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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 viewpoint[75] 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

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[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

a court had the power to appoint a guardian ad litem prior to the commencement of an action.

The original draft of rule 1202 provided that a motion for the appointment of a guardian ad litem could be made "to the court in which the action is brought at any stage in an action, *or to the court in which the action is about to be brought.*"[82]

The Revisers after changing this clear and unequivocal language to its present form, indicated that the change in language was not intended to effect any change in meaning.[83] Thus the court's interpretation of rule 1202 appears consistent with its legislative history.

PLEADINGS

Liberal Construction of Pleadings — Foley v. D'Agostino

The December 1963 Survey expressed hope that the courts would give prompt and unambiguous indication that the CPA's pleading technicalities would not be permitted to encumber the CPLR; and that their inquiry on a motion to dismiss a pleading for failure to state a cause of action would be *only* that — *i.e.,* whether it states a cause of action — without regard to any prior-law notions that often laid more stress on form than on substance.

Such indication was soon forthcoming. In *Foley v. D'Agostino,*[84] the appellate division, first department, sustained a complaint that would in all likelihood have been dismissed under the CPA. It examined in depth the intent of the Revisers and treated in perspective the several provisions of the CPLR from which the new pleading requirements are culled.

The decision is the outstanding one on pleadings under the CPLR and, unless the Court of Appeals itself indicates otherwise, it appears destined to remain the judicial foundation for the bar's use of Article 30 of the CPLR. In an extensive and unanimous opinion by Justice Eager, a number of CPLR provisions are treated, including those which lie at the heart of CPLR pleading: section 3013, rule 3014 and section 3026.

The case speaks for itself, and with an authority that only judicial determination can command. To paraphrase it here would not be helpful, and to quote only portions of it would be an

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secured an appointment of a guardian ad litem before instituting the action); *In re* O'Malley's Trust, 286 App. Div. 869, 142 N.Y.S.2d 21 (2d Dep't 1955) (wherein the court indicated that it was a proper exercise of discretion for a court to appoint a guardian prior to the adjourned return day of order to show cause).

[82] SECOND REP. 375.

[83] FIFTH REP. 334.

[84] (App. Div. 1st Dep't), 151 N.Y.L.J., April 13, 1964, p. 1, col. 1.