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Ins. Law § 167(8): Insurer's Failure to Disclaim Liability or Deny Coverage as Soon as Is Reasonably Possible Does Not Result in Coverage Where the Insurance Carrier Has Insured Neither the Person Nor the Vehicle Involved in an Automobile Accident

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tiff's complaint[56] and, thus, presumably receives adequate notice that the cross-claimant possesses a jurisdictional defense.[57] Indeed, it is submitted that the majority, by erecting such a requirement, has created little more than a procedural trap for the unwary practitioner. It is hoped, therefore, that the Court of Appeals will reexamine both *Bartley* and *Bides* in light of the policy favoring joinder of claims,[58] judicial economy,[59] and basic fairness in the administration of justice. Until it does so, however, defendants who have a jurisdictional challenge should be aware that the assertion of a cross-claim which does not reserve a jurisdictional defense automatically will subject them to the jurisdiction of the courts of this state.

Susan D. Koester

INSURANCE LAW

Ins. Law § 167(8): Insurer's failure to disclaim liability or deny coverage as soon as is reasonably possible does not result in coverage where the insurance carrier has insured neither the person nor the vehicle involved in an automobile accident

Section 167(8) of the Insurance Law requires a liability insurer to give to a claimant written notice of its disclaimer of liability or

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[56] *See* CPLR 2103(e) (1976).

[57] *See* CPLR 320, commentary at 368-69 (1972). If an answer contains a jurisdictional objection, it nevertheless may include counterclaims and cross-claims. *Id.* 3011 (1974). Assuming that a cross-claim is asserted in an answer which contains a jurisdictional challenge to the plaintiff's complaint, it is clear that the cross-defendant will receive notice of such objection since every party appearing in an action receives copies of all papers served upon the other parties to that suit. *See id.* 2103(e) (1976).

[58] *See* CPLR 601 (1976 & Supp. 1981-1982). Under the Civil Practice Act, disputes between codefendants that were independent of the plaintiff's claim could not be asserted in a cross-claim. *See id.* 601, commentary at 164-65 (1976). The CPLR, on the other hand, permits any controversy between codefendants to be the subject of a cross-claim. *Id.* 601 (1976 & Supp. 1981-1982). Notably, if the rights of any party appear to be prejudiced by a joinder of claims, the court may order separate trials. *See* Note, *supra* note 54, at 110-11; *see also* Newburgh v. Clarendon Gardens, Inc., 33 Misc. 2d 436, 436, 227 N.Y.S.2d 233, 233-34 (Sup. Ct. Kings County 1962) (severance ordered if joinder will prejudice substantial rights or cause confusion at trial).

[59] *See* CPLR 601 (1976) (joinder of claims); *id.* 602 (consolidation of actions); *see also* Saunders v. Saunders, 54 Misc. 2d 1081, 1083, 283 N.Y.S.2d 969, 971 (Sup. Ct. Kings County 1967) (public policy favoring complete relief in one action and avoidance of multiplicity of suits); Kalmanowitz v. Solomon, 22 Misc. 2d 988, 989, 198 N.Y.S.2d 928, 931 (N.Y.C. Mun. Ct. N.Y. County 1960) (joinder of action to reduce caseload of the court and its personnel and to avoid waste of time, money and manpower).

denial of coverage "as soon as is reasonably possible."[60] Indeed, it has been recognized that a failure to provide such notice may result in a waiver of valid defenses which the insurer otherwise might assert against the claim.[61] While this provision has been held appli-

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[60] N.Y. INS. LAW § 167(8) (McKinney Supp. 1981-1982). Section 167(8) provides:

> If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Id. This subdivision was enacted as part of the Motor Vehicle Accident Indemnification Corporation Law, ch. 759, § 3, [1958] N.Y. Laws 1624, (current version at N.Y. INS. LAW § 167(8) (McKinney Supp. 1981-1982)), which also created the Motor Vehicle Accident Indemnification Corporation (MVAIC). Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 267, 265 N.E.2d 736, 737, 317 N.Y.S.2d 309, 311 (1970). Since the Motor Vehicle Financial Security Act of 1956, ch. 655, § 2, [1956] N.Y. Laws 1457, was inadequate to serve the purpose of a compulsory automobile insurance scheme, *see* N.Y. INS. LAW § 600 (McKinney 1966), the MVAIC was enacted "to fill the gaps" in such a plan. Insurance Co. of N. Am. v. Godwin, 46 App. Div. 2d 154, 157, 361 N.Y.S.2d 461, 464 (4th Dep't 1974); *In re* Askey, 30 App. Div. 2d 632, 632, 290 N.Y.S.2d 759, 761 (4th Dep't 1968), *aff'd*, 24 N.Y.2d 937, 250 N.E.2d 65, 302 N.Y.S.2d 576 (1969). Specifically, the purpose of the MVAIC is to provide a source of indemnification for otherwise uninsured, innocent victims of motor vehicle accidents if they are injured under certain circumstances. N.Y. INS. LAW § 600 (McKinney 1966). For example, among the injuries previously uncovered by the former legislation were those caused by "insured motor vehicles where the insurer disclaims liability or denies coverage." *See id.* Under the current compulsory automobile insurance scheme, however, the liability of the MVAIC may be triggered by an insurer's valid disclaimer. *See id.* § 620.

An important reason for requiring an insurer to give timely notice of its disclaimer is that it will enable the MVAIC to investigate potential claims as early as possible, in the event that the disclaimer is upheld and the MVAIC is required to defend. Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 267, 265 N.E.2d 736, 737, 317 N.Y.S.2d 309, 312 (1970); Olenick v. Government Employees Ins. Co., 68 Misc. 2d 764, 770, 328 N.Y.S.2d 50, 56 (Sup. Ct. Nassau County 1971), *modified on other grounds*, 42 App. Div. 2d 760, 346 N.Y.S.2d 320 (2d Dep't 1973). Additionally, prompt disclaimer or denial of coverage enables injured parties to recover more expeditiously, since delay in giving such notice may cause them to commence costly litigation against the insurer rather than seek settlement through the MVAIC. Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 267, 265 N.E.2d 736, 737-38, 317 N.Y.S.2d 309, 312 (1970); Olenick v. Government Employees Ins. Co., 68 Misc. 2d 764, 770, 328 N.Y.S.2d 50, 56 (Sup. Ct. Nassau County 1971), *modified on other grounds*, 42 App. Div. 2d 760, 346 N.Y.S.2d 320 (2d Dep't 1973); *see* Appell v. Liberty Mut. Ins. Co., 22 App. Div. 2d 906, 907, 255 N.Y.S.2d 545, 547 (2d Dep't 1964), *aff'd*, 17 N.Y.2d 519, 214 N.E.2d 792, 267 N.Y.S.2d 516 (1966); *cf.* Ashland Window & Housecleaning Co., v. Metropolitan Casualty Ins. Co., 269 App. Div. 31, 34-35, 53 N.Y.S.2d 677, 679 (1st Dep't 1945) (insurer's delay in denying coverage misled insured into neither preparing a defense nor seeking a settlement); Merchants Mut. Casualty Co. v. Wildman, 21 Misc. 2d 1073, 1075, 197 N.Y.S.2d 925, 928 (Sup. Ct. Nassau County), *aff'd*, 12 App. Div. 2d 664, 209 N.Y.S.2d 242 (2d Dep't 1960) (insurer's delay in denying coverage caused action by insured against uninsured motorist to be time-barred), *aff'd*, 9 N.Y.2d 985, 176 N.E.2d 513, 218 N.Y.S.2d 63 (1961).

[61] *See* Hartford Ins. Co. v. Nassau, 46 N.Y.2d 1028, 1029, 389 N.E.2d 1061, 1062, 416 N.Y.S.2d 539, 540 (1979); State v. Fidelity & Casualty Co., 70 App. Div. 2d 687, 689-90, 416

cable to all insurance contracts regardless of the specific terms of the policy,[62] it has not been applied where the contractual relationship between the parties has terminated.[63] Recently, in *Zappone v. Home Insurance Co.*,[64] the Court of Appeals held that section 167(8) does not apply to an automobile insurance carrier which has insured neither the vehicle involved in an accident nor the driver incurring the liability.[65]

In *Zappone*, the plaintiff was involved in a collision while driving an automobile owned by his sister and insured by Aetna Insurance Company.[66] At the time of the accident, the plaintiff's

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N.Y.S.2d 403, 406 (3d Dep't 1979). Among the reasons for which an insurer validly may deny liability are failure by the insured to cooperate in the lawsuit, *see* Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 276, 160 N.E. 367, 369 (1928); National Grange Mut. Ins. Co. v. Davis, 26 App. Div. 2d 528, 529, 271 N.Y.S.2d 74, 75 (1st Dep't 1966), lack of timely notice of an accident by the insured, *see* Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 440, 293 N.E.2d 76, 78, 340 N.Y.S.2d 902, 905 (1972); Allstate Ins. Co. v. Furman, 84 App. Div. 2d 29, 32-33, 445 N.Y.S.2d 236, 239 (2d Dep't 1981), and existence of an exclusion in the policy that covers the circumstances of the claim, *see, e.g.*, Newman v. Ketani, 54 App. Div. 2d 926, 927-28, 388 N.Y.S.2d 128, 129-30 (2d Dep't 1976) (exclusion covering vehicles used for other than private purposes valid if timely notice of disclaimer had been given). In order to preserve its right to disclaim liability or deny coverage, the insurer's notice must be more than a mere letter reserving its rights. *See, e.g.*, Hartford Ins. Co. v. Nassau, 46 N.Y.2d 1028, 1029, 389 N.E.2d 1061, 1062, 416 N.Y.S.2d 539, 541 (1979); Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 269, 265 N.E.2d 736, 738, 317 N.Y.S.2d 309, 313 (1970). Additionally, the insurer's notice must provide the claimant with all the grounds for the insurer's position, or else the unasserted grounds will be deemed waived. *See* General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 864, 387 N.E.2d 223, 225, 414 N.Y.S.2d 512, 514 (1979).

[62] *See* Michigan Millers Mut. Ins. Co. v. Baranowski, 105 Misc. 2d 669, 670-71, 432 N.Y.S.2d 766, 767-68 (Sup. Ct. Oneida County 1980). Originally, section 167(8) applied exclusively to motor vehicle accidents, but it was amended to include any type of accident resulting in death or bodily injury. *See* N.Y. Ins. Law, ch. 775, § 1, [1975] N.Y. Laws 1208 (McKinney). The timely notice requirement of this subdivision applies both to primary and to excess liability policies. *See* Preisch v. Continental Casualty Co., 55 App. Div. 2d 117, 122, 389 N.Y.S.2d 700, 703-04 (4th Dep't 1976).

[63] *See* State Farm Mut. Auto. Ins. Co. v. Elgot, 48 App. Div. 2d 362, 365, 369 N.Y.S.2d 719, 721 (1st Dep't 1975); Perez v. Hartford Accident & Indem. Co., 31 App. Div. 2d 895, 896, 297 N.Y.S.2d 875, 876 (1st Dep't 1969) (per curiam), *aff'd*, 26 N.Y.2d 625, 255 N.E.2d 722, 307 N.Y.S.2d 467 (1970); *cf.* Zappone v. Home Ins. Co., 80 App. Div. 2d 661, 662, 436 N.Y.S.2d 402, 404 (3d Dep't 1981) (contractual relationship never existed in the first instance), *aff'd*, 55 N.Y.2d 131, 432 N.E.2d 783, 447 N.Y.S.2d 911 (1982). The court in *Perez* stated that "subdivision 8 of section 167 of the Insurance Law does not refer to a situation . . . where coverage had terminated due to a cancellation of the policy long before the happening of the accident." 31 App. Div. 2d at 896, 297 N.Y.S.2d at 876.

[64] 55 N.Y.2d 131, 432 N.E.2d 783, 447 N.Y.S.2d 911 (1982), *aff'g* 80 App. Div. 2d 661, 436 N.Y.S.2d 402 (3d Dep't 1981).

[65] 55 N.Y.2d at 135-36, 432 N.E.2d at 786, 447 N.Y.S.2d at 914.

[66] *Id.* at 134, 432 N.E.2d at 785, 447 N.Y.S.2d at 913. The plaintiff was operating the vehicle, a Mercedes Benz, with his sister's permission. *Id.*

sister and father owned other vehicles which were insured by the defendant, Home Insurance Company.[67] After being sued by two of the persons injured in the collision,[68] the plaintiff and his sister notified the defendant-insurer of the accident.[69] Fifteen months later, the defendant notified the plaintiff and his sister that it would not provide coverage since the vehicle involved in the accident was neither an "owned automobile" nor a "non-owned automobile" under the policies carried for the plaintiff's family.[70] A declaratory action thereafter was commenced seeking a determination that the plaintiff was entitled to coverage under the policy provided by the defendant and, additionally, that the defendant's disclaimer was untimely under section 167(8) of the Insurance Law.[71] Trial term granted the relief sought, but the Appellate Division, Third Department, reversed.[72]

On appeal, the Court of Appeals affirmed.[73] Judge Meyer, writing for the majority,[74] initially stated that the defendant's denial of coverage was not "by reason of exclusion,"[75] but rather was based upon a "lack of inclusion"[76] since there was no existing policy covering the driver or the vehicle involved in the accident.[77]

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[67] *Id.* The plaintiff's sister owned an MG and his father owned a Chevrolet. *Id.*

[68] *Id.* Aetna Insurance Company undertook the defense of the plaintiff and his sister in the claim arising out of the accident, and offered to settle up to the limit of its policy. *Id.*

[69] *Id.* The plaintiff notified Home Insurance Company of the accident 6 months after it had occurred. *Id.* Two weeks after being so notified, the defendant advised the plaintiff that it would investigate the claim, and that it was reserving its rights under the policy due to the plaintiff's late notice. *Id.*

[70] *Id.* at 134-35, 432 N.E.2d at 785, 447 N.Y.S.2d at 913.

[71] *Id.* at 135, 432 N.E.2d at 785, 447 N.Y.S.2d at 913.

[72] *Id.*

[73] *Id.* at 135-36, 432 N.E.2d at 785-86, 447 N.Y.S.2d at 913-14.

[74] Judge Meyer was joined by Judges Jones, Jasen and Wachtler. Judge Gabrielli dissented in a separate opinion in which Chief Judge Cooke and Judge Fuchsberg concurred.

[75] 55 N.Y.2d at 136, 432 N.E.2d at 786, 447 N.Y.S.2d at 914. Judge Meyer noted that an insurer's denial of liability could arise from a policy exclusion. *Id.* Such an exclusion might include a situation where an insured's employee was injured in the course of his employment, or where injuries were sustained in an automobile insured exclusively as a private vehicle, but was being used as a public conveyance at the time of the accident. *Id.* The Court observed that in these situations, the policy would cover the driver, the vehicle, and the accident, but for the existence of the policy exclusion which the carrier must assert so as not to mislead the claimant into believing that policy coverage attached. *Id.*

[76] *Id.* The Court stated that liability may be denied when an insurance contract does not cover the person or the vehicle involved in an accident, or when such a contract did exist but was terminated or cancelled prior to the accident. *Id.*

[77] *See id.* In addition to denial of coverage "by reason of exclusion" or due to "lack of inclusion," the Court stated that an insurer might deny coverage when an insured breaches a term of the policy. *Id.* Such a breach might occur, noted the Court, when an insured fails

Rejecting the plaintiff's argument that the plain language of the statute mandates its application to all instances in which a carrier denies liability,[78] the Court observed that the purpose of section 167(8) is to avoid prejudice to a claimant resulting from a delay in learning of the carrier's position, rather than to create indemnification for which the parties had not contracted.[79] Finally, Judge Meyer noted that because other courts have held section 167(8) inapplicable when an insurance contract which would have provided coverage has been cancelled, the section likewise should not apply to a policy which never contemplated the carrier's liability in the first instance.[80]

In a vigorous dissent, Judge Gabrielli found no logical distinction between an insurer's denial of coverage "by reason of exclusion" and its denial based upon a "lack of inclusion."[81] Maintaining that a literal reading of the statute can best aid interpretation of legislative intent, the dissent argued that section 167(8) should be applied to all denials of coverage since no unreasonable or unjust consequences would result.[82] Indeed, Judge Gabrielli empha-

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to cooperate in the defense of a lawsuit brought by an injured party, or when the insured does not give notice of an accident which has occurred or of an action brought against the insured. *Id.*; *see supra* note 61.

[78] 55 N.Y.2d at 137, 432 N.E.2d at 786-87, 447 N.Y.S.2d at 914-15. The Court emphasized that the mere fact that a statute's wording appears unambiguous does not dictate a literal interpretation of that language when such a construction would "occasion great inconvenience, or produce inequality, injustice or absurdity." *Id.*, 432 N.E.2d at 786, 447 N.Y.S.2d at 914 (citing Hogan v. Culkin, 18 N.Y.2d 330, 335, 221 N.E.2d 546, 549, 274 N.Y.S.2d 881, 885 (1966); Petterson v. Daystrom Corp., 17 N.Y.2d 32, 38, 215 N.E.2d 329, 331, 268 N.Y.S.2d 1, 4 (1966); *In re* Meyer, 209 N.Y. 386, 389, 103 N.E. 713, 714 (1913)).

[79] 55 N.Y.2d at 137, 432 N.E.2d at 787, 447 N.Y.S.2d at 915. Judge Meyer reasoned that the application of section 167(8) to situations not contemplated in the liability policy would violate the legislative mandate that premium rates should be reasonably related to the risks assumed by the parties. *Id.* at 138, 432 N.E.2d at 787, 447 N.Y.S.2d at 915 (citing N.Y. INS. LAW §§ 180, 183-186 (McKinney Supp. 1981-1982)).

[80] 55 N.Y.2d at 138-39, 432 N.E.2d at 787-88, 447 N.Y.S.2d at 915-16 (citing Perez v. Hartford Accident & Indem. Co., 31 App. Div. 2d 895, 896, 297 N.Y.S.2d 875, 876 (1st Dep't 1969) (per curiam), *aff'd*, 26 N.Y.2d 625, 255 N.E.2d 722, 307 N.Y.S.2d 467 (1970)). The Court characterized the cancellation and "lack of inclusion" situations as instances in which there is no coverage, and, thus, no duty on the part of the insurer to disclaim liability. 55 N.Y.2d at 138-39, 432 N.E.2d at 787-88, 447 N.Y.S.2d at 915-16.

[81] 55 N.Y.2d at 140, 432 N.E.2d at 788, 447 N.Y.S.2d at 916 (Gabrielli, J., dissenting). The dissent focused only upon the situations in which a policy exclusion exists or where a policy does not cover the person or vehicle involved in the accident. *See id.* (Gabrielli, J., dissenting). Judge Gabrielli agreed with the majority that section 167(8) does not apply when a policy has expired since such expiration terminates the insurer-insured relationship. *See id.* at 140 n.1, 432 N.E.2d at 788 n.1, 447 N.Y.S.2d at 916 n.1 (Gabrielli, J., dissenting).

[82] *Id.* at 140-41, 432 N.E.2d at 788-89, 447 N.Y.S.2d at 917 (Gabrielli, J., dissenting).

sized, because of the complex nature of the documents typically used in insurance contracts, the legislature must have intended that a liability insurer under any policy bear the burden of notifying the insured as to whether a particular accident is covered.[83] Moreover, the dissent urged, when an insurer fails to deny coverage promptly, its potential liability remains the same regardless of the ground upon which a denial could have been based.[84]

It is submitted that the *Zappone* decision is tenuous insofar as it is premised upon the semantic distinction between noncoverage by reason of a "lack of inclusion" and noncoverage based upon a policy exclusion.[85] In either instance, it is apparent that a contract forms the basis of a concrete relationship between the insurance carrier and the owner or driver of a particular vehicle.[86] When an insurer denies coverage by reason of exclusionary language in the policy, it is evident that the existence of this relationship alone, rather than the specific terms of the contract, triggers the applicability of section 167(8).[87] The *Zappone* Court, however, failed to

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[83] *Id.* at 141, 432 N.E.2d at 789, 447 N.Y.S.2d at 917 (Gabrielli, J., dissenting).

[84] *Id.* at 141-42, 432 N.E.2d at 789, 447 N.Y.S.2d at 917 (Gabrielli, J., dissenting).

[85] *Id.* at 137, 432 N.E.2d at 786, 447 N.Y.S.2d at 914. The *Zappone* Court stated that there was a "basic distinction" between a lack of coverage "by reason of exclusion" and noncoverage "by reason of lack of inclusion" despite the fact that both situations could be denominated as denials of coverage. *Id.* The dissent noted, however, that "the majority provid[ed] no rationale for distinguishing the two." *Id.* at 140, 432 N.E.2d at 788, 447 N.Y.S.2d at 916 (Gabrielli, J., dissenting).

[86] It is suggested that the mere fact of an insurance policy's existence creates a relationship between the insurance carrier and the person holding that policy, even if the policy does not cover the particular liability incurred. This situation is distinguishable from that in which a policy no longer exists. *See, e.g.*, Perez v. Hartford Accident & Indem. Co., 31 App. Div. 2d 895, 896, 297 N.Y.S.2d 875, 876 (1st Dep't 1969) (per curiam), *aff'd*, 26 N.Y.2d 625, 255 N.E.2d 722, 307 N.Y.S.2d 467 (1970). Indeed, in *Perez*, the court stated that "[s]ubdivision 8 of 167 of the Insurance Law does not refer to a situation . . . where coverage terminated due to a cancellation of the policy long before the happening of the accident." 31 App. Div. 2d at 896, 297 N.Y.S.2d at 876. In such a case, it would appear that any relationship between the parties ends at the time when the insurance contract is terminated.

[87] It has been held that the notice required by section 167(8) must be given in instances where a policy exclusion purposely was inserted to indicate that certain liability was not covered by the contract. Newman v. Ketani, 54 App. Div. 2d 926, 927-28, 388 N.Y.S.2d 128, 129-30 (2d Dep't 1976). It would appear, therefore, that it is not the policy's contemplated coverage which brings the section 167(8) requirement into play. In *Newman*, for example, the automobile insurance policy in question contained an exclusionary clause applicable to the specific facts and upon which the insurer based its denial of coverage. *Id.* at 927, 388 N.Y.S.2d at 129. The court held that since the insurer did not provide notice of its disclaimer until more than 4 years after the action was commenced, the timeliness of such notice, rather than the propriety of the disclaimer, presented a question of fact properly to be decided in the lower court. *Id.* at 927-28, 388 N.Y.S.2d at 130.

recognize the importance of this relationship in determining that section 167(8) does not take effect if an insurer denies coverage due to the existing policy's "lack of inclusion."[88]

Furthermore, it is suggested that in making the applicability of the notice requirement dependent upon whether the liability is incurred by an insured person or vehicle, the Court failed to consider a vehicle owner's vicarious liability.[89] It seems incongruous that an automobile owner who is otherwise "insured" against liability under an automobile insurance policy is denied the benefit of section 167(8) notice merely due to the manner in which his liability arose. Indeed, pursuant to the Court's reasoning, vicarious liability seems to strip an automobile owner of his status as a "covered person," thereby eliminating the notice requirement, whereas no such "stripping" effect occurs where the nature of the damage resulting in liability to an owner is specifically excluded by the policy even though the owner is equally uninsured.[90]

Finally, under the Court's decision, a claimant not privy to the precise terms of an insurance contract will be unaware of whether notice of noncoverage is forthcoming, thereby becoming exposed to the same prejudice that the legislature sought to obviate by the enactment of section 167(8).[91] In view of the theoretical, equitable

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[88] *See* 55 N.Y.2d at 137-38, 432 N.E.2d at 787, 447 N.Y.S.2d at 915.

[89] Although the owner of a vehicle would not be liable for the negligence of its driver at common law, except under the theory of respondeat superior or agency, such liability has been imposed by statute in New York where the driver is operating the vehicle with the owner's consent. *See* N.Y. VEH. & TRAF. LAW § 388(1) (McKinney 1970). *See generally* Plath v. Justus, 28 N.Y.2d 16, 20, 268 N.E.2d 117, 118-19, 319 N.Y.S.2d 433, 435-36 (1971). New York State further requires that "policies of insurance issued to the owner of *any* vehicle subject to [vicarious liability] shall contain a provision for indemnity or security against [such liability]." N.Y. VEH. & TRAF. LAW § 388(4) (McKinney Supp. 1981-1982) (emphasis added); *see* N.Y. INS. LAW § 167(2) (McKinney Supp. 1981-1982). There is no requirement, however, that the vehicle in which the liability is incurred be the subject of the insurance policy for the statutes to be effective, provided that the owner is issued the policy.

[90] *See supra* note 85.

[91] *See supra* note 60 and accompanying text. Prior to the enactment of section 167(8) of the Insurance Law, an insurer was estopped from disclaiming liability if the claimant could show that he was prejudiced as a result of the insurer's late notice. *See, e.g.*, S. & E. Motor Hire Corp. v. New York Indem. Co., 255 N.Y. 69, 74-75, 174 N.E. 65, 67 (1930); Gerka v. Fidelity & Casualty Co., 251 N.Y. 51, 56-57, 167 N.E. 169, 170-71 (1929). Accordingly, in Allstate Ins. Co. v. Gross, 27 N.Y.2d 263, 265 N.E.2d 736, 317 N.Y.S.2d 309 (1970), the defendant-insurer contended that the disclaimer of liability or denial of coverage required by section 167(8) need only be given in a timely fashion if prejudice would result to the claimant. *Id.* at 265, 265 N.E.2d at 736, 317 N.Y.S.2d at 310. The Court of Appeals, however, refused to recognize this argument, stating that "[w]hether the absolute rule [of section 167(8)] was enacted because of a presumption of prejudice from any undue delay or for

and practical difficulties engendered by *Zappone,* therefore, it is hoped that the Court will seize the first opportunity to reevaluate its position regarding the applicability of section 167(8)'s notice requirement when an insurer denies coverage by reason of a "lack of inclusion."

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DEVELOPMENTS IN NEW YORK LAW

Custodial statements made by youth to his parent are inadmissible where youth was neither accorded privacy nor warned that overheard statements may be used against him

In order to protect the privacy of certain confidential relationships, the New York legislature has created a number of evidentiary privileges which preclude the compelled disclosure of various communications.[92] Notwithstanding the early unwillingness of

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some other reason is of no moment. The statute lays down an unconditional rule." *Id.* at 269-70, 265 N.E.2d at 739, 317 N.Y.S.2d at 314. Indeed, the Court noted that to require such prejudice under the present statute would be to "[miss] the point of the statute, and the evident purpose for its enactment." *Id.* at 269, 265 N.E.2d at 739, 317 N.Y.S.2d at 313. Thus, the Court stated, the insurer's failure to give written notice of disclaimer to the claimant for 7 months was unreasonable despite the fact that no actual prejudice resulted. *Id.*

[92] *See* CPLR 4502(b) (1963) ("husband or wife shall not be required, or, without consent of the other . . . , allowed to disclose a confidential communication made by one to the other during marriage"); *id.* 4503(a) (privilege extending to confidential communications between attorney and client); *id.* 4504(a) (physician-patient privilege); *id.* 4505 (a clergyman "shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor"); *id.* 4507 (confidential communications between a psychologist and his patient are "placed on the same basis as those provided by law between attorney and client"); *id.* 4508 (social worker may "not be required to disclose a communication made by his client to him . . . in the course of his professional employment"). Each privilege specified in the CPLR is subject to exception. The spousal privilege, for example, only protects those exchanges that "would not have been made but for the absolute confidence in, and induced by, the marital relationship." People v. Melski, 10 N.Y.2d 78, 80, 176 N.E.2d 81, 83, 217 N.Y.S.2d 65, 67 (1961). Similarly, the attorney-client privilege only shields those communications made in confidence, or intended to be made in confidence, by a client seeking professional advice. *In re* Jacqueline F., 47 N.Y.2d 215, 219, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887 (1979). The physician-patient privilege is restricted to "medical information, or at least information which is relevant to some medical purpose" given by a patient to his doctor. CPLR 4504, commentary at 197 (McKinney Supp. 1981-1982); *see* Polsky v. Union Mut. Stock Life Ins. Co., 80 App. Div. 2d 777, 778, 436 N.Y.S.2d 744, 745 (1st Dep't 1981) (privilege did not extend to the patient's discussion of suicide with his dentist). To be entitled to claim the clergyman-penitent privilege, the penitent must have been seeking "religious counsel, advice, solace, absolution or ministration" from the clergyman when he made the statement in question. *In re* Fuhrer, 100 Misc. 2d 315, 320, 419