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CPLR 410: Court suggests procedure for personal injury plaintiff faced with insurer's disclaimer.

A driver injured in an automobile accident by a party whose liability insurer disclaims its obligation under the policy is placed in a dilemma. Collection may be had under the uninsured motorist endorsement,⁶² of one's own policy, but, only if the disclaimer by the offending driver's insurer is valid. Alternatively, a negligence suit may be commenced, but a judgment in such an action may be of little value unless the offending driver's insurance policy is in force.

The supreme court, New York County, in *In re Blondo*,⁶³ offered a solution to the problem. Although recognizing that the validity of disclaimer was the key issue, the court pointed out that there should be no need for the plaintiff to await the determination of that issue before choosing which party to proceed against. It suggested that the preferable course of action would be for the plaintiff to begin two proceedings simultaneously, one to enforce the uninsured motorist endorsement and the other to establish the defendant's personal liability. When, in the course of the former proceeding, the issue of validity of the disclaimer is reached and determined, the inappropriate proceeding can be discontinued and the proper action will continue without delay.

The value of this procedure is emphasized by the fact that in the instant case the court denied that CPLR 410 granted an automatic trial preference to a plaintiff who brought a special proceeding to enforce his uninsured motorist endorsement before suing for negligence.⁶⁴ In spite of the statutory language that in special proceedings questions of fact are to be tried "forthwith," the court stated that the granting of the preference depends upon the nature of the situation. It was reasoned that there was nothing in this situation, to warrant a more expeditious determination of the claim than in the normal negligence case.⁶⁵

⁶² Such endorsements are required in all automobile liability insurance policies. N.Y. INS. LAW §167(2-a). They uniformly call for compulsory arbitration to determine the uninsured party's liability. Ward, *The Uninsured Motorist: National and International Protection Presently Available*, 9 BUFFALO L. REV. 283, 291 (1960).

⁶³ 56 Misc. 2d 516, 288 N.Y.S.2d 765 (Sup. Ct. N.Y. County 1968).

⁶⁴ The court relied on the statement of the Advisory Committee that "[T]he trial should proceed forthwith, i.e., at the earliest possible date. It is contemplated that special proceedings would be given preference on trial calendars, depending upon their nature." THIRD REP. 162 (emphasis added).

⁶⁵ The rationale of this case was followed in *In re Aetna Cas. & Sur.*, 159 N.Y.L.J. 16 (Sup. Ct. N.Y. County, Feb. 15, 1968).