limitations were enacted to prevent litigation of stale claims and the institution of an action after a reasonable period of time has elapsed. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 429, 248 N.E.2d 871, 872, 301 N.Y.S.2d 23, 25 (1969).

For a discussion of the general purposes of statutes of limitations, see 2 CARMODY-WAIT, CYCOLPEDIA OF NEW YORK PRACTICE § 13:1, at 295-97 (2d ed. 1965 & Supp. 1987); SIEGEL § 33, at 34 (1978); 1 WK&M ¶ 201.01, at 2-7—2-10 (1986).

[2] CPLR 201, commentary at 58 (McKinney 1972); *see, e.g.*, State v. Waverly Cent. School Dist., 28 App. Div. 2d 628, 628, 280 N.Y.S.2d 505, 506 (3d Dep't 1967) (CPLR injury to property limitation provision subordinated to notice and time requirements of GML 50-e in action against state); Reiss v. Pacific Steel Pool Corp., 73 Misc. 2d 78, 79, 341 N.Y.S.2d 364, 365 (Sup. Ct. Albany County 1973) (CPLR 213(2) limitation period for contract actions subordinated to U.C.C. statute of limitations for sale of goods); *see generally* 2 CARMODY-WAIT, *supra* note 1, § 13:3, at 299-309 (listing all prescribed periods of limitation and their statutory reference).

[3] *See* CPLR 213(1) (McKinney 1972). CPLR 213 provides in pertinent part: "The following actions must be commenced within six years: 1. an action for which no limitation is specifically prescribed by law . . . ." *Id.* Aside from its use as a "catch-all" provision, CPLR 213(1) is applied in actions seeking equitable relief. *See, e.g.*, Loengard v. Santa Fe Indus., 70 N.Y.2d 262, 266, 514 N.E.2d 113, 115, 519 N.Y.S.2d 801, 803 (1987) (claim for breach of equitable duty governed by CPLR 213(1)). *See generally* 1 WK&M ¶¶ 213.01-.07, at 2-126—2-138 (discussing application of "catch-all" provision to various actions in equity).

Generally, the substance of the complaint, not the relief or remedy sought, identifies the appropriate limitation period. *See* Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 294, 360 N.E.2d 1091, 1093, 392 N.Y.S.2d 409, 411 (1977); Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937). *But see* Sears, Roebuck & Co. v. Enco Assocs., 43 N.Y.2d 389, 394-95, 372 N.E.2d 555, 558, 401 N.Y.S.2d 767, 770 (1977) (limitation period related to remedy sought, not theory of liability). In addition, the substance of the complaint helps determine when an action accrued. *See* CPLR 203, commentary at 111-14 (McKinney 1972). Since the question of whether the statute of limitations has expired is dependent on when the statute starts running, the determination of the accrual date may be as important as deciding upon the applicable statute of limitations. *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950) [hereinafter *Limitations*]; *see also* SIEGEL §§ 40-44, at 42-46 (examining situations when determining moment of accrual is difficult issue). However, the CPLR also provides tolls which may delay the running of the statutory period in certain instances. *See* SIEGEL §§ 50-56, at 51-57; *Limitations*, *supra*, at 1200-37.

the Taylor Law,[4] governs the rights and obligations of public sector employers, employees, and unions.[5] While the Taylor Law and its accompanying regulations[6] have established some limitation periods,[7] neither the CPLR nor the Taylor Law expressly prescribes a period of limitations applicable to an action for a public sector union's breach of duty of fair representation.[8] Recently, in *Baker v. Board of Education*,[9] the Court of Appeals held that the "catch-all" provision of section 213(1) of the CPLR is the controlling statutory period in an action brought by a public school teacher against her union for breach of its duty of fair representation.[10]

In *Baker*, the plaintiff Linda Baker, a math teacher, was granted a full-time educational leave of absence for the 1983-84

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[4] N.Y. CIV. SERV. LAW §§ 200-12 (McKinney 1983).

[5] *Id.* The major impetus behind the enactment of the Taylor Law was stated in the GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS—FINAL REPORT, *reprinted in* [1966] PUBLIC PAPERS OF GOVERNOR ROCKEFELLER 878 [hereinafter FINAL REPORT]. *See* King, *The Taylor Act—Experiment in Public Employer-Employee Relations*, 20 SYRACUSE L. REV. 1, 2 (1968). The enactment of the Taylor Law was due in part to failure of the Condin-Wadlin Law, N.Y. CIV. SERV. LAW §§ 1, 2 (McKinney 1963), *repealed by* N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1983), to prevent public strikes and to respond to the needs of public employees. *See* FINAL REPORT, *supra*, at 880, 892. These concerns and others expressed in the FINAL REPORT were addressed by the state legislature and culminated in the enactment of the Public Employees' Fair Employment Act. *See* Governor's Memorandum on Approval of ch. 392, *reprinted in* [1967] N.Y. LEGIS. ANN. 273. The underlying policies of the Taylor Law are best summarized by section 200:

> [T]he purpose of this act [is] to promote harmonious and cooperative relationships between government and its employees . . . by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees . . . (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers . . . .

N.Y. CIV. SERV. LAW § 200 (McKinney 1983) (footnote omitted).

[6] *See* [1988] 4 N.Y.C.R.R. §§ 200-15. Section 205 of the Civil Service Law created the Public Employment Relations Board ("PERB") and empowered it "[t]o establish procedures for the prevention of improper employer and employee organization practices." N.Y. CIV. SERV. LAW § 205(5)(d) (McKinney 1983).

[7] *See, e.g.*, N.Y. CIV. SERV. LAW § 213(a)(1) (McKinney 1983) (orders of PERB reviewable under CPLR article 78 if filed within thirty days); [1988] 4 N.Y.C.R.R. § 204.1(a)(1) (four-month limitation period for filing an improper practice charge with PERB director).

[8] *See infra* notes 21-26 and accompanying text.

[9] Baker v. Board of Educ., 70 N.Y.2d 314, 514 N.E.2d 1109, 520 N.Y.S.2d 538 (1987).

[10] *See id.* at 319, 514 N.E.2d at 1111, 520 N.Y.S.2d at 540. The union must represent its members fairly and in good faith. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 190 (1966) (breach of duty of fair representation only occurs when union acts arbitrarily or in bad faith).

school year to pursue graduate studies in computer science.[11] In response to the district superintendent's refusal to grant her request for an extension of her educational leave, the plaintiff submitted her resignation.[12] Subsequently, Baker learned that male teachers in similar circumstances had been granted the same type of request.[13] As a result, Baker filed a formal grievance pursuant to the collective bargaining agreement between her union and the school district[14] and requested that the union prosecute her grievance.[15] The union declined to represent the plaintiff in her claim since she lost her union member status when she resigned.[16] In February 1985, the union refused to reconsider submitting her grievance to arbitration.[17]

In July 1985, ten months after her resignation, Baker instituted an action against the school district for wrongful discharge and against the union for breach of its duty of fair representation.[18] Special Term denied the union's motion to dismiss the claim against it.[19] Unanimously reversing the decision below, the

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[11] *Baker*, 70 N.Y.2d at 317, 514 N.E.2d at 1110, 520 N.Y.S.2d at 539. Baker was a mathematics teacher in the district and member of the West Irondequit Teacher's Association for approximately fourteen years. *See id.*

[12] *See id.* As an alternative, Baker had requested that she be relieved from certain administrative duties so that she could continue her graduate studies part time. *Id.* Since the superintendent indicated that such relief might be available for only one semester, Baker resigned. *See id.*

[13] *Id.*

[14] *Id.* at 317, 514 N.E.2d at 1110, 520 N.Y.S.2d at 539. The collective bargaining agreement included a mandatory three-stage grievance procedure. First, an informal attempt was undertaken to resolve the grievance with the school principal. *Id.* Next, the union, if satisfied that the grievance was legitimate, could file a formal written appeal with the district superintendent. *Id.* Finally, if the union and the teacher were dissatisfied with the superintendent's decision, the matter could be submitted to arbitration. *Id.*

[15] *See id.* Before filing her complaint, Baker attempted to resolve the matter directly with the school's principal and the district superintendent. *See id.* However, they would not address her grievance because she was no longer an employee of the school district. *See id.* at 317-18, 514 N.E.2d at 1110, 520 N.Y.S.2d at 539.

[16] *See id.* The union informed Baker that she would have to pursue the matter on her own if she wanted any relief. *See id.* Additionally, Baker's request for arbitration was denied because she was not able to use the grievance procedure without representation by the union. *See id.*

[17] *See id.*

[18] *See id.* at 318, 514 N.E.2d at 1110, 520 N.Y.S.2d at 539. The action for wrongful discharge was not an issue before the court because it could not be addressed until the question of timeliness was resolved. *See id.* Baker alleged that the union's failure to pursue her claim was "arbitrary, capricious and in bad faith." *Id.*

[19] *Id.*, 514 N.E.2d at 1110, 520 N.Y.S.2d at 540. The union sought dismissal on three grounds: untimeliness; failure of the complaint to state a cause of action; and the plaintiff's failure to exhaust contractual and internal remedies. *Id.*, 514 N.E.2d at 1111, 520 N.Y.S.2d

Appellate Division, Fourth Department, dismissed the complaint against the union as untimely, concluding that the applicable statute of limitations for a cause of action for breach of the duty of fair representation was the federal six-month period for filing an unfair labor practice.[20]

The Court of Appeals reversed, holding *inter alia*, that the limitations period for bringing an action for breach of the obligation of fair representation against a public union was not governed by the six-month federal statute of limitations period as applied by the Supreme Court in analogous actions by *private* employees,[21] nor by any of the periods suggested by the union.[22] Writing for an

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at 540.

[20] Baker v. Board of Educ., 123 App. Div. 2d 500, 501, 507 N.Y.S.2d 340, 341 (4th Dep't 1980). In addition, the Appellate Division reasoned that there was no duty to represent someone who, by virtue of a resignation, is no longer a member of the union. *See id.* The Appellate Division had relied heavily on the Supreme Court's decision in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). *See id.*

In *DelCostello*, the Supreme Court decided the issue of the timeliness of a cause of action for breach of a duty of fair representation against a *private* rather than a *public* union. The Court observed that New York's limitation period for vacating an arbitration award—CPLR 7511—failed to adequately balance the competing concerns at hand: society's concern for the prompt resolution of labor disputes and its interest in providing an adequate opportunity for an aggrieved employee to vindicate his rights under the fair representation doctrine. *See DelCostello*, 462 U.S. at 166-69. The Supreme Court concluded that these interests were best balanced by applying the six-month limitation period for bringing an unfair labor practice charge under the National Labor Relations Act ("NLRA"), the federal counterpart to the Taylor Law. *See id.* at 169. The NLRA provides in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board." 29 U.S.C. § 160(b) (1982).

[21] *See Baker*, 70 N.Y.2d at 319-22, 514 N.E.2d at 1111-13, 520 N.Y.S.2d at 540-42. The court rejected the Appellate Division's adoption of *DelCostello* to public sector disputes. *See id.* The court also held that the Appellate Division erred in declaring that Baker was no longer entitled to representation by the union after she resigned. *See id.* at 323, 514 N.E.2d at 1114, 520 N.Y.S.2d at 543. Finding it significant that Baker was a member of the union's bargaining unit when her grievance arose, the court concluded that the gravamen of Baker's complaint was a constructive discharge. *See id.* Therefore, her resignation did not extinguish her cause of action against the union because an employee is generally able to maintain an action after resignation or termination. *See, e.g.*, Hoerger v. Board of Educ., 127 App. Div. 2d 88, 92, 514 N.Y.S.2d 395, 398 (2d Dep't 1987) (plaintiff successfully brought action after retiring); Ferri v. Public Employees Fed'n, 92 App. Div. 2d 1054, 1055, 461 N.Y.S.2d 534, 534 (3d Dep't 1983) (employee entitled to union representation after termination), *later proceeding*, 115 App. Div. 2d 814, 495 N.Y.S.2d 759 (1985).

[22] *See Baker*, 70 N.Y.2d at 321, 514 N.E.2d at 1112-13, 520 N.Y.S.2d at 541-42. The court rejected the union's suggestion that the applicable limitations period was governed by CPLR 7511(a), which prescribes a ninety-day limit in an action to vacate an arbitration award, because Baker had not had the opportunity for her grievance to run its full course. *See Baker*, 70 N.Y.2d at 321, 514 N.E.2d at 1112-13, 520 N.Y.S.2d at 541-42. In addition,

unanimous court, Judge Kaye asserted that the present action was governed by New York State's Taylor Law, not the federal National Labor Relations Act ("NLRA").[23] The court reasoned that, since the state is excluded from the definition of "employer" under the NLRA, a limitations period established by the New York legislature should be applied.[24] In addition, the statutory basis for implying a cause of action against a public union precludes federal law from being accorded "binding or controlling precedent" because of "fundamental distinctions" between public and private unions.[25] Examining both the Taylor Law and the CPLR, the court determined that neither prescribes a specific statutory period applicable to a public union's breach of its duty of fair representation.[26] As a result, the court applied the "catch-all" provision de-

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the four-month period delineated by [1988] 4 N.Y.C.R.R. § 204.1(a)(1) for filing an unfair practice charge with the PERB was rejected since this period had not been designated by the legislature to govern the timeliness of a judicial proceeding. *See Baker*, 70 N.Y.2d at 321, 514 N.E.2d at 1112-13, 520 N.Y.S.2d at 541-42. While strong policy considerations underlie the enactment of a four-month period for the preclusion of court actions, the court reasoned that the legislature, not an administrative agency, should determine whether judicial actions should be affected by a truncated period of limitations. *See id.*, 514 N.E.2d at 1112, 520 N.Y.S.2d at 542 (citations omitted).

The court also rejected the plaintiff's contention that the limitations period should be governed by CPLR 213(2) (McKinney 1972) (specifying limitations period for contract actions), or CPLR 214(6) (McKinney 1972) (delineating limitations period for malpractice actions). *But see Hoerger*, 127 App. Div. 2d at 98, 514 N.Y.S.2d at 402 (analogizing breach of duty of fair representation action to legal malpractice and adopting state limitations period).

[23] *See Baker*, 70 N.Y.2d at 319-20, 514 N.E.2d at 1111-12, 520 N.Y.S.2d at 540-41. The court recognized that New York's Taylor Law governs the relationships between public employers, employees, and unions. *Id.* Furthermore, as the statutory scheme which entitles public employees to have a certified union act as their exclusive bargaining agent, *see* N.Y. Civ. Serv. Law § 204 (McKinney 1983), the Taylor Law provides the basis for the "implied cause of action in favor of public employees against their unions for breach of the duty to represent all members fairly." *Baker*, 70 N.Y.2d at 320, 514 N.E.2d at 1112, 520 N.Y.S.2d at 541 (citations omitted).

[24] *See Baker*, 70 N.Y.2d at 320, 514 N.E.2d at 1112, 520 N.Y.S.2d at 541. The court relied upon the provision in the NLRA which states that "the term 'employer' . . . shall not include . . . any state or political subdivision thereof." *See id.* (citing 29 U.S.C. § 152(2) (1982)).

[25] *See id.* (citing 29 U.S.C. § 152(2) (1982); N.Y. Civ. Serv. Law § 209-a(3) (McKinney 1983)). Section 209-a(3) of the Taylor Law provides that "fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent." N.Y. Civ. Serv. Law § 209-a(3) (McKinney 1983). The court concluded that the federal limitations period is properly applied in cases arising under the NLRA, but that time limitations for actions governed by New York law must be determined by state law. *See Baker*, 70 N.Y.2d at 320, 514 N.E.2d at 1112, 520 N.Y.S.2d at 541.

[26] *See Baker*, 70 N.Y.2d at 319, 514 N.E.2d at 1111, 520 N.Y.S.2d at 540.

lineated in CPLR 213(1) and invited the legislature to enact an appropriate statutory period.[27]

The *Baker* court's use of CPLR 213(1) creates a dichotomy, apparently unintended by the legislature, between the rights of public and private employees when asserting claims for the breach of duty of fair representation.[28] *Baker* involved an action against a public union which is regulated by the Taylor Law.[29] In addition, the "fundamental distinctions" language of section 209-a(3) of the Taylor Law clearly precludes the federal six-month limitations period from being considered "binding or controlling" on New York courts.[30] However, it is submitted that this statutory language does *not* prohibit application or consideration of the federal period and that its use would have been appropriate in *Baker*.

The legislative history underlying the enactment of the Taylor Law suggests that certain public employee relations should be kept in line with federal policy.[31] A union's duty of fair representation was not a statutory creation; it was originally implied under federal case law,[32] and later adopted by the New York courts.[33] Conse-

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[27] *See id.* at 322, 514 N.E.2d at 1113, 520 N.Y.S.2d at 542. Judge Kaye noted that applying section 213(1) ran counter to policy considerations dictating that labor disputes and employee-employer grievances be disposed of expeditiously. *See id.* Recognizing the disparity created between timeliness requirements for similar claims in the private and public sectors, the court acknowledged that the entire grievance and collective bargaining system could become useless if administrative decisions were called into question many years after resolution. *See id.* (citing United Parcel Serv. v. Mitchell, 451 U.S. 56, 63-64 (1981)). The court called upon the legislature to balance these concerns when ascertaining an appropriate limitations period and establishing the applicable accrual date for this claim. *See id.* at 322 n.1, 514 N.E.2d at 1113 n.1, 520 N.Y.S.2d at 542 n.1.

[28] *See id.* at 322, 514 N.E.2d at 1113, 520 N.Y.S.2d at 542.

[29] *See supra* notes 23-28 and accompanying text.

[30] *See supra* note 25.

[31] *See* FINAL REPORT, *supra* note 5, at 881. The Taylor Commission indicated it would be appropriate to follow federal policy in situations premised on a public union's right to exclusively represent employees in negotiations and grievance procedures. *See id.* From these exclusive representation privileges, a union's duty of fair representation has been implied under the Taylor Law and the NLRA. *See* Civil Serv. Bar Ass'n v. City of New York, 64 N.Y.2d 188, 196, 474 N.E.2d 587, 591, 485 N.Y.S.2d 227, 231 (1984).

It is further suggested that the "fundamental distinctions" language in the Taylor Law was primarily concerned with addressing the contrasting rules which allow private employees to strike, *see* 29 U.S.C. § 52 (1982), while public sector employees are prohibited from such acts. *See* N.Y. CIV. SERV. LAW § 210(1) (McKinney 1983). The purpose of section 210(1) of the Civil Service Law is to "provid[e] greater deterrents against strikes and disruption of vital public services by public employees." *See* Governor's Memorandum on Approval of ch. 24, *reprinted in* [1969] N.Y. LEGIS. ANN. 49.

[32] *See Civil Serv. Bar Ass'n*, 64 N.Y.2d at 195-96, 474 N.E.2d at 591, 485 N.Y.S.2d at 231. The duty of fair representation had its origins under federal law in cases involving

quently, it is suggested that the federal limitations period for breach of the duty of fair representation applied by the Supreme Court is an area of public employee relations where the Taylor Law should be in conformity with the federal scheme.

It is therefore suggested that the Court of Appeals in *Baker* has unnecessarily provoked a legislative response to their adoption of the six-year statute of limitations period by effecting an unintentional dichotomy between public and private employees. The *Baker* court should have adopted the six-month period, thus accommodating the federal scheme, the legislative purposes of the

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racial discrimination. *See* Steele v. Louisville & N. R.R., 323 U.S. 192 (1944). Shortly thereafter, this duty was engrafted onto the labor area under the NLRA. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); *see also* Vaca v. Sipes, 386 U.S. 171, 177 (1967) (recounting history of obligation of fair representation).

[33] The duty of fair representation was initially recognized by New York courts in cases involving private sector unions. *See* Gosper v. Fancher, 49 App. Div. 2d 674, 674, 371 N.Y.S.2d 28, 29 (4th Dep't 1975), *aff'd in part and appeal dismissed in part*, 40 N.Y.2d 867, 356 N.E.2d 479, 387 N.Y.S.2d 1007 (1976), *cert. denied*, 430 U.S. 915 (1977). Later, courts extended this cause of action to the public sector and permitted its assertion in state court by public employees otherwise exempt from federal limitations periods in recognition of the fact that denying this action violated public policy. *See* Sinicropi v. New York State Pub. Employment Relations Bd., 125 App. Div. 2d 386, 389, 509 N.Y.S.2d 357, 361 (2d Dep't 1986) (citing *Civil Serv. Bar Ass'n*, 64 N.Y.2d at 196, 474 N.E.2d at 591, 485 N.Y.S.2d at 231); Jackson v. Regional Transit Serv., 54 App. Div. 2d 305, 309, 388 N.Y.S.2d 441, 443 (1976).

Although New York has adopted the duty of fair representation in the public sector, the courts have not been consistent in determining the appropriate statute of limitations period. *See, e.g.*, Hoerger v. Board of Educ., 127 App. Div. 2d 88, 98, 514 N.Y.S.2d 395, 402 (2d Dep't 1987) (applying six-year limitation for bringing contract action under CPLR 213(2) and rejecting *DelCostello*'s six-month period); Ferri v. Public Employees Fed'n, 115 App. Div. 2d 814, 814, 495 N.Y.S.2d 759, 760 (3d Dep't 1985) (*DelCostello*'s six-month limitation applicable to public sector union); McClary v. Civil Serv. Employees Ass'n, 130 Misc. 2d 883, 887, 497 N.Y.S.2d 590, 593 (Sup. Ct. Steuben County 1985) (six-year "catch-all" provision applicable), *rev'd on other grounds*, 133 App. Div. 2d 522, 520 N.Y.S.2d 88 (4th Dep't 1987) (mem.). The *Hoerger* and *McClary* courts hinged their decisions on a public-private dichotomy. The *McClary* court, however, asserted that the plaintiff's complaint, which alleged that the union's failure to fairly represent the deceased caused his death, transcended the normal fair representation situation. *See McClary*, 130 Misc. 2d at 886, 497 N.Y.S.2d at 593.

> To enforce a six-month Statute of Limitations in a tragedy such as befell the plaintiff's deceased would be a travesty of justice. Likewise, to dismiss a matter on the basis of a technicality, without considering the underlying facts and circumstances would be contrary to the principles of the American legal system.

*Id.* at 886-87, 497 N.Y.S.2d at 593. However, the court intimated that had the complaint been a simple case of a union's failure to argue or substantiate a plaintiff's grievance, as was the case in *Baker*, then the federal six-month limitations period would have been appropriate. *Sec id.* at 886, 497 N.Y.S.2d at 593.

Taylor Law, the public-private dichotomy, and the legislative need to weigh various policy considerations before deciding whether or not a six-month period is appropriate.

*Russell G. Wohl*

## Estates, Powers and Trusts Law

### *EPTL § 13-3.3: Trustee as beneficiary denied right to receive proceeds of insurance policy due to decedent's failure to execute trust agreement prior to designation of beneficiary*

Fundamental to the law of trusts and estates is the canon that the subject matter of a trust, or trust res, be an existent interest recognized by law.[1] An exception has been carved out of the gen-

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[1] *See* Restatement (Second) of Trusts § 75 (1959) [hereinafter Restatement]. In a similar vein, the Restatement provides that the subject matter of a trust can be neither indefinite, *id.* § 76, nor a mere expectancy interest, *id.* § 86. Contingent interests, however, have long been recognized as interests suitable for assignment to trusts provided they are transferable to begin with. *Id.* § 85; *cf.* Jones v. Mayor of New York, 90 N.Y. 387, 390 (1882) (non-existence of fund not fatal to validity of equitable assignment).

In addition to a sufficient trust res, the validity of any trust is further conditioned upon successful planning and drafting in regard to the rule against perpetuities and the doctrine of merger. *See* Lundgren, *Estate Planning With Life Insurance and Trusts*, 54 N.Y. St. B.J. 132 (1982). Generally, problems with the rule against perpetuities arise in irrevocable trusts concerning class gifts and "unborn widows." *See id.* at 133-34; *see also* EPTL § 9-1.3(c), commentary at 239-40 (McKinney 1967 & Supp. 1988) ("unborn widow" problem remedied by presumption that instrument refers to life in being at its effective date). Under the doctrine of merger, the ritual of appointing a trustee becomes meaningless when the legal rights of the trustee and the receiving rights of the beneficiary merge in a single person creating a legal life estate. *See* Greene v. Greene, 125 N.Y. 506, 510, 26 N.E. 739, 740 (1891). However, the merging must be almost complete for such life estate to be created. *Compare In re* Estate of Duskis, 76 Misc. 2d 411, 351 N.Y.S.2d 97 (Sur. Ct. New York County 1973) (legal life estate created where trustee-beneficiary had sole right to trust income and unfettered power to raid income producing assets) *with In re* Will of Seidman, 88 Misc. 2d 462, 389 N.Y.S.2d 729 (Sur. Ct. Kings County 1976) (legal life estate not created where trustee-beneficiary had right to raid income-producing assets only if income itself was insufficient for support and maintenance), *modified*, 58 App. Div. 2d 72, 395 N.Y.S.2d 674 (2d Dep't 1977).

As a prefatory matter, trusts and their concomitant requisites of formation are categorized by the time in which the trust comes into existence. *See* G. Turner, Irrevocable Trusts § 8.02 (1985). A transfer inter vivos is brought into being on the day of execution, *see id.*, whereas a testamentary transfer is an ambulatory disposition, i.e., one which is to take effect on the death of its creator. *See* 1 A. Scott, Law of Trusts § 53 (3d ed. 1967). As a general matter, a trust may be revoked by its creator provided he obtains written and acknowledged consent from the beneficiaries. EPTL § 7-1.9 (McKinney Supp. 1988); *see* Warren v. Cropsey, 29 App. Div. 2d 290, 296, 287 N.Y.S.2d 944, 950 (3d Dep't 1968) (not-