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What Endless Tolling Of Claims Means For NY Litigation

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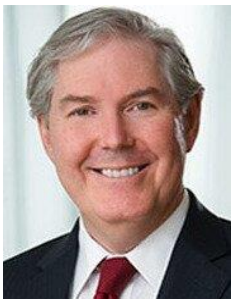

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New York's General Obligation Law limits the length of time that claims arising out of a contract can be tolled.

As interpreted by the New York Court of Appeals, Section 17-103(1) of the GOL "allows extension of the limitations period only for, at most, the time period that would apply if the cause of action had accrued on the date of the agreement."[1]

But what if the parties to a maximally long tolling agreement want to toll the claims again upon the expiration of the initial agreement? Does Section 17-103(1) impose a hard cap, or can the parties enter into a successive agreement?

On April 19, Justice Joel M. Cohen of the New York County Commercial Division held for the first time that they can. Should Justice Cohen's decision survive appeal, New York litigants will be free to toll their claims forever, so long as they enter into separate agreements that toll the claims for no longer than the length of the limitations period.

Section 17-103(1) states, in relevant part:

> A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise.

In Freedom Trust 2011-2 v. HSBC Bank USA NA, Justice Cohen found that Section 17-103(1) limits only the length of any single tolling agreement.[2] Justice Cohen emphasized that Section 17-103(1) "limits the amount of tolling that can be attached to 'a promise,' a single agreement."[3]

The parties in Freedom Trust 2011-2 entered into 12 successive tolling agreements. Each agreement

individually tolled the claims by less than the minimum possible three-year limitations period.[4]

But taken together, they tolled the claims for more than six years, the maximum possible limitations period.[5] The plaintiff filed suit less than a year after the 12th agreement — which was within the limitations period only if all 12 agreements could be given effect.[6] The defendant moved to dismiss, arguing that the 12th agreement increased the total tolling period beyond six years thereby rendering it unenforceable under Section 17-103(1).[7]

Justice Cohen disagreed. He held that "[t]he fact that each successive agreement incorporates the prior does not change the fact that the relevant promise in each one is the one to extend the tolling which is effective at the date of extension."[8]

Referencing the language of Section 17-103(1), Justice Cohen found that the 12th tolling extension had a date of the promise of Jan. 15, 2021 — less than a year before suit.[9] Because the minimum possible limitations period was three years, the 12th tolling extension complied with the GOL and was deemed effective.

Justice Cohen reached his conclusion notwithstanding the defendant's argument that "having Statute of Limitations Period[s] go on forever" was bad for public policy. Instead, he determined that a limit on tolling could cause "equal and arguably worse public policy problems" by prematurely ending parties' productive negotiations.[10]

The implications of Justice Cohen's decision are clear — endless tolling is now available to litigants in New York state courts, to the benefit of both would-be plaintiffs and defendants. Plaintiffs can take their time to build a case, rather than file complaints they prefer not to. Defendants can kick the can even further down the road and increase the odds of a resolution outside the courts or of a plaintiff choosing not to file.

While acknowledging that the propriety of successive tolling agreements was an "an interesting question of first impression," Justice Cohen correctly noted that successive tolling agreements are "far from an unusual situation."[11]

But successive tolling that extends beyond the length of the limitations period is unlikely to come up often — especially for claims that are available for six years. That said, it could be critical in certain niche circumstances.

New York's six-year statute of limitations for breach of contract, while generous for most claims, is meager for some. Mortgage-backed securities litigation, as in Freedom Trust 2011-2, is a good example.

In such litigation, the expected life of an operative agreement is decades — consistent with the typical 30-year life of a residential mortgage loan — such that a breach of contract on the date of execution could harm beneficiaries to the contract decades later. And due to the complexity of mortgage-backed securities claims, it may take several years for a claimant to identify a breach and prepare its lawsuit.[12]

In the wake of the 2008 financial crisis, and as the six-year anniversaries of precrisis mortgage-backed securities transactions approached in 2011 and 2012, it became common for parties to those agreements to toll claims before they were fully investigated.

Now, 14 years later, the limitations periods on some claims from the mid-aughts have expired several

times over. Some parties who filed mortgage-backed securities suits in the last few years, as tolling agreements were expiring, might not have done so had they been confident that they could extend tolling even further.

Although prospective plaintiffs may not feel comfortable relying on Justice Cohen's decision alone, should higher courts endorse it, future parties will undoubtedly take advantage of infinite tolling.

At the other end of the spectrum, claims with especially short statute of limitations periods may be most impacted. For example, the statute of limitations period for enforcing arbitration awards is just one year, and the period for challenging an arbitration award is only 90 days.[13]

Complex commercial litigators know that 90 days, or even 180 days, can be an extremely short time. Before Freedom 2011-2, parties seeking to challenge an arbitration award needed to do so almost immediately. Now, should Justice Cohen's ruling take hold, a more deliberate process is available and the possibility of a negotiated resolution is much more viable.

The defendant in Freedom 2011-2 has until October 2022 to perfect an appeal to the New York State Supreme Court Appellate Division's First Judicial Department.

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[1] Deutsche Bank Nat'l Tr. Co. Tr. for Harborview Mortg. Loan Tr. v. Flagstar Cap. Mkts. Corp., 32 N.Y.3d 139, 152-53 (2018); see also Bayridge Air Rights, Inc. v. Blitman Const. Corp., 80N.Y.2d 777, 779–80 (1992) (holding that a tolling agreement could extend the limitations period by only the length of the applicable six-year limitations period).

[2] Transcript of Oral Argument at 57:19-20, Freedom-Trust 2011-2, Index No. 653319/2021 (Apr. 19, 2022) (NYSCEF 44).

[3] Id.

[4] Id. at 59:7-13. There was some dispute about which state's statute of limitations would apply in Freedom Trust 2011-2, given New York's "borrowing statute" (CPLR 202). Maryland and Delaware had a three year limitations period, whereas New York had a six-year period. For the purposes of the motion, Justice Cohen assumed Delaware's three-year period applied. Id. at 52:22-24.

[5] Id. at 7:6-9.

[6] Id. at 9:21-25.

[7] Id. at 4:13-7:17.

[8] Id. at 58:1-4.

[9] Id. at 58:5-6.

[10] Id. at 59:20-60:7.

[11] Id. at 57:7-12.

[12] This is especially true in light of the Court of Appeals' recent decision in U.S. Bank N.A. v. DLJ Mortg. Capital, Inc., Index No. 650369/2013, 2022 WL 801440 (Mar. 17, 2022), which interprets the contracts governing RMBS put-back claims as requiring that a plaintiff enumerate every individual loan in its pre-suit notice to the party responsible for repurchasing defective loans.

[13] While Section 17-103(1) applies only to claims "arising out of a contract," that includes suits to enforce arbitration awards where the arbitration was intended to resolve breach of contract claims. See EGI-VSR, LLC v. Huber, No. 19 CIV. 6099 (ER), 2020 WL 1489790, at *10-11 (S.D.N.Y. Mar. 27, 2020), appeal withdrawn, No. 20-1306, 2020 WL 4197304 (2d Cir. June 11, 2020).