

CPLR 321: Insurance Counsel Not Permitted To Effectuate a Disclaimer by Withdrawal

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question the propriety of service authorized by a court under 308(4). In the latter case the interests of the defendant and his carrier conflict and denial to question the propriety of service under 308(4) may substantially affect the carrier's rights adversely.

CPLR 321: Insurance counsel not permitted to effectuate a disclaimer by withdrawal.

In *Bialy v. Reeber*,⁴¹ the court denied a motion to withdraw made by defendant's counsel. The attorney had been retained by defendant's insurance company to defend him. Prior to this motion the insurance company had attempted to disclaim for lack of cooperation on defendant's part because he gave two conflicting versions of the accident.⁴² Nevertheless the carrier was then held to be under a duty to defend. An exhaustive and diligent search having been made in an effort to locate the defendant, counsel predicated his motion to withdraw on the necessity of presence of the defendant at the trial.

The court conceded that the insurer might have grounds for a valid disclaimer but was unwilling to allow defendant's attorney to withdraw and thus use this as a "device to obtain or ratify a disclaimer-in-fact."⁴³ Generally, the courts require a plenary action for a declaratory judgment as to the insurance carrier's coverage liability.⁴⁴

An attorney "may terminate his relationship at any time for a good and sufficient cause and upon reasonable notice."⁴⁵ A good cause is found where it appears that the defendant and his insurance company are at odds, *i.e.*, where the insurance company disclaims liability under the policy. To require the attorney in such a case to represent the defendant would create a genuine conflict of interest. However, since the courts place a heavy burden of proof upon the insurer before liability may be disclaimed,⁴⁶ they will not permit counsel by way of withdrawal to effectuate a disclaimer. For, while, in reality, the attorney represents the insurer, his position is such that until there is a disclaimer, he has certain obligations to the insured.⁴⁷

⁴¹ 54 Misc. 2d 773, 283 N.Y.S.2d 450 (Sup. Ct. Suffolk County 1967).

⁴² "On the trial of the disclaimer action [defendant] gave several other versions and was characterized then . . . as an incredible witness—absolutely unworthy of belief." *Id.* at 774, 283 N.Y.S.2d at 452.

⁴³ *Id.* at 775, 283 N.Y.S.2d at 452.

⁴⁴ *Ganas v. Terry*, 16 App. Div. 2d 826, 228 N.Y.S.2d 999 (2d Dep't 1962) (mem.); *Brooks v. City of New York*, 1 Misc. 2d 740, 149 N.Y.S.2d 592 (Sup. Ct. Queens County 1956).

⁴⁵ *In re Dunn*, 205 N.Y. 398, 403, 98 N.E. 914, 916 (1912).

⁴⁶ *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967); *Amatucci v. Maryland Cas. Co.*, 25 App. Div. 2d 583, 267 N.Y.S.2d 41 (3d Dep't 1966) (Per curiam).

⁴⁷ *Bialy v. Reeber*, 54 Misc. 2d 773, 775, 283 N.Y.S.2d 450, 453 (Sup. Ct. Suffolk County 1967).