

May 2013

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

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

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.

insured to verify a cross-complaint. *American Surety Co. v. Diamond*, 1 N.Y.2d 594, 136 N.E.2d 876 (1956).

In liability insurance² 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 co-operate in the defense of the action against him, an insurer would be practically at the mercy of the participants in an accident.³ To meet this need the co-operation clause evolved.⁴ The earliest form taken by the co-operation clause consisted in the requirement of notice that an accident had taken place.⁵ With the impetus of such decisions as *Maryland Casualty Company v. Lamarre*,⁶ the co-operation clause grew first more common, then more complicated.⁷ The co-operation clause has been upheld so often that the validity of such clauses is no longer open to question.⁸ The New York⁹ 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.¹⁰ 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

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).

³ *Durland, Blood and Marital Relationships Under the Cooperation Clause*, 312 INS. L.J. 3 (1949). See also *Rochon v. Preferred Acc. Ins. Co.*, 114 Conn. 313, 158 Atl. 815 (1932).

⁴ See *Kindervater v. Motorists Cas. Ins. Co.*, 120 N.J.L. 373, 199 Atl. 606, 608 (1938).

⁵ Note, 22 NOTRE DAME LAW. 118 (1946).

⁶ 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.

⁷ Today 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).

⁸ See *Durland, supra* note 7, at 3. See, e.g., *Schoenfeld v. New Jersey Fidelity and Plate Glass Ins. Co.*, 203 App. Div. 796, 197 N.Y. Supp. 606 (2d Dep't 1922); *Watkins v. Watkins*, 210 Wis. 606, 245 N.W. 695, 698 (1932).

⁹ See, e.g., *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928); *Century Indemnity Co. v. Hartford Acc. and Indemnity Co.*, 130 N.Y.S.2d 844, 847 (Sup. Ct. 1951).

¹⁰ *Whittle v. Assoc. Indemnity Corp.*, 130 N.J.L. 576, 33 A.2d 866 (1943); *Martin v. Traders & General Ins. Co.*, 258 S.W.2d 142 (Tex. Civ. App. 1953). *Contra*, *Woodman v. Pacific Indemnity Co.*, 33 Cal. App. 2d 321, 91 P.2d 898 (1939); *Houran v. Preferred Acc. Ins. Co.*, 109 Vt. 258, 195 Atl. 253 (1937).

to the insurer.¹¹ Some jurisdictions, however, hold that lack of co-operation only constitutes a defense if the insurer has been substantially prejudiced thereby.¹²

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.¹³ Such conduct includes false statements,¹⁴ false testimony,¹⁵ and voluntarily entering a jurisdiction so process could be served.¹⁶ Harmless acts done without malice, however, such as waiving personal service of process,¹⁷ or engaging an attorney for a relative,¹⁸ 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;¹⁹ although it has been held that under such circumstances the evidence should be examined with great particularity.²⁰

Closely allied with, and in some cases overlapping, collusion are the cases involving misrepresentation and nondisclosure of facts.²¹ Misrepresentations that the insured had not been drinking,²² that

¹¹ See *Wenig v. Glens Falls Indemnity Co.*, 294 N.Y. 195, 61 N.E.2d 442 (1945); *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928).

¹² See, e.g., *State Farm Mut. Automobile Ins. Co. v. Koval*, 146 F.2d 118 (10th Cir. 1944); *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 752, 7 P.2d 999, 1002 (1932); *Rochon v. Preferred Acc. Ins. Co.*, 118 Conn. 190, 171 Atl. 429 (1934); *Conroy v. Commercial Cas. Ins. Co.*, 292 Pa. 219, 140 Atl. 905 (1928).

¹³ See, e.g., *State Automobile Mut. Ins. Co. v. York*, 104 F.2d 730 (4th Cir.), cert. denied, 308 U.S. 591 (1939); *Metropolitan Cas. Ins. Co. v. Richardson*, 81 F. Supp. 310 (S.D. Ill. 1948); *Luntz v. Stern*, 135 Ohio St. 225, 20 N.E.2d 241 (1939); *Buckner v. Buckner*, 207 Wis. 303, 241 N.W. 342 (1932).

¹⁴ *Western Cas. & Surety Co. v. Weimar*, 96 F.2d 635 (9th Cir. 1938).

¹⁵ See *Medico v. Employers' Liability Assur. Corp.*, 132 Me. 422, 172 Atl. 1 (1934). See also *Storer v. Ocean Acc. & Guarantee Corp.*, 80 F.2d 470, 472 (6th Cir. 1935); *Beauregard v. Beauregard*, 56 Ohio App. 158, 10 N.E.2d 227 (1937).

¹⁶ See *Ems v. Continental Automobile Ins. Ass'n*, 284 S.W. 824 (Mo. App. 1926).

¹⁷ *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).

¹⁸ *New Amsterdam Cas. Co. v. Mandel*, 115 N.J. Eq. 198, 201-02, 170 Atl. 19, 21 (Ch.) (dictum), *aff'd per curiam*, 116 N.J. Eq. 48, 172 Atl. 364 (Ct. Err. & App. 1934).

¹⁹ *State Automobile Mut. Ins. Co. v. York*, 104 F.2d 730, 734 (4th Cir.) (dictum), cert. denied, 308 U.S. 591 (1939); see *Riggs v. New Jersey Fidelity & Plate Glass Co.*, 126 Ore. 404, 270 Pac. 479 (1928).

²⁰ See, e.g., *Buckner v. Buckner*, 207 Wis. 303, 241 N.W. 342 (1932). See *Durland, Blood and Marital Relationships Under the Cooperation Clause*, 312 Ins. L.J. 3, 4 (1949).

²¹ See, e.g., *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 160 N.E. 367 (1928); *Allegretto v. Oregon Automobile Ins. Co.*, 140 Ore. 538, 13 P.2d 647, 648 (1932); *Francis v. London Guarantee & Acc. Co.*, 100 Vt. 425, 138 Atl. 780, 781 (1927).

²² *Hunt v. Dollar*, 224 Wis. 48, 271 N.W. 405 (1937).

another drove the automobile at the time of the accident,²³ and that a non-existent person was responsible for the accident²⁴ were held to be breaches. So too, inconsistent statements as to fault,²⁵ or the insured's recollection of the circumstances of the accident²⁶ were held a breach of the co-operation clause.

Another group of cases is that including a voluntary assumption of liability.²⁷ The assumption must be voluntary, however, and a truthful explanation of the accident and circumstances does not constitute a breach.²⁸ Variant testimony at the trial²⁹ or failure of the insured to attend³⁰ also have often been held breaches of a co-operation clause. Conflicting statements and testimony regarding the rental of a motor vehicle,³¹ the speed,³² and the relative positions of the automobiles³³ 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,³⁴ nor verify a pleading he believes false;³⁵ a wilful refusal to verify a pleading is a breach of the policy.³⁶ The Court was asked to go one step further

²³ See *Rochon v. Preferred Acc. Ins. Co.*, 114 Conn. 313, 158 Atl. 815, 816 (1932); *Brogdon v. American Automobile Ins. Co.*, 290 Mich. 130, 287 N.W. 406 (1939).

²⁴ See *Hoffman v. Labutzke*, 233 Wis. 365, 289 N.W. 652 (1940).

²⁵ See *Storer v. Ocean Acc. & Guarantee Corp.*, 80 F.2d 470 (6th Cir. 1935); *Ohrback v. Preferred Acc. Ins. Co.*, 227 App. Div. 311, 237 N.Y. Supp. 494 (1st Dep't 1929); *Solomon v. Preferred Acc. Ins. Co.*, 132 Misc. 134, 229 N.Y. Supp. 257 (App. T. 1st Dep't 1928).

²⁶ Cf. *Seltzer v. Indemnity Ins. Co.*, 252 N.Y. 330, 169 N.E. 403 (1929).

²⁷ See *Kesinger v. Commercial Standard Ins. Co.*, 101 Colo. 109, 70 P.2d 776 (1937); *Kindervater v. Motorists Cas. Ins. Co.*, 120 N.J.L. 373, 199 Atl. 606, 608 (1938); *Ridler v. Travelers' Ins. Co.*, 342 Mo. 677, 117 S.W.2d 241 (1938).

²⁸ *Wenig v. Glens Falls Indemnity Co.*, 294 N.Y. 195, 61 N.E.2d 442 (1945); *Porter v. Employers' Liability Assur. Corp.*, 40 Cal. App. 2d 502, 104 P.2d 1087 (1940); *U-Drive-It Car Co. v. Friedman*, 153 So. 500 (La. App. 1934); *Great Am. Indemnity Co. v. McMenamin*, 134 S.W.2d 734, 736-37 (Tex. Civ. App. 1939) (dictum).

²⁹ See *Ohrback v. Preferred Acc. Ins. Co.*, 227 App. Div. 311, 237 N.Y. Supp. 494 (1st Dep't 1929); cf. *Schiels v. London & Lancashire Indemnity Co.*, 251 App. Div. 775, 295 N.Y. Supp. 434 (3d Dep't 1937).

³⁰ *Goldstein v. Bernstein*, 315 Mass. 329, 52 N.E.2d 559 (1943); *Horton v. Employers' Liability Assur. Corp.*, 25 Tenn. App. 593, 164 S.W.2d 1011, cert. denied, 179 Tenn. 562, 164 S.W.2d 1016 (1942).

³¹ *Hilliard v. United Pacific Cas. Ins. Co.*, 195 Wash. 478, 81 P.2d 513 (1938).

³² *Wright v. Farmers Automobile Inter-Insurance Exchange*, 39 Cal. App. 2d 70, 102 P.2d 352 (1940).

³³ *Shafer v. Utica Mut. Ins. Co.*, 248 App. Div. 279, 289 N.Y. Supp. 577 (4th Dep't 1936).

³⁴ *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).

³⁵ *Svitak v. Sun Indemnity Co.*, 136 Neb. 303, 285 N.W. 604 (1939).

³⁶ *Jenkinson v. New York Cas. Co.*, 241 Wis. 328, 6 N.W.2d 192 (1942).

in the instant case as the insurer contended that the co-operation clause³⁷ was broad enough to obligate the insured to verify a third-party complaint.³⁸ 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 Act³⁹ 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,⁴⁰ and the insurer will not get the benefit of any doubt.⁴¹ 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.⁴² 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. . . ."

⁴⁰ See *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

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, 49, 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.⁴³ The authorities would also seem to cover the case of indirect suit through the spouse's son.⁴⁴

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,¹ even though the injury occurred in a jurisdiction which granted the right to maintain such action.² The tort was recognized; but the married parties were con-

⁴³ "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).

⁴⁴ This would follow from the strict construction given the statute by the courts. See, *e.g.*, *Fuchs v. London & Lancashire Indemnity Co.*, 258 App. Div. 603, 605, 17 N.Y.S.2d 338 (2d Dep't 1940); *Peka, Inc. v. Kaye*, 208 Misc. 1003, 145 N.Y.S.2d 156 (Sup. Ct. 1955), *rev'd on other grounds*, 1 A.D.2d 879, 150 N.Y.S.2d 774 (1st Dep't 1956); *Standard Acc. Ins. Co. v. Newman*, 47 N.Y.S.2d 804 (Sup. Ct.), *aff'd*, 268 App. Div. 967, 51 N.Y.S.2d 767 (1st Dep't 1944).

* On appeal to the New York Court of Appeals.

¹ See, *e.g.*, *Caplan v. Caplan*, 268 N.Y. 445, 198 N.E. 23 (1935); *Allen v. Allen*, 246 N.Y. 571, 159 N.E. 656 (1927) (mem. opinion); *Perlman v. Brooklyn City R.R.*, 117 Misc. 353, 191 N.Y. Supp. 891 (Sup. Ct. 1921), *aff'd mem.*, 202 App. Div. 822, 194 N.Y. Supp. 971 (2d Dep't 1922).

² *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).