New York State Bar Association
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Memorandum Urging Veto

TORTS, INSURANCE AND COMPENSATION LAW SECTION AND COMMITTEE ON CIVIL PRACTICE LAW AND RULES

TICL/CPLR #1-GOV

August 9, 2019

S. 6552
A. 2373

By: Senator Skoufis
By: M. of A. Dinowitz
Senate Committee: Rules
Assembly Committee: Codes
Effective Date: Immediately, and shall apply to all judgments entered by plaintiffs on or after such date

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 & SECTION REFERRED TO: CPLR 1405

THE TORTS, INSURANCE AND COMPENSATION LAW SECTION and THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES OPPOSE THIS LEGISLATION AND URGE ITS VETO

This bill would enact a new CPLR 1405 which would permit a "plaintiff judgment creditor" to recover on a judgment in favor of the defendant-judgment debtor for contribution or indemnification against a third party (either a third-party defendant or co-defendant), even where the plaintiff has asserted no direct claim against that party. The bill would legislatively overrule ***Klinger v. Dudley***, 41 N.Y.2d 362 (1977), except in such circumstances where the third party is the plaintiff's employer.

Under ***Klinger v. Dudley***, 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. 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. 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. 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 v. New York City Health and Hospitals Corp***, 56 N.Y.2d 1011 (1982)] unless public policy prohibits that artifice. The Worker's Compensation Law

represents just such a public policy, and ***Reich v. Manhattan Boiler and Equipment Corp***., 91 N.Y.2d 772 (1998) 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. The bill incorporates this public policy exception by preventing the application of new CPLR 1405 to the plaintiff's employer.

This bill purports 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. For the reasons below, the Torts, Insurance and Compensation Law Section and the Committee on CPLR are opposed to the bill, and request that the Governor veto it.

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 may be a question of 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, and is likely to deeply impact insurance coverage, particularly in the construction industry.

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 interposed a direct claim by 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 [***Duffy v. Horton Mem. Hosp.,*** 66 N.Y.2d 473 (1985)]. There seems to be no rationale to allow a plaintiff to recover from a third-party defendant that the plaintiff was free to assert a claim against, and decided against doing so.

Among those whom the plaintiff could not have sued at the time of the third-party action, are those against whom the statute of limitations had run, municipalities against whom the plaintiff had failed to serve a timely notice of claim, or other legal impediments to direct action. With respect to those against whom the statute of limitation had run, the impact of this bill is to nullify the statutes of limitations, statutes which are founded upon

firmly entrenched policy principles [***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. Similarly, under the bill, plaintiffs may recover directly against a municipality without any need for the service of a notice of claim, thus negating the public policy that supports such notices.

In short, this bill will have deep implications upon the requirement of insurance in many situations, particularly with respect to construction contracts, where, under the Labor Law, the plaintiff may be afforded absolute liability against a general contractor and the owner with limited defenses, and the defendants frequently rely upon indemnification. There is not ample justification for this deeply consequential change in the law.

For the foregoing reasons, NYSBA's Torts, Insurance and Compensation Law Section and Committee on Civil Practice Law and Rules **OPPOSE THIS LEGISLATION AND URGE ITS VETO.**