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CPLR § 203(e): Plaintiff May Assert an Otherwise Time-Barred Claim Against a Third-Party Defendant If Court in its Discretion Finds Defendant Had Notice of the Claim and Amended Complaint Relates Back to Service of Third-Party Complaint

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Furthermore, the recent amendment to section 501(c) does not contravene, and perhaps implicitly codifies, the *Fe Bland* mandate that a combined reading of all the relevant documents must permit the imposition of a flip tax. Thus, shareholder approval of any flip tax will still be required, and although the statute has retroactive application, a transfer fee imposed without shareholder approval prior to the date of the new legislation would be an invalid exercise of corporate power.

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CIVIL PRACTICE LAW AND RULES

CPLR 203(e): Plaintiff may assert an otherwise time-barred claim against a third-party defendant if court in its discretion finds defendant had notice of the claim and amended complaint relates back to service of third-party complaint.

CPLR 203(e) allows a plaintiff, in amending a timely complaint, to include an otherwise time-barred claim, provided the original pleading has given sufficient notice of the transactions or occurrences "to be proved pursuant to the amended pleading."[1] CPLR 203(e) was enacted to overcome case law which prohibited

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[1] *See* CPLR 203(e) (McKinney 1972). CPLR 203(e) provides:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Id. Section 203(e) was based on Rule 15(c) of the Federal Rules of Civil Procedure which provides that an amendment may relate back only if the claim against the new party arose out of the "conduct, transaction, or occurrence" set forth in the original pleading and if the party sought to be added knew or should have known of the institution of the suit. *See* 1 WK&M ¶ 203.29, at 2-118.16 (1986); *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 283, 284 (1966); *The Quarterly Survey*, 41 ST. JOHN'S L. REV. 467, 467 (1967); *see also* M. GREEN, BASIC CIVIL PROCEDURE 135 (2d ed. 1979) (relation back theory underlying Rule 15(c)).

The practical effect of CPLR 203(e) was to necessitate that a defendant make a comprehensive, timely examination of all facts surrounding the transaction to anticipate potential claims which could be added later. *See, e.g.*, Henegar v. Freudenheim, 40 App. Div. 2d 825, 826, 337 N.Y.S.2d 280, 282 (2d Dep't 1972) (amendment to assert lack of informed consent permitted in medical malpractice action); Watso v. City of New York, 39 App. Div. 2d 960, 961, 333 N.Y.S.2d 492, 493 (2d Dep't 1972) (amendment of wrongful death complaint to allege assault as well as negligence); *see also, The Biannual Survey*, 39 ST. JOHN'S L. REV. 178, 184-85 (1964).

amended pleadings from asserting obligations or liabilities not originally pleaded before the statute of limitations for those claims had expired.[2] Courts have interpreted the statute liberally,[3] allowing amendments to pleadings to relate back to the original filing date in instances where a party seeks to add a wrongful death claim to a personal injury action[4] or to change the capacity in which a party appears in a lawsuit.[5] The law has remained unset-

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[2] *See* SECOND REP. 50, 51 (1958). CPLR 203(e) had no counterpart in prior practice statutes, but was intended to overcome caselaw resulting from *Harriss v. Tams*, 258 N.Y. 229, 179 N.E. 476 (1932). *See* SECOND REP. at 51. The court in *Harriss* held that a defendant need only investigate those facts relevant to a defense against the cause of action stated in the complaint, and that an amendment which changes the legal theory of recovery is based on "different" conduct, thus such an amendment would be prejudicial to a defendant. *See* 258 N.Y. at 243-44, 179 N.E. at 482.

Prior to the enactment of CPLR 203(e), courts had consistently held that amendments to assert claims against third party defendants did not relate back. *See* McCabe v. Queensboro Farm Prods. Inc., 15 App. Div. 2d 553, 223 N.Y.S.2d 21 (2d Dep't 1961), *aff'd without opinion*, 11 N.Y.2d 963, 183 N.E.2d 326, 229 N.Y.S.2d 11 (1962); Paskes v. Buonaguro, 42 Misc. 2d 1004, 249 N.Y.S.2d 943 (Sup. Ct. Kings County 1964); Spen & Co. v. Ocean Box Corp., 16 Misc. 2d 436, 184 N.Y.S.2d 152 (Sup. Ct. Kings County 1959).

[3] *See, e.g., In re* Smith 104 App. Div. 2d 445, 448, 478 N.Y.S.2d 963, 966 (2d Dep't 1984) (CPLR 203(e) liberally construed to allow "affidavit" as valid amendment to original petition); Imperial Outfitters to Large Men, Inc. v. Genesco, Inc., 95 App. Div. 2d 755, 756, 464 N.Y.S.2d 757, 759 (1st Dep't 1983) (cross-claim raised in amended pleading deemed to have been interposed when complaint served). CPLR 104 requires that CPLR provisions "be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." CPLR 104 (McKinney 1972); *see also*, Spallina v. Giannoccaro, 98 App. Div. 2d 103, 108, 469 N.Y.S.2d 824, 827 (4th Dep't 1983) (although pleading rules are construed liberally, mere conclusory assertions are insufficient to enable defendants to respond); Shaw v. Hospital Ass'n of Schenectady, 57 Misc. 2d 461, 461, 292 N.Y.S.2d 984, 985 (Sup. Ct. Schenectady County 1968) (in light of liberal construction of CPLR, deposition may be taken where party unable to attend trial); Hardenburg v. Hardenburg, 42 Misc. 2d 818, 819, 248 N.Y.S.2d 789, 790 (Sup. Ct. Steuben County 1964) (although CPLR liberally construed, pretrial examinations not allowed in matrimonial actions without showing special circumstances). *See generally* J. FRIEDENTHAL, H. KANE & A. MILLER, CIVIL PROCEDURE § 5.26 at 302 (1985) (trend away from strict technical pleading).

[4] *See, e.g.*, Caffaro v. Trayna, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974); Vastola v. Maer, 48 App. Div. 2d 561, 370 N.Y.S. 2d 955 (2d Dep't 1975); *aff'd*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S2d 246 (1976); Palmer v. New York City Transit Auth., 37 App. Div. 2d 766, 324 N.Y.S.2d 550 (1st Dep't 1971). *See generally* 1 WK&M ¶ 203.30, at 2-102 to 2-105 (1986) (discussing *Caffaro* decision and its effects on wrongful death and other claims).

[5] *See, e.g.*, Boyd v. United States Mortgage & Trust Co., 187 N.Y. 262, 79 N.E. 999 (1907); Rivera v. St. Luke's Hosp., 102 Misc. 2d 727, 424 N.Y.S.2d 656 (Sup. Ct. Orange County 1980); Princeton Textile Printing Corp. v. Peek Paper Corp., 195 Misc. 955, 91 N.Y.S.2d 443 (Sup. Ct. N.Y. County), *aff'd without opinion*, 275 App. Div. 1024, 91 N.Y.S. 827 (1st Dep't 1949). *See generally* 1 WK&M ¶ 203.34, at 2-118.26 to 2-118.30 (1986) (discussing CPLR 203(e) as it allows amended complaints to change capacity of parties to action).

tled, however, as to whether section 203(e) permits a plaintiff to assert an otherwise time-barred claim within an amended complaint against a third-party defendant who was served with the third-party summons and complaint within the prescribed statutory period.[6] Recently, in *Duffy v. Horton Memorial Hospital*,[7] the Court of Appeals settled the controversy, holding that it is within the discretion of the court to allow amendment of the complaint to include a time-barred claim against a third-party defendant, provided that the third-party complaint had been served before the statute of limitations ran, and that such service gave the party notice of a possible claim.[8]

The plaintiff in *Duffy* commenced a medical malpractice action in August, 1979 against the defendant hospital,[9] alleging that the hospital had failed to recognize and diagnose an early stage of lung cancer.[10] In June, 1981, the hospital brought a timely third-

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[6] The First, Second and Fourth Departments have held that an amended complaint relates back to service of the third-party complaint. *See* Cucuzza v. Vaccaro, 109 App. Div. 2d 101, 103, 490 N.Y.S.2d 518, 520 (2d Dep't 1985); Holst v. Edinger, 93 App. Div. 2d 313, 315, 461 N.Y.S.2d 813, 815 (1st Dep't 1983); Lancaster Silo & Block Co. v. Northern Propane Gas Co., 75 App. Div. 2d 55, 60, 427 N.Y.S.2d 1009, 1012 (4th Dep't 1980); *see also* Landi v. We're Assocs., Inc., 124 Misc. 2d 331, 336, 475 N.Y.S.2d 969, 972 (Sup. Ct. Suffolk County 1983) (amended complaint against third-party defendant should relate back).

The *Cucuzza* decision represents the Second Department's recent departure from its stance in a long line of cases holding that CPLR 203(e) does not allow relation back in third-party actions. *See* 109 App. Div. 2d at 103, 490 N.Y.S.2d at 520. The Second Department was, in fact, the first Appellate Division presented with this set of facts. *See* Trybus v. Nipark Realty Corp., 26 App. Div. 2d 563, 271 N.Y.S.2d 5 (2d Dep't 1966). The *Trybus* court held that CPLR 203(e) refers to notice as of the time of service of the original complaint, and therefore there can be no relation back of service against a third party who does not receive notice until service of the third-party complaint. *See id.* at 564, 271 N.Y.S.2d at 6; Allstate Ins. Co. v. Emsco Homes Inc., 93 App. Div. 2d 874, 874-75, 461 N.Y.S.2d 429, 430 (2d Dep't 1983). The Third Department, however, has strictly construed CPLR 203(e) to refer only to relation back to the time that the *"original pleading"* was interposed and not to the service of the third-party complaint. *See* St. Johnsville v. Travelers Indemn. Co., 93 App. Div. 2d 932, 933, 462 N.Y.S.2d 317, 318 (3d Dep't 1983) (emphasis in original); Knorr v. City of Albany, 58 App. Div. 2d 904, 905, 396 N.Y.S.2d 507, 509 (3d Dep't 1977). The Third Department has been reluctant to recognize relation back even when a plaintiff attempts to assert a claim against a defendant who has been a party to the action from the outset. *See* Howard v. Hachigian, 88 App. Div. 2d 1064, 1065, 452 N.Y.S.2d 741, 742 (3d Dep't 1982).

[7] 66 N.Y.2d 473, 488 N.E.2d 820, 497 N.Y.S.2d 890 (1985).

[8] *See id.* at 478, 488 N.E.2d at 823, 497 N.Y.S.2d at 893.

[9] *See id.* at 475, 488 N.E.2d at 821, 497 N.Y.S.2d at 891.

[10] *See id.* The plaintiff's husband died in May, 1981, and leave was granted to amend the complaint to add a wrongful death claim. *Id.* Such amendments are granted when death results from the same injury upon which the original action was based. *See* Caffaro v. Trayna, 35 N.Y.2d 245, 250, 319 N.E.2d 174, 176, 360 N.Y.S.2d 847, 850 (1974); *supra* note 4

party action against the family physician who had treated the decedent prior and subsequent to the hospital's examination.[11] The plaintiff sought to amend her original complaint in October, 1982 to name this physician as a defendant,[12] because an independent action against him was barred by the statute of limitations.[13] The plaintiff asserted that, pursuant to CPLR 203(e), this claim was not time-barred since the amended complaint related back to the time of service of the third-party complaint.[14]

The Supreme Court, Special Term, initially granted leave to amend, but upon reargument, followed precedent in the Third Department and denied the motion to amend on the ground that the plaintiff's claim was barred by the statute of limitations.[15] The Appellate Division, Third Department, affirmed;[16] the court refused to adopt the First, Second and Fourth Departments' interpretation of CPLR 203(e), which allows such an amendment to relate back.[17] The Court of Appeals reversed and remitted the matter to the Third Department, giving that court the opportunity to exercise its discretion in determining whether the plaintiff's amendment was warranted.[18]

Judge Titone, writing for a unanimous court, conceded that CPLR 203(e) does not by its terms refer to third-party proceedings,[19] but nevertheless applied it by analogy, reasoning that such application was proper judicial construction, and consistent with the policies underlying the statute of limitations.[20] The court noted

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and accompanying text. The addition of the wrongful death claim does not "expand the scope of proof or the relevant legal considerations" because the defendant will already be preparing to defend based on the injury. Caffaro v. Trayna, 35 N.Y.2d at 251, 319 N.E.2d at 177, 360 N.Y.S.2d at 851.

[11] 66 N.Y.2d at 475, 488 N.E.2d at 820, 497 N.Y.S.2d at 891.

[12] *Id.* at 475, 488 N.E.2d at 821-22, 487 N.Y.S.2d at 891-92. A deposition of Dr. Greenberg, the family physician, was taken in October, 1982, after which the plaintiff sought the amendment. *Id.* Subsequently, Dr. Greenberg died and the executrices of his estate were substituted as third-party defendants. *Id.* at 475 n.1, 488 N.E.2d at 821, 487 N.Y.S.2d at 891.

[13] *Id.* at 475, 488 N.E.2d at 822, 497 N.Y.S.2d at 892.

[14] *Id.*

[15] *Id.*

[16] *See* 109 App. Div. 2d 927, 486 N.Y.S.2d 402 (3d Dep't 1985).

[17] *See id.* at 928, 486 N.Y.S.2d at 403.

[18] *See* 66 N.Y.2d at 478, 488 N.E.2d at 823-24, 497 N.Y.S.2d at 893-94. CPLR 5613 directs the Court of Appeals to remit a case to the Appellate Division to consider matters of fact which were not raised in the previous proceeding. *See* CPLR 5613 (McKinney 1978).

[19] *See* 66 N.Y.2d at 476-77, 488 N.E.2d at 822-23, 497 N.Y.S.2d at 892-93; *See also supra* note 1 (text of CPLR 203(e)).

[20] *See* 66 N.Y.2d at 477, 488 N.E.2d at 823, 497 N.Y.S.2d at 893.

that statutes of limitation are specifically designed to protect defendants from the burden of adjudicating stale claims and to prevent such claims from clogging an already overtaxed judicial system.[21]

The *Duffy* court recognized that an amendment relating back to the original filing date of a complaint, as applied to the parties already before the court, is not in conflict with these policies.[22] The court noted, however, that a more difficult case arises when an amendment is sought to add a new party against whom the statute of limitations has run.[23] Judge Titone resolved this difficulty, stating that such an amendment is permissible if the court finds that, within the statutory period, the potential defendant has been made fully aware of the claim against him with respect to the transactions or occurrences in the suit, and is in fact a participant in the litigation.[24]

It is submitted that the court's approach in *Duffy* strikes an appropriate balance: it avoids a blanket adoption of relation back in third-party actions which would unjustly burden defendants unable to prepare an adequate defense, yet it permits courts to recognize a valid claim when the facts indicate that the third-party defendant was on notice of the possible claim.[25] This holding is

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[21] *See* 66 N.Y.2d at 477, 488 N.Y.2d at 823, 497 N.Y.S.2d at 892. Statutes of limitations are designed to "promote justice by preventing surprise through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Burnett v. New York Cent. R. R. Co., 380 U.S. 424, 428 (1965) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)). The statute of limitations is also based on the theory that there is a reasonable time within which a person of ordinary diligence would bring an action. *See* 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 purposes of the statute of limitations, see 2 CARMODY-WAIT 2D, NEW YORK PRACTICE § 13:1, at 296-97 (1982); J. FRIEDENTHAL, H. KANE & A. MILLER, CIVIL PROCEDURE § 5.27 at 305 (1985); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 4.16 at 218-19 (3d ed. 1985); 1 WK&M ¶ 201.01, at 2-7 (1986); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950).

[22] *See* 66 N.Y.2d at 477, 488 N.E.2d at 823, 497 N.Y.S.2d at 893. The court stated that amendments which "merely add a new theory of recovery or defense arising out of a transaction or occurrence already in litigation does not conflict with these policies," because "a party is likely to have collected and preserved available evidence relating to the entire transaction or occurrence and the defendant's sense of security has already been disturbed by the pending action." *Id.* (citations omitted).

[23] *See id.* According to the court, "if the new defendant has been a complete stranger to the suit" when the amendment is sought, the bar of the statute of limitations must stand. *Id.*

[24] *See id.* at 477-78, 488 N.E.2d at 823, 497 N.Y.S.2d at 893.

[25] *See* SIEGEL, § 49 at 17-18 (1985 Supp.). Professor Siegel notes that allowing the

consistent with the trend away from formalized pleading rules towards the adjudication of claims on their merits.[26] This approach will protect plaintiffs whose potential claims against third-party defendants do not surface until the litigation process has commenced and the statute of limitations has expired.

It is suggested, however, that the court could have based its holding solely on the statutory procedures of the CPLR which provide for requisite notice to third-party defendants.[27] By arguing that the policies underlying the statute of limitations are a sufficient basis upon which to extend a statutory provision beyond its

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amendment to relate back is more consistent with the CPLR's rule of liberal construction (CPLR 104) and with the principal purpose of the statute of limitations—notice to the party of the transaction plaintiff's amendment to include a direct claim against a third-party defendant under CPLR 203(e) can be analogized to the relation back under CPLR 203(b), which provides that timely service on one of several parties "united in interest" satisfies the statute of limitations with respect to all of them. *See* Farrell, *Civil Practice* 1982 *Survey of New York Law*, 34 SYRACUSE L. REV. 25, 34 (1983). The rationale underlying CPLR 203(b) is that a defendant who is not named in the original complaint may not be a stranger to the action; in fact the parties may be so intertwined that service upon one may be deemed notice to the other, sufficient to satisfy the policies of the statute of limitations. *See* Connell v. Hayden, 83 App. Div. 2d 30, 39-41, 443 N.Y.S.2d 383, 391-92 (2d Dep't 1981). CPLR 203(b), however, is akin to CPLR 203(e) in that it does not offer automatic relation back of all claims. *See* Brock v. Bua, 83 App. Div. 2d 61, 66-67, 443 N.Y.S.2d 407, 410-11 (2d Dep't 1981).

[26] *Compare* Vastola v. Maer, 48 App. Div. 2d 561, 564-65, 370 N.Y.S.2d 955, 958 (2d Dep't 1975) (service of *notice* of motion and proposed amended complaint prior to expiration of statute of limitations timely interposes claims asserted) (emphasis added), *aff'd*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S.2d 246 (1976) *with* Arnold v. Mayal Realty Co., 299 N.Y. 57, 85 N.E.2d 616 (1949) (service of notice of motion is not equivalent to service of summons and complaint, therefore statute of limitations is a defense). *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 5.26 at 302 (1985) (impact of improper pleading softened by liberal amendment rules available in most jurisdictions). Statutes of limitation in particular are construed where possible to give parties their day in court and should not be subjected to overstrict construction. Hotaling v. General Elect. Co., 16 App. Div.2d 339, 228 N.Y.S.2d 376 (3d Dep't 1962), *aff'd*, 12 N.Y.2d 310, 239 N.Y.S.2d 344 (1963); Callarama v. Associates Discount Corp. of Del., 69 Misc.2d 287, 329 N.Y.S.2d 711, (Sup. Ct. New York County 1972).

[27] *See* CPLR 1007-1009 (McKinney 1976). When a third-party action is commenced, the third-party plaintiff must serve the third-party defendant with a copy of all prior pleadings, including the plaintiff's original complaint. CPLR 1007 (McKinney 1976). The third-party plaintiff must also serve the plaintiff with a copy of the third-party complaint, *id.*, and the third-party answer, when he receives it. CPLR 1009 (McKinney 1976). The statute authorizes the third-party defendant to assert any defenses he may have against the plaintiff at this time. CPLR 1008 (McKinney 1976). The plaintiff may assert a direct claim against the third-party defendant by right within 20 days of service of the third-party defendant's answer. CPLR 1009 (McKinney 1976). It is submitted that these provisions provide for such an interaction between the parties that it is reasonable to ascribe notice to the third-party defendant at this time, absent a showing to the contrary.

express terms, the court has opened the door to a more liberal reading of the statute of limitations which could hinder, rather than advance, its purposes.[28]

Jean Townley Nichols

CPLR § 302(b): Jurisdiction over a nonresident in an equitable distribution action following a foreign divorce will be controlled by the matrimonial "long-arm" statute

CPLR 302(b) permits the courts of New York to exercise personal jurisdiction over a nonresident defendant in certain matri-

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[28] Parties have already begun to utilize CPLR 203(e) in ways not contemplated by the statute, nor by the court of appeals in *Duffy*. *See, e.g.*, Leibman v. Schlossberg's Atlas Boiler and Welding Co., 57 App. Div. 2d 820, 820, 395 N.Y.S.2d 23, 24 (1st Dep't 1977); T.R. America Chems. Inc., v. Seaboard Sur. Co., 116 Misc. 2d 874, 456 N.Y.S.2d 608 (Sup. Ct. N.Y. County 1982). In *T.R. America*, the court held that CPLR 203(e) could be used by the third-party defendant to amend his third-party answer to assert a cause of action in defamation against the original plaintiff beyond the one year statute of limitations, since the claim arose out of the same transactions upon which plaintiff's claim was based. *See T.R. America*, at 887, 456 N.Y.S.2d at 617. Since the amendment was sought against the plaintiff, the court held that the amendment related back to the date that the plaintiff instituted a suit against the defendant, not the time when the answer to the third-party complaint was interposed. *See id.* at 886, 456 N.Y.S.2d at 616.

In *Leibman*, the court held that where a plaintiff attempted to serve its amended complaint before expiration of the statutory period, but after the 20 days allowed by CPLR 1009 to amend of right without leave of the court, and the proper amended complaint was not served until after the three year statute of limitations had expired, the proper amended complaint related back. *See Liebman*, at 820, 395 N.Y.S.2d at 24. The court stated that since all of the relevant information was exchanged before the limitation had expired, to hold any differently would be "an exaltation of form over substance." *Id.* at 820, 395 N.Y.S.2d at 24. *Cf.* Tri-City Elec. Co. v. People, 96 App. Div. 2d 146, 151, 468 N.Y.S.2d 283, 287 (4th Dep't 1983) (amendment relates back even though class action suit was not proper posture in which to bring suit), *aff'd*, 63 N.Y.2d 969, 473 N.E.2d 240, 483 N.Y.S.2d 990 (1984).

The Appellate Division, Second Department, has distinguished between a situation where the plaintiff is aware of the third-party's involvement and lets the statute of limitations expire without bringing him into the suit, and a case where the third-party knows that his involvement was not manifest to the plaintiff, and therefore it would not be reasonable to conclude that the plaintiff has made a conscious choice not to sue. *See* Brock v. Bua, 83 App. Div. 2d 61, 70-71, 443 N.Y.S.2d 407, 413 (2d Dep't 1981).

At least one federal court has construed Rule 15(c) to allow relation back in a third party action, even if the third-party complaint was not served within the statutory period. *See* Meredith v. United Air Lines, 41 F.R.D. 34, 37 (D.C. Cal. 1966); *supra* note 1 (discussing Rule 15(c) as model for CPLR 203(e)).