# CIVIL PRACTICE

**Jay C. Carlisle†**

## INTRODUCTION

During the *1992 Survey* year, "new" legislation was enacted which fundamentally changes the procedure for commencement of some lawsuits.[1] Effective December 31, 1992, all civil actions in supreme and county courts must be commenced by filing a summons and complaint or summons with notice.[2] Several important amendments to the Civil Practice Law and Rules ("CPLR") were enacted[3] and effective January 1, 1993, new IAS[4] and escrow check bouncing[5] rules became effective. Additionally, there have been significant developments in the decisional law of statute of limitations,[6] discovery,[7] sanctions,[8] and the legal profession[9]. These and other areas should be of interest to the bench and bar.

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This article is dedicated to Professor Hervey M. Johnson and to Jeffrey Brown, Esq. Both died during the *1992 Survey* year. Professor Johnson was a founding member of the Pace University School of Law faculty. He graduated from Princeton and was an editor of the Duke Law Review prior to practicing law as an associate at the New York firm of Davis, Polk & Wardwell. Hervey was a wonderful law teacher and our students consistently rated him as one of our best professors. His courses in Constitutional Law and Contracts were favorites of thousands of Pace Law School students. Jeff Brown was an outstanding law student at Pace Law School and an outstanding lawyer at the New York City law firm of Sullivan & Cromwell. Jeff was the chief assistant to Robert Macrate when he was president of the American Bar Association. The fact that Jeff died so soon after his graduation from law school reminds us that life is fragile. The students, faculty, deans and alumni of Pace Law School salute Hervey Johnson and Jeff Brown. We miss them very much.

1. *See infra* notes 62-99 and accompanying text.
2. *See infra* note 66 and accompanying text.
3. *See infra* notes 35-44 and accompanying text.
4. *See infra* notes 12-23 and accompanying text.
5. *See infra* notes 24-28 and accompanying text.
6. *See infra* notes 100-188 and accompanying text.
7. *See infra* notes 238-240 and accompanying text.
8. *See infra* notes 261-295 and accompanying text.
9. *See infra* notes 296-311 and accompanying text.

## I. NEW LEGISLATION AND RULES

Space limitations prevent inclusion of an appendix summarizing all CPLR legislation enacted during the *Survey* year. The reader should review the table of contents for the various CPLR publications.[10] The most important change is the adoption of a new filing law for all civil actions in supreme and county courts.[11] Prior to discussing these changes, the bench and bar should be alerted to the following statutory and rule changes.

### *A. New IAS Rules Effective January 1, 1993*

A series of changes in rules and operations of the Individual Assignment System ("IAS") became effective January 1, 1993.[12] The changes will provide judges with more case-management powers[13] and encourage them to experiment with IAS rules.[14] The new rules require that preliminary conferences occur within forty-five days of the filing of a request for judicial intervention, unless the parties complete and submit an agreed upon discovery schedule on a form order prior to the conference.[15] Also, unless the judge determines that circumstances require settlement or an order, decisions will be self-effectuating in nature.[16] The rules and operational changes recommended will be implemented in accordance with plans submitted by the administrative judges and approved for each judicial district in the

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10. The complete text should be available for review in the 1992-93 publications by Matthew Bender ("The Red Book"), Gould Publications ("The Black Book") or West's McKinney Commentaries. Copies of the entire legislative texts may be obtained by contacting the Department of Governmental Relations. The practitioner should also consider subscribing to the Annual Legislative Bulletin of the Association of the Bar of the City of New York. The Bulletin analyzes the merits of the proposed bills and discusses their impact on current laws. It is an excellent research tool and will keep the reader abreast of current developments in Albany.

11. *See infra* note 66 and accompanying text.

12. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 208.8 (effective Jan. 1, 1993) (amending § 202.8 of the Uniform Civil Rules for the supreme and county courts, relating to motion procedure).

13. *See* Martin Fox, *Rules Changes for IAS System Effective Jan. 1*, N.Y. L.J., Dec. 14, 1992, at 1.

14. *Id.* at 2. (Chief Administrator of the Courts Matthew T. Crosson states the changes "will increase the court system's ability to deal with the overwhelming number of matters that come before it every day . . . [and] will also serve to strengthen the Individual Assignment System by making case processing procedures more uniform and understandable."

15. N.Y. UNIFORM RULES OF THE COURT § 202.12(b) (McKinney 1993).

16. *Id.*

state.[17] Plans have been made for an IAS Committee "to monitor and review the progress and effectiveness" of the new rules on a regular basis and to issue its first monitoring report on or before May 1, 1993.[18] Operational changes include informal motion practices such as telephone conferences,[19] the development of specialized commercial[20] and matrimonial parts,[21] block conference scheduling,[22] and refinement of existing methods of trial assignment.[23] Copies of the implementation plans for each judicial district should be obtained by members of the bar.

### *B. New Escrow Check Bouncing Rules*

During the *Survey* year important amendments to rules and regulations governing the maintenance of lawyer trust and escrow bank accounts have been enacted.[24] Among the changes, which are effective January 1, 1993, are amendments to Disciplinary Rule ("DR") 9-102 of the Lawyers' Code of Professional Responsibility.[25] The new rules require that attorneys and law firms use only banks that have agreed to report dishonored checks to attorney disciplinary committees.[26] The rules are applicable to special, trust, escrow, and IOLA accounts. The Lawyers' Fund for Client Protection will periodically publish a list of participating banks. There will be three designations for client

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17. Plans for the Ninth Judicial District and for the First Judicial District have already been published and distributed to the bar. (Copies on file with the Syracuse Law Review in the Barclay Law Library).

18. *See* Fox, *supra* note 13, at 2.

19. *Id.*

20. *Id.*

21. *Id.* "The use of specialized parts will increase, particularly with the establishment of four specialized commercial parts in New York County on Jan. 1, and the addition of more specialized parts exclusively for matrimonial cases."

22. Cases will be scheduled for conferences in blocks of time at intervals during the day. This will decrease waiting time for lawyers and litigants and will replace the former method of scheduling, where a large number of cases were scheduled to be heard at the same time on a single day.

23. *See* Fox, *supra* note 13, at 2. "Based on a district-by-district review of current caseloads, administrative judges, on an approved local option basis, will adopt or refine existing methods of trial assignment, including dual-track (the assignment of back-up judges for trial-ready cases if the IAS judge is unavailable) and the use of Trial Assignment Parts (in which all trial-ready cases are pooled and sent out to available judges for trial)."

24. *See* STATE BAR NEWS, December 1992, at 12, col.1.

25. N.Y. DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1993).

26. *See* STATE BAR NEWS, *supra* note 24, at 12.

and escrow accounts. Attorneys and law firms must choose one for each account and have the title placed on their checks and deposit slips. The titles are "Attorney Trust Account," "Attorney Special Account," and "Attorney Escrow Account."

The new escrow rules provide for a dishonored check notice procedure.[27] If a check written on one of the designated accounts bounces for lack of funds, a notice will be sent by the bank to the Lawyers' Fund for Client Protection. The Fund will hold the check for ten days in case the notice was sent in error by the bank. Even if the lawyer deposits money to cover the check, the notice won't be withdrawn unless the bank was in error. Finally, after expiration of the ten day period, the Fund will forward the notice to the appropriate disciplinary committee, based on the attorney or law firm's address. The Committee will then conduct an investigation and may order an audit.[28]

### *C. Attorney Fees Against the State*

The New York State Equal Access to Justice Act was permanently enacted during the *Survey* year.[29] The law creates a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the State of New York. It is similar to the provisions of federal law contained in 28 U.S.C. section 2412(d) and the significant body of case law that has evolved thereunder. Awards are limited to cases where the state cannot show that its position is "substantially justified."[30] Fees will be determined pursuant to prevailing market rates for the kind and quality of the services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.[31]

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27. *Id.*

28. *Id.*

29. *See* Act of March 31, 1992, ch. 36, 1992 McKinney's Sess. Laws of N.Y. 61 (codified at N.Y. STATE EQUAL ACCESS TO JUSTICE ACT §§ 1, 2 (McKinney Supp. 1992)).

30. *Id. See also* Pierce v. Underwood, 487 U.S. 552 (1988) (fees under similar federal statute could be awarded only if an agency had proceeded when there was no fair ground for litigation).

31. *See* Act of March 31, 1992, *supra* note 29. *See also* Gary Spencer, *Cuomo Signs Bill Authorizing Awards of Fees Against State*, N.Y. L.J., Oct. 27, 1989, at 1.

### *D. Recovery of Attorney Fees and Damages in SLAPP Suits*

Effective January 1, 1993, a new section 70-a has been added to the New York State Civil Rights Law.[32] This authorizes claimants who are subject to a SLAPP suit to claim costs, attorney fees, other compensatory damages, and punitive damages. A claimant must fit within the definitional section of section 76-a of the Civil Rights Law.[33]

### *E. Civil Justice Expense and Reduction Plans*

We again remind federal litigators that new civil justice expense and reduction plans were enacted several weeks prior to the beginning of the *1992 Survey* year. On December 12, 1991, the Civil Justice Expense and Delay Reduction Plan was adopted by the Board of Judges of the Southern District of New York. On December 17, 1991, a similar plan was adopted by the Board of Judges of the Eastern District of New York. The plans were discussed in last year's *Survey* of Civil Practice.[34] Copies of the plans are available in the appropriate federal court clerk's office and are "must reading" for anyone contemplating litigation in the Eastern or Southern Districts.

### *F. Significant CPLR Changes*

During the *Survey* year there were thirty-six section or rule changes to the CPLR. Some of the important changes are listed below. The practitioner is reminded to review the table of contents for the various CPLR publications to note changes that may be relevant to his areas of interest.[35]

#### *1. CPLR 213-b*

CPLR 213-b was added to provide that a crime victim may commence a civil action for damages against a person convicted of a crime within seven years of the date of the crime. This provision became effective on July 24, 1992.[36]

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32. *See* Act of August 3, 1992, ch. 767, 1992 McKinney's Sess. Laws of N.Y. 2103 (codified at N.Y. CIV. RIGHTS § 70-a (McKinney Supp. 1992)).

33. *Id.* (codified at N.Y. CIV. RIGHTS § 76-a (McKinney Supp. 1992)).

34. *See* Jay C. Carlisle, *Civil Practice, 1991 Survey of N.Y. Law*, 43 SYRACUSE L. REV. 77, 96-101 (1992).

35. *See supra* note 10.

36. N.Y. CIV. PRAC. L. & R. 213-b (McKinney Supp. 1992).

### *2. CPLR 214-c(1)*

CPLR 214-c(1) was amended to broaden the definition of "exposure" to include exposure by implantation. The amendment became effective on July 24, 1992, and is good news for plaintiffs who seek to use New York's new discovery accrual statute of limitations in substance cases.[37]

### *3. CPLR 307(2)*

CPLR 307(2) was amended to add a provision authorizing personal service upon specified state agency officers by certified mail, return receipt requested. The provision became effective January 1, 1993, and requires that the envelope containing process bear the legend "URGENT LEGAL MAIL."[38] Failure to strictly comply with the statute may result in a dismissal in supreme and county courts. Dismissal in the inferior courts will be for lack of jurisdiction and if the statute of limitations has run, the action will be time-barred.[39]

### *4. CPLR 3405*

CPLR 3405 was amended to provide that the rules promulgated by the Chief Judge of the Court of Appeals for the arbitration of certain claims may authorize use of judicial hearing officers as arbitrators. The rule became effective April 10, 1992.[40]

### *5. CPLR 3407*

CPLR 3407 relates to preliminary conferences in personal injury actions involving certain terminally ill parties. It was enacted by chapter 582 of the Laws of 1992 and became effective September 1, 1992. Lawyers representing clients who are terminally ill and who allege their illness is the result of the culpable conduct of another party to the action "may request an expedited preliminary conference."[41]

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37. N.Y. CPLR 214-c(1) (McKinney Supp. 1993).
38. N.Y. CPLR 307(2) (McKinney Supp. 1992).
39. *Id.*
40. *See* Act of April 10, 1992, ch. 55, 1992 N.Y. Laws 55 (codified at N.Y. CPLR 340(s)(2) (McKinney Supp. 1992)).
41. *See* Act of July 24, 1992, ch. 582, 1992 McKinney's Sess. Laws of N.Y. 1614 (codified at N.Y. CPLR 3407 (McKinney Supp. 1992)).

### 6. *CPLR 87*

Effective April 10, 1992, Chapter 55 of the Laws of 1992 added Article 87 to the CPLR.[42] The provisions of the Article shall expire and be deemed repealed on April 1, 1994.[43] The new provision is entitled "Punitive Damage Awards: Public Share." It provides that in any civil action resulting in an award of punitive damages to a private party, other than an award rendered against the state, upon expiration of the time to appeal or the exhaustion of available appeals, twenty percent of such punitive damages award shall be payable to the state, and the judgment shall order payment accordingly.[44]

## *G. The New Filing Law*

During the *Survey* year a new mandatory filing law was enacted for civil actions commenced in supreme and county courts after December 31, 1992.[45] The legislation includes changes in CPLR 203, 205, 207, 304, 305, 306-a, 306-b, 312-a, 1007, 1101, 1319, 6213, and 7102. It also provides for changes in the Uniform District Court Act,[46] the New York Civil Court Act,[47] the Uniform City Court Act,[48] the Uniform Justice Court Act,[49] the Domestic Relations Law,[50] the General Municipal Law,[51] the Navigation Law,[52] the Parks, Recreation and Historic Preservation Law,[53] and the Vehicle and Traffic Law.[54] Professor Siegel,[55] Professor Arkin,[56] Professor

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42. *See* Act of April 8, 1992, ch. 55, 1992 McKinney's Sess. Laws of N.Y. 324 (codified at N.Y. CPLR 8701-8704 (McKinney Supp. 1992)).

43. *Id.*

44. *Id.*

45. Act of June 23, 1992, ch. 216, 1992 McKinney's Sess. Laws of N.Y. 835 (codified at N.Y. CPLR 306-b (McKinney Supp. 1992)).

46. N.Y. UNIFORM DIST. CT. ACT § 401, *et seq.* (McKinney 1989 & Supp. 1992).

47. N.Y. CITY CIV. CT. ACT § 400 (McKinney 1992 & Supp. 1992).

48. N.Y. UNIFORM CITY CT. ACT §§ 400m, 409m, 411 (McKinney 1989 & Supp. 1992).

49. *Id.* § 400 (McKinney 1989 & Supp. 1992).

50. N.Y. DOM. REL. LAW § 211 (McKinney 1988 & Supp. 1992).

51. N.Y. GEN. MUN. LAW § 504-a (McKinney 1986 & Supp. 1992).

52. N.Y. NAV. LAW §§ 48, 74 (McKinney 1989 & Supp. 1992).

53. N.Y. PARKS REC. & HIST. PRESERV. LAW § 25.27 (McKinney 1984 & Supp. 1992).

54. N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986 & Supp. 1992).

55. *See* David D. Siegel, *Imminent New Filing System Threatens Viability of Civil Lawsuits*, N.Y. L.J., Dec. 28, 1992, at 1 [hereinafter *Imminent New Filing*]; David D. Siegel, N.Y. ST. L. DIG., Nos. 390, 391, 395 and 396. *See also* DAVID D. SIEGEL, NEW YORK PRACTICE (2d ed. 1991 & Supp. 1992).

Barker,[57] Professor Shapiro,[58] Professor Carpinello,[59] and others[60] have written on the new filing law. In addition Bert Bauman, Esq., and the New York State Trial Lawyers Institute have published a useful "Quick Tip" digest.[61] Professor Farrell, who authored the *Survey* of Civil Practice for ten years prior to the current author, has provided very helpful written comments regarding the legislative changes in rules affecting commencement of actions in supreme and county courts. The new rules are highlighted as follows:

### *1. In General*

Prior to July 1, 1992, satisfaction of the statute of limitations was inextricably linked to service of the summons and complaint or summons and notice upon the defendant.[62] Failure to comply strictly with New York service statutes would result in a dismissal for lack of jurisdiction and if the statute of limitations had run, the plaintiff did not get the benefit of a six month extension under CPLR 205(a).[63] Effective September 1, 1991, CPLR 306-a required that the summons and proof of service be filed with the clerk of the court within thirty days after service was complete.[64] The statute applied to actions commenced in the supreme or county courts, including third party actions.[65] It was designed to raise revenue, but many lawyers did not comply with the statute and the legislature was forced to pass Chapter 216 of the Laws of 1992, which establishes mandatory filing require-

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56. *See* Marc M. Arkin, New York's New Commencement By Filing Law, Special Alert Available from Matthew Bender (an analysis of practice under Chapter 216 of the Laws of 1992).

57. *See* Robert A. Barker, *Provisions of The New Filing Law*, N.Y. L.J., July 20, 1992, at 3.

58. *See* Fred L. Shapiro, *Commencement by Filing Legislation*, 19 WESTCHESTER BAR J. 303 (Fall 1992).

59. *See* Carpinallo, The Commencement-by-Filing Law (written remarks before New York State Trial Lawyers Institute) (copy on file in Barclay Law Library).

60. *See* James N. Blair and Paul H. Aloe, *New Commencement by Filing Law: A Practitioner's Survival Guide*, N.Y. L.J., June 26, 1992, at 1.

61. *See* Bert Bauman, New Commencement By Filing Law, (written remarks before New York State Trial Lawyers Institute) (copy on file in Barclay Law Library) and NYSTLA QUICK TIP (written analysis of commencement of a special proceeding in supreme and county courts of New York) (copy on file in Barclay Library).

62. *See* Jay C. Carlisle, *Civil Practice, 1989 Survey of N.Y. Law*, 41 SYRACUSE L. REV. 63, 89-94 (1990).

63. *See* Jay C. Carlisle, *Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 101-108 (1989).

64. *See* Carlisle, *Civil Practice, 1991 Survey*, *supra* note 34, at 78.

65. *Id.*

ments for all civil actions in supreme and county courts.[66] The new legislation also seems to apply to actions filed in the surrogate's court,[67] but actions in other courts, including the court of claims, must be commenced by service of process upon the defendant.[68] The new statutory scheme became effective July 1, 1992, and applies to civil actions and proceedings commenced thereafter. There was a transitional provision which permitted commencement of all civil actions by service of process on the defendant until December 31, 1992.[69] If the filing fee required by CPLR 306-a was not paid by December 31, 1992, the "old style" action was deemed dismissed without prejudice. In this respect, the practitioner should note *Metropolitan Property & Casualty Insurance Co. v. Roosevelt*,[70] where Justice Joan Lefkowitz authorized the late filing of a summons because the filing fee had been paid in 1992.[71]

### 2. *Summary of Changes*

#### *(a) CPLR 203*

The applicable statute of limitations stops running in supreme and county court civil actions when the summons and complaint or summons and notice is properly filed with the clerk of the court.[72] The plaintiff, or his representative, must pay $170 for the index fee, obtain a receipt, and be sure the summons indicates the index number assigned and the date of filing. If "circumstances prevent filing," e.g., the clerk's office is closed, new CPLR 203(c)(2) provides that signing of a judge's order will mark commencement of the action if the order is filed within five days.[73] REMEMBER, under the new filing law,

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66. *See Imminent New Filing*, *supra* note 55, at 1.

67. *See id.*

68. *Id.*

69. *See id.*

70. 154 Misc. 2d 336, 593 N.Y.S.2d 923 (Sup. Ct. Rockland Co. 1993).

71. *Id.* at 336, 593 N.Y.S.2d at 923 (Plaintiff started an action on August 14, 1992, and defendant defaulted. Plaintiff wanted to enter a default judgment but had failed to file the summons and proof of service. Plaintiff had purchased an index number in 1992 and moved for a nunc pro tunc order of filing. The Supreme Court pointed out that prior to December 31, 1992, one could commence an action without filing of summons and complaint or summons and notice with the Supreme Court. The issue was whether plaintiff's application was subject to the new law. Justice Lefkowitz authorized the late filing because the fee was paid in 1992, which met the implicit effective date requirements.).

72. *See* N.Y. CPLR 306-a (McKinney 1990 & Supp. 1992).

73. *See* N.Y. CPLR. 203(c)(2) (McKinney 1990 & Supp. 1992).

CPLR 203(b)(5)[74] no longer governs supreme and county court actions but it is applicable in other courts.[75]

*(b) CPLR 205*

CPLR 205 codifies the applicable case law. There is no six month extension if a civil action filed in supreme or county court is dismissed for failure to obtain jurisdiction over the defendant.[76] However, CPLR 306-b(b) allows the plaintiff to commence a second action within 120 days after an automatic dismissal for failure to file "proof of service" or within 120 days after a jurisdictional dismissal.[77]

*(c) CPLR 304*

An action in the supreme or county court is commenced by the filing of a summons and complaint or summons with notice with the clerk of the court.[78] A special proceeding is commenced by filing of a notice of petition or order to show cause with the clerk together with the $170 index fee.[79] As noted under CPLR 203, a court order may establish the commencement date if circumstances prevent filing.[80]

*(d) CPLR 305*

The summons must indicate the index number assigned and the date of filing. The third-party summons must also indicate the date of filing. If the summons is served without the index number and date of filing, it may be dismissed on jurisdictional grounds.[81]

*(e) CPLR 306-a; CPLR 1007 (third party actions)*

Third party actions require filing the summons and complaint or summons with notice and paying the $170 fee under CPLR 8018.[82] A

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74. *See id.* 203(b)(5) (McKinney 1990 & Supp. 1992).
75. *Id.*
76. *See* sources cited *supra* note 55.
77. *See* N.Y. CPLR 306-b(b) (McKinney 1990 & Supp. 1992).
78. *See id.* 306(a) (McKinney 1990 & Supp. 1992).
79. *See* sources cited *supra* note 55.
80. *See* N.Y. CPLR 203(c)(2) (McKinney 1990 & Supp. 1992).
81. It is possible the court will consider a summons served without the index number and date of filing on it a mere "irregularity" that can be cured, but why take the chance?
82. *See* N.Y. CPLR 1007 (McKinney 1976 & Supp. 1992).

third party action requires payment of an additional fee but no new index number will be assigned.[83]

*(f) CPLR 306-b*

Within 120 days from the date plaintiff files the summons and complaint or summons and notice, he must also file proof of service.[84] If the plaintiff fails to do so, the complaint is automatically dismissed without prejudice and without costs.[85] The defendant cannot waive the filing requirement.[86] If the statute of limitations is four months or less, i.e., Article 78 proceedings, proof of service must be filed not later than fifteen days after the statute of limitations expires.[87]

If the action was timely commenced but dismissed "for failure to effect proper service," i.e., failure to file proof of service within the first 120 days, or failure to make proper service pursuant to the strict compliance requirements in New York, plaintiff may refile and receive another 120 days to complete the service. If service is not made during the first 120 days, the original action is deemed dismissed and the second 120 days starts immediately upon the date the action is automatically dismissed.[88] If service was attempted but "improper" for failure to comply with New York's strict compliance requirements, the second 120 days starts from the dismissal "despite the expiration of the statute of limitations after commencement of the original action."[89]

Thus, if a tort action with a three year statute of limitations accrued on April 1, 1990, and the plaintiff files a summons and complaint or summons and notice on March 30, 1993, the action is timely. However, plaintiff must properly serve defendant and file proof of service within 120 days from March 30, 1993. Assume plaintiff purports to serve defendant on May 1, 1993, and files proof of service on that date. Defendant answers on June 1, 1993, and raises the affirmative defense of improper service. Plaintiff does not move to strike the defense and the court decides service was improper (no jurisdiction) on

83. *Id.*
84. *See* N.Y. CPLR 306-b (McKinney 1990 & Supp. 1992).
85. *Id.*
86. *See* sources cited *supra* note 55.
87. *See* N.Y. CPLR 306-b(b) (McKinney 1990 & Supp. 1992).
88. *See id.* 306-b (McKinney 1990 & Supp. 1992).
89. *Id.*

June 1, 1996! Plaintiff has 120 days from that date to commence a new action, properly serve the defendant and file proof of service.

*3. Procedural Steps*

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| First: | Prepare the summons with notice or summons and complaint as you would ordinarily, except the summons should provide for entering the index number and the date of filing. |
| Second: | Go to the Clerk's office with copies of the papers prepared in step one. |
| Third: | File the papers. When filing with the $170 fee for the index number be sure to ask the clerk for a receipt and a copy of the papers date-stamped. If the clerk advises that he will stamp and file the papers at a later date, inform him politely that it is extremely important for you to have the papers date-stamped immediately. Failure to do so could result in a clerical filing error that might cause your papers to be filed after the statute of limitations has run. This could result in a dismissal on statute of limitations grounds. Also, if there are two or more clerks of the court, be sure to file with the proper clerk. If you are not sure, file with both clerks.[90] |
| Fourth: | Enter the index number and date of filing on the summons to be served upon the defendant(s). |

90. *See* David D. Siegel, *The Filing System That Takes Over On January 1, 1993, Part III*, N.Y. ST. L. DIG., No. 395 (1992). Professor Siegel discusses who is "the clerk of the court." He reminds us that by statute it is the county clerk who is the clerk of both the supreme court and the county court in her county. *See* N.Y. COUNTY LAW §§ 525, 909 (McKinney 1991 and Supp. 1993). However, in some places the supreme court and county court have separate nonjudicial officers who do the filing for those courts. Their offices may even be separated geographically. Professor Siegel suggests: "To be sure of satisfying both the practicalities and the technical law, we've heard some lawyers say that they file initiatory papers with both, when there are separate offices." Siegel, *supra*.

Fifth: Serve the defendant(s) within 120 days of the filing in step three. REMEMBER that New York decisional law requires STRICT COMPLIANCE for service of summons and complaint or summons and notice. Failure to strictly comply with the service statutes may result in a jurisdictional dismissal. The dismissal is not fatal because plaintiff will have another 120 days from the date of dismissal to commence a new action and make proper service, but who wants to do that?

Sixth: File proof of service within 120 days of the filing.

### *4. New York Rule Differs From Federal Practice*

Lawyers should note the following important differences between federal filing requirements and the New York filing requirements. First, in federal court actions the defendant must be served within 120 days from the date the summons and complaint is filed, but proof of service can be made thereafter. CPLR 306-a requires both filing, service, and proof of service within the 120 day period. Also, in federal practice the clerk of the court issues the summons. Second, under federal law the 120 day service requirement is not applicable if service is made on a defendant in a foreign country. New York's new filing law does not provide for this exception. Third, Rule 6 of the Federal Rules of Civil Procedure provides for a motion to enlarge the 120 day period.[91] The New York law contains no such provision.

How will the New York filing law affect federal diversity actions? In these actions timely service for limitations purposes must be measured by state, rather than federal law on the authority of *Walker v. Armco Steel Corp.*[92] Can the practitioner rely on the 120 days of CPLR 306-b, or the 120 days of Rule 4(j) of the Federal Rules of Civil Procedure? Professor Siegel suggests "[a] better answer than the right answer is to take steps that would satisfy both of them."[93]

### *5. Impact on Provisional Remedies*

The new laws do not affect provisional remedies but the practitioner should remember that in attachment practice, service must be

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91. *See* FED. R. CIV. P. 6.

92. 446 U.S. 740 (1980).

93. *See* David D. Siegel, *Filing System, Part IV*, N.Y. ST. L. DIG., No. 396 (1992). Kudos to Professor Siegel for his four digest articles discussing the new filing laws.

made within the sixty day period required by CPLR 6213. Also, in *lis pendens* cases, under CPLR 6512 the technical effectiveness of the notice provided by a notice of pendency depends on service within 30 days after filing.

*6. Default Judgements*

Assuming proof of service is filed within the 120 period following filing, the new scheme does not appear to impact on default judgments, except that a defaulting defendant, who has a valid claim that jurisdiction was not obtained, may get out from under the default under CPLR 5015(a)(4). In this situation, the plaintiff would be free to take advantage of CPLR 306-b, possibly at a dramatically long delay from the commencement of the original action.

*7. RJI Forms*

Requests for Judicial Intervention ("RJI") are not affected by the new legislation. Remember that under the new IAS rules, effective January 1, 1993, preliminary conferences will occur within forty-five days of the filing of an RJI, unless the parties complete and submit an agreed-upon disclosure schedule on a form order before the conference.[94]

*8. Matrimonial Actions*

Matrimonial actions are commenced by filing, and not service. Although the new laws contain minor amendments to Domestic Relations Law 211,[95] it should be noted that statute of limitations problems seldom occur in matrimonial matters.

*9. New Rules Not Applicable in Inferior Courts*

The Uniform District Court Act, the New York City Civil Court Act, the Uniform City Court Act, and the Uniform Justice Court Act specifically state the new filing laws do not apply in district, city, civil, and justice courts.[96] Also, the new laws do not apply in the Court of Claims.[97] Thus, the practitioner must remember that in these courts the statute of limitations will be stopped only by properly making ser-

94. *See supra* note 15 and accompanying text.
95. *See* N.Y. DOM. REL. LAW § 211 (McKinney 1988 & Supp. 1992).
96. *See supra* notes 46-49 and accompanying text.
97. *See* N.Y. CT. CL. ACT § 10 (McKinney 1989 & Supp. 1992).

vice of summons and complaint or summons and notice on the defendant. If the plaintiff fails to do so and the statute of limitations has expired, the action is dismissed and plaintiff will not be allowed to recommence it.[98]

*10. Problem Areas (What if Things Go Wrong?)*

*(a) Single Defendant Lawsuits*

CPLR 306-b(a) and (b) must be read together because, even if the plaintiff fails to comply with the 120 day requirement of subsection (a), he still has a second bite at the apple. The following examples illustrate how the new scheme works.

*EXAMPLE I*

The summons and complaint are filed on April 1, 1993, the day the statute of limitations expires. The 120 day period within which to serve defendant and file proof of service runs out on August 1, 1993. If proof of service is not filed, or if defendant does not appear, or if defendant is not served by August 1, 1993, (and proof of service made on that date) the action is "deemed dismissed." But, according to CPLR 306-b(b), plaintiff has 120 days from August 1, 1993 (or until December 1, 1993), to file a "new" summons and complaint or summons and notice, purchase a "new" index number, properly serve the defendant, and file proof of service in the "new" action against the defendant.

*EXAMPLE II*

As in Example I, filing occurs on April 1, 1993. The process server subsequently returns with an affidavit of service, which indicates that service was made on June 1, 1993. Proof of service is filed within a few days after plaintiff's lawyer receives the affidavit. Defendant makes a timely motion before Justice S to dismiss, correctly showing (as it turns out) that service was botched. Justice S's calendar rules are such that the motion is not heard until August 1, 1993 and not decided until December 1, 1993, when by decision order Justice S dismisses the action. CPLR 306-b(b) allows plaintiff 120 days from December 1, 1993 (or until April 1, 1994), to file a summons and

98. *See* Carlisle, *Civil Practice, 1991 Survey, supra* note 34, at 123.

complaint or summons and notice, serve the defendant and file proof of service in a "new" action against the defendant.

*EXAMPLE III*

As in Example I, filing occurs on April 1, 1993. The process server makes service by leave and mail, or nail and mail under CPLR 308 and returns with an affidavit of service which indicates that the leave or nail was completed on July 15, 1993, and the mailing was completed on July 25, 1993. CPLR 308(2) and (4) require that proof of service be filed with the clerk of the court designated in the summons within twenty days of the mailing. Does the plaintiff have until August 5, 1993, to file proof of service or does the 120 day period in CPLR 306-b(a) govern and require plaintiff to file proof of service by August 1, 1993? If plaintiff fails to make proof of service by August 1, 1993, the action will automatically be deemed dismissed. Plaintiff will then have to file a "new" action, purchase a new index number, and start over again.

*(b) Multi-Defendant Lawsuits*

In multi-defendant lawsuits, filing with the clerk of the court will satisfy the statute of limitations as to all defendants, but proof of service must be filed within 120 days as to each defendant who has not appeared. The action is "deemed dismissed" as to any defendant who has not been served, and as to whom proof of service has not been filed, by the end of the 120 day period. The examples above also serve to illustrate the consequences of dismissal as to one of several co-defendants. Note that when a "new" action is commenced as to the co-defendant, separate actions (the original action plus the "new" action) exist. As a consequence, assuming the "new" action satisfies the CPLR scheme, plaintiff should make a motion to consolidate the original and "new" actions.

Finally, mention should be made of the obvious fact that judicial interpretation will be crucial to the application of the new filing laws and until decisions are rendered the practitioner should proceed with caution.[99] Also, it would appear that defendants draw no terminal

99. *See* Farmer v. King, No. 17618 (Sup. Ct. Westchester Co. Oct. 14, 1992). In *Farmer*, petitioner timely began a proceeding by filing an order to show cause and petition to challenge the result of a primary election. The petition was dismissed for failure to effectuate it within the time required by the order to show cause. Within fifteen days