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# GOL § 17-103(1): Contractual Provision Agreed Upon Before Cause of Action Accrued May Not Extend Statute of Limitations Notwithstanding Contrary Intent of Parties

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Finally, the *Cohen* court's restrictive interpretation of section 50-e seems to deprive the 1976 amendment of its vitality by giving it de minimus effect. Where an infant brings an action against a municipal corporation, the amendment, as interpreted in *Cohen*, merely substitutes 1 year and 90 days for the prior 1-year period as the time limitation within which an infant may apply for permission to serve a late notice of claim. This result hardly supplied the "urgently require[d] statutory relief" to which the Judicial Conference referred in its 1976 report to the legislature.<sup>231</sup> Further, in actions against public corporations where the applicable statute of limitations is 1 year,<sup>232</sup> the *Cohen* interpretation has the effect of negating the amendment and reinstating the prior law, since under either version of section 50-e the time limitation to apply for leave to serve a late notice would be 1 year from the date the cause of action accrues. Because such results were not intended by the legislative changes, other courts should not follow this rigid position.

Clara S. Licata

#### GENERAL OBLIGATIONS LAW

*GOL § 17-103(1): Contractual provision agreed upon before cause of action accrued may not extend statute of limitations notwithstanding contrary intent of parties*

Statutes of limitations are intended to protect individuals from "stale" and "vexatious" claims and the public by "giving repose to human affairs."<sup>233</sup> Although contracting parties have some freedom

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<sup>231</sup> 1976 REPORT, *supra* note 207, at 286.

<sup>232</sup> A public corporation includes a municipal corporation, a district corporation or a public benefit corporation. N.Y. GEN. CONSTR. LAW § 66(1) (McKinney Supp. 1978-1979). The 1-year 90-day statute of limitations prescribed by § 50-i of the General Municipal Law applies only to municipal corporations. GEN. MUN. LAW § 50-i (McKinney 1977). There are numerous public benefit corporations within the Public Authorities Law which prescribe a 1-year statute of limitations for tort claims. *E.g.*, N.Y. PUB. AUTH. LAW §§ 569-a(2), 1276(2), 1297(2), 1299-p(2) (McKinney 1970).

<sup>233</sup> *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); *see Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). Although considered statutes of repose, *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 302, 200 N.E. 824, 827 (1936), statutes of limitations often may prevent the assertion of a just claim. Any resulting hardship, however, is deemed outweighed by the public interest in barring stale claims. *Id.* at 302, 200 N.E. at 827-28; Note, *Validity and Effect of Agreements Waiving the Statute of Limitations*, 1951 Wis. L. Rev. 718, 718. Moreover, courts may not ignore these statutes in order to prevent an unjust result. *In re City of New York (Elm St.)*, 239 N.Y. 220, 225, 146 N.E. 342, 344 (1924); *see CPLR 201 (1972)*. *See generally* 1 WK&M ¶ 201.01.

to alter this period by shortening the applicable time,<sup>234</sup> agreements extending the statutory limitation will be upheld in contract disputes only when executed after the cause of action has accrued.<sup>235</sup> In *John J. Kassner & Co. v. City of New York*,<sup>236</sup> the Court of Appeals recently held that a contractual clause could not extend the statute of limitations despite its intended function to shorten the statutory period, because it was adopted before the cause of action on the contract had accrued.<sup>237</sup>

In *Kassner*, the plaintiff, a professional engineering corporation, and the City of New York entered into a construction contract providing for payment in installments as the work progressed, subject to audit by the city comptroller.<sup>238</sup> According to the terms of the

<sup>234</sup> See CPLR 201 (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.

Agreements that shorten the statutory period are strictly construed. *E.g.*, *Stanley R. Benjamin, Inc. v. Fidelity & Cas. Co.*, 72 Misc.2d 742, 743, 340 N.Y.S.2d 578, 580 (Sup. Ct. Nassau County 1972); *Hauer Constr. Co. v. City of New York*, 193 Misc. 747, 749, 85 N.Y.S.2d 42, 44 (Sup. Ct. App. T. 1st Dep't 1948), *aff'd mem.*, 276 App. Div. 841, 93 N.Y.S.2d 915 (1st Dep't 1949). Such agreements will be upheld only if the time periods are reasonable. *See, e.g.*, *Planet Constr. Corp. v. Board of Educ.*, 7 N.Y.2d 381, 385, 165 N.E.2d 758, 760, 198 N.Y.S.2d 68, 72 (1960); *Sapinkopf v. Cunard S.S. Co.*, 254 N.Y. 111, 113-14, 172 N.E. 259, 259 (1930) (per curiam); *Staff v. Lido Dunes, Inc.*, 47 Misc.2d 322, 327, 262 N.Y.S.2d 544, 549 (Sup. Ct. Nassau County 1965). *See generally* 2 CARMODY-WAIT 2d, N.Y. PRAC., ¶ 13:6 (1965 & Supp. 1979); 35 N.Y. JUR., *Limitations and Laches*, § 5 (1964 & Supp. 1979); 8 WK&M ¶ 7502.15.

<sup>235</sup> N.Y. GEN. OBLIG. LAW § 17-103[1] (McKinney 1978). Section 17-103[1] which prescribes the exclusive method of extending or waiving the statute of limitations, provides in pertinent part:

A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract . . . , if made after the accrual of the cause of action and made . . . in a writing signed by the promisor . . . is effective . . . 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.

*Id.* Advance waivers of any statutory benefits founded in public policy traditionally have been disfavored by the courts. *E.g.*, *Boyd H. Wood Co. v. Horgan*, 291 N.Y. 422, 426, 52 N.E.2d 932, 933-34 (1943); *Crowe v. Liquid Carbonic Co.*, 208 N.Y. 396, 402-03, 102 N.E. 573, 575 (1913); *Shapley v. Abbott*, 42 N.Y. 443, 452 (1870); *Pine v. Okoniewski*, 256 App. Div. 519, 520, 11 N.Y.S.2d 13, 15 (4th Dep't 1939). Since statutes of limitations are legislative expressions of public policy, *see* note 233 and accompanying text *supra*, courts similarly have disapproved of waivers made before the cause of action accrues, *see Watertown Nat'l Bank v. Bagley*, 134 App. Div. 831, 834, 119 N.Y.S. 592, 596 (4th Dep't 1909); *Gorowitz v. Blumstein*, 184 Misc. 111, 116, 53 N.Y.S.2d 179, 184 (Sup. Ct. N.Y. County 1944). *See generally* 1 WK&M ¶ 201.12.

<sup>236</sup> 46 N.Y.2d 544, 389 N.E.2d 99, 415 N.Y.S.2d 785 (1979), *rev'g* 62 App. Div. 2d 1184, 404 N.Y.S.2d 216 (1st Dep't 1978) (mem).

<sup>237</sup> 46 N.Y.2d at 552, 389 N.E.2d at 104, 415 N.Y.S.2d at 790.

<sup>238</sup> *Id.* at 548, 389 N.E.2d at 101, 415 N.Y.S.2d at 787.

contract, any action arising under its provisions had to be commenced within 6 months of the filing of a certificate of final payment with the city comptroller.<sup>239</sup> After completing its work, the plaintiff submitted a claim for final payment, most of which was disallowed by the comptroller.<sup>240</sup> Although the disallowance was promptly protested, more than 6 years had passed before the plaintiff demanded final compensation.<sup>241</sup> Upon receiving a request for payment of the amount approved by the comptroller, the city paid the plaintiff, and a certificate of final payment was filed in the comptroller's office.<sup>242</sup> Less than 6 months later, the plaintiff brought suit to recover the unpaid balance.<sup>243</sup> The city moved for summary judgment, claiming the 6-year statute of limitations barred the action.<sup>244</sup> Concluding that the parties were bound by the

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<sup>239</sup> *Id.* The contract provided:

No action shall be . . . maintained against the City upon any claim based upon this contract or arising out of this contract . . . unless such action shall be commenced within six (6) months after the date of filing in the office of the Comptroller of the City of the certificate for . . . final payment . . . None of the provisions of Article 2 of the [CPLR] shall apply to any action against the City arising out of this contract.

*Id.* The clause is apparently a standard provision in city contracts; its purpose is to prevent stale or fraudulent claims from being asserted against the city. *See, e.g.,* *Soviero Bros. Contracting Corp. v. City of New York*, 286 App. Div. 435, 439, 142 N.Y.S.2d 508, 511 (1st Dep't 1955), *aff'd mem.*, 2 N.Y.2d 924, 141 N.E.2d 918, 161 N.Y.S.2d 888 (1957).

<sup>240</sup> 46 N.Y.2d at 548, 389 N.E.2d at 101, 415 N.Y.S.2d at 787. On December 13, 1967, the plaintiff requested payment of \$39,523.69. The comptroller disallowed \$38,423.69, authorizing payment of only \$1,100. *Id.*

<sup>241</sup> *Id.* Neither the exact date of the final audit nor the date when the plaintiff first became aware of its results is clear. *See id.* The evidence indicated, however, that the plaintiff learned of the audit's outcome by July 1, 1968, the date it sent the city a letter of protest demanding payment of the full amount claimed. *Id.*

<sup>242</sup> *Id.* The check for \$1,100 was sent to the plaintiff and the certificate was filed with the comptroller's office on November 8, 1974. *Id.*

<sup>243</sup> *Id.* The action was commenced on April 18, 1975. *Id.*

<sup>244</sup> *Id.*; *see* CPLR 213(2) (1972). The city contended that, since "the plaintiff's cause of action [had] 'accrued no later than July 1, 1968,'" the date on which it was shown that the plaintiff knew it had a claim against the city, *see* note 241 *supra*, the action was time-barred because it was commenced more than 6 years after it had accrued. 46 N.Y.2d at 548-49, 389 N.E.2d at 101-02, 415 N.Y.S.2d at 788. As a second defense, the city claimed the contractual limitations clause was intended to curtail the statute of limitations and therefore could not serve to extend it. *Id.* at 549, 389 N.E.2d at 102, 415 N.Y.S.2d at 788. In addition, the city argued that, since it had no power to waive the statute of limitations, *see* N.Y. GEN. CRRY LAW § 20[5] (McKinney 1968), the limitation provision in the contract was void. 46 N.Y.2d at 549, 389 N.E.2d at 102, 415 N.Y.S.2d at 788.

The plaintiff, on the other hand, contended that the 6-month period established by the contract governed the action and began to run when the final payment certificate had been filed in the comptroller's office. The plaintiff also urged that the city had not waived the statute of limitations in the contract, but merely had specified the event that would cause the statute of limitations to begin to run. *Id.*

limitations period prescribed in the contract, the Supreme Court, New York County, held that the action was timely since it was commenced within 6 months of the filing of the certificate of final payment.<sup>245</sup> The Appellate Division, First Department, affirmed.<sup>246</sup>

On appeal, a unanimous Court of Appeals reversed.<sup>247</sup> Writing for the Court, Judge Wachtler<sup>248</sup> reasoned that since the cause of action accrued upon the completion of the comptroller's final audit, when the plaintiff had the *right* to demand payment of the undisputed balance, the suit was not commenced within the period established by the statute of limitations.<sup>249</sup> Addressing the contractual limitations period, the Court held that the parties could not extend the statute of limitations.<sup>250</sup> Judge Wachtler noted that although agreements reducing the time within which an action must be commenced will be upheld if reasonable,<sup>251</sup> attempts to lengthen the limitations period are more restricted.<sup>252</sup> The Court observed that

<sup>245</sup> 46 N.Y.2d at 549, 389 N.E.2d at 102, 415 N.Y.S.2d at 788. The supreme court stated: "The City entered into a binding agreement and it may not now use the CPLR as a shield against the provisions of the contract." *Id.*

<sup>246</sup> 62 App. Div. 2d 1184, 404 N.Y.S.2d 216 (1st Dep't 1978) (mem.).

<sup>247</sup> 46 N.Y.2d at 552, 389 N.E.2d at 104, 415 N.Y.S.2d at 790.

<sup>248</sup> Judge Wachtler was joined by Chief Judge Cooke and Judges Jasen, Gabrielli, Jones and Fuchsberg.

<sup>249</sup> 46 N.Y.2d at 550, 389 N.E.2d at 102-03, 415 N.Y.S.2d at 788-89; *see* CPLR 213(2) (1972). Noting that a contract cause of action accrues at the time of breach, the Court observed that when performance is subject to a condition, a cause of action generally accrues only upon fulfillment of the condition. 46 N.Y.2d at 550, 389 N.E.2d at 102, 415 N.Y.S.2d at 788 (citing *Nolan v. Whitney*, 88 N.Y. 649 (1882); *SIMPSON, CONTRACTS* § 112 (1973); 36 N.Y. *Jur.*, *Limitations and Laches* § 61 (1964)). The Court concluded, therefore, that the city's obligation to pay was conditioned upon the comptroller's audit and not upon the filing of the certificate of final payment, 46 N.Y.2d at 550, 389 N.E.2d at 102, 415 N.Y.S.2d at 788-89, because the comptroller "unequivocally refused to pay the full amount demanded and allegedly due on the contract" when the audit was completed. *Id.*, 389 N.E.2d at 103, 415 N.Y.S.2d at 789.

Although the *Kassner* Court also stated that the plaintiff's cause of action accrued when the "audit was completed and the plaintiff was informed of the results," *id.*, 389 N.E.2d at 102, 415 N.Y.S.2d at 789, it should be noted that the plaintiff's knowledge of the outcome of the audit was not a prerequisite to the accrual of the action. *See, e.g.,* *Bykowsky v. Public Nat'l Bank*, 209 App. Div. 61, 204 N.Y.S. 385 (1st Dep't 1924), *aff'd mem.*, 240 N.Y. 555, 148 N.E. 702 (1925); *Cincus v. New York, New Haven & Hartford R.R.*, 149 N.Y.S.2d 602 (N.Y.C. Civ. Ct. N.Y. County 1956).

<sup>250</sup> 46 N.Y.2d at 550, 389 N.E.2d at 103, 415 N.Y.S.2d at 789.

<sup>251</sup> *Id.* at 550-51, 389 N.E.2d at 103, 415 N.Y.S.2d at 789; *see Sapinkopf v. Cunard S.S. Co.*, 254 N.Y. 111, 113-14, 172 N.E. 259, 259 (1930) (per curiam); CPLR 201 (1972); note 234 *supra*.

<sup>252</sup> 46 N.Y.2d at 551, 389 N.E.2d at 103, 415 N.Y.S.2d at 789. The Court considered both the private and public interests that are implicated in statutes of limitations. *Id.* at 550, 389 N.E.2d at 103, 415 N.Y.S.2d at 789 (quoting *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)); *see Schwartz v. Hayden Newport*

agreements to extend the statute of limitations must comply with section 17-103[1] of the General Obligations Law,<sup>253</sup> which requires the agreement to be adopted after the cause of action has accrued.<sup>254</sup> Since the contractual limitations clause in *Kassner* had been agreed upon before the plaintiff's cause of action had accrued, the Court held that it was unenforceable, notwithstanding that the parties' original intent "undoubtedly was to curtail the statutory period."<sup>255</sup>

It is submitted that the *Kassner* decision is consistent with the public policy of the General Obligations Law.<sup>256</sup> The purpose of section 17-103[1], applicable to contract causes of action,<sup>257</sup> is to prevent a party in a superior bargaining position from coercing a

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Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); note 233 *supra*. While agreements shortening the statute of limitations implement the public policy of the statute, see note 1 and accompanying text *supra*, and are enforceable if reasonable, see *Sapinkopf v. Cunard S.S. Co.*, 254 N.Y. 111, 172 N.E. 259 (1930) (per curiam); *Ripley v. Aetna Ins. Co.*, 30 N.Y. 136, 163 (1864), the *Kassner* Court observed that agreements waiving or extending the statute are ineffective if made before any liability has arisen "because a party cannot 'in advance, make a valid promise that a statute founded in public policy shall be inoperative.'" 46 N.Y.2d at 551, 389 N.E.2d at 103, 415 N.Y.S.2d at 789 (quoting *Shapley v. Abbott*, 42 N.Y. 443, 452 (1870)); see *Pine v. Okoniewski*, 256 App. Div. 519, 11 N.Y.S.2d 13 (4th Dep't 1939); *Crocker v. Ireland*, 235 App. Div. 760, 256 N.Y.S. 638 (4th Dep't 1932); note 235 *supra*. When agreements to waive or extend the statute of limitations are included as part of the original contract, it was found that there is a greater risk that they might be the product of "ignorance" or "unequal bargaining position." 46 N.Y.2d at 551, 389 N.E.2d at 103, 415 N.Y.S.2d at 789.

<sup>253</sup> N.Y. GEN. OBLIG. LAW § 17-103[1] (McKinney 1978).

<sup>254</sup> 46 N.Y.2d at 551-52, 389 N.E.2d at 103, 415 N.Y.S.2d at 789-90; see note 235 *supra*.

<sup>255</sup> 46 N.Y.2d at 552, 389 N.E.2d at 104, 415 N.Y.S.2d at 790. The Court observed that the contractual provision was "a standard clause which, undoubtedly, was included to shorten the Statute of Limitations." *Id.* (citing *Soviero Bros. Contracting Corp. v. City of New York*, 286 App. Div. 435, 142 N.Y.S.2d 508 (1st Dep't 1955), *aff'd mem.*, 2 N.Y.2d 924, 141 N.E.2d 918, 161 N.Y.S.2d 888 (1957)); see note 239 *supra*.

Addressing the city's argument that the agreement was unenforceable because the city has no authority to waive the statute of limitations, see N.Y. GEN. CTRY LAW § 20[5] (McKinney 1968); note 244 *supra*, the Court reasoned that, while the city has no power to waive the statute, it may, under limited circumstances, extend the statutory period. 46 N.Y.2d at 552, 389 N.E.2d at 104, 415 N.Y.S.2d at 790; see NEW YORK, N.Y. ADMIN. CODE ch. 5, § 93d-3.1 (1976). The Court noted that the statute may be extended only after the limitation period has expired, and since the agreement in *Kassner* was made before the statute had run, the Court concluded that the limitation clause in the contract did not constitute an extension of the statute of limitations. 46 N.Y.2d at 551-52, 389 N.E.2d at 103-04, 415 N.Y.S.2d at 789-90.

<sup>256</sup> See note 235 *supra*.

<sup>257</sup> N.Y. GEN. OBLIG. LAW § 17-103[1] (McKinney 1978). One authority has suggested that in a non-contract case, an agreement extending the statute of limitations might be utilized to estop the defendant from raising the statute of limitations as a defense. *SEGEL*, § 39 (1978); see *Robinson v. City of New York*, 24 App. Div. 2d 260, 263, 265 N.Y.S.2d 566, 569-70 (1st Dep't 1965).

waiver of the statute of limitations.<sup>258</sup> In order to maintain this policy the *Kassner* Court discounted the parties' intent, which was to shorten the statutory period. Regardless of the form of the agreement and the apparent intent of the parties when they enter a contract, *Kassner* requires striking a provision that has the effect of lengthening the statute of limitations.<sup>259</sup>

Under circumstances different from *Kassner*, it nevertheless would appear that contracting parties sometimes may delay the time at which the cause of action normally accrues by including in the initial agreement a condition precedent to the fulfillment of the contractual obligations. Where the right to final payment is contingent upon the happening of a specified event, a cause of action for money due on the contract does not accrue, and the statute of limitations does not begin to run, until that event has occurred.<sup>260</sup> Provided the condition precedent was an integral part of the agreement, such a procedure would not violate section 17-103[1] since it would not extend the statutory period but merely would delay the commencement of its running.<sup>261</sup> The plaintiff in *Kassner* would not be aided by this procedure, however, since it would not be a substantive provision in the contract.

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<sup>258</sup> See McLaughlin, *Statute of Limitation*, N.Y.L.J., June 8, 1979, at 1, col. 1. The General Obligations Law thus would prevent a creditor from requiring a debtor to waive or extend the statute of limitations as a condition to giving a loan. *Id.* Once the cause of action has accrued, however, an agreement waiving or extending the statute of limitations is less likely to be the result of unequal bargaining power and indeed may be to the advantage of all parties. *Id.* See also 46 N.Y.2d at 551, 389 N.E.2d at 103, 415 N.Y.S.2d at 789.

<sup>259</sup> The *Kassner* Court's strict construction of § 17-103[1] encompasses not only promises that expressly extend or waive the statute of limitations, but also promises that would have that result, even though that never was intended by the parties. See 46 N.Y.2d at 552, 389 N.E.2d at 104, 415 N.Y.S.2d at 790. See generally Recommendation of the Law Revision Commission to the Legislature Relating to Agreements Extending the Statutes of Limitation, [1961] N.Y. LAW REV. COMM'N REP. 97-99.

<sup>260</sup> See, e.g., *Blakeley v. Agency of Canadian Car & Foundry Co.*, 73 N.Y.S.2d 573, 575 (Sup. Ct. N.Y. County), *aff'd mem.*, 272 App. Div. 1001, 74 N.Y.S.2d 829 (1st Dep't 1947). See also *Arc Elec. Constr. Co. v. George A. Fuller Co.*, 24 N.Y.2d 99, 103, 247 N.E.2d 111, 113, 299 N.Y.S.2d 129, 132 (1969); *Nolan v. Whitney*, 88 N.Y. 649, 650 (1882).

<sup>261</sup> See generally CPLR 206(a) (1972); 1 WK&M ¶ 206.01.