Death of the Impleader?
The Omnibus Workers'Compensation
Reform Act of 1996

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Introduction

This memorandum will describe the recent changes to New York State's Workers Compensation Law and its repercussions on the viability of third-party actions against plaintiff's employer.

Background

Section 2 of the Omnibus Workers Compensation Act of 1996 amends section 11, the Alternative Remedy provision. **Johnson v. Space Saver Corp.**, 656 N.Y.S.2d 715 (1997). The motivation for this amendment is clear from the legislative history of the bill. As stated on the Assembly floor by the Act's principal sponsor, Majority Leader Michael Bragman, just minutes before the Assembly vote on then bill (H) 11331, the Omnibus Act was designed to protect the interests of New York State's workers while addressing the spiraling cost of Workers' Compensation insurance paid by the State's businesses. See, N.Y. S. Assembly floor debate transcript, July 12, 1996, at 622.

The New York Assembly Majority Task Force on Workers' Compensation Report indicates that for six consecutive years prior to 1993, premiums experienced double-digit increases, costing the state thousands of jobs. Majority Leader Bragman noted that the ability of defendants to implead employers, so-called Dole liability, accounted for 6.4 percent of the cost of Worker's Compensation insurance. Transcript, 622-23. In order to encourage business to remain in, and relocate to, New York, the legislature perceived the need for an immediate reduction in Workers' Compensation premiums so as to make New York competitive with other states. According to the sponsors, the bill's passage was expected to do just that, effecting a reduction in the Dole percentage from 6.2 to 3.1 percent, saving employers close to $300 million per year and providing

insurance carriers with an approximate $1 billion benefit from premiums paid for Dole liability in the past decade. Transcript, 622-23, ***Majewski v. Broadalbin-Perth Central School District***, *169 Misc.2d 429 (1996), 653 N.Y.S.2d 822, 826, Gary Spencer, "Workers' Comp Reforms Held not Retroactive", NYLJ, July 11, 1997.*

The bill employed three methods to limit the section 11 Alternative Remedy. First, the right to implead an employer would be reserved for cases where an employee suffered a "grave injury". Second, common law basis of liability would be eliminated, leaving the statute as the principal basis of a cause of action. Lastly, limits would be placed on contractual indemnification.

While the Omnibus Act significantly reduced employers' future exposure to third party contribution claims, the legislature stopped well short of a comprehensive bar on these third party suits. What emerged from the Assembly was not a statute that excised *Dole v. Dow*, codified in Article 14 of the CPLR, from New York jurisprudence, but instead a less restrictive Act aimed at reducing, but by no means eliminating, the cost associated with Dole liability.

"Grave Injury"

The revised statute now reads as follows:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability to 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" which shall mean only one or more of the following: 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." Chapter 635, McKinney's Session Laws 1996, Omnibus Workers' Compensation Reform Act of 1996, Section. 11

In the litigation that has occurred up to this point, defendants have paid little attention to the threshold "grave injury" issue, focusing instead on the application issue, which is discussed in detail below. However, once the temporal applicability of the statute is determined, litigation over the boundaries of "grave injury" will surely begin.

Some of the injuries characterized by the statute as "grave" are clear-cut, like death and paraplegia. Others, like "acquired brain injury" and "severe facial disfigurement", will surely be open to interpretation. In fact, this interpretive dilemma has the potential to turn the statute into a legal quagmire similar to what exists under Article 51 of the Insurance Law concerning the serious injury threshold in motor vehicle accident cases. The new statute sets no guidelines as to the extent of amputation or the degrees of loss: above the elbow, below the knuckle? While the terms "permanent and total" are used with "loss of use", they do not appear to refer to amputation. It is clear that litigation similar to that of the no-fault "serious injury" threshold will follow, and the specificity and statutory construction of the "grave injury" standard will compound the problem.

In one of the more interesting twists, the Act places the burden of proof on the defendant (the "third person" as defined in the statute) to demonstrate by competent medical evidence that the employee has suffered a "grave injury" within the meaning of the statute. In order for defendants to be able to pursue the employer for contribution,

they will be forced to argue that the injury inflicted on the plaintiff was "grave". This could even entail the defendant characterizing the injury to plaintiff as worse than alleged by the plaintiff himself, with the hopes of the injury qualifying as "grave".

The question would then be whether, in making the initial argument that the injury was "grave" in order to bring the employer into the litigation as a third party, the defendant would be estopped from reversing his position at trial. If not, a defendant will have to decide what is more valuable, contribution from the employer or the possibility of defeating plaintiff's suit.

The "grave injury" threshold provides important protection to the employer seeking to avoid third-party lawsuits. The injuries listed in the statute as a condition precedent to a third-party suit are severe. As a practical matter, the vast majority of plaintiffs do not sustain injuries that would meet the definition of a grave injury.

Common Law Indemnification

The Omnibus Act expressly eliminates any common law cause of action. Under the common law, the right to indemnity arose when there was an express agreement to indemnify or when the law implied the existence of such an agreement as warranted by the circumstances. N.Y.Jur.2d, § 1401.09 p. 14-24. This provision of the Act apparently applies only to the latter situation, as the Act contains a separate, narrow provision for pre-existing indemnity contracts.

This change in the law represents a significant departure from Dole. In cases following that decision, the Court of Appeals made clear that while Dole affected the right of contribution, it was not intended to overturn principles of common-law indemnification. ***Rogers v. Dorchester Associates****, 32 N.Y. 2d 553, 347 N.Y.S.2d 22, 300*

N.E.2d 403 (1973). In addition, section 1404 of the CPLR "expressly insures that nothing in Article 14 'shall impair any right of indemnity. . . under the law'." CPLR Article 14, §1404, practice comments C1404:2, p. 193.

However, the Omnibus Act did have in mind the overturning of common law basis of indemnity as is stated quite explicitly in section 11, excerpted above. The statute states that the liability of an employer is exclusive, barring claims at "common law or otherwise". This reflects the deep dissatisfaction of third-party claims under Dole and the intention of the drafters of the Omnibus Act to limit the alternative remedy.

Contractual Indemnification

> "For purposes of this section the terms "indemnity" and contribution" shall not include a claim or cause of action for contribution or indemnification based on a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered". Chapter 635, McKinney's Session Laws 1996, Omnibus Workers' Compensation Reform Act of 1996, Section. 11

This provision represents an acknowledgment of both business and legal realities. From the legal perspective, the Act would have run head-first into the contracts clause, Article I, the section 10 of the U.S. Constitution, ["No State shall. . . pass. . . any Law impairing the Obligation of Contracts"] had it attempted to void existing indemnification contracts.

However, the legislature was able to place requirements on contracting parties and specify under what circumstances contracts for indemnification would be

recognized under the Act. Section 11 requires a "written contract" entered into prior to the occurrence in which the employer "expressly" agrees to indemnify a claimant "for the type of loss suffered". While this tightens controls and places an increased burden on parties seeking contractual indemnification, it preserves the right of businesses to allocate among themselves the risks of doing business, of which contribution and/or indemnification for injury are two such risks.

The legislation provides significant protection to the employer in lawsuits initiated by an employee for injuries received on the job site. Third-party actions are possible only if the plaintiff has suffered a grave injury. As a practical matter, it will be rare for an employee to meet the grave injury threshold of the statute. The legislation also precludes common law actions in contribution and indemnity. It is only this last portion of the statute, dealing with contractual indemnification, which will provide the avenue for third-party actions against the employer. This will primarily exist in construction cases.

It is common practice in construction work for a contractor or subcontractor to agree in writing, to contractually indemnify the owner and/or general contractor for injuries that occur during the work of the subcontractor. In these situations it will be common for third-party actions to be initiated against the employer when this employee is injured and starts a lawsuit.

Conclusion

Although the Amendment has created substantial protections for compensation - paying employers, under certain circumstances, a third-party action is still an available option and will result in a successful transfer of liability to the active tortfeasor.