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Retroactivity

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Retroactivity

It is settled that *Dole* rights are available in any action which was still in the trial or appellate process at the time of the *Dole* decision.[245] Whether *Dole* was meant to be fully retroactive is yet to be determined. The Court of Appeals engrafted one limitation on *Dole*'s applicability when it held in *Codling v. Paglia*[246] that a settlement agreed upon before *Dole* and prior to trial precluded the defendant from obtaining *Dole* apportionment. The Supreme Court, Albany County, however, recently held in *Lampila v. Harrington*[247] that where there is not merely a naked settlement, but a settlement prompted by a pre-*Dole* judgment, the opportunity to seek apportionment of damages is available.[248]

The Appellate Division, First Department, reached the opposite conclusion in *Glicksman v. Smith*,[249] where a pre-*Dole* third-party claim had failed under the active-passive test. The court affirmed the trial court's refusal to entertain a second third-party complaint, deeming the original dismissal a final judgment, unaffected by a subsequent change in the law. This decision draws the First Department into conflict with the Second Department,[250] which is in accord with the better view that the doctrine of the law of the case should not be applied in light of the predominating interest of effectuating the policy of *Dole*. The purpose of *Dole* was to eliminate the frequent injustice produced by the active-passive dichotomy. To rely upon a prior dismissal of the complaint under this now discredited rule to reject a claim for equitable apportionment defeats this purpose.

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245 Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); Frey v. Bethlehem Steel Corp., 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972) (mem.). *See, e.g.*, Mosca v. Pensky, 41 App. Div. 2d 775, 342 N.Y.S.2d 76 (2d Dep't 1973) (mem.); Liebman v. County of Westchester, 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (2d Dep't 1973) (mem.); Hain v. Hewlett Arcade, Inc., 40 App. Div. 2d 991, 338 N.Y.S.2d 791 (2d Dep't 1972) (mem.); Brown v. City of N.Y., 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972); Moreno v. Galdorisi, 39 App. Div. 2d 450, 336 N.Y.S.2d 646 (2d Dep't 1972); Meade v. Roberts, 71 Misc. 2d 120, 335 N.Y.S.2d 349 (Sup. Ct. Broome County 1972); Sanchez v. Hertz Corp., 70 Misc. 2d 449, 333 N.Y.S.2d 699 (Sup. Ct. Kings County 1972). *But see* Glomboski v. Baltimore & Ohio R.R., 72 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct. Monroe County 1972) (mem.).

246 32 N.Y.2d 330, 344, 298 N.E.2d 622, 629-30, 345 N.Y.S.2d 461, 471 (1973).

247 76 Misc. 2d 423, 351 N.Y.S.2d 345 (Sup. Ct. Albany County 1973).

248 The court noted that while the Court of Appeals has held *Dole* applicable to pending cases, it has never held this to be the limit of its retroactivity. *Id.* at 426, 351 N.Y.S.2d at 346.

249 43 App. Div. 2d 544, 349 N.Y.S.2d 709 (1st Dep't 1973).

250 *See* Mosca v. Pensky, 41 App. Div. 2d 775, 342 N.Y.S.2d 76 (2d Dep't 1973) (mem.); *see also* Liebman v. County of Westchester, 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (2d Dep't 1973) (mem.), where a third-party complaint was upheld because the damages segment of the trial was still pending.

Some had predicted that *Dole* would prompt the re-opening of hundreds of pre-*Dole* actions involving multiple tortfeasors,[251] but this has not occurred. The *Lampila* decision, holding as it does in favor of full retroactivity, should alert the practitioner to the possibility that his "dead" files may in fact be alive with *Dole* claims.[252]

It should be noted that, even if the *Dole* claim is struck, contribution may still be available under CPLR 1401 if the prior judgment was obtained jointly against the party from whom contribution is sought.

Waiver

While CPLR 1401 has been termed "near dead,"[253] it maintains some further vitality where the right to *Dole* apportionment has been waived.[254] In *Caucci v. Fesko*,[255] the action was commenced one month after *Dole*, and the trial judge's charges in accordance with pre-*Dole* law went unchallenged at trial and on appeal. A subsequent claim for relative contribution on cross-motion to a CPLR 1401 motion was rejected by the Supreme Court, Westchester County, on the theory that the failure to raise *Dole* rights before final judgment constituted a waiver.

While *Dole* apportionment can generally be had in a separate indemnity action, this right is not available where it could have been asserted in the original action via crossclaim.[256] In the present case, the omission to assert *Dole* was not an inadvertence but was part of the trial strategy.[257] Where this is so, little reason exists to give the party a second chance. However, this situation will rarely occur since

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251 *See, e.g.*, Welborn v. DeLeonardis, 168 N.Y.L.J. 3, July 6, 1972, at 2, col. 4, 5 (Sup. Ct. N.Y. County), wherein the court expressed fear that full retroactive application of *Dole* would "create a chaotic situation. . . ."

252 The statute of limitations will generally pose no difficulty. It commences upon payment of the judgment, Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964), and runs for six years. CPLR 213(2) (McKinney 1972). *See* 7B McKINNEY'S CPLR 3019, supp. commentary at 239 (1973).

253 7B McKINNEY'S CPLR 3019, supp. commentary at 241 (1973).

254 For a discussion of the waiver of *Dole* rights see 7B McKINNEY'S CPLR 3019, supp. commentary at 230 (1973); Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 208 (1972).

255 76 Misc. 2d 614, 349 N.Y.S.2d 886 (Sup. Ct. Westchester County 1973).

256 76 Misc. 2d at 616-17, 349 N.Y.S.2d at 889, *quoting* 7B McKINNEY'S CPLR 3019, supp. commentary at 241 (1973). *See* Henriquez v. Mission Motor Lines, Inc., 72 Misc. 2d 782, 339 N.Y.S.2d 478 (Sup. Ct. N.Y. County 1972).

257 Professor David D. Siegel recommends that because of the newness and importance of *Dole* rights, there should be a presumption against waiver and "[t]he clearest indications of intent to waive, the strongest showing of prejudice to other litigants, or at least a distasteful combination of those things should be required to overturn the presumptions." 7B McKINNEY'S CPLR 3019, supp. commentary at 241 (1973).