Insurance–Co-Operation Clause–Verification of Third-Party
Complaint (American Surety Co. v. Diamond, 1 N.Y.2d 594 (1956))

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As the judicial interpretation of the restraining statutes has thus evolved, if a borrower gives his note for $1,000 to a non-banking corporate lender who supplies him with $940 cash, there has been an illegal discount and the note is void. If the borrower instead makes his note for $1,000 with interest at 6% and receives $1,000 in cash from the lender, no discount being involved, the note is valid.

Although these two cases are clear cut, the line of distinction is not nearly as apparent in other instances. Suppose the lender were to ask for two notes, one for $1,000 representing the amount of the loan and a separate note for the $60 charge. If the note for the principal and the note for interest cannot be separated and the entire transaction involves an illegal discount, what is the status of corporate bonds with interest coupons attached if purchased by corporate underwriters? 29

The statutes under consideration are an example of the special protection generally afforded to banks in the area of lending. 30 The instant case points out the need for a critical re-examination of the "Restraining Acts" in the light of present day economic and commercial activities. Lending by a non-banking corporation does not create a deposit and have the indirect effects on the economy which monetary regulation is designed to control. 31 Therefore, a more modified restriction of lending and discounting by non-banking corporations may be sufficient.

INSURANCE—CO-OPERATION CLAUSE—VERIFICATION OF THIRD-PARTY COMPLAINT.—Plaintiff-insurer brought this action to have a policy declared forfeit. The mother of defendant-insured was the driver of his car in an accident wherein defendant's father was killed. Defendant's mother, as executrix, then sued defendant for wrongful death for his imputed negligence. 1 Plaintiff undertook to defend insured, but insured refused to verify a cross-complaint against his mother. The Court held that the co-operation clause binding defendant to "... assist . . . in the conduct of suits," did not obligate

29 See Kripke, Illegal "Discounts" By Non-Banking Corporations in New York, 56 Colum. L. Rev. 1183, 1192-93 (1956).
30 Although a usurious instrument is void and no action may be maintained thereon (N.Y. Gen. Bus. Law §373) a bank may recover the principal of a note (N.Y. Banking Law §108). See Schlesinger v. Gilhooly, 189 N.Y. 1, 81 N.E. 619 (1907).
31 Kripke, supra note 29, at 1196; Kupfer, Prohibited Discounts Under the Banking and General Corporation Laws, 12 Record 30, 45-46 (1957).
1 N.Y. VEHICLE & TRAFFIC LAW § 59.

In liability insurance it early became apparent that the insurer had a strong interest in the defense made by the insured. This was necessarily so in a type of insurance where the liability of the company depended upon the successful conclusion of the injured party's suit against the insured. Without a clause binding the insured to cooperate in the defense of the action against him, an insurer would be practically at the mercy of the participants in an accident.

To meet this need the co-operation clause evolved. The earliest form taken by the co-operation clause consisted in the requirement of notice that an accident had taken place. With the impetus of such decisions as *Maryland Casualty Company v. Lamarre*, the co-operation clause grew first more common, then more complicated. The co-operation clause has been upheld so often that the validity of such clauses is no longer open to question.

The New York and majority view is that the co-operation clause is a material condition of the policy and a condition precedent to liability on the part of the insurer.

In addition the New York courts have taken the position that a material breach relieves the insurer of liability, even in the absence of prejudice.

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2"... [T]hat form of insurance by which insured is indemnified... against loss or liability on account of injuries to property." State ex rel. Travelers' Indemnity Co. v. Knott, 114 Fla. 820, 153 So. 304, 306 (1934).


5See, e.g., 83 N.H. 206, 140 Atl. 174 (1928). There the court stated that the insured was not bound to co-operate since no co-operation was expressly required by the policy.

7Today the typical co-operation clause is couched in the following language:

"The insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident." Durland, *Blood and Marital Relationships Under the Cooperation Clause*, 312 Ins. L.J. 3 (1949). See also American Surety Co. v. Diamond, 1 N.Y.2d 594, 596, 136 N.E.2d 876, 878 (1956).


to the insurer. Some jurisdictions, however, hold that lack of co-operation only constitutes a defense if the insurer has been substantially prejudiced thereby.

The cases involving breach of a co-operation clause fall into several broad categories. Outstanding among these is that where the insured, by fraud and collusive conduct, assists the plaintiff in the maintenance of his suit, rather than the insurer. Such conduct includes false statements, false testimony, and voluntarily entering a jurisdiction so process could be served. Harmless acts done without malice, however, such as waiving personal service of process, or engaging an attorney for a relative, have been held not to constitute a breach. Nor does the mere fact of a close relationship or friendship between the parties constitute a breach; although it has been held that under such circumstances the evidence should be examined with great particularity.

Closely allied with, and in some cases overlapping, collusion are the cases involving misrepresentation and nondisclosure of facts. Misrepresentations that the insured had not been drinking, that

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15 See Ems v. Continental Automobile Ins. Ass'n, 284 S.W. 824 (Mo. App. 1926).
16 See, e.g., Glade v. General Mut. Ins. Ass'n, 216 Iowa 622, 246 N.W. 794 (1933); Ohio Cas. Ins. Co. v. Beckwith, 74 F.2d 75, 77 (5th Cir. 1934) (dictum).
another drove the automobile at the time of the accident, and that a non-existent person was responsible for the accident were held to be breaches. So too, inconsistent statements as to fault, or the insured's recollection of the circumstances of the accident were held a breach of the co-operation clause.

Another group of cases is that including a voluntary assumption of liability. The assumption must be voluntary, however, and a truthful explanation of the accident and circumstances does not constitute a breach. Variant testimony at the trial or failure of the insured to attend also have often been held breaches of a co-operation clause. Conflicting statements and testimony regarding the rental of a motor vehicle, the speed, and the relative positions of the automobiles have been held to relieve the insurer of liability.

More closely connected with the instant case is a breach by refusal to sign or verify pleadings. Although it is well settled that the insured need not distort or misrepresent the facts, nor verify a pleading he believes false; a wilful refusal to verify a pleading is a breach of the policy. The Court was asked to go one step further

33 United States Fidelity & Guaranty Co. v. Pierson, 89 F.2d 602 (8th Cir. 1937); Employers' Liability Assur. Corp. v. Bodron, 65 F.2d 539 (5th Cir.), cert. denied, 290 U.S. 698 (1933); Nevil v. Wahl, 228 Mo. App. 49, 65 S.W.2d 123 (1933).
in the instant case as the insurer contended that the co-operation clause was broad enough to obligate the insured to verify a third-party complaint. In addition to the holding that the clause did not compel verification, the Court also stated that the fact that the defendant requested a judicial ruling on the question under Section 546 of the Civil Practice Act did not constitute a breach and was reasonable under the circumstances. Thus, the insured’s conduct would not have amounted to a breach even if the clause had covered third-party practice.

If there is any ambiguity in an insurance contract, it will be construed according to the understanding of the average person, and the insurer will not get the benefit of any doubt. Since the instant case seems to be the first time that it was claimed a co-operation clause could compel impleader, and the clause did not specifically refer to it, it would seem that the decision, though technical, is correct. Again, it was conceded that, under the subrogation clause, the insured would have been compelled to co-operate in a suit against his mother after payment by the insurer. The very fact that the policy only referred to such an obligation in the event of payment lends support to the view of the majority.

One further question suggested itself in this case. The insured also claimed that he should not be compelled to verify a complaint against his mother since, as the driver, she was covered by his policy. Such an action, it was contended, would result in circuity of action since the insurer would be liable to the mother for any recovery against her. As the insurer argued, however, the better view is that

37 "Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. . ." American Surety Co. v. Diamond, 1 N.Y.2d 594, 596, 136 N.E.2d 876, 878 (1956).

38 Although the opinion refers to the complaint as both a third-party complaint and a cross-claim, it would seem that the latter designation is erroneous. A cross-claim is asserted against one already a party. See Prashker, New York Practice 298 (3d ed. 1954). Here the mother, as executrix, was a party in a representative capacity, not individually. See Keating v. Stevenson, 21 App. Div. 604 (1st Dep't 1897).

39 "The parties to a question in difference which might be the subject of an action or special proceeding, being of full age, may agree upon a case containing a statement of the facts upon which the controversy depends; and may present a written submission thereof to a court of record which would have jurisdiction of an action or special proceeding brought for the same cause. . . ."


41 "To sustain the construction which the lower courts have placed upon the clause, the burden was on the defendant to establish that the words and expressions used not only are susceptible of that construction but that it is the only construction that can fairly be placed thereon." Hartol Products Corp. v. Prudential Ins. Co., 290 N.Y. 44, 47 N.E.2d 687, 690 (1943).

42 See Maryland Cas. Co. v. Employers Mut. Liability Ins. Co., 208 F.2d 731 (2d Cir. 1953); cf. Maryland Cas. Co. v. Pearson, 194 F.2d 284 (2d Cir. 1952)
the company would not be liable for any damage sustained by the driver's spouse on a direct action. The authorities would also seem to cover the case of indirect suit through the spouse's son.

Although the principal case is a novel and interesting one, it seems that its effect on the law will not be lasting. By the simple expedient of amending the co-operation clause to include co-operation in third-party practice, insurers can remedy the problem raised by this case. There is little doubt that they will do just that.

Insurance — Section 167(3) of Insurance Law — Held Applicable to Accidents in Other Jurisdictions. — Plaintiff-insurer issued, in New York, a liability policy to defendant's wife on her automobile. Defendant is suing his wife in Connecticut for injuries received from the wife's negligent operation of the vehicle. Plaintiff seeks a declaratory judgment denying liability on the ground that the policy did not expressly insure the wife against the husband's suit as required by Section 167(3) of the New York Insurance Law. The appellate division in reversing the judgment for the defendant held that the requirements of Section 167(3) also applied to accidents occurring outside the jurisdiction, thereby relieving the plaintiff of all liability. New Amsterdam Cas. Co. v. Stecker, 1 A.D.2d 629, 152 N.Y.S.2d 879 (1st Dep't 1956).*

At common law, New York courts did not recognize a personal injury action by one spouse against the other, even though the injury occurred in a jurisdiction which granted the right to maintain such action. The tort was recognized; but the married parties were con-

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*On appeal to the New York Court of Appeals.

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42 "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy." N.Y. Ins. Law § 167(3). See Feinman v. Bernard Rice Sons, Inc., 133 N.Y.S.2d 639, aff'd, 285 App. Div. 926, 139 N.Y.S.2d 884 (1st Dep't 1955); Katz v. Wessel, 207 Misc. 456, 139 N.Y.S.2d 564 (Sup. Ct. 1955).

