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Ins. Law § 167(1)(b): Court Incorporates Separate Proceeding Against Insurance Carrier into Underlying Negligence Action

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Fuentes requires that the defendant receive notice and a meaningful opportunity to be heard prior to any attachment of his property. Absent extraordinary circumstances, the court will be afforded an opportunity to balance the respective rights of the plaintiff and the defendant with the aid of information supplied by both parties to the action.

The need for a complete legislative reevaluation of provisional remedies can readily be seen as a priority of the first magnitude. *Fuentes v. Shevin* requires nothing less. Respect for the constitutional rights of the defendant and the availability of effective remedies for the plaintiff are not concepts which are mutually exclusive. Within the framework of *Fuentes v. Shevin* ample opportunity exists to strike a balance equitable to both.

INSURANCE LAW

Ins. Law § 167(1)(b): Court incorporates separate proceeding against insurance carrier into underlying negligence action.

Section 167(1)(b) of the Insurance Law[196] allows an injured party to bring a direct action against an insurer where a judgment against its insured within the policy terms and limits remains unpaid thirty days after notice of entry is served on the insured or his attorney and the insurer.

In *Brown v. Reid*,[197] after denying the defendants' motion to vacate a default judgment entered against the owner and the operator of a vehicle which struck the plaintiffs' vehicle from behind, the Supreme Court, Nassau County, held that participation of insurance carriers in the defense of the primary litigation obviated the need for a separate section 167 proceeding.[198] Reasoning that the essential ingredients of

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stroyed, and thus comes squarely within the *Fuentes* exception of a special situation demanding prompt action.

The filing of a notice of pendency under CPLR 6501 is constructive notice of the pendency of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property. No application need be made to a court as a condition precedent to the filing of the notice of pendency. While the notice of pendency technically does not restrain the conveyance of real property, it serves as a severe deterrent to a prospective buyer, and thus constitutes a significant limitation of the defendant's right to free alienation of his property. *Fuentes* requires notice of a hearing before the defendant is "deprived of *any* significant property interest . . . ." 407 U.S. at 82 (emphasis added). While constructive notice is given by the filing of a notice of pendency, no opportunity to challenge the action at a hearing exists prior thereto. Absent extraordinary circumstances, a broad reading of *Fuentes* would seem to require that the defendant be given an opportunity to be heard prior to the filing of a notice of pendency.

196 N.Y. INS. LAW § 167(1)(b) (McKinney 1966).

197 72 Misc. 2d 237, 339 N.Y.S.2d 204 (Sup. Ct. Nassau County 1972).

198 Two insurers, the defendant-owner's carrier and the Motor Vehicle Accident Indemnification Corporation (MVAIC), representing his uninsured driver, were involved in the litigation from the beginning. The former disclaimed liability on the basis of the

such a proceeding — judgment against the defendants within the coverage limits and presence of and notice to the insurers — were already present,[199] the court directed the plaintiffs and the insurers to appear at a pretrial conference to file any remaining claims or defenses as to coverage.[200] In incorporating the section 167 proceeding into the instant forum, the court relied on CPLR 103(c), which empowers a court having jurisdiction over the parties to make whatever order is required for the proper prosecution of an action brought in the wrong form, and CPLR 2001, which permits a court to correct a mistake at any stage of an action if a party is not prejudiced thereby.[201] It also cited section 167's lack of procedural specifications.[202]

While the transformation of the concluded negligence action into a section 167 proceeding is novel, *Brown* is fair. Although, technically, jurisdiction was not acquired over the insurers, realistically, they were the real defendants in interest from the outset of the action.[203] *Brown* raises a compelling issue as to the need for a costly separate proceeding where an insurer has been present throughout litigation, particularly where issues of coverage have been resolved.

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owner's allegation of nonpermissive use by the driver. The MVAIC insisted that the default judgment settled the issue, inculpating the owner and his insurer.

199 *Id.* at 241, 339 N.Y.S.2d at 209. The court noted that there had been no claim that the accident or injuries were excluded from policy coverage or that the policy was not in effect when the accident occurred. *See* Jones v. Zurich Gen. Acc. & Liab. Ins. Co., 121 F.2d 761 (2d Cir. 1941).

200 The court decried the injustice of requiring the plaintiffs to bring "yet another full bloom court action" (72 Misc. 2d at 242, 339 N.Y.S.2d at 210) where, "[w]ithout the participation of the insurance companies, the entire action, including damages, would have been decided on default." *Id.* at 240, 339 N.Y.S.2d at 209. *But cf.* Overhill Bldg. Co. v. Delaney, 28 N.Y.2d 449, 271 N.E.2d 537, 322 N.Y.S.2d 696 (1971).

201 *But cf.* Asphalt Pavers, Inc. v. Cosentino, 53 Misc. 2d 613, 279 N.Y.S.2d 630 (Dist. Ct. Nassau County 1967) (essential element for correction under CPLR 2001 is jurisdiction over parties).

202 72 Misc. 2d at 241, 339 N.Y.S.2d at 209.

> There are no procedural guidelines prescribed by the statute, no special service, notice or jurisdictional requirements, and, therefore, the general rules applicable under the CPLR to declaratory judgment actions apply. A section 167 proceeding is designed only to protect injured plaintiffs. . . .

Id., citing CPLR 103(c); CPLR 104; Jackson v. Citizens Cas. Co., 277 N.Y. 385, 390, 14 N.E.2d 446, 448 (1938).

203 In Simpson v. Loehmann, 21 N.Y.2d 305, 311, 234 N.E.2d 668, 672, 287 N.Y.S.2d 633, 637 (1967), *motion for reargument denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 341 (1968), the Court stated:

> Viewed realistically, the insurer . . . is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation.

Cf. Brothers v. Burt, 27 N.Y.2d 905, 265 N.E.2d 922, 317 N.Y.S.2d 626 (1970) (mem.); Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967) (service of notice of entry on attorneys retained by carrier to defend its insured was proper service on the carrier).