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Insurance Law—Third Party Practice—Cooperation

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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 liability⁵¹—she was the permittee-driver. Claiming that the insured had an action over against his active tort feisor, the Company requested the insured to verify a third-party complaint⁵² 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 facts⁵³ 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 judgments⁵⁴ 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).

of action over by virtue of the subrogation clause and that this right did not come into existence until there was a payment under the policy; and, therefore, the majority held, that the insured had no obligation to implead his mother. As a second ground for its decision the majority felt that, since there was a real question as to whether it was proper to sue another insured, his conduct was not a willful and avowed obstruction⁵⁶ which would justify the Company in refusing to defend.

Although in agreement with the majority's position that there was no failure to cooperate, the minority contended that this is just the kind of case for which third-party practice is designed, and because the insurer is entitled to the claims over its insured has, it is part of cooperation in the conduct of suits under the policy terms to assist in actions over as well as in the defense of suits. According to the minority's opinion, this would not be a suit between persons insured by the same policy because under section 167(3) of the Insurance Law⁵⁷ an automobile liability policy does not insure one spouse against liability for causing the death of the other unless this risk is expressly assumed. Though this case did not involve direct interspouse liability, the minority reasoned that the statute did apply in this instance where the insured was only liable because of the mother's causing the father's death.

It is submitted that the Court correctly decided this case which essentially involved the construction of the policy's terms. The insurer should not be able to assert a right—*viz*, that of subrogation-before judgment which under the contract does not come into existence until after payment. In view of the fact that the question was one of contract and not of procedure, the minority's position based upon the economics of impleader appears to be irrelevant.

Under its disposition of the case, the majority avoided real contact with the question of the applicability of section 167(3) to this situation but in a dictum merely mentioned that interspouse liability was not involved here. There is not space in a writing of this nature to explore the problem that remains decisively unanswered: was the mother-driver insured in this action? It should provoke considerable discussion, however, to point out the seemingly unjust result which could come about. For example: though this decision does not preclude the insurer from exercising its right of subrogation, if the mother is also insured any right of action over against her is, in effect, a nullity; and the wife would, presumably, as beneficiary of her husband's estate, receive the insurance proceeds free and clear. Thus we place a premium upon tortious conduct!

56. See *Coleman v. New Amsterdam Cas. Co.*, 247 N. Y. 271, 160 N. E. 367 (1928).

57. N. Y. INSURANCE LAW §167(3): No policy . . . shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse . . . unless express provision relating thereto is included in the policy.