

Policy Held to Limit Insurer's Right to Implead Tortfeasor

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payment of the check, did not arise from any act of, and therefore need not be indemnified by, the third-party defendants.

However, unlike the practice under the CPA, where the complaint would likely have been dismissed,⁶⁷ Rule 1010 of the CPLR affords the court broad discretion in disposing of third-party causes of action. In applying this rule the court examined the relative equities of the parties and decided that a consolidation would effect the best result. Though Section 602 of the CPLR, which treats specifically of consolidation, appears to require a motion for such relief, the "such other order as may be just" words of rule 1010 appear to give a firm ground to the court's action in the instant case.

In view of the hesitancy of the courts to dismiss third-party complaints at the pleading stage,⁶⁸ and considering the broad discretion afforded by rule 1010, outright dismissal of third-party complaints should be less frequent in the future.

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Substantive law determines whether a third-party cause of action exists.⁶⁹ For example, in the recent case of *Ross v. Pawtucket Mut. Ins. Co.*,⁷⁰ an insured brought an action against an insurance carrier on an automobile collision policy. The insurer served a third-party complaint on the alleged tortfeasors. The Court of Appeals in affirming the dismissal of the third-party complaint, held that since the right of subrogation did not accrue under the policy until payment of the claim by the carrier, the carrier may not implead the third-party tortfeasors.⁷¹

Prior to this decision there was a divergence of opinion in New York on the issue *Ross* resolved. Some cases indicated that the insurer may not implead a third-party before payment of the

⁶⁷ For cases dismissing complaints where impleader was improper, see *Central Budget Corp. v. Perdigan*, 32 Misc. 2d 655, 228 N.Y.S.2d 311 (Sup. Ct. 1961); *Verder v. Schack*, 90 N.Y.S.2d 801 (Sup. Ct. 1949).

⁶⁸ *De Lilli v. Niagara Mohawk Power Corp.*, 11 App. Div. 2d 839, 202 N.Y.S.2d 857 (3d Dep't 1960) (court must look at third-party pleadings liberally on a motion to dismiss); *Schellhorn v. New York State Elec. & Gas Corp.*, 283 App. Div. 678, 127 N.Y.S.2d 182 (3d Dep't 1954) (where main complaint may be construed as charging third-party plaintiff with passive negligence even though it also charges him with active negligence, court will not dismiss third-party complaint).

⁶⁹ See *Bernstein v. El-Mar Painting & Decorating Corp.*, 13 N.Y.2d 1053, 195 N.E.2d 456, 245 N.Y.S.2d 772 (1963) (landlord's cross-complaint dismissed since he was actively negligent); Note, 28 *FORDHAM L. REV.* 782 (1960).

⁷⁰ 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963).

⁷¹ *Id.* at 234, 195 N.E.2d at 893, 246 N.Y.S.2d at 214. *But see* *W. T. Grant Co. v. Unceda Doll Co.*, 19 App. Div. 2d 361, 243 N.Y.S.2d 428 (1st Dep't 1963).

claim.⁷² Thus, it was held that an insurer had no right to maintain a separate action for recoupment until payment,⁷³ and that it was not a breach of the policy's cooperation clause for the insured to refuse to implead a third party in an action against such insured which was covered by the policy.⁷⁴ Other cases adopted the federal viewpoint⁷⁵ and held that the insurer may implead a third party before the right of subrogation accrued through payment to the insured.⁷⁶ The opinion in *Ross* merely stated that the resolution of the problem depended on the "nature of the subrogation right and the terms of the policy itself."⁷⁷

Allowing impleader in the instant case might have resulted in a longer trial and the postponement of payment to the insured of a legitimate claim while the issues of negligence were tried in the third-party action in which the insured had no interest.⁷⁸ On the other side, the decision limits the use of section 1007 by insurers by indicating that limitations on subrogation rights even as arising under the contract override the right to implead. Perhaps the insurance policy should be made to confer a kind of "tentative" subrogation in these circumstances.

INFANTS

Appointment of Guardian Ad Litem Before Action Commenced

While the CPLR does not require that a guardian ad litem be appointed for an infant in every instance,⁷⁹ rule 1202 permits the court in which the action is triable to appoint a guardian ad litem "at any stage in the action." Recently the New York Supreme Court,⁸⁰ in a case of first impression,⁸¹ held that under this rule

⁷² See *Glens Falls Ins. Co. v. Wood*, 8 N.Y.2d 409, 71 N.E.2d 321, 208 N.Y.S.2d 978 (1960); *McGrath v. Carnegie Trust Co.*, 221 N.Y. 92, 116 N.E. 787 (1917).

⁷³ *American Home Assur. Co. v. Botto*, 31 Misc. 2d 277, 219 N.Y.S.2d 764 (Sup. Ct. 1961).

⁷⁴ *American Sur. Co. v. Diamond*, 1 N.Y.2d 594, 136 N.E.2d 876, 154 N.Y.S.2d 918 (1956).

⁷⁵ *St. Paul Fire & Marine Ins. Co. v. United States Lines Co.*, 258 F.2d 374 (2d Cir. 1958), *cert. denied*, 359 U.S. 910 (1959); *Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60 (4th Cir. 1952).

⁷⁶ *Madison Ave. Properties Corp. v. Royal Ins. Co.*, 281 App. Div. 641, 120 N.Y.S.2d 626 (1st Dep't 1953); *Oswego County v. American Sur. Co.*, 63 N.Y.S.2d 723 (Sup. Ct. 1946), *aff'd*, 272 App. Div. 862, 70 N.Y.S.2d 927 (4th Dep't 1947).

⁷⁷ *Ross v. Pawtucket Mut. Ins. Co.*, 13 N.Y.2d 233, 234, 195 N.E.2d 892, 893, 246 N.Y.S.2d 213, 214 (1963).

⁷⁸ See *Madison Ave. Properties Corp. v. Royal Ins. Co.*, *supra* note 76, at 646, 120 N.Y.S.2d at 631.

⁷⁹ See WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 71 (1963).

⁸⁰ *In re Major's Will*, 247 N.Y.S.2d 358 (Sup. Ct. 1964).

⁸¹ *But see Gelenter v. Gelenter*, 19 Misc. 2d 25, 187 N.Y.S.2d 283 (Sup. Ct. 1958) (where it appeared in the facts that plaintiff had applied for and