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Late Claims Filed Against the State Under Section 10(6) of the Court of Claims Act May Be Amended by Leave of Court

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COURT OF CLAIMS ACT

Late claims filed against the state under section 10(6) of the Court of Claims Act may only be amended by leave of court

The Court of Claims Act (the Act) is the vehicle by which the state has waived its common-law immunity from liability.[38] Nonetheless, to facilitate prompt notification of claims against the state,[39] recovery under the Act is contingent upon compliance with several technical provisions.[40] Indeed, relief is denied to claimants who fail to comply with the filing requirements of section 10 of the Act.[41] The harshness of this rule is mitigated by subdivision 6 of

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[38] N.Y. CT. CL. ACT § 8 (McKinney 1963); *see* Brown v. Hamptonburg School Dist. No. 4, 303 N.Y. 484, 489, 104 N.E.2d 866, 868 (1952); Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945). For an extensive discussion of the history and nature of the Court of Claims Act, see Glavin, *The Court of Claims — Its History, Jurisdiction and Practice*, 21 N.Y.S. B. BULL. 357 (1949); McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1, 12 (1965).

[39] *See* Estate of Johnson v. State, 49 App. Div. 2d 136, 137-38, 373 N.Y.S.2d 671, 672-73 (3d Dep't 1975); Garrette v. State, 197 Misc. 842, 846, 94 N.Y.S.2d 528, 532 (Ct. Cl. 1950). One function of seasonable notification of claims is to allow the state to investigate the transaction upon which its liability is premised. *Cf.* Beary v. City of Rye, 44 N.Y.2d 398, 412, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13 (1978); Adkins v. City of New York, 43 N.Y.2d 346, 350, 372 N.E.2d 311, 312, 401 N.Y.S.2d 469, 471 (1977); Winbush v. City of Mount Vernon, 306 N.Y.2d 327, 335, 118 N.E.2d 459, 462 (1954) (seasonable notification of claims against municipal corporations required under section 50-e of the General Municipal Law). *See* TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 302 (1976). Another purpose of notification is to give local government an opportunity to settle claims without the expense, hazards, and risks of litigation. Cohen v. Pearl River Union Free School Dist., 70 App. Div. 2d 94, 98-99, 419 N.Y.S.2d 998, 1001 (2d Dep't 1979), *rev'd on other grounds*, 51 N.Y.2d 256, 414 N.E.2d 639, 434 N.Y.S.2d 138 (1980); Worrell v. City of New York, 101 Misc. 2d 270, 272, 420 N.Y.S.2d 994, 996 (Sup. Ct. N.Y. County 1979).

[40] *See* N.Y. CT. CL. ACT §§ 8, 10 (McKinney 1963 & Supp. 1980). A claimant must comply with the Act's provisions in order to have a right of action against the state. Welch v. State, 71 App. Div. 2d 494, 498, 423 N.Y.S.2d 102, 105 (4th Dep't 1979). The requirement of timely filing of a claim or notice of intention is a jurisdictional condition precedent to suit, rather than a statute of limitations. DeMarco v. State, 43 App. Div. 2d 786, 786, 350 N.Y.S.2d 230, 231 (4th Dep't 1973), *aff'd mem.*, 37 N.Y.2d 735, 337 N.E.2d 131, 374 N.Y.S.2d 619 (1975); Aetna Cas. & Sur. Co. v. State, 92 Misc. 2d 249, 252, 400 N.Y.S.2d 469, 471 (Ct. Cl. 1977). The timely filing of a claim, or notice of intention to file a claim, confers upon the court subject matter jurisdiction over the claim. Kurtz v. State, 40 App. Div. 2d 917, 919, 338 N.Y.S.2d 345, 348 (3d Dep't), *aff'd mem.*, 33 N.Y.2d 828, 307 N.E.2d 46, 351 N.Y.S.2d 973 (1973); H. Sysol Constr. Co. v. State, 92 Misc. 2d 238, 242, 399 N.Y.S.2d 1006, 1009 (Ct. Cl. 1977).

[41] *See* N.Y. CT. CL. ACT §§ 8, 10 (McKinney 1963). Section 10 of the Court of Claims Act commences with an advisory that "[n]o judgment shall be granted in favor of any claimant unless such claimant shall have complied with the provisions of this section applicable to his claim." *Id.* at § 10. The severity of this rule has been exacerbated by the courts' technical application of the filing requirements of section 10. *See, e.g.*, McGaughy v. State, 55 App. Div. 2d 823, 823, 390 N.Y.S.2d 301, 302 (4th Dep't 1976); Estate of Johnson v.

section 10, which permits late filings in the discretion of the court.[42] It had been unsettled, however, whether claims filed by permission are, like timely claims, amendable as of right. Recently, in *Iazzetta v. State*,[43] the Court of Claims held that late claims filed pursuant to section 10(6) of the act may only be amended by leave of court.[44]

The claimant in *Iazzetta* had been shot by a state peace officer,[45] but failed to timely file his personal injury claim.[46] Nevertheless, the court granted his motion for a late filing.[47] Subsequently, the claimant moved to file an amended claim which included theories of recovery arising from the same set of facts as set forth in his original pleading.[48] Contending that the amended claim did not comply with the court order which granted the original late filing, the state moved to dismiss the complaint.[49] In response, the claimant argued that his pleading could be amended as of right and, in the alternative, cross-moved for leave to amend to

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State, 49 App. Div. 2d 136, 139, 373 N.Y.S.2d 671, 674 (3d Dep't 1975).

[42] Section 10(6) states that a person who fails to timely file a claim against the state may file a late claim "in the discretion of the court." N.Y. CT. CL. ACT § 10(6) (McKinney Supp. 1980). Enacted in 1976, section 10(6) replaced a more rigid procedure set forth in section 10(5) for filing late claims against the state. *See* N.Y. CT. CL. ACT § 10(5) (McKinney 1963). Under section 10(5), leave to file a late claim had to be sought within 2 years after the claim accrued. *Id.* Further, the motion was denied when the plaintiff could not demonstrate a "reasonable excuse" for the failure to file within the statutorily prescribed period. *See* La. Bar Truck Rental, Inc. v. State, 52 App. Div. 2d 1007, 1007, 383 N.Y.S.2d 432, 433 (3d Dep't 1976) (ignorance of filing requirement); Peterson v. State, 84 Misc. 2d 296, 300, 374 N.Y.S.2d 1002, 1007 (Ct. Cl. 1975) (late filing not permitted without reasonable excuse). *See generally* Farrell, *Civil Practice*, 30 SYRACUSE L. REV. 385, 393-95 (1979).

[43] 105 Misc. 2d 567, 432 N.Y.S.2d 987 (Ct. Cl. 1980).

[44] *Id.* at 570, 432 N.Y.S.2d at 989.

[45] *Id.* at 568, 432 N.Y.S.2d at 987-88. The claimant, Ronald Iazzetta, was shot and injured on October 26, 1978, while resisting arrest by his father-in-law, a peace officer. *Id.*

[46] *Id.* Section 10 of the Court of Claims Act requires that a claim for personal injuries caused by official state action must be filed within 90 days after such injuries were sustained. N.Y. CT. CL. ACT § 10(3) (McKinney 1963). Alternatively, within the same 90 day period, a claimant may file a notice of intention to file a claim. *Id.* In the latter case, the claimant may commence an action within 2 years after accrual of his claim. *Id.* The claimant in *Iazzetta* failed to comply with either of these provisions since, although he was injured on October 26, 1978, he did not file a claim until October 24, 1979, almost 1 year after the incident. 105 Misc. 2d at 567, 432 N.Y.S.2d at 987.

[47] 105 Misc. 2d at 568, 432 N.Y.S.2d at 988.

[48] *Id.* at 568-69, 432 N.Y.S.2d at 988. The claimant's proposed amendment contained causes of action for assault, battery, false arrest, false imprisonment, and malicious prosecution. *Id.* Each of these theories of recovery arose out of the Ocober 26, 1978 incident. *Id. See* note 7 *supra.*

[49] 105 Misc. 2d at 569, 432 N.Y.S.2d at 988.

include the new claims.[50] The court denied the state's motion to dismiss and granted the claimant's motion to amend by leave of court.[51]

Although the Court of Claims approved the claimant's motion to amend, it rejected his contention that a late claim is amendable as of right.[52] Writing for the court, Judge Weisberg acknowledged that rule 16(a) of the Rules of the Court of Claims, which permits amendments as of right, does not distinguish between late and timely filings.[53] Nonetheless, Judge Weisberg reasoned that by side stepping the barrier of judicial scrutiny to which late filings themselves are subject, "as of right" amendments could "manifest[ly] prejudice" the state.[54] To thwart this possibility, Judge Weisberg concluded that rule 16(a) does not apply to claims filed by permission, and that amendments to such claims, like original filings, must be scrutinized according to the guidelines listed in section 10(6).[55]

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[50] *Id.*

[51] *Id.* at 573, 432 N.Y.S.2d at 991.

[52] *Id.* at 570, 432 N.Y.S.2d at 989.

[53] *Id.* at 569, 432 N.Y.S.2d at 988. Rule 16 was enacted under the authority of section 9 of the Court of Claims Act to "establish rules for the government of the court." N.Y. CT. CL. ACT § 9(9) (McKinney Supp. 1980). *See* [1980] 22 N.Y.C.R.R. § 1200. Subdivision (a) of rule 16 permits amendments as of right in three instances:

> A party may amend his pleadings once without leave of the court within 20 days after its service, or at any time before the period for responding to it expires, or within 20 days after service of a pleading responding to it.

[1980] 22 N.Y.C.R.R. § 1200.16(a); *cf.* CPLR 3025(a) (1974) (amendments without leave of court). Amendments by leave of court are authorized by subdivision (b) of rule 16 which provides that "[p]leadings may be amended at any time by leave of court. Leave of court shall be freely given upon such terms as may be just." [1980] 22 N.Y.C.R.R. § 1200.16(b); *cf.* CPLR 3025(b) (amendments by leave of court).

[54] 105 Misc. 2d at 569, 432 N.Y.S.2d at 988.

[55] *Id.* at 570, 432 N.Y.S.2d at 989. While other considerations may also be pertinent, six factors are listed in section 10(6) for determining whether a late filing is permissible:

> [w]hether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file a timely claim or notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy.

N.Y. CT. CL. ACT. § 10(6) (McKinney Supp. 1980). An abridged section 10(6) inquiry generally involves an investigation into whether the state is prejudiced by the admission of late claims. *See* McCormick v. State, 51 App. Div. 2d 28, 32, 378 N.Y.S.2d 991, 996 (3d Dep't 1976) (Herlihy, P. J., dissenting), *aff'd mem.*, 44 N.Y.2d 774, 377 N.E.2d 481, 406 N.Y.S.2d 372 (1978). Such prejudice could result when a lapse of time impedes the state from effectively gathering evidence relevant to its defense. *See* Crane v. State, 29 App. Div. 2d 1001, 1002, 289 N.Y.S.2d 521, 523 (3d Dep't 1968); Bivas v. State, 97 Misc. 2d 524, 526, 411

It is submitted that by denying amendments as of right to *all* pleadings filed by permission, the *Iazzetta* decision fosters unnecessary duplication of judicial effort.[56] Approval of a late filing necessarily involves a tacit finding by the court that it would not prejudice the state.[57] Indeed, the purpose of section 10 is to apprise the state of transactions upon which its potential liability is founded so that it may conduct a "prompt investigation" of the incident and preserve the "evidence of the facts and circumstances out of which the claims arise."[58] Logically, therefore, the addition of new dependent theories of recovery stemming from the same event out of which the late filing arose should not evoke an issue of prejudice.[59] Thus, such amendments properly may be admitted without further scrutiny.[60] By requiring indiscriminate judicial re-

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N.Y.S.2d 854, 856-57 (Ct. Cl. 1978); Plate v. State, 92 Misc. 2d 1033, 1040, 402 N.Y.S.2d 126, 131 (Ct. Cl. 1978); Emanuele v. State, 43 Misc. 2d 135, 138, 250 N.Y.S.2d 361, 365 (Ct. Cl. 1964). Alternatively, several decisions have stated that factors other than those listed in section 10(6) may be considered in determining whether to permit a late claim. *See* Santana v. New York State Thruway Auth., 92 Misc. 2d 1, 5, 399 N.Y.S.2d 395, 398 (Ct. Cl. 1977); Walach v. State, 91 Misc. 2d 167, 175, 397 N.Y.S.2d 853, 859 (Ct. Cl. 1977), *aff'd mem.*, 69 App. Div. 2d 1015, 416 N.Y.S.2d 771 (4th Dep't 1979).

[56] The *Iazzetta* court's section 10(6) inquiry into the proposed amended claim did not raise any issues that were not previously reviewed by the court which granted the original motion to file the late claim. 105 Misc. 2d at 573, 432 N.Y.S.2d at 991. Indeed, the *Iazzetta* court rested its decision to permit an amendment by leave on the fact that there was no prejudice to the state in allowing the original section 10(6) motion. Since the amendment "[did] no more than to amplify the facts upon which the court [had] already ruled," no prejudice could exist in permitting the amendment. *Id.* The state had been apprised of the facts of the plaintiff's injury as of the date of the original filing. *Id.* It seems that any prejudice to the state respecting any occurrence will be determined as of the date of the original filing, notwithstanding the limitations period on each theory of recovery. *See* note 39 *supra.*

[57] *See* note 55 *supra.*

[58] Beary v. City of Rye, 44 N.Y.2d 398, 412, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 13 (1978); *see* note 39 *supra.*

[59] Adding new theories of recovery based on the same facts essentially is an attempt to cure defects in the original pleading. *See* SIEGEL §37. *See generally* Montana v. Village of Lynbrook, 23 App. Div. 2d 585, 586, 256 N.Y.S.2d 651, 652-53 (2d Dep't 1965). This approach is used in the CPLR counterpart to rule 16(a). CPLR 3025(a) permits pleadings to be amended without leave of court in certain instances. CPLR 3025(a) (1974). The amendment is viewed as a "later version of the original pleading." CPLR 3025(a), commentary at 471 (1974). CPLR 3025(a) intends that the pleader may amend "any error, deficiency or oversight in his original pleading." Citibank v. Suthers, 68 App. Div. 2d 790, 794, 418 N.Y.S.2d 679, 681 (4th Dep't 1979). Furthermore, CPLR 3025(a) is given a literal interpretation, since the benefits that accrue in providing for a correction of pleadings as of right outweigh any possible prejudice to the opponent. *Id.* at 795, 418 N.Y.S.2d at 682.

[60] Although late "dependent" amendments ordinarily do not prejudice the state, such amendments are problematical if they are time-barred at the time of the original late filing. Indeed, section 10(6) of the Act provides that late claims may not be filed after "an action

view, however, the *Iazzetta* decision engenders needless pretrial delay and unwarranted procedural hurdles to recovery.[61]

Clearly, the *Iazzetta* "leave of court" rule is desirable when a claimant seeks to add claims unrelated to the transaction upon which the late filing is based.[62] Because such "independent" amendments arise from unique circumstances, the reviewing court would not be conducting a redundant section 10(6) inquiry. Moreover, it is here that Judge Weisberg's concern of side stepping judicial scrutiny is apposite, since the state would not have had notice of the new claim within the period prescribed by section 10 and, therefore, might be prejudiced by its admission. Indeed, given the potential for abuse of the amendment process, the advisability of scrutinizing proposed "independent" amendments is apparent, for

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asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules." N.Y. CT. CL. ACT § 10(6) (McKinney Supp. 1980). For example, when the statute of limitations for an amended cause of action is shorter than the statute of limitations for the original late filing, the amendment may be time-barred under the CPLR. *E.g.*, Edwards v. State, 95 Misc. 2d 516, 521-22, 407 N.Y.S.2d 804, 808-09 (Ct. Cl. 1978). Hence, although the court ordinarily should permit amendments to late claims, such amendments properly may be dismissed if time-barred at the time of the original late filing. *See* McCormick v. State, 51 App. Div. 2d 28, 30-31, 378 N.Y.S.2d 991, 993-94 (3d Dep't 1976), *aff'd mem.*, 44 N.Y.2d 774, 377 N.E.2d 481, 406 N.Y.S.2d 37 (1978); 105 Misc. 2d at 572, 432 N.Y.S.2d at 990; 3 J. MOORE FEDERAL PRACTICE ¶ 15.15[3] (2d ed. 1980).

[61] The "leave of court" procedural hurdle created by *Iazzetta* was ameliorated by the court's liberal application of section 10(6). Thus, although the court scrutinized the claimant's motion to amend, its examination was not strict. Indeed, the court ultimately granted leave to amend. 105 Misc. 2d at 573, 432 N.Y.S.2d at 991. In permitting the amendment, the *Iazzetta* court relied on an expansive interpretation of section 10(6) pronounced in Zeller v. State, No. 63828 (Ct. Cl. June 9, 1980) and in McCormick v. State, 51 App. Div. 2d 28, 31, 378 N.Y.S.2d 991, 994-95 (1976), *aff'd*, 44 N.Y.2d 774, 377 N.E.2d 481, 406 N.Y.S.2d 37 (1978). Both *Zeller* and *McCormick* stated "that leave to amend be 'freely given upon such terms as may be just.' Absent prejudice to the opposing party, the amendment must be granted." 105 Misc. 2d at 573, 432 N.Y.S.2d at 991 (quoting Zeller v. State, No. 63828 (Ct. Cl. June 9, 1980)) (citations omitted). It is submitted that this liberal application of section 10(6) comports with the underlying purpose of the section, which is to promote a logical and fair process for filing late claims and to ensure that the Court of Claims will hear the merits of meritorious claims. Governor's Memorandum on Approval of ch. 280, N.Y. Laws (June 8, 1976), *reprinted in* [1976] N.Y. Laws 2435 (McKinney); *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, 362-428 (1976); Farrell, *Civil Practice*, 30 SYRACUSE L. REV. 385, 393-95 (1979).

[62] It is submitted that when a proposed amendment arises out of a different transaction than the late filing, it should be permitted in the interest of judicial economy. Nonetheless, since such "independent" amendments may prejudice the state, the *Iazzetta* "leave of court" rule is a necessary safeguard.

claimants should not be allowed to do indirectly what they cannot do directly.[63]

Neil A. Abrams

CRIMINAL PROCEDURE LAW

CPL § 270.25: Prosecutor's use of peremptory challenges for sole purpose of excluding blacks from jury violates criminal defendant's right to trial by an impartial jury

CPL section 270.25 requires a court to exclude from a jury a prospective juror against whom a peremptory challenge has been exercised.[64] Since no reason need be given to exercise a peremptory

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[63] Clearly, were as-of-right amendments to be permitted in all instances, claimants would be well advised to refrain from interposing claims which are prejudicial to the state until *after* the original late filing had been subjected to section 10(6) scrutiny. Irrespective of whether or under what restrictions amendments to late claims may be interposed, it is suggested that the practitioner should submit all contemplated actions in the original filing. Such an approach would be sensible in light of Jones v. State, 51 N.Y.2d 943, 416 N.E.2d 1050, 435 N.Y.S.2d 715 (1980), wherein the Court of Appeals refused to overturn a supreme court decision which held that a claimant may not amend a technical defect in a late claim. *Id.* at 994, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715. Indeed, the distinction between an amendment to a defective late filing (barred by *Jones* on a jurisdictional theory) and an amendment to a valid late filing (permitted by leave of court in *Iazzetta*) could disappear should the courts continue to embrace technical pleading requirements. *See, e.g.*, McGaughy v. State, 55 App. Div. 2d 823, 390 N.Y.S.2d 301 (4th Dep't 1976); Estate of Johnson v. State, 49 App. Div. 2d 136, 373 N.Y.S.2d 671 (3d Dep't 1975); Peterson v. State, 84 Misc. 2d 296, 374 N.Y.S.2d 1002 (Ct. Cl. 1975).

[64] CPL § 270.25(1) provides that "[a] peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." CPL § 270.25(1) (1971). Historically, the peremptory challenge existed only for the benefit and protection of the defendant. People v. McQuade, 110 N.Y. 284, 294, 18 N.E. 156, 159 (1888). Blackstone described the peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 W. BLACKSTONE, COMMENTARIES 346 (1st ed. 1769). *But cf.* Swain v. Alabama, 380 U.S. 202, 213 (1965) (suggesting peremptory challenges could be exercised by both sides at common law).

In New York, such challenges were not granted to the prosecution until the middle of the nineteenth century. J. VAN DYKE, JURY SELECTION PROCEDURES 148-49 (1977). Today, peremptory challenges are a statutory right and can be exercised by the prosecution and the defendant in all state and federal courts. *Id.* at 281-84; FED. R. CRIM. P. 24(b). Although the use of a peremptory challenge is a substantial right given a defendant, People v. McQuade, 110 N.Y. 284, 293, 18 N.E. 156, 158 (1888); People v. Hamlin, 9 App. Div. 2d 173, 174, 192 N.Y.S.2d 870, 871 (3d Dep't 1959), it does not rise to the level of a constitutional right, Swain v. Alabama, 380 U.S. 202, 219 (1965), and "rests entirely with the Legislature." People v. Lobel, 298 N.Y. 243, 257, 82 N.E.2d 145, 152 (1948); People v. Doran, 246 N.Y. 409, 426, 159 N.E. 379, 385 (1927); People v. King, 47 App. Div. 2d 594, 595, 363 N.Y.S.2d 682,