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CPLR 205(a): Six-Month Extension Available Where Wrongful Death Action Dismissed for Want of a Duly Appointed Administrator

David Don

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ment of the action. The *Carrick* Court held that in such case the plaintiff was entitled to reinstitute the action with the benefit of the extension of the statute of limitations. In a related case, *Jones v. State*, the Court held that the premature filing of a wrongful death claim in an action against the state constituted a jurisdictional defect requiring dismissal. Left open by the *Jones* Court is the availability of the CPLR 205(a) extension in an action in the Court of Claims.

Feldman v. New York City Health and Hospitals Corp., among the important lower court cases commented upon, examined a plaintiff's options for recovery of a judgment in an impleader situation where the main defendant is insolvent. The Supreme Court, Kings County, held that a defendant may satisfy a judgment against him with funds borrowed pursuant to an agreement arranged by the plaintiff, thus enabling the defendant to enforce a contribution claim against a solvent but otherwise unreachable third-party defendant. Also treated in *The Survey* is *Aversano v. Town of Brookhaven*, wherein the Appellate Division, Second Department, held that service of a summons without a complaint or CPLR 305(b) notice is a jurisdictional defect. Notably, the court further held that service of a notice of appearance and demand for a complaint by the defendant results in a waiver of this defect.

It is hoped that through presentation of these and other important decisions, *The Survey* will continue to keep the practitioner aware of recent developments in New York practice.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 205(a): Six-month extension available where wrongful death action dismissed for want of a duly appointed administrator

When an action, timely commenced, is dismissed for reasons other than a voluntary discontinuance, a failure to prosecute, or a final judgment on the merits, CPLR 205(a) enables the plaintiff to commence a new action within 6 months of the dismissal.¹ Recent

¹ CPLR 205(a) provides:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or adminis-

case law, though, raised the question whether CPLR 205(a) is available to revive a wrongful death action dismissed for failure to name a duly appointed administrator in the summons.² In *Carrick*

trator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of the commencement of the prior action.

CPLR 205(a) (McKinney Supp. 1980-1981). In addition to the three statutory exceptions to CPLR 205(a), there is a fourth common-law exception: a defect in personal jurisdiction. See *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 178, 390 N.E.2d 1156, 1160, 417 N.Y.S.2d 231, 236 (1979); *Smalley v. Hutcheon*, 296 N.Y. 68, 73, 70 N.E.2d 161, 163 (1946); *Erickson v. Macy*, 236 N.Y. 412, 415, 140 N.E. 938, 939 (1923); CPLR 205(a) commentary at 61 (McKinney Supp. 1980-1981). The rationale behind this exception is that since an action is not commenced—and personal jurisdiction over the defendant is not obtained—“unless there is [proper] service of the summons,” defective service constitutes noncommencement. See *Erickson v. Macy*, 236 N.Y. 412, 416, 140 N.E. 938, 939 (1923). Hence, CPLR 205(a) is not available because it contemplates that a prior action had been commenced. *Id.* See *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 178, 390 N.E.2d 1156, 1160, 417 N.Y.S.2d 231, 236 (1979). It has been suggested, however, that when a defendant receives timely notice of an initial action which is dismissed due to a defect in personal jurisdiction, CPLR 205(a) should nonetheless apply. See *Amato v. Svedi*, 35 App. Div. 2d 672, 672, 315 N.Y.S.2d 63, 64-65 (2d Dep’t 1970) (mem.); SREGEL § 52, at 54; note 26 and accompanying text *infra*.

² See *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 179-80, 390 N.E.2d 1156, 1160-61, 417 N.Y.S.2d 231, 237 (1979); *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 1029-30, 369 N.E.2d 8, 8, 398 N.Y.S.2d 1008, 1009 (1977) (mem.); *Carrick v. Central Gen. Hosp.*, 71 App. Div. 2d 226, 229, 422 N.Y.S.2d 112, 114 (2d Dep’t 1979), *rev’d*, 51 N.Y.2d 242, 253, 414 N.E.2d 632, 638, 434 N.Y.S.2d 130, 136 (1980). In *George*, a unanimous Court of Appeals held that a defect in the identity of the named plaintiff in a *survival* action would not preclude application of CPLR 205(a). 47 N.Y.2d at 178-79; 390 N.E.2d at 1161, 417 N.Y.S.2d at 236-37. In so holding, the Court distinguished between survival and wrongful death actions. *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 180, 390 N.E.2d 1156, 1161-62, 417 N.Y.S.2d 231, 237 (1979). Indeed, in concluding that CPLR 205(a) is applicable to survival actions, the Court noted that “there is a fundamental difference between an action for wrongful death and an action which survives the death of the injured party.” *Id.* This distinction between wrongful death and survival actions was wrought by the *George* Court in reaction to its *Goldberg* opinion. In *Goldberg*, the Court had held that the plaintiff could not amend—under CPLR 203(e)—a flawed and time-barred wrongful death complaint, since CPLR 203(e) permits amendments only to preexisting actions. *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 1029-30, 369 N.E.2d 8, 8, 398 N.Y.S.2d 1008, 1009 (1979) (citing *Vastola v. Maer*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S.2d 246 (1976) and *Caffaro v. Trayna*, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974)). Subsequently, in *Carrick*, the Appellate Division, Second Department, held that in light of *George*, CPLR 205(a) was not available to revive a wrongful death action dismissed for failure to name an administrator in the summons. *Carrick v. Central Gen. Hosp.*, 71 App. Div. 2d 226, 229, 422 N.Y.S.2d 112, 115 (2d Dep’t 1979), *rev’d*, 51 N.Y.2d 242, 253, 414 N.E.2d 632, 638, 434 N.Y.S.2d 130, 136 (1980). Nevertheless, prior to the *George* and *Carrick* decisions, it had been well settled that CPLR 205(a) was available when the original action had been a wrongful death action. See *Sharrow v. Inland Lines, Ltd.*, 214 N.Y. 101, 110-11, 108 N.E. 217, 220 (1915); *Mogavero v. Stony Creek Dev. Corp.*, 53 App. Div. 2d 1021, 1022, 385 N.Y.S.2d 899, 900 (4th Dep’t 1976) (mem.); *Mehrer v. North Ninth Lumber Co.*, 275 App. Div. 1059, 1059, 92 N.Y.S.2d 178, 179 (2d Dep’t), *appeal denied*, 276 App. Div. 784, 93 N.Y.S.2d 305 (1949).

v. Central General Hospital,³ the Court of Appeals settled the issue by holding that the section's 6-month savings provision may properly be used to reinstitute a wrongful death action.⁴

In *Carrick*, the plaintiff commenced a wrongful death action on behalf of her husband, an alleged victim of the defendants' medical malpractice.⁵ At the time of commencement the plaintiff had not been appointed administratrix of her husband's estate, but was, nevertheless, denominated as the "proposed administratrix" in the caption of the summons.⁶ The defendants, noting that the naming of an administrator is an essential element of a wrongful death claim, moved to dismiss the complaint.⁷ Shortly after that motion was granted, and upon her appointment as administratrix, the plaintiff instituted a second action.⁸ Once again the defendants moved to dismiss, this time on the ground that the wrongful death statute of limitations had expired.⁹ The plaintiff argued, however, that CPLR 205(a) provides for recommencement of an action within 6 months of dismissal.¹⁰ Special Term agreed and denied

³ *Carrick v. Central Gen. Hosp.*, 51 N.Y.2d 242, 414 N.E.2d 632, 434 N.Y.S.2d 130 (1980), *rev'g*, 71 App. Div. 2d 226, 422 N.Y.S.2d 112 (2d Dep't 1979).

⁴ 51 N.Y.2d at 252, 414 N.E.2d at 637-38, 434 N.Y.S.2d at 136.

⁵ *Id.* at 246, 414 N.E.2d at 633, 434 N.Y.S.2d at 131. The plaintiff also instituted a survival action against the same defendants. *Id.* Service of a summons and notice, both for the wrongful death and survival actions, was effected by the plaintiff barely 4 weeks before the 2-year wrongful death statute of limitations had expired. *Id.* See EPTL § 5-4.1 (1967) (2-year statute of limitations for wrongful death proceedings).

⁶ 51 N.Y.2d at 246, 414 N.E.2d at 634, 434 N.Y.S.2d at 132.

⁷ *Id.* The defendants also moved for, and Special Term granted, dismissal of the plaintiff's survival action. *Id.* The defendants' motions were premised on the fact that wrongful death and survival actions may only be instituted by a duly appointed personal representative. *Id.* See *Mogavero v. Stony Creek Dev. Corp.*, 53 App. Div. 2d 1021, 1021, 385 N.Y.S.2d 899, 900 (4th Dep't 1976) (mem.); *Boffe v. Consolidated Tel. & Elec. Subway Co.*, 171 App. Div. 392, 157 N.Y.S. 318 (1st Dep't 1916), *aff'd without opinion*, 222 N.Y. 654 (1919); *Beninati v. Oldsmobile Div. of Gen. Motors*, 94 Misc. 2d 835, 838, 405 N.Y.S.2d 917, 918 (Sup. Ct. N.Y. County 1978).

⁸ 51 N.Y.2d at 246, 414 N.E.2d at 634, 434 N.Y.S.2d at 132. Letters of administration were issued to the plaintiff less than 1 month after the expiration of the 2-year statute of limitations for wrongful death. Brief for Appellant at 3, *Carrick v. Central Gen. Hosp.*, 51 N.Y.2d 242, 414 N.E.2d 632, 434 N.Y.S.2d 130 (1980).

⁹ 51 N.Y.2d at 246, 414 N.E.2d at 634, 434 N.Y.S.2d at 132.

¹⁰ Brief for Appellant at 6, *Carrick v. Central Gen. Hosp.*, 51 N.Y.2d 242, 414 N.E.2d 632, 434 N.Y.S.2d 130. The plaintiff contended that she was entitled to the 6-month savings provision of CPLR 205(a) since the original dismissal had not been the result of either "a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits." *Carrick v. Central Gen. Hosp.*, 71 App. Div. 2d 226, 228, 422 N.Y.S.2d 112, 114 (2d Dep't 1979). See CPLR 205(a) (McKinney Supp. 1980-1981); note 1 and accompanying text *supra*. The plaintiff argued that the prior dismissal had been predicated merely upon her lack of legal capacity to bring the action. 71 App. Div. 2d at 228,

the defendant's motion to dismiss.¹¹ On appeal, the Appellate Division, Second Department, relying upon the recent Court of Appeals decision in *George v. Mount Sinai Hospital*,¹² held that the plaintiff's failure to appoint a proper representative in her initial action precluded use of CPLR 205(a) to rehabilitate her wrongful death claim.¹³

On appeal, the Court of Appeals reversed.¹⁴ Writing for the Court, Judge Gabrielli¹⁵ explained the import of the Court's decision in *George*. The *George* Court had held that CPLR 205(a) could be applied to reinstate an otherwise time-barred survival action.¹⁶ Judge Gabrielli stated, however, that that decision was not intended to deny CPLR 205(a) privileges to wrongful death complainants.¹⁷ The Court reasoned that although the *George* decision noted basic differences between wrongful death and survival actions, such differences are not dispositive under CPLR 205(a).¹⁸ In-

422 N.Y.S.2d at 114. The Court of Appeals rejected this line of reasoning, commenting that the existence of a qualified representative was essential to a wrongful death action and that there was no statutory right to recover for wrongful death until an administrator had been named. 51 N.Y.2d at 249 n.2, 414 N.E.2d at 636 n.2, 434 N.Y.S.2d at 134 n.2. See *Boffe v. Consolidated Tel. & Elec. Subway Co.*, 171 App. Div. 392 (1st Dep't 1916), *aff'd without opinion*, 226 N.Y. 554 (1919); note 7 and accompanying text *supra*.

¹¹ 51 N.Y.2d at 247, 414 N.E.2d at 634, 434 N.Y.S.2d at 132.

¹² 47 N.Y.2d 170, 390 N.E.2d 1156, 417 N.Y.S.2d 231 (1979). See note 2 and accompanying text *supra*.

¹³ 71 App. Div. 2d 226, 228, 422 N.Y.S.2d 112, 114 (2d Dep't 1979). Relying upon *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 390 N.E.2d 1156, 417 N.Y.S.2d 231 (1979), the appellate division determined that the "basis for personal injury action differs from that underlying a wrongful death action." 71 App. Div. 2d at 229, 422 N.Y.S.2d at 114. See note 2 *supra*. The court further reasoned that although a *survival* action that had been commenced in the name of a nonrepresentative party was a prior action within the meaning of CPLR 205(a), a similarly flawed *wrongful death* action was not, since the naming of an administrator is an essential element of a wrongful death action. 71 App. Div. 2d at 229, 422 N.Y.S.2d at 114. When this essential element is found wanting, the court concluded, the initial action must be deemed a nullity. *Id.*

¹⁴ 51 N.Y.2d at 254, 414 N.E.2d at 638, 434 N.Y.S.2d at 137.

¹⁵ Judge Gabrielli was joined by Chief Judge Cooke and Judges Jasen, Jones, and Wachtler. Judges Fuchsberg and Meyer filed separate concurring opinions. *Id.* at 254-55, 414 N.E.2d at 639, 434 N.Y.S.2d at 137.

¹⁶ *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 177-78, 390 N.E.2d 1156, 1160-61, 417 N.Y.S.2d 231, 235-36 (1979). The *George* Court had held that although the plaintiff's first survival action was dismissed because it was not commenced by a proper party, the action was not a nullity within the meaning of CPLR 205(a). *Id.* at 177, 390 N.E.2d at 1160, 417 N.Y.S.2d at 236. See note 2 *supra*. Thus, the Court permitted the plaintiff to utilize CPLR 205(a) to recommence her survival action after the statute of limitations had run. 47 N.Y.2d at 181, 390 N.E.2d at 1162, 417 N.Y.S.2d at 238.

¹⁷ 51 N.Y.2d at 253, 414 N.E.2d at 638, 434 N.Y.S.2d at 136.

¹⁸ 51 N.Y.2d at 250, 414 N.E.2d at 636, 434 N.Y.S.2d at 134. In addition to holding that

deed, the proper inquiry under that section is whether a prior timely action had been commenced, not whether or why that action had been defective.¹⁹ The Court concluded, therefore, that the 6-month savings provision of CPLR 205(a) was available to the plaintiff, even though the defect in issue was an essential element of a wrongful death action.²⁰

Judges Fuchsberg and Meyer concurred in the Court's opinion.²¹ Judge Fuchsberg, after noting his support for the majority's rationale, emphasized that when technical errors are not prejudicial to either party, dismissal is discouraged in favor of "ameliorative" justice.²² In a separate concurrence, Judge Meyer maintained that CPLR 203(e) should have been used to amend the wrongful death claim to the survival action that also had been commenced by the plaintiff.²³

the differences between wrongful death and survival actions are not dispositive under CPLR 205(a), *id.*, the Court distinguished between CPLR 205(a) and CPLR 203(e). 51 N.Y.2d at 248-49, 414 N.E.2d at 635, 434 N.Y.S.2d at 133. CPLR 203(e) provides:

(e) Claim in amended pleading. 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 pleadings.

CPLR 203(e) (1972). The *Carrick* Court determined that, unlike CPLR 205(a), CPLR 203(e) presupposes a valid preexisting action to which an amendment may be interposed. 51 N.Y.2d at 248-49, 414 N.E.2d at 635, 434 N.Y.S.2d at 133. Hence, CPLR 203(e) is not available to a plaintiff attempting to amend a flawed and time-barred wrongful death action. *Id.*

¹⁹ 51 N.Y.2d at 249, 414 N.E.2d at 636, 434 N.Y.S.2d at 134. The Court held that before CPLR 205(a) could be used a prior timely action must have been commenced within the meaning of CPLR 304. *Id.* at 249, 414 N.E.2d at 635, 434 N.Y.S.2d at 134. See *Erickson v. Macy*, 236 N.Y. 412, 414, 140 N.E. 938, 938-39 (1923).

²⁰ 51 N.Y.2d at 252-53, 414 N.E.2d at 638, 434 N.Y.S.2d at 136. Two additional issues were raised in *Carrick*. The first was whether a dismissal for lack of an essential element of the action did in fact "implicate the merits . . . at least in a technical sense," and thus constitute "final judgment upon the merits." *Id.* at 251, 414 N.E.2d at 637, 434 N.Y.S.2d at 135. If so, the dismissal would fall within one of the statutory exceptions to CPLR 205(a). See CPLR 205(a)(McKinney Supp. 1980-1981); note 1 *supra*. While conceding that such a problem might "exist on some highly abstract, theoretical plane," the *Carrick* Court found that it presented no "serious impediment to the application of CPLR 205 (subd. [a].)" 51 N.Y.2d at 251, 414 N.E.2d at 637, 434 N.Y.S.2d at 135. A second issue discussed by the *Carrick* Court was whether a common-law cause of action for wrongful death should be created. The Court decided against such a course of action, reasoning that a common-law wrongful death action would circumvent the stringent requirements of its statutory counterpart. *Id.* at 250 n.2, 414 N.E.2d at 636 n.2, 434 N.Y.S.2d at 134 n.2.

²¹ *Id.* at 255, 414 N.E.2d at 639, 434 N.Y.S.2d at 137.

²² *Id.* at 254, 414 N.E.2d at 639, 434 N.Y.S.2d at 137 (Fuchsberg, J., concurring).

²³ *Id.* at 255, 414 N.E.2d at 639, 434 N.Y.S.2d at 137 (Meyer, J., concurring). Judge Meyer concurred for the reasons stated in the closing paragraph of his dissent in *Jones v. State*, 51 N.Y.2d 943, 952-53, 416 N.E.2d 1050, 1054-55, 435 N.Y.S.2d 715, 719-20 (1980)

The Court's decision in *Carrick* appears to be the denouement of a series of cases which have examined the relevance of CPLR 205(a) to actions fatally defective in commencement.²⁴ By abrogating previously suggested distinctions between wrongful death and survival actions under CPLR 205(a), the Court has chosen a path which is conceptually sound and in accordance with the intent of the section.²⁵

Additionally, it is suggested that the *Carrick* Court de-emphasized technical barriers to courtroom adjudication by holding that CPLR 205(a) is available to plaintiffs irrespective of whether their prior actions were flawed. Indeed, it is arguable that the *Carrick* Court was primarily concerned with receipt by the defendant of timely notice of commencement of an action, thereby ensuring that recommencement under CPLR 205(a) would not be prejudicial.²⁶

(mem.) (Meyer, J., dissenting). In his dissent in *Jones*, Judge Meyer maintained that CPLR 203(e) properly could be employed to amend a time-barred wrongful death claim to a preexisting survival action, since the original pleading had given the defendant notice of the occurrence upon which the wrongful death claim was predicated. *Id.* at 952-53, 416 N.E.2d at 1054, 435 N.Y.S.2d at 720 (Meyer, J., dissenting). See The Survey, notes 155-83 and accompanying text *infra*. It appears that in the *Carrick* case, Judge Meyer would have approved of first recommencing the plaintiff's survival action under CPLR 205(a), and then amending her wrongful death action to the survival action under CPLR 203(e).

²⁴ The *Carrick* decision clarified the uncertainty arising from the *George* decision, wherein it appeared that the distinctions between wrongful death and survival actions were in issue, rather than the utilization of the appropriate remedial statute. See 51 N.Y.2d at 248, 414 N.E.2d at 635, 434 N.Y.S.2d at 133; note 2 and accompanying text *supra*.

²⁵ The purpose of CPLR 205(a) is to "ameliorate the potentially harsh effect of the Statute of Limitations." *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 177, 390 N.E.2d 1156, 1160, 417 N.Y.S.2d 231, 236 (1979). See *Gaines v. City of New York*, 215 N.Y. 533, 539, 109 N.E. 594, 595-96 (1915). Indeed, it is submitted that a narrow and technical construction of CPLR 205(a) would be inconsistent with the purpose of the statute of limitations itself, since limitations statutes are not intended merely to present procedural barriers to litigious persons, but rather, to protect defendants from being forced to defend stale claims. 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).

²⁶ See 51 N.Y.2d at 249, 414 N.E.2d at 635, 434 N.Y.S.2d at 133. Prior to *Carrick*, commentators had urged that "fair and timely" notice be adopted as the minimum standard for determining application of CPLR 205(a). See, e.g., CPLR 205(a), commentary at 61 (McKinney Supp. 1980-1981); SIEGEL § 52, at 53; 1 WK&M ¶ 2-205.03, at 2-134 (1979). Despite such direction, the Court in *George v. Mount Sinai Hosp.*, 47 N.Y.2d 170, 390 N.E.2d 1156, 417 N.Y.S.2d 231 (1979), although presented with the opportunity, expressly opted not to resolve whether actual notice should be the sole determinative factor in applying CPLR 205(a). *Id.* at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. Subsequently, however, the *Carrick* Court stated that so long as a prior timely action "was 'commenced' within the meaning of CPLR 304," the extension provision of CPLR 205(a) was available. 51 N.Y.2d at 249, 414 N.E.2d at 635-36, 434 N.Y.S.2d at 133-34. See note 19 and accompanying text

Moreover, in view of the timely notice concern, it is suggested that the *Carrick* Court could properly have held CPLR 203(e) applicable in lieu of CPLR 205(a).²⁷ CPLR 203(e) permits an otherwise untimely claim asserted in an amended pleading to relate back to claims which were timely asserted in the original pleading.²⁸ Thus, the use of that section to amend a dismissed wrongful death action to a preexisting survival action would appear to satisfy the timely notice requirement and not be prejudicial to the defendant. Such an approach would encourage procedural efficiency by obviating the need to first dismiss an action, and then reinstitute that action under CPLR 205(a).²⁹

David Don

ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 305(b): Plaintiff's service of bare summons is jurisdictional defect, but defect is waived by defendant's service of notice of appearance and demand for complaint

CPLR 305(b) requires that the summons commencing an

supra. Of course, it has been held that proper CPLR 304 service entails fulfillment of CPLR 305(b). See *Young v. Franklyn*, 93 Misc. 2d 508, 402 N.Y.S.2d 966 (N.Y.C. Civ. Ct. Bronx County 1978). CPLR 305(b) stipulates that when a complaint is not served with a summons, the summons must contain a notice of the nature of the claim and the relief sought. CPLR 305(b)(McKinney Supp. 1980-1981). Nevertheless, one court has held that failure to comply with CPLR 305(b) will not preclude the subsequent use of CPLR 205(a) to reinstitute the claim. See *Limpert v. Garland*, 100 Misc. 2d 525, 419 N.Y.S.2d 863 (Sup. Ct. Erie County 1979). See also CPLR 305(b) commentary at 96 (McKinney Supp. 1980-1981); CPLR 3012:1 commentary at 83 (McKinney Supp. 1980-1981); SIEGEL § 60, at 11 (1979-1980 pam.). Thus, timely service by summons, without CPLR 305(b) notice, would appear to be the *sine qua non* to use of CPLR 205(a).

²⁷ A similar solution was advocated by Judge Meyer in his concurrence in *Carrick*. See 51 N.Y.2d at 255, 414 N.E.2d at 639, 434 N.Y.S.2d at 137 (Meyer, J., concurring) (citing *Jones v. State*, 51 N.Y.2d 943, 952-53, 416 N.E.2d 1050, 1054-55, 435 N.Y.S.2d 715, 719-20 (1980) (Meyer, J., dissenting)). See note 23 and accompanying text *supra*. See also *Caffaro v. Trayna*, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974).

²⁸ CPLR 203(e) (1972). See note 18 *supra*.

²⁹ Although the utilization of CPLR 203(e) in lieu of CPLR 205(a) would be in the interest of judicial economy, there is scant support for the concept, since the amending-back provisions of CPLR 203(e) consistently have been held to depend on a valid preexisting claim. See 51 N.Y.2d at 248, 414 N.E.2d at 635, 434 N.Y.S.2d at 133; *Goldberg v. Camp Mikán-Recro*, 42 N.Y.2d 1029, 1030, 369 N.E.2d 8, 8, 398 N.Y.S.2d 1008, 1009 (1977) (mem.); *Caffaro v. Trayna*, 35 N.Y.2d 245, 250, 319 N.E.2d 174, 176, 360 N.Y.S.2d 847, 850 (1974); *Mogavero v. Stony Creek Dev. Corp.*, 53 App. Div. 2d 1021, 1021, 385 N.Y.S.2d 899, 900 (4th Dep't 1976); note 18 *supra*.