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The Insurance Liability Crisis in New York: Is Article 16 Our Saving Grace?

I. Introduction

No Risky Businesses Need Apply! This was the reality many municipalities and businesses recently faced throughout New York State and the nation in their search for affordable liability insurance.[1] The years 1985 and 1986 marked the peak of the insurance liability crisis,[2] characterized by substantial increases in municipal liability insurance premiums,[3] dramatic in-

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1. Church, *Sorry, Your Policy is Canceled*, TIME, Mar. 24, 1986, at 16; GOVERNOR'S ADVISORY COMM'N ON LIAB. INS., REPORT ON INSURING OUR FUTURE 40-41 (1986) [hereinafter JONES COMM'N REPORT]. According to a survey conducted by the National Association of Insurance Commissioners (NAIC) in which 39 states participated,

> the problems of general and functional availability experienced in New York are similar to those experienced in other States. The most commonly identified problem lines [of coverage] in the reporting States are as follows (including citation of [the] number of States reporting each type of difficulty): Day Care (32 States), Asbestos Removal (15), Hazardous Waste Disposal (13), Government Entities (29), Liquor Liability (26), . . . Long-Haul Truckers (22).

Id. at 41.

The legislative history of Article 16 of the New York Civil Practice Law and Rules, §§ 1600-1603 (McKinney Supp. 1988), indicates that "[d]ay care centers, not-for-profit organizations, volunteer groups, businesses, governmental entities, housing and transit authorities, professionals and others have experienced sudden and inexplicable cancellations and non-renewals of their liability insurance policies with little, if any, notice." 1986 N.Y. Laws 220.

The liability insurance problems of New York mirror the national problem. Cotter, *Insurance Commission Releases Report*, THE BULLETIN, April, 1986, at 2 (newsletter of the New York State Insurance Department).

2. Cotter, *supra* note 1, at 1, 2; Church, *supra* note 1, at 16; JONES COMM'N REPORT, *supra* note 1, at 40. *See also*, TORT POLICY WORKING GROUP, ATT'Y GEN. COMM'N, CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 1-5 (1986).

3. Church, *supra* note 1, at 16. The following increases in insurance liability premiums were experienced by New York counties in the year 1985: Cattaraugus County 356%; Onondaga County 394%; Ontario County 400%; and Wyoming County 553%. *Liability Ins.: Its Impact upon Local Gov'ts, Municipalities and School Dists., 1985: Hearings Before the N.Y. State Senate Standing Comm'n on Ins., Educ., Local Gov't and Cities* 11 (1985) [hereinafter *Hearings*] (statement of Randi Triant, Ass't Director, Ass'n of Counties).

Of 260 towns surveyed by the Association of Towns, over 163 had increases between creases in deductibles,[4] and a lack of available coverage for certain high risk activities.[5] As a result, many communities were forced to cut services to cover premiums, or in extreme cases, were forced to go without insurance at all.[6] The New York Legislature noted that the lack of available and affordable liability insurance "threaten[s] to undermine economic development and the delivery of essential and necessary services to residents, consumers and businesses throughout New York State."[7]

On July 30, 1986, Governor Mario Cuomo signed into law a bill which had originated in response to the outcry by municipalities for affordable liability insurance.[8] Section 6 of the bill is codified as Article 16 of the New York Civil Practice Law and Rules.[9] Article 16 reforms the doctrine of joint and several liabil-

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1% and 100%, 42 had increases between 101% and 200%, 10 towns had increases between 201% and 300%, and 10 towns had increases of 301% or more. *Id.* at 17 (statement of G. Jeffrey Haber, Exec. Sec'y, County Dist. Att'y). A school district in Oswego County paid $2,900 for insurance in 1984. This premium was increased to $21,000 in 1985 and the coverage decreased from $5 million to $3 million. *Id.* at 29 (statement of Louis Grumet, Exec. Dir., N.Y. St. Sch. Bds. Ass'n).

4. Even the City of Hartford, "the insurance capital of the world," had its liability coverage slashed from $31 million to $4 million with a corresponding 20% rise in total premiums. Church, *supra* note 1, at 17.

5. In 1985 it was very difficult, if not impossible, in New York to obtain insurance liability coverage for environmental impairment, foster parents' liability, and public officials' liability. *Hearings, supra* note 3, at 11 (statement of Randi Triant, Ass't Dir., Ass'n of Counties). The State Thruway Authority had a difficult time obtaining affordable insurance because road construction and road condition were such common sources of municipal liability. *Id.* at 10; Church, *supra* note 1, at 16-26.

Pollution liability insurance was difficult to obtain because insurers had no accurate way to measure the potential risk, and hence they steered clear of supplying coverage at all rather than miscalculate. *Hearings, supra* note 3, at 64 (statement of James Corcoran, St. Sup't of Ins.).

6. In 1985, state insurance carriers informed officials of Broome, Dutchess, and Seneca counties that these counties would no longer be covered. *Hearings, supra* note 3, at 11 (statement of Randi Triant, Ass't Dir., Ass'n of Counties). New York City's Roosevelt Island tram was closed when the insurance premium increased from $800,000 to almost $9 million. It was later reopened under the City's self-insurance plan. Church, *supra* note 1, at 18.

7. 1986 N.Y. Laws 220, § 1.

8. Act of July 30, 1986, ch. 682. In the memorandum Governor Cuomo wrote accompanying his signing of the bill, he said "[the bill] is intended to alleviate for the New York insurance consumer the problems of unaffordability and unavailability of commercial risk, professional liability and public entity insurance." Governor's Memorandum on Approval of ch. 682, N.Y. Laws (July 30, 1986), *reprinted in* [1986] N.Y. Laws 3182, 3183-84 (McKinney).

9. N.Y. CIV. PRAC. L. & R. §§ 1600-1603 (McKinney Supp. 1988). The text of Article

16 is as follows:

§1600. Definitions.

As used in this article the term "non-economic loss" includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss.

§1601. Limited liability of persons jointly liable.

1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state).

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

§1602. Application.

The limitations set forth in this article shall:

1. apply to any claim for contribution or indemnification, but shall not include:

(a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the tortfeasor had entered into a written contract in which the tortfeasor had expressly agreed to indemnify the claimant for the type of loss suffered; or

(b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.

2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in the diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.

3. not apply to administrative proceedings.

4. not apply to claims under the workers' compensation law or to a claim against a defendant where such defendant has impleaded a third party against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law, to the extent of the equitable share of said third party.

5. not apply to actions requiring proof of intent.

6. not apply to any person held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined respectively in sections three hundred eleven and one hundred twenty-five of the vehicle and traffic law.

ity[10] by limiting a defendant's liability for noneconomic losses to the defendant's percentage of actual fault, if he is liable for 50% or less.[11]

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7. not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.

8. not apply to any person held liable by reason of the applicability of article ten of the labor law.

9. not apply to any person held liable for causing claimant's injury by having unlawfully released into the environment a substance hazardous to public health, safety or the environment, a substance acutely hazardous to public health, safety or the environment of a hazardous waste, as defined in articles thirty-seven and twenty-seven of the environmental conservation law and in violation of article seventy-one of such law; provided, however, that nothing herein shall require that the violation of said article by such person has resulted in a criminal conviction or administrative adjudication of liability.

10. not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer.

11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failure upon which liability is based; provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which said parties may be held liable to the claimant.

§1603. Burdens of proof.

In any action or claim for damages for personal injury a party asserting that the limitations of liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in section sixteen hundred two applies. A party asserting limited liability pursuant to this article shall have the burden of proving by a preponderance of the evidence its equitable share of the total liability.

10. Under the theory of joint and several liability, each defendant is accountable for the entire amount of the judgment regardless of his individual share of fault with respect to a co-defendant. W. PROSSER, PROSSER & KEETON ON TORTS 475 (5th ed. 1984). *See infra* text accompanying notes 121-124.

11. N.Y. CIV. PRAC. L. & R. § 1601 (McKinney Supp. 1988). Section 1601 is not clear as to whether plaintiff's negligence is to be considered when determining whether defendant's share of the total negligence is 50% or less. This ambiguity could lead to vastly different results. Consider the situation where P is 40% at fault, D1 is 40% at fault, and D2 is 20% at fault. If P's share is included in determining whether D1 and D2 are less than 50% liable, then both D1 and D2 have only several liability. On the other hand, if P's share is excluded from the determination, then as between D1 and D2, D1 is 66⅔% at fault and D2 is 33⅓% at fault. Thus, D1 is now jointly and severally liable for the amount of the judgment against the defendants.

Although there are no cases to date which resolve this ambiguity, Professor David Siegel, editor of the New York State Bar Association publication THE NEW YORK STATE

Part II of this Comment outlines the development of tort law in New York and the overwhelming effect of *Dole v. Dow Chemical Co.*[12] In Part III, conflicting theories on the factors which led to the insurance liability crisis are examined. Also discussed are the harsh effects of the imposition of joint and several liability on defendants who have a low percentage of fault but who possess substantial assets. Recommendations addressed to the insurance liability crisis, and the legislative response embodied in Article 16, are presented in Part IV. Part V identifies the roots of the insurance crisis as the proliferation of third-party actions. This Part concludes that to the extent that the dramatic increase in litigation costs due to an explosion of third-party actions has contributed to higher insurance premiums, Article 16 offers only a partial solution. This Comment concludes that Article 16, although not a complete remedy to the problems which led to the insurance liability crisis, is much more than a Band-Aid, and may be the best legislative compromise available for a complex problem.

II. Background

A. *The Historical Development of Tort Law in New York*

1. *Sovereign Immunity*

Under common-law principles of tort liability, the sovereign could do no wrong.[13] In the United States, where the sovereign was replaced by a system of state and federal government, sover-

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LAW DIGEST, believes that "had the Legislature considered the point, it would have excluded . . . [the plaintiff's] own share of fault from the joint versus joint and several tabulation." D. Siegel, *The New Law Partially Abolishing the Joint Liability Rule in Tort Cases - Part II*, N.Y. ST. L. DIG., Nov. 1986, at 1.

12. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

13. W. PROSSER, *supra* note 10, at 1033. "In its origin it goes back to very ancient times, when the principle was recognized that it was necessarily a contradiction of the sovereignty of any lord and especially of the king to allow him to be sued as of right in his own courts." RESTATEMENT (SECOND) OF TORTS §§ 895A-J introductory note (1977).

> 'Besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute perfection. The king can do no wrong: . . .
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> The king, moreover, is not only incapable of *doing wrong*, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness.'

Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 479 (1953) (quoting 1 W. BLACKSTONE, COMMENTARIES *246) (emphasis in original).

eign immunity[14] applied to both governmental levels.[15]

Sovereign immunity was the law of New York until 1929, when it was abolished by the 1929 Court of Claims Act.[16] In 1945, *Bernadine v. City of New York*,[17] interpreted the Court of Claims Act as eliminating sovereign immunity for all political subdivisions of the state.

At the time sovereign immunity existed, industry profited from the common belief that the social benefit derived from the production of goods outweighed any reason for burdening industry with liability for injuries.[18] Accordingly, the prevailing prin-

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14. Traditional sovereign immunity as borrowed from the English common law protected the sovereign (and in the United States, the government) from legal action at all levels. *See* W. PROSSER, *supra* note 10, at 1033. Through case law, the principle of sovereign immunity in the United States was broadened to bar suit against the government except where the government has specifically consented to be sued. Kawananakoa v. Polyblank, 205 U.S. 349 (1907).

15. W. PROSSER, *supra* note 10, at 1033. A few exceptions to sovereign immunity developed between 1887 and 1946. In 1887 the Tucker Act allowed suits against the government on contract claims in the Court of Claims. 24 Stat. 505 (1887). The Act is currently found at 28 U.S.C.A. §§ 507 (1968), 1346, 1402 (1976 & Supp. 1988), 1491, 1496, 1497, 1501, 1503 (1973 & Supp. 1988), 2071 (1982 & Supp. 1988), 2411 (1978 & Supp. 1988), 2501, 2512 (1965 & Supp. 1988). Also, the Due Process Clause of the Fifth Amendment allowed citizens to obtain just compensation from the government if they could show that the government committed a taking of their property, or that the citizen fell into one of the narrow statutory exceptions to sovereign immunity, or that such relief was warranted under a private bill in Congress. W. PROSSER, *supra* note 10, at 1033. In 1946 Congress enacted the Federal Tort Claims Act. 60 Stat. 843 (1946). The current provisions are located at 28 U.S.C.A. §§ 1346, 1402 (1976 & Supp. 1988), 2401 (1978 & Supp. 1988), 2402 (1978), 2411, 2412 (1978 & Supp. 1988), 2671, 2672 (1965 & Supp. 1988), 2674 (1965), 2675 (1965 & Supp. 1988), 2676 (1965), 2677, 2678, 2679, 2680 (1965 & Supp. 1988). W. PROSSER, *supra* note 10, at 1034.

16. N.Y. CT. CL. ACT § 8 (McKinney 1963).

17. Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). In Bernadine, the plaintiff sued the City of New York for injuries caused by a runaway police horse. The court held that the civil divisions of the state do not have any independent sovereignty. Therefore, the waiver of sovereign immunity by the State also waived immunity for the civil divisions of the State. *Id.* at 365, 62 N.E.2d at 605.

18. JONES COMM'N REPORT, *supra* note 1, at 122. According to the noted Judge Oliver Wendell Holmes,

> [a] man need not . . . do this or that act . . . but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.

O. HOLMES, THE COMMON LAW 95 (1881). This doctrine was restated as follows: "To hold that a person does every voluntary act at his peril, and must insure others against all of the consequences that may occur would, in most instances, be an intolerably heavy burden upon human activity." W. PROSSER, *supra* note 10, at 163 (citing O. HOLMES, THE ciple of the time was "loss from accident must lie where it falls,"[19] unless the loss is the result of activity unreasonably hazardous to others.[20] Not surprisingly, the term "unreasonably hazardous" was construed quite narrowly.[21]

Limits to recovery also existed on the defendant's side. Until 1972, a defendant's ability to seek contribution from other tortfeasors turned on the active-passive negligence distinction.[22]

2. *The Active-Passive Negligence Distinction*

Under the active-passive negligence rule, a defendant found to be 'actively' negligent was not allowed to implead a third-party defendant.[23] Thus, the active-passive distinction served to limit the number of third-party defendants who could be impleaded.[24]

In the landmark case of *Dole v. Dow Chemical Co.*,[25] the New York Court of Appeals abolished the distinction between active and passive tortfeasors.[26] In *Dole*, the plaintiff's husband inhaled a fumigant used by his employer and subsequently died, allegedly as a result of inhaling the fumes. The plaintiff sued the manufacturer of the fumigant for failing to properly label the fumigant with a warning of its dangerous nature. The manufacturer impleaded the employer alleging that the product had been adequately labeled and that it was the employer's failure to

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COMMON LAW 93-96 (1881)).

19. O. HOLMES, *supra* note 18, at 94. "All the cases concede that an injury arising from inevitable accident, or . . . from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility." *Id.* at 95 (quoting Harvey v. Dunlop, Hill & Den. 193 (1843)).

20. JONES COMM'N REPORT, *supra* note 1, at 122. "Unless my act is of a nature to threaten others . . . ." O. HOLMES, *supra* note 18, at 96.

21. JONES COMM'N REPORT, *supra* note 1, at 122.

22. D. Siegel, NEW YORK PRACTICE 211 (1978). A defendant's impleader right was controlled by a plaintiff's complaint. "The impleader was allowed if [a plaintiff] alleged 'passive' conduct by [a defendant] but precluded if [a plaintiff] pleaded 'active' behavior." *Id.* at 210 n.5 (quoting Kennedy v. Bethlehem Steel Co., 282 A.D. 1001, 125 N.Y.S.2d 552 (4th Dep't 1953), *aff'd*, 307 N.Y. 875, 122 N.E.2d 753 (1954)).

23. D. SIEGEL, *supra* note 22, at 211.

24. *Id.*

25. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

26. *Id.* at 148-49, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 387; D. SIEGEL, *supra* note 22, at 211. N.Y. CIV. PRAC. L. & R. § 3019, commentary at 49 (McKinney 1987). The principles enunciated in *Dole* were codified in N.Y. CIV. PRAC. L. & R. §§ 1401-1404 (McKinney 1987).

defumigate the area that caused decedent's death.[27] Had the active-passive distinction been applied in *Dole*, Dow "would have been precluded [from impleading the employer because Dow] was accused of . . . labeling and circulating a poison product, which would have qualified as 'active' negligence."[28] Instead, the *Dole* court allowed the use of the impleader device by an 'active' tortfeasor, thereby abandoning the active-passive distinction.[29]

By eliminating the active-passive classification entirely, an active or passive defendant can implead both an active or passive third-party defendant.[30] In other words, after *Dole*, many more parties can be brought into a suit.

Another direct result of the *Dole* decision was to eliminate one of the few remaining barriers to a plaintiff's cause of action.[31] In addition to sovereign immunity and the active-passive distinction, the contributory negligence rule was a formidable restriction on tort actions in early tort history.

3. *Contributory Negligence Replaced By Comparative Negligence*

The contributory negligence rule barred a plaintiff from recovering from a defendant where the plaintiff himself contributed in any way to the injury.[32] In 1975, New York joined the

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27. *Dole*, 30 N.Y.2d at 143, 282 N.E.2d at 288, 331 N.Y.S.2d at 382.

28. D. SIEGEL, *supra* note 22, at 211.

29. *Id.*

30. *Dole* created a right of contribution from passive tortfeasors. *Id.* at 212.

> The widow could not sue [the employer] directly because as against . . . the employer, workmen's compensation was the exclusive remedy. WORKMEN'S COMP. L. § 11. But when suit by or in behalf of the employee is brought against some other person liable for the tort, the latter may turn around and implead the employer. The theory is that such a claim is one for indemnity, not for tort, and is therefore not precluded by the exclusivity of the workmen's compensation remedy. *Dole* is a classic illustration of this phenomenon in New York, which subjects the employer indirectly (via having to make good as a third-party defendant) to the full measure of common law tort liability for which suit by the employee could not be brought against the employer directly.

Id. at 211 n.4.

31. N.Y. CIV. PRAC. L. & R. § 3019, commentary at 56 (McKinney 1974); D. SIEGEL, *supra* note 22, at 212.

32. W. PROSSER, *supra* note 10, at 451-52. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." *Id.* at 451 (quoting RESTATEMENT (SECOND) OF TORTS § 463 (1979)). In the United States,

majority of the states in replacing the rule of contributory negligence with that of comparative negligence.[33] The *Dole* decision has been credited with accelerating this changeover in that it established, by judicial fiat, comparative negligence among tortfeasors.[34]

Pursuant to the comparative negligence rule, the jury determines the percentage of fault attributable to each party. The plaintiff can recover from the defendants for the amount of the injury, less the percentage of his own contributory negligence.[35] If there are multiple defendants, they are each liable to the plaintiff for their respective shares of fault.[36]

> This change removed the disincentive for plaintiffs to sue defendants who might be assigned minor shares of fault. Indeed, in cases where the primary defendant is without assets or judgment-proof, the rule of comparative negligence combines with the rule of joint and several liability to exert a powerful incentive to include low-fault defendants in the lawsuit as the plaintiff's only practical hope for recovering any substantial compensation.[37]

Thus, adoption of the comparative negligence rule provides the motive and the opportunity to bring in as many third-party defendants as possible, resulting in a surge of third-party litigation.[38]

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contributory negligence has been a bar to plaintiffs' suits since 1824. Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

33. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1987); JONES COMM'N REPORT, *supra* note 1, at 130. By 1979, 32 states had adopted comparative negligence. Gordon & Crowley, *Indemnity Issues in Settlement of Multiparty Actions in Comparative Negligence Jurisdictions*, 48 INS. COUNSEL J. 457, 458 (1981).

34. N.Y. CIV. PRAC. L. & R. § 3019, commentary at 56 (McKinney 1974); D. SIEGEL, *supra* note 22, at 212. "It is generally acknowledged that *Dole* is very much a doctrine of comparative negligence restricted to the sphere of the tortfeasors' rights inter se." N.Y. CIV. PRAC. L & R. § 3019, commentary at 56 (McKinney 1974).

35. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976); W. PROSSER, *supra* note 10, at 472.

36. N.Y. CIV. PRAC. L. & R. § 1411 (McKinney 1976); W. PROSSER, *supra* note 10, at 472.

37. JONES COMM'N REPORT, *supra* note 1, at 130.

38. Because the majority of states adopted a comparative negligence rule in the 1970's, a surge of third-party litigation occurred not only in New York, but nationwide. JONES COMM'N REPORT, *supra* note 1, at 130-31; Gordon & Crowley, *supra* note 33, at 457, 458 (1981).

4. *The Post-*Dole *Megacase*

Brennan v. Nelicks Furniture and Craftmaster Furniture [39] is a classic example of the post-*Dole* third-party action phenomenon. In *Brennan*, the plaintiff purchased a couch from the defendant retailer.[40] The plaintiff suffered severe burns when a lighted cigarette burned through the plastic covering to the cotton batting, which ignited the polyurethane filling of the couch.[41] Although the plastic covering itself was not flammable, it melted, allowing the cigarette to reach the cotton batting and the highly flammable polyurethane.[42] The batting had been treated with an oil-base dust suppressant which probably sustained the burning of the batting and allowed it to reach the polyurethane.[43]

The plaintiff sued the retailer and the manufacturer of the couch. Defendant Craftmaster brought a third-party action against Hickory Springs, Inc., the supplier of the polyurethane filling, Quaker Fabrics, the manufacturer of the plastic upholstery covering on the sofa, and William Burnett Co., the manufacturer of the cotton batting used as filling in the sofa.[44] Prior to *Dole*, it is doubtful that the defendant Craftmaster could have brought a third-party action against any of the suppliers since Craftmaster was "actively" negligent[45] in combining the components of the couch in such a way as to make them dangerous.[46] Clearly, the defendant Craftmaster had a strong incentive to bring in as many third parties as it could in an effort to diminish its own share of fault.[47] Thus, an action that would have involved three parties pre-*Dole*, involved six parties post-*Dole*.

Another example of this phenomenon is *Clickner v. Shanley*.[48] In that case, the plaintiff passenger was injured in a

39. No. 5339-81 (N.Y. Sup. Ct. Albany County 1987).

40. *Id.* Telephone interview with Alfred Purello, Esq., attorney for the plaintiff (Feb. 16, 1988) [hereinafter Purello interview].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See supra* text accompanying notes 23-30.

46. Purello interview, *supra* note 40.

47. *Id.*

48. No. 144540 (N.Y. Sup. Ct. Rensselaer County Feb. 16, 1988).

car accident in the City of Troy and taken to a local hospital.[49] The plaintiff sued the driver of the other car for negligence, and the hospital and the orthopedic surgeon for malpractice.[50] Later, the plaintiff was barred by the statute of limitations from joining the City or the anesthesiologist as defendants.[51] However, because the statute of limitations did not bar a defendant from bringing in third parties, the City of Troy and the anesthesiologist were brought in by the defendant.[52] Before *Dole*, neither the City nor the anesthesiologist, as alleged "passive" wrongdoers, could have been joined by the defendant.[53] Again, where there would have been only four parties pre-*Dole*, there were now six. This post-*Dole* ability to join numerous third parties has occurred, however, at a cost.

B. *Symptoms of Insurance Unavailability and Unaffordability Begin*

Six years after the comparative negligence rule became the second of the *Dole* tort reforms to be codified,[54] insurance premiums began to rise dramatically. The premium increases between 1981 and 1985[55] resulted in the emergence of two unique problems throughout the State. The first was the general unavailability of insurance, which has been defined as "the total inability of an enterprise or local government that desires coverage to obtain any insurance at any price."[56] The second was the functional unavailability of insurance, which is defined as:

> either the exclusion from coverage of certain activities of the in-

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49. *Id.*

50. *Id.*

51. *Id.* Impleader is permissible after the defendant has served his answer in the primary action and "is not subject to any other specific time limit. While laches may be a defense to the impleader, in most cases it is a defense only to the plaintiff and not to the third-party defendant." N.Y. CIV. PRAC. L. & R. § 1007, commentary at 10 (McKinney 1976).

52. Clickner v. Shanley, No. 144540 (N.Y. Sup. Ct. Rensselaer County Feb. 16, 1988).

53. *Id.* Prior to *Dole*, an "active" defendant could not implead a third party until a judgment had been rendered against the defendant. Then, an action for indemnification could be brought. D. SIEGEL, *supra* note 22, at 211.

54. *See supra* text accompanying notes 23-30 for a discussion of the first *Dole* tort reform codification, the elimination of the active-passive negligence distinction.

55. COTTER, *supra* note 1, at 2.

56. JONES COMM'N REPORT, *supra* note 1, at 22.

sured that are perceived as high risk, without the option to eliminate the exclusion in return for a price override; or the inability of the insured to obtain at any price coverage affording the higher policy limits that the insured considers necessary and prudent.[57]

General unavailability is less prevalent than functional unavailability, but has more severe consequences.[58] To counter the problem of general unavailability, the State Department of Insurance established the Market Assistance Program (MAP) to "assist municipalities and other public entities that have been unable to secure insurance in the voluntary insurance marketplace."[59] Realizing that a community without liability insurance exposes itself to the possibility of catastrophic financial indebtedness, 164 municipalities opted to apply for MAP assistance by April 1, 1986.[60]

Functional unavailability, on the other hand, has been an even greater problem for municipalities because it is more widespread.[61] In New York, pollution-producing activities, recreational activities, certain types of mass transportation, child care centers, and liquor purveyors represent the most common areas for which insurance has been functionally unavailable.[62]

In January 1986, in response to the alarm over the dwindling availability and escalating cost of insurance, Governor Cuomo established the Governor's Advisory Commission on Liability Insurance[63] to investigate the problem and recommend a solution.[64] Because a crisis existed which demanded an immediate remedy, the legislative course was accelerated. Just four months after the Jones Commission was formed, it produced its findings and recommendations. A bill was drafted in June based on the recommendations of the Jones Commission, signed by the Governor on June 28, 1986, and became effective on July 30,

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57. *Id.* at 23.
58. *Id.* at 6.
59. *Id.* at 25 n.1.
60. *Id.* at 26.
61. *Id.* at 6.
62. *Id.* at 23-24.
63. Known as the Jones Commission, *see supra* note 1.
64. JONES COMM'N REPORT, *supra* note 1, at 1; Governor's Memorandum on Approval of ch. 682, N.Y. Laws (July 30, 1986), *reprinted in* [1986] N.Y. Laws 3182, 3183-84 (McKinney).

1986.[65] In short order, Article 16 was added to the Civil Practice Law and Rules, making sweeping changes in the application of joint and several liability in New York. Article 16 was drafted based on what the Jones Commission identified as the causes of the insurance liability crisis. Since misidentification of the causes would inevitably result in an inappropriate solution, it is necessary to examine the roots of the problem before predicting whether Article 16 is a proper remedy.

III. Factors Behind the Insurance Crisis

Because the Jones Commission membership was composed of many insurance industry representatives,[66] its findings have been challenged by those who felt the Commission's membership was biased.[67] In its report, the Jones Commission found two primary causes for the insurance crisis: First, a "long-term surge in the costs arising from civil liability"[68] and second, the insurance business cycle.[69]

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65. *See* Act of July 30, 1986, ch. 682.

66. The Jones Commission was composed of the following representatives:

3 insurance industry executives;
4 insurance defense or corporate attorneys;
3 representatives of municipal entities;
1 representative of the NYS medical society;
1 representative of professional insurance agents;
1 representative of an insurance brokerage firm;
1 media consultant for a firm which has worked for tort [r]eform;
2 judges;
2 consumer advocates; and
2 representatives of minority organizations.

Pazer, *Insurance Study Commission Flawed by Its Membership*, N.Y.L.J., July 14, 1986, at 21, col. 1.

67. ALLIANCE FOR CONSUMER RIGHTS, 1987 BRIEFING BOOK 6 [hereinafter ALLIANCE]. The Alliance for Consumer Rights (ACR) was the primary lobbying group opposing the Jones Commission's findings and proposals. ACR represented the interests of the New York State Trial Lawyers Association, and received support in its lobbying efforts from the Environmental Planning Lobby (EPL), the Brooklyn Fifth Avenue Committee, the St. Nicholas Development Corporation, the Citizen Action of New York (formerly New York Community Action Network), and the AFL-CIO. *Id.* at 6-8.

68. JONES COMM'N REPORT, *supra* note 1, at 45 (emphasis omitted).

69. *Id.* at 45. The insurance business cycle is the "erratic but . . . repetitive orbit revolving around the relative profitability of underwriting and investment activities and the worldwide ebb and flow of capital into and out of insurance." *Id.*

A. *Is There a Long-term Surge in the Costs Arising from Civil Liability?*

The Jones Commission reported that "the frequency of accidents generating claims approximately doubled over the past five years, [and] the number of claims valued by the insurer at more than $100,000 grew much more rapidly."[70] The Jones Commission concluded that "[i]t is the growth of a relatively small minority of larger claims, and the upward pressure that this has exerted on [the] average claim value, that has generated most of the cost surge."[71]

1. *Are Jury Awards on the Rise?*

According to the Jones Commission, the reason for the increased claim values is "an upward revaluation of societal concepts of the dollar value of intangible injury,"[72] a phenomenon linked to the presence of a jury.[73] The Attorneys General from six states, however, who had formed an ad hoc committee[74] to address the problem of nationwide skyrocketing premiums, disagreed sharply with the idea that jury verdicts have increased dramatically.[75] Their study concluded that "[t]he 'large' verdict is . . . the means used by proponents of changes in tort law to suggest that victims are being overcompensated, and has become the target of many proposed tort law changes."[76]

The Jones Commission reported that between 1977 and 1985, "[t]he dollar value of the average personal injury settlement [in New York City][77] had risen from $7,127 to $31,740 . . .

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70. *Id.* at 13.

71. *Id.*

72. *Id.* at 83.

73. *Id.* at 84.

74. Known as the Ad Hoc Committee on Insurance Availability of the National Association of Attorneys General.

75. An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance, [1986] ATT'YS GEN. REP., *reprinted in* N.Y. ST. TRIAL LAW. ASS'N, 1987 BRIEFING BOOK 31 [hereinafter BRIEFING BOOK]. The ad hoc committee was composed of the Attorneys General from Massachusetts, California, North Carolina, Texas, West Virginia, and Wisconsin. The Committee prepared a report on the insurance liability crisis for the National Association of Attorneys General.

76. *Id.* at 32.

77. Because the Jones Commission found that poor business practices partially contributed to the crisis, the Commission focused on data from the City of New York. The

an increase of 345%."[78] These figures reported by the Jones Commission, however, are deceptive because the changing value of the dollar was not taken into account.[79] Using a constant dollar value, Gustav Shubert of the Rand Corporation Institute of Civil Justice, found that "the median jury verdict has remained at approximately $8,000 in 1979 dollars since 1959."[80] The Rand Corporation is not alone in this finding. The New York Office of the Comptroller concurs in these findings, noting that:

> [s]ince 1981, the amount of money the City of New York spends on personal injury cases has declined in both constant dollars and as a percentage of the City's budget. The amount the City spent on personal injury cases was 0.75% of the 1981 budget, and only 0.63% of the 1985 budget.[81]

The explanation for the figures presented by the insurance industry showing increasing jury awards is found in the limited scope of their data. Jury Verdicts Research (JVR) of Solon, Ohio, which provides the insurance industry with much of its data, has only painted half the picture.[82] The JVR results are misleading because they do not take into account such significant factors as inflation, settlements, verdicts lowered on appeal,[83] bench verdicts, verdicts for defendants, or verdicts in-

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City of New York is self-insured and would not be subject to the insurance industry's poor business cycle. JONES COMM'N REPORT, *supra* note 1, at 35-39.

78. *Id.* at 38.

79. ALLIANCE, *supra* note 67, at 21.

80. *Id.*

> A strong argument can be made that little evidence has been offered which demonstrates a significant increase in the number of claims or lawsuits, or in the average size of payment [of] bodily injury claims. The 1983 Rand study concludes 'not only that reports of a product liability 'crisis' in the mid-1970s were exaggerated, but that . . . it has become evident that product liability claims have not been an unreasonable cost to most manufacturers.

Kindregan & Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 ST. MARY'S L.J. 673, 709 (1987) (quoting THE INSTITUTE FOR CIVIL JUSTICE, THE RAND CORP., DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 121 (1983) as cited in S. REP. No. 476, 98th Cong., 2d Sess. 76 (1984)).

81. ALLIANCE, *supra* note 67, at 21.

82. BRIEFING BOOK, *supra* note 75, at 11.

83. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) ("exploding Pinto" case in which punitive damages award lowered from $125 million to $3.5 million).

volving no money.[84]

Furthermore, in order to determine a typical jury award, one must calculate the median and not the average award.[85] Because a median is the midpoint of all the awards, it reflects the maximum amount awarded in at least half of the cases. Since an average could be skewed by a few large awards, the median typically would be significantly smaller.[86] To illustrate, the average award for reported verdicts in Cook County, Illinois, in 1983 was $137,350, whereas the median award was only $8,800.[87] A full 87.7% of the awards were lower than the average.[88] Moreover, if higher jury awards actually were the reason for the increase in premiums, logic would dictate that enactment of legislation which sets caps on those awards should cause premiums to return to precrisis levels. However, "in repeated testimony, the insurance industry representatives refused to guarantee reduced premiums" even in exchange for caps on claim values.[89]

2. *Is Increased Litigation a Factor?*

Allegations by the insurance industry that runaway civil litigation has led to the long-term surge in the cost of civil litigation are also in dispute. The insurance industry claimed that as a result of a flood of tort litigation, they suffered losses in 1984 of $20.5 billion.[90] The General Accounting Office figures for 1984, however, indicate that industry's capital gains realized in that year exceeded losses by $300 million, actually giving the industry a net gain for that year.[91] In 1985 the industry reported a

84. BRIEFING BOOK, *supra* note 75, at 11.

85. *Id.* at 31 (discussing DANIELS, PUNITIVE DAMAGES: A STORM ON THE HORIZON? PRELIMINARY REPORT OF THE PUNITIVE DAMAGES PROJECT 13 (prepared for delivery at the American Bar Foundation Fellows Seminar, February 8, 1986)).

86. BRIEFING BOOK, *supra* note 75, at 31.

87. *Id.*

88. *Id.*

89. ALLIANCE, *supra* note 67, at 5-6.

90. Kindregan & Swartz, *supra* note 80, at 710. These loss figures provided by the insurance industry were used by the Jones Commission in making its report. BRIEFING BOOK, *supra* note 75, at 42.

91. Kindregan & Swartz, *supra* note 80, at 710; ALLIANCE, *supra* note 67, at 32. These are the figures that have been recorded for the industry by the U.S. General Accounting Office.

net after-tax profit of $1.7 billion.[92] Moreover, within the first quarter of 1986, income from investments had already exceeded losses by $474 million.[93]

Most importantly, the "losses" cited by the insurance industry as justification for premium increases do not represent actual money paid out to claimants.[94] Rather, they represent the amount of funds put into reserve to meet projected future claims.[95] Actually, with the exception of 1974, insurance company assets have increased every year between 1955 and 1985.[96] Such growth does not support the insurance industry's contention that it is being drained by our increasingly litigious society.[97]

Although courts suffer a backlog of cases on their calendars,[98] the Jones Commission concluded that the primary increase of cases in most jurisdictions is in the area of criminal and family matters, not tort claims.[99] A study by the National Center for State Courts found that between 1981 and 1984, the number of state court civil filings actually decreased by 4%.[100] In addition, they determined that over a six-year period there was only a 9% increase in tort claims nationwide, which parallels the 8% increase in population for that period.[101] Therefore,

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92. ALLIANCE, *supra* note 67, at 32.

93. Kindregan & Swartz, *supra* note 80, at 711.

94. *Id.* at 710-11.

95. *Id.* at 711; ALLIANCE, *supra* note 67, at 22. This type of accounting allows the industry to avoid paying income taxes on the premiums received by offsetting them against expected future losses. In recognition of the need to close this loophole, Congress passed legislation forcing the insurance industry to change its system of accounting. *Id.* at 22-23.

96. Kindregan & Swartz, *supra* note 80, at 710. The industry has been accused of engaging in "voodoo accounting," based on claims that "if adjustments are made for some quirks in insurance accounting (primarily involving the treatment of taxes, dividends and the rising paper value of investments), the industry made a net profit every year." Church, *supra* note 1, at 25.

97. Kindregan & Swartz, *supra* note 80, at 710.

98. JONES COMM'N REPORT, *supra* note 1, at 84.

99. *Id.* While this may not be the situation in every jurisdiction, the Jones Commission found it to be generally the case in the majority of jurisdictions. *See also* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

100. BRIEFING BOOK, *supra* note 75, at 8-9.

101. *Id.* at 9.

increased litigation does not seem to have been a significant factor in the insurance crisis.

3. *Did the Elimination of Contributory Negligence Significantly Impact the Costs of Providing Liability Coverage?*

The Jones Commission and Eugene Borenstein, Deputy Chief of the New York City Law Department Tort Division, have cited to the elimination of the contributory negligence rule as a major factor in the increased cost of municipal liability coverage.[102] After *Dole*, and the enactment of the comparative negligence rule,[103] a plaintiff, despite any contributory negligence of his own, can recover a money judgment where he previously would have been completely barred.

Logically speaking, it would seem that creating an avenue for recovering a judgment in tort where none previously existed would increase insurance payouts and cause higher premiums. Elimination of the contributory negligence rule, however, did not make as much of a difference in a plaintiff's ability to recover as the Jones Commission and others claim.[104] The contributory negligence rule was only a bar to recovery in so far as the jury wanted it to be.[105] In other words, juries sympathizing with an injured plaintiff were unlikely to deny a plaintiff any recovery whatsoever where the plaintiff contributed only minimally to the injury.[106] For example, a plaintiff wearing high heels or neglecting to wear prescription glasses might easily have contributed to his or her fall on a sidewalk.[107] While technically, these activities

102. Interview with Eugene Borenstein, Deputy Chief of the Tort Division of the New York City Law Department, in New York City (Jan. 27, 1988) [hereinafter Borenstein interview]; JONES COMM'N REPORT, *supra* note 1, at 123, 130.

103. After the 1972 *Dole* decision, and even before the enactment of the comparative negligence rule in 1975, many of the lower New York courts abandoned contributory negligence in favor of comparative negligence. N.Y. CIV. PRAC. L. & R. § 3019, commentary at 270-73 (McKinney 1974).

104. Interview with Judge Edward S. Conway, Administrative Judge for the Third Judicial District of New York, in Albany, New York (Feb. 1, 1988) [hereinafter Conway interview]. Judge Conway has served as a judge for 22 years, since 1967.

105. *Id.*

106. *Id.*

107. According to Eugene Borenstein, because of the possibility that the lack of prescription glasses or the use of high heels could contribute to an injury, no plaintiffs in the history of litigation against the City of New York ever wore high heels or were without the aid of their prescription glasses. Borenstein interview, *supra* note 102.

could be a complete bar to a plaintiff's recovery under the contributory negligence rule, it was highly unlikely that any jury would bar plaintiff's recovery on the basis of such commonplace behavior.[108] Furthermore, the judge himself would not make a strong jury charge of contributory negligence in this situation.[109]

B. *The Insurance Business Cycle Leads to Bad Business Practices on the Part of the Insurance Industry*

It is generally accepted, even by the insurance industry itself, that certain practices of the industry are to blame for contributing significantly to the increasing cost of coverage.[110] The insurance industry business cycle is one which "revolv[es] around the relative profitability of underwriting and investment activities and the worldwide ebb and flow of capital into and out of insurance."[111] As a result of this cycle, the insurance industry engages in the practice of cash-flow underwriting when interest rates are high.[112] A United States Senate study found that this "practice of 'cash flow underwriting'[113] was linked directly to the . . . crisis."[114]

The practice of cash-flow underwriting began at the time of the unprecedented rise in interest rates during the late 1970's and early 1980's.[115] In an effort to obtain as many premium dollars as the industry could for its investment portfolios, the in-

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108. Conway interview, *supra* note 104.

109. *Id.*

110. *Hearings*, *supra* note 3, at 56-57 (statement of James P. Corcoran, N.Y. St. Sup't. of Ins.); JONES COMM'N REPORT, *supra* note 1, at 68-69.

111. JONES COMM'N REPORT, *supra* note 1, at 45.

112. *Id.*

113. Cash-flow underwriting involves writing business at a loss in the anticipation that "the investment income will offset the losses and result in a bottom line profit." *Hearings*, *supra* note 3, at 132-33. Cash-flow underwriting occurs

> [w]hen interest rates and investment income are high, as they were during the early 1980s, [and] insurers . . . use that income to subsidize underwriting operations in order to maximize the cash that those operations generate for investment . . . . When disinflation reduced interest rates, however, the investment subsidy disappeared and the underwriting losses began to take their toll.

JONES COMM'N REPORT, *supra* note 1, at 10-11.

114. Kindregan & Swartz, *supra* note 80, at 711 (quoting S. REP. No. 294, 99th Cong., 2d Sess. 4 (1986)).

115. JONES COMM'N REPORT, *supra* note 1, at 67-69; ALLIANCE, *supra* note 67, at 22; BRIEFING BOOK, *supra* note 75, at 11.

dustry engaged in a price war.[116] Not only did it sell insurance policies to poor business risks, it also sold policies at too low a premium.[117] Furthermore, carriers were reluctant to be the first to raise prices when it became prudent to do so.[118] As the Jones Commission noted: "[A]lthough the behavior of the industry can be understood, it can hardly be described as prudent. Society has every right to expect a higher standard of judgment from a corporate sector to which it has entrusted a function as vital as property/casualty insurance."[119]

A recognition of the consequences to the insurance consumer of these insurance practices has resulted in extensive changes to the insurance regulations regarding cash-flow underwriting.[120] These poor business practices, however, were only partially responsible for the insurance liability crisis. The application of the theory of joint and several liability to deep pocket defendants has played a significant role in contributing to the emergency as well.

C. *Joint and Several Liability - The Root of Deep Pocket Trauma?*

Under the theory of joint and several liability, each defendant in a multidefendant suit is accountable for the entire amount of the judgment, regardless of his individual share of fault.[121] For example, one defendant can be forced to pay an entire judgment, regardless of his proportionate share of fault, where a co-defendant is insolvent.[122] This has become known as the "deep pocket" theory of liability.[123] Municipalities, in particular, have been plagued by the harsh financial reality of joint

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116. JONES COMM'N REPORT, *supra* note 1, at 68; ALLIANCE, *supra* note 67, at 22.

117. ALLIANCE, *supra* note 67, at 22; BRIEFING BOOK, *supra* note 75, at 11. For example, retroactive insurance was given to the MGM Grand Hotels, Inc. after its Las Vegas hotel fire in 1980. ALLIANCE, *supra* note 67, at 22.

118. JONES COMM'N REPORT, *supra* note 1, at 68-69.

119. *Id.* at 69.

120. N.Y. COMP. CODES R. & REGS. tit. 11, § 162 (1987).

121. W. PROSSER, *supra* note 10, at 475.

122. *Id.* "[T]he defendant who pays has the right to require, and if necessary to sue to compel, other defendants to reimburse him/her in shares equal to their respective shares of adjudged fault." JONES COMM'N REPORT, *supra* note 1, at 129.

123. "The low-fault/high-pay dynamic has come to be known as the 'deep pocket' phenomenon." JONES COMM'N REPORT, *supra* note 1, at 131.

and several liability.[124] The imposition of joint and several liability is especially severe when a defendant's share of the fault is very small.

For example, in New York, which only requires drivers to carry $10,000 of personal liability insurance on their motor vehicles,[125] one can easily see how the imposition of joint and several liability could hold a public-entity defendant responsible for paying that part of the judgment in excess of the $10,000.[126] Examples of this manifest unfairness abound.

A driver on Staten Island fell asleep and collided with the rear of a vehicle owned by the City of New York. A female passenger brought suit against the driver and the City for injuries which left her a quadriplegic. A jury awarded her $4.2 million. The City was found 15% liable because its vehicle was being driven too slowly as opposed to the sleeping driver who was found 85% liable. Since the driver was insured for only $50,000, the City was liable for its own $650,000 share plus the sleeping driver's $3.53 million share.[127]

In *Gonzalez v. City of New York*,[128] another deep pocket municipal liability case, plaintiff was hit by a car while standing on an icy roadway behind an illegally parked car. He was pinned between the illegally parked car and another, resulting in severe injury requiring the surgical amputation of his legs above the knees.[129] The jury found that the plaintiff was not at fault and awarded him $2,125,000 in damages.[130] The trial judge set aside the verdict, stating that the jury's finding was beyond the weight

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124. *Id.* at 130; N.Y. St. Coalition for Mun. Tort Liab. and Ins. Reform, Ten Point Mun. Tort Liab. and Ins. Reform Plan, (Oct. 15, 1985), *reprinted in Hearings, supra* note 3, at appendix. The coalition is composed of the following members: The Conference of Mayors and Municipal Officials; the Association of Counties; the Association of Towns; the School Boards Association; the City of New York; and the Independent Insurance Agents Association of New York, Inc.

125. N.Y. Veh. & Traf. Law § 311(4)(a) (McKinney 1986). The minimum coverage required by law for personal injury liability is only $10,000 per person, and $20,000 per occurrence.

126. Borenstein interview, *supra* note 102.

127. Torain, *State's Local Governments Seek Cap Of Damage Suits,* Canandaiga Daily Messenger, Mar. 21, 1985, at 14, col. 1.

128. Gonzalez v. City of New York, No. 2730s (N.Y. App. Div. 2d Dep't Oct. 14, 1986).

129. *Id.*

130. *Id.* at 1, 2.

of the evidence because "[the plaintiff's] conduct placed him in an area of danger which should have been obvious to a reasonably prudent observer."[131] The case is now on appeal.[132] Although the jury found the City of New York to be only 5% at fault, if the award is upheld on appeal, under the theory of joint and several liability, the City will end up paying the majority.[133]

An even more shocking example of how joint and several liability can work against a municipality is the case of *Cordero v. City of New York*[134] in which the driver of a car struck the pillar of an elevated subway, injuring several passengers in the car.[135] The jury found that the defendant driver was intoxicated at the time of the incident, and was 99% at fault.[136] The jury returned a verdict for the plaintiff, passenger D. Cordero, in the sum of $1,000,000.[137] Despite the fact that the jury found the City of New York to be only 1% at fault, under joint and several liability, the City must pay whatever amount the driver is unable to pay.[138] In this case, it might be the entire $1,000,000.[139]

Recently, in *Bailey v. Honda Motor Co.*,[140] the plaintiff brought an action for personal injuries arising out of the collision of a Honda motor bike, owned and operated by defendant Albertini, with a car owned and operated by defendant, Smeaton.[141] The street on which the accident occurred had re-

131. *Id.* at 2 (quoting Terry v. State, 79 A.D.2d 1069, 1069, 435 N.Y.S.2d 389, 390 (3d Dep't 1981)).

132. Borenstein interview, *supra* note 102.

133. *Id.*

134. Cordero v. City of New York, 112 A.D.2d 914, 492 N.Y.S.2d 430 (2d Dep't 1985).

135. *Id.* at 915, 492 N.Y.S.2d at 432.

136. *Id.* at 916, 492 N.Y.S.2d at 432; Borenstein interview, *supra* note 102.

137. *Cordero*, 112 A.D.2d at 914, 492 N.Y.S.2d at 431.

138. Borenstein interview, *supra* note 102.

139. *Id.* If, however, comparative negligence theory was applied, the City would only have to pay its proportionate share, or $10,000. According to Eugene Borenstein, when the jury found out that the City would probably end up paying the whole amount, they wanted to go back to the judge to inform him that their intention was for the City to pay Cordero only $10,000 and not $1,000,000. *Id. See also supra* text accompanying notes 33-38 for a discussion of comparative negligence.

140. No. 81-2253 (N.Y. Sup. Ct. Schenectady County 1987), *aff'd*, No. 55633 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file).

141. *Id.*; Plaintiff's Pretrial Memorandum at 1, Bailey v. Honda Motor Co., No. 81-2253, (N.Y. Sup. Ct. Schenectady County 1987), *aff'd*, No. 55633 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file) (available from

cently been repaved for the City of Schenectady by another defendant, Paving Contractors, Inc. who, five weeks after repaving, had not yet repainted the center dividing line.[142] The City was held to be 5% at fault for failing to restripe the road after resurfacing.[143] The remaining defendants who were 95% at fault, however, did not have enough insurance coverage to satisfy their part of the judgment.[144] As a result, although the City was only 5% at fault, it will probably end up paying the bulk of the judgment.[145]

IV. Legislative Response

A. *Recommendations of the Jones Commission*

Based on its findings regarding the perils of joint and several liability for deep-pocket defendants, the Jones Commission made recommendations for both the elimination of joint and several liability[146] and the imposition of monetary caps on pain and suffering awards.[147] Although the Governor made it clear at the inception of the Jones Commission that he was vehemently opposed to caps,[148] the Commission still proposed the following: "except for intentional torts and actions for wrongful death, in any personal injury action against a public entity defendant, a plaintiff's compensation for non-economic damages[149] should be statutorily limited to $250,000, adjusted annually for inflation."[150]

DeGraff, Foy, Conway, Holt-Harris & Mealey, attorneys for plaintiffs, Albany, N.Y.).

142. Plaintiff's Pretrial Memorandum at 2, Bailey v. Honda Motor Co., No. 81-2253 (N.Y. Sup. Ct. Schenectady County 1987), *aff'd*, No. 55633 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file).

143. Telephone interview with John DeGraff, DeGraff, Foy, Conway, Holt-Harris & Mealey (Feb. 16, 1988).

144. *Id.*

145. *Id.*

146. JONES COMM'N REPORT, *supra* note 1, at 132-33.

147. *Id.* at 149.

148. Interview with Wayne B. Cotter, Director of Research & Statistics, New York State Insurance Department, in New York City (Nov. 25, 1987).

149. Noneconomic damages are pain and suffering, loss of consortium, and severe emotional distress. Economic damages are any monetary loss that the plaintiff can show resulted from plaintiff's injuries. Examples of economic damages include lost wages (both past and future) and medical bills (past and future). D. SIEGEL, *supra* note 22, at 61 (Supp. 1987).

150. JONES COMM'N REPORT, *supra* note 1, at 149.

In arriving at its recommendations, the Commission considered proposals by various lobby groups. The State Conference of Mayors, proposed not only the elimination of joint and several liability, but also a threshold $2,500 minimum medical expense in order to qualify for recovery for any noneconomic losses, a cap of $150,000 on individual awards, and a $450,000 cap with respect to each occurrence.[151]

Countering this proposal, the Alliance for Consumer Rights, the Trial Lawyers Association, and Ralph Nader lobbied against the imposition of caps. These organizations argued that caps put artificial and arbitrary limits on a plaintiff's right to a monetary recovery.[152] They found that seriously injured victims with severe lifelong disabilities, would recover no more than a less seriously injured plaintiff who is given the maximum award allowed by the cap.[153] Furthermore, "[t]he elderly and poor are disproportionately affected by a cap [because] . . . [t]hese . . . people . . . would sustain little 'economic damage,' and depend mostly on 'non-economic damages' for compensation."[154]

The constitutionality of caps has been the subject of debate nationwide.[155] Some states have already declared such caps unconstitutional.[156] Others, however, have gone the route of imposing monetary caps in an effort to bring down the costs of liability.[157]

151. *Hearings*, *supra* note 3, at Appendix.

152. ALLIANCE, *supra* note 67, at 5; BRIEFING BOOK, *supra* note 75, at 12, 14.

153. BRIEFING BOOK, *supra* note 75, at 14.

154. *Id.*

155. *See, e.g.*, Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986). In this Virginia case, a jury returned a verdict in excess of the state's statutory cap on damages. *Id.* at 784-85. The judge upheld the verdict and refused to reduce the award to coincide with the statutory limits. *Id.* at 796.

156. *Id.* at 785 n.2. The following courts have declared limitations of recovery on damages unconstitutional: Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Civ. App. 1984), *writ of error revoked*, 714 S.W.2d 310 (1986); White v. State, 203 Mont. 363, 661 P.2d 1272 (1983); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) *on remand*, Nos. 55527 & 55586 (4th D. Idaho Nov. 3, 1980) (damages held unconstitutional); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Simon v. Saint Elizabeth Medical Center, Inc., 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. Montgomery 1976); Wright v. Central DuPage Hosp., 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

157. Thirty-five states have some kind of monetary ceiling on damages. JONES COMM'N REPORT, *supra* note 1, at 138-39. *See, e.g.*, ALASKA STAT. § 9.17.010 (Supp. 1986); COLO. REV. STAT. § 13-21-102.5 (1986); 1986 Fla. Sess. Law Serv. 86-160 (West); 1986

The Jones Commission justified its proposal for monetary caps, stating: "[p]ublic entities must constantly balance competing needs against scarce resources."[158] The Jones Commission also cited to the Court of Appeals' opinion in *O'Connor v. City of New York*[159] that stated public policy should not "impede municipal officials from allocating resources where they would most benefit the public, by making the prime concern the avoidance of tort liability rather than the promotion of the public welfare."[160]

Despite the Jones Commission recommendation for caps, however, Governor Cuomo in conjunction with the State Assembly leadership, forced caps to be cut from the proposed legislation.[161] The focus then turned to the problem of holding one defendant responsible for an entire judgment, regardless of the proportionate shares of fault.[162] As a result, modification of the joint and several liability rule in New York, through the passage of Article 16, became the Legislature's solution to the insurance liability crisis.

B. *The Scope of Article 16*

Article 16 limits liability for a defendant who is 50% or less at fault to his proportionate share; in other words, he is only held severally liable.[163] The statute's application is limited to noneconomic losses such as pain and suffering, loss of consor-

Haw. Sess. Laws Act 2; 1986 Ill. Laws 84-1431; KY. REV. STAT. ANN. §§ 44.070(1),(5) (Michie/Bobbs-Merrill 1986); ME. REV. STAT. ANN. tit. 14, § 8202(1) (1988); 1986 Mass. Acts 351 § 26 (604); NEV. REV. STAT. § 41.031 (1985); N.H. REV. STAT. ANN. § 541-B:14 (1988); OKLA. STAT. ANN. tit. 51, § 154A (West 1986); R.I. GEN. LAWS § 45-15-16 (1986); S.C. CODE ANN. § 15-78-120 (Law. Co-op. 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (Vernon 1986); VA. CODE ANN. § 46.1-227 (1986); 1986 Wash. Laws 305 § 301 (2); W.VA. CODE § 29-12A-7 (1988); 1985-87 Wis. Laws 340. Pennsylvania has established monetary ceilings on damages in case law. *See* Loeffler v. Mountaintop Area Joint Sanitary, 101 Pa. Commw. 514, 516 A.2d 848 (1986).

158. JONES COMM'N REPORT, *supra* note 1, at 144.

159. 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

160. *Id.* at 191, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

161. ALLIANCE, *supra* note 67, at 3.

162. *Id.*

163. " 'Severally liable' means that each defendant will be liable only for the share of an award that corresponds to his/her adjudged percentage share of fault." JONES COMM'N REPORT, *supra* note 1, at 133 n.1. *But see supra* note 10 and *supra* text accompanying notes 121-124.

tium, and mental anguish.[164]

The statute requires due diligence in joining all defendants within the court's jurisdiction.[165] Tortfeasors who are within the jurisdiction of the court may have their share of fault adjudicated, whether a party to the action or not.[166] If it is proven that there is no jurisdiction over a tortfeasor, his absence from the action will not prejudice the plaintiff because that tortfeasor's percentage of liability is not considered in computing payment of the judgment.[167]

The statute will apply to municipal vehicle accidents which involve a police or fire vehicle; however, under the motor vehicle exception, Article 16 will not apply to those accidents involving other municipal vehicles, road conditions, or traffic signs.[168] While Article 16 made sweeping changes in tort law, its application is greatly limited by this and numerous other exceptions.

Other exceptions include cases involving intentional torts, reckless disregard, products liability, and nondelegable duties.[169] Many of the exceptions reflect the efforts of special interest groups.[170] The Environmental Planning Lobby (EPL) was instrumental in creating the exemption for unlawful releases of hazardous substances,[171] while the AFL-CIO lobbied successfully for a workers' compensation exemption from the joint and several modification.[172] Under this exception, where plaintiff's employer is impleaded, both the employer and the primary defend-

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164. N.Y. Civ. Prac. L. & R. § 1601 (McKinney Supp. 1988). Indemnification and contribution rights have not been affected by Article 16. *Id.* § 1602(1), (2)(ii). Indemnification and contribution, however, were affected by a companion bill, S.9351-A, which abolished the collateral source rule. Previously, under the collateral source rule, wrongdoers were not able to take advantage of any collateral source of money due the victim in order to offset the judgment, for example, money from the victim's own insurance company. The elimination of this rule causes the victim's award to be reduced by this amount, and result in an unearned windfall for the defendant's carrier.

165. *Id.* § 1601(1).

166. *Id. See also* D. Siegel, *The New Law Partially Abolishing the Joint Liability Rule in Tort Cases - Part I*, N.Y. St. L. Dig., Oct. 1986, at 2.

167. N.Y. Civ. Prac. L. & R. § 1601(1) (McKinney Supp. 1988); *see also* D. Siegel, *The New Law Partially Abolishing the Joint Liability Rule in Tort Cases - Part II*, N.Y. St. L. Dig., Oct. 1986, at 2.

168. N.Y. Civ. Prac. L. & R. § 1602(6) (McKinney Supp. 1988).

169. *Id.* § 1602.

170. Alliance, *supra* note 67, at 6-8.

171. *Id.* at 7.

172. *Id.* at 8.

ant can still be held jointly and severally liable.[173]

Unfortunately, many of the exceptions to Article 16 have taken the bite out of the statute. The application of Article 16, for example, is precluded in any situation involving a nondelegable duty.[174] The case of *Bailey v. Honda Motor Co.*,[175] where the city was found to be only 5% at fault,[176] illustrates the application of the nondelegable duty exception. In *Bailey*, the fact that the private contractor was hired to restripe the road and neglected to do so for five weeks[177] becomes irrelevant with respect to the city's responsibility, since responsibility for road condition is a nondelegable duty.[178] Therefore, even after the enactment of Article 16, the city would still be held jointly and severally liable for its 5% of fault. Thus, the pre-Article 16 outcome is the same as the post-Article 16 outcome.

The question that must ultimately be answered is: Will Article 16, with its many exceptions, be of any help in addressing the problems of the insurance liability crisis?[179] Commentators have speculated that because these exceptions greatly limit the impact of Article 16, many will eventually be eliminated after the legal community and consumer groups have had sufficient time to swallow the bitter pill of tort reform.[180]

V. Did Article 16 Get to the Root of the Problem?

The Jones Commission identified such factors as higher jury awards, increased litigation, the elimination of contributory negligence, poor business practices on the part of the insurance in-

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173. N.Y. CIV. PRAC. L. & R. § 1602(4) (McKinney Supp. 1988).

174. *Id.* § 1602(2)(iv). Delegation is defined by Prosser as "the appointment by the obligor of another to render performance on his behalf." W. PROSSER, *supra* note 10, at 662.

175. No. 81-2253, (N.Y. Sup. Ct. Schenectady County 1987), *aff'd*, No. 55633 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file). For the facts of *Bailey*, *see supra* text accompanying notes 140-145.

176. *Bailey*, No. 81-2253, *aff'd*, No. 55633 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file).

177. *Bailey*, No. 55633, slip op. at 2 (N.Y. App. Div. 3d Dep't Oct. 20, 1988) (WESTLAW, States library, New York file).

178. N.Y. CIV. PRAC. L. & R. § 1602(2)(iv) (McKinney Supp. 1988); D. Siegel, *The New Law Partially Abolishing the Joint Liability Rule in Tort Cases - Part II*, N.Y. ST. L. DIG., Nov. 1986, at 3.

179. Conway interview, *supra* note 104.

180. *Id.*

dustry, and the imposition of joint and several liability as having caused the insurance liability crisis.[181] Many consumer groups and people in the legal profession disagreed with the first three of these five factors.[182] The latter two were addressed by the legislature in Article 16 and new insurance industry regulations.[183] Nevertheless, it is a mistake to believe that the problems of the insurance liability crisis have been remedied now that Article 16 has significantly changed some of the principles of joint and several liability, and new regulations are in place to address the problems of poor industry business practices.[184] On the contrary, joint and several liability and poor industry business practices lie only at the surface of the insurance problem. The core of the problem is found by examining the recent developments in tort law which have broadened the scope of tortfeasors' liability, thus, exposing them to greater liability than ever before.

A. *The Real Villain - The Impact of* Dole

The landmark New York case of *Dole v. Dow Chemical Co.*[185] singlehandedly removed many of the obstacles and disincentives to joining third parties; first, by eliminating the active-passive distinction among tortfeasors,[186] and later, through the establishment of comparative negligence and the mechanics for apportioning damages between all parties in a single action.[187] The immediate consequence of this radical departure from a longstanding principle (the distinction between active and passive tortfeasors), and the creation of a process for apportionment

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181. *See supra* text accompanying notes 66-145.

182. *See supra* text accompanying notes 66-145.

183. *See supra* note 9 *and* N.Y. COMP. CODES R. & REGS. tit. 11, § 162 (1987).

184. N.Y. COMP. CODES R. & REGS. tit. 11, § 162 (1987).

185. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See also supra* text accompanying note 26 discussing the facts of *Dole.*

186. *Dole*, 30 N.Y.2d at 148-49, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 387; D. SIEGEL, supra note 22, at 211. *See also supra* text accompanying notes 23-30.

187. 30 N.Y.2d at 148-49, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 387; D. SIEGEL, *supra* note 22, at 211. *See supra* text accompanying notes 35-38.

> The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

Dole, 30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

of damages, was a veritable avalanche of third-party litigation.[188]

The theory behind the decision in *Dole* was to join all parties in one action to reduce redundant and repeated litigation of essentially the same issues in a later suit for contribution among defendants.[189] While *Dole* may have succeeded in achieving that goal, it created other problems. The increase in third-party litigation which resulted, brought with it an attendant increase in the cost of defending and litigating such complex matters. In other words, the real villain appears to be the inevitable fallout of *Dole v. Dow Chemical Co.*[190]

B. *Litigation Costs are Increased by Post-*Dole *Surge in Third-Party Litigation*

For the purposes of this discussion, it is essential to distinguish between primary litigation (victim v. active tortfeasor), and third-party litigation (primary defendant v. alleged third-party passive or active defendants). While the number of primary actions in New York has remained relatively constant,[191] there has been an exponential increase in the number of third-party actions instituted.[192]

Before the emergence of *Dole*, the bulk of cases tried involved merely a single plaintiff and a defendant.[193] After *Dole*, a flood of third-party litigation ensued from the newly found ability of a defendant in the primary action to sue over against a plaintiff's employer, or any other passive tortfeasor involved.[194] The defendant's desire to secure some level of contribution from each party involved was a strong incentive to implead as many third parties as could be found.[195] Now, it is not uncommon for a case to involve a multitude of parties brought in through cross-claims, impleader, and counterclaims. Consequently, there was a

188. Conway interview, *supra* note 104.

189. *Id.*

190. *Dole*, 30 N.Y.2d at 143, 282 N.E.2d at 288, 331 N.Y.S.2d at 382. *Dole's* statutory counterparts in other states would account for the nationwide insurance liability crisis. *See* Gordon & Crowley, *supra* note 33, at 458.

191. *See supra* text accompanying notes 98-101.

192. Conway interview, *supra* note 104.

193. *Id.*

194. *Id.*

195. *Id.*

corresponding increase in the cost of litigating actions involving numerous third parties.[196] Because each party's interests may conflict with the others', cases necessarily involve a multitude of attorneys, as well. It is not surprising that this multitude of parties and attorneys would multiply the costs of litigation. According to Mr. Bonaros, Vice-President and General Counsel of Utica Mutual, as "litigation has become increasingly complex . . . the cost of defending law suits has increased accordingly."[197]

In 1962, the New York State Legislature adopted extensive provisions in Article 31 of the Civil Practice Law and Rules for disclosure, discovery, and inspection in the prosecution of all actions.[198] Under those rules, each party is entitled to conduct its own discovery upon each of the other parties.[199] Since the enactment of Article 31, and especially since the increase in third-party actions, there has been an extraordinary proliferation of demands, motions, and proceedings to enforce them.[200] The reason for the dramatic increase is that Article 31 not only permits demands by the plaintiff and defendant in the primary action, but also permits demands for disclosure, discovery, and inspection among each of the parties in each of the third-party actions.[201] As third-party motion practice involving demands and proceedings to enforce demands has become commonplace, the level of proceedings and consequent labor has increased in an exponential manner.[202] This has led to a corresponding increase in the cost of litigation. Since it is often the insurance companies who are defending these suits (in addition to paying the judgments) they would be directly and substantially affected by increased litigation costs. The Jones Commission never addressed this obvious and highly significant development, which occurred

196. *Id.*

197. *Hearings*, *supra* note 3, at 87 (statement of Thomas Bonaros, Vice-President and General Counsel, Utica Mutual). According to Judge Conway, "[t]he cost of litigation has, of course, gone up with the increase in numbers of parties." Conway interview, *supra* note 104.

198. N.Y. CIV. PRAC. L. & R. §§ 3101-3140 (McKinney 1970 & Supp. 1989).

199. *Id.*

200. Conway interview, *supra* note 104.

201. N.Y. CIV. PRAC. L. & R. § 3101(a) and commentary at 17-18 (McKinney 1970 & Supp. 1989).

202. Conway interview, *supra* note 104.

following the decision in *Dole v. Dow Chemical Co.*[203]

Despite the disadvantages of complexity and cost of multiparty litigation, the advantage is that all parties involved are present at one time, thereby providing a more complete picture of the evidence, facts, and issues to the jury. While the methodology of apportioning verdicts between multiple defendants must inevitably result in some difficulty for jurors, it appears to be the only fair way to ensure that each party is held responsible only to the extent of his involvement or level of wrongdoing. Thus, third-party actions are here to stay, especially in light of the Article 16 limits on joint and several liability. By holding the defendant who is 50% or less at fault only to his proportionate share, there now is an even greater incentive for him to join as many co-defendants as possible, thereby reducing his own share of fault.

C. *Are Our Insurance Problems Over?*

Premiums have decreased somewhat since 1985 as a result of the investment cycle of the insurance industry. No cases, however, have come to trial thus far under Article 16. Therefore, the results of the New York State Legislature's attempt to rescue the deep-pocket defendant from the perils of low-fault/high-paying judgments through modification of joint and several liability have yet to be seen.

The obvious question that remains is whether Article 16 will bring an end to the problems of insurance availability and affordability which have plagued both insurance consumer and insurer. Since municipalities, as deep-pocket defendants, were often made to bear a disproportionate amount of the burden of a judgment,[204] the limits now imposed on joint and several liability should reduce the amount insurance carriers pay out in judgments against municipalities. This in turn should reduce municipal premiums. However, Article 16's effect may be diminished to the extent that factors other than joint and several liability — such as the increase in third-party actions — have contributed to the crisis.

203. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

204. *See supra* text accompanying notes 125-145.

Dole made sweeping changes in tort law with respect to active/passive negligence, contributory negligence, and comparative negligence. These changes, in conjunction with the theory of joint and several liability, leave few limitations on who may be brought into an action by the plaintiff or the defendant, and even fewer limitations on how much of the judgment they may ultimately be required to pay.[205] The post-*Dole* student and practitioner are familiar with the mind-boggling results, *i.e.* third-party defendants, third-party plaintiffs, fourth-party defendants, fourth-party plaintiffs, and so on. This proliferation of parties was almost unheard of in the days of pre-*Dole* restrictions[206] barring impleader by an active defendant of a cotortfeasor, and maintenance of suits where the plaintiff was contributorily negligent.[207] Once *Dole* lifted these restrictions, the floodgates were opened — not to an increase in the numbers of plaintiffs bringing primary actions, but rather to the avalanche of third-party actions that ensued.[208] To the extent that this proliferation of third-party claims has increased the costs of litigation and thus underwriting expenses, Article 16 will not effect a change.

Suggestions have been made for additional changes in municipal liability coverage to further reduce the likelihood of dramatic across-the-board premium hikes. For small municipalities and villages, whose premiums rose dramatically in 1985 regardless of their claims record, Thomas Goddard, of the Alliance for Consumer Rights, has suggested that insurance premiums work as the automobile liability system works — according to past performance.[209] Under this system, a city's liability premium would be calculated based on the amount and number of past

205. *See supra* text accompanying notes 25-54 and 121-145.

206. Conway interview, *supra* note 104.

207. *Id. See also supra* text accompanying notes 23-38.

208. Conway interview, *supra* note 103. *See also supra* text accompanying notes 185-195.

209. Testimony of Thomas G. Goddard, Director, Alliance for Consumer Rights, before the Governor's Special Comm'n on Liab. Ins. 20 (Feb. 19, 1986) [hereinafter Goddard testimony] (copies of testimony available from Alliance for Consumer Rights, 321 Broadway, New York, N.Y. 10007). Since insurance industry practices have contributed to the insurance crisis, consideration should be given to solutions which address these practices, such as the creation of risk retention programs. Kindregan & Swartz, *supra* note 80, at 711.

liability claims against it.[210] Thus, if a city has a particularly bad claims record for road safety, that record would be reflected in the amount of its premium. This system would achieve two things. First, the cost of insuring cities with bad claims records would not be passed along to cities with good claims records. Second, the system would serve as an incentive program, encouraging cities to step up public safety in exchange for the rewards of lower premiums. This system has worked for automobile insurance.[211] There is no reason why it would not work for municipal liability.

Still another approach to reducing deep-pocket liability would be to raise the minimum amount of statutorily prescribed liability insurance that must be carried by all resident motorists in the State. Currently, the minimum is only $10,000.[212] Therefore, when judgments exceed that amount and the defendant cannot pay, a financially responsible defendant is more likely to be forced to pay a disproportionate share of the costs.

A $10,000 minimum auto insurance coverage,[213] burdensome costs of litigating a multitude of third-party actions,[214] and premium rates which are set without regard to an insured's claim record,[215] still stand today as obstacles to reduced insurance premiums. Nonetheless, Article 16 has made significant progress toward reducing deep-pocket liability. Moreover, Article 16 strikes a fair balance between a plaintiff's right to recover and a municipality's obligation to protect its constituents from uninsured or underinsured losses.

VI. Conclusion

Inherent in our tort system is the concept that wrongdoers should pay for their wrongdoing, and that those harmed should be justly compensated.[216] Any attempt at tort reform, therefore,

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210. Despite the fact that the Capital District Transit Authority had no claims filed against its umbrella policy, the premium jumped 288% in one year. JONES COMM'N REPORT, *supra* note 1, at 33.

211. Goddard testimony, *supra* note 209, at 20.

212. *Id.* at 22.

213. *Id.*

214. *See supra* text accompanying notes 195-202.

215. *See supra* text accompanying notes 211-213.

216. W. PROSSER, *supra* note 10, at 7.

must be undertaken with veneration for these common-law principles of justice. Rather than seeking the total elimination of the plaintiff's rights to a full recovery with one stroke of the legislative pen, reform should begin with smaller steps which leave society in a position to assess results and to plan subsequent moves accordingly.

Ultimately, any tort reform should strike a balance between honoring the plaintiff's right to compensation and protecting the public fisc. While Article 16 does not completely address the post-*Dole* proliferation of third-party litigation, it does strike such a balance. Article 16 protects the deep-pocket defendant from paying a grossly disproportionate share of the jury award, and in so doing it offers such defendants substantial relief. At the same time, Article 16 leaves the plaintiff a degree of protection, in that joint and several liability is to some extent retained.

Dole has had an overwhelming effect in contributing to the costs of litigation, and in its wake, would-be reformers should not be lulled into mistaken reliance on industry's oft-cited claims of ever increasing jury awards and increasing litigiousness of our society to justify proposals for curtailing plaintiff's rights. The real villain in the insurance liability crisis is *Dole*, and in that sense, Article 16 while only a partial remedy, is nonetheless a saving grace.

Gail Huberty Glance