

Ins. Law § 167: Party Who Obtained Judgment in Excess of Policy Limits Is Not "Aggrieved" by Insurer's Refusal to Settle within Limits

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addition to creating an injustice to the injured party, a malpractice trap for lawyers has been created. For all concerned, the injured parties, lawyers, and judges, the appellate courts would do well if they applied CPLR 2004 so as to mitigate the undue burden of § 50-e.

NEW YORK INSURANCE LAW

Ins. Law § 167: Party who obtained judgment in excess of policy limits is not "aggrieved" by insurer's refusal to settle within limits.

Section 167(b) of the Insurance Law, New York's "direct action" statute, permits an injured party whose judgment against the insured has remained unsatisfied for thirty days from notice of entry of judgment to maintain an action against the insurer under the terms of and within the policy limits.

In *Browdy v. State-Wide Insurance Co.*,²³⁷ the injured party, who had obtained judgment for personal injuries against the insured in excess of the policy limits, brought an action against the insurer for the entire amount of the judgment. The plaintiffs contended that the insurance company had refused to settle in bad faith. Special term, Queens County, held that the plaintiff could not recover from the insurance company for refusal to settle within the policy limits, because clearly he recovered more than he would have had the company settled. Plaintiff was therefore not a "person aggrieved" by any improper conduct on the insurer's part. The court, however, did point out that the insured should be able to assign his cause of action for refusal to settle.²³⁸ For example, in partial payment of the judgment, the injured party could accept the assigned cause of action against the insurer from the insured. He could then sue the insurance company as the proper party plaintiff.²³⁹

²³⁷ 56 Misc. 2d 610, 289 N.Y.S.2d 711 (Sup. Ct. Queens County 1968).

²³⁸ *Id.* at 612-13, 289 N.Y.S.2d at 714.

²³⁹ See, e.g., *Lemons v. State Auto Mut. Ins. Co.*, 171 F. Supp. 92 (E.D. Ky. 1959). For discussion of the New York rule on an insurance company's refusal to settle, see Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544 (1968).