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Ct. Cl. Act § 10: Filing of Wrongful Death Claims Prior to Appointment as Administratrix Deemed Jurisdictional Defect Requiring Dismissal

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have the same strategic problems faced by the city in *De Paolis*.[153] Furthermore, a distinction of this type might discourage certain defendants from interposing their *Dole* claims at the trial of the main action, thus frustrating the general policy favoring disposition of all *Dole* issues at one time.[154] In any event, however, since the general availability of the permissible inconsistency exception must abide by appellate case law, it is suggested that the trial bar would do well to avoid making tactically unnecessary admissions in their opening remarks regarding their right to contribution.

Donald Chase

COURT OF CLAIMS ACT

Ct. Cl. Act § 10: Filing of wrongful death claim prior to appointment as administratrix deemed jurisdictional defect requiring dismissal

Section 10, subdivision 2 of the Court of Claims Act (the Act) provides that a wrongful death claim against the state must be interposed "within 90 days after the appointment" of the decedent's personal representative and within 2 years of the decedent's death.[155] In the past, the Court of Appeals has interpreted these

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to justify dismissal under CPLR 4401 of a third-party claim but not a cross-claim, the effect would be to resurrect the plaintiff's ability to control the substantive rights of defendants by his choice of whom he will sue.

[153] *See* text accompanying notes 139-142 *supra*.

[154] Presently, a claim for contribution can be interposed in various forms: cross-claim, third-party claim, counterclaim or separate action. CPLR 1403. Although technically a claim for contribution does not accrue until after judgment has been rendered and payment made, the courts permit the claim to be brought prematurely to avoid a multiplicity of suits and procedural inefficiency. *See* Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978); Burgandy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp., 51 App. Div. 2d 140, 379 N.Y.S.2d 873 (4th Dep't 1976); CPLR 1007, commentary at 11 (McKinney Supp. 1980). Since the plaintiff can always opt to assert his contribution claim in a separate action wherein he will not be handicapped by "wearing two hats," it is submitted that in the name of procedural efficiency the court should not prejudice the defendant who raises the issue in the main proceeding. Rather, the court should seek to discourage the procedure of instituting a separate contribution action. Meckley v. Hertz Corp., 88 Misc. 2d 605, 388 N.Y.S.2d 555 (Civ. Ct. N.Y. 1976).

[155] Section 10(2) of the Court of Claims Act provides in pertinent part:

> A claim by an executor or administrator of a decedent . . . shall be filed within ninety days after the appointment of such executor or administrator, unless the claimant shall within such time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two years after the death of

limitations as requiring the appointment to precede the filing.[156] Such filing prior to appointment, though, did not toll the 2-year limitations period since the order of filing and appointment was deemed to be a jurisdictional requirement.[157] Subsequently, how-

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the decedent. In any event such claim shall be filed within two years after the death of the decedent.

N.Y. CT. CL. ACT § 10(2) (McKinney 1963). The short notice requirement of the provision is intended to afford the state the opportunity to make a prompt investigation of the claim. *See, e.g.*, Anrad Constr. Corp. v. State, 47 Misc. 2d 998, 1001, 263 N.Y.S.2d 454, 458 (1965); Petzold v. State, 202 Misc. 255, 256, 114 N.Y.S.2d 572, 574 (Ct. Cl. 1952). The courts have held compliance with the provisions of section 10(2) to be a condition precedent to maintaining an action in the Court of Claims. *See* note 156 *infra*.

[156] Lewis v. State, 26 App. Div. 2d 878, 878, 274 N.Y.S.2d 255, 256 (3d Dep't 1966), *aff'd*, 25 N.Y.2d 881, 250 N.E.2d 880, 303 N.Y.S.2d 890 (1969); Davis v. State, 22 App. Div. 2d 733, 733, 253 N.Y.S.2d 267, 268 (3d Dep't 1964). In *Davis*, the plaintiff timely filed a wrongful death claim, but was not appointed administratrix until more than 3 years after the decedent's death. *Id.* After dismissing the claim, the Court of Claims allowed the plaintiff to amend her complaint to reflect the subsequent appointment. *Id.* On appeal, the appellate division reversed, holding that the failure to have a personal representative appointed did not toll the statute of limitations. *Id.* Since the defect was considered jurisdictional, the court noted, it could not be corrected *nunc pro tunc* once the limitations period had elapsed. *Id.* In *Lewis*, the plaintiff timely filed a wrongful death acton prior to appointment as administratrix. 26 App. Div. 2d at 878, 274 N.Y.S.2d at 256. Although she was appointed within the statutory period, she failed to amend her claim to reflect such fact. *Id.* On the state's motion, the court dismissed the claim on the authority of *Davis*, without adverting to the distinction of the timely appointment. The Court of Appeals affirmed without opinion, 25 N.Y.2d at 883, 250 N.E.2d at 880, 303 N.Y.S.2d at 890. The decision in *Lewis* recently has been followed without further exposition. Smith v. State, 41 N.Y.2d 1063, 1065, 364 N.E.2d 838, 839, 396 N.Y.S.2d 174, 175 (1977).

[157] *See* note 156 *supra*. The effect of a defect being deemed "jurisdictional" is that the claim must be dismissed because the court lacks power to adjudicate the dispute. *See* Lurie v. State, 73 App. Div. 2d 1006, 1007, 423 N.Y.S.2d 969, 970 (3d Dep't 1980); Phillips v. State, 35 App. Div. 2d 750, 750, 314 N.Y.S.2d 951, 952 (3d Dep't 1970); Lynn v. City of New York, 18 App. Div. 2d 1076, 1077, 239 N.Y.S.2d 448, 451 (2d Dep't), *aff'd*, 13 N.Y.2d 955, 194 N.E.2d 423, 244 N.Y.S.2d 457 (1963); Andrews v. Donabella, 60 Misc. 2d 1007, 1007-08, 304 N.Y.S.2d 266, 267 (Sup. Ct. Onondaga County 1969).

Typically, the presence of all the statutorily prescribed elements of a cause of action against the state has been deemed a condition precedent to the court's jurisdiction over the subject matter of the claim. *See* De Marco 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); Dimovitch v. State, 33 App. Div. 2d 146, 149, 307 N.Y.S.2d 26, 30 (4th Dep't 1969); O'Sullivan v. State, 83 Misc. 2d 426, 431, 371 N.Y.S.2d 766, 771 (Ct. Cl. 1975). Thus, failure to comply with the enumerated requirements of the Act results in dismissal of the claim. 43 App. Div. 2d at 786, 350 N.Y.S.2d at 231. Of course, where the limitations period has not yet expired, reinstitution or amendment in proper form of a claim dismissed on jurisdictional grounds is permissible. *See* Satinoff v. State, 50 App. Div. 2d 1048, 1049, 377 N.Y.S.2d 747, 748 (3d Dep't 1975); Gonzalez v. State, 69 Misc. 2d 432, 433, 330 N.Y.S.2d 437, 439 (Ct. Cl. 1972); Shaw v. Fairyland at Harvey's Inc., 45 Misc. 2d 493, 494, 257 N.Y.S.2d 552, 554 (Sup. Ct. Suffolk County 1965), *aff'd*, 26 App. Div. 2d 576, 271 N.Y.S.2d 70 (2d Dep't 1966). Where the period has lapsed, however, the dismissal may preclude relief on the claim. *See* Ratka v. St. Francis Hosp., 44 N.Y.2d 604, 611-12, 378 N.E.2d 1027, 1031, 407 N.Y.S.2d 458,

ever, the legislature amended the Act, liberalizing procedures in the Court of Claims by allowing the court, in its discretion, to permit a claimant who did not comply with statutory limitations in the Act to file a claim "any time before an action asserting a like claim . . . would be barred under the provisions of article two [of the CPLR].[158] Despite this direction, recently, in *Jones v. State*,[159]

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462 (1978); 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); Roberson v. First Nat'l City Bank, 63 Misc. 2d 105, 106, 311 N.Y.S.2d 601, 604 (Sup. Ct. N.Y. County), *aff'd mem.*, 34 App. Div. 2d 896, 311 N.Y.S.2d 265 (1st Dep't), *appeal dismissed*, 27 N.Y.2d 1005, 267 N.E.2d 486, 318 N.Y.S.2d 752 (1970); Paskes v. Buonaguro, 42 Misc. 2d 1004, 1004, 249 N.Y.S.2d 943, 945 (Sup. Ct. Kings County 1964). *But see* George v. Mount Sinai Hosp., 47 N.Y.2d 170, 179-80, 390 N.E.2d 1156, 1161-62, 417 N.Y.S.2d 231, 237 (1979); Mogavero v. Stony Creek Dev. Corp., 53 App. Div. 2d 1021, 1022, 385 N.Y.S.2d 899, 901 (4th Dep't 1976); Berlin v. Goldberg, 48 Misc. 2d 1073, 1078, 266 N.Y.S.2d 475, 481 (N.Y.C. Civ. Ct. N.Y. County 1966).

Notably, while not allowing the institution of an action by a party prior to appointment as administrator, the courts have been more willing to permit such party to file a late notice of claim against the state. *See In re* Johnson v. State, 49 App. Div. 2d 136, 137-38, 373 N.Y.S.2d 671, 672-73 (3d Dep't 1975); Gonzalez v. State, 69 Misc. 2d 432, 433, 330 N.Y.S.2d 437, 439 (Ct. Cl. 1972). *But see In re* Welch v. State, 71 App. Div. 2d 494, 498, 423 N.Y.S.2d 102, 105 (4th Dep't 1979), *appeal denied*, 50 N.Y.2d 802 (1980). In *In re Johnson*, the court noted that the purpose of the notice of claim—to give the state prompt notice of the details of the claim—is served by filing the notice as the next of kin to the decedent. 49 App. Div. 2d at 137-38, 373 N.Y.S.2d at 673 (citing Winbush v. City of Mount Vernon, 306 N.Y. 327, 334, 118 N.E.2d 459, 463 (1954)); *accord, In re* Figueroa v. City of New York, 279 App. Div. 771, 771, 109 N.Y.S.2d 126, 127 (2d Dep't 1951).

[158] Section 10(6) of the Act, enacted in 1976, provides in pertinent part:

> A claimant who fails to file a claim or notice of intention . . . within the time limited therein . . . may, . . . in the discretion of the court, be permitted to file such claim at any time before an action 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. . . . In determining whether to permit the filing of a claim pursuant to this subdivision, the court shall consider, among other factors, whether 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. 1980-1981). The purpose of section 10(6) was to provide claimants greater access to the Court of Claims, Governor's Memorandum (N.Y.S. 8789, N.Y.A. 10203, 199th Sess.), *reprinted in* [1976] N.Y. LEGIS. ANN. 1. Although section 10(6) was intended to liberalize the jurisdiction of the court, it appears to have been applied restrictively. *See, e.g.*, Sessa v. State, 63 App. Div. 2d 334, 335, 408 N.Y.S.2d 547, 548 (3d Dep't 1978), *aff'd*, 47 N.Y.2d 976, 393 N.E.2d 1044, 419 N.Y.S.2d 972 (1979) (no retroactivity under section 10(6)); De Hart v. State, 92 Misc. 2d 631, 634-35, 401 N.Y.S.2d 417, 420 (Ct. Cl. 1977) (use of late notice as claim itself not authorized under section 10(6)). *But see* Flannery v. State, 91 Misc. 2d 797, 801, 399 N.Y.S.2d 88, 91 (Ct. Cl. 1977) (each factor under section 10(6) need not be satisfied to allow filing of late claim).

[159] 51 N.Y.2d 943, 416 N.E.2d 1050, 435 N.Y.S.2d 715 (1980), *aff'g* 69 App. Div. 2d 936,

the Court of Appeals held that the filing of a wrongful death claim prior to appointment as personal representative, absent a subsequent refiling within the 2-year period, is a jurisdictional defect requiring dismissal of the claim.[160]

In *Jones*, the plaintiff's son was fatally assaulted by a former psychiatric patient from the Bronx State Hospital.[161] Alleging that the state was negligent in releasing the assailant prematurely, the plaintiff, "individually and as intended Administratrix" of her son's estate, filed a consolidated personal injury and wrongful death action in the Court of Claims.[162] Shortly thereafter, the plaintiff was appointed administratrix but failed to amend her claim to delete the word "intended."[163] Subsequent to the expiration of the 2-year statutory period, the state moved to dismiss the claim, contending that the filing of the wrongful death claim prior to appointment as administratrix rendered the filing a nullity.[164] The Court of Claims denied the motion and permitted the plaintiff to amend her claim.[165] On appeal, the Appellate Division, Third Department reversed and dismissed the claim, holding that the filing of the wrongful death claim by the plaintiff prior to her appointment as administratrix was a fatal defect.[166]

In so holding, the appellate division reaffirmed prior decisions which held that the requirements of section 10, subdivision 2 of the Act were jurisdictional conditions precedent to maintaining a wrongful death action in the Court of Claims.[167] Since the section requires the claim to be filed "within 90 days after the appointment," the plaintiff's attempt to amend the claim to reflect her timely appointment was ineffective because it came after the expiration of the statutory period.[168] On appeal, a closely divided Court

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415 N.Y.S.2d 294 (3d Dep't 1979).

[160] *Id.* at 944, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715.

[161] 69 App. Div. 2d at 936, 415 N.Y.S.2d at 295.

[162] 51 N.Y.2d at 945, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715 (Meyer, J., dissenting).

[163] *Id.* (Meyer, J., dissenting).

[164] *Id.* (Meyer, J., dissenting).

[165] *Id.* at 945, 416 N.E.2d at 1051, 435 N.Y.S.2d at 716 (Meyer, J., dissenting).

[166] 69 App. Div. 2d at 936-37, 415 N.Y.S.2d at 295.

[167] *See, e.g.*, Smith v. State, 41 N.Y.2d 1063, 1065, 364 N.E.2d 838, 839, 396 N.Y.S.2d 174, 175 (1977); Lewis v. State, 25 N.Y.2d 881, 250 N.E.2d 880, 303 N.Y.S.2d 890 (1969); Davis v. State, 22 App. Div. 2d 733, 733, 253 N.Y.S.2d 267, 268 (3d Dep't 1964). Notably, while the facts in *Lewis* were virtually identical to those in *Jones*, *Lewis* was decided before September 1, 1976, the effective date of § 10(6). *See* note 158 *supra*.

[168] 69 App. Div. 2d at 936, 415 N.Y.S.2d at 295.

of Appeals[169] affirmed without opinion, adopting the memorandum opinion of the appellate division.[170]

Authoring a vigorous dissent, Judge Meyer contended that the legislature did not intend the order of filing and appointment to be jurisdictional.[171] He argued that the language "within ninety days after appointment" permits a filing at any time within 2 years after the decedent's death up to 90 days after appointment of an administrator.[172] Even assuming that the statute required a subsequent filing, Judge Meyer asserted, the earlier filing should, nonetheless, not be considered a jurisdictional defect.[173] Both subdivision 6 of section 10 and subdivision 8 of section 9 of the Act give the Court of Claims broad power to correct even substantive errors in the plaintiff's claim "in furtherance of justice."[174] While recognizing

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[169] Chief Judge Cooke and Judges Gabrielli, Jasen and Jones, joined in the affirmance of the appellate division opinion. Judge Meyer dissented in a separate opinion in which Judges Wachtler and Fuchsberg joined.

[170] 51 N.Y.2d at 944, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715. Significantly, while the wrongful death claim was dismissed, the personal injury action survived. Indeed, although the personal injury action was dismissed by the appellate division, the state consented to its reinstatement on argument to the Court of Appeals. *Id.* It appears that the Court gave the personal injury action the benefit of section 10(6), *see* note 158 *supra*, since the claim was dismissed prior to the expiration of the statute of limitations for a personal injury action under the CPLR. *See* CPLR 214 (McKinney Supp. 1980-1981).

[171] 51 N.Y.2d at 947, 416 N.E.2d at 1052, 435 N.Y.S.2d at 717 (Meyer, J., dissenting). Emphasizing that the state had received actual notice of the claim within 3 months after the injury, Judge Meyer noted that the Clerk of the Court of Claims, as well as the Attorney General's office, had notified the plaintiff that the original claim would be filed "subject to whatever legal objections may apply thereto." *Id.* at 945, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715 (Meyer, J., dissenting).

The vigor of Judge Meyer's dissent in part may reflect his apparent displeasure with the state's "[h]aving played possum" for over a year without informing the plaintiff of any legal objections that applied. *Id.* His reference to the ethical considerations in the Code of Professional Responsibility seemed to indicate dissatisfaction with the approach of the Attorney General's office. *Id.* By acknowledging the claim and demanding particulars, it would appear that the Attorney General intentionally lulled the plaintiff into a false sense of security.

[172] 51 N.Y.S.2d at 946-47, 416 N.E.2d at 1051, 435 N.Y.S.2d at 716 (Meyer, J., dissenting). The dissent contended that by having the filing requirement run from the date of the appointment of the personal representative rather than from the date of the decedent's death the legislature intended to extend the time for filing a wrongful death claim. *Id.* at 947, 416 N.E.2d at 1051, 435 N.Y.S.2d at 716. Adherence to the majority view would, according to the dissent, thwart that aim. *Id.*

[173] *Id.* at 948, 416 N.E.2d at 1052, 435 N.Y.S.2d at 717 (Meyer, J., dissenting).

[174] *Id.* at 949, 416 N.E.2d at 1052, 435 N.Y.S.2d at 717 (Meyer, J., dissenting) (quoting N.Y. CT. CL. ACT § 9(8) (McKinney 1963)); *see* note 158 *supra*. Since, pursuant to section 10(6), the failure to file a claim at all is not a jurisdictional defect, Judge Meyer suggested, the legislature could not have intended a faulty filing to be fatally defective. 51 N.Y.2d at 947-48, 416 N.E.2d at 1052, 435 N.Y.S.2d at 717 (Meyer, J., dissenting).

that neither provision precisely addresses the question of "permitting amendment in order to validate the 'invalid' claim," the dissent noted that the thrust of the two provisions indicates that the legislature "did not conceive of the appointment of a personal representative as jurisdictional."[175] Thus, in light of this intent and considerations of fairness, Judge Meyer suggested that prior case law mandating dismissal where filing preceded appointment be overruled.[176]

Judge Meyer found his view buttressed by the language in section 9(8) of the Act. By giving the courts broad discretion to correct any error of substance in a claim, the legislature, according to the dissent, has indicated that what have heretofore been considered "jurisdictional defects" may be corrected by court order. *Id.* at 949, 416 N.E.2d at 1053, 435 N.Y.S.2d at 718 (Meyer, J., dissenting). Indeed, subdivision 8 of section 9 permits the court to "vacate, amend, correct, or modify any process, claim, order or judgment, in furtherance of justice for any error in form or substance." N.Y. Ct. Cl. Act § 9(8) (McKinney 1963). Despite its reference to errors of substance and its apparent grant of broad discretionary power, research indicates infrequent application of section 9(8). *See* Williams v. State, 77 Misc. 2d 396, 399, 353 N.Y.S.2d 691, 694 (Ct. Cl. 1974); D'Angelo v. State, 200 Misc. 657, 661, 106 N.Y.S.2d at 350, 353 (Ct. Cl. 1951); A.W. Banko, Inc. v. State, 186 Misc. 491, 494, 60 N.Y.S.2d 758, 761 (Ct. Cl. 1946). In *Williams*, the court used section 9(8) to allow later verification of a notice of intention which had been timely filed. As an apparently technical omission, the *Williams* court stressed that as long as the state had notice, the purpose of the statute would not be perverted. 77 Misc. 2d at 399, 353 N.Y.S.2d at 694.

Although the Court of Claims in *Jones* had used section 9(8) to amend the claim to properly designate the plaintiff as administratrix, 51 N.Y.2d at 945, 416 N.E.2d at 1051, 435 N.Y.S.2d at 716 (Meyer, J., dissenting), neither the appellate division nor the majority in the Court of Appeals addressed its application.

[175] *Id.* at 949, 416 N.E.2d at 1053, 435 N.Y.S.2d at 718 (Meyer, J., dissenting). Thus, in light of this intent and the unfairness resulting from a contrary result, Judge Meyer suggested that prior case law mandating dismissal where filing preceded appointment be overruled.

[176] *Id.* at 946, 416 N.E.2d at 1051, 435 N.Y.S.2d at 716 (Meyer, J., dissenting). The dissent distinguished Smith v. State, 41 N.Y.2d 1063, 364 N.E.2d 838, 396 N.Y.S.2d 174 (1977) by noting that in *Smith*, in contrast to *Jones*, the personal representative was not appointed until after the 2-year limitations period had expired. 51 N.Y.2d at 951, 416 N.E.2d at 1054, 435 N.Y.S.2d at 719 (Meyer, J., dissenting). *See generally* 41 N.Y.2d at 1065, 364 N.E.2d at 839, 396 N.Y.S.2d at 175; note 156 *supra*. While admitting that Lewis v. State, 25 N.Y.2d 881, 250 N.E.2d 880, 303 N.Y.S.2d 890 (1969), relied upon by the *Jones* majority, was factually indistinguishable from *Jones*, *see generally* note 156 *supra*, Judge Meyer stated bluntly that it was erroneously decided. 51 N.Y.2d at 951, 416 N.E.2d at 1054, 435 N.Y.S.2d at 719 (Meyer, J., dissenting).

As an additional reason for reversal Judge Meyer urged that section 10(6), which provides that the limitations period in the CPLR constitutes the underlying period within which the court may permit the filing of a claim against the state, contemplates that such period be extended by any applicable tolls and extensions. *Id.* at 952, 416 N.E.2d at 1054, 435 N.Y.S.2d at 719, (Meyer, J., dissenting). Since a personal injury claim, dismissed on the ground that it had been commenced in the name of a deceased plaintiff, has recently been held entitled to the 6-month extension of CPLR 205(a), *see* George v. Mount Sinai Hosp., 47 N.Y.2d 170, 180, 390 N.E.2d 1156, 1162, 417 N.Y.S.2d 231, 237 (1979), and since a wrong-

In holding that the filing of a wrongful death claim prior to appointment as administrator is a jurisdictional defect, the Court did not foreclose the possibility that the plaintiff could reinstitute the claim pursuant to CPLR 205(a).[177] Indeed, subsequent to its

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ful death claim has been held under CPLR 203(e) to relate back to a timely commenced personal injury action, *see* note 179 *infra*, Judge Meyer argued that the amendment permitted by the Court of Claims was within the discretion granted by section 10(6). 51 N.Y.2d at 952, 416 N.E.2d at 1054, 435 N.Y.S.2d at 719 (Meyer, J., dissenting).

[177] CPLR 205(a) provides:

> 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 upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, 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 commencement of the prior action.

CPLR 205(a) (McKinney Supp. 1980-1981). The general rule is that the CPLR governs the proceedings in "all courts of the state" unless the procedure "is regulated by inconsistent statute." CPLR 101 (1972). *See* N.Y. CT. CL. ACT § 9(9) (McKinney Supp. 1980-1981). It has been noted that "[t]he major factor that will determine whether any CPLR provision applies to a court that has its own practice act is whether and in what manner the local court act covers the particular aspect of procedure in question." 1 WK&M ¶ 101.14. Thus, application of CPLR 205(a) will turn on whether the Act's provisions preempt its use. *Id.*

Although the Court of Appeals has not ruled on the applicability of CPLR 205(a) to Court of Claims actions, in Gaines v. City of N.Y., 215 N.Y. 533, 109 N.E. 594 (1915), the Court had occasion to consider whether a predecessor provision would permit the recommencement of an action against a municipality. In *Gaines*, the plaintiff had brought a negligence action against the city of New York in the city court. *Id.* at 536, 109 N.E. at 595. Because the city court had no jurisdiction over actions against the city, the claim was dismissed. *Id.* The plaintiff thereafter sought to recommence the action in the proper court, pursuant to section 405 of the Code of Civil Procedure (a predecessor to CPLR 205(a)), after the statute of limitations had run. *Id.* at 539, 109 N.E. at 596. Finding the statute applicable, notwithstanding that the dismissal was on jurisdictional grounds, Judge Cardozo stated that the "important consideration" for the court is whether "a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the court. When that has been done, a mistaken belief that the court has jurisdiction, stands on the same plane as any other mistake of law." *Id.*

Several lower courts have applied CPLR 205(a) or the relation-back provision, CPLR 203(e), to save claims against the state. *See* Mastandrea v. State, 57 App. Div. 2d 679, 679, 393 N.Y.S.2d 817, 818 (3d Dep't 1977); Marsala v. State, 41 App. Div. 2d 878, 878, 343 N.Y.S.2d 149, 151 (3d Dep't 1973); Iazzetta v. State, 105 Misc. 2d 567, 571, 432 N.Y.S.2d 987, 990 (Ct. Cl. 1980). In Lewis v. State, 69 Misc. 2d 1031, 332 N.Y.S.2d 793 (Ct. Cl. 1972), the Court of Claims, however, flatly rejected application of CPLR 205(a) to reinstitute an action previously dismissed by the Court of Appeals. 69 Misc. 2d at 1033, 332 N.Y.S.2d at 294; *see* note 156 *supra*. The *Lewis* court reasoned that the limitations of section 10(2) were conditions precedent to suit which cannot be modified by CPLR 205(a). 69 Misc. 2d at 1033, 332 N.Y.S.2d at 294. Recently, however, the Court of Appeals has rejected the theory that a dismissal due to a failure to comply with a condition precedent to suit is in every instance an absolute barrier to use of CPLR 205(a). *See* note 178 and accompanying text *infra*.

decision, the Court permitted reinstitution of a claim in a private action under circumstances almost identical to those in *Jones*.[178] If CPLR 205(a) is not available in the Court of Claims, the result will be that plaintiffs in private actions will be able to recommence actions in the name of the proper party after the expiration of the statutory period while plaintiffs in the Court of Claims under identical circumstances will be time-barred.[179] It is submitted that the mere fact that the defendant is the state rather than a private individual should not justify such disparate results. Indeed, the recent amendment of the Court of Claims Act evidences an intent to liberalize jurisdictional requirements in order to place plaintiffs in the Court of Claims on a more equal footing with their counterparts in private actions.[180] In adhering to precedent, the Court has

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[178] Carrick v. Central Gen. Hosp., 51 N.Y.2d 242, 414 N.E.2d 632, 434 N.Y.S.2d 130 (1980). In *Carrick*, a unanimous Court of Appeals held that the plaintiff, whose action for wrongful death had been dismissed when not timely filed as an appointed adminstratrix, could recommence the action under CPLR 205(a). *Id.* at 253, 414 N.E.2d at 638, 434 N.Y.S.2d at 136. The Court reasoned that since the appointment as administratrix, while a condition precedent, is not related to the merits of the claim, a dismissal for lack of appointment should be regarded as a "tangential matter not affecting the validity of the claim itself." *Id.* at 252, 414 N.E.2d at 638, 434 N.Y.S.2d at 136. Thus, the prior dismissal was deemed *not* to be a final judgment on the merits that would preclude application of CPLR 205(a). *Id.* Judge Fuchsberg, concurring, stated that the Court can no longer "blithely accept the formalisms on which this claim, *and that in Jones*, were rejected below." *Id.* at 254, 414 N.E.2d at 639, 434 N.Y.S.2d at 137 (Fuchsberg, J., concurring) (emphasis added); *see The Survey*, notes 1-29 and accompanying text *supra*.

Notably, the *Carrick* Court found CPLR 203(e), which permits a claim in an amended pleading to relate back to the original pleading, inapplicable, stating that the relation-back provisions depended upon the existence of a valid pre-existing action. *Id.* at 248-49, 414 N.E.2d at 635, 434 N.Y.S.2d at 133; *accord* George v. Mount Sinai Hosp., 47 N.Y.2d 170, 179-80, 390 N.E.2d 1156, 1161, 417 N.Y.S.2d 231, 237 (1979).

[179] *See* note 178 and accompanying text *supra*. Some "worthy" Court of Claims plaintiffs may be denied relief afforded their less prompt private counterparts. For example, the plaintiff in Caffaro v. Trayna, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974) gave the defendant actual notice of the wrongful death claim six years after the decedent's death, thus presenting problems of proof and investigation. *Id.* at 255, 319 N.E.2d at 179, 360 N.Y.S.2d at 854 (Breitel, J., dissenting). Nevertheless, the Court allowed the assertion of the death claim by means of an amendment to the complaint, pursuant to CPLR 203(e), of a timely commenced personal injury action. *Id.* at 252, 319 N.E.2d at 177, 360 N.Y.S.2d at 852. In *Jones*, however, where the defendant received actual notice of the claim within 3 months of the decedent's death, the death action was dismissed. 51 N.Y.2d at 945, 416 N.E.2d at 1050, 435 N.Y.S.2d at 715 (Meyer, J., dissenting).

[180] *See* notes 158 & 174 *supra*. Further evidence of legislative intent to save meritorious claims may be found in the more relaxed notice requirements of the GML. By amendment, the legislature has granted the courts more discretion in the filing of a late notice of intention to file a claim against a public corporation. Ch. 745, § 2(5), [1976] N.Y. Laws 3 (codified at GML § 50-e(5) (1977)). In particular, in passing upon an application to file a late notice of claim, the courts are to consider whether the public corporation had acquired actual

ignored the underlying aim, if not the literal language, of these modifications and has created an unwarranted distinction between plaintiffs based on the character of the defendant.[181]

It is hoped that in the future the Court will ameliorate the harshness of the *Jones* holding by explicitly permitting recommencement of such actions pursuant to CPLR 205(a). Under circumstances like those in *Jones*, where the state had actual notice of the claim within the statutory period, it would appear that the state will not be prejudiced in defense of the action by the plaintiff's reinstitution of the claim within 6 months after dismissal.[182] Should the judiciary be reluctant to apply CPLR 205(a) in the Court of Claims, it is suggested that it is incumbent upon the legislature to confirm the statute's applicability in actions against the state. For the moment, however, the practitioner filing a claim in the Court of Claims should be aware that there is a substantial risk that a wrongful death action filed prior to appointment as personal representative will be dismissed without the opportunity to recommence the action.[183]

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knowledge of the essential facts of the claim and whether the public corporation would be substantially prejudiced in its defense of the claim. *Id.*; *see* Beary v. City of Rye, 44 N.Y.2d 398, 407-08, 377 N.E.2d 453, 455, 406 N.Y.S.2d 9, 10 (1978); SIEGEL § 32 at 32-33.

[181] It is unclear whether the literal language of section 10(6) would permit the reinstitution of the claim under CPLR 205(a) suggested for the plaintiff in *Jones*. *See* note 158 and accompanying text *supra*. It is submitted, however, that the reference to article two of the CPLR in section 10(6) combined with needed emphasis on the determinative factors therein and the thrust of the *Carrick* rationale compel the conclusion that a CPLR 205(a) action would be permitted in *Jones*.

[182] It is suggested that even an action dismissed for a lack of appointment within the statutory period should obtain the benefit of CPLR 205(a), where the plaintiff can establish, pursuant to the factors enumerated in section 10(6), that the state would not be unfairly prejudiced by recommencement. *See* note 158 *supra*.

[183] Commentators have suggested that the Court of Claims be merged into the supreme court. SIEGEL § 17 at 20; 1 WK&M ¶ 101.14. Should such a merger be accomplished, it seems likely that some of the "jurisdictional" requirements of the Court of Claims Act will be modified to conform to the CPLR.