

Dole Counterclaim Unavailable Against a Plaintiff Suing in Representative Capacity

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easily resolved by prompt notice and investigation. Thus, an early notice of accident provision would further, not hinder, the purpose of no-fault, *viz.*, to reimburse injured claimants.²³²

By establishing as a matter of law that 90 days' notice is reasonable in the no-fault area, it appears that Justice Wallach is rewriting the provisions of the contract between the parties. In light of well-established principles of insurance law, the *Subia* court should have denied plaintiff's motion for summary judgment. It is suggested that the court overstepped the bounds of its judicial function in selecting this forum for expressing its displeasure with the no-fault notice provisions.

DOLE V. DOW CHEMICAL CO.

Dole counterclaim unavailable against plaintiff suing in representative capacity.

The CPLR states that "[a] counterclaim may be any cause of action in favor of one or more defendants . . . against one or more plaintiffs, [or] a person whom a plaintiff represents" ²³³ While the statute's broad language may appear to permit unrestricted claims back and forth between the parties regardless of the capacity in which a party appears in the action, it is an established rule in New York civil procedure that a defendant's counterclaim against a plaintiff is "restricted to the capacity in which [the plaintiff] sues."²³⁴ The purpose of this rule is to "preclude an unwarranted mixture of a person's individual and representative liabilities and assets through the confusing use of counterclaims in litigation."²³⁵

It is not surprising, therefore, that in *Grierson v. Wagar*²³⁶ the Supreme Court, Rensselaer County, granted a motion to dismiss a counterclaim against plaintiff in her individual capacity when plaintiff had sued as executrix. The action which arose out of an automobile accident with the defendant was brought by plaintiff to recover damages

incurred. A claimant is entitled to recover interest at 2% per month on all payments not made within 30 days of the loss. N.Y. INS. LAW § 675(1) (McKinney Supp. 1974).

²³² See Governor's Memorandum of Feb. 13, 1973, Approval of Bills, Comprehensive Automobile Insurance Reparations Act, in MCKINNEY'S SESSION LAWS OF NEW YORK 2335 (1973). See also Comment, *New York Adopts No Fault: A Summary and Analysis*, 37 ALBANY L. REV. 662, 671 (1973), wherein it is stated that "the [no-fault] Act was primarily intended to compensate motor vehicle accident victims quickly for substantially all of their economic loss."

²³³ CPLR 3019(a).

²³⁴ *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259, 257 N.E.2d 890, 892, 309 N.Y.S.2d 341, 344 (1970) (counterclaim against plaintiff as representative of estate not allowed when plaintiff sued in individual capacity); 7B MCKINNEY'S CPLR 3019, commentary at 217-18 (1974). See 3 WK&M ¶ 3019.08.

²³⁵ 7B MCKINNEY'S CPLR 3019, commentary at 218 (1974).

²³⁶ 78 Misc. 2d 479, 357 N.Y.S.2d 351 (Sup. Ct. Rensselaer County 1974).

for the conscious pain and suffering²³⁷ and the wrongful death²³⁸ of the testator she represented. Since the decedent had been driving plaintiff's car at the time of the accident, defendant counterclaimed against plaintiff in her individual capacity, seeking indemnification under the doctrine of *Dole v. Dow Chemical Co.*²³⁹ in the event plaintiff obtained a judgment for the estate of the decedent. The counterclaim alleged that plaintiff had been negligent in allowing her car to remain in a defective condition. In granting plaintiff's motion to dismiss the counterclaim, the *Grierson* court held that defendant's claim could only be asserted against plaintiff by means of a third-party complaint.²⁴⁰

The *Grierson* rationale was logically correct. Plaintiff, suing as executrix, had brought the action for the benefit of the testator's distributees and devisees.²⁴¹ In the eyes of the law, her capacity was that of "a distinct person and stranger to any right or liability as an individual."²⁴² A counterclaim for apportionment of liability for the injury and death of the deceased would, of necessity, fail to state a cause of action, since plaintiff, as executrix, had no legal existence prior to the testator's death.²⁴³ This line of reasoning inevitably leads to the conclusion reached by the court — that impleader²⁴⁴ is the proper means by which defendant might assert his claim for indemnification.²⁴⁵

As the court noted, "the purpose of the [same capacity] rule is to preclude the interposition of an unrelated claim, or of a claim which would, if successful, diminish the represented person's recovery with something that was only against the representative."²⁴⁶ Admittedly, defendant's *Dole* counterclaim seeking a determination of plaintiff's personal liability was directly related to plaintiff's cause of action. The

²³⁷ N.Y. EST., POWERS & TRUSTS LAW § 11-3.2 (McKinney 1967) provides that a cause of action for personal injury survives the death of the injured party and may be continued by the personal representative of the deceased.

²³⁸ The personal representative of the decedent is authorized to bring an action to recover damages for wrongful death under *id.* § 5-4.1.

²³⁹ 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

²⁴⁰ 78 Misc. 2d at 481, 357 N.Y.S.2d at 353.

²⁴¹ *See id.*

²⁴² *Leonard v. Pierce*, 182 N.Y. 431, 432, 75 N.E. 313, 314 (1905).

²⁴³ *See* N.Y. EST., POWERS & TRUSTS LAW § 1-2.13 (McKinney 1967).

²⁴⁴ 7B MCKINNEY'S CPLR 1007 (1963). Impleader is a procedural device whereby a defendant may join in the action a person not a party who is or may be liable to the defendant for all or part of the plaintiff's claim against him. *See* 7B MCKINNEY'S CPLR 1007, commentary at 90-100 (1974); 3 CARMODY-WAIT 2d §§ 19.113 at 365, 19.126 at 397 (1968).

²⁴⁵ The impleader procedure has been recognized as a proper and logical mechanism for the assertion of a *Dole* right. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972); *Lipson v. Gewirtz*, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. Nassau County 1972). *See also* *Birnbaum, Civil Practice, 1973 Survey of New York Law*, 25 SYRACUSE L. REV. 349 (1974).

²⁴⁶ 78 Misc. 2d at 480, 357 N.Y.S.2d at 352.

danger inherent in permitting a counterclaim to be asserted in this action is that a finding of personal liability on the part of the "representative" plaintiff would serve to diminish the represented person's recovery. In a wrongful death action, the personal representative's right to recover "depends solely on the right of the injured person to recover, . . . and although brought by the personal representative, accrues for the benefit of the distributees."²⁴⁷ Any recovery in a cause of action for personal injuries becomes part of the decedent's estate.²⁴⁸ Therefore, as the court explained, if defendant is ultimately successful in prosecuting his counterclaim, the distributees or devisees of the decedent would be adversely affected as to that part of the judgment for which plaintiff was found personally liable as a joint tortfeasor.²⁴⁹

Defendants who wish to establish the personal liability of a plaintiff who has brought suit in a fiduciary capacity are therefore reminded that due to the substantial possibility of prejudice to the rights of represented parties, courts will permit such claim to be asserted only by means of a third-party complaint.

DEVELOPMENTS IN NEW YORK PRACTICE

Standing to litigate in suits against the civil service.

Standing, a judicially created concept resulting from a blend of public policy considerations and discretionary judicial restraint, restricts a court's power to render decisions. Recently, in *Burke v. Sugarman*,²⁵⁰ the Court of Appeals unanimously held that persons who pass a civil service examination and are placed on an eligible list "have standing to challenge unlawful appointments or designations to positions for which the list has been established."²⁵¹

Petitioners in *Burke* instituted a special proceeding pursuant to CPLR article 78,²⁵² seeking the removal of certain persons alleged to have been unlawfully appointed to positions in the New York City Department of Social Services. These employees had been promoted from without the appropriate eligible list, in contravention of the

²⁴⁷ N.Y. EST., POWERS & TRUSTS LAW § 5.4-4(a) (McKinney 1967) provides that the damages are "exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto . . ."

²⁴⁸ *Id.* § 11-3.3(a).

²⁴⁹ 78 Misc. 2d at 481, 357 N.Y.S.2d at 353.

²⁵⁰ 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974), *rev'g* 41 App. Div. 2d 1026, 344 N.Y.S.2d 310 (1st Dep't 1973) (mem.).

²⁵¹ 35 N.Y.2d at 44, 315 N.E.2d at 774, 358 N.Y.S.2d at 718.

²⁵² See generally Fox, *Reviewability of Quasi-Legislative Acts of Public Officials in New York Under Article 78 of the CPLR*, 39 ST. JOHN'S L. REV. 49 (1964); Weintraub, *Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules*, 38 ST. JOHN'S L. REV. 86 (1963).