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Dole Claim Held to Accrue on Date Judgment Is Paid by Party Seeking Contribution

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Roseman on the ground of forum non conveniens illustrates the way in which administrative benefits may be derived from use of the doctrine while preserving the "interests of justice."

Joseph G. Braunreuther

ARTICLE 14—CONTRIBUTION

Dole claim held to accrue on date judgment is paid by party seeking contribution

Article 14 of the CPLR, the codification of the seminal Dole v. Dow Chemical Co.\(^7\) decision, authorizes a claim for contribution among joint tortfeasors in proportion to their relative culpability.\(^8\) Although the legislation describes the procedure for claiming contribution,\(^9\) it does not expressly define when the cause of action accrues.\(^10\) One line of cases in New York has held that the Dole cause of action ripens on the date the claimant actually pays the judgment for which contribution is sought.\(^11\) A second view has main-


\(^{8}\) CPLR 1401-1402. 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 between those parties. 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

This reasoning has been codified in CPLR 1401, which states, 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 . . .," and in CPLR 1402, which provides that a tortfeasor is entitled to contribution for the amount paid in excess of his "equitable share . . . determined in accordance with the relative culpability of each person liable for contribution."

\(^{9}\) CPLR 1403 provides that "[a] cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

\(^{10}\) The accrual issue has particular significance when the claimant is seeking contribution from the state. In such cases, the claimant cannot bring the state into the primary action, since the state can only be sued in the Court of Claims. Breen v. Mortgage Comm'n, 285 N.Y. 425, 429, 35 N.E.2d 25, 26 (1941); see In re Dormitory Auth., 18 N.Y.2d 114, 218 N.E.2d 693, 271 N.Y.S.2d 983 (1966). Instead, the claimant must bring a separate action for contribution in the Court of Claims after complying with the jurisdictional filing and notice requirements of the Court of Claims Act. N.Y. Cr. Cl. Acr § 8 (McKinney 1963); see McCorkle v. Degl, 74 Misc. 2d 611, 344 N.Y.S.2d 802 (Sup. Ct. Kings County 1973); 2A WK&M ¶ 1403.05. Since the limitations period for filing an action in the Court of Claims is unusually abbreviated, see note 101 infra, the question when the cause of action accrues becomes extremely important.

tained that the claim accrues upon entry of judgment, while a third line of decisions has suggested that the claim arises on the date of the underlying tortious act. Recently, in Bay Ridge Air Rights, Inc. v. State, the Court of Appeals resolved this conflict,


The date-of-payment rule is derived from the accrual rule traditionally applied to common law indemnity claims. In Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903), the Court of Appeals approved the fiction of an implied contract of indemnity in order to permit a tortfeasor whose negligence was “passive” to recover from an “active” joint tortfeasor. In adopting the quasi-contract approach, the Court noted the distinction between indemnity protecting against liability and indemnity protecting only against loss. The former requires the indemnitor to respond as soon as a liability is incurred, while the latter creates no obligation to indemnify until actual loss is suffered. 175 N.Y. at 218, 67 N.E. at 440; see Brown v. Mechanics & Traders' Bank, 43 App. Div. 173, 59 N.Y.S. 354 (1st Dep't 1899). The Dunn Court concluded that an implied contract of indemnity is analogous to an express indemnity contract for “loss or damage.” 175 N.Y. at 218, 67 N.E. at 440. Other courts, extrapolating from this reasoning, concluded that a cause of action for indemnity accrued only upon payment of the awarded damages. See Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); Satta v. City of New York, 272 App. Div. 782, 70 N.Y.S.2d 575 (2d Dep't 1947).

The availability of certain pre-judgment procedural devices for asserting Dole claims, however, seems inconsistent with this “traditional analysis.” Despite the apparent contradiction, the courts generally have taken a pragmatic position, allowing assertion of claims for contribution prior to the theoretical date of accrual, in the interest of consolidating actions and promoting judicial economy. See Taca Int'l Airlines, S.A. v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 263 N.Y.S.2d 269 (Sup. Ct. N.Y. County 1965). See generally Contribution, supra, at 230.

11 See, e.g., O'Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Cl. Ct. 1975); Winn v. Peter Bratti Assocs., 80 Misc. 2d 766, 364 N.Y.S.2d 137 (Sup. Ct. Albany County 1975); Zillman v. Meadowbrook Hosp. Co., 73 Misc. 2d 726, 342 N.Y.S.2d 302 (Sup. Ct. Nassau County 1973), rev'd on other grounds, 45 App. Div. 267, 358 N.Y.S.2d 466 (2d Dep't 1974). In adopting the date-of-judgment approach, the O'Sullivan court was persuaded by the language of CPLR 5011, which provides that “[a] judgment is the determination of the rights of the parties in an action.” CPLR 5011; 83 Misc. 2d at 433, 371 N.Y.S.2d at 774. Reasoning that the obligation to pay damages does not arise until a judgment is entered, the court rejected argument that the rendition of a verdict should mark the accrual of a Dole claim. Id. at 434, 371 N.Y.S.2d at 774 (citing CPLR 5011). The O'Sullivan court also pointed out that the date-of-judgment rule is preferable to the date-of-payment rule because it results in less delay and therefore is less prejudicial to the party from whom contribution is sought. 83 Misc. 2d at 438-39, 371 N.Y.S.2d at 778.


holding that a *Dole* claim accrues when the judgment is paid by the party seeking contribution.\textsuperscript{95}

The claimant in *Bay Ridge* was sued in federal court for the allegedly negligent hiring of a building custodian who had killed one of the building's tenants.\textsuperscript{96} The custodian had been released from a state psychiatric facility shortly before the incident.\textsuperscript{97} Seeking contribution from the state in the federal action, *Bay Ridge* filed a third-party impleader complaint,\textsuperscript{98} which ultimately was dismissed for lack of jurisdiction.\textsuperscript{99} Following the dismissal, almost 3 years after the killing, *Bay Ridge* instituted a separate action in the New York Court of Claims by serving the state attorney general with both a notice of intention to file a claim and a proposed claim for indemnity and apportionment from the State.\textsuperscript{100} Holding that claimant's *Dole* cause of action accrued on the date of the killing, the Court of Claims dismissed the action for failure to comply with the filing requirements of the Court of Claims Act.\textsuperscript{101} The Appellate Division,
Third Department, affirmed the dismissal on the ground that the suit was premature since judgment had neither been entered nor paid.102

On appeal, a unanimous Court of Appeals affirmed, holding that a Dole claim does not accrue until payment of the judgment by the claimant.103 Chief Judge Breitel, writing for the Court, observed that, while common law claims for indemnity classically were deemed to accrue on the date the claimant discharged his liability to the injured party, disagreement persisted as to when Dole contribution claims ripen.104 While acknowledging that the “evil attendant upon a delayed accrual date [is] substantial,”105 the Court nonetheless was unable to discern anything in either Dole or article 14 to justify disparate treatment of Dole claims for apportionment and traditional claims for indemnity.106 Absent legislative authorization, the Court concluded,107 it was not empowered “to cut contract actions. See, e.g., Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); Taca Int'l Airlines, S.A. v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 773, 263 N.Y.S.2d 269, 272 (Sup. Ct. N.Y. County 1965); Hansen v. City of New York, 43 Misc. 2d 1048, 252 N.Y.S.2d 695 (Sup. Ct. Kings County 1964).

102 57 App. Div. 2d at 240, 394 N.Y.S.2d at 465. Bay Ridge’s claim was dismissed without prejudice to the filing of a new claim should one accrue. Id.

103 44 N.Y.2d at 53, 375 N.E.2d at 30, 404 N.Y.S.2d at 74.

104 Id. at 53-54, 375 N.E.2d at 31, 404 N.Y.S.2d at 75; see notes 91-93 supra.

105 Id. at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 75. While the date-of-payment accrual rule generally placed the impleaded defendant at a significant disadvantage, the Bay Ridge Court observed that “[i]n this particular case, the State [was] not hopelessly disadvantaged,” because the claimant had notified the state attorney general of its intention to seek apportionment in December 1974. The claimant’s unsuccessful attempt to implead the state in the underlying federal action also served to give notice of potential liability. Id., 375 N.E.2d at 32, 404 N.Y.S.2d at 76.

106 Id., 375 N.E.2d at 31, 404 N.Y.S.2d at 75. The Court rejected, without explanation, the state’s contention that the contribution claim accrued upon commencement of the underlying tort action. It also declined to adopt a date-of-injury rule, observing that, under this approach, the injured party’s failure to commence a tort action within the short Court of Claims limitations period, see note 101 supra, could foreclose any claim the defendant might have for contribution from the state. 44 N.Y.2d at 53, 375 N.E.2d at 31, 404 N.Y.S.2d at 75. Moreover, in the Court’s view, the date-of-injury rule, which would deem the apportionment claim to accrue before entry or payment of judgment, is inconsistent with “traditional conceptual analysis of accruals of causes of action [for indemnity].” Id. at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 75.

107 44 N.Y.2d at 55-56, 375 N.E.2d at 31-32, 404 N.Y.S.2d at 75-76. In deferring to the legislature, the Bay Ridge Court joined numerous other courts that have suggested a legislative solution to the question of when a Dole claim accrues. See Berlin & Jones, Inc. v. State, 85 Misc. 2d 970, 977, 381 N.Y.S.2d 778, 783 (Ct. Cl. 1976); O’Sullivan v. State, 83 Misc. 2d 426, 437, 371 N.Y.S.2d 766, 777 (Ct. Cl. 1975); Leibowitz v. State, 82 Misc. 2d 424, 429, 371 N.Y.S.2d 110, 114 (Ct. Cl. 1975). With respect to claims for contribution against the state, the Bay Ridge Court offered two alternative approaches to resolving the accrual imbroglio. It suggested that an earlier accrual date could be established by statute. The Court was more supportive, however, of legislation which would authorize the claimant to implead the state in the underlying action. 44 N.Y.2d at 56, 375 N.E.2d at 32, 404 N.Y.S.2d at 76.

108 44 N.Y.2d at 55-56, 375 N.E.2d at 31-32, 404 N.Y.S.2d at 75-76. In deferring to the legislature, the Bay Ridge Court joined numerous other courts that have suggested a legislative solution to the question of when a Dole claim accrues. See Berlin & Jones, Inc. v. State, 85 Misc. 2d 970, 977, 381 N.Y.S.2d 778, 783 (Ct. Cl. 1976); O’Sullivan v. State, 83 Misc. 2d 426, 437, 371 N.Y.S.2d 766, 777 (Ct. Cl. 1975); Leibowitz v. State, 82 Misc. 2d 424, 429, 371 N.Y.S.2d 110, 114 (Ct. Cl. 1975). With respect to claims for contribution against the state, the Bay Ridge Court offered two alternative approaches to resolving the accrual imbroglio. It suggested that an earlier accrual date could be established by statute. The Court was more supportive, however, of legislation which would authorize the claimant to implead the state in the underlying action. 44 N.Y.2d at 56, 375 N.E.2d at 32, 404 N.Y.S.2d at 76.
off abruptly a cause of action good until then under conventional law."\(^{108}\)

While the *Bay Ridge* Court’s resolution of the date of accrual controversy comports with longstanding precedent,\(^{109}\) it is submitted that the Court’s uncritical adherence to this authority is ill-advised in view of the policies underlying the statutory changes in third-party practice prompted by the *Dole* decision. Article 14 was intended, in part, to encourage trial of multi-party tort litigation in a single action.\(^{110}\) The *Bay Ridge* decision, which sanctions maintenance of separate *Dole* claims years after the original tortious act,\(^{111}\) is clearly not supportive of that aim. Moreover, it is difficult to reconcile the Court’s continued endorsement of the date-of-payment accrual, which is based upon the concept of indemnity against loss,\(^{112}\) with the *Dole* Court’s holding that liability, not loss, is to be apportioned among tortfeasors.\(^{113}\) Since indemnity princi-

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\(^{108}\) 44 N.Y.2d at 55, 375 N.E.2d at 31, 404 N.Y.S.2d at 76. Since *Bay Ridge*’s *Dole* apportionment claim had not yet accrued, the Court did not reach the issue of which Court of Claims Act limitations period would have been applicable. *Id.* at 56, 375 N.E.2d at 32, 404 N.Y.S.2d at 76. See also note 101 supra.

\(^{109}\) See note 91 supra.


\(^{111}\) In O’Sullivan v. State, 83 Misc. 2d 426, 371 N.Y.S.2d 766 (Ct. Cl. 1975), the court observed that adherence to the date-of-payment rule and the attendant possibilities of “motions addressed to judgments, appeals and cross appeals therefrom . . . would result in . . . delay . . . so overbearing in prejudice that it can neither be countenanced nor permitted.” *Id.* at 438-39, 371 N.Y.S.2d at 778. The practical effect of such delay may be to give considerable tactical advantage to a third-party plaintiff who delays bringing a separate action for contribution until after witnesses disappear or memories dim and a reasonable opportunity to ascertain the facts surrounding the claim has passed. In fact, the jurisdictional filing requirements of the Court of Claims Act are designed to avoid such delays and to give the state an opportunity to promptly and thoroughly investigate claims. See Atlantic Mut. Ins. Co. v. State, 80 Misc. 2d 454, 363 N.Y.S.2d 186 (Ct. Cl. 1975), *aff’d* 50 App. Div. 2d 356, 378 N.Y.S.2d 95 (3d Dep’t 1976), *aff’d mem.* 41 N.Y.2d 884, 362 N.E.2d 624, 393 N.Y.S.2d 994 (1977); Wasserberger v. State, 6 Misc. 2d 678, 164 N.Y.S.2d 877 (Ct. Cl. 1957). See also Williams v. State, 77 Misc. 2d 396, 353 N.Y.S.2d 691 (Ct. Cl. 1974); Gonzales v. State, 69 Misc. 2d 432, 330 N.Y.S.2d 437 (Ct. Cl. 1972). The consequences of delay cannot be minimized in view of the magnitude of annual awards in the Court of Claims. See [1976] N.Y. Dep’t R. 49 ($19,674,296.73); [1975] N.Y. Dep’t R. 48 ($38,397,002.22). In view of the *Bay Ridge* decision, however, it appears that the only remedy a third-party defendant would have where assertion of the *Dole* claim has been inordinately delayed is the interposition of a laches defense. Recently, such a defense was recognized in Blum v. Good Humor Corp., 57 App. Div. 2d 911, 911-12, 394 N.Y.S.2d 894, 896 (2d Dep’t 1977), where a separate action for apportionment was commenced many years after the original tortious act and 13 months after payment of the judgment awarded in the underlying action. *But see* Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep’t 1964).

\(^{112}\) See note 107 supra.

\(^{113}\) See note 91 supra.
ples underlying the date-of-payment rule are actually nothing more than judicially created fictions, the Bay Ridge Court's deference to the legislature and concomitant reluctance to repudiate this rule are difficult to justify.

Thomas M. Dawson

CRIMINAL PROCEDURE LAW

Representation by layman held not to deprive accused of right to counsel

The right to counsel embodied in the sixth amendment has been interpreted to include the right to effective representation by counsel at trial. While it is clear that incompetent advocacy by a

14 See note 91 supra.
15 Professor Occhialino's recognition of the conflict between post-Dole third-party practice principles and a date-of-payment accrual led him to propose that Dole claims be deemed to accrue when the defendant in the underlying action is served with process. Contribution, supra note 91, at 231. This proposal has several practical advantages. For example, all claims arising from a single incident would more likely be tried in one proceeding, thereby minimizing the impact on already crowded dockets and simplifying the apportionment of fault among the parties. Id. Where the claimant seeks contribution from the state, of course, adoption of a date-of-service rule would alleviate much of the prejudice to the state resulting from adherence to date-of-payment accrual. See note 111 supra. Moreover, the tortfeasor served with process would not be placed at a disadvantage, since he will generally be aware at the time of service of any contribution rights he might have against joint tortfeasors. Contribution, supra note 91, at 231. Professor Occhialino also suggested a specific 1-year limitation period for Dole claims, but acknowledged the "element of arbitrariness" inherent in the choice of time period. Id. at 233.

16 U.S. Const. amend. VI. As early as 1932, the Supreme Court characterized representation by counsel in capital cases as "vital and imperative." Powell v. Alabama, 287 U.S. 45, 71 (1932). In Betts v. Brady, 316 U.S. 455 (1942), however, the Court stated flatly that "appointment of counsel is not a fundamental right, essential to a fair trial" in all criminal cases. Id. at 471. In Gideon v. Wainwright, 372 U.S. 335, 344 (1963) the Court expressly overruled Betts, holding that the sixth amendment right to counsel was applicable to state felony proceedings through the fourteenth amendment. Thereafter, the Court extended the right to counsel to all criminal prosecutions involving a potential deprivation of liberty. See Argersinger v. Hamlin, 407 U.S. 25 (1972). For a critical analysis of the results of these decisions, see Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811 (1976).

17 See McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Powell v. Alabama, 287 U.S. 45, 71 (1932); see People v. Labree, 34 N.Y.2d 257, 313 N.E.2d 730, 357 N.Y.S.2d 412 (1974); People v. Bennett, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972). The Supreme Court has declined to establish specific standards for determining whether "effective representation" has been provided. See McMann v. Richardson, 397 U.S. 759, 771 (1970). In New York, the courts have utilized the "mockery of justice" test articulated by the Court of Appeals for the District of Columbia Circuit in Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). Under this test, the defendant has the burden of showing that his attorney made glaring errors that