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# Insurance Law—Conflict of Interest Between Company and Assured

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plaintiff's tax returns. The plaintiff failed to produce the records claiming that they had been lost in the fire, and also refused to permit examination of its tax returns. The insured did produce a document which was purported to be the original of an inventory taken a few weeks before the fire. During the examination the plaintiff withdrew its $20,000 claim for "out-of-sight" damages and demanded an appraisal, but the insurer refused to take part.

Although the Court of Appeals has indicated that a forfeiture may result if the insured refuses to participate in an appraisal demanded by the insurer,[36] it is settled in New York that the Court will not force the insurer to join in the appraisal.[37] Relying on this, the Court affirmed a dismissal of the plaintiff's first cause of action.

The Court then found that the Appellate Division erred in granting the defendant's motion for summary judgment. A motion for summary judgment dismissing the complaint on affidavits may be made in an action for a sum of money arising on an express contract.[38] As pointed out by Judge Cardozo, to award this relief, however, "the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."[39] Thus, summary judgment has been denied where the question depended upon the intent of the parties to a contract[40] and where an ambiguity in a contract existed.[41] In reaching its decision in the instant case the Court felt that the question of whether or not there was a wilful and fraudulent withholding of information is the kind of question of fact which should be resolved at a trial.

In a case of this nature it is difficult to say that the facts clearly show that the insured has failed to comply with the terms of the policy. It therefore seems to be the better result, that before the insured should forfeit his entire claim—the net effect of granting defendant's motion—he should have the facts determined at a trial.

## Conflict of Interest Between Company and Assured

The right to a declaratory judgment depends on there being a present

36. *Matter of Delmar Box Co. (Aetna Ins. Co.)*, 309 N. Y. 60, 65, 127 N. E. 2d 808, 811 (1955).
37. *Matter of Delmar Box Co. (Aetna Ins. Co.), supra*, note 36. The agreement as regards appraisal is distinguished from an agreement to submit to arbitration in *Syracuse Sav. Bank v. Yorkshire Ins. Co.*, 301 N. Y. 403, 94 N. E. 2d 73 (1950).
38. N. Y. R. Civ. Prac. 113(4).
39. *Curry v. Mackenzie*, 239 N. Y. 267, 146 N. E. 375 (1925).
40. *Piedmont Hotel Co. v. A. E. Nettleton Co.*, 263 N. Y. 25, 188 N. E. 145 (1933).
41. *Utica Carting, Storage & Contracting Co. v. World Fire & Marine Ins. Co.* 277 App. Div. 483, 100 N. Y. S. 2d 941 (4th Dep't 1950).

justiciable controversy,[42] with the presence of the parties before the court and an inadequacy of other relief.[43] Jurisdiction rests in the discretion of the court.[44]

In *Prashker v. U. S. Guarantee Co.*[45] plaintiff sought to have the liability of the insurance company declared concerning the assured's liability policy which contained an exclusionary clause. Plaintiff's decedent was involved in an accident and a cause of action was brought against the estate. The complaint contained allegations some of which would be within, and some without the policy; the Court refused to grant a declaratory judgment on the ground that no justiciable controversy was presented, the question of liability being premature. The correctness is obvious from the possible anomalous consequences which could result. A determination of liability of the insurance company might be made in this declaratory judgment, holding that the decedent's negligence was within the policy. But in the main negligence trial, the estate could be held liable on a ground within the exclusionary clause. A declaratory judgment is final;[46] the Court's judgment would be res judicata. As a result the Court might be rewriting the insurance contract by holding the company liable or exonerating it contrary to stipulated terms in the policy.

The most interesting question, however, concerned the Court's ruling that due to this conflict of interest the plaintiff could select an attorney to represent the decedent's estate rather than have the insurance company represent the estate in the main negligence action, the standard procedure as stated in most insurance liability policies.[47] The insurance company, the Court stated, would still be responsible for the assured's attorney's fees.

The assured would naturally seek to avoid all liability but if held liable a conflict of interest would arise. In that case the assured would want to have the grounds of negligence fall within the policy, while the insurance company would attempt to show that the assured's liability fell within the exclusionary clause. Nothing in the Court's ruling implies, however, that the company cannot have its own attorney at the trial to protect its own interests.

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42. *Reed v. Littleton*, 249 App. Div. 310, 292 N. Y. Supp. 363 (2d Dep't 1936).

43. *Post v. Metropolitan Casualty Ins. Co. of New York*, 227 App. Div. 156, 237 N. Y. Supp 64 (4th Dep't. 1929), *aff'd.*, 254 N. Y. 541, 173 N. E. 857 (1930); N. Y. CIV. PRAC. ACT §473: The supreme court shall have power in any action . . . to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment . . . .

44. *Bareham v. City of Rochester*, 246 N. Y. 140, 158 N. E. (1927); N. Y. R. CIV. PROC. 212: If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

45. 1 N. Y. 2d 584, 136 N. E. 2d 871 (1956).

46. N. Y. CIV. PRAC. ACT §473.

47. No New York or foreign jurisdiction cases could be found where such conflict of interest was resolved in this manner.

In case liability should be determined the company could deny liability on the ground that the negligence fell within the exclusionary clause. A special verdict would solve this problem but if such a verdict were denied the basis of liability would still have to be determined. The Court equitably and correctly resolved the conflict of interests between the assured and the insurance company by permitting the assured to select an attorney to represent the deceased's estate despite the fact that the terms of the policy may have been rewritten in part.

### Third-Party Practice—Cooperation

Most automobile liability insurance policies contain a "cooperation clause."[48] In general, this provides that the insured shall cooperate with the company in such matters as giving evidence, attending hearings, and in the conduct of suits.[49] In *American Surety Company of New York v. Diamond*,[50] the Court had to decide whether the insured's refusal to verify a third-party complaint amounted to a failure to meet the obligations of this clause.

The insured's father, a passenger, was fatally injured when the automobile driven by the insured's mother was involved in a collision. The mother, as executrix of her husband's estate, brought an action against the insured under a theory of vicarious liability[51]—she was the permittee-driver. Claiming that the insured had an action over against his active tort feasor, the Company requested the insured to verify a third-party complaint[52] against his mother. The insured refused. He argued that it was not proper to make a claim against his mother who, as driver of the car, was also insured under the same policy. The Company declined to accept the insured's offer to submit this controversy to the Appellate Division upon an agreed statement of facts [53] but commenced this action seeking a declaratory judgment that it was not obligated to defend this action or to pay any judgment which might be rendered against the insured.

In a 4-3 decision the Court reversed judgments[54] in the company's favor and dismissed the complaint. Judge Desmond, writing for the majority, pointed out that the purpose of the cooperation clause is to guarantee the insured's assistance in the defense of claims;[55] he stated that the Company only acquired the right

48. SAWYER, AUTOMOBILE LIABILITY INSURANCE 145 (1936).
49. Ibid.
50. 1 N. Y. 2d 594, 136 N. E. 2d 876 (1956).
51. N. Y. VEHICLE AND TRAFFIC LAW §59.
52. N. Y. CIV. PRAC. ACT §193(a) 1. After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving as a third-party plaintiff upon such person a summons and a copy of a verified complaint.
53. N. Y. CIV. PRAC. ACT §546.
54. *Am. Sur. Co. of N. Y. v. Diamond*, 206 Misc. 309, 133 N. Y. S. 2d 697 (Sup. Ct. 1954), *aff'd mem.*, 285 App. Div. 1138, 142 N. Y. S. 2d 364 (1st Dep't 1955).
55. See *Wenig v. Glens Falls Indem. Co.*, 294 N. Y. 195, 61 N. E. 2d 442 (1945).