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Article 15

CPLR 602: Joint Trial Denied Where Disclosure of Insurance Coverage in Action for Declaratory Judgment Would Prejudice Defendant in Negligence Action

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ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Joint trial denied where disclosure of insurance coverage in action for declaratory judgment would prejudice defendant in negligence action.

CPLR 602(a) enables the court to order a joint trial "to avoid unnecessary delay and costs." Presently, the courts permit consolidation whenever possible, regardless of the diversity of issues.[73] But implicit in CPLR 602 is the written limitation of CPA 96 that consolidation must be effected without prejudice to a substantial right of any party.[74] Naturally, the courts are compelled to make this determination on a case-by-case basis.

In *Kelley v. Yannotti*,[75] a defendant in a negligence action filed a third-party complaint against an insurance company. The Court of Appeals, in ordering a severance pursuant to CPLR 407, stated that

> [a]t the very beginning of the trial, then, the jury would *know* that "insurance" was involved in the case. . . . The jury might be more disposed than other wise if it saw fit to render a verdict in favor of the plaintiffs. . . .[76]

In *Orange v. Swiftway Supermarkets, Inc.*,[77] one action was brought to recover damages for personal injuries, and a second was brought for a declaratory judgment with respect to possible insurance coverage. The personal injury action was to be tried before a jury. A motion made for joint trial in the supreme court was denied.

The Appellate Division, First Department, affirming, held that joinder might prejudice the defendants in the first action although *consecutive* trials before the same justice would be permissible.

Obviously, the *Orange* court was utilizing the underlying rationale of *Kelley*; and it is equally obvious that a defendant would in fact be prejudiced if his insurance coverage was expressly brought to the jury's attention. Separate trials in instances such as these insure to the defendant his basic right to a fair trial by an impartial jury. More-

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73 Dasheff v. Bath & Tennis Club, 25 Misc. 2d 13, 15, 206 N.Y.S.2d 733, 736 (Sup. Ct. N.Y. County 1959); *see also The Quarterly Survey*, 42 ST. JOHN'S L. REV. 615, 628 (1968).

74 2 WK&M ¶ 602.09 (1969).

75 4 N.Y.2d 603, 152 N.E.2d 69, 176 N.Y.S.2d 637 (1958).

76 *Id.* at 607, 152 N.E.2d at 72, 176 N.Y.S.2d at 641. For a discussion of a similar type of negligence case basing denial of joinder upon dissimilarity between the negligence action and an action for a declaratory judgment see *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 615, 627-28 (1968).

77 32 App. Div. 2d 631, 300 N.Y.S.2d 345 (1st Dep't 1969).

over, the ability to have both causes heard before the same judge will expedite the disposition of the cases being heard.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3018: Joint tortfeasor may offset medical insurance payments given to plaintiff by other defendant's insurer.

The general rule in the United States is that payments made to a plaintiff from a collateral source, *e.g.*, payments made pursuant to a policy of insurance, do not reduce the amount recoverable from the tortfeasor whether or not the plaintiff has himself provided for such payments.[78] New York, however, follows the stricter minority rule which requires that the plaintiff must have in some way paid for his benefits, is absolutely or conditionally liable to repay his benefactor, or has subrogated his right to sue for specified payments to his benefactor, before these payments will be considered "collateral."[79]

It is clear that insurance proceeds are "owed" to a plaintiff and, hence, "collateral" under the New York rule when the plaintiff himself has paid for the premiums.[80] But it is not as clear when the plaintiff is a beneficiary of an insurance policy procured by a third person not a party to the litigation. In *Silinsky v. State-Wide Insurance Co.*,[81] plaintiff was covered by her father's insurance policy as a member of the insured's household. The court indicated that the plaintiff may have been "owed" the insurance proceeds as a third-party beneficiary of the insurance contract between her father and the insurer.

However, plaintiff's claim to be a third-party beneficiary of an insurance contract cannot always be successfully employed. In *Moore v. Leggette*,[82] for example, the plaintiff was the beneficiary of an in-

78 REPORT OF THE N.Y. LAW REVISION COMM., N.Y. LEG. DOC. NO. 65, at 221, 225 (1957): "[Otherwise] the practical effect . . . is to give the wrongdoer an undeserved windfall."

79 New York's minority view was established by Drinkwater v. Dinsmore, 80 N.Y. 390 (1880) and was recently followed in Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962) (plaintiff physician, treated gratuitously by his colleagues as a professional courtesy, cannot claim medical expenses in action against the defendant). In 1957, the New York Law Revision Commission proposed an amendment to the CPA which would have implemented the majority view. However, the Legislature declined to act on the proposal. *Id.* at 374, 183 N.E.2d at 891-92, 230 N.Y.S.2d at 2.

80 *See* Cady v. City of New York, 14 N.Y.2d 660, 198 N.E.2d 901, 249 N.Y.S.2d 868 (1964), *aff'g* 19 App. Div. 2d 822, 243 N.Y.S.2d 661 (1st Dep't 1963) (reduction of damages for payment from firemen's pension fund not permitted); Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 44 (1961).

81 30 App. Div. 2d 1, 289 N.Y.S.2d 541 (2d Dep't 1968).

82 24 App. Div. 2d 891, 264 N.Y.S.2d 765 (2d Dep't), *aff'd*, 18 N.Y.2d 864, 22 N.E.2d 737, 276 N.Y.S.2d 118 (1966). "Where such wrongdoer is a person prudent enough to take out a policy of insurance to indemnify the plaintiff . . . [the wrongdoer] is entitled