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BY JOEL M. SIMON AND MARK YAGERMAN

Indemnification and Article 16: In for a Penny or a Pound?

Article 16 of the CPLR—Joint and Several Liability. Just the mention of it can send shivers down the spine to the most experienced trial attorney. What is in essence a simple concept, can often get overly convoluted and confusing.

When Article 16 of the Civil Practice Law and Rules (CPLR) was enacted in 1986, it was seen as an attempt by the Legislature to remedy what was perceived as the harsh treatment of municipalities and other deep pockets. It modified the common-law doctrine of joint and several liability limiting the recovery for noneconomic damages, if 50 percent or less negligent, to the percentage that the defendant in a multidefendant litigation was found to be negligent. However, the statute has multiple exceptions and has been the source of untold confusion through the years.

For many years, it has been the common understanding that Article 16 would not apply in situations where an entity who is liable purely on a vicarious or statutory nature seeks to pass through that liability to the actively negligent party. In such situations, the old adage, "in for a penny, in for a pound" applied.

Passing Down 1 Percent

The idea would be that the statutorily or vicariously liable entity, often a property owner or municipality, would simply have to pass down 1 percent to the other entity in order to have complete indemnification, see *Salamone v. Wincaf Properties*, 9 AD3d, 127, 777 NYS2d 37, lv dismissed, 4 NY3d 794, 795 NYS2d 168.

Joel M. Simon *Mark Yagerman*

It has been understood that Article 16 would not apply in situations where an entity who is liable purely in a vicarious way seeks to "pass through" that liability. As such, the old adage, "in for a penny, in for a pound" applied.

In *Salamone*, supra, the First Department found that CPLR 1602(2)(ii) did not limit the owner's right of indemnification against the partially liable party. A complete pass through was permitted. To many, such a resolution made a certain amount of sense as a party who actually had no negligence and whose liability was based on an act of law, was able to pass off its liability to the actual culpable party, not withstanding the degree of that party's culpability. On the other hand, others found such a determination draconian as it results in a party, who may only have minimal culpability, being held responsible for the entire exposure, notwithstanding the Legislature's clear intent of holding responsible, those most likely to be able to control the risk, i.e., landowners, general contractors and municipalities.

Court of Appeals

These two conflicting viewpoints were presented recently to the Court of Appeals in *Stephen R. Frank v. Meadowlakes Development Corp*. __NE2d__, 2006 WL 797678 N.Y. March 30, 2006. The Court of Appeals enunciated the issue by setting forth the question:

> …Whether a tortfeasor whose liability is determined to be 50 percent or less can be found responsible for total indemnification of noneconomic loss despite CPLR Article 16.

In this Court of Appeals decision, the plaintiff, while walking up a staircase, lost his balance falling off the side of the staircase which had no ramp. A jury found the general contractor to be 80 percent responsible with the owner of the property held in pursuant to Labor Law §240. The owner had also impleaded the plaintiff's employer and that employer was found to be 10 percent responsible.[1] The owner attempted to seek a complete indemnification pass through to the employer under the premise that as long as a party you are seeking to be indemni-

Joel M. Simon *is a senior member at Smith Mazure Director Wilkins Young & Yagerman, where he heads the law and appellate department.* **Mark Yagerman** *is an executive member at Smith Mazure.*

fied from is minimally 1 percent negligent, they would be responsible for all liability if you, yourself are not negligent.[2] The Court of Appeals, however, disagreed. In *Frank,* the Court of Appeals noted that even in an indemnification action, the party against whom indemnity is sought should only be held responsible for its percentage of culpability for noneconomic loss. The Court, in *Frank,* not only reversed the Fourth Department, but specifically overruled *Salamone,* supra.

The Court of Appeals carefully examined Article 16 in toto, as well as the legislative intent in fashioning its decision. The Court of Appeals stated that the entirety of Article 16 must be examined to discern the overall intent. In reciting this intent, the Court stated:

> It is clear that the Legislature wanted Article 16's protections to apply to indemnification actions…. The purpose of Article 16 was to place the risk of a principally-at-fault but impecunious defendant on those seeking recovery and not on a low-fault, deep-pocket defendant…

The Court buttressed it decision, noting it was in accordance with prior rulings, citing *Rangolan v. County of Nassau,* 96 NY2d 42, 725 NYS2d 611 (2001), in which the Court held that CPLR 1602(2)(iv) did not preclude apportionment when a defendant's liability arose from nondelegable duty because the subsection was a savings provision and not an exception.

The Court in *Frank* held that a vicariously or statutorily liable party seeking common-law indemnification will be permitted to obtain indemnification for noneconomic damages to the extent of the indemnitor's culpable conduct. The Court's ruling noted the intent of Article 16 is to limit an indemnitor's liability to the extent of its culpable conduct, if same was 50 percent or less.

Clearly additional issues are presented and additional questions will have to be answered. For example, CPLR 1601 specifically notes that the culpable conduct of a person not a party to the action shall not be considered in determining the share involved if the claimant proves that he or she was unable to obtain jurisdiction over such a party in the action. Additionally excluded from consideration is the equal share of a party who cannot be brought into the action because the claimant has not sustained a grave injury as defined in §11 of the Workers' Compensation Law. This provision was obviously a concession to the 1996 Workers' Compensation Reform Act.

The Antisubrogation Rule

An interesting question arises, however, where a party is not brought into the action, for purposes of indemnification, due to the applicability of what is known in New York as the antisubrogation rule. See, *North Star Reins. Corp. v Continental Ins. Co.,* 82 NY2d 281, 294 [1993]. In such a circumstance, the entity who normally would have been brought into the action had the foresight to name the party seeking indemnity as an additional insured under its policy of insurance. As such, that insurance carrier is now the entity providing coverage for the statutorily or otherwise vicariously liable party. However, as an insurer cannot sue its own insured, it is unable to implead the real culpable party into the action to the extent of its own insurance coverage. The statutorily liable party impleads another entity who also shares the culpability.

The question now arises, can that culpable party utilize the culpability of the entity who was not brought in, for the purposes of determining its equitable share under Article 16. While not specifically answered by the Court and noting that there are many variables which may arise, it is the opinion of this writer that the percentage of the nonparty could be utilized. This is due to the fact that CPLR 1601 very specifically excludes from determination the percentage of an employer who cannot be brought in due to grave injury or other nonparty where jurisdiction could not be obtained over such a person in the action.

There is no exception referenced in Article 16 for circumstances due to other acts of law, such as the anti-subrogation rule. Given the very specific nature of these exceptions, one would have to read and construe CPLR 1601 strictly thereby permitting the utilization of the nonparty's percentage. This would also appear to coincide with the Court of Appeals decision in *Frank,* supra, whereby the policy of culpability to the extent of an entity's negligence is set forth.

The fact that an insurance carrier chooses to provide coverage to an entity should not necessarily prejudice the rights of a party who has only a smaller percentage of that culpability. It would also serve to prevent strategic insurance carrier takeovers, done solely for the purpose of enabling the 100 percent pass through or even to protect an excess policy that may exist, not withstanding a sharing of the culpability.

Conclusion

As noted, CPLR Article 16 was a statute drafted in an attempt to solve certain problems and appease certain entities. Its intent, although long promulgated always seemed to become lost in its varied interpretations. The intent of the Legislature to limit the liability of a tortfeasor to its culpable conduct is finally being applied by the Court of Appeals in a variety of situations and scenarios.

Consequentially, based on *Frank,* if you are in for a penny, you may only pay a penny.

1. It should be noted that due to the Workers' Compensation Reform Act of 1996, this exact situation could not now occur as no grave injury was present. The subject suit predated the "grave injury" threshold to maintain common law impleader of employers.

2. The *Frank* case did not deal with a contractual indemnity obligation which would fall outside the scope of Article 16.