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GML § 50-e: Statute of Limitations Is Tolled under CPLR 204 When Plaintiff's Application to Serve Late Notice of Claim Is Sub Judice

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ren, which involved a statute that had never been constitutionally questioned, provides a compelling illustration of the need for a rule to protect a dutiful public official from the vagaries of constitutional law.

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GENERAL MUNICIPAL LAW

GML § 50-e: Statute of limitations is tolled under CPLR 204 when plaintiff's application to serve late notice of claim is sub judice

Section 50-e of the General Municipal Law (GML) requires that, as a condition precedent to suit against a public corporation, a plaintiff must serve a notice of claim upon the defendant public corporation within ninety days after the claim arises.[71] The statute

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[71] GML § 50-e(1)(a) (McKinney Supp. 1983-1984). GML § 50-e provides, in pertinent part:

> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . against a public corporation, as defined in the general construction law . . . the notice of claim shall . . . be served . . . within ninety days after the claim arises . . . .

Id. A public corporation includes, among others, "a county, city, town, village and school district." N.Y. GEN. CONSTR. LAW § 66(1)-(2) (McKinney Supp. 1983-1984). Section 50-e applies only to plaintiffs who are required by law to serve the notice of claim as a condition precedent to the commencement of the action. GML § 50-e(1)(a) (McKinney Supp. 1983-1984). The statute was intended and designed to encompass not only statutorily required notices of claim, but also judicially prescribed notices. *See* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes*, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE, 358, 374 (1976). The service of the notice of claim is merely a condition precedent to suit, "not a statutory prohibition." Weiss v. Niagara Frontier Transp. Auth., 68 Misc. 2d 1059, 1061, 328 N.Y.S.2d 767, 769 (Sup. Ct. Erie County 1972). As a condition precedent—that is, an act or event other than a lapse of time, that must exist or occur before the duty to perform a promise arises, *see*, RESTATEMENT (SECOND) OF CONTRACTS § 224 & comment b (1981)—performance or excuse is "an essential element of [the plaintiff's] cause of action" and must be pleaded and proved in the same manner as all other elements of his cause of action, *see* Graziano, *supra* at 373-74. The notice of claim must provide the nature of the claim, the time, place and manner in which the claim arose, and for some plaintiffs, the damages, thus far ascertainable, claimed to have been suffered. GML § 50-e(2) (McKinney Supp. 1983-1984). The notice must be served "within ninety days after the claim arises," *id.* § 50-e(1)(a), and must be in writing, sworn to by the claimant, and include the name and address of the claimant and his attorney, *see id.* § 50-e(2).

The primary purpose of the requirement that a municipality be served with a notice of claim is to provide public corporations with "an opportunity to investigate claims and obtain evidence promptly." SIEGEL § 32, at 32; Beary v. City of Rye, 44 N.Y.2d 398, 412-13, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13-14 (1978); *see* Winbush v. City of Mount Vernon, 306 N.Y. 327, 333, 118 N.E.2d 459, 462 (1954); Ziecker v. Town of Orchard Park, 70 App. Div. 2d 422, 427, 421 N.Y.S.2d 447, 450 (4th Dep't 1979), *aff'd*, 51 N.Y.2d 957, 416 N.E.2d 1055, 435

was amended in 1976 to provide the judiciary with broad discretion to permit a plaintiff to serve a late notice of claim,[72] and, al-

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N.Y.S.2d 720 (1980); SIEGEL § 32, at 32.

> In upholding the constitutionality of section 50-e, the Court of Appeals has stated: The right . . . of citizens to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function . . . is statutory in origin. . . . Accordingly, the right to bring suit against a municipality may be granted upon such conditions as the Legislature, in its wisdom, sees fit to impose.

In re Brown v. Board of Trustees, 303 N.Y. 484, 489, 104 N.E.2d 866, 868-69 (1952). The constitutionality of notice of claim statutes continues to be upheld despite the fact that "the undercurrent of dissent grows stronger." Graziano, *supra*, at 365; *see* Pausley v. Chaloner, 54 App. Div. 2d 131, 133, 388 N.Y.S.2d 35, 37 (3d Dep't), *appeal dismissed sua sponte*, 41 N.Y.2d 900, 393 N.Y.S.2d 1025, 262 N.E.2d 641; Guarrera v. A. L. Lee Memorial Hosp., 51 App. Div. 2d 867, 867, 380 N.Y.S.2d 161, 162 (4th Dep't 1976), *appeal denied*, 39 N.Y.2d 942, 386 N.Y.S.2d 1029, 352 N.E.2d 897 (1976).

[72] *See* GML § 50-e(5) (1977). The amended notice of claim statute provides in pertinent part:

> Upon application, the court, in its discretion, may extend the time to serve a notice of claim . . . .

Id.; *see* Gelles v. New York City Hous. Auth., 87 App. Div. 2d 757, 758, 449 N.Y.S.2d 36, 37 (1st Dep't 1982) (§ 50-e(5) was amended to permit greater discretion in allowing late notice of claim to be filed). In the exercise of their discretion, courts are to consider, *inter alia*,

> whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified . . . or within a reasonable time thereafter . . . whether the claimant was an infant, or mentally or physically incapacitated, . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

GML § 50-e(5) (1977).

Prior to the 1976 amendment, courts maintained some discretion to permit late service of a notice of claim, *see, e.g.*, Stuto v. City of New York, 192 Misc. 935, 936, 84 N.Y.S.2d 812, 813 (Sup. Ct. Kings County 1948) (plaintiff's incapacitation during entire notice period sufficient to warrant extension of period), but the grounds upon which a late filing was permitted were narrowly construed, *see* SIEGEL § 32, at 32; *see also* Weed v. County of Nassau, 42 App. Div. 2d 848, 848, 346 N.Y.S.2d 702, 703 (2d Dep't 1973) (notice period is "rigid and inflexible"), *aff'd*, 34 N.Y.2d 723, 313 N.E.2d 787, 357 N.Y.S.2d 493 (1974); Pugh v. Board of Educ., 38 App. Div. 2d 619, 620, 326 N.Y.S.2d 300, 303 (3d Dep't 1971) (statute provides courts with no general discretion to extend time), *aff'd*, 30 N.Y.2d 968, 287 N.E.2d 621, 335 N.Y.S.2d 830 (1972). This narrow construction generated "literally a graveyard of meritorious claims that were barred by lateness." SIEGEL § 32, at 32; *see, e.g.*, Camarella v. East Irondequoit Cent. School Bd., 41 App. Div. 2d 29, 32, 341 N.Y.S.2d 729, 732 (4th Dep't 1973) ("verdict [for plaintiff] would be permitted to stand but for" the filing of notice 2 days late), *aff'd*, 34 N.Y.2d 139, 313 N.E.2d 29, 356 N.Y.S.2d 553 (1974); Komar v. City of New York, 24 App. Div. 2d 941, 941, 265 N.Y.S.2d 331, 332 (1st Dep't 1965) (judgment for defendant affirmed since notice was filed 1 day late).

The discretion afforded to judges to permit late service of a notice of claim was markedly expanded by the 1976 amendment to the statute. *Compare* GML § 50-e(5) (McKinney 1965) (discretion to extend time limited to enunciated circumstances) *with id.* § 50-e(5) (1977) (court granted discretion to extend time but not beyond applicable statute of limitations). As amended, the statute grants courts broad discretion to permit late service of the notice, *see Report to the 1976 Legislature in Relation to the Civil Practice Law and Rules*

though the amended statute does not authorize the judiciary to grant leave to serve a late notice of claim after the applicable statute of limitations has run,[73] the amendment expressly permits courts to grant this leave after the plaintiff has commenced an action.[74] In light of this amendment, it has become unclear whether CPLR 204(a), which tolls a statute of limitations when the commencement of an action has been stayed,[75] applies during the pe-

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and Proposed Amendments Adopted Pursuant to Section 229 of the Judiciary Law, TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE, 278, 301 (1976) [hereinafter cited as *Report*]; Graziano, *supra* note 71, at 403, and it enables the court to be more flexible in granting extensions. Graziano, *supra* note 71, at 403.

[73] GML § 50-e(5) (1977). Subdivision 5 of § 50-e specifically provides that although the court is granted broad discretion to permit late service, the court is not permitted to extend the time beyond the applicable statute of limitations. *Id.* The intent of the legislature, therefore, as "manifested in the amended statute, [was] to relax the objectionably restrictive features of the old statute, but to fix the period of the Statute of Limitations as the period within which any relief must be sought." Pierson v. City of New York, 56 N.Y.2d 950, 955, 439 N.E.2d 331, 332-33, 453 N.Y.S.2d 615, 617 (1982) (quoting Graziano, *supra* note 71, at 412); *see* Gaynor v. Town of Hoosick, 85 App. Div. 2d 844, 845, 446 N.Y.S.2d 475, 476 (3d Dep't 1981), *aff'd*, 58 N.Y.2d 699, 444 N.E.2d 1008, 458 N.Y.S.2d 544 (1982); Wemett v. County of Onondaga, 64 App. Div. 2d 1025, 1026, 409 N.Y.S.2d 312, 313 (4th Dep't 1978).

In actions against public corporations, the statute of limitations is 1 year and 90 days. GML § 50-i(1)(c) (McKinney Supp. 1983-1984). This statute provides that the expressed limitation is "applicable notwithstanding any inconsistent provisions of law, general, special or local." *Id.* § 50-i(2). It has been noted that the purpose of this longer limitations period is to provide "adequate compensation for the statutory stays, [so] that no further extensions" are needed. McLaughlin, *Civil Practice*, 19 SYRACUSE L. REV. 501, 508-09 (1968); *see also The Biannual Survey*, 39 ST. JOHN'S L. REV. 406, 411 (1965) (although it does not expressly repeal any of them, § 50-i prevails over any inconsistent statutes and no deviations will be permitted).

[74] GML § 50-e(5) (1977). The amendment provides, in pertinent part:

> An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

Id.; *see, e.g.*, Palazzo v. City of New York, 444 F. Supp. 1089, 1091 (E.D.N.Y. 1978); Pierson v. City of New York, 56 N.Y.2d 950, 954, 439 N.E.2d 331, 332, 453 N.Y.S.2d 615, 616 (1982); *see also* SIEGEL § 32, at 33 (late notice may be made even after commencement of action). According to Professor Graziano, the purpose of this provision was to "remove an unnecessary procedural roadblock to prompt recourse to the ameliorative provisions of subdivision 5." Graziano, *supra* note 71, at 412. As a condition precedent to suit, compliance with the notice of claim must be alleged in the complaint and proved as part of the plaintiff's case. *Id.* at 373-74. Though § 50-e provides that leave to serve late notice shall not be denied because "it was made after commencement of an action," GML § 50-e(5) (1977), it is submitted that what the legislature actually intended was that late notice should not be denied because it was made after service of a summons and complaint or after service of a summons with notice. This is so because an action cannot be commenced until all conditions precedent have been satisfied. *See* SIEGEL § 32, at 31; Graziano, *supra* note 71, at 373-74.

[75] CPLR 204(a) (1972). CPLR 204(a) provides:

> Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the

riod in which the plaintiff's application to serve a late notice of claim is pending in a suit brought against a public corporation.[76] Recently, however, in *Giblin v. Nassau County Medical Center*,[77] the Court of Appeals held that the statute of limitations for municipal tort liability is tolled during the pendency of the plaintiff's application for leave to serve a late notice of claim.[78]

In *Giblin*, two cases appealed as a matter of right from the

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action must be commenced.

Id.

[76] *Compare* Colantuono v. Valley Cent. School Dist., 90 Misc. 2d 918, 920-21, 396 N.Y.S.2d 590, 591-92 (Sup. Ct. Orange County) (notwithstanding amendment to § 50-e, CPLR 204(a) tolling provisions are still applicable), *aff'd*, 59 App. Div. 2d 926, 399 N.Y.S.2d 262 (2d Dep't 1977) *with* Davis v. New York City Transit Auth., 96 App. Div. 2d 819, 819-20, 465 N.Y.S.2d 567, 568-69 (2d Dep't 1983) (tolling provisions no longer apply since § 50-e(5) does not impose a statutory stay to commencement of action), *rev'd sub nom.* 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S.2d 563 (1984) *and* Giblin v. Nassau County Medical Center, 95 App. Div. 2d 795, 796, 463 N.Y.S.2d 512, 513 (2d Dep't 1983) (since § 50-e as amended provides for late service of notice despite commencement of action, nothing precludes commencement of action while application to serve is sub judice), *rev'd*, 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S. 2d 563 (1984) *and* Corey v. County of Rensselaer, 88 App. Div. 2d 1104, 1105, 453 N.Y.S.2d 65, 65-66 (3d Dep't) (CPLR 204 tolls statute only when commencement of action is precluded by statutory or judicial stay; 50-e, as amended, imposes no such stay), *motion for leave to appeal denied*, 57 N.Y.2d 602, 440 N.E.2d 798, 454 N.Y.S.2d 1027 (1982). There was no question, prior to the 1976 amendment to the GML, that § 204 was available to toll the statute of limitations while the plaintiff's application to serve a late notice was under consideration by the court. *See* Barchet v. New York City Transit Auth., 20 N.Y.2d 1, 6-7, 228 N.E.2d 361, 363, 281 N.Y.S.2d 289, 292-93 (1967). In *Barchet*, the plaintiff was injured on December 23, 1963 by the allegedly negligent operation of the defendant's transit lines. *Id.* at 4, 228 N.E.2d at 361, 281 N.Y.S.2d at 290. Five days before the expiration of the 1-year statute of limitations, *id.*; *see* N.Y. PUB. AUTH. LAW § 1212 (McKinney 1961), the plaintiff moved to serve a late notice of claim, 20 N.Y.2d at 4, 228 N.E.2d at 362, 281 N.Y.S.2d at 290. The court granted the leave, the plaintiff served the late notice, and, thereafter, commenced the action on March 22, 1965—1 year and 3 months from the accident. *See id.* at 4, 228 N.E.2d at 362, 281 N.Y.S.2d at 291. The Court of Appeals held that the statute of limitations was tolled while the application to serve a late notice was under judicial consideration and therefore the action was commenced timely. *Id.* at 7, 228 N.E.2d at 364, 281 N.Y.S.2d at 293. Courts have asserted that the tolling provisions of § 204(a) apply since the plaintiff's ability to sue depends upon an action by an outside entity, and it would be unjust to extinguish the plaintiff's right to sue based on a delay by that body. *See* Santaniello v. DeFrancisco, 74 Misc. 2d 229, 232, 344 N.Y.S.2d 589, 593 (Sup. Ct. Nassau County 1973), *aff'd*, 44 App. Div. 2d 831, 355 N.Y.S.2d 569 (2d Dep't 1974). "[I]t would be mindless to permit the filing of a late notice of claim without simultaneously creating some kind of toll of the statute of limitations," McLaughlin, *supra* note 73, at 508, since the statute, which entitles the plaintiff to use the entire statutory period within which to serve a late notice, *see* GML § 50-e(5) (1977), would be nullified without a toll, *see Barchet*, 20 N.Y.2d at 7, 228 N.E.2d at 363, 281 N.Y.S.2d at 293.

[77] 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S.2d 563 (1984).

[78] *Id.* at 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566.

Appellate Division were consolidated by the Court of Appeals.[79] In each case, the plaintiff commenced a tort action against a public corporation but failed to serve the requisite notice of claim within the statutorily prescribed time period.[80] Although each plaintiff was granted leave by the trial court to serve a late notice of claim upon the respective defendant, neither plaintiff, after serving the late notice, commenced an action within the applicable statutory time limit.[81] The defendants, therefore, moved to dismiss the actions against them as time-barred.[82] In opposition to the motions, the plaintiffs claimed that the statutes of limitations were tolled while their respective applications to file late notices were pending, and therefore had not yet lapsed.[83] Both the Supreme Court, Nassau County, and the Supreme Court, Kings County, denied the motions to dismiss.[84] In unanimous decisions, both cases were re-

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[79] *Id.* at 69, 459 N.E.2d at 856, 471 N.Y.S.2d at 563. The two cases consolidated on appeal were Giblin v. Nassau County Medical Center, 95 App. Div. 2d 795, 463 N.Y.S.2d 512 (2d Dep't 1983) and Davis v. New York City Transit Auth., 96 App. Div. 2d 819, 465 N.Y.S.2d 567 (2d Dep't 1983).

[80] 61 N.Y.2d at 70, 459 N.E.2d at 856-57, 471 N.Y.S.2d at 563-64. The plaintiff in *Giblin* alleged that the County of Nassau negligently failed to diagnose properly his injury when he was treated on November 16, 1980. *Id.* In accordance with § 50-e of the GML, the plaintiff was required to file a notice of claim within 90 days after his claim arose. *See id.* at 70, 459 N.E.2d at 857, 471 N.Y.S.2d at 564; GML § 50-i(1) (McKinney Supp. 1983-1984); *see also id.* § 50-e(1)(a) (McKinney Supp. 1983-1984).

In *Davis*, the plaintiff brought suit against the New York City Transit Authority after he was seriously injured on May 17, 1980, when he fell between two moving subway cars. 61 N.Y.2d at 71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564. In accordance with § 50-e of the GML, he too was required to serve a notice of claim within 90 days. *See id.*; *see also* N.Y. PUB. AUTH. LAW § 1212(2) (McKinney 1982); GML § 50-E(1)(A) (MCKINNEY SUPP. 1983-1984).

[81] 61 N.Y.2d at 70-71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564. Giblin moved on August 13, 1981 for permission to file a late notice of claim. *Id.* at 70, 459 N.E.2d at 857, 471 N.Y.S.2d at 564. This permission was granted on September 15, 1981 and the notice of claim was filed a few days later. *Id.* Nevertheless the summons and complaint were not served until March 4, 1982. *Id.* Since the action was governed by a 1 year and 90 day statute of limitations, *see* GML § 50-i(1) (McKinney Supp. 1983-1984), absent the toll, the period during which the action could be commenced ended on or about February 16, 1982, *see* 61 N.Y.2d at 70, 459 N.E.2d at 857, 471 N.Y.S.2d at 564.

Davis' December 29, 1980 application to file a late notice of claim was granted by the court on March 25, 1981. *Id.* at 71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564. Though the notice of claim was deemed served on that date, the summons and complaint were not served until October 1, 1981. *Id.* The 1 year and 120 day statute of limitations applicable in *Davis*, *see* N.Y. PUB. AUTH. LAW § 1212(2) (McKinney 1982), absent a toll, should have lapsed on or about September 17, 1981, *see* 61 N.Y.2d at 71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564.

[82] 61 N.Y.2d at 70-71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564.

[83] *Id.*

[84] *Id.* The trial courts relied on Barchet v. New York City Transit Auth., 20 N.Y.2d 1,

versed by the Appellate Division, Second Department.[85]

In both opinions, the Appellate Division recognized that prior to the 1976 amendment to GML section 50-e, the Court of Appeals, in *Barchet v. New York City Transit Authority*,[86] held that the toll provisions of CPLR 204(a) are available during a plaintiff's application to serve a late notice of claim.[87] Nonetheless, the Second Department panels maintained that the 1976 amendment to GML section 50-e(5) effectively rendered the *Barchet* rule inapplicable by permitting plaintiffs to file for leave to serve a late notice of claim after the commencement of their action.[88]

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228 N.E.2d 361, 281 N.Y.S.2d 289 (1967), as authority for tolling the statute of limitations during the pendency of an application to file a late notice of claim. *See* 61 N.Y.2d at 70-71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564.

[85] 61 N.Y.2d at 70-71, 459 N.E.2d at 857, 471 N.Y.S.2d at 564; *see* Davis v. New York City Transit Auth., 96 App. Div. 2d 819, 819-20, 465 N.Y.S.2d 567, 568-69 (2d Dep't 1983), *rev'd sub nom.* 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S.2d 563 (1984); *Giblin*, 95 App. Div. 2d 795, 796, 463 N.Y.S.2d 512, 513 (2d Dep't 1983), *rev'd*, 61 N.Y.2d 67, 459 N.E.2d 856, 471 N.Y.S.2d 563 (1984).

[86] 20 N.Y.2d 1, 228 N.E.2d 361, 281 N.Y.S.2d 289 (1967).

[87] *See* 61 N.Y.2d at 70-71, 459 N.E.2d at 856-58, 471 N.Y.S.2d at 564-65.

[88] *Id.*; *see Davis*, 96 App. Div. 2d at 819-20, 465 N.Y.S.2d at 568-69; *Giblin*, 95 App. Div. 2d at 796, 463 N.Y.S.2d at 513.

The *Giblin* court stated:

> the 1976 amendment to subdivision 5 of section 50-e of the General Municipal Law changed the underlying basis of the *Barchet* decision by providing: "[a]n application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation" . . . . Since the plaintiff could have brought this action either before or at the same time as his application for leave to serve a late notice of claim, or even during the pendency of the application . . . there was no statutory stay . . . and the *Barchet* rule no longer applies.

Id. at 796, 463 N.Y.S.2d at 513 (citations omitted). The court relied on a case from the Appellate Division, Third Department decided over a year earlier. *Id.*; *see* Corey v. County of Rensselaer, 88 App. Div. 2d 1104, 453 N.Y.S.2d 65 (3d Dep't), *motion for leave to appeal denied*, 57 N.Y.2d 602, 440 N.E.2d 798, 454 N.Y.S.2d 1027 (1982).

In *Corey*, the plaintiff was involved in a collision on March 16, 1979 with a vehicle owned by the defendant county. 88 App. Div. 2d at 1104, 453 N.Y.S.2d at 65. An order granting the plaintiff leave to serve a late notice was entered on August 21, 1980 and the late notice was served by the plaintiff the next day. *Id.* at 1105, 453 N.Y.S.2d at 65. The summons and complaint were not served, however, until October 15, 1980, and the defendant moved for summary judgment contending that the action was time-barred. *Id.; see* GML 50-i(1) (1977). Rejecting the plaintiff's contention that the statute of limitations was tolled while her application to serve a late notice was under consideration, the trial court granted the defendant's motion. 88 App. Div. 2d at 1105, 453 N.Y.S.2d at 65.

In affirming the trial court, the Appellate Division reasoned that since the plaintiff's application to serve a late notice could have been made after commencement of the action, *see* GML § 50-e(5) (1977), she "could have timely commenced the action by service of a summons with notice either before or at the same time she applied for leave to serve a late notice of claim," 88 App. Div. 2d at 1105, 453 N.Y.S.2d at 66. The court, therefore, con-

On appeal, the Court of Appeals unanimously reversed,[89] holding that section 50-e of the GML, as amended, does not dispense with the statutory prohibitions to commencing suit; namely, service of a notice of claim and allegation or proof thereof.[90] The Court reasoned that the 1976 amendment went no further than to eliminate an obstacle that prevented a plaintiff from applying for leave to make late service of the notice once the action had been commenced, and in no way abandoned the requirement that the plaintiff's complaint allege that notice of the claim had been served.[91] Judge Wachtler, citing the legislative history of the 1976 amendment, observed that the legislature neither intended to abolish *Barchet* nor desired to eliminate the conditions precedent to suit.[92] Instead, the Court noted, the legislature realized that plaintiffs often serve their complaint on a public corporation prior to serving their notice of claim, and, in order to avoid dismissing a plaintiff's claim for this procedural practice, amended the statute to "give a claimant the opportunity immediately to correct his nonperformance of the condition precedent if he possibly can."[93] Thus, the Court concluded, since the 1976 amendment did not alter the statutory prohibitions to commencing an action, the rule

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cluded that the plaintiff was under neither a statutory nor a judicial stay and the tolling provisions under CPLR 204(a) were not applicable. *Id.*; *see* CPLR 204(a) (1972).

The *Davis* court, finding *Giblin* controlling, relied solely on that decision to dismiss the complaint. 96 App. Div. 2d at 820, 465 N.Y.S.2d at 569.

[89] 61 N.Y.2d at 76, 459 N.E.2d at 860, 471 N.Y.S.2d at 567. Chief Judge Cooke, Judges Jasen, Jones, Meyer, and Kaye concurred in the opinion authored by Judge Wachtler. *Id.* Judge Simons took no part in the decision. *Id.*

[90] *Id.* at 73-74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566.

[91] *Id.* The Court explained that under the current statutes, service of the notice of claim and allegation or proof of the service are still conditions precedent to suit. *Id.* The Court noted that "the 1976 amendment simply eliminates the obstacle which prevented a plaintiff from applying for leave to file a late notice of claim once he had commenced the action." *Id.*

[92] *Id.* at 73, 459 N.E.2d at 858-59, 471 N.Y.S.2d at 565-66. The Court asserted: "[T]he amendment does not, as the Appellate Division concluded, expressly authorize [the commencement of the action prior to service of the notice] or completely eliminate the problems encountered by a plaintiff who has filed a premature complaint, so as to dispense with the need for the *Barchet* rule." *Id.* The Court "assumes that the plaintiff will respect, or at least not intentionally disregard, the statutory prohibition in which case he is entitled to the benefit of the tolling provisions." *Id.* at 75, 459 N.E.2d at 860, 471 N.Y.S.2d at 567; *see Barchet*, 20 N.Y.2d at 6-7, 228 N.E.2d at 363, 281 N.Y.S.2d at 292-93; CPLR 204(a) (1972).

[93] 61 N.Y.2d at 73-75, 459 N.E.2d at 858-59, 471 N.Y.S.2d at 565-66 (quoting Graziano, *supra* note 71, at 403). The legislative "history supports the conclusion that the amendment was not intended to abolish the *Barchet* rule, but was simply designed to have [a] limited effect." *Id.* at 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566.

espoused in *Barchet* remains applicable and CPLR 204(a) should toll the statute of limitations while a motion to serve a late notice of claim is pending.[94]

Although the 1976 amendment to GML section 50-e arguably is not as "clear on its face" as the Court maintained,[95] it is submitted that the *Giblin* Court properly concluded that the legislature did not intend to circumscribe the *Barchet* rule when it amended the statute.[96] Indeed, it is submitted that the Court's conclusion is firmly founded on the interpretation of 50-e in pari materia with collateral statutes, the legislative history and subsequent judicial interpretation of 50-e.

As the Court properly noted, the legislature amended section 50-e merely to provide that an application to file a late notice of claim should not be denied on the ground that the action already had been commenced,[97] and did not alter other controlling statutes that require that a notice of claim be served as a condition precedent to the maintenance of a suit.[98] Interpreting section 50-e in pari materia with these statutes, it is clear that the legislature never intended the amendment to affect the availability of the *Barchet* rule.[99] This intent is equally apparent from the legislative history of the statute, in which the *Barchet* rule was discussed with

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[94] *Id.* 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566.

[95] *See id.* at 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566. GML § 50-e was amended in 1976 to permit a plaintiff to serve a late notice of claim despite the fact that the action was commenced earlier. *See* GML § 50-e (1977); *supra* text accompanying note 74. The statutory language of § 50-e, however, does not expressly address the effect of the amendment on either the continuance or the discontinuance of the *Barchet* rule. *See id.*; *supra* note 76 and accompanying text.

[96] *See* 61 N.Y.2d at 72-75, 459 N.E.2d at 858-59, 471 N.Y.S.2d at 565-66.

[97] *See supra* note 95 and accompanying text.

[98] 61 N.Y.2d at 73, 459 N.E.2d at 858, 471 N.Y.S.2d at 565; *see* GML § 50-e(5) (1977); *supra* note 74 and accompanying text.

[99] *See* 61 N.Y.2d at 73, 459 N.E.2d at 858, 471 N.Y.S.2d at 565; *see* GML § 50-i(1) (McKinney Supp. 1983-1984); N.Y. PUB. AUTH. LAW § 1212(4) (1982); *supra* notes 71 & 74.

The *Giblin* Court properly concluded that the legislature "removed the statutory obstacle to the granting of a motion to serve a late notice of claim" by enacting the 1976 amendment to the GML, 61 N.Y.2d at 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566; *see* GML § 50-e(5) (1977), but, by maintaining the other controlling statutes, *see* GML § 50-i(1) (McKinney Supp. 1983-1984); N.Y. PUB. AUTH. LAW § 1212(4) (1982), the legislature "did not remove the statutory impediments to suit," 61 N.Y.2d at 74, 459 N.E.2d at 859, 471 N.Y.S.2d at 566. Since these statutory prohibitions still apply to actions against public corporations, application of the doctrine of reading statutes in pari materia compels the conclusion that the legislature intended the *Barchet* rule to remain applicable. *See id.* at 74-75, 459 N.E.2d at 859-60, 471 N.Y.S.2d at 566-67.

approval.[100] Moreover, the legislative history clearly indicates that the plaintiff has the full statute of limitations period to rectify noncompliance with the condition precedent since the statute of limitations tolls while the plaintiff's application to file a late notice is sub judice.[101] Finally, recent New York case law provides further support for the Court's conclusion.[102]

It is submitted that the *Giblin* Court properly recognized that the judiciary has broad discretion with respect to granting leave to serve late notices of claim. In affirming the breadth of this discretion, it is suggested that the Court has made it more likely that municipalities will be forced to defend suits without the benefit of early notice and thereby has undermined the primary purpose of

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[100] *See Report, supra* note 72, at 303; Graziano, *supra* note 71, at 398.

[101] *See Report, supra* note 72, at 303; Graziano, *supra* note 71, at 398. "[Plaintiffs] do . . . have the full [statutory] period within which to make their applications since the time during which the application is sub judice is not part of the time within which an action to enforce the claim must be commenced." Graziano, *supra* note 71, at 398.; *see also* McLaughlin, *supra* note 73, at 508. The legislative history demonstrates that the legislature intended these tolling provisions to remain applicable because, in enacting the amendment, the legislature intended only to provide a plaintiff with "the opportunity immediately to correct his nonperformance of the condition precedent," not the opportunity to circumvent the requirement that they be satisfied. Graziano, *supra* note 71, at 403; *see* 61 N.Y.2d at 72-75, 459 N.E.2d at 858-60, 471 N.Y.S.2d at 565-67. Thus, since the notice of claim requirements may still amount to a statutory stay to the commencement of an action, the tolling provisions of the CPLR, as espoused in *Barchet*, are still applicable. *See* Graziano, *supra* note 71, at 398, 403; *see also* Barchet v. New York City Transit Auth., 20 N.Y.2d 1, 6-7, 228 N.E.2d 361, 363, 281 N.Y.S.2d 289, 292-93 (1967); Colantuono v. Valley Cent. School Dist., 90 Misc. 2d 918, 920-21, 396 N.Y.S.2d 590, 591-92 (Sup. Ct. Orange County), *aff'd*, 59 App. Div. 2d 926, 399 N.Y.S.2d 262 (2d Dep't 1977); CPLR 204(a) (1972).

[102] *See, e.g.*, Pierson v. City of New York, 56 N.Y.2d 950, 954-55, 439 N.E.2d 331, 332-33, 453 N.Y.S.2d 615, 617 (1982) (plaintiff has only 1 year and 90 days after cause of action accrued to file late notice unless time was tolled); Cohen v. Pearl River Union Free School Dist., 51 N.Y.2d 256, 260, 414 N.E.2d 639, 641, 434 N.Y.S.2d 138, 139 (1980) (CPLR 208 also tolls time during which court may authorize late notice of claim); Colantuono v. Valley Cent. School Dist., 90 Misc.2d 918, 920-21, 396 N.Y.S.2d 590, 591-92 (Sup. Ct. Orange County) (amendment to § 50-e does not affect the *Barchet* rule), *aff'd*, 59 App. Div. 2d 926, 399 N.Y.S.2d 262 (1977).

Several appellate division cases have followed the *Cohen* rule, which held that CPLR tolling provisions are available to toll the statute of limitations subsequent to the amendment of GML § 50-e. *See, e.g.*, Montana v. City of New York, 96 App. Div. 2d 1031, 1032, 466 N.Y.S.2d 436, 437 (2d Dep't 1983) (where claimant is infant, time to serve late notice may be tolled beyond 1 year and 90 day period); Waiters v. New York City Health & Hosps. Corp., 80 App. Div. 2d 880, 880, 437 N.Y.S.2d 133, 134 (2d Dep't 1981) (CPLR 210 tolls period); Yepez v. County of Nassau, 79 App. Div. 2d 1023, 1024, 435 N.Y.S.2d 51, 52 (2d Dep't 1981) (following *Cohen*). Though these cases do not provide for the continuance of the *Barchet* rule after the amendment to the GML, it is submitted that they provide ample judicial precedent upon which the *Giblin* decision is supported.

notice of claim statutes. [103] In so doing, the decision furnishes yet another argument for legislative elimination of such notice of claim statutes. [104]

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DEVELOPMENTS IN THE LAW

Penal Law § 70.08: Multiple prior sentences and not convictions are required before a defendant may be sentenced as a persistent felony offender

Statutes imposing harsher penalties upon repeat offenders have been enacted in most states.[105] New York adopted the first recidivist statute in the country in 1796,[106] and continues to pro-

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[103] The primary purpose of notice of claim statutes "is to discourage fraudulent claims against municipalities by requiring notice while the claim is still fresh enough for the defendant to investigate it." McLaughlin, *Civil Practice*, 20 SYRACUSE L. REV. 449, 454 (1968); *supra* note 71. Professor Graziano suggests that the real objective of these statutes is to protect the "public purse." *See* Graziano, *supra* note 71, at 364. It is submitted that neither purpose is fostered by the notice statutes, since, as *Giblin* affirmed, courts may grant leave to serve late notice of claim beyond the statute of limitations period, provided there was tolling, regardless of whether the defendant had notice. *See* 61 N.Y.2d at 75, 459 N.E.2d at 859, 471 N.Y.S.2d at 566. Indeed, though the amendment to GML alleviated the harsh results that accompanied a plaintiff's failure to service timely notice, *see* SIEGEL § 32, at 32, plaintiff's action will still be dismissed if he, though serving a timely summons and complaint, fails to apply to the court for leave to serve a late notice of claim prior to the expiration of the limitations period, *see, e.g.*, Briganti v. Harrison Cent. School Dist., 91 App. Div. 2d 648, 648, 457 N.Y.S.2d 89, 90 (2d Dep't 1982); Moore v. City of New York, 84 App. Div. 2d 562, 562, 443 N.Y.S.2d 267, 268 (2d Dep't 1981), *aff'd*, 56 N.Y.2d 950, 439 N.E.2d 331, 453 N.Y.S.2d 615 (1982).

[104] *See* McLaughlin, *supra* note 103, at 454. Over 15 years ago, Professor McLaughlin asked "whether the good to be achieved by [notice of claim] statute[s] is outweighed by the harm it does to honest claimants." *Id.* Professor McLaughlin "remains unconvinced that the legislature has made the right judgment." *Id.* at 453. Presently, in light of the trend to abolish sovereign immunity, *see* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS § 131, at 1032 (5th ed. 1984), it is submitted that Professor McLaughlin's conclusion appears even more persuasive.

[105] *See* 1 H. ROTHBLATT, CRIMINAL LAW OF NEW YORK 438 n.13 (1978); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 104 (1971). Until the 19th century, even the most trifling crimes were punishable by death or severe prison terms. *See id.* Therefore, recidivism is a relatively new social problem, *id.* at 99, which proponents of harsher penalties for repeat offenders claim can be addressed by recidivist statutes because they deter crime and afford protection to society, *id.* at 103.

[106] *See* H. ROTHBLATT, *supra* note 105, at 438-40. New York was the first state to adopt a recidivist statute. *See* CRIMINAL LAW, Ch. 30 [1976] N.Y. Laws 699 (current version in scattered sections of the N.Y. PENAL LAW (McKinney 1975 & Supp. 1983-1984)) Originally, the statute dealt only with second offenders. *See id.* In 1907, provisions were enacted by the legislature that imposed harsher sentences for fourth offenders. *See* PENAL LAW, Ch. 645