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Insurance--Application of Puerto Rican Direct Action Statute in New York Deemed Not Violative of Public Policy (Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111 (1965))

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INSURANCE — APPLICATION OF PUERTO RICAN DIRECT ACTION STATUTE IN NEW YORK DEEMED NOT VIOLATIVE OF PUBLIC POLICY. — Plaintiff, a New York domiciliary, was injured while on vacation in Puerto Rico. Pursuant to a Puerto Rican direct action statute,[1] she brought a negligence action in New York directly against defendant-insurer. Defendant moved to dismiss on the ground that an action directly against an insurer contravened New York's public policy. In reversing the unanimous ruling of the appellate division, the New York Court of Appeals *held* that the Puerto Rican statute was substantive rather than procedural, since it created a *right* to proceed directly against the insurer, and that such a cause of action did not violate New York's public policy. *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965).

In line with the majority of jurisdictions, New York has not enacted a direct action statute. Generally, therefore, an aggrieved party may not proceed directly against an insurer but must bring his negligence suit in the first instance against the insured wrongdoer.[2] This policy is based upon New York's traditional view that in a negligence suit, the admission to the jury of the defendant's insurance coverage might prove to be unduly prejudicial to the insured defendant.[3]

However, a minority of jurisdictions has enacted statutes which allow an injured plaintiff to proceed in specified instances directly against an insurance company without the necessity of first suing the insured.[4] These statutes differ in various respects. For ex-

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[1] "The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury, death, or damage to property of a third person, shall become absolutely liable whenever a loss covered by the policy occurs, and payment of such loss by the insurer . . . shall not depend upon payment by the insured of or upon any final judgment against him arising out of such occurrence." P.R. LAWS ANN. tit. 26 § 2001 (1958). "Any individual sustaining damages and losses shall have, at his option, a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly. The liability of the insurer shall not exceed that provided for in the policy, and the court shall determine, not only the liability of the insurer, but also the amount of the loss. Any action brought under this section shall be subject to the conditions of the policy or contract and to the defenses that may be pleaded by the insurer to the direct action instituted by the insured." P.R. LAWS ANN. tit. 26 § 2003(1) (1958).

[2] Thirty days after service of notice of entry of judgment on the insurer, the injured party may proceed directly against the insurer on the judgment. N.Y. INS. LAW § 167(1)(b).

[3] See Morton v. Maryland Cas. Co., 1 App. Div. 2d 116, 123, 148 N.Y.S. 2d 524, 530 (2d Dep't 1955), *aff'd*, 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S. 2d 329 (1958).

[4] ARK. STAT. ANN. § 66-3240 (Supp. 1963) (limited to entities not subject to suit for tort); LA. REV. STAT. ANN. § 22:655 (1950); R.I. GEN. LAWS ANN. § 27-7-2 (1956) (limited to situations where no jurisdiction is obtainable over the insured); WIS. STAT. § 204.30(4) (1957) (limited to motor vehicle suits).

ample, Rhode Island has limited this right of action to locally written insurance contracts,[5] whereas Louisiana has granted this right to a party involved in any accident within the state.[6] Moreover, in several jurisdictions where such statutes have not been enacted, the courts have nevertheless permitted an injured party to proceed directly against the insurer on the theory that the existence of compulsory insurance evidences a legislative intent to protect and benefit the injured party.[7]

A problem consequently arises, as in the instant case, when a person is injured in a direct action jurisdiction and seeks to enforce his claim in a non-direct action forum. For example, Michigan refused to entertain such an action on the ground that it was violative of its public policy as indicated by a state statute expressly forbidding the disclosure of insurance in negligence suits.[8] Although New York has no such legislation, its courts have maintained a long-standing policy against the disclosure of insurance coverage to a jury when such disclosure might be prejudicial in favor of an injured plaintiff. In fact, the courts have held that the mere mention of insurance may constitute reversible error if the fact of insurance coverage is irrelevant to the case.[9] This court-made rule has been applied so strictly that an insured may not even implead his insurer, since it has been held that to do so might unduly influence the jury.[10]

On facts similar to those in the instant case, the appellate division in *Morton v. Maryland Cas. Co.*[11] dismissed an action based on a Louisiana direct action statute. In that case the injury took place in Louisiana and the plaintiff sought to enforce his claim in New York. The court reasoned that the policy of withholding from a jury any knowledge of the defendant's insurance was of such a nature and of sufficient importance to justify disallowing the action.

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[5] Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 Atl. 186 (1927).

[6] See Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954).

[7] See James v. Young, 77 N.D. 451, 455-59, 43 N.W.2d 692, 695-98 (1950); Enders v. Longmire, 179 Okla. 633, 67 P.2d 12 (1937); *cf.* Grasso v. Cannon Ball Motor Freight Lines, 124 Tex. 154, 81 S.W.2d 482 (1935) (initial judgment against insured held a necessary prerequisite to suit against insurer).

[8] See Lieberthal v. Glens Falls Indem. Co., 316 Mich. 37, 24 N.W.2d 547 (1946), wherein plaintiff was injured in Wisconsin and commenced an action against a New York insurance company doing business in Michigan. The court held that a suit commenced directly against an insurer would be contrary to Michigan public policy which forbade the mentioning of insurance to juries.

[9] *E.g.*, Simpson v. Foundation Co., 201 N.Y. 479, 490, 95 N.E. 10, 14-15 (1911); Tacktill v. Eastern Capitol Lines, Inc., 260 App. Div. 58, 61, 21 N.Y.S.2d 14, 17 (1st Dep't 1940).

[10] Kelly v. Yannotti, 4 N.Y.2d 603, 152 N.E.2d 69, 176 N.Y.S.2d 637 (1958).

[11] 1 App. Div. 2d 116, 148 N.Y.S.2d 524 (2d Dep't 1955), *aff'd*, 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S.2d 329 (1958).

The court also stated that the venue provisions of the Louisiana statute limited the action to courts of that forum. The court of appeals affirmed solely on the basis of the restrictive venue provisions in the Louisiana statute.[12] It is interesting to note that shortly after *Morton*, the Second Circuit was called upon to enforce the same Louisiana statute in light of New York law and reached an opposite result by interpreting the restrictive venue provisions as being applicable only to suits brought in Louisiana.[13] The court further stated that the law of New York was unsettled in this area and that it could not be definitely established that to enforce such a claim would be in opposition to New York's public policy.[14] Thus, prior to the principal case, it appeared that two contradictory views existed in New York with respect to the recognition and application of foreign direct action statutes.

In the instant case, the Court was confronted initially with the problem of whether the Puerto Rican substantive law, rather than the substantive law of the forum, should be applied. After deciding that Puerto Rico had the more significant contacts with the injury and that its substantive law should therefore be applied,[15] the Court was then compelled to determine whether the Puerto Rican direct action statute was procedural or substantive in nature. If the relevant provisions of the statute were merely procedural, New York law would apply, whereas if that statute was more properly labelled as substantive, Puerto Rican law would dictate the final disposition of the case. The Court of Appeals held that since the statute gave an injured party a *right* of action against an insurer, which did not exist prior to the enactment of the statute, it was thereby substantive.[16]

The question of New York public policy concerning insurance was vital to the Court's determination, for a New York court is not compelled to apply a foreign statute which is repugnant to its public policy.[17] The opinion indicated that merely because New York courts would, in the first instance, handle the problem differently was not a sufficient reason to compel the conclusion that the enforcement of any such foreign statute would be violative of its public

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[12] Morton v. Maryland Cas. Co., 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S.2d 329 (1958).

[13] Collins v. American Auto. Ins. Co., 230 F.2d 416 (2d Cir. 1956).

[14] *Id.* at 423.

[15] See Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[16] See Aponte v. American Sur. Co., 276 F.2d 678, 680 (1st Cir. 1960); Bosco v. Foreman's Fund Ins. Co., 171 F. Supp. 432, 434 (D.P.R. 1959), wherein the Puerto Rican District Court characterized the statute as "substantive." In Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954), the Supreme Court approved Louisiana's characterization of its direct action statute as "substantive," since it created a separate and distinct cause of action against the insurer.

[17] RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

policy.[18] The Court further noted that the fact of insurance coverage is not always kept from the jury. For example, the disclosure of insurance coverage to a jury has been the practice in this state whenever such evidence was relevant.[19] In addition, the Court took judicial notice of the fact that whenever insurance coverage is involved, most jurors are not ignorant of that fact. Hence, the mere fact that the maintenance of this direct action would inform the jury that the insurance company was the real party in interest would not per se violate New York's public policy.

The Court in *Oltarsh* did not intend to extend New York's policy which severely limits the disclosure of insurance to a jury, but meant to clarify the existing law in this area. However, the implication reasonably to be drawn from the decision would suggest an apparent loosening of the state's policy which normally disallows the divulgence of insurance in jury cases. Should a lower court adopt a more lenient attitude because of this decision, certain problems may arise which heretofore have been dormant. The question of how far an attorney may proceed in "hinting" of the defendant's insurance coverage is still within the discretion of the trial court, for the instant case leaves the question unanswered. However, the rule regarding disclosure of insurance to the jury may very well be relaxed in light of this decision.

The result arrived at in this case seems to be somewhat deleterious when one carefully scrutinizes the direct action statutes of the various jurisdictions. Each of these direct action jurisdictions maintains built in "safety valves" for the protection of the insurer. For example, the Louisiana Constitution provides for a de novo review by the appellate courts,[20] while the Puerto Rican civil law dictates that cases be tried without juries.[21] When New York applies foreign direct action statutes, these "safety valves" will not be available to the defendant, since they are merely procedural in nature. Thus, the plaintiff will have certain procedural advantages in New York which might inure to his benefit. These procedural advantages may well result in a plaintiff recovering a larger verdict than he could have obtained in the direct action jurisdiction itself. Such a result would be anomalous and hardly intended by the Court of Appeals. Yet such an inference is irresistible.

Furthermore, one jurisdiction has interpreted its direct action statute so as to deprive the defendant-insurer of certain defenses he might otherwise have asserted against the insured if the latter

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[18] Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918).

[19] Leotta v. Plessinger, 8 N.Y.2d 449, 171 N.E.2d 454, 209 N.Y.S.2d 450 (1960).

[20] LA. CONST. art. VII, § 29.

[21] Brief for Defendant-Respondent, pp. 16-17.

had been a party to the litigation.[22] It has always been the policy of New York to permit the insurer to interpose such defenses.[23] Consequently, if the New York courts enforce direct action statutes as interpreted by the courts of the enacting jurisdictions, the strong public policy of this state concerning the defenses available to the insurer may be abrogated.

The direct action statute does have the advantage of preventing collusion between the insured and his insurer. Therefore, the lack of cooperation by the insured cannot defeat the right of the injured party against the insurer. However, such protection is already provided in New York's Insurance Law.[24]

If the insurer is permitted to interpose against the injured party those defenses available against the insured, and if the procedural "safety valves" are provided to keep jury verdicts in their proper perspective, deleterious implications to be drawn from the instant case will be obviated. However, the possible loss of defenses by the insurer, coupled with the fact that New York may be inviting forum-shopping by providing a forum which will enforce direct action statutes without procedural "safety valves," would seem to indicate that the Court in the instant case did not reach a wholly satisfactory result.

LABOR LAW — SECTIONS 8(a)(5) AND 9(a) — SUBCONTRACTING IN ACCORDANCE WITH ESTABLISHED PRACTICE HELD NOT MANDATORY SUBJECT OF COLLECTIVE BARGAINING. — Since the 1940's the respondent-employer, an appliance manufacturer, had unilaterally subcontracted approximately four thousand jobs, all of which could have been performed by his own employees. Although the union had never challenged this custom, in 1963 it filed a complaint with the National Labor Relations Board in which it demanded the right to bargain concerning the employer's *decision* to subcontract. In reversing the trial examiner, the National Labor Relations Board *held* that subcontracting which merely continues a long established practice, without significantly changing existing terms or conditions of employment, is not subject to man-

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[22] West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950) (failure of insured to cooperate not available as a defense against injured party). *Contra*, Cespuglio v. Cespuglio, 238 Wis. 603, 300 N.W. 780 (1941).

[23] Roth v. National Auto. Mut. Cas. Co., 202 App. Div. 667, 195 N.Y. Supp. 865 (1st Dep't 1922); Killeen v. General Acc. Assur. Corp., 131 Misc. 691, 227 N.Y. Supp. 220 (N.Y. County Ct. 1928).

[24] Under New York law, the injured party can protect himself from the insured's failure to give notice to his insurer by giving such notice himself. N.Y. INS. LAW § 167(1)(c).