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CPLR 1402: Defense of Laches May Be Interposed in Separate Action for Dole Contribution

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locate financially responsible parties and ensure that all causes of action are asserted directly against them. In addition, settlements accompanied by releases of liability should only be entered into in full knowledge of the financial strength of the remaining parties.[84] The *Klinger* decision indicates that the Court of Appeals will require strict adherence to the statutory mechanism for obtaining contribution. If properly used, New York procedural law provides the means to ensure that those responsible for the injury to the plaintiff are liable directly to him on the judgment.[85]

CPLR 1402: Defense of laches may be interposed in separate action for Dole *contribution.*

Actions for indemnity in New York traditionally have been analogized to claim in quasi-contract and hence governed by the 6-year contract statute of limitations.[86] With the advent of a right to contribution among joint tortfeasors, it was widely assumed that the 6-year limitation period would control these actions as well.[87] Recently, however, in the case of *Blum v. Good Humor Corp.*,[88] the Appellate Division, Second Department, qualified this 6-year time limitation by holding that laches may be interposed as a defense in an action for contribution among joint tortfeasors.[89]

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contribution "upon . . . paying the full amount of the judgment rendered against him," 49 App. Div. 2d 693, 693, 370 N.Y.S.2d 760, 761, prior authority had indicated that defendant need only pay an amount in excess of his *Dole* share to be eligible for contribution. *See* Adams v. Lindsay, 77 Misc. 2d 824, 826-27, 354 N.Y.S.2d 356, 358-59 (Sup. Ct. Monroe County 1974); CPLR 3019, commentary at 276-79 (McKinney 1974); 2A WK&M ¶ 1402.01. The *Klinger* Court agreed with the latter interpretation. 41 N.Y.2d at 372, 361 N.E.2d at 981, 393 N.Y.S.2d at 330. Therefore, under *Klinger*, a defendant who has paid only an amount equal to his equitable share is not entitled to contribution.

[84] General Obligations Law § 15-108 provides that a release given by a plaintiff to one of several tortfeasors does not release the other tortfeasors from liability. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1976-1977). The amount that may be obtained from the unreleased tortfeasors, however, may exceed neither their *Dole* shares nor the amount of the judgment as reduced by the consideration received by the plaintiff for the release. *Id.; see id.*, commentary at 139-40.

[85] *See* note 65 *supra.*

[86] A cause of action for indemnity is predicated upon a contract implied in law; the 6-year contract statute of limitations, which also governs suits in quasi-contract, therefore has been held applicable. *See* Moran Transp. Corp. v. Lehigh Valley R.R., 126 F. Supp. 122, 123 (S.D.N.Y. 1954); Wechsler v. Bowman, 285 N.Y. 284, 294, 34 N.E.2d 322, 327 (1941); Smith v. Smucker, 198 Misc. 944, 947-48, 100 N.Y.S.2d 35, 38-39 (Sup. Ct. Nassau County 1950); Liberty Mut. Ins. Co. v. Societe Coiffure, Inc., 50 N.Y.S.2d 40, 41-42 (Sup. Ct. N.Y. County 1944).

[87] *See* Occhialino, *Contribution*, NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 230 (1974).

[88] 57 App. Div. 2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977).

[89] *Id.* at 912, 394 N.Y.S.2d at 896.

An action originally had been instituted against Blum for personal injuries sustained by a 2 1/2-year-old child. The infant had darted out from between a parked automobile and an ice cream truck allegedly belonging to Good Humor, at which point he was struck by a car owned and operated by Blum. Although the accident occurred on July 12, 1970, the case was not settled until early 1974.[90] Thirteen months later, on March 2, 1975, Blum brought the instant action against Good Humor for contribution.[91] In its answer, the defendant Good Humor raised the equitable defense of laches, claiming not only that nearly 5 years had elapsed since the accident, but also that the operator of the truck had never been identified, the police accident report had not mentioned Good Humor's vehicle, and Good Humor itself had never been notified of the accident.[92] The Supreme Court, Nassau County, denied plaintiff Blum's motion to strike the defense of laches from defendant's answer.[93]

The Appellate Division, Second Department, affirmed the order of the supreme court.[94] Justice Martuscello, writing for a divided panel, reasoned that since an action for contribution is equitable in nature,[95] any "gross injustice" occasioned by the 13-month delay could be considered by the court.[96] The second department

[90] *Id.* at 911, 394 N.Y.S.2d at 895-96.

[91] *Id.*, 394 N.Y.S.2d at 896. It should be noted that the general right of a joint tortfeasor to obtain contribution was not established until almost 2 years after the *Blum* accident. *See* Dole v. Dow Chem. Co., 30 N.Y. 2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972). In fact, the question whether the doctrine of contribution applied to actions pending on the date *Dole* was decided was not resolved affirmatively until a few months after *Dole* when the decision in Frey v. Bethlehem Steel Corp., 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972) (mem.), was announced. *See* CPLR 3019, commentary at 302 (McKinney 1974). Accordingly, Blum did not have a substantive right to implead Good Humor into the original suit.

[92] 57 App. Div. 2d at 911-12, 394 N.Y.S.2d at 896. For a defense of laches to succeed, both a delay and resulting prejudice must be demonstrated. Sorrentino v. Mierzwa, 25 N.Y.2d 59, 63, 250 N.E.2d 58, 60, 302 N.Y.S.2d 565, 568-69 (1969); CPLR 3019, commentary at 261 (McKinney 1974); H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 125 (3d ed. 1973); 1 WK&M ¶ 213.07.

[93] 57 App. Div. 2d at 911, 394 N.Y.S.2d at 895. The supreme court granted Blum's motion to strike defendant's statute of limitations defense, since the action had been brought within the prescribed 6-year period. *Id.* The second department affirmed. *Id.*

[94] *Id.*

[95] *Id.* at 912, 394 N.Y.S.2d at 896. The doctrine of contribution, which represents an attempt to distribute equally the burdens of an obligation, is of equitable origin. 2 S. WILLISTON, THE LAW OF CONTRACTS § 345, at 765 (3d ed. W. Jaeger 1959). Until recent times, however, this action generally was restricted to liability based on contractual obligations, *see id.*, and did not encompass tortious liability, *see* Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799); W. PROSSER, THE LAW OF TORTS § 50 (4th ed. 1971).

[96] 57 App. Div. 2d at 912, 394 N.Y.S.2d at 896. Although the *Blum* majority never fully defined laches, characterizing it only as "undue delay," it is well established that laches is

therefore concluded that the defense of laches was not insufficient as a matter of law and might be raised at trial.[97] In a dissenting opinion, Justice Cohalan argued that an action for contribution, regardless of its equitable origins, is still essentially an action at law to determine the relative negligence of tortfeasors and hence is controlled *only* by the statute of limitations.[98] Noting that an action for contribution accrues upon payment of the judgment by defendant to plaintiff,[99] the dissent suggested that the applicable 6-year statute of limitations had not yet run.[100] Furthermore, even if laches were to apply, Justice Cohalan was unable to find any prejudice to the position of the defendant attributable to plaintiff's 13-month delay in commencing the action for contribution.[101]

While the defense of laches is utilized to prevent prejudicial delay in suits in equity, it is apparently available only when discretionary relief is sought.[102] Since a joint tortfeasor has a legal right to contribution,[103] it is suggested that the *Blum* court erred by enter-

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more than mere delay; it is delay coupled with prejudice to the defendant arising from the delay. *See* note 92 *supra.*

[97] 57 App. Div. 2d at 912, 394 N.Y.S.2d at 896.

[98] *Id.* at 912-13, 394 N.Y.S.2d at 897-98. (Cohalan, J., dissenting).

[99] CPLR 3019, commentary at 290 (McKinney 1974); W. PROSSER, THE LAW OF TORTS § 309 (4th ed. 1971); 2A WK&M ¶ 1403.03; *cf.* Hofferberth v. Nash, 191 N.Y. 446, 450-51, 84 N.E. 400, 401 (1908) (action to charge property of unserved debtor accrues on payment of original judgment); Musco v. Conte, 22 App. Div. 2d 121, 125-26, 254 N.Y.S.2d 589, 595 (2d Dep't 1964) ("action for indemnity . . . accrues . . . at the time of the payment of the judgment"). *See also* Graziano, *Recommendations Relating to Section 50-e of the General Municipal Law and Related Statutes,* TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 358, 378 n.105 (1976) (discussion of cases determining when an action for indemnity or contribution accrues against the state). The proposition that an action for contribution accrues upon payment follows from the theory that the obligation to contribute arises out of an implied contract to indemnify; a duty to indemnify does not mature until an actual loss is incurred. *See* RESTATEMENT OF RESTITUTION §§ 76-77 (1937). In the interest of judicial economy, CPLR 1403 permits an action for contribution to be commenced prior to its accrual "by cross-claim, counterclaim, or third-party claim" in the underlying suit.

[100] 57 App Div. 2d at 913, 394 N.Y.S.2d at 897-98 (Cohalan, J., dissenting). No more than 13 months had run on the limitation period, since only 13 months had elapsed between the date of settlement and the date the action for contribution was instituted.

[101] *Id.*, 394 N.Y.S.2d at 898. (Cohalan, J., dissenting).

[102] Feldman v. Metropolitan Life Ins. Co., 259 App. Div. 123, 123-25, 18 N.Y.S.2d 285, 287 (1st Dep't 1940); H. PETERFREUND & J. MCLAUGHLIN, NEW YORK PRACTICE 125 (3d ed. 1973). For example, although an action for specific performance must be brought within the statutorily mandated time period, since it is a discretionary remedy the court may find laches a bar to granting such relief. *See* Groesbeck v. Morgan, 206 N.Y. 385, 99 N.E. 1046 (1912).

[103] New York seems to afford joint tortfeasors a substantive *right* to contribution. *See* CPLR 3019, commentary at 236 (McKinney 1974). *See also* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(d). This right is enunciated in both Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972), and CPLR 1401, which provides in pertinent part: "[T]wo or more persons who are subject to liability . . . for the

taining a laches defense. This ruling, if followed, would reduce contribution from the right established by *Dole v. Dow Chemical Co.*[104] and CPLR 1401[105] to an equitable remedy available only in the discretion of the court.[106] Beyond this criticism, it is submitted that the *Blum* decision reflects a dissatisfaction with the 6-year limitation period in contribution actions. This 6-year period seems excessive and may conflict with the concept of judicial economy as well as the policy against piecemeal litigation.[107] In this regard, it has been urged that a 1-year statute of limitations for contribution actions would best comport with all relevant policy considerations.[108] De-

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same . . . injury . . . may claim contribution." In short, the availability of contribution does not appear to be left to the discretion of any tribunal.

It is submitted that equitable considerations are relevant in determining whether a claim for contribution should be tried separately from the main action. This appeared rather clearly in the wording of *Dole* which stressed: "Whether the causes are tried together or separately would rest in the court's discretion, according to the requirements of fairness." 30 N.Y.2d at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391. *See* CPLR 3019, commentary at 261-62 (McKinney 1974).

[104] 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 286 (1972). *See* CPLR 3019, commentary at 236 (McKinney 1974); 47 N.Y.U. L. REV. 815, 820-21 (1972).

[105] CPLR 1401, *quoted in* note 103 *supra.*

[106] By applying the equitable defense of laches, a court in its discretion may bar an action although the suit was within the period set by the statute of limitations. *See* note 102 *supra.*

[107] *See* Occhialino, *Contribution,* NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 232-33 (1974). The Uniform Contribution Among Tortfeasors Act employs a unique approach in this area:

> If there is no judgment . . . against the tortfeasor seeking contribution, his right of contribution is barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(d). Alternatively, if there is a judgment against the tortfeasor, his right to contribution is barred "after the judgment has become final by lapse of time for appeal or after appellate review." *Id.* § 3(c). *See id.,* comment to subsections (c) & (d).

The emergence of a 6-year limitations period for contribution actions was rather fortuitous. As Professor Occhialino pointed out in his study, the unjust results which flowed from the pre-*Dole* limitations on contribution among tortfeasors led to the development of a partial remedy through the recognition of an indemnity doctrine. Occhialino, *Contribution,* NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 231 (1974); 47 N.Y.U. L. REV. 815, 815-18 (1972). In search of a theoretical underpinning for this limited right to contribution, the courts turned to a quasi-contract theory with its accompanying 6-year statute of limitations. *See* note 86 *supra.*

[108] Professor Occhialino proposed a 1-year statute of limitations for contribution actions. This shorter period effectively would result in trying most actions for contribution together with the underlying suits. Occhialino, *Contribution,* NINETEENTH ANN. REP. N.Y. JUD. CONFERENCE 217, 232-33 (1974); *accord,* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c). Professor Occhialino also argued that the cause of action for contribution should

spite the questionable result reached, the decision in *Blum* may have the salutory effect of focusing legislative attention upon this area. As a consequence, it is hoped legislative action significantly reducing the statute of limitations for actions in contribution will be forthcoming.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102(a): Party requesting nonjury trial may not later object to withdrawal of another party's demand for jury trial.

CPLR 4102(a) requires a party who desires a jury trial to include a demand in a note of issue served on all parties and filed with the court.[109] Failure to include the demand is deemed a waiver of the right to a jury trial.[110] To withdraw a demand under 4102(a), a party must obtain the consent of the other parties to the action.[111] Recently, in *Gonzalez v. Concourse Plaza Syndicates, Inc.*,[112] the Court of Appeals, in a per curiam opinion, held that a party who indicates his preference for a nonjury trial in a note of issue thereby consents to any subsequent withdrawal of demand for a jury trial.[113]

The *Gonzalez* plaintiff commenced a wrongful death action after her husband fell from a window he was washing at the Concourse Plaza Hotel, naming the hotel and the Weinbergs, occupants of the apartment whose windows the decedent was washing, as defendants. Plaintiff filed a note of issue requesting a trial without a

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accrue at the time the tortfeasor is served with process and is able to obtain jurisdiction over the third-parties. *Id.* at 230-32.

[109] CPLR 4102(a) provides in pertinent part:

> Any party may demand a trial by jury of any issue of fact triable of right by a jury, by serving upon all other parties and filing a note of issue containing a demand for trial by jury. Any party served with a note of issue not containing such a demand may demand a trial by jury by serving upon each party a demand for a trial by jury and filing such demand . . . within fifteen days after service of the note of issue.

For a general discussion of CPLR 4102, see 4 WK&M ¶¶ 4102.01-.22.

[110] CPLR 4102(a). Although the right to trial by jury is protected by the state constitution, "a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." N.Y. CONST. art. 1, § 2. The Court of Appeals has held that the right to a jury trial must be timely asserted. *See* Brenner v. Great Cove Realty Co., 6 N.Y.2d 435, 442, 160 N.E.2d 826, 829, 190 N.Y.S.2d 337, 342 (1959). *See generally* Craig v. City of New York, 228 App. Div. 275, 239 N.Y.S. 328 (1st Dep't 1930); 4 WK&M ¶ 4102.10.

[111] CPLR 4102(a). *See* Russell v. Russell, 40 App. Div. 2d 945, 339 N.Y.S.2d 319 (4th Dep't 1972) (mem.); Schrank v. Rensselaer Assocs., 65 Misc. 2d 428, 317 N.Y.S.2d 674 (Sup. Ct. Rensselaer County 1970) (mem.).

[112] 41 N.Y.2d 414, 361 N.E.2d 1011, 393 N.Y.S.2d 362 (1977) (per curiam), *aff'g* 51 App. Div. 2d 42, 378 N.Y.S.2d 716 (1st Dep't 1976).

[113] 41 N.Y.2d at 416, 361 N.E.2d at 1013, 393 N.Y.S.2d at 363.