

**Overview of New York Law on Contribution, Apportionment, Joint Liability,  
Comparative Negligence and Settlement  
CPLR ARTICLES 14 through 16 and GOL §15-108**

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**Introduction:**

This paper shall seek to provide the practitioner with a working overview of the following: contribution among tortfeasors (CPLR Article 14); plaintiff's comparative negligence (CPLR Article 14-A); proceeding against and recovering from persons jointly liable (CPLR Article 15); apportionment of joint tortfeasors' liability (CPLR Article 16); and the effect of settlement on contribution among tortfeasors (GOL §15-108).

**I. Contribution Among Tortfeasors (CPLR Article 14)**

**A. History: Prior to *Dole v. Dow***

Prior to *Dole v. Dow Chemical*<sup>1</sup>, a defendant's liability was joint and several with that of his named co-defendants. If a plaintiff sued only a deep pocket defendant and failed to name more culpable defendants in the action, there could be no impleader (third-party practice) and hence, no contribution. The named defendant was not permitted to go after other unnamed defendants for contribution. See *D'Ambrosio v. New York*, 55 N.Y.2d 454, 460-61, 450 N.Y.S.2d 149, 151-52, 435 N.E.2d 366, 368-69 (1982); *Fox v. Western New York Motor Lines, Inc.*, 257 N.Y. 305, 178 N.E. 289 (1931). See also former N.Y. Civ. Prac. A. §211-a and §193(2). The lone named defendant's only recourse was to seek full, one hundred percent (100%) indemnification from the active, unnamed tortfeasor. If he/she could establish that his/her negligence was "passive", the named defendant would be entitled to implead or bring a separate action against the "active" tortfeasor for indemnity (one hundred percent (100%) reimbursement). Such was permitted in the *respondeat superior* situations between the innocent employer ("passive" tortfeasor) who was cast in vicarious liability as a matter of law for the tort of his negligent employee ("active" tortfeasor). Absent that, the lone named defendant would suffer the brunt of paying the full verdict, regardless of his/her degree of culpability. Hence, under the old law, although a plaintiff could bring in as many or as few defendants as

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<sup>1</sup> [Dole v. Dow Chemical Co.](#), 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972)

he chose, the named defendant could not. As to contribution between named co-defendants, under the old common law, it did not exist.

Former N.Y. Civ. Prac. A. §211 was then enacted to eliminate some of the harsh results of the common law. That statute allowed for a *pro rata* apportionment between named co-defendants only and only if one paid more than his/her *pro rata* share of the judgment. It did not factor in the liability of unnamed tortfeasors who should have shared in the liability. Hence, it still did not allow named defendants to implead others who were not so named by the plaintiff. See *Fox*, 257 N.Y. at 307-08, 178 N.E. at 289-90.

## **B. Contribution after *Dole v. Dow***

In 1972, there was a seachange in how liability would be apportioned among joint tortfeasors. The Court of Appeals, in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972), swept aside the “active”/“passive” dichotomy by changing the common law in New York to allow a defendant who paid all of the damages to seek contribution from other tortfeasors who were only partially responsible, based upon their equitable share of the liability. These other tortfeasors did not even have to be named in the original action by the plaintiff. A named defendant could implead them or bring a separate action against them. No longer would a named defendant’s right to apportionment be premised upon the “active” negligence of another. Now even partial, as opposed to one hundred percent (100%) liability is sufficient for impleader.

## **C. Codification of *Dole v. Dow***

In 1974, the New York Legislature codified *Dole v. Dow* in Article 14 of the N.Y. Civ. Prac. Law and Rules (CPLR).

### **CPLR §1401**

#### **“Claim for contribution**

Except as provided in [sections 15-108<sup>2</sup>](#) and [18-201 of the general obligations law](#), sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.”

CPLR §1401.

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<sup>2</sup> See *infra*, at part IV.

Now, a defendant who was named in a lawsuit can seek contribution from another for their equitable share of the liability, even if that other tortfeasor was not originally named by the plaintiff. To be able to obtain contribution under CPLR §1401, the tortfeasors' liability must pertain to the same injury. Contribution can even be had against an intentional, successive<sup>3</sup>, alternative and/or independent tortfeasor who contributed to the "same injury". *Schauer v. Joyce*, 54 N.Y.2d 1, 5, 444 N.Y.S.2d 564, 565, 429 N.E.2d 83, 84 (1981). However as a matter of public policy in the intentional tort situation, no contribution is allowed for punitive damages.

The wording of the statute itself limits contribution to tort liability, not contract. For contribution to apply, "two or more persons [must be] subject to liability for damages for the **same personal injury, injury to property or wrongful death**. . . ." CPLR §1401 (emphasis added). This interpretation has been held to include strict liability and breach of warranty theories of liability, but not a claim for breach of contract. *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 451, 398 N.Y.S.2d 401, 406, 368 N.E.2d 24, 29 (1977)(contribution allowed under strict liability theory of abnormally dangerous activity); *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26, 523 N.Y.S.2d 475, 477, 517 N.E.2d 1360, 1363 (1987)("purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute").

So long as a tortfeasor would be liable to the plaintiff had he/she been named in the action, that tortfeasor is subject to contribution. Remember, the statute provides that if "two or more persons who are subject to liability for damages for the same personal injury . . .", then contribution between them is allowed. This is true even if the plaintiff cannot bring a direct action against the unnamed tortfeasor (i.e., Workers' Compensation or Statute of Limitations defense). The statute of limitations for contribution does not begin to run until after the payment of a judgment by a defendant in excess of his equitable share. *Bay Ridge Air Rights, Inc. v. State*, 44 N.Y.2d 49, 55-56, 404 N.Y.S.2d 73, 75-76, 375 N.E.2d 29, 31 (1978). Once that occurs, the statute of limitations is the six (6) year limitation period for contract actions (CPLR 213(2)). See *Blum v. Good Humor Corp.*, 57 A.D.2d 911, 394 N.Y.S.2d 894 (2<sup>nd</sup> Dep't 1977)(right of contribution based upon fiction of an implied contract to ameliorate inequity of having paid excess beyond proportionate share).

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<sup>3</sup> **Caveat:** Because the initial tortfeasor set the ball in motion with his negligence, the initial tortfeasor is responsible to plaintiff both for his negligence and also for the subsequent foreseeable acts of negligence of a successive tortfeasor. However, the successive tortfeasor is only responsible for his/her equitable share of the liability for which he/she contributed. The successive tortfeasor is not liable to the plaintiff for the injuries inflicted by the original tortfeasor. Therefore, the successive tortfeasor may not seek contribution from the initial tortfeasor. See *Glaser v. M. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 647, 529 N.Y.S.2d 59, 61, 524 N.E.2d 413, 415 (1988).

**CPLR §1402: Amount of contribution:**

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

According to the wording of this statute, although contribution may be had prior to the entry of a judgment in a separate action (see CPLR §1403), it cannot be collected until after the party asserting a claim for contribution has first paid more than his/her proportionate share the original judgment. Recovery under contribution is limited to the excess, dollar for dollar, above one's proportional share that has been paid. The party from whom contribution is sought is only responsible for their proportional share and not a penny more.

However if a defendant is unable to pay the judgment, plaintiff may not recover against the third-party who was not named as a defendant in the main action. In that situation, the Court of Appeals considered a *bone fide* loan to the defendant in the combined amount of both the defendant's equitable share as well as the third-party's proportionate share to be deemed a payment so that the right to contribution is triggered. *Feldman v. N.Y.C. Health & Hospitals Corp.*, 56 N.Y.2d 1011, 439 N.E.2d 398, 453 N.Y.S.2d 683 (1982)(citing to opinion of Special Term at 107 Misc. 2d 145, 437 N.Y.S.2d 491 (1981)).

In *Feldman*, plaintiff recovered an \$835,000.00 verdict against the defendant automobile operator and the successive tortfeasor doctor for medical malpractice. The jury then apportioned liability between the two defendants and the third-party defendant N.Y.C. Health & Hospitals Corp., finding fault as follows: ten percent (10%) as against the automobile defendant; thirty-six percent (36%) as against defendant doctor and fifty-four percent (54%) as against the third-party defendant hospital. The defendant doctor paid his proportionate share of the judgment or \$300,600.00. However, the automobile defendant only had a \$25,000.00 policy and no other assets.<sup>4</sup> Therefore, before the automobile

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<sup>4</sup> The automobile defendant, as the initial tortfeasor who started this chain reaction of negligence, is responsible jointly and severally for his negligence as well as the negligence of both the doctor and the hospital. Had the automobile defendant been able to pay the full judgment, then he would be entitled to contribution from both the doctor and the hospital. However, had the doctor paid the full amount of the judgment (both the doctor's share and the defendant and third-party defendant's share)(which would not have happened today under CPLR §1601, see *infra*, at part III), the doctor would not have been able to get contribution from the automobile defendant. The condition precedent to a contribution action under CPLR §1401, requires there to be the "same injury" to which both would be held responsible to the plaintiff. The doctor did not cause the automobile injury, he/she just aggravated it by having committed medical malpractice.

defendant's right to contribution for excess recovery could be triggered, he would have to have paid not only his proportionate share (\$83,500.00), but also the third-party defendant's share (\$450,900.00) as well.<sup>5</sup>

To get around this dilemma, plaintiff's counsel arranged for a "friendly" stranger to loan the automobile defendant \$534,400.00, in which to pay plaintiffs. The money was then held in escrow by plaintiff's attorney. Plaintiff, in exchange, executed a general release and satisfaction of the judgment to the automobile defendant. The automobile defendant assigned his cause of action for contribution against the third-party defendant hospital to the lender. For this the lender would keep twenty-five percent (25%) of the proceeds of the contribution recovery.<sup>6</sup> The Court of Appeals held that the right to contribution is triggered only when the defendant pays the plaintiff the excess above his equitable share. "It does not restrict the source of funds from which to make this payment." *Feldman*, 107 Misc. 2d at 153, 437 N.Y.S.2d at 496.

### **CPLR §1403: How to Assert a Contribution Claim**

"A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action."

CPLR §1403.

### **CPLR §1404: "Rights of persons entitled to damages not affected; rights of indemnity or subrogation preserved"**

(a) Nothing contained in this article shall impair the rights of any person entitled to damages under existing law.

(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law."

CPLR §1404.

With the exception of CPLR §1601 and 1411, the common law right of a plaintiff to elect to recover his/her damages from one or more of several joint tortfeasors, who are each jointly and severally liable, is unaffected by the statutory contribution rules. *Kelly v. LILCO*, 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241 (1972). Moreover, a defendant's right to seek and recover full

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<sup>5</sup> Today, under CPLR §1601, joint liability for the excess above a defendant's proportionate share where that defendant has been adjudged to have been fifty percent (50%) or less liable no longer exists. See *infra*, at part III.

<sup>6</sup> Since the party's were not certain whether this collusive loan strategy would work to trigger an assignment of the automobile defendant's right to contribution, plaintiff, in addition to the automobile defendant, also provided the lender with a \$534,400.00 promissory note to secure the loan.

indemnification is also not affected. *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 347 N.Y.S.2d 22, 300 N.E.2d 403 (1973).

**CPLR §1411. “Damages recoverable when contributory negligence or assumption of risk is established**

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.”

CPLR §1411.

Comparative fault now diminishes a plaintiff’s recovery in proportion to the culpable conduct of the defendants. The common law rule that a plaintiff is barred from recovering if he/she was even one percent (1%) at fault is no longer the law.

Derivative actions, i.e., loss of consortium, are reduced by the main plaintiff’s percentage of fault. *Maidman v. Stagg*, 82 A.D.2d 299, 441 N.Y.S.2d 711 (2<sup>nd</sup> Dep’t 1981).

Caveat: The “seatbelt defense” is not the same as CPLR §1411 comparative fault. It simply is a failure to mitigate damages. Since the failure to wear a seatbelt was not the cause of the accident, it is not taken into account for apportionment of liability purposes. *Stein v. Penatello*, 185 A.D.2d 976, 587 N.Y.S.2d 37 (2<sup>nd</sup> Dep’t 1992).

**Caveat:** Despite comparative negligence, there are four instances when a plaintiff’s culpable conduct will be a complete bar to recovery:

- 1) when a plaintiff’s conduct was the “sole” cause of the injuries;
- 2) when a plaintiff was injured as a result of serious criminal or illegal conduct;
- 3) when a plaintiff has “expressly” assumed the risk; and
- 4) when plaintiff’s voluntary participation, usually in competitive sports, “primary” assumption of risk prevents plaintiff from recovering when the risks are known, apparent or reasonably foreseeable.

**Statutory Exceptions to Comparative Fault:**

- 1) Labor Law §240(1): New York’s Scaffold Law imposes absolute liability on owners and contractors for failure to maintain a safe

elevated workplace. Hence, the injured worker may recover his/her full amount of damages without any diminishment by comparative fault.

- 2) Worker's Compensation Law §11: If an employer fails to procure workers compensation insurance, an injured employee may elect to sue for damages. In that scenario, the financially irresponsible employer may not claim assumption of the risk or contributory negligence. *But see, fn 8 at p.13, infra.*

#### **§ 1412. "Burden of pleading; burden of proof"**

Culpable conduct claimed in diminution of damages, in accordance with [section fourteen hundred eleven](#), shall be an affirmative defense to be pleaded and proved by the party asserting the defense."

#### **§ 1413. "Applicability"**

This article shall apply to all causes of action accruing on or after September first, nineteen hundred seventy-five."

### **II. Actions Based Upon Joint Obligations**

When an obligation is joint, such as co-makers of a promissory note, joint obligors on a contract or partners who are jointly liable for the debts of the partnership, CPLR §1501 allows a plaintiff to proceed against only the defendants served, when less than all are served.

#### **CPLR § 1501. "Actions against persons jointly liable; service of summons; judgment"**

Where less than all of the named defendants in an action based upon a joint obligation, contract or liability are served with the summons, the plaintiff may proceed against the defendants served, unless the court otherwise directs, and if the judgment is for the plaintiff it may be taken against all the defendants.

Joint obligors are considered necessary parties under CPLR 1001. Therefore, plaintiff should name and serve all of them. However, CPLR §1501 empowers a plaintiff to proceed with the action despite the failure to serve all parties, unless the Court orders otherwise. The judgment taken will be in joint form as against all the defendants, even those named, but not served with process. Execution upon the judgment can be had against jointly-owned property of those both served and not served and against the individual assets of only those who were served.

CPLR 5018(a) states, in pertinent part, that “[i]f the judgment is upon a joint liability of two or more persons the words ‘not summoned’ shall be written next to the name of each defendant who was not summoned.” Execution upon a judgment can only be taken against a judgment debtor. CPLR §5230. A joint obligor who was not served, hence the words “not summoned” appear next to his name, is not a judgment debtor. CPLR 105(m). Thus, plaintiff cannot enforce the judgment against the individual assets of a joint obligor who was not served.

The only way that plaintiff can execute upon the individual assets of a joint obligor who was not served is to commence a second action, pursuant to CPLR §1502, against him/her.

**Caveat:** If all joint obligors are named and served, but one defaults, a default judgment, pursuant to CPLR 3215(a), against the defaulting party will discharge the liability of the other joint obligors. The common law treats joint obligations as one; hence they are inseverable. Therefore, a default judgment acts as a merger of plaintiff’s claim and a discharge of liability against the other joint obligors who did not default. This is different from N.Y. Gen. Oblig. Law §15-102 where a judgment against joint obligors does not discharge the liability of a joint obligor who was not served.

Bear in mind that where a default judgment is entered against one who is both jointly and severally liable, as opposed to strictly jointly liable, then there is no merger. In that scenario, plaintiff is free to pursue his claim against the others so long as the first judgment has not yet been satisfied. See CPLR 3002(a). See also, *Hecht v. City of N.Y.*, 60 N.Y.2d 57, 62-63, 467 N.Y.S.2d 187, 190, 454 N.E.2d 527, 530 (1983).

**CPLR § 1502. Provisional remedies and defenses in subsequent action against co-obligor**

A subsequent action against a co-obligor who was not summoned in the original action must be maintained in order to procure a judgment enforceable against his individually held property for the sum remaining unpaid upon the original judgment, and such action shall be regarded as based upon the same obligation, contract or liability as the original judgment for the purpose of obtaining any provisional remedy. The complaint in the subsequent action shall be verified. The defendant in the subsequent action may raise any defenses or counterclaims that he might have raised in the original action if the summons had been served on him when it was first served on a co-obligor, and may raise objections to the original judgment, and defenses or counterclaims that have arisen since it was entered.



The judgment in the first action is not *res judicata* in the second action. The complaint in the second action must be verified and must state the extent to which the first judgment has been satisfied. CPLR 3016(d). The Statute of Limitations for the second action is six (6) years. It begins to run from the entry of judgment in the first action. See e.g., *Hofferberth v. Nash*, 191 N.Y. 446, 84 N.E. 400 (1908).

### **III. Apportionment of Liability of Persons Jointly Liable, pursuant to Article 16 of the CPLR**

Do not confuse apportionment of liability under Article 16 with the right to contribution under Article 14. Although the two articles are inter-related insofar as whether plaintiff can recover all or part of a judgment from any one or more joint tortfeasors, apportionment of liability, under Article 16, determines whether a joint tortfeasor will only be responsible to the plaintiff for his/her proportionate share or for the full amount of the judgment. Contribution, under Article 14, allows a joint tortfeasor to recover whatever excess over that tortfeasor's proportionate share of liability that he/she paid on the judgment against another joint tortfeasor. Therefore, under certain circumstances when apportionment will not be allowed because of the exceptions contained in CPLR 1602, a defendant may still recover contribution for the excess paid beyond his/her proportionate share from another joint tortfeasor.

#### **CPLR §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."

CPLR §1600.

#### **CPLR § 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 or she was unable to obtain jurisdiction over

such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

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](#).<sup>7</sup>

CPLR §1600 (emphasis added).

Article 16 severely restricts the common law's application of joint and several liability with respect to a joint tortfeasor's liability for the full amount of any judgment for pain and suffering, loss of consortium, mental anguish (non economic loss) without regard to that defendant's degree of culpability. As of 1986, if a defendant's equitable share of liability is determined to be fifty percent (50%) or less of the total liability for all the defendants, whether or not named, then that defendant shall only be liable to the extent of his degree of culpability. It does not affect joint and several liability for economic losses. Joint tortfeasors continue to be jointly and severally liable for economic losses, no matter what their degree of culpability. Moreover, this Article only applies to personal injury actions (including medical malpractice actions). Traditional joint and several liability still applies for judgments on property damage claims as well as for economic damage claims (i.e., medical expenses, lost income and wrongful death damages (E.P.T.L. §5-4.3: wrongful death is for pecuniary/economic loss)). Furthermore, if a joint tortfeasor is found to be more than fifty percent (50%) liable, then that party is jointly and severally liable to plaintiff for the full amount of the judgment, regardless of his/her degree of culpability.

Persons who should have been named as defendants because they caused or contributed to the injuries, but were not named, CPLR §1601 will allow their percentage of liability to be apportioned along with the other named defendants. However, if a plaintiff can prove that with due diligence he/she was unable to obtain jurisdiction over that unnamed party, then that party's proportionate share will not be factored into the apportionment analysis.

**Limited Contribution and Indemnification Against Employer:** Workers' Compensation Law §11 prevents a third-party impleader action from being brought against an employer when its employee is suing another tortfeasor for injuries sustained on the job, unless that employee has sustained a "grave injury", as defined by that statute. In that scenario, the employer's share of fault will not be apportioned under Article 16 and the remaining defendants will not be

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<sup>7</sup> See explanation in part IV, *infra*.

able to obtain contribution from that employer under Article 14. Section 11 of the Workers' Compensation Law states, in pertinent part, the following:

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury’ . . . .”

Workers' Compensation Law §11.

That statute goes on define a “grave injury” as

“death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

Workers' Compensation Law §11.

Even if the employee did sustain a “grave injury”, CPLR 1602(4) states that with respect to the plaintiff's action, the limitations of Article 16 do not apply. This means that the employer's proportionate share of liability is not factored against plaintiff and that the remaining defendants, no matter what their share of culpability, are nevertheless liable to the plaintiff, jointly and severally, for the employer's proportionate share of liability as well as for their own. However, when an employee sustained a “grave injury”, the other defendants may implead the employer as a third-party defendant and recover contribution from the employer for the employer's equitable share of liability to the extent that they paid plaintiff more than their equitable share.

### **Bankruptcy and its Effect on Apportionment**

The stay of litigation afforded to a party in bankruptcy does not justify a plaintiff in failing to include that party in the action. *In re N.Y.C. Asbestos Litigation (Tancredi v. ACandS, Inc.)*, 194 Misc.2d 214, 750 N.Y.S.2d 469 (Sup. Ct. N.Y. County 2002). The culpability of a bankrupt, non-party tortfeasor would be included when calculating the defendant-tortfeasors' exposure. *Id.* Just because a party is in bankruptcy proceedings, a plaintiff can technically acquire jurisdiction over him/her. *See also, Kharmah v. Metropolitan Chiropractic Center*, 288 A.D.2d 94, 733 N.Y.S.2d 165 (1<sup>st</sup> Dep't 2001). *But see, In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2<sup>nd</sup> Cir. 1992)(jurisdiction cannot be

obtained during bankruptcy petition; therefore, tortfeasor's liability cannot be apportioned).

### **Plaintiff's Comparative Negligence**

Plaintiff's negligence is not factored into the apportionment equation when determining whether liability to the plaintiff should be joint and several or simply several. Plaintiff's liability percentage is excluded and each defendant's equitable share is determined in relation to the other tortfeasors. The total percentages of liability among the tortfeasors are recalculated to total one hundred percent (100%) and their respective equitable shares are based on that extrapolation.

### **CPRL §1602: Exceptions to Article 16 Apportionment**

"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 claimant has sustained a "grave injury" as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom

the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law 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 any person may be held liable.<sup>8</sup>

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.

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 or 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

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<sup>8</sup> Caveat: If a financially irresponsible employer, who appears to possess the lion's share of liability, fails to secure Workers' Compensation insurance coverage, a plaintiff who elects to sue this employer will not have the benefit of Workers' Compensation exception to apportionment. Therefore, it would behoove the plaintiff in that situation to elect Workers' Compensation benefits instead of filing suit. This would prevent the employer's equitable share of liability from being factored into determining whether the remaining joint tortfeasors' are jointly and severally or just severally liable to the plaintiff.

intentionally, and in concert, to cause the acts or failures 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.

12. in conjunction with the other provisions of this article not be construed to create or enlarge actions for contribution or indemnity barred because of the applicability of the workers' compensation law of this state, any other state or the federal government, or [section 18-201 of the general obligations law.](#)”

CPLR §1602.

CPLR 1602(2)(ii) preserves a defendant's common law right to indemnity. *Salamone v. Wincaf Properties, Inc.*, 9 A.D.3d 127, 777 N.Y.S.2d 37 (1<sup>st</sup> Dep't 2004).

CPLR 1602(2)(iv) preserves the vicarious liability of a defendant whose agent/employee has been found negligent. The vicariously liable defendant (i.e., employer under *respondeat superior*) cannot seek apportionment between itself and its employee. The vicariously liable party continues to be liable for the nondelegable duty to the same extent as its employee. The vicariously liable defendant may nevertheless seek an apportionment from other joint tortfeasors outside the employment relationship.

CPLR §1602(8) states that apportionment is not applicable to liability under Article 10 of New York's Labor Law (nondelegable duty of owners and contractors to provide employees with a safe place to work)

Where one joint tortfeasor has been held to have acted intentionally and the other, negligently, the intentional tortfeasor is liable for the full amount of the judgment (CPLR 1602(5)). The negligent tortfeasor gets the apportionment benefit of Article 16 and is, therefore, only responsible for his/her equitable share. *Chianese v. Meier*, 98 N.Y.2d 270, 766 N.Y.S.2d 657, 774 N.E.2d 722 (2002). Moreover, if more than one tortfeasor has been found to have acted intentionally, CPLR 1602(11) precludes them from apportionment with each other. Hence, they are each jointly and severally liable for whatever judgment is rendered against them.

CPLR 1602(6) excludes the apportionment benefit from all motor vehicle and motorcycle accident cases involving users, operators and owners of these vehicles.

### **CPLR § 1603. “Burdens of proof**

In any action or claim for damages for personal injury a party asserting that the limitations on 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 [subdivision one of section sixteen hundred one](#) or [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.”

CPLR §1603 (emphasis added).

This particular statute has been strictly interpreted to require a plaintiff to actually plead the specific exemption to Article 16 apportionment. *Roseboro v. NYC Transit Auth.*, 286 A.D.2d 222, 729 N.Y.S.2d 472 (1<sup>st</sup> Dep’t 2001).

Although the defendant automatically gets the benefit of apportionment, pursuant to CPLR §1601(1), a defendant should still plead it as an affirmative defense if a claim is to be made as to the culpability of an unnamed tortfeasor or if a defendant intends to minimize his/her culpability on a theory of liability different from that pleaded by plaintiff. See CPLR 3018(b). See also *Maria E. v. 599 West Assocs.*, 188 Misc.2d 119, 726 N.Y.S.2d 237 (Sup. Ct. Bronx County 2001).

## **IV. GOL §15-108: Settlement and its Effect on Contribution**

### **Forfeiture of Contribution:**

A settling defendant who has obtained a general release from the plaintiff is free from any claim of contribution by the non-settling defendants under Article 14 of the CPLR. That defendant will be dropped from the action. Furthermore, the settling defendant forfeits any claim that he/she may have for contribution against the other non-settling defendants; he/she does not, however, forfeit the right to indemnification.

### **Indemnification Claims Survive Settlement:**

GOL §15-108 is not applicable to claims of indemnification. *Riviello v. Waldron*, 47 N.Y.2d 297, 305-06, 418 N.Y.S.2d 300, 304-05, 391 N.E.2d 1278, 1282-83 (1979). An employer who settles a vicarious liability claim is still free to go after the tortfeasor employee for indemnification and the remaining defendants are still free to go after the settling defendant for any indemnification claim that they may have against him/her.

### **Reduction of Judgment:**

Under GOL §15-108, the non-settling defendants get the benefit of having the judgment against them reduced by the greater of the following: either the settling tortfeasor's equitable share of fault or the amount that the settling tortfeasor paid for the settlement. Therefore, in multiparty litigation, the prudent plaintiff should consider carefully whether to accept a partial settlement offered by the party that is suspected to be predominantly liable. If accepted, the remaining defendants can have the ultimate judgment reduced (set off) by either the settlement amount or that settling defendant's proportionate share of liability. Conceivably, the judgment could be reduced to practically nothing. In that case, the partial settlement that plaintiff was quick to accept could turn out to be the *de facto* settlement for the entire action.

**Caveat:** Although the contribution claims are forfeited upon settlement, under GOL §15-108, the non-settling defendants also get the benefit of having the settling party's proportionate share of fault or the amount paid for the settlement, whichever is greater, applied to set off/reduce the non-settling defendant's liability for both economic and noneconomic damages. CPLR §1601(2) expressly states that "[n]othing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law." CPLR §1601(2).

### **GOL §15-108: "Release or covenant not to sue**

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.



**Caveat:** The contribution forfeiture rule of GOL §15-108 does not apply to post-judgment settlements after a judgment has been entered on both liability and damages. *Rock v. Reed-Prentice Div. Of Pkg. Machinery Co.*, 39 N.Y.2d 34, 382 N.Y.S.2d 720, 346 N.E.2d 520 (1976). Therefore, once judgment has been entered and a defendant's offer of settlement, in lieu of an appeal, is accepted, that party is free to go after the remaining defendants for contribution. However, in a bifurcated trial, a settlement after a liability trial, but before the damages trial, invokes the contribution forfeiture rule of GOL §15-108. Therefore, any amount paid to the plaintiff in excess of the settling defendant's proportionate share of liability is viewed as a voluntary payment and cannot be recouped via contribution from the non-settling defendants.

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