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Erratum

On page 235, lines 22-23 which read: *Duprey v. Security Mututal Casualty Company*, 22 App. Div. 544, 256 N.Y.S.2d 987 (1965). Should have read: *Duprey v. Security Mutual Casualty Co.*, 22 A.D.2d 544, 256 N.Y.S.2d 987 (3d Dep't 1965).

INSURANCE LAW—DEDUCTION OF SETTLEMENTS FROM INSURANCE COMPANY'S LIABILITY ON AUTOMOBILE POLICY ALLOWABLE

An automobile owned and operated by a person insured with the defendant collided with a tractor-trailor. The driver of the car and his two passengers were killed; the driver of the tractor-trailor was injured. The administrators of the passengers' estates and the driver of the tractor-trailor initiated suits against the insured's estate, which estate consisted solely of the $10,000/$20,000 limits of the automobile insurance policy. The cumulative amount asked in these suits was in excess of the liability limit of the insurance policy. Prior to trial, the defendant settled with the truck driver for $9,000. Although the trial resulted in jury verdicts of $11,000 for each of the passengers' estates, the defendant paid them $5,500 apiece, arguing that since it had already settled a claim for $9,000, this amount should be deducted from its $20,000 liability limit. One of the passengers' estates sued the Insurance Company for additional payment, contending that the $9,000 out of court settlement should not be deducted because the defendant was under no legal obligation to pay it. The Supreme Court rendered judgment in favor of the plaintiff. On appeal, the Appellate Division *held*, reversed. When an insurance company, in good faith, settles one suit against the insured, realizing that all suits will probably exceed the policy limits and that the policy will probably supply the only funds for recovery, the settlement nevertheless reduces the insurance company's liability remaining under the policy. *Duprey v. Security Mutual Casualty Company*, 22 App. Div. 544, 256 N.Y.S.2d 987 (1965).

In 1929 New York State enacted a law requiring that an individual who had a judgment against him (for personal injuries, or property damage in excess of $100,) due to a car accident which was unsatisfied for fifteen days, had to have automobile insurance. A similar requirement was also imposed following the conviction of a driver for certain serious traffic offenses.[1] In 1941 the act was amended to include almost all uninsured motorists having accidents resulting in any personal injuries, or property damage in excess of $25.[2] Periodically, there were changes in the amount of coverage necessary,[3] and by 1951 $10,000 was mandatory for injury or death to one person and $20,000 for all persons; $5,000 was the amount for property damage.[4] In 1958 the Compulsory Insurance Act was enacted, requiring that all motor vehicles be insured to the limits set in 1951.[5] The main purpose of the act is to assure ". . . that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them."[6] The Act provides that the Superintendent of Insurance

1. N.Y. Sess. Laws 1929, ch. 695, § 1.
2. N.Y. Sess. Laws 1941, ch. 872, § 1.
3. N.Y. Sess. Laws 1949, ch. 196, § 3; N.Y. Sess. Laws 1951, ch. 667, § 3.
4. N.Y. Sess. Laws 1951, ch. 667, § 3.
5. N.Y. Vehicle and Traffic Law §§ 93-93k (now §§ 310-321).
6. N.Y. Vehicle and Traffic Law § 93 (now § 310).

regulate the minimum provisions of the required policy.[7] The regulations he has established, which may be superseded only by provisions more favorable to judgment creditors,[8] state that settlements do not have to be paid by the company in excess of the policy limits.[9] The majority of apportionment cases resulting from insufficient funds have involved cases where one party already has a judgment and has either collected on it or is attempting to collect on it.[10] New York has agreed with the majority of states[11] in allowing those with judgments to collect and exhaust the fund, although other claimants have not yet proceeded to judgment.[12] The most recent New York decision in interpreting the purpose of the Compulsory Insurance Act[13] showed the purpose to be consonant with these decisions, stating, "Were the rule otherwise, an insurer could protect itself against being required to pay more than its policy limits only by refusing *any payment* until an equity action had been brought for the purpose of ratable apportionment among *judgment creditors* . . . . Such a result would greatly impede realization of the legislative purpose set forth in Section 93 of the Vehicle and Traffic Law."[14]

The law concerning settlement of some claims without court action where there are insufficient funds to satisfy all claims is not as well established. Courts have consistently favored settling claims where it may be done without apparent injustice,[15] but there is a question as to whether it is just to settle some claims and require other claimants to obtain judgment and receive only partial payment. Only two New York State cases have considered this problem.[16] One case concerned a vehicle transporting passengers for hire.[17] There is, however, a specific statute governing such vehicles which provides that the proceeds of the compulsory insurance, with respect to vehicles for hire, are to be "apportioned

7. N.Y. Vehicle and Traffic Law § 93a (now § 311).

8. 11 Official Compilation of Codes, Rules and Regulations of the State of New York (hereafter referred to as N.Y.C.R.R.) § 60.1.

9. 11 N.Y.C.R.R. § 60.1(b).

10. Burchfield v. Bevans, 242 F.2d 239 (10th Cir. 1957); Century Indem. Co. v. Kofsky, 115 Conn. 193, 161 Atl. 101 (1932); Turk v. Goldberg, 91 N.J. Eq. 283, 109 Atl. 732 (1920); David v. Bauman, 24 Misc. 2d 67, 196 N.Y.S.2d 746 (Sup. Ct. 1960); Pisciotta v. Preston, 170 Misc. 376, 10 N.Y.S.2d 44 (Sup. Ct. 1938); Stolove v. Fidelity & Cas. Co. of New York, 157 Misc. 106, 282 N.Y. Supp. 263 (Sup. Ct. 1935); O'Donnell v. New Amsterdam Cas. Co., 50 R.I. 275, 146 Atl. 770 (1929).

11. Annot., 70 A.L.R.2d 416 (1960).

12. David v. Bauman, 24 Misc. 2d 67, 196 N.Y.S.2d 746 (Sup. Ct. 1960); Pisciotta v. Preston, 170 Misc. 376, 10 N.Y.S.2d 44 (Sup. Ct. 1938); Stolove v. Fidelity & Cas. Co. of New York, 157 Misc. 106, 282 N.Y. Supp. 263 (Sup. Ct. 1935).

13. N.Y. Vehicle and Traffic Law § 310.

14. David v. Bauman, 24 Misc. 2d 67, 69, 196 N.Y.S.2d 746, 748-49 (Sup. Ct. 1960).

15. *Accord*, Werden v. Werden, 255 App. Div. 795, 7 N.Y.S.2d 145 (2d Dep't 1938); In the Matter of Estate of Gardiner, 204 Misc. 884, 126 N.Y.S.2d 121 (Surr. Ct. 1953); In the Matter of Estate of Sidman, 154 Misc. 675, 278 N.Y. Supp. 43 (Surr. Ct. 1935); Kraemer v. Long Island Produce & Fertilizer Co., 236 N.Y.S.2d 929 (Suffolk County Ct. 1962).

16. O'Dwyer v. Grove Serv. Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338 (Sup. Ct. 1958), *aff'd*, 15 A.D.2d 457, 222 N.Y.S.2d 683 (1st Dep't 1961); Frank v. Hartford Acc. & Indem. Co., 136 Misc. 186, 239 N.Y. Supp. 397 (Sup. Ct.), *aff'd*, 231 App. Div. 707, 245 N.Y. Supp. 777 (1st Dep't 1930).

17. Frank v. Hartford Acc. & Indem. Co., *supra* note 16.

ratably among the judgment creditors."[18] In the particular case involving a vehicle for hire, the Insurance Company settled with some claimants before judgment, because it knew that the insured had his own funds to satisfy judgments in excess of the policy limits. However, the insured became insolvent leaving a shortage of funds. The court decided that the settlement could not be deducted from the Insurance Company's liability since the persons settled with were not judgment creditors.[19] The other New York State case concerned a passenger car. In that case there were four claims, two of which were settled for a total of $14,000, but insurance coverage was only $20,000 for all four claimants. There is no statute requiring ratable apportionment in cases not involving vehicles for hire. The two claimants who did not settle secured judgments totaling $45,000. The insured appealed, but in order to get a limited stay of execution the insurance company was required by statute[20] to file an undertaking to pay the judgment for the amount of liability which remained under the policy. The court decided that the $14,000 in settlements should be deducted from the company's liability and allowed the undertaking to be filed for $6,000.[21] Many other states have considered the problem of the instant case, all allowing the insurance company to deduct the settlements from its liability.[22] However, many of these cases considered points not applicable in New York. Two of the courts implied that in their states, if an insurance company is negligent in failing to settle, and the verdict after litigation imposes more of a liability on the insured than a settlement would have, the insurance company is liable for the excess.[23] These courts reason that since the insurance company may be liable for not settling, it would be unfair to subject the companies to a possible increase in liability if they did settle.[24] In New York the insurance company is not liable for negligence in failing to settle a claim.[25] All of the cases but one were decided in states where not every car owner is required to have insurance and thus not every injured person is protected.[26] In Massachusetts, a state that has compulsory insurance,[27] the Supreme Court decided a case similar to the instant case

18. N.Y. Vehicle and Traffic Law § 370.

19. Frank v. Hartford Acc. & Indem. Co., 136 Misc. 186, 239 N.Y. Supp. 397 (Sup. Ct. 1930), *aff'd*, 231 App. Div. 707, 245 N.Y. Supp. 777 (1st Dep't 1930).

20. N.Y. Sess. Laws 1938, ch. 226 § 1.

21. O'Dwyer v. Grove Serv. Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338 (Sup. Ct. 1958), *aff'd*, 15 A.D.2d 457, 222 N.Y.S.2d 683 (1st Dep't 1961).

22. Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933); Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957); Bruyette v. Sandini, 291 Mass. 373, 197 N.E. 29 (1935); Liguori v. Allstate Ins. Co., 76 N.J. Super. 204, 184 A.2d 12 (1962); Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 (1958).

23. Bennett v. Conrady, *supra* note 22; Alford v. Textile Ins. Co., *supra* note 22.

24. Bennett v. Conrady, *supra* note 22; Alford v. Textile Ins. Co., *supra* note 22.

25. Best Building Co. v. Employers' Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911, 71 A.L.R. 1464 (1928). (There is dicta in the case indicating that the insurance company would be liable if it exhibited fraud or bad faith).

26. Conn. Gen. Stat. Ann. § 14-112 (Supp. 1963); Kan. Gen. Stat. Ann. § 8-738, § 8-739 (1964); Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954); N.J. Rev. Stat. § 39:6-31 (1961); N.C. Gen. Stat. §§ 20-230-20-231, 20-279.1-20-279.38 (Cum. Supp. 1963).

27. Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954).

and came to the same conclusion saying, "It is apparent that the Compulsory Motor Vehicle Law did not give to a claimant, in terms, any greater or further rights to the benefits of a policy of motor vehicle liability insurance than existed prior to the . . . law."[28] The only relevant difference between the Massachusetts act and the New York State act is that New York State makes its legislative policy more explicit by stating that the purpose of its act is to enable innocent victims of automobile accidents to be compensated for their injuries.[29]

The Appellate Division, in its opinion in the instant case, is careful to note that the insurance company settled in good faith despite its knowledge that there were other claimants, that total claims would probably exceed the policy limits, and that the policy would probably be the only course of recovery. The Appellate Division considered the lower court's reasoning which characterized the settlement as a "voluntary payment," "gift," or "additional insurance," and which found in Section 310 of the Vehicle and Traffic Law an expression of policy requiring ratable apportionment among all claimants where policy limits are insufficient to cover all claims.[30] While the upper court feels that this policy is a good one, it is faced with ". . . considerable logic and precedent which compels its rejection."[31] The insurance policy involved permits a settlement. Furthermore, an Insurance Policy Regulation in prescribing the mandatory minimal provisions of automobile liability policies indicates that the company can retain its settlement privileges.[32] The court seems to feel that since the insurance company is given the privilege to settle, its liability should not be increased for exercising this privilege. The court cites two New York State cases which are closely analagous to the instant case and do not support the interpretation given by the lower court to Section 310.[33] Other jurisdictions which have legislation similar to Section 310 have uniformly recognized settlements as reducing the liability remaining under the policy.[34]

The "considerable logic and precedent" which the upper court feels it has found to support its conclusions is not entirely convincing. The court, in stating that the insurance policy permits a settlement, infers that the settlement can be deducted from the insured's liability. However, the policy does not specifically say that the settlement can be deducted. The insurance contract states that the

28. Bruyette v. Sandini, 291 Mass. 373, 377, 197 N.E. 29, 31 (1935).

29. Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954); N.Y. Vehicle and Traffic Law § 310.

30. Duprey v. Security Mut. Cas. Co., 43 Misc. 2d 811, 252 N.Y.S.2d 375 (Sup. Ct. 1964).

31. Duprey v. Security Mut. Cas. Co., 22 A.D.2d 544, 546, 256 N.Y.S.2d 987, 989 (3d Dep't 1965).

32. 11 N.Y.C.R.R. § 60.1.

33. O'Dwyer v. Grove Serv. Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338 (Sup. Ct. 1958), *aff'd*, 15 A.D.2d 457, 222 N.Y.S.2d 683 (1st Dep't 1961); David v. Bauman, 24 Misc. 2d 67, 196 N.Y.S.2d 746 (Sup. Ct. 1960).

34. Bartlett v. Travelers' Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933); Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957); Bruyette v. Sandini, 291 Mass. 373, 197 N.E. 29 (1935); Liguori v. Allstate Ins. Co., 76 N.J. Super. 204, 184 A.2d 12 (1962); Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 (1958).

company is "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay . . ." and later states, ". . . but the company may make such investigation and settlement on any claim or suit as it deems expedient."[35] The lower court reasoned that since the insurance company is not legally obligated to pay settlements, when it does settle it does so for its own benefit and cannot deduct the amount from its liability. Considering the interpretations of the upper and lower courts, the clause seems to be ambiguous. If the clause is ambiguous it should be construed against the insurance company and the deduction should not be allowed.[36] The upper court also points out that other states having legislation similar to Section 310 have uniformly recognized settlements as reducing the liability remaining under the policy.[37] It fails to add that of the five cases cited, two were from states imposing liability on an insurance company for not settling.[38] Of the three remaining, only one had compulsory insurance as in New York.[39] None of the statutes had a separate section stating its purpose as New York does in Section 310.[40] In these other states, however, a similar purpose is inferred.

Section 310 of the Vehicle and Traffic Law states that the purpose of the Compulsory Insurance Act is so that "innocent victims" in automobile accidents may be recompensed for their injuries.[41] The lower court feels the victims can be compensated best by not allowing settlements to be deducted from the company's liability. It reasoned that in a situation like the instant case the insurance company could settle with two claimants for $10,000 each, thereby rendering the vehicle in the accident uninsured as to the third claimant.[42] The upper court could have reasoned that this objection is more apparent than real. It would be foolish for an insurance company to do this, since all it might gain financially would be the court costs of the suit with the third claimant; its liability for damages would be $20,000 in either instance. On the other hand an insurance company would have much to lose. If a court felt that an insurance company was exploiting the right to deduct settlements from its liability, the court might decide against the company on grounds that such a settlement constituted bad

35. Duprey v. Security Mut. Cas. Co., 43 Misc. 2d 811, 813, 252 N.Y.S.2d 375, 378 (Sup. Ct. 1964).

36. *Accord*, Bushey and Sons v. American Ins. Co., 237 N.Y. 24, 142 N.E. 340 (1923); Long Island Coach Co. v. Hartford Acc. & Indem. Co., 223 App. Div. 331, 227 N.Y. Supp. 633 (1st Dep't 1928), *aff'd*, 248 N.Y. 629, 162 N.E. 552 (1928).

37. Conn. Gen. Stat. Ann. § 14-112 (Supp. 1963); Kan. Gen. Stat. Ann. §§ 8-738, 8-739 (1964); Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954); N.J. Rev. Stat. § 39:6-31 (1961); N.C. Gen. Stat. §§ 20-230-20-231, 20-279.1-20-279.38 (Cum. Supp. 1963).

38. Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957); Alford v. Textile Ins. Co., 248 N.C. 224, 103 S.E.2d 8, 70 A.L.R.2d 408 (1958).

39. Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954); N.Y. Vehicle and Traffic Law §§ 310-321.

40. Conn. Gen. Stat. Ann. § 14-112 (Supp. 1963); Kan. Gen. Stat. Ann. § 8-738, § 8-739 (1964); Mass. Gen. Laws Ann. ch. 90, §§ 34A-34J (1954); N.J. Rev. Stat. § 39:6-31 (1961); N.Y. Vehicle and Traffic Law § 310; N.C. Gen. Stat. §§ 20-230-20-231, 20-279.1-20-279.38 (Cum. Supp. 1963).

41. N.Y. Vehicle and Traffic Law § 310.

42. Duprey v. Security Mut. Cas. Co., 43 Misc. 2d 811, 252 N.Y.S.2d 375 (Sup. Ct. 1964).

faith. The upper court cites two cases which do not support the interpretation given by the lower court to Section 310,[43] but does not discuss it further. One of these cases suggests that a solution requiring more court decisions ". . . would . . . have catastrophic effects upon court calendars, already heavily congested despite the fact that less than 10% of all automobile accident claims actually reach trial."[44] Not allowing settlements to be deducted would require the reduction of many more claims to judgment; the consequent congestion in already crowded courts would cause considerable expense and delay. An "innocent victim" might be better recompensed if he could collect his money soon after the accident and not a few years later. One point that has not been discussed in sufficient detail by either court is the effect of Section 370 of the Vehicle and Traffic Law, which provides for ratable apportionment for vehicles for hire.[45] Had our case involved a taxicab, with all other facts remaining the same, the upper court could not have decided the case as it did. If a vehicle for hire had an accident with another car containing five people, the five people, according to the upper court, would have different rights than if the car in which they were riding had been hit by a passenger car. This does not seem just. Although it may be argued that passengers in a vehicle for hire are paying customers who deserve protection, Section 310 shows a desire by the legislature to protect "innocent victims" of all automobile accidents.[46] Section 370 has been interpreted by the courts to mean that an insurance company cannot deduct settlements from its liability under a policy in a case concerning a vehicle for hire. A strong argument can be made that since the courts have required ratable distribution in circumstances closely analagous to those in the instant case, the same rule should be applied unless the legislature specifically states otherwise. Most of the problems in the instant case would have been avoided had the insurance company included in its policy a provision allowing it to deduct settlements from its liability. It is surprising that the insurance company did not include such a provision since an Insurance Department Regulation allows its insertion.[47] Another solution which would make future decisions easier would be for the legislature to clarify its position by enacting a statute specifically covering the situation which arose in the instant case.[48] In this particular case, the wording of the contract and the possibility of incorporating the legislative policy

43. O'Dwyer v. Grove Serv. Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338 (Sup. Ct. 1958), *aff'd*, 15 A.D.2d 457, 222 N.Y.S.2d 683 (1st Dep't 1961); David v. Bauman, 24 Misc. 2d 67, 196 N.Y.S.2d 746 (Sup. Ct. 1960).

44. David v. Bauman, *supra* note 43, at 69, 196 N.Y.S.2d at 749.

45. N.Y. Vehicle and Traffic Law § 370.

46. N.Y. Vehicle and Traffic Law § 310.

47. 11 N.Y.C.R.R. § 60.1(b).

48. The legislature could extend the rule in Section 370 of the New York Vehicle and Traffic Law to govern all vehicles, could allow all settlements to be deducted, or could adopt one of the solutions discussed at length in legal periodicals. Keeton, *Preferential Settlement of Liability-Insurance Claims*, 70 Harv. L. Rev. 27 (1956); 11 N.Y.U.L. Rev. 447 (1934); Comment, *Pro-Rating Automobile Liability Insurance to Multiple Claimants*, 32 U. Chi. L. Rev. 337 (1965); 43 Yale L.J. 136 (1933).

of Section 370 into Section 310 seem to show that the lower court reached the correct decision although the cases and the policy reasons supporting the opposite view cannot be ignored.

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