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CPLR 1402: Insolvent Defendant May Borrow Judgment Money Pursuant to Agreement with Plaintiff Thus Accruing His Claim for Contribution

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ARTICLE 14—CONTRIBUTION

CPLR 1402: Insolvent defendant may borrow judgment money pursuant to agreement with plaintiff thus accruing his claim for contribution

CPLR 1402 entitles a defendant to a claim for contribution equal to the amount paid by him in excess of his apportioned share of liability.[92] While a contribution claim may be asserted prior to judgment in the main action, it cannot be enforced until the defendant pays more than his equitable share.[93] Thus, the main defen-

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[92] CPLR 1402 (1976) provides:

> The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

Article 14 of the CPLR as presently codified was amended by ch. 742, § 1, [1974] N.Y. Laws 1915 (current version at CPLR art. 14 (1976)) to reflect the Court of Appeals' decision in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In *Dole*, the Court held that liability between or among joint tortfeasors may be apportioned according to their fault in contributing to the plaintiff's injuries. *Id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. *See* TWELFTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1973), in TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 197, 218-19 (1974) [hereinafter cited as TWELFTH REPORT]; *The Survey*, 49 ST. JOHN'S L. REV. 170, 184 (1974). Prior to the *Dole* decision the CPLR allowed contribution claims between joint tortfeasors where one defendant had paid the injured plaintiff in excess of his pro rata share of liability. CPLR 1402, ch. 308 [1962] N.Y. Laws 1344, *as amended by*, ch. 388, § 5 [1964] N.Y. Laws 1256 (current version at CPLR art. 14 (1976)); *see* CPLR 1401, commentary at 361 (1976). Apportionment was not permitted, however, because of the "unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability among wrongdoers." Dole v. Dow Chem. Co., 30 N.Y.2d at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 305-23 (4th ed. 1971); *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 185, 186-200 (1972).

[93] Klinger v. Dudley, 41 N.Y.2d 362, 369, 361 N.E.2d 974, 979, 393 N.Y.S.2d 323, 328 (1977). CPLR 1403 states that "[a] cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action." CPLR 1403 (1976). Prior to the 1974 revision of article 14, however, if the plaintiff failed to name a joint tortfeasor as a defendant in the main action, that tortfeasor was unreachable by the other defendants, for there was no applicable impleader provision. *See* SIEGEL § 174, at 214. The present statute allows the main defendant to assert his contribution claim immediately, *see* Figueroa v. Kahn, 101 Misc. 2d 821, 822, 422 N.Y.S.2d 274, 275 (Sup. Ct. New York County 1979); 2A WK&M ¶ 1402.01 at 14-90, but prevents him from enforcing the claim until he has paid more than his apportioned share. Klinger v. Dudley, 41 N.Y.2d at 369, 361 N.E.2d at 979, 393 N.Y.S.2d at 328; Cubito v. Kriesberg, 69 App. Div. 2d 738, 746, 419 N.Y.S.2d 578, 583 (2d Dep't 1979); *see* Adams v. Lindsay, 77 Misc. 2d 824, 826, 354 N.Y.S.2d 356, 358 (Sup. Ct. Monroe County 1974); 2A WK&M ¶ 1402.01 at 14-90, 14-91; *cf.* McCabe v. Queensboro Farm Prods. Inc., 22 N.Y.2d 204, 208, 239 N.E.2d 340, 341, 292 N.Y.S.2d 400, 403 (1968) (contribution claim asserted by impleader before change in statute).

dant's insolvency will shield a culpable third-party defendant from liability unless the plaintiff previously asserted a claim against him.[94] It had been unclear, however, whether a plaintiff could improve his options for recovery through concerted action with the main defendant.[95] Recently, in *Feldman v. New York City Health and Hospitals Corporation*,[96] the Supreme Court, Kings County, held that an insolvent defendant may borrow the judgment money pursuant to an agreement arranged by the plaintiff, thereby entitling the defendant to enforce his contribution claim against the otherwise unreachable, but solvent, third-party defendant.[97]

In *Feldman*, an action was brought against the New York City Health and Hospitals Corporation (Hospitals Corporation) to recover on a contribution claim arising from a personal injury action apportioning liability among the main and third-party defendants.[98] Pursuant to the judgment in the tort action the defen-

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There is one instance, however, where a main defendant may enforce his contribution claim without having paid his apportioned share of the judgment. *See* Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976). In *Reed-Prentice*, the plaintiff received from the main defendant, as a settlement, an amount less than its "judicially fixed" share of liability as determined by the actual judgment. *Id.* at 40, 346 N.E.2d at 523, 382 N.Y.S.2d at 723. When the defendant sought to enforce its contribution claim, the third-party defendant refused to pay his share, asserting that the main defendant had failed to pay in excess of its equitable share. *Id.* The Court, however, held that a settlement obtained after litigation and judgment "does not preclude [the defendant] from enforcing the judgment for contribution previously obtained against [the third-party defendant]." *Id.* at 41, 346 N.E.2d at 524, 382 N.Y.S.2d at 723. Therefore, although the defendant had paid less than his apportioned share of the declared judgment, he was permitted to enforce his claim because he paid in excess of the equitable share of the amount received by the plaintiff. *Id.* at 41-42, 346 N.E.2d at 524, 382 N.Y.S.2d at 723-24; *see* CPLR 1402 (1976).

[94] *See* notes 120 & 122 and accompanying text *infra*.

[95] *See* CPLR 5230, commentary at 37 (McKinney Supp. 1980-1981); Farrell, *Survey of New York Law—Civil Practice*, 29 SYRACUSE L. REV. 449, 488-89 (1978).

[96] 107 Misc. 2d 145, 437 N.Y.S.2d 491 (Sup. Ct. Kings County 1981).

[97] *Id.* at 153-54, 437 N.Y.S.2d at 496.

[98] *Id.* at 148-49, 437 N.Y.S.2d at 494. Alexander Dubicki sustained various injuries as a result of being hit by an automobile driven by Robert Maresco and owned by Carlo Maresco. Dubicki v. Maresco, 64 App. Div. 2d 645, 645, 407 N.Y.S.2d 66, 68 (2d Dep't 1978). He was treated at New York City Health and Hospitals Corporation's Elmhurst General Hospital for two days and then moved to a hospital closer to his home. *Id.* There, under the supervision of Dr. Joseph Dashefsky, Mr. Dubicki received extensive treatment, but lost complete use of his right leg. *Id.* Mr. Dubicki and his wife filed suit, asserting a claim in negligence against the Marescos and one in medical malpractice against Dr. Dashefsky. *Id.* After Dr. Dashefsky impleaded the Health and Hospital Corporation, the Marescos cross-claimed against it seeking contribution. *Id.* at 645-46, 407 N.Y.S.2d at 69. The jury returned a $835,000 verdict against all the defendants and the third-party defendant. *Id.* After modificaton by the appellate division, liability was apportioned as follows: The Marescos

dants therein, the Marescos, owed $534,400 to the original plaintiffs, the Dubickis.[99] Impleaded by one of the defendants,[100] the Hospitals Corporation was found liable for $450,900 of this amount.[101] Except for a $25,000 liability insurance policy, the Marescos were insolvent. Since the Hospitals Corporation, as third-party defendant, was obligated to contribute only the amount actually paid by the Marescos in excess of $83,500, their apportioned share of liability,[102] the Dubickis' judgment remained largely unsatisfied.[103] In order to obtain payment, the Dubickis arranged a series of transactions whereby one Feldman loaned to the Marescos the entire amount outstanding on the judgment.[104] The Marescos then paid the Dubickis and received a full release from the judgment.[105] In return, Feldman was assigned the Marescos' right to enforce the contribution claim against the Hospitals Corporation and obtained Dubicki's guaranty of the loan in the event he could not recover.[106] This action resulted after the Hospitals Corporation refused to pay Feldman on the third-party claim.[107]

In an opinion by Justice Aronin, the Supreme Court, Kings County, sustained the validity of the agreements and held the Hospitals Corporation liable on the third-party judgment.[108] Recogniz-

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10%; Dr. Dashefsky 36%; and Health and Hospital Corporation 54%. *Id.* at 647, 407 N.Y.S.2d at 70.

[99] 107 Misc. 2d at 146, 437 N.Y.S.2d at 492. Dr. Dashefsky, the second defendant in the tort action, paid his share directly to the Dubickis, thereby reducing the Maresco's share of liability to 64% of the total amount. *Id.* Although the Marsecos were found to be only 10% at fault, they were the initial tortfeasors and thus were liable for the entire judgment. *Id.*

[100] *See* note 98 *supra.*

[101] 107 Misc. 2d at 146, 437 N.Y.S.2d at 492.

[102] *Id.* at 147, 437 N.Y.S.2d at 493; *see* text accompanying notes 93-94 *supra.*

[103] 107 Misc. 2d at 147, 437 N.Y.S.2d at 493.

[104] *Id.* at 148, 437 N.Y.S.2d at 493. According to the agreement among the Dubickis, the Marescos and Robert Feldman, Mr. Feldman loaned to the Marescos $546,202, an amount equal to the remaining judgment plus interest. *Id.*

[105] *Id.* The Marescos paid by a check which the Dubickis deposited in the escrow account maintained by their lawyer. *Id.* The Dubickis then executed an unconditional "general release and a full satisfaction of the judgment against the Marescos." *Id.*

[106] *Id.* The Marescos gave Feldman a demand promissory note in the amount of the loan plus 10% interest per annum. *Id.* Payment of the note was guaranteed by the Dubickis. *Id.* at 148, 437 N.Y.S.2d at 493-94.

[107] *Id.* at 149, 437 N.Y.S.2d at 494. As an affirmative defense to Feldman's suit, the Hospitals Corporation asserted that the arrangement was violative of public policy and that it constituted a collusive scheme intended to circumvent the *Klinger* prohibition against direct liability running from the third-party defendant to the plaintiff. *Id.*

[108] *Id.* at 149-54, 437 N.Y.S. at 494-96.

ing that in *Klinger v. Dudley*,[109] the Court of Appeals gave a literal interpretation to CPLR 1402 by requiring that payment first be made by the main defendant, the *Feldman* court noted that inequitable results might occur when the defendant is unable to pay an amount greater than his apportioned share of liability.[110] Justice Aronin reasoned, however, that the *Klinger* rule is justified since it ensures that the third-party defendant's contribution will not be kept by the main defendant without being made to the plaintiff.[111] Furthermore, the court observed that, unless the main defendant can satisfy the entire judgment, the third-party defendant is the beneficiary of the *Klinger* principle in cases where the plaintiff fails to proceed directly against it.[112] In Justice Aronin's view, *Klinger* does not prevent a plaintiff, faced with an uncollectible judgment, from taking concerted action with the defendant to arrange the necessary financing to fulfill the third-party defendant's condition precedent to liability.[113] Notwithstanding that the defendants incurred no out-of-pocket expense, the court stated that the sole requirement of *Klinger* is that payment come directly from the defendant.[114] Thus, Justice Aronin concluded that the agreement was not collusive and that it achieved equitable results consistent with the underlying purposes of the *Klinger* decision.[115]

It is submitted that the *Feldman* decision subverts the policy

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[109] 41 N.Y.2d 362, 361 N.E.2d 974, 393 N.Y.S.2d 323 (1977).

[110] 107 Misc. 2d at 150, 437 N.Y.S.2d at 494. The result in *Klinger*, stated the court, "can and does produce inequitable results for the parties involved." *Id.* For example, Justice Aronin added, it penalizes the plaintiff for his attorney's failure to proceed against all the proper parties. *Id.*

[111] *Id.* at 151, 437 N.Y.S.2d at 495. The *Feldman* court noted that a claim for contribution is equivalent to a claim for partial indemnification, *id.* (citing Zillman v. Meadowbrook Hosp. Co., 73 Misc. 2d 726, 729-30, 342 N.Y.S.2d 302, 306 (Sup. Ct. Nassau County 1973), *rev'd on other grounds*, 45 App. Div. 2d 267, 358 N.Y.S.2d 466 (2d Dep't 1974)), which is based on the concept that the main defendant should not be made to suffer because of the wrongs of the third-party defendant. 107 Misc. 2d at 151, 437 N.Y.S.2d at 495. The court noted that injustice can result where the *Klinger* rule is applied to an insolvent defendant, for not only will the plaintiff remain unpaid, but the defendant also could remain "subject to continuing income and/or property executions or other enforcement devices to pay off this additional liability." *Id.*

[112] *Id.* at 151, 437 N.Y.S.2d at 495.

[113] *Id.* at 153, 437 N.Y.S.2d at 495.

[114] *Id.*

[115] *Id.* The court also addressed the Hospitals Corporation's assertion that the Marescos had not really paid the Dubickis because the payment was held in escrow and could be returned to Feldman if the result of the suit was not in his favor. *Id.*; *see* note 105 *supra*. The court responded that what the Dubickis did with their money was irrelevant and of no concern to the Marescos. *Id.*

considerations underlying the contribution statute. As acknowledged by the *Feldman* court, CPLR 1402 is designed to prevent unjust enrichment of the third-party defendant arising from the payment by the main defendant of an amount exceeding his apportioned share of liability.[116] The *Klinger* rule furthers that aim by limiting the defendant's right to recover until actual payment of this amount.[117] It is suggested that, although not addressed by *Klinger*,[118] an agreement of the type sanctioned in *Feldman* is not consistent with these underlying principles. When a defendant has been released from liability before he has paid at least his share of the judgment, any amount later paid by the third-party defendant should not be deemed to compensate for an expense incurred by the main defendant. The third-party defendant is not unjustly enriched until such time as the defendant incurs a personal loss beyond his apportioned share of liability.[119] Carried to its logical extreme, the reasoning of the *Feldman* court would validate such an agreement even where the defendant is totally released from liability. In such a case, there is no unjust enrichment, and hence, no

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[116] *Id.* at 151, 437 N.Y.S.2d at 495. CPLR 1404 also demonstrates that the *Dole* Court did not change the plaintiff's right to fully recover from any initial tortfeasor. The statute states that "[n]othing contained [herein] shall impair the rights of any person entitled to damages under existing law." CPLR 1404(a) (1976); *see* TWELTH REPORT, *supra* note 92, at 221-22; CPLR 1404, commentary at 381 (1976).

In *Dole*, the Court accepted for the first time the principle that "[t]here are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification." 30 N.Y.2d at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386. In 1974, when article 14 of the CPLR was drastically altered to reflect *Dole*, *see* TWELFTH REPORT, *supra* note 92, at 218-19, the New York Legislature also expressed its approval of relative fault. The beneficiary of these rules was clearly the defendant. Prior to this revision in the law, a defendant had no recourse against a joint tortfeasor not sued by the plaintiff in the main action. *See* SIEGEL at 214. It is the tortfeasor—joint, concurrent, successive and independent—who has the right to enforce a claim for contribution. *E.g.*, McMahon v. Butler, 73 App. Div. 2d 197, 198, 426 N.Y.S.2d 326, 327 (3d Dep't 1980); *see* CPLR 1401, commentary at 362-63 (1976). Because the plaintiff has been denied the right to collect a judgment directly from the third-party defendant, where the main defendant is insolvent, the plaintiff's recovery will fall far short of the court's declared amount. Only the defendant can recover from the third-party defendant, unless the defendant allows the plaintiff to step into his place. Although a court probably would not allow direct assignment to the plaintiff of the defendant's right to collect from the third-party defendant, there seems to be no difference when the plaintiff finds someone to substitute for him.

[117] 107 Misc. 2d at 151, 437 N.Y.S.2d at 495.

[118] *See* CPLR 5230, commentary at 37 (McKinney Supp. 1980-1981); Farrell, *Survey of New York Law—Civil Practice*, 29 SYRACUSE L. REV. 449, 488-89 (1978).

[119] *See* Adams v. Lindsay, 77 Misc. 2d 824, 827, 354 N.Y.S.2d 356, 359 (Sup. Ct. Monroe County 1974).

apparent reason for allowing contribution under CPLR 1402.

Additionally, there are a number of other issues which the *Feldman* court should have considered before permitting this type of arrangement. Usually, when a party is impleaded, the plaintiff may amend his complaint pursuant to CPLR 1009 to assert any claim he has against that party.[120] Where the plaintiff's attorney fails through his negligence to properly assert a direct claim, the plaintiff has an adequate remedy in professional malpractice.[121] Furthermore, where the failure to amend stems from a statutory limitation, such as worker's compensation or notice of claim, it is not clear whether a court should sustain an agreement of this type.[122] If the third-party defendant is the plaintiff's employer, acceptance of a loan agreement initiated by a plaintiff-employee and an insolvent defendant permits the employee to circumvent the ex-

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[120] CPLR 1009 provides: "Within twenty days after service of the third-party complaint, the plaintiff may amend his complaint without leave of court to assert against the third-party defendant any claim he has against the third-party defendant." CPLR 1009 (1976).

[121] *E.g.*, Klinger v. Dudley, 41 N.Y.2d at 368, 361 N.E.2d at 979, 393 N.Y.S.2d at 328.

[122] Two possible statutory limitations to amending a complaint pursuant to CPLR 1009, *see* note 120 *supra*, are significant in the contribution context. The first is N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1980-1981) which provides in pertinent part: "the liability of an employer [under this chapter] shall be exclusive and in place of any other liability whatsoever . . ." to the injured employee and his privies. *See, e.g.*, O'Rourke v. Long, 41 N.Y.2d 219, 221, 359 N.E.2d 1347, 1350, 391 N.Y.S.2d 553, 556 (1976). Because of the exclusive nature of the statute, an injured employee is barred from asserting any claim against his employer. *See* N.Y. WORK. COMP. LAW § 11, commentary at 105 (McKinney Supp. 1980-1981). When his employer is impleaded by the main defendant as a third-party defendant, therefore, the employee is unable to use CPLR 1009 to amend his complaint. *E.g.*, Klinger v. Dudley, 41 N.Y.2d at 368, 361 N.E.2d at 979, 393 N.Y.S.2d at 328.

A second statutory limitation on CPLR 1009 is the notice of claim requirement embodied in section 50-e of the GML which provides in pertinent part:

> (a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation . . . or any officer, appointee or employee thereof, the notice of claim shall comply with and be served . . . within ninety days after the claim arises.

GML § 50-e (1977). The purpose of this provisions is to give timely notice to a municipality of the claim against it so that it can adequately prepare its defense. *E.g.*, Ziecker v. Town of Orchard Park, 70 App. Div. 2d 422, 427, 421 N.Y.S.2d 447, 450 (4th Dep't 1979); Leone v. City of Utica, 66 App. Div. 2d 463, 468, 414 N.Y.S.2d 412, 416 (4th Dep't 1979), *aff'd*, 49 N.Y.2d 811, 403 N.E.2d 964, 426 N.Y.S.2d 980 (1980); Worrell v. City of New York, 101 Misc. 2d 271, 272, 420 N.Y.S.2d 994, 996 (Sup. Ct. New York County 1979). If a plaintiff fails to comply with the provision when he wishes to sue a municipality, his claim will be defeated. *See* 2999 Realty Corp. v. Hallen Constr. Corp., 95 Misc. 2d 227, 406 N.Y.S.2d 951 (N.Y.C. Civ. Ct. Bronx County 1978).

clusive recovery feature of the worker's compensation statute.[123] Also left unresolved by the *Feldman* court is the possibility of successive contribution claims by the defendant. The potential for harassment of the third-party defendant in this situation has been noted where a small incremental amount in excess of his apportioned share is loaned to the defendant.[124] Moreover, while a third-party provided the loan proceeds in *Feldman,* the court's rationale would be applicable equally to cases in which the funds came directly from the plaintiff. In either case, the incentives for collusion are great where the named tortfeasor is insolvent. Consequently, the effect, if not the spirit of the *Klinger* rule, will be diminished substantially by permitting a *Feldman*-type agreement.

Ellen R. Dunkin

ARTICLE 44—TRIAL MOTIONS

CPLR 4401: Dismissal of cross-claim for contribution unwarranted despite cross-claimant's opening statement exculpating codefendants

A motion to dismiss a cause of action based on admissions in the opening statements of counsel which effectively preclude recovery may be made pursuant to CPLR 4401.[125] Although the statute

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[123] *See* note 122 *supra.*

[124] *See* CPLR 5230, commentary at 37-38 (McKinney Supp. 1980-1981). Successive claims would occur if the court allowed for assertion of the contribution claim through a "bucket brigade" approach. *Id.* at 37. This system of recovery applies where a defendant already has paid his exact share of the judgment. Each additional dollar he pays is one over and above his share and therefore collectible from the third-party defendant. Once the defendant collects that dollar, he can pay the plaintiff and thus, has another claim against the third-party defendant. *Id.* Rather than require the defendant to assert one contribution claim at a time, another commentator has postulated that the defendant may be entitled to receive the full amount owing once he pays just one dollar. *See* WK&M ¶ 1402.01a, at 14-94.

[125] CPLR 4401 (1963) provides:

> Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions.

Although not included expressly, dismissal on the basis of admissions in a counsel's opening statement is within the purview of the statute. SECOND REP. at 306; *see* CPLR 4401, commentary at 212 (1963). The practice of using the motion in this fashion is well established in New York. *See, e.g.,* Hoffman House v. Foote, 172 N.Y. 348, 356, 65 N.E. 169, 171 (1902); Schaefer v. Karl, 43 App. Div. 2d 747, 747, 350 N.Y.S.2d 728, 729 (2d Dep't 1973); Denenfeld v. Baumann, 40 App. Div. 502, 503, 58 N.Y.S. 110, 110 (1st Dep't 1899). Indeed,