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Ins. Law § 167(3): Insurer Absolved From Defending Dole Claim Against Driver-Spouse Where Passenger-Spouse Is Plaintiff in Main Action

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was expressed in *People v. Bonnerwith*.[322] According to the *Bonnerwith* court, more than a slight showing of judicial bias must be present before a judge should be disqualified, stating that "[t]he proponent should be required to show clear circumstances which would render a particular judge unfit to hear the case."[323]

The United States Supreme Court has addressed itself to the problem of disqualification in *Tumey v. Ohio*[324] and *Ward v. Village of Monroeville*.[325] In both of these cases, a judge was disqualified because of a conflict of interest stemming from his dual role of judge and mayor.[326] While not condemning the mere union of judicial and executive power, the Court in each case stated that due process of law was denied in a situation where an official "occupies two practically and seriously inconsistent positions, one partisan and the other judicial . . . ."[327] Although not dispositive of whether mere "appearances" are enough to disqualify a judge,[328] these decisions lend support to the *Kessler* court's finding of a conflict of interest sufficient to warrant disqualification of the Shelter Island justices of the peace.

INSURANCE LAW

Ins. Law § 167(3): Insurer absolved from defending Dole *claim against driver-spouse where passenger-spouse is plaintiff in main action.*

With its decision in *State Farm Mutual Automobile Insurance Co. v. Westlake*,[329] the Court of Appeals has reversed a trend which

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322 69 Misc. 2d 516, 330 N.Y.S.2d 248 (Justice Ct. Town of Rhinebeck 1972).

323 *Id.* at 522, 330 N.Y.S.2d at 255.

324 273 U.S. 510 (1927).

325 409 U.S. 57 (1972).

326 The Court found that the accused individuals in both cases were denied due process as required by the fourteenth amendment because of the pecuniary interest the judges had in the outcome of the respective cases. In Tumey v. Ohio, 273 U.S. 510 (1927), part of the fine levied in the case went to the village, some of which was used to supplement the salary of the judge himself. *Id.* at 521-22. In Ward v. Village of Monroeville, 409 U.S. 57 (1972), the revenue from fines of the type involved provided a substantial portion of the revenue of the village in which the judge served as mayor. *Id.* at 58.

327 409 U.S. at 60, *quoting* Tumey v. Ohio, 273 U.S. 510, 534 (1927).

328 Tumey v. Ohio, 273 U.S. 510 (1927) can be interpreted as supporting the position that there need not be a finding of specific bias to disqualify a judge. The Court noted that the evidence in *Tumey* clearly established the guilt of the accused, and that he had received the minimum fine possible, but stated that irrespective of the evidence against him, the defendant had been denied the right to an impartial judge. *Id.* at 535.

In like manner, Ward v. Village of Monroeville, 409 U.S. 57 (1972), can be interpreted as supporting the same view. There, the Court found that an Ohio statute which disqualified judges who were interested, biased, or prejudiced in the outcome of litigation before them, did not sufficiently protect the rights of the defendant, since it appeared to require a showing of special prejudice. *Id.* at 61.

329 35 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974). *Westlake* was an action for declaratory judgment instituted by State Farm Mutual Automobile Insurance Company. The insurer sought a declaration of "nonresponsibility to defend or to pay any

would have wrought great change in a previously well settled area of insurance law. The Court rejected the contention that third-party liability, arising under *Dole v. Dow Chemical Co.*,[330] lies outside the intraspousal exclusion from insurance coverage found in section 167(3) of the Insurance Law.[331] The Court unanimously held that, absent an agreement to the contrary, an insurer is not obligated to defend or indemnify a third-party defendant whose spouse instituted the main claim.

The controversy surrounding the apparently broad and all-encompassing language of the statute, is pointed up by the following hypothetical. Husband (*H*) is driving car one and his wife (*W*) is a passenger therein. Car one and car two, driven and owned by defendant (*D*), collide. As a result, *W*, having suffered personal injuries, sues *D*. Thereafter, *D* institutes a *Dole* claim against *H*. The question then arises as to whether *H*'s insurance policy, containing no express provision relating specifically to intraspousal liability, will cover the impleader action so that *H*'s insurer must defend him in any action and indemnify him for any judgment arising therefrom.

As might be expected, a sharp clash of authority existed on this point, with the case law equally divided.[332] The better view, as enun-

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judgment recovered" against the insured, a third-party defendant in an action begun by his wife. *Id.* at 590, 324 N.E.2d at 138, 364 N.Y.S.2d at 484.

330 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

331 That section provides:

> [N]o policy or contract 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 specifically thereto is included in the policy.

N.Y. INS. LAW § 167(3) (McKinney 1966).

332 *Compare* Logan v. Exchange Mut. Ins. Co., 44 App. Div. 2d 886, 355 N.Y.S.2d 855 (4th Dep't 1974) (mem.) (a fair interpretation of § 167(3) required an insurer to defend an insured where the insured and his wife sued a defendant who then interposed a counterclaim for indemnity against the husband); Stone v. Agricultural Ins. Co., 76 Misc. 2d 1021, 351 N.Y.S.2d 496 (Sup. Ct. Albany County 1973) (§ 167(3) was not applicable to a *Dole* action against the husband of the plaintiff); United States Fidelity & Guar. Co. v. Franklin, 74 Misc. 2d 506, 344 N.Y.S.2d 251 (Sup. Ct. Westchester County 1973), *aff'd mem.*, 43 App. Div. 2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974) (§ 167(3) should be narrowly construed and should not be interpreted to deny coverage to an insured driver because he was the spouse of the injured passenger); Aetna Cas. & Sur. Co. v. DeLosh, 73 Misc. 2d 275, 341 N.Y.S.2d 465 (Sup. Ct. St. Lawrence County 1973) (possibility of fraud in *Dole* actions is sufficiently remote so as to make unjust a holding that the legislature intended to exclude coverage with regard to such claims in § 167(3)), *with* United States Fire Ins. Co. v. Gould, 43 App. Div. 2d 462, 352 N.Y.S.2d 541 (4th Dep't 1974) (where plaintiff-wife, a passenger in a car owned by the corporation of which her husband was president, recovered a judgment against the corporation, the corporation's insurer was not obligated to defend and indemnify the driver-husband because of the § 167(3) exclusion); Perno v. Exchange Mut. Ins. Co., 73 Misc. 2d 346, 342 N.Y.S.2d 298 (Sup. Ct. Monroe County 1973) (construing the language of § 167(3) broadly, stating that exclusion from coverage of the third-party spouse cannot be said to abrogate the intention of the legislature); Smith v. Employer's Fire Ins. Co., 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972) (construing § 167(3) broadly to encompass *Dole* actions within the exclusion).

ciated in the more persuasive opinions[333] and espoused by several commentators,[334] was that *Dole* liability was not contemplated by section 167(3). In *State Farm*, however, the Court of Appeals has strictly construed the language of the Insurance Law and refused to allow *Dole* to alter what it deemed to be the plain intendment of the statute.

The decision in *State Farm* rested upon two main points. First, the language of section 167(3) was said to be "all inclusive and . . . applicable 'whenever indemnification is asked by a husband whose liability, *regardless of the form in which or person by whom asserted*, is basically and unquestionably *because of* injuries sustained by his wife as a result of his negligence.' "[335] Second, it was felt that to obligate the insurer to defend and indemnify the insured spouse when a *Dole* apportionment is fixed for injuries caused to his wife would be "to rewrite the contract of the parties."[336] Since the insured is not obligated to pay "the necessary premium for the added coverage,"[337] an extension of coverage to *Dole* actions would, the Court urged, expose the insurer "to a risk not contemplated by the parties and for which it is not compensated."[338]

It is beyond contention that the legislative purpose behind section 167(3) is to protect insurance carriers from collusive actions between spouses arising from automobile accidents.[339] Whether this purpose is served when section 167(3) is read to exclude intraspousal coverage for liability arising from *Dole* actions has been the subject of careful analysis in conflicting decisions.[340] In the *State Farm* decision in the Appellate Division,[341] a majority of the Second Department concluded that there was little likelihood of fraud since the plaintiff-

333 *See, e.g.*, Stone v. Agricultural Ins. Co., 76 Misc. 2d 1021, 351 N.Y.S.2d 496 (Sup. Ct. Albany County 1973); United States Fidelity & Guar. Co. v. Franklin, 74 Misc. 2d 506, 344 N.Y.S.2d 251 (Sup. Ct. Westchester County 1973), *aff'd mem.*, 43 App. Div. 2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974).

334 7B McKINNEY'S CPLR 3019, commentary at 253-55 (1974); Birnbaum, *Civil Practice*, in *1973 Survey of New York Law*, 25 SYRACUSE L. REV. 321, 350-51 (1973); Lynch, *Insurance*, in *1973 Survey of New York Law*, 25 SYRACUSE L. REV. 239, 240-42 (1973); McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 109, Dec. 8, 1972, at 5, cols. 1-2; *The Quarterly Survey*, Dole v. Dow Chemical Co.: *Recent Developments*, 47 ST. JOHN'S L. REV. 725, 762 (1973).

335 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486 (citations omitted) (emphasis added), *quoting* Peka, Inc. v. Kaye, 208 Misc. 1003, 1005, 145 N.Y.S.2d 156, 159 (Sup. Ct. Bronx County 1955), *rev'd on other grounds*, 1 App. Div. 2d 879, 150 N.Y.S.2d 774 (1st Dep't 1956) (mem.).

336 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486.

337 *Id.*

338 *Id.*

339 *See* New Amsterdam Cas. Co. v. Stecker, 3 N.Y.2d 1, 6-8, 143 N.E.2d 357, 359-60, 163 N.Y.S.2d 626, 630-31 (1957).

340 *See* note 332 *supra*.

341 43 App. Div. 2d 314, 351 N.Y.S.2d 147 (2d Dep't 1974), *rev'd*, 35 N.Y.2d 587, 324 N.E.2d 137, 369 N.Y.S.2d 482 (1974).

wife would have to be successful in her action against the defendant before the latter would have any right over against the husband. The court noted that "the situation created by the *Dole* rule in cases such as this carries a built-in safeguard against any collusion between spouses directed against the insurer of one of the spouses."[342]

The circuity of action present in the *Dole* situation had been assigned varying degrees of effect in negating collusion and fraud. In *Aetna Casualty & Surety Co. v. DeLosh*,[343] utilization of a *Dole* apportionment was seen as eliminating the incentive and possibility of fraud. In *Stone v. Agricultural Insurance Co.*,[344] the court, though specifically conceding that there may indeed be some possibility for fraud, implicitly minimized the importance of such possibility.[345] Even in a decision that applied the section 167(3) exclusion, *Perno v. Exchange Mutual Insurance Co.*,[346] the diminished possibility for fraud and collusion had been conceded. However, the court in *Perno* noted that the situation which section 167(3) was intended to prevent may still exist in at least one particular instance: where the injuries to the passenger-spouse are substantial, collection of any part of a judgment in excess of the defendant's insurance coverage will be aided if that defendant can recover judgment for the excess from the driver-spouse through a *Dole* action. If the exclusion is held not to apply, such excess would be paid by the driver-spouse's insurer. Where the injured spouse confronts a defendant with limited coverage, the driver-spouse, to facilitate his wife's recovery, may be induced to concede to a liability greater than his actual responsibility when named as a third-party defendant. Though the injured spouse has legitimately sustained and proved her damages against a nonspouse defendant, the driver-spouse's insurer is made to suffer by paying a larger portion of the verdict than is just.

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342 43 App. Div. 2d at 317, 351 N.Y.S.2d at 150; *accord*, United States Fidelity & Guar. Co. v. Franklin, 74 Misc. 2d 506, 508-10, 344 N.Y.S.2d 251, 253-54 (Sup. Ct. Westchester County 1973), *aff'd mem.*, 43 App. Div. 2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974).

343 73 Misc. 2d 275, 341 N.Y.S.2d 465 (Sup. Ct. St. Lawrence County 1973).

344 76 Misc. 2d 1021, 351 N.Y.S.2d 496 (Sup. Ct. Albany County 1973).

345 The desire to protect against fraud was made to give way to stronger policy considerations:

> To give a strict literal interpretation to § 167 subd. 3 of the Insurance Law and to determine that there is no coverage afforded in such a situation . . . is to make a determination in direct contravention to the expressed intent of the Legislature that motorists shall be financially able to respond to damage for their negligent acts.

76 Misc. 2d at 1025, 351 N.Y.S.2d at 500.

346 73 Misc. 2d 346, 342 N.Y.S.2d 298 (Sup. Ct. Monroe County 1973); *accord*, Smith v. Employer's Fire Ins. Co., 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972).

Nevertheless, the likelihood of fraud and collusion is sufficiently remote in the context of a *Dole* claim for indemnity against the plaintiff's spouse. Accordingly, the purpose of section 167(3) is served if the exclusion is held inapplicable. The Court of Appeals, however, did not consider this factor persuasive. Judge Stevens, writing for the Court, remarked: "The absence of fraud or the possibility of fraud is not sufficient to negate the plain intendment of the statutory exclusion provision."[347] In spelling out what it deemed to be that clear intendment, the Court implicitly rejected an argument, advanced in several lower court cases,[348] that the language of section 167(3) does not in fact relate to liability arising from an apportionment of damages.

In *State Farm*, the Court of Appeals has chosen to follow the consistently applied rule which flatly rejects any device used to circumvent the reach of section 167(3). The Supreme Court, Bronx County, enunciated this broad prohibition in *Peka, Inc. v. Kaye*:[349] "Courts may not lend themselves to an indirect avoidance of, or a flank attack upon, a law whose purpose is to protect against collusive actions between husbands and wives."[350] Likewise, in *Smith v. Employer's Fire Insurance Co.*,[351] the Supreme Court, Tompkins County, found the language of the statute "clear and specific": "[Section 167(3)] absolves an insurer from defending an action where the liability of its insured is incurred *because of* death or injuries to the spouse."[352] The *Smith* court, in turn, relied upon *Feinman v. Rice Sons, Inc.*[353] for a strict construction of section 167(3). There, the wife of the insured brought suit against her husband's employer based on the spouse's negligence in operating his employer's automobile with the latter's permission. In the third-party suit by the employer against the husband for indemnity, the Supreme Court, Bronx County, held that section 167(3) absolved the insurer from any obligation under the insurance contract to defend and indemnify the husband.[354]

Feinman, however, can be readily distinguished from the factual situation present in those decisions involving *Dole* apportionments. In *Feinman*, the injured wife's claim against the employer-defendant

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347 35 N.Y.2d at 592, 324 N.E.2d at 139, 364 N.Y.S.2d at 486.

348 *See* note 332 *supra*.

349 208 Misc. 1003, 145 N.Y.S.2d 156 (Sup. Ct. Bronx County 1955), *rev'd on other grounds*, 1 App. Div. 2d 879, 150 N.Y.S.2d 774 (1st Dep't 1956) (mem.).

350 208 Misc. at 1007, 145 N.Y.S.2d at 159.

351 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972).

352 *Id.* at 525, 340 N.Y.S.2d at 13 (emphasis in original).

353 2 Misc. 2d 86, 133 N.Y.S.2d 639 (Sup. Ct. Bronx County 1954), *aff'd mem.*, 285 App. Div. 926, 139 N.Y.S.2d 884 (1st Dep't 1955).

354 2 Misc. 2d at 83, 133 N.Y.S.2d at 641.

was based entirely on her husband's negligence; liability of the employer-owner was purely vicarious, and his claim over against the insured husband was grounded in common law indemnification. The cases involving a *Dole* action present a different situation. Claims over against the spouse-driver have been predicated on an apportionment of liability between co-tortfeasors. Consequently, the plaintiff is not asserting a claim of negligence directly or indirectly against a spouse, but is predicating his claim solely on the negligence of the defendant. It is the defendant's negligence, not the spouse's, which is the basis for the plaintiff's recovery.[355] Based on this distinction, the Supreme Court, Westchester County, in *United States Fidelity & Guaranty Co. v. Franklin*,[356] advanced the theory that the liability described in the exclusion section is not in fact the liability arising in a *Dole* apportionment, since the latter does not arise because of injuries to the insured's spouse. The court stated:

> An analysis of the newly recognized right to proportional indemnity among joint tortfeasors, as described in *Dole*, indicates that this is a right of a special kind; a right to recovery of an independent obligation owed to one joint tortfeasor by another. . . .
>
> The right, therefore, to crossclaim against the spouse-operator . . . is not a right based upon the injuries suffered by his wife, but rather a right based on the obligation of the spouse-operator to the defendants. . . .[357]

The Court of Appeals, in *State Farm*, found the meaning of "any liability" to be clear. It drew no fine distinctions, nor contemplated the results of its blanket rule. In so holding, the decision marks a retreat from what the Supreme Court, Nassau County, noted was the "modern" trend, *viz.*, "to extend the class of persons insured under standardized automobile insurance policies. This is largely to protect the public, and to facilitate indemnity to innocent victims of vehicular misuse."[358] In almost all decisions supporting coverage in the *Dole* action against the insured, the courts have noted that the injured plaintiff might only recover a portion of his actual damages if the spouse were required to pay over to the defendant a portion of the

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355 *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Westlake, 43 App. Div. 2d 314, 318, 351 N.Y.S.2d 147, 151 (2d Dep't 1974), *rev'd*, 135 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974); Aetna Cas. & Sur. Co. v. DeLosh, 73 Misc. 2d 275, 278-79, 341 N.Y.S.2d 465, 469 (Sup. Ct. St. Lawrence County 1973).

356 74 Misc. 2d 506, 344 N.Y.S.2d 251 (Sup. Ct. Westchester County 1973), *aff'd mem.*, 43 App. Div. 2d 844, 352 N.Y.S.2d 1009 (2d Dep't 1974).

357 74 Misc. 2d at 511, 344 N.Y.S.2d at 256.

358 Long Island Lighting Co. v. Hartford Accident Indem. Co., 76 Misc. 2d 832, 833, 350 N.Y.S.2d 967, 968 (Sup. Ct. Nassau County 1973).

verdict attributable to his negligence.[359] Since the Court of Appeals has seen fit to ignore this possibility and to follow a restrictive statutory interpretation, the burden now rests with the legislature to liberalize the law.

DOLE V. DOW CHEMICAL CO.

Federal Tort Claims Act

By virtue of the Federal Tort Claims Act,[360] the United States has agreed to waive its sovereign immunity[361] in certain instances[362] involving suits based on personal injury or property loss caused by the negligent or wrongful act of a federal government employee. Congress, however, conditioned consent to suit on the requirement that the liability of the United States be determined in a federal district court.[363] The legislative history of the Act indicates that the denial of state court jurisdiction over such suits was designed to protect the Government from overly generous verdicts on the part of state court juries.[364]

Pursuant to this statutory design, the United States, as third-party defendant in *Gerardi v. Brady*,[365] moved for an order dismissing the complaint filed against it in the New York Supreme Court.[366] The parent action was brought by plaintiffs, injured as a result of a colli-

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359 *See, e.g.*, Stone v. Agricultural Ins. Co., 76 Misc. 2d 1021, 1023, 351 N.Y.S.2d 496, 499 (Sup. Ct. Albany County 1973).

360 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970). For a detailed explanation of the purpose of the Federal Tort Claims Act, see Feres v. United States, 340 U.S. 135 (1950).

361 For a discussion of the concept of sovereign immunity, see Pound, *The Tort Claims Act: Reason or History?* 30 NACCA L.J. 404 (1964).

362 Immunity is waived by the United States where, in accordance with the law of the state where the act or omission occurred, an individual would be liable. *See* 28 U.S.C. §§ 1346(b), 2674 (1970).

363 *See id.* § 1346(b), which provides:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .

See also United States v. Sherwood, 312 U.S. 584 (1941), wherein the Supreme Court stated:

> The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.

Id. at 586 (citations omitted). The United States' consent is also conditioned on the timely commencement of the suit as provided in 28 U.S.C. § 2401 (1970).

364 *See, e.g.*, H.R. REP. No. 1287, 79th Cong., 1st Sess. 1, 4, 12 (1945) (Minority Objections). In fact, actions against the United States under section 1346(b) must be tried in the federal district courts without juries. *See* 28 U.S.C. § 2402 (1970).

365 78 Misc. 2d 11, 355 N.Y.S.2d 281 (Sup. Ct. Kings County 1974) (mem.).

366 The motion was made pursuant to CPLR 3211(a)(2) and (7) upon the ground that the court had no jurisdiction of the subject matter of the third-party complaint against the United States.