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Amendment to the Insurance Law Relating to the Rights of Judgment Creditors Against Liability Insurers

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Under certain circumstances the court may extend by a reasonable time the sixty-day notice provision for infants and incapacitated persons if such application is made within a year.[9]

There is a provision to the effect that mistakes, omissions, irregularities or defects made in the notice of claim required to be served, not pertaining to the manner or time of service, may be corrected, supplied or disregarded in the discretion of the court.

Section 50-e specifically provides that it shall not apply to claims arising under the provisions of the Workmen's Compensation Law, nor to claims arising under Article Ten of the General Municipal Law (regarding rights and privileges of firemen and policemen). The Act became effective September 1, 1945 but was not to apply to claims accruing before that date.

The statute is a welcome step toward securing uniformity in the preparation and presentation of tort claims against public corporations and gives promise of a more equitable administration of justice in this field.

ROBERT E. VON ELTEN.

AMENDMENT TO THE INSURANCE LAW RELATING TO THE RIGHTS OF JUDGMENT CREDITORS AGAINST LIABILITY INSURERS.—Effective September 1, 1945, Section 167 of the New York Insurance Law was amended by the addition of subsection seven.

Before the adoption of this amendment, that is, under Section 167 and its predecessor, Section 109, an action against the liability insurer could be brought only by the injured person, or his personal representative, who had recovered a judgment for damages against his tort-feasor, the insured. The amendment gives this right of action, in addition to the injured person, or his personal representative, to three other classes of judgment creditors: assignees, contribution creditors and indemnity creditors.

Under the common law of New York an injured party had recourse only against the insured, his tort-feasor. He could have no recourse against the liability insurer. If the insured was execution proof, the injured person could collect nothing; the insured sustained no pecuniary loss or damage and the insurer was under no duty to pay. In 1917, to give the injured person an additional remedy, Section 109 was adopted.

This section provided that no policy of insurance against loss or damage resulting from an accident or injury should be valid unless there was contained in the policy a provision that the insolvency or bankruptcy of the person insured or the insolvency of his estate

[9] The Judicial Council originally recommended "a reasonable time after the disability ceases" while the compromise bill of 1944 provided for six months.

should not release the insurance carrier from the payment of damages for injury and gave to "the injured person or his or her personal representative" an action against the insurer, "in case judgment against the insured or his or her personal representative in an action brought by the injured person or his or her personal representatives, to recover damages for injury sustained or loss occasioned during the life of the policy shall remain unsatisfied at the expiration of thirty days from the date of service of notice of judgment upon the attorney for the insured and upon the insurer."

Section 109 was added to the Insurance Law of 1909 by Laws of 1917, Chapter 524. In 1925 it was held constitutional by the United States Supreme Court and not in violation of the Federal Bankruptcy Laws.[1]

In *Jackson v. Citizens Casualty Co.*[2] it was held that the right of action against the insurer under Section 109 was not transferable by a voluntary assignment, hence that the assignee could not be substituted for the judgment plaintiff in an action to recover judgment against the insurer. The court concluded that the statute was drawn for the protection of injured plaintiffs [3] and that the specific mention of the injured person or his or her personal representative as those to whom the right of action was given implied the exclusion of others.[4]

The plaintiff argued that by Section 41 of the Personal Property Law [5] final judgments, even for personal injuries, are assignable. The court stated that Section 41 did not enlarge the class of persons to whom the action was given. To the argument that the plaintiff's cause of action against the insurer was a *contractual* right and therefore freely assignable, the court replied that the contractual provision was compulsory, and therefore gave no greater rights than the statute.

The court did concede, however, that the legislature could enlarge these rights.[6]

The case deals with a voluntary assignment of a judgment against the insured. A judgment may be transferred involuntarily as by bankruptcy or sale on execution, or by operation of law as in the case of subrogation. The only New York cases which have dealt with the rights of an involuntary transferee against the liability insurer relate to subrogation. Under Section 29 of the Workmen's Compensation Law [7] (which was enacted substantially in its present form prior to the enactment of former Section 109 of the Insurance Law),

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[1] Merchants Mutual Automobile Liability Insurance Co. v. Smart, 267 U. S. 126, 69 L. ed. 538 (1925).
[2] 277 N. Y. 385, 14 N. E. (2d) 446 (1938).
[3] 277 N. Y. at 390.
[4] *Ibid.*
[5] N. Y. CONS. LAWS (1909) c. 41.
[6] 277 N. Y. at 391.
[7] N. Y. CONS. LAWS § 29.

an employer, having paid an award to its employee for injuries arising out of and in course of the employment, is entitled to maintain an action against a third person who tortiously caused the employee's injuries for which such award was made; and the same right is given to the insurance carrier of the employer, which is thus subrogated to the rights of its insured. Yet the New York courts have held that the person who obtained such a judgment against the tort-feasor was not entitled to maintain an action against the tort-feasor's liability insurer, pursuant to former Section 109 of the Insurance Law.[8] The reasons given in these cases are similar to those of *Jackson v. Citizens Casualty Co.*,[9] namely the restrictive language of the statute and its supposed policy.

In 1939 the Insurance Law was amended, Section 109 becoming Section 167. The language of former Section 109 was limited to an action "by the injured person, or his or her personal representative" against the insurer. In the corresponding provision of Section 167, the phrase quoted is omitted. The present statute states merely that "an action may be maintained" and does not expressly restrict the class of persons who may maintain the action. This change in the wording of unamended Section 167 which omits "by the injured person" would seem to indicate a legislative intention to supersede the restrictive interpretation of the case of *Jackson v. Citizens Casualty Co.*[10] The decision in *La Gumina v. Citizens Casualty Co. of N. Y.*[11] indicated that a more specific statutory amendment would be necessary if the restrictive interpretation was to be abrogated.

In this case the plaintiff and one Rabin had been sued as co-defendants in a personal injury action by one Kaplan who recovered a judgment for $1,000 and costs against both. In the same action La Gumina, having paid the judgment in full, recovered a judgment against Rabin for contribution. La Gumina then sought to recover judgment for this amount against Rabin's liability insurer, the defendant here. The court pointed to precedents[12] holding that under Section 109 of the former Insurance Law, the predecessor of present

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[8] Royal Indemnity Co. v. Travelers Ins. Co., 244 App. Div. 582, 280 N. Y. Supp. 485 (1st Dep't 1935), *aff'd*, 270 N. Y. 574, 1 N. E. (2d) 337 (1936) (memo. op.) (suit by employer's insurer); Knickerbocker Ice Co. v. New York Indemnity Co., 140 Misc. 654, 251 N. Y. Supp. 526 (App. T. 1931) (suit by employer); Franklin Surety Co. v. U. S. Fidelity & Guaranty Co., 282 N. Y. 537, 24 N. E. (2d) 976 (1939) (no opinion), *aff'g*, 256 App. Div. 973, 11 N. Y. S. (2d) 247 (1st Dep't 1939) (no opinion) (suit by employer's insurer).

[9] *Supra* note 2.

[10] *Supra* note 2.

[11] 180 Misc. 877, 44 N. Y. S. (2d) 534 (N. Y. City Ct. 1943), *aff'd*, 181 Misc. 180 (Sup. Ct. 1944) (no opinion), *motion for leave to appeal denied*, 267 App. Div. 955, 48 N. Y. S. (2d) 471 (1st Dep't 1944).

[12] Jackson v. Citizens Casualty Co., *supra* note 2; Royal Indemnity Co. v. Travelers Ins. Co., *supra* note 8.

Section 167, the right against the insurer was confined to "injured plaintiffs" and hence did not include a joint tort-feasor seeking to collect a judgment for contribution. The words "by the injured person," which were in Section 109, and which were relied upon in the precedents, were omitted from Section 167. Yet the court found that a proposal to insert express language in Section 167 recognizing the right to contribution failed of enactment by the legislature. The court refused to give the statute an interpretation which the legislature had failed to enact. A motion to dismiss the complaint was granted.

The right of indemnity which the law gives to one tort-feasor against the other is based on the principle that the latter is, for some reason appearing in the relations between the parties or the other circumstances of the case, primarily liable for the entire loss and hence will be unjustly enriched unless he is compelled to make full reimbursement to the former who has paid the claim wholly or in part. This right arises by operation of law and does not depend on an express agreement to assume such liability. This right may arise even though there be such an agreement.

In a recent New York case,[13] the defendant Ford Motor Company contracted to inspect airplane equipment for the plaintiff. In the course of its inspection the defendant failed to discover, or to report the discovery of, machine tool marks on a certain part of a plane which marks made it more likely to break. The part did break. The resulting crash cost the plaintiff $90,000 including claims paid for the death of passengers. Judgment was given for the plaintiff. In another recent case the liability insurer of the indemnitee, having paid the judgment obtained by the injured party, was held entitled by way of subrogation to recover judgment against the party primarily liable.[14]

The three New York cases, cited above,[15] in which an employer was denied recovery against the insurer of the tort-feasor who injured his employee in the course of his employment, indicate that a common law indemnitee would be denied recovery, since the Workmen's Compensation Law, Section 29, in effect creates a statutory right of indemnity. The employer is liable without regard to fault, whereas the tort-feasor is ordinarily held liable only because of his fault.

No New York cases have been found either granting or denying the right of a common law indemnitee judgment creditor to recover

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[13] American Airways v. Ford Motor Co., 170 Misc. 721, 10 N. Y. S. (2d) 816 (Sup. Ct. 1939), *aff'd as modified*, 258 App. Div. 957, 17 N. Y. S. (2d) 998 (1st Dep't 1940), *aff'd* 284 N. Y. 807, 31 N. E. (2d) 925 (1940) (no opinion).

[14] Liberty Mutual Ins. Co. v. Societe Coiffure, Inc., 50 N. Y. S. (2d) 40 (Sup. Ct. 1944); John Wanamaker, New York, Inc. v. Otis Elevator Co., 228 N. Y. 192, 126 N. E. 718 (1920).

[15] *Supra* note 8.

from the indemnitor's liability insurer. The reasoning of *La Gumina v. Citizens Casualty Co.*,[16] and of the New York cases construing former Section 109, would lead to the conclusion that the indemnity creditor would be denied recourse against the indemnity debtor's liability insurer.

Thus it is seen that since the less restrictive phrasing of Section 167 did not lead to less restrictive interpretation, there was a need for a more specific statutory amendment. Subsection seven gives to the assignee, the contribution creditor, and the indemnitee creditor the same right of action as is given to the injured party or his personal representative.

KENNETH FOX.

RIGHTS OF DEFENDANT DIRECTORS, OFFICERS AND EMPLOYEES TO REIMBURSEMENT FOR DEFENSE OF STOCKHOLDERS' DERIVATIVE ACTION.—The New York Legislature at its last session enacted Article 6a of the General Corporation Law.[1] The primary purpose of this article is an attempt to eliminate the "benefit rule" as established by the courts in declaring the common law and in interpreting former Section 61a of the General Corporation Law.[2]

At common law, the court, in *New York Dock Co., Inc. v. McCollum*,[3] required a defendant director to show that some direct benefit had accrued to the corporation before he would be allowed reimbursement for his successful defense of a stockholders' derivative action. However, that this was paradoxical [4] was apparent and even recognized by the *McCollum* case which established the "benefit rule", since it is obvious that a corporation stands to gain only if the plaintiff stockholder is successful.

Soon after the *McCollum* case, and probably as a result, the legislature enacted former Section 61a of the General Corporation Law, presumably to remedy the effect of the *McCollum* case. However, in subsequently interpreting the two main divisions of Section

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[16] *Supra* note 11.

[1] N. Y. Laws 1945, c. 869, effective April 1945.

[2] N. Y. Laws 1941, c. 350, § 1, effective April 1941, repealed L. 1945, c. 869, § 2.

[3] New York Dock Co., Inc. v. McCollum, 173 Misc. 106, 16 N. Y. S. (2d) 844 (Sup. Ct. 1939).

In this case, former Court of Appeals Judge Crouch, sitting as official referee, concluded that there is no legal or equitable right to reimbursement for a director's successful defense of a stockholders' derivative action except where a director can show that: "in conducting his own defense successfully, he has conserved some substantial interest of the corporation which otherwise might not have been conserved or has brought some definite benefit to the corporation which otherwise might have been missed"; Bailey v. Bush Terminal, 293 N. Y. 735, 56 N. E. (2d) 739 (1944). *Contra:* Soliminie v. Hollander *et al.*, 129 N. J. Eq. 264, 19A (2d) 344 (1941).

[4] In the words of former Court of Appeals Judge Crouch: "Just how such a state of facts can come about, however, is not very clear to the referee."