

# Vouching In: Available Where Party Sought To Be Vouched In Is the Defendant's Indemnitor

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authority from relying on a defense of failure to file properly a notice of claim.

#### ARTICLE 6—JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

##### *CPLR 603: Court grants separate trial for severable issues.*

Pursuant to CPLR 603, a trial court may on its own motion sever the issues in an action, and order a separate trial of any claim or of any separate issue for convenience or to avoid prejudice.

In *Hacker v. City of New York*,<sup>94</sup> the appellate division, first department, in interpreting CPLR 603, explained the procedure of granting separate trials of severable issues. In *Hacker*, an action for personal injuries, the parties stipulated that the issue of liability be tried by the court without a jury, in advance of the issue of damages. Having found for the plaintiff on the issue of liability, the court ordered the trial of damages to be placed on the calendar. The City then appealed and moved for a stay of the trial of damages pending this appeal. The instant court, in a unanimous opinion, held that defendant was entitled to appeal from the judgment on the separate issue of liability, and granted a stay of the trial of damages.

This decision was contrary to *Bliss v. Londner*,<sup>95</sup> wherein the second department held that although separate trials on the issues of liability and damages were proper, a finding on the liability issue was merely a ruling in the course of the trial, and an appeal from such a ruling must await the entry of a judgment. The instant court called the *Bliss* decision irrelevant because "we do not have in this case . . . 'one continuous proceeding' in which the issues of liability and damages proceed to determination together. . . ." <sup>96</sup> The court compared the appeal allowed here with an appeal from an order granting summary judgment and directing an assessment of damages.

#### ARTICLE 10—PARTIES GENERALLY

*Vouching in: Available where party sought to be vouched in is the defendant's indemnitor.*

Vouching in, the common-law ancestor of impleader,<sup>97</sup> is used today in cases where impleader cannot be used.<sup>98</sup> The defendant,

<sup>94</sup> 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1st Dep't 1966).

<sup>95</sup> 20 App. Div. 2d 640, 246 N.Y.S.2d 296 (2d Dep't 1964).

<sup>96</sup> *Hacker v. City of New York*, 25 App. Div. 2d 35, 37, 266 N.Y.S.2d 194, 196 (1st Dep't 1966).

<sup>97</sup> CPLR 1007.

<sup>98</sup> For example, impleader cannot be used where the third person is not subject to the jurisdiction of the court in which the defendant has been sued.

without making the third person a party, may vouch him in by giving him sufficient notice of the pendency of the suit and by offering him the opportunity to control the defense.<sup>99</sup> Whether or not the third person chooses to accept, he would then be held bound by the judgment. This procedure, however, may only be used when the person sought to be vouched in is the indemnitor of the defendant.

In *C. K. S. Inc. v. Helen Borgenicht Sportswear, Inc.*,<sup>100</sup> the plaintiff retailer sought to recover the amount paid by him in settlement of a separate action for personal injuries sustained when a blouse sold by the plaintiff caught fire. The plaintiff, claiming that the defendant was the manufacturer of the blouse and, therefore, through an implied warranty of fitness, an indemnitor, vouched him in.

In reversing an order of the lower court, the appellate division, first department, held that in the subsequent indemnification action it was proper for the defendant to show that he was not the plaintiff's indemnitor and, therefore, that he could not be vouched in.<sup>101</sup> The court noted, however, that had it been conclusively established below that the defendant was an indemnitor, he could not here deny liability by contesting facts already established.<sup>102</sup> Had it been determined that the defendant was the plaintiff's indemnitor, he would have been bound by that decision in the subsequent indemnification action.

*CPLR 1025: Limited partner cannot sue derivatively on behalf of his partnership.*

In *Klebanow v. New York Produce Exch.*,<sup>103</sup> the second circuit permitted limited partners to sue on behalf of the partnership after the general partners had rendered themselves unable to sue by placing the partnership in the hands of a liquidator allegedly affiliated with the defendants.

Though it has been suggested that New York law would be influenced by *Klebanow*,<sup>104</sup> in *Millard v. Newmark & Co.*,<sup>105</sup> the appellate division, first department, in a 3-2 decision, held that 32 of 100 limited partners could not maintain a derivative suit on behalf of the partnership. The majority in *Millard* distinguished

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<sup>99</sup> Hartford Acc. & Indem. Co. v. First Nat'l Bank & Trust Co., 281 N.Y. 162, 167-68, 22 N.E.2d 324, 326 (1939).

<sup>100</sup> 25 App. Div. 2d 218, 268 N.Y.S.2d 409 (1st Dep't 1966).

<sup>101</sup> *C. K. S. Inc. v. Helen Borgenicht Sportswear, Inc.*, 25 App. Div. 2d 218, 268 N.Y.S.2d 409 (1st Dep't 1966).

<sup>102</sup> *Id.* at 220, 268 N.Y.S.2d at 411.

<sup>103</sup> 344 F.2d 294 (2d Cir. 1965).

<sup>104</sup> *E.g.*, *Standing of Limited Partners to Sue Derivatively*, 65 COLUM. L. REV. 1463 (1965).

<sup>105</sup> 24 App. Div. 2d 333, 266 N.Y.S.2d 254 (1st Dep't 1966).