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CPLR 4401: Dismissal of Cross-Claim for Contribution Unwarranted Despite Cross-Claimant's Opening Statement Exculpating Codefendants

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clusive recovery feature of the worker's compensation statute.[123] Also left unresolved by the *Feldman* court is the possibility of successive contribution claims by the defendant. The potential for harassment of the third-party defendant in this situation has been noted where a small incremental amount in excess of his apportioned share is loaned to the defendant.[124] Moreover, while a third-party provided the loan proceeds in *Feldman,* the court's rationale would be applicable equally to cases in which the funds came directly from the plaintiff. In either case, the incentives for collusion are great where the named tortfeasor is insolvent. Consequently, the effect, if not the spirit of the *Klinger* rule, will be diminished substantially by permitting a *Feldman*-type agreement.

Ellen R. Dunkin

ARTICLE 44—TRIAL MOTIONS

CPLR 4401: Dismissal of cross-claim for contribution unwarranted despite cross-claimant's opening statement exculpating codefendants

A motion to dismiss a cause of action based on admissions in the opening statements of counsel which effectively preclude recovery may be made pursuant to CPLR 4401.[125] Although the statute

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[123] *See* note 122 *supra.*

[124] *See* CPLR 5230, commentary at 37-38 (McKinney Supp. 1980-1981). Successive claims would occur if the court allowed for assertion of the contribution claim through a "bucket brigade" approach. *Id.* at 37. This system of recovery applies where a defendant already has paid his exact share of the judgment. Each additional dollar he pays is one over and above his share and therefore collectible from the third-party defendant. Once the defendant collects that dollar, he can pay the plaintiff and thus, has another claim against the third-party defendant. *Id.* Rather than require the defendant to assert one contribution claim at a time, another commentator has postulated that the defendant may be entitled to receive the full amount owing once he pays just one dollar. *See* WK&M ¶ 1402.01a, at 14-94.

[125] CPLR 4401 (1963) provides:

> Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.

Although not included expressly, dismissal on the basis of admissions in a counsel's opening statement is within the purview of the statute. SECOND REP. at 306; *see* CPLR 4401, commentary at 212 (1963). The practice of using the motion in this fashion is well established in New York. *See, e.g.,* Hoffman House v. Foote, 172 N.Y. 348, 356, 65 N.E. 169, 171 (1902); Schaefer v. Karl, 43 App. Div. 2d 747, 747, 350 N.Y.S.2d 728, 729 (2d Dep't 1973); Denenfeld v. Baumann, 40 App. Div. 502, 503, 58 N.Y.S. 110, 110 (1st Dep't 1899). Indeed,

typically has been used by defendants to obtain dismissal of the plaintiff's claim,[126] the broad language of the statute appears to contemplate that in multiparty litigation an admission in the opening remarks of defense counsel will support dismissal of a cross-claim as well.[127] Where dismissal of a cross-claim is sought, however, particularly a *Dole* cross-claim for contribution,[128] considera-

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notwithstanding that a motion to dismiss for failure to state a cause of action falls within the ambit of CPLR 3211(a)(7), when the motion is predicated on admissions made by counsel, CPLR 4401 affords the proper procedural vehicle for seeking dismissal. *See* 4 WK&M ¶ 4016.14.

A dismissal based on counsel's opening statement may be predicated on any of three theories: insufficient facts to state a cause of action, admissions in the answer sufficient to negate as a matter of law an element necessary to the cause of action, or admissions or statements of fact in the opening statement which irrebuttably destroy the case. Gilbert v. Rothschild, 280 N.Y. 66, 70, 19 N.E.2d 785, 786 (1939); Hoffman House v. Foote, 172 N.Y. 348, 350, 65 N.E. 169, 169 (1902); 4 WK&M ¶ 4016.14. In order to justify dismissal, the admissions should be of a kind "formally intended to be part of the pleadings," Martin Fireproofing Corp. v. Maryland Cas. Co., 45 Misc. 2d 354, 359, 257 N.Y.S.2d 100, 106 (Sup. Ct. Erie County 1965), *aff'd*, 26 App. Div. 2d 910, 275 N.Y.S.2d 375 (4th Dep't 1966) (citing Lloyd v. R.S.M. Corp., 251 N.Y. 318, 320, 167 N.E. 456, 456 (1929)), and not evidentiary in nature such as inadvertent or inconclusive factual admissions. *See* Gracie Square Realty Corp. v. Choice Realty Corp., 305 N.Y. 271, 278, 113 N.E.2d 416, 419 (1953); Lefler v. Clark, 247 App. Div. 402, 403-04, 287 N.Y.S. 476, 479 (1st Dep't 1936), SIEGEL § 402; 4 WK&M ¶ 4016.15. It is clear that the mere omission from the opening statement of elements necessary to establish a prima facie case is not ordinarily grounds for dismissal. *See* Rivera v. Board of Educ., 11 App. Div. 2d 7, 8-9, 201 N.Y.S.2d 372, 374-75 (1st Dep't 1960); Goodman v. Brooklyn Hebrew Orphan Asylum, 178 App. Div. 682, 685, 165 N.Y.S. 949, 951 (2d Dep't 1917). Dismissal is proper only where counsel "deliberately and intentionally states or admits some fact that, in any view of the case, is fatal to the action." Hoffman House v. Foote, 172 N.Y. 348, 351, 65 N.E. 169, 169 (1902).

[126] *See, e.g.*, Gilbert v. Rothschild, 280 N.Y. 66, 70, 19 N.E.2d 785, 786 (1939); Hoffman House v. Foote, 172 N.Y. 348, 350-51, 65 N.E. 169, 169 (1902); Runkel v. City of New York, 282 App. Div. 173, 179, 123 N.Y.S.2d 485, 491 (2d Dep't 1953) (per curiam).

[127] CPLR 4401 is not limited by its language to motions to dismiss the main action. Motions to dismiss counterclaims, cross-claims, interpleader claims, and third-party claims may all be cognizable under this provision. *See* SECOND REP. at 306-08; 4 WK&M ¶¶ 4016.14, 4401.01. Nevertheless, no case has been found which applies CPLR 4401 to a *Dole* cross-claim for contribution. *But cf.* Pine v. Solow, 69 App. Div. 2d 760, 760-61, 415 N.Y.S.2d 3, 5 (1st Dep't 1979) (admission in pretrial examination which exonerates codefendant not fatal to cross-claim for contribution). Notably, it has been suggested that CPLR 4401 ought to be a basis for dismissals of affirmative defenses as well. 4 WK&M ¶ 4016.14. *But see In re* Humphrey, 191 App. Div. 291, 294-95, 181 N.Y.S. 169, 170-72 (1st Dep't 1920) (Smith, J., concurring).

[128] A *Dole* claim for contribution is the hybrid result of the comingling of the concepts of indemnification and contribution. *See generally* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). It is referred to alternatively as a claim for "partial indemnification," *id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386, or "relative contribution," Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972). Whereas a traditional cross-claim may be independent of the main action and remain before the court even after dismissal of a plaintiff's case, *see* CPLR

tion must be given to a party's dual role as defendant in the main action and plaintiff on the cross-claim. Recently, in *De Paolis v. City of New York*,[129] the Supreme Court, Kings County, emphasizing the dual capacity of the *Dole* cross-claimant, held that a defense counsel's opening statement which exculpated codefendants did not justify dismissal of a cross-claim for contribution.[130]

In *De Paolis*, an automobile driven by Josephine Prestianni collided at an intersection with a car owned by Rocco Schirripa and operated by his son, Joseph.[131] The plaintiff, a passenger in the latter's vehicle, instituted a negligence action against the owners and operators of both cars to recover for personal injuries sustained in the accident.[132] In addition, the plaintiff sued the City of New York based on its negligent maintenance of a stop sign at the intersection.[133] Cross-claims for an allocation of liability were filed by each defendant against all codefendants.[134] At trial, notwithstanding its cross-claim against the Schirripas, the city declared in its opening statement that the sole proximate cause of the collision was Prestianni's negligent failure to stop at the corner.[135] The attorney for the Schirripas thereupon moved for dismissal of the city's cross-claim against them.[136]

3019(b) and commentary at 230 (1974), a contribution claim is ordinarily secondary in nature and dependent on the main action for its continued existence, *see* Tarantola v. Williams, 48 App. Div. 2d 552, 554, 371 N.Y.S.2d 136, 140 (2d Dep't 1975); Torrence v. Stenson, 87 Misc. 2d 697, 699, 386 N.Y.S.2d 605, 607 (Onondaga County Ct. 1976); 3 WK&M ¶ 3019.13.

Dole claims are accorded a significant degree of procedural latitude. This is attributable in part to the notion that indemnification and contribution rights are essentially equitable in character. Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 465 F. Supp. 790, 794 (S.D.N.Y. 1978), *aff'd*, 617 F.2d 936 (2d Cir. 1980); Blum v. Good Humor Corp., 57 App. Div. 2d 911, 912, 394 N.Y.S.2d 894, 896 (2d Dep't 1977). Laches will rarely be a defense to a *Dole* claim, and apportionment of liability may be made despite the failure to request it in the pleadings. Howard v. Chalk, 58 App. Div. 2d 526, 526, 395 N.Y.S.2d 192, 194 (1st Dep't 1977); CPLR 3019, commentary at 260-62 (1974); *see* Caucci v. Fesko, 76 Misc. 2d 614, 349 N.Y.S.2d 886 (Sup. Ct. Westchester County 1973). Courts also allow *Dole* claims to be raised before they technically accrue. *See* note 154 *infra*. For an analysis of the history of the contribution doctrine in New York, see Note, *The New Right of Relative Contribution:* Dole v. Dow Chem. Co., 37 ALBANY L. REV. 154, 155 (1972); *The Survey*, 47 ST. JOHN'S L. REV. 185 (1972).

[129] 105 Misc. 2d 307, 432 N.Y.S.2d 322 (Sup. Ct. Kings County 1980).

[130] *Id.* at 311; 432 N.Y.S.2d at 325.

[131] *Id.* at 308; 432 N.Y.S.2d at 323.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

Justice Weisberg denied the motion and held that the remarks by the city's counsel exculpating its codefendants did not justify dismissal of the city's cross-claim for contribution.[137] In so holding, the court characterized as "the critical fact" the dual capacity in which the city appeared.[138] As a defendant in the main action, the court noted, the city was trying to establish its freedom from liability.[139] As a cross-claimant for contribution, on the other hand, it was trying to establish the shared responsibility of its codefendants.[140] The inherent inconsistency in these postures persuaded the court that the city's admission was a permissible "trial tactic."[141] In the court's view, the statement that only one codefendant caused the accident was consistent with the city's denial of liability in the main action, and therefore not a basis for dismissing the cross-claims against the remaining defendants.[142] The court cautioned, however, that the same conclusion would not necessarily have been reached if the cross-claim defendants, the Schirripas, were not defendants in the main action, but rather had been impleaded by the city.[143]

The decision in *De Paolis* is significant for its creation of a "permissible inconsistency" exception in the application of CPLR 4401 to admissions in the opening statement.[144] If it is generally

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[137] *Id.* at 311; 432 N.Y.S.2d at 325.

[138] *Id.* at 310; 432 N.Y.S.2d at 324. Notably, the court rejected the city's contention that it had made no admission of fact, finding that the admissions made by the city's counsel would have been sufficient, in the absence of other factors, to warrant dismissal. *Id.*

[139] *Id.* at 310; 432 N.Y.S.2d at 325.

[140] *Id.*

[141] *Id.* at 310; 432 N.Y.S.2d at 324. Justice Weisberg pointed out that CPLR 1401 and CPLR 1007 admit of certain inconsistencies. In particular, he noted, action for contribution may be brought although it has not yet technically accrued. *Id.* at 310; 432 N.Y.S.2d at 325.

[142] *Id.*

[143] *Id.*

[144] After initially determining that the opening statement of counsel included an admission of the type which would require dismissal of the defendant's cross-claim under the *Hoffman* guidelines, the court distinguished the "context" in which the city's admission had occurred, thus carving out an exception to *Hoffman*. *Id.* at 309-10, 432 N.Y.S.2d at 324-25.

It is submitted, however, that the court did not need to create an exception to *Hoffman* to resolve the case. It is suggested that the statements in *De Paolis* were not sufficient to constitute a fatal admission under the criteria enunciated by *Hoffman* and its progeny. The *Hoffman* court stated that in order to justify dismissal the admission in the opening must be such that counsel's case is "completely ruined." 172 N.Y. 348, 350-51, 65 N.E. 169, 169 (1902). In *De Paolis*, it may be persuasively argued that counsel's statements were mere assumptions as to the main action rather than fatal admissions regarding the cross-claim. The distinction between admissions of fact and assumptions was discussed in Brick v. Cohn-Hall-Marx Co., 283 N.Y. 99, 27 N.E.2d 518, 520 (1940). In *Brick*, the defendant sought dis-

accepted, a defendant will not risk dismissal of his cross-claim for contribution merely by making admissions in his opening statement inconsistent with the maintenance of those claims.[145] As long

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missal of a second action pursuant to the predecessor of CPLR 4401 based on an admission in a prior action. *Id.* at 105, 27 N.E.2d at 521. In the prior action, the plaintiff had asserted that a 6-year breach of contract statute of limitations applied. After dismissal, he reasserted his claim under a theory of breach of covenant by declaring the contract was under seal. The defendant argued that by asserting that the 6-year breach of contract statute of limitations applied in the prior action, plaintiff admitted that the contract was not under seal. *Id.* at 102-03, 27 N.E.2d at 519-20. The Court denied the motion to dismiss, stating that the declaration of erroneous legal conclusions is not binding on a party. *Id.* at 105, 27 N.E.2d at 521. The *Brick* Court intimated that, at best, the admission could be used to attack credibility. *Id.* at 106, 27 N.E.2d at 521. The Court concluded that "*assumptions* for the purposes of one suit [need not] be considered admissions in a second." *Id.* (emphasis added). Therefore, it is submitted that it is consistent with *Brick* to apply the admissions in *De Paolis* only to the main action. The contribution claim is, in reality, a separate "action" joined merely for purposes of convenience. *See* Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 375 N.E.2d 29, 32, 404 N.Y.S.2d 73 (1978); CPLR 1007, commentary at 11 (McKinney Supp. 1980).

Since the purpose of an opening statement is to convey to the court and jury the general nature and issues of the case, Best v. District of Columbia, 291 U.S. 411, 415 (1934), and the admissions which form the basis of a CPLR 4401 motion should be intended as part of the pleading, Martin Fireproofing Corp. v. Maryland Gas Co., 45 Misc. 2d 354, 359, 257 N.Y.S.2d 100, 106 (Sup. Ct. Erie County 1965), *aff'd*, 26 App. Div. 2d 910, 275 N.Y.S.2d 375 (4th Dep't 1966), the court could have buttressed its decision by analogizing to the treatment of admissions in the pleadings. Admissions in the pleadings are conclusive in the judicial proceeding in which they are made but only evidentiary in nature when offered in a second action. *E.g.*, Walsh v. New York Cent. & H.R.R., 204 N.Y. 58, 66, 97 N.E. 408, 411 (1912); *see* FISCH, NEW YORK EVIDENCE § 803 (2d ed. 1977); W. RICHARDSON, EVIDENCE § 217 (10th ed. 1973); *cf.* Talbot v. Laubheim, 188 N.Y. 421, 425, 81 N.E. 163, 165 (1907) (admission in counterclaim submitted along with defendant's general denial in answer not conclusive in the main action since it pertains to counterclaim only). This supports the conclusion in *De Paolis*. Since a *Dole* claim does not technically arise until after judgment is rendered, *see* note 128 *supra*, an admission in the main action should not be fatal to the subsequently accruing *Dole* claim. *Cf.* CPLR 3123(b) (admission of fact made at request of party to action is limited in effect to pending action and does not constitute admission for any other purpose or proceeding).

[145] It is submitted that the court's holding in *De Paolis* is inherently sound and should be followed. In analogous situations, courts have long tolerated certain inconsistencies in trial strategy in order to avoid prejudice to a party appearing in two capacities. For example, when a "servant" commits a tort while under the "master's" control, a plaintiff may sue both the servant and the master jointly. In such a case, the master frequently is compelled to assert his servant's lack of culpable conduct in order to defeat the plaintiff in the main action. If this assertion were characterized as an "admission," the master could not require the servant to indemnify him for damages awarded to the plaintiff. This dubious result, of course, does not obtain. *See* Brady v. Stanley Weiss & Sons, Inc., 6 App. Div. 2d 241, 244-45, 175 N.Y.S.2d 850, 854 (4th Dep't 1958); Ganley v. Kahn, 31 Misc. 2d 856, 857, 220 N.Y.S.2d 713, 715 (Sup. Ct. Kings County 1961).

In addition, the result in *De Paolis* is consistent with the general rule permitting hypothetical pleadings, *see, e.g.*, Ganley v. Kahn, 31 Misc. 2d 856, 857, 220 N.Y.S.2d 713, 715 (Sup. Ct. Kings County 1961), and, more particularly, the pleading of hypothetical cross-

as his opening relates to his defense of the main action, he need not fear that those statements may undermine his *Dole* status.[146] Indicative of the present judicial reluctance to dismiss a cause of action on the basis of counsel's opening statement,[147] this approach should prove particularly beneficial in multiparty tort cases. Indeed, to demand at the outset absolute consistency in trial strategy in cases involving numerous parties varyingly related to each other would require counsel for each party to devise a complex opening in order to detail the nature of his claims without compromising his right to assume different tactical postures as the trial progressed. The *De Paolis* rule commendably avoids this problem by limiting the binding effect of a party's admissions when he appears in a dual capacity.

Expressly left open in *De Paolis* is whether the same result

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claims, *see* 50 New Walden, Inc. v. Federal Ins. Co., 22 App. Div. 2d 4, 5, 253 N.Y.S.2d 383, 385 (4th Dep't 1964)(per curiam); Brady v. Stanley Weiss & Sons, Inc., 6 App. Div. 2d 241, 244, 175 N.Y.S.2d 850 (4th Dep't 1958); 3 WK&M ¶ 3019.21. The oral admissions in *De Paolis*, it is submitted, are in the nature of alternative pleadings.

[146] It is suggested that a dismissal would be justified if the admission is inconsistent with both the cross-claim and any defense in the main action. When the statements constituting the admission do not support any defense or theory of recovery, the *De Paolis* rationale should not apply.

[147] *See* Hoffman House v. Foote, 172 N.Y. 348, 350-51, 65 N.E. 169, 169 (1902); Schaefer v. Karl, 43 App. Div. 2d 747, 747, 350 N.Y.S.2d 728, 729 (2d Dep't 1973); Davidson v. Hillcrest Gen. Hosp., 40 App. Div. 2d 693, 693, 336 N.Y.S.2d 296, 297 (2d Dep't 1972); Malcolm v. Thomas, 207 App. Div. 230, 230, 201 N.Y.S. 849, 849 (2d Dep't 1923), *aff'd mem.*, 238 N.Y. 577, 144 N.E. 899 (1924); SIEGEL § 402. *But see* Gilbert v. Rothschild, 280 N.Y. 66, 19 N.E.2d 785 (1939); Payton v. Brooklyn Hosp., 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964), *aff'd mem.*, 19 N.Y.2d 610, 224 N.E.2d 891, 278 N.Y.S.2d 398 (1967). The power to dismiss based on an opening statement is exercised cautiously, with all doubts resolved in favor of the party against whom dismissal is sought. Best v. District of Columbia, 291 U.S. 411, 415-16 (1934); French v. Central N.Y. Power Corp., 275 App. Div. 238, 239, 89 N.Y.S.2d 543, 545 (4th Dep't 1949) (per curiam); *see* Schaefer v. Karl, 43 App. Div. 2d 747, 747, 350 N.Y.S.2d 728, 729 (2d Dep't 1973); Aesman v. Fox, 26 App. Div. 2d 739, 272 N.Y.S.2d 94, (3d Dep't 1966); Covell v. H.R.H. Constr. Corp., 24 App. Div. 2d 566, 262 N.Y.S.2d 370 (2d Dep't 1965), *aff'd*, 17 N.Y.2d 709, 216 N.E.2d 710, 269 N.Y.S.2d 718 (1966).

Indeed, as a general rule, if there is any doubt as to the competency of a claim, courts tend to permit introduction of all the evidence before they render judgment. SIEGEL § 402. One advantage in this approach is that res judicata consequences will attach to the judgment. CPLR 5013 provides that dismissal before the close of a proponent's evidence is not with prejudice unless specifically so stated. CPLR 5013 (1963). However, dismissal after the close of a proponent's evidence will have res judicata effect. CPLR 5013 applies to third-party claims and cross-claims as well as plaintiff's main claim. *See* SIEGEL § 402; 5 WK&M ¶ 5013.01-.02. Thus, a dismissal based on the opening statements of counsel would most likely not be on the merits. *See* Goodman v. Brooklyn Hebrew Orphan Asylum, 178 App. Div. 682, 165 N.Y.S. 949 (2d Dep't 1917); Steele v. Wells, 20 N.Y.S. 736 (Sup. Ct. Gen. T. 1st Dep't 1892) (per curiam).

would obtain if the parties seeking dismissal were third-party defendants impleaded by the city itself.[148] Although the court intimated that a defendant who impleads a third party may risk dismissal under CPLR 4401 by making admissions in his opening statement inconsistent with the *Dole* claim,[149] it is submitted that the *De Paolis* rule should apply to all contribution claims irrespective of the form of their assertion.[150] Apart from the mechanics of interposing the claim, there is little difference between a cross-claim and a third-party claim for contribution.[151] The mere fact that a party has entered an action as a third-party defendant rather than as a codefendant, it is submitted, is not a distinction significant enough to justify denying him the tactical latitude afforded by the *De Paolis* rule.[152] In either case, the defendant will

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[148] It may well be that in limiting the applicability of its holding, the court was suggesting that a defendant, contemplating impleader of a third party for contribution, is to be charged with the responsibility of anticipating and minimizing his need to espouse conflicting theories of liability at trial. This reasoning, if indeed inferable from the court's intimation that disparate results may obtain depending on the nature of the claim to which the 4401 motion was addressed, ignores the substantial economic and equitable considerations which militate in favor of adjudicating all liability in one proceeding. *See generally* SIEGEL § 155.

[149] 105 Misc. 2d at 310, 432 N.Y.S.2d at 325.

[150] *Cf.* Greenberg v. City of Yonkers, 45 App. Div. 2d 314, 318, 358 N.Y.S.2d 453, 457 (2d Dep't 1974), *aff'd mem.*, 37 N.Y.2d 907, 340 N.E.2d 744, 378 N.Y.S.2d 382 (1975) (right to indemnity not dependent on manner of assertion whether by cross-claim or independent action). *But see* 2 WK&M ¶ 1007.04 (courts should be more reluctant to dismiss cross-claim than third-party claim as long as dismissal without prejudice).

[151] Prior to *Dole*, a third-party action was easily distinguishable from a cross-claim. A third-party claim was available only for indemnity actions. A cross-claim could be used to interpose a claim for contribution or indemnity, but, by its nature, it could not be served on a party whom the plaintiff had not named as a codefendant. These propositions are no longer true. *See* CPLR 1007, 3019(b). By eliminating many of the substantive distinctions between contribution and indemnity, the *Dole* Court minimized the traditional differences between the cross-claim and the third-party claim as well. *See generally* SIEGEL §§ 171, 227; Note, *The New Right of Relative Contribution:* Dole v. Dow Chem. Co., 37 ALBANY L. REV. 154 (1972). Nevertheless, a few distinctions remain. For example, a traditional cross-claim, unlike a third-party claim, can contain causes of action which are unrelated to the main action. *See* CPLR 3019(b); 3 WK&M ¶ 3019.14; SIEGEL § 227. A cross-claim may be filed against a codefendant or a third party not previously named in the action, but a third-party claim is not a proper means to assert an indemnity or contribution claim against a codefendant. 3 WK&M ¶ 3019.18. It is submitted, however, that these distinctions do not justify disparate application of CPLR 4401.

[152] The way in which a claim for contribution or indemnification will be asserted often depends solely on the plaintiff's decision regarding whom he will join as a party. SIEGEL § 227; 3 WK&M ¶ 3019.18. Recognition of the inequities involved in allowing plaintiff's choice to control led the *Dole* Court to extricate a tortfeasor's right to contribution from its dependence on whom the plaintiff elected to sue. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-50, 282 N.E.2d 288, 292-93, 331 N.Y.S.2d 382, 387-89 (1972). If an admission was held sufficient

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