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Article 29

Waiver

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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).

the trial court will generally raise the issue sua sponte if the parties do not.[258]

Indemnity Contracts

One area in which *Dole* has been held inapplicable is where an indemnity agreement exists between the parties. In *Williams v. D. A. H. Construction Corp.*,[259] the Appellate Division, Second Department, reversed the trial court's direction of a verdict in favor of the plaintiff and third-party plaintiff, and remanded for a determination of whether the terms of the indemnity contract had been satisfied, *i.e.*, whether the plaintiff's injury was caused by any act or omission by the third-party defendant. The court stated that *Dole* does not apply in this situation.[260] It is notable, however, that while the indemnity agreement controls the third-party plaintiff's claim here, *Dole* would have produced the same effect as the terms of the contract.

Court of Claims

The New York State Constitution establishes the Court of Claims as the exclusive forum for claims against the state.[261] As to claims against all other defendants, however, the court has no competence whatsoever. Because this truncated jurisdiction rules out third-party practice,[262] several actions may be necessary to finally resolve a controversy to which the state is a party. This shortcoming of Court of Claims practice has become all the more apparent since *Dole*.[263] When the

258 The Second Department requires the trial court to sua sponte charge the jury with respect to apportionment of fault even absent a crossclaim. Stein v. Whitehead, 40 App. Div. 2d 89, 337 N.Y.S.2d 821 (2d Dep't 1972). *See also* Lipson v. Gewirtz, 70 Misc. 2d 599, 602, 334 N.Y.S.2d 662, 665 (Dist. Ct. Nassau County 1972) ("The court on its own initiative is to instruct the jury to fix responsibility among the defendants and apportion damages among those found to be liable.").

259 42 App. Div. 2d 877, 346 N.Y.S.2d 862 (2d Dep't 1973) (mem.).

260 *But see* Schwab, *supra* note 232, at 160-61, where the author states:

> If the intent of Dole, inter alia, is to broaden the basis of recovery and to induce otherwise reluctant litigants to contribute towards a settlement, surely the contractual indemnification case law of New York, as recent as it is, accomplishes a contrary result.

261 The court has jurisdiction over "claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide." N.Y. CONST. art. 4, § 9. *See generally* McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1 (1965); *Jurisdiction of the Court of Claims, Consolidation into the Supreme Court*, in SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 94 (1957).

262 *See* Horoch v. State, 286 App. Div. 303, 143 N.Y.S.2d 327 (3d Dep't 1955). Trial by jury is not available in the Court of Claims. N.Y. CT. CL. ACT § 12(3) (McKinney 1963). Impleader by the state would, therefore, deprive a third-party defendant of a constitutionally guaranteed right. N.Y. CONST. art I, § 2.

263 *See* Bartlett v. State, 40 App. Div. 2d 267, 340 N.Y.S.2d 66 (4th Dep't 1973) (state may not seek a *Dole* apportionment in the Court of Claims).