**St. John's Law Review**

Volume 53, Spring 1979, Number 3 — Article 15

# Ins. Law § 167(3): 1976 Amendment Applicable Only to Dole Claims Arising from Accidents Occurring On or After Effective Date

Frank K. Walsh

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

Walsh, Frank K. (1979) "Ins. Law § 167(3): 1976 Amendment Applicable Only to Dole Claims Arising from Accidents Occurring On or After Effective Date," *St. John's Law Review*: Vol. 53 : No. 3 , Article 15.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol53/iss3/15

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

that a trial judge who hears evidence concerning a defendant's past conduct may consider the evidence for an improper purpose.[189] Furthermore, even assuming that the judge is able to limit his consideration of the evidence to its bearing on the issue of the defendant's credibility as a witness, the defendant nevertheless is prejudiced since he may be discouraged from testifying due to a justifiable fear that cross-examination may have an adverse effect on the judge.[190]

It is submitted that a defendant should be afforded the protections of *Sandoval* without regard to whether he elects a jury trial. To insure that the objectives of *Sandoval* are attained, the ruling should be made by a judge other than the trial judge.[191] This procedure, which only would exclude evidence that is inadmissible in jury trials, seems consistent with the language and spirit of *Sandoval*.[192]

*Michael Jacobellis*

## INSURANCE LAW

*Ins. Law § 167(3): 1976 amendment applicable only to* Dole *claims arising from accidents occurring on or after effective date*

Section 167(3) of the Insurance Law initially excluded from

[189] *See* People v. Horie, 258 App. Div. 246, 16 N.Y.S.2d 235 (1st Dep't 1939); *cf.* People v. O'Brien, 86 Misc. 2d 139, 381 N.Y.S.2d 972 (Wayne County Court 1976) (conviction reversed when the trial judge delayed handing down decision in order to hear evidence of similar cases). *But see* People v. D'Abate, 37 N.Y.2d 922, 340 N.E.2d 750, 378 N.Y.S.2d 390 (1975), wherein the Court found that although it was error to cross-examine the defendant on three out-of-state convictions, it was not prejudicial, especially since there was no jury.

[190] *See* People v. Sandoval, 34 N.Y.2d at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 854; *see* note 188 *supra*.

[191] An administrative problem may arise if *Sandoval* is applied to nonjury cases. It is suggested that the mere knowledge of a defendant's prior criminal activities, acquired when hearing the motion, is sufficient to prejudice the court and defeat the purpose of *Sandoval*. Moreover, because of this potential prejudice, even a defendant who expects the motion to be granted, may be discouraged from making the motion and testifying on his own behalf if the trial judge hears the motion. It is suggested, therefore, that in nonjury cases a different judge should determine the *Sandoval* motion whenever possible. A similar procedure is used in juvenile proceedings where a hearing on the issue of voluntariness of confessions is conducted by a judge other than the one who serves as the trier of fact. *See, e.g., In re* Edwin R., 60 Misc. 2d 355, 359, 303 N.Y.S.2d 406, 410 (Family Ct. N.Y. County 1969).

[192] In *Sandoval*, Judge Jones consistently referred to "the jury or the court" instead of merely "the jury" when discussing those who would be prejudiced, indicating that *Sandoval* also was intended to apply to nonjury cases. 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855. Judge Hertz, in *Rosa*, was unable to effectively discount the significance of the phrase "jury or court" in *Sandoval*. 96 Misc. 2d at 492-93, 409 N.Y.S.2d at 118. Judge Hertz believed that the use of the phrase "triers of fact" limited *Sandoval* to jury cases, but it appears that this phrase applies to judges or juries, depending on the case. It is suggested that the rephrasing of the issue on terms of the impact on the jury in the post-*Sandoval* cases, *see* note 170 *supra*, represents a fortuitous consequence that these cases were jury cases.

insurance coverage any liability arising from the death of or injury to the insured's spouse absent a contrary provision in the insurance policy.[193] In *State Farm Mutual Automobile Insurance Co. v. Westlake*,[194] the Court of Appeals held that this exclusion was applicable even where the insured is impleaded for apportionment of damages[195] in an action brought by his spouse against a third-party tortfeasor.[196] In direct response to the *Westlake* decision, the legisla-

---

[193] The former § 167(3) of the Insurance Law provided:

> No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy.

N.Y. INS. LAW § 167(3) (McKinney 1966) (amended 1976). Section 388(4) of the Vehicle and Traffic Law, which governs compulsory automobile liability insurance policies, contained a similar provision. N.Y. VEH. & TRAF. LAW § 388(4) (McKinney 1970) (amended 1976). Both provisions are intended to prevent collusive suits between spouses. New Amsterdam Cas. Co. v. Stecker, 3 N.Y.2d 1, 7, 143 N.E.2d 357, 360, 163 N.Y.S.2d 626, 631 (1957); Employers' Liab. Assur. Corp. v. Aresty, 11 App. Div. 2d 331, 335, 205 N.Y.S.2d 711, 716 (1st Dep't 1960), *aff'd mem.*, 11 N.Y.2d 696, 180 N.E.2d 916, 225 N.Y.S.2d 764 (1962); United States Fid. & Guar. Co. v. Franklin, 74 Misc. 2d 506, 508, 344 N.Y.S.2d 251, 253 (Sup. Ct. Westchester County 1973), *aff'd mem.*, 43 App. Div. 2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974); Note, *Liability Insurance and Inter-Spouse Negligence Actions: The Effect of Section 167(3) of the Insurance Law*, 32 ST. JOHN'S L. REV. 273, 275 (1958).

[194] 35 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974).

[195] *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). The *Dole* Court stated:

> [W]here a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. The rule enunciated by the *Dole* Court was codified in CPLR article 14. CPLR 1401 provides in pertinent part that "two or more persons who are subject to liability for damages for the same personal injury . . . or wrongful death, may claim contribution among them." CPLR 1401 (1976).

[196] 35 N.Y.2d at 592-93, 324 N.E.2d at 139-40, 364 N.Y.S.2d at 486. In *Westlake*, the insured's wife, a passenger in an automobile owned and operated by the insured, was injured in a collision with another automobile owned and operated by the Christs. *Id.* at 590, 324 N.E.2d at 138, 364 N.Y.S.2d at 484. After the Westlakes instituted an action to recover for the wife's injuries, the Christs asserted a third-party claim against the husband-insured for contribution. *Id.* Relying upon § 167(3) of the Insurance Law, the husband's insurer sought to be relieved of its duty under the insurance policy to defend and indemnify the husband. 43 App. Div. 2d at 314, 351 N.Y.S.2d at 147; *see* note 193 *supra*. Holding that § 167(3) was applicable to a claim for contribution arising out of an injury to an insured's spouse, a unanimous Court stated that "[t]he language is all inclusive and is applicable 'whenever indemnification is asked by a husband whose liability, regardless of the form in which or person by whom asserted, is basically and unquestionably because of injuries sustained by his wife as a result of his negligence.' " 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486 (quoting 30 N.Y. JUR. *Insurance* § 1171 (1963)). The *Westlake* Court reasoned that, although the statute was intended to prevent collusive interspousal suits, "[t]he absence of fraud or the possibility of fraud is not sufficient to negate the plain intendment of the

ture amended section 167(3), limiting its effect to actions in which "the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse."[197] Although the amendment was to take effect on August 1, 1976 and "apply to all causes of action arising on and after such date,"[198] it remained uncertain whether it is the cause of action for contribution or the claim in the main action that must arise on or after August 1, 1976.[199] In *Mandels v. Liberty*

---

statutory exclusion provision." 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486. A contrary holding, in the *Westlake* Court's view, would, in effect, constitute a judicial rewriting of the insurance policy, imposing terms upon the insurer which were neither contemplated nor included in the calculation of the insurance premium. *Id.*

The result in *Westlake* was criticized by Professor Siegel, who urged that, although the decision is technically correct under the language of § 167(3), the statute's purpose of preventing collusive interspousal suits would be better effectuated by a rule requiring insurers to defend and indemnify in third-party actions. CPLR 3019, commentary at 254 (McKinney 1974).

[197] Ch. 616, § 1, [1976] N.Y. Laws 1325 (McKinney) (codified in N.Y. INS. LAW § 167(3) (Supp. 1978-1979)); *see* Recommendation of the Law Revision Commission to the 1976 Legislature Relating to Liability Insurance Exclusion of Coverage for Injuries to Spouse, [1976] N.Y. LAW REV. COMM'N REP., *reprinted in* [1976] N.Y. Laws 2246, 2247 (McKinney). In recommending passage of the 1976 amendment, the Law Revision Commission noted that § 167(3) had been strictly construed by the courts in order to effectuate the legislative intention of preventing collusive interspousal suits. *Id.* at 2246. The Commission argued, however, that amending § 167(3) to preclude its application to claims for contribution would not contravene the original legislative purpose, since in situations "[w]here the injured spouse's cause of action does not rise and fall on the proof of the driver-spouse's negligence, the chance of fraud and collusion is very slight." *Id.* at 2247. Indeed, in support of the bill, the Law Revision Commission maintained that § 167(3) was never intended to apply to third-party contribution claims and observed:

> Recent statutes (Vehicle and Traffic Law, § 310; Insurance Law, § 600) have expressed as their purpose to secure the right of innocent accident victims to be recompensed for their injuries despite the inadequate financial responsibility of the tortfeasor to respond in damages. Applying section 167(3) to contribution claims defeats this policy by making the driver-spouse a self-insurer and by making the ability of the third-party to collect a *Dole* judgment dependent on the driver-spouse's financial responsibility.

*Id.* at 2246.

[198] The amendment to § 167(3), enacted on July 21, 1976, originally was to have taken effect immediately. Ch. 616, § 2, [1976] N.Y. Laws 1325 (McKinney). On the same day, however, when the legislature enacted a companion amendment to § 388(4) of the Vehicle and Traffic Law, Ch. 617, § 1, [1976] N.Y. Laws 1325 (McKinney); *see* note 1 *supra*, it provided that both amendments would take effect "on August first, nineteen hundred seventy-six and shall apply to all causes of action arising on and after such date." Ch. 617, § 2, [1976] N.Y. Laws 1325-26 (McKinney); *see id.* § 3, [1976] N.Y. Laws 1325-26 (McKinney).

[199] A defendant's claim for contribution ripens only when he satisfies the judgment in the main action. Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 53, 375 N.E.2d 29, 30, 404 N.Y.S.2d 73, 74 (1978), *discussed in The Survey*, 52 ST. JOHN'S L. REV. 620, 642 (1978). *See generally* CPLR 3019, commentary at 290 (1974); W. PROSSER, THE LAW OF TORTS § 50, at 309 (4th ed. 1971); 2A WK&M ¶ 1403.03. Relying on this principal, three lower courts held that the 1976 amendment to § 167(3) was applicable to a claim for contribution accruing on

*Mutual Insurance Co.*,[200] the Court of Appeals resolved the question by holding that the amendment applies only to third-party claims arising out of accidents occurring on or after August 1, 1976.[201]

On May 30, 1976, while a passenger in an automobile owned and operated by her husband, Sophie Mandels sustained injuries as a result of a collision with another vehicle.[202] In October 1976, she brought suit against the owner and operator of the other vehicle, who subsequently impleaded her husband.[203] Upon the refusal of his automobile liability insurer to defend and indemnify him in the third-party action, the husband initiated an action against the insurer seeking declaratory relief.[204] Reasoning that the amendment to section 167(3) governed the third-party action for contribution since it arose after August 1, 1976, the Supreme Court, Nassau County, held the insurer obligated to defend and indemnify.[205] The Appellate Division, Second Department, however, concluded that the interpretation of the effective date of the amendment by the lower court would "vitiate" the holding in *Westlake* and held that "sound principles of statutory construction and public policy mandate a reversal of the judgment."[206]

On appeal, the Court of Appeals affirmed the order of the appellate division.[207] Judge Gabrielli, writing for a unanimous Court, noted that the substantive portion of the amendment to section 167(3) is addressed not to third-party claims but rather to "direct suits between spouses."[208] Thus, the *Mandels* Court concluded, the amendment's applicability provision also must refer to the date that the main cause of action "arose."[209] Finding that a contrary ruling would be "illogical" and would lead to "inequitable results," the

---

or after August 1, 1976, even though the claim was connected to an accident that occurred before that date. Ward v. Accordino, 93 Misc. 2d 746, 748, 403 N.Y.S.2d 438, 440 (Sup. Ct. Niagara County 1978); Hanozas v. Grammas, 91 Misc. 2d 520, 522, 398 N.Y.S.2d 204, 205-06 (Sup. Ct. Nassau County 1977); Lumbermens Mut. Cas. Co v. Barnett, 91 Misc. 2d 3, 6, 396 N.Y.S.2d 1007, 1009 (Sup. Ct. Erie County 1977).

[200] 45 N.Y.2d 455, 382 N.E.2d 762, 410 N.Y.S.2d 62, *aff'g* 60 App. Div. 2d 864, 401 N.Y.S.2d 255 (2d Dep't 1978).

[201] 45 N.Y.2d at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

[202] *Id.* at 457, 382 N.E.2d at 763, 410 N.Y.S.2d at 64.

[203] *Id.*

[204] 45 N.Y.2d at 457-58, 382 N.E.2d at 763, 410 N.Y.S.2d at 64.

[205] 60 App. Div. 2d at 865, 401 N.Y.S.2d at 257.

[206] *Id.* at 865-66, 401 N.Y.S.2d at 257. The appellate division observed that holding insurance carriers liable for contribution claims against an insured when such liability was not contemplated at the time the insurance policy was issued might result in an unconstitutional impairment of the insurance contract. *Id.* at 866, 401 N.Y.S.2d at 257.

[207] 45 N.Y.2d at 459, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

[208] *Id.* at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

[209] *Id.*

Court held that the amendment applies only where the accident giving rise to the insured's liability for contribution occurs on or after August 1, 1976.[210]

In so holding, the *Mandels* Court may have been attempting to forestall challenges to the amendment on the ground that it unconstitutionally impairs insurers' existing contract rights.[211] In addition, the Court may have been concerned with the unfairness inherent in requiring insurers to defend and indemnify in third-party actions resulting from accidents that occurred when the *Westlake* rule insulated insurers from liability.[212] Despite these concerns, the Court was careful to avoid reviving the theoretical underpinnings of

---

[210] *Id.* The *Mandels* Court stated that for accidents occurring before August 1, 1976, the *Westlake* rule would relieve the insurer of any obligation in the third-party action, unless expressly provided for in the insurance contract. *Id.*

[211] Prior to the passage of the amendment, questions were raised concerning its constitutionality. *See, e.g.*, Letter from the National Association of Independent Insurers to Judah Gribetz (June 4, 1976) (on file in the St. John's Law Review office); *accord*, 60 App. Div. 2d at 866, 401 N.Y.S.2d at 257. One critic noted: "The immediate effective date appears to raise a constitutional objection since it would impair existing contracts." Memorandum of State Insurance Department (June 10, 1976) (on file in the St. John's Law Review office).

It may be profitable to compare the issue before the Court in Becker v. Huss Co., 43 N.Y.2d 527, 373 N.E.2d 1205, 402 N.Y.S.2d 980 (1978), *discussed in The Survey*, 52 ST. JOHN'S L. REV. 485, 523 (1978), with that presented in *Mandels*. The *Becker* Court was faced with the problem of determining the effective date of an amendment to the Worker's Compensation Law which authorizes an injured employee to obtain an equitable apportionment of litigation expenses from the carrier upon recovery of a judgment against the tortfeasor. 43 N.Y.2d at 537, 373 N.E.2d at 1207, 402 N.Y.S.2d at 982; *see* N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1978-1979). In holding that the amendment applies to actions which have not proceeded to final judgment or settlement before its effective date regardless of when the cause of action accrued or was commenced, the *Becker* Court noted that the amendment in question represented only a "[re]allocation of financial economic benefits and burdens" within the workmen's compensation system and "neither created a new right nor impaired an existing one, although the reallocation might be characterized verbally either way." 43 N.Y.2d at 542, 373 N.E.2d at 1210, 402 N.Y.S.2d at 985. Thus, unlike the *Mandels* Court, the *Becker* Court was not faced with a latent constitutional issue arising from a statute which affirmatively imposed a new liability upon insurers.

[212] Since the 6-year statute of limitations does not begin to run until the third-party plaintiff has paid more than his pro-rata share of a judgment, *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), the Court was concerned that inequitable results "necessarily would occur" if insurers were held liable for contribution claims traceable to pre-amendment accidents. 45 N.Y.2d at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

The application of the 6-year statute of limitations to claims for contribution has been criticized. Occhialino, *Contribution*, NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 229-31 (1974); *The Survey*, 52 ST. JOHN'S L. REV. 620, 646-47 (1978); *The Survey*, 51 ST. JOHN'S L. REV. 786, 805-06 (1977). Professor Occhialino has suggested that a 1-year statute of limitations should be adopted with respect to contribution actions "[i]n order to accomplish the goals of prevention of piecemeal litigation and the furtherance of judicial economy." Occhialino, *supra*, at 233.

the *Westlake* decision.[213] Had the *Mandels* Court pursued the most expedient route to the desired result, it would have held that a cause of action for contribution "arises" at the time of the underlying accident, although it "accrues" only upon payment of the judgment in the main action.[214] Using this reasoning, the Court could readily have concluded that the terms of the amendment precluded its application in cases where the accident occurred and the contribution claim consequently "arose" before the enactment's effective

[213] In order to hold § 167(3) applicable to third-party actions, the *Westlake* Court relied on the theory that there is an underlying identity between the contribution claims and the main claim. *See* 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486; N. Dachs & N. Shayne, *Injuries to Employees and Spouses,* N.Y.L.J., Nov. 14, 1978, at 1, col. 1; note 196 *supra.* Contrasting this approach to the rule prevailing in worker's compensation situations, Dean McLaughlin has noted that an employer may be impleaded in an action brought by an employee against a third-party tortfeasor, although the employer has no direct liability to the employee. McLaughlin, *Dole v. Dow Chemical,* N.Y.L.J., Dec. 8, 1972, at 5, col. 2. If there is an identity between the contribution claim and the main claim, however, such third-party suits logically would seem to be prohibited. *See* CPLR 3019, commentary at 254 (1974); McLaughlin, *supra,* at 5, col. 2. Dean McLaughlin has attempted to distinguish between the *Westlake* theory and the rule governing worker's compensation situations by observing that

> the Insurance Law provision does not forbid suits by one spouse against the other but relieves the insurance company of the duty to defend against "any liability of an insured" because of "injuries to his or her spouse," and it might reasonably be held that this language is sufficiently sweeping to distinguish the problem from the Workmen's Compensation Cases.

*Id.* This analysis, however, does not seem convincing.

[214] The appellate division in *Mandels* took note of, but apparently did not adopt, the distinction between the words "arising" and "accruing." *See* 60 App. Div. 2d at 865, 401 N.Y.S.2d at 257. The court indicated that a distinction has been drawn between these two terms in other jurisdictions. *Id.* Although New York in certain narrow instances recognizes a distinction between the time when a cause of action accrues and the time when the statute of limitations begins to run, it does not appear to have assigned separate meanings to the terms "arising" and "accruing." It should be noted that in situations where the statute of limitations begins to run before or after the cause of action accrues, the distinction is usually established by statute. The Court of Appeals is generally reluctant to create such situations without statutory authority, but is specific when it does so. *See* D. SIEGEL, NEW YORK PRACTICE §§ 40-44 (1978). *See generally* City of New York v. State, 40 N.Y.2d 659, 357 N.E.2d 988, 389 N.Y.S.2d 332 (1976); Memphis Constr., Inc. v. Village of Moravia, 59 App. Div. 2d 646, 398 N.Y.S.2d 386 (4th Dep't 1977); Vanderlinde Elec. Corp. v. City of Rochester, 54 App. Div. 2d 155, 388 N.Y.S.2d 388 (4th Dep't 1976); *cf.* Relyea v. State, 59 App. Div. 2d 364, 399 N.Y.S.2d 710 (3d Dep't 1977) (cause of action for indemnity accrues upon payment of judgment). *See also* Excelsior 57th Corp. v. 303 Assoc., N.Y.L.J., Sept. 7, 1978, at 6, col. 2 (Sup. Ct. N.Y. County). Interestingly, although the Court in Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978), held that the cause of action for contribution "accrues" upon payment of the judgment, the *Mandels* Court characterized the *Bay Ridge* holding as a statement of when the statute of limitations on the claim for contribution begins to run. 45 N.Y.2d at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64 (citing Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978)). In this respect, the *Mandels* opinion may thus be viewed as a clarification of *Bay Ridge.*

date.[215] Nevertheless, the Court resisted using this discredited approach[216] and instead relied on the internal design of the amendment as a basis for its holding.

It is submitted, however, that the *Mandels* Court's reasoning cannot withstand close scrutiny. The fallacy lies in the Court's failure to analyze the amendment in context. As an exception to the general rule requiring insurers to defend and indemnify when their insureds are exposed to liability, section 167(3) is drafted in language that describes the situations to which the exclusion applies. By adding a modifying clause to this provision, the legislature effectively narrowed the scope of the exception and thereby imposed an additional duty on insurers to defend and indemnify in third-party suits. Under this analysis, it seems logical to conclude that the clause making the amendment applicable to "causes of action arising" after its effective date refers to the contribution cause of action for which the additional duty was imposed rather than to the main cause of action, which is the subject of the preexisting rule.

Since the *Mandels* Court confined its holding to a narrow ques-

[215] *See* Farrell, *Civil Practice, 1976 Survey of N.Y. Law,* 28 SYRACUSE L. REV. 379, 420 (1977).

[216] In Graphic Arts Mut. Ins. Co. v. Bakers Mut. Ins. Co., 45 N.Y.2d 551, 557, 382 N.E.2d 1347, 1350, 410 N.Y.S.2d 571, 574 (1978), decided one week after *Mandels,* the Court unequivocally stated that a claim for contribution cannot be linked conceptually to the main claim. In *Graphic Arts,* an employee was injured in a collision while a passenger in his employer's truck, which was driven by a fellow employee. *Id.* at 555, 382 N.E.2d at 1348, 410 N.Y.S.2d at 573. The employee brought suit against the owner and operator of the other vehicle, who in turn impleaded the employer and the coemployee driver. *Id.* at 556, 382 N.E.2d at 1349, 410 N.Y.S.2d at 573. Graphic Arts Mutual Insurance Company, the employer's automobile insurance carrier, thereupon brought an action for a declaratory judgment, alleging that the employer's worker's compensation carrier, Bakers Mutual Insurance Company of New York, was solely liable on the third-party complaint. *Id.* at 556, 382 N.E.2d at 1349, 410 N.Y.S.2d at 574. Graphic Arts alleged that two clauses in the automobile insurance policy excluding coverage for liabilities typically covered under worker's compensation relieved it of any obligations in the third-party action. *Id.* at 556-57, 382 N.E.2d at 1349, 410 N.Y.S.2d at 574. Rejecting this contention in what is perhaps the clearest statement of the independent, substantive nature of a *Dole* claim, the *Graphic Arts* Court unanimously stated:

> The right under the *Dole-Dow* doctrine to seek equitable apportionment based on relative culpability is not one intended for the benefit of the injured claimant. It is a right affecting the distributive responsibilities of tort-feasors *inter sese* . . . . Thus, to urge on behalf of Graphic that the third-party claim against Chimes assumes legally the color of the claim of [the injured employee] does not withstand analysis.

*Id.* at 557, 382 N.E.2d at 1350, 410 N.Y.S.2d at 574 (citations omitted). Significantly, Chief Judge Breitel summarized by stating that "[t]his is just as it would have been had a stranger been the injured party in the principal tort action." *Id.* at 558, 382 N.E.2d at 1350, 410 N.Y.S.2d at 575. In light of *Graphic Arts,* it would appear that the Court of Appeals is disinclined to find that a claim for contribution "arises" upon the occurrence of an injury to the plaintiff.

tion of statutory construction, the logical flaws in the opinion are unlikely to have serious adverse consequences. By referring to "accident" and the accrual of the "main claim" interchangeably,[217] however, the Court has left unclear which event should be considered in determining whether the 1976 amendment is applicable. This distinction would be significant, for example, in wrongful death cases where the accident occurs prior to August 1, 1976, but the death occurs thereafter. The problem arises because the time of the accident has no significance in the cause of action for wrongful death, which accrues when an administrator is appointed to represent the interests of the decedent's distributees.[218] In cases where the death occurs after August 1, 1976, it is submitted, the Court would have little alternative but to hold that the amendment to section 167(3) requires an insurer to defend and indemnify an impleaded spouse. Even under the *Mandels* rationale, it would seem difficult for the Court to find that the date of the underlying accident rather than the accrual date of the main claim controls, since the amendment, by its terms, applies to "causes of action" arising on or after its effective date. Thus, were the Court to hold that the accident date controls, it would have to do so on the unlikely ground that a wrongful death claim "arises" when underlying tortious conduct occurred.

*Frank K. Walsh*

## JUDICIARY LAW

### Judiciary Law § 90(4): *Conviction of any federal felony compels automatic disbarment*

Section 90(4) of the Judiciary Law mandates automatic disbarment of an attorney who has been convicted of a felony.[219] Traditionally, the courts limited this statute to instances in which the

---

[217] *See id.* at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

[218] *See* EPTL § 5-4.1 (1967); D. SIEGEL, NEW YORK PRACTICE § 44 (1978).

[219] N.Y. JUD. LAW § 90(4) (McKinney 1968) provides in pertinent part: "Any . . . attorney . . . convicted of a felony, shall, upon such conviction, cease to be an attorney . . . or to be competent to practice law as such." Under § 90(4), an attorney convicted of a felony is ipso facto disbarred without further judicial proceedings. *In re* Mitchell, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 96 (1976); *In re* Barash, 20 N.Y.2d 154, 157, 228 N.E.2d 896, 898, 281 N.Y.S.2d 997, 1000 (1967); *In re* Ginsburg, 1 N.Y.2d 144, 147, 134 N.E.2d 193, 194, 151 N.Y.S.2d 361, 362 (1956). Section 90(4) further provides that upon presentation of a certified or exemplified copy of the judgment of conviction, the appellate division will order the attorney's name struck from the rolls. N.Y. JUD. LAW § 90(4) (McKinney 1968).