

# Legislation Report

## COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 37

May 8, 2001

S. 3574  
A. 7342

By: Senator Volker  
By: M. of A. Weinstein

Senate Committee: Codes  
Assembly Committee: Judiciary  
Effective Date: 1st day of January next  
succeeding the date on which it  
shall have become law

**AN ACT** to amend the civil practice law and rules, in relation to permitting a plaintiff in a tort case to recover against a third party defendant in certain cases when the third party plaintiff is insolvent

**LAW AND SECTIONS REFERRED TO:** The civil practice law and rules is amended by adding a new section 1405

**REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#11)**

### THIS BILL IS DISAPPROVED

This bill would enact a new CPLR 1405 which would permit a "judgment creditor or a judgment debtor" to recover on a judgment for contribution or indemnification, regardless of whether the judgment debtor has satisfied the underlying judgment for which contribution or indemnification is sought. The bill arises out of an OCA advisory committee proposal, purportedly because of some "uncertainty" in the law following the determination in Reich v. Manhattan Boiler and Equipment Corp., 91 N.Y.2d 772 (1998), and two earlier cases, Feldman v. New York City Health and Hospitals Corp., 56 N.Y.2d 1011 (1982), and Klinger v. Dudley, 41 N.Y.2d 362 (1977).

The law, however, is not uncertain. Where a party is sued in tort, and impleads another alleged tortfeasor, plaintiff must recover damages only from the party whom he or she sued (Klinger). Where that party has paid in excess of its share of the liability, that defendant can then seek recovery from the impleaded third-party defendant (Id.). If the defendant is impecunious, no recovery can be had from the third-party defendant, because plaintiff never sued that party, and defendant cannot be indemnified for that which it did not pay (Id.). If the defendant obtains a loan in order to pay off the judgment debt (with plaintiff's assistance), the defendant or its assignee will be permitted to then seek recovery against the third-party defendant (Feldman), unless public policy prohibits

that artifice. The Worker's Compensation Law represents just such a public policy, and Reich prevents use of a loan artifice in order to recover against a third-party defendant who is plaintiff's employer from whom plaintiff has already received worker's compensation benefits.

This bill attempts to make use of the artifice unnecessary, and would allow a plaintiff to obtain directly from a third-party defendant recovery where defendant is insolvent. Beyond difficulties with the language of the bill (of which there are many), a majority of this committee is opposed to this bill for many substantive reasons.

First, this bill would work a fundamental change in the jurisprudence of our State. It would permit a plaintiff to recover against a party whom that plaintiff never sued and against whom the plaintiff may not have introduced any evidence. There are those in this committee who question whether this meets due process requirements under our constitution. In any event, an ocean-tide change in the law such as this should only be premised on the most significant of grounds, which have not here been shown.

The concerns in allowing a plaintiff to recover directly against a third-party defendant are magnified where the third-party defendant is being held liable to the defendant for indemnification premised upon a contractual agreement to indemnify. In that instance, the contract is solely as between the defendant and the third-party defendant. There is no showing - - nor, typically, could there be - - that the plaintiff was intended to be a beneficiary of the contract. Thus, this bill would also have the effect of expanding contractually-undertaken liability for the benefit of those who are not parties to the contract. This, too, is a substantial change in the law.

Beyond these jurisprudential concerns, the impact of this bill would be to undermine two firmly-established public policy considerations which are the bedrock of comprehensive statutory provisions.

In tort settings, there are essentially two types of third-party defendants: (a) those whom plaintiff could have sued, but did not, and (b) those whom plaintiff could not have sued by operation of law. As to the first group, one may wonder whether additional extraordinary measures are warranted to provide a remedy to plaintiffs against those whom they chose not to sue. The law already provides that where the third-party action was brought within the limitations period applicable to plaintiff's tort claim, plaintiff has the statutory right to immediately amend the complaint to name the third-party defendant as a direct defendant (CPLR 1009). What is more, even if plaintiff fails to take immediate action, he or she may seek to amend the complaint later in the action, provided there is no prejudice (see Duffy v. Horton Mem. Hosp., 66 N.Y.2d 473 [1985]).

Thus, the only third-party defendants within this group - - i.e., whom plaintiff could have sued directly - - who would be snared by this bill are those against whom no action was instituted, neither a direct action nor a third-party action, until after the statutory limitations for the tort involved had expired. The impact of the bill, therefore, is to nullify statutes of limitations in such cases, statutes which are founded upon firmly

entrenched policy principles (see Schwartz v. Heyden Newport Chem Corp., 12 N.Y. 2d 212 [1963]). No grounds have been provided for such a drastic change. Especially is this so, given that, under Feldman, if all else fails, even such a recalcitrant plaintiff may still employ a loan arrangement to secure recovery notwithstanding an impecunious defendant.

That leaves third-party defendants against whom plaintiff could have brought no suit - - i.e., plaintiff's employer. As to such third-party defendants, a steadfast public policy has prohibited any recovery by the employee directly against his or her employer for anything other than workers' compensation benefits. This rule has been enforced even where the employer is sued in his, her or its role as something other than an employer - - e.g., as manufacturer of the product which caused plaintiff's injury or as owner of the land upon which the accident occurred (see, e.g., Billy v. Consolidated Mach. Tool Corp., 51 N.Y. 2d 152 [1980]; Heritage v. Van Patten, 59 N.Y. 2d 1017 [1983]; Riggins v. Stong, 238 A.D. 2d 950 [4<sup>th</sup> Dept. 1997]). The reason was clearly stated by the court in Reich, supra: the Legislature's imposition upon employers to pay worker's compensation benefits regardless of fault was intended to have a concomitant benefit, i.e., freedom from tort liability to an employee. This quid-pro-quo has been the underlying rationale behind strict enforcement of the worker's compensation exclusivity provisions. Those policy considerations would be directly undermined by this bill.

Suggestions that the Worker's Compensation Reform Act of 1996, by permitting third-party claims against employers to continue under circumstances of "grave injury", can somehow support the bill at issue mischaracterize the statute and, what is worse, completely misconceive the function of third-party claims against employers. Employees never had the right to recover directly from their employers amounts other than worker's compensation benefits. To suggest that the Reform Act of 1996, which was unmistakably designed to eliminate most third-party claims against the employers, set the stage for a direct claim by an employee against an employer is simply incongruous. What is more, third-party claims against employers, as expressly related by the New York Court of Appeals in Dole v. Dow Chemical Corp., 30 N.Y.2d 143, 152-153 (1972), were never designed for the benefit of the employee. To the contrary, the court took great pains (there and in Reich) to state that the purpose for allowing such third-party actions was to benefit defendants, who would otherwise be required to shoulder full tort liability where fault should be shared with the employer. Yet, under this bill, third-party claims against employers are being transmogrified so as to benefit the employee by permitting direct recovery against his or her own employer. Nothing of the sort meshes with either the Reform Act or any established principle of New York law.

For the foregoing reasons, this bill is **DISAPPROVED**.

The Person Who Prepared the Report: David B. Hamm, Esq.

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