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Ins. Law § 59-a: Unauthorized Act in New York by Agent of Foreign Insurer Held Sufficient Basis for Personal Jurisdiction

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his own defense. One result is clear: where it is found that the insurer's withdrawal from the defense of the negligence action was not made in bad faith, this fact will serve as justification for its refusal to participate in settlement negotiations, thereby avoiding liability for a resulting judgment in excess of policy limits.[260]

Ins. Law § 59-a: Unauthorized act in New York by agent of foreign insurer held sufficient basis for personal jurisdiction.

Many New York residents hold insurance policies issued by insurers not authorized to do business in this state, and Insurance Law section 59-a allows such residents to acquire personal jurisdiction over such insurers. The section permits service of process on the superintendent of insurance if an unauthorized foreign insurer has performed any of the acts enumerated therein,[261] including issuance or delivery of insurance contracts to New York residents.[262]

In *Ford v. Unity Hospital*,[263] the Appellate Division, Second Department, decided whether New York could exercise personal jurisdiction over a foreign insurance company whose agent had exceeded its authority in issuing and delivering a cover note for a malpractice policy to a New York medical partnership. The partnership was sued for malpractice and brought a third-party action against the insurer, which argued that under the agency agreement the agent was not authorized to issue medical malpractice insurance or to do business on its behalf in New York, and thus could not subject it to New York jurisdiction by the issuance of the cover note.[264] Nevertheless, the court held that juris-

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260 For a contrary view, see Blakely v. American Employers' Ins. Co., 424 F.2d 728, 734 (5th Cir. 1970), which held that an insurer's "breach of its contract to defend should not release it from its implied duty to consider [its insured's] interest in the settlement" even though its reasons for denying liability under the policy may not have been entirely groundless. Professor Keeton indicates that the insurer can manipulate the situation to its advantage: "[C]omplete denial of policy coverage and refusal to defend has proven to be one of the more effective ways for a company to prevent excess liability." Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1160 (1954).

261 *See, e.g.*, Zacharakis v. Bunker Hill Mut. Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953), which held Insurance Law § 59-a applicable to a foreign insurer which had issued a policy to a New York resident and collected the premiums through the mail.

262 N.Y. INS. LAW § 59-a(2)(a)(1) (McKinney 1966).

263 39 App. Div. 2d 569, 331 N.Y.S.2d 865 (2d Dep't 1972) (mem.).

264 The agent's dealings with the insurer, a Mexican company, were carried on through Mid-Continent Underwriters, Inc., a Louisiana corporation which was the insurer's managing agent in the United States. A third-party complaint against Mid-Continent was dismissed, for Mid-Continent was not a party to the agency agreement, the agent did not purport to act for it in New York, and its activity with respect to the transaction — the issuance of a cancellation notice to the defendants — was not sufficient under Insurance Law § 59-a or CPLR 302(a)(1) to subject it to jurisdiction. *Id.* at 571, 331 N.Y.S.2d at 868.

diction was obtainable under Insurance Law section 59-a, based on the doctrine of apparent authority.[265]

While recognizing that the case "test[s] the very outer limits of due process requirements,"[266] the *Ford* court felt that the exercise of jurisdiction was proper because of the state's strong policy of protecting the rights of its residents in their dealings with foreign insurers,[267] even if such insurers will be called into a foreign forum to defend suits where no authorized acts were performed on their behalf. The doctrine of *forum non conveniens* remains available to prevent the exercise of jurisdiction where injustice would otherwise occur.

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265 *Cf.* Elman v. Belson, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 540 (1970). *Elman* involved the retention of New York attorneys by the agent of the defendant, an Illinois domiciliary. The court, without reaching the merits as to the scope of the agency, held that New York could exercise personal jurisdiction because of the alleged agent's implied authority to engage the plaintiffs' services.

266 39 App. Div. 2d at 571, 331 N.Y.S.2d at 868, *citing* Hanson v. Denckla, 357 U.S. 235 (1958); Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965), *discussed in The Quarterly Survey*, 40 ST. JOHN'S L. REV. 122, 133 (1965).

267 *See* N.Y. INS. LAW § 59-a(1) (McKinney 1966).