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INSURANCE—RIGHT OF INSURED TO MAKE HIS OWN DEFENSE AT EXPENSE OF INSURER WHERE P AND D ARE INSURED BY SAME INSURER—The drivers of two automobiles involved in a collision were insured against liability for damages by the same insurance company. Their policies contained clauses reserving to the insurer the right and duty to defend all actions. One driver, Borad, sued the other, O'Morrow, who, through counsel of his own selection, filed a cross complaint for damages and gave notice to the insurance company that these attorneys would also present his defense. When the company informed O'Morrow that it considered his independent defense a breach of the co-operation clause, he brought this action for declaratory relief. On appeal from a judgment in the trial court for insurer, *held*, the insurer may not control the defenses of two insureds, because it is contrary to public policy to permit both sides of litigation to be directed by one person; and, where there is such conflict between the interest of the insurer and the insureds, the latter are excused from

compliance with the co-operation clauses and may recover from insurer any costs of suit and reasonable attorney's fees incurred in defending themselves against each other's claims. *O'Morrow v. Borad*, 27 Cal. (2d) 794, 167 P. (2d) 483 (1946).

The court's solution to this novel problem is more a cutting than an untying of the proverbial knot. Granted that the insurance company would gain if the conflicting claims of the insureds nullify each other, there are other ways of protecting the insureds than by taking away the insurer's contractual rights.¹ It is something of a slur on the legal profession to suggest that the attorneys hired by insurer to represent the parties to the litigation would be guilty of collusive or champertous conduct.² If in fact the defense were mismanaged, the insured would have a cause of action for damages resulting from the negligence or bad faith of the insurer.³ The insurer is required to exercise due care in protecting the rights of the insured.⁴ When there is a conflict of interest between insurer and insured, the insurer's conduct is subject to closer scrutiny,⁵ and the insured must be informed to give him an opportunity to protect himself.⁶ In such a case there is no reason why both insurer and insured should not have legal representation.⁷ But, conceding that public policy prevents a defense by insurer, is it fair to make insurer pay the costs of the defense by insured? On prior appeal to the California District Court of Appeals, insured's claim for attorney's fees from insurer for such defense was refused,⁸ the ground of decision being

¹ The court distinguishes the principal case from the situation where the conflict between the interests of insurer and insured is due to the probability that any judgment received will exceed the amount of policy coverage. In such a case the interest of the insurer makes certain a vigorous defense; whereas in the instant case the court feels there is no such assurance. Principal case at p. 799.

² In determining whether to accept an offer of settlement, counsel for insurer is often put in the awkward position of serving two masters. If the amount offered is within the policy coverage, it would benefit insured to have insurer accept. But if the settlement figure approaches the limit of insurer's liability, it might be to his benefit to chance escaping all liability by defending. No doubt, insurer could insist on defending the suit in insured's name, and any excess in adverse judgment over the policy would have to be paid by insured, unless he could prove insurer guilty of neglect of insurer's interest or of bad faith in not accepting settlement. See VANCE, HANDBOOK OF THE LAW OF INSURANCE, 2d ed., § 275 (1930).

³ *State Automobile Mut. Ins. Co. v. York*, (C.C.A. 4th, 1939) 104 F. (2d) 730, certiorari denied, 308 U.S. 591, 60 S. Ct. 120 (1939).

⁴ That insurer is an independent contractor in conducting defense, *Holmes v. Hughes*, 125 Cal. App. 290, 14 P. (2d) 149 (1932); that insurer in defending acts as agent of insured, *Traders & General Ins. Co. v. Rudco Oil & Gas Co.*, (C.C.A. 10th, 1942) 129 F. (2d) 621, 142 A.L.R. 799 at 809 (1943).

⁵ *Traders & General Ins. Co. v. Rudco Oil & Gas Co.*, (C.C.A. 10th, 1942) 129 F. (2d) 621, 142 A.L.R. 799 at 809 (1943).

⁶ *Automobile Underwriters' Ins. Co. v. Long*, (Texas 1933) 63 S.W. (2d) 356.

⁷ Where injured employee alleged two causes of action, only one of which was covered by employer's indemnity policy, it was held that neither could employer demand surrender of defense by insurer, nor insurer retain exclusive control of litigation. *Fidelity & Casualty Co. v. Stewart Dry Goods Co.*, 208 Ky. 429, 271 S.W. 444 (1925), 43 A.L.R. 318 at 326 (1926).

⁸ *O'Morrow v. Borad*, 70 A. Cal. A. 497, 161 P. (2d) 28 (1945).

that since insurer owed no duty to prosecute the counterclaim,⁹ the insurer should not be held liable for the defense.¹⁰ However, the Supreme Court of California has reached the opposite result by relying on the law applicable where the insurer has made an unwarranted refusal or failure to defend the insured, the rule in such a case being that insured may defend himself at insurer's expense.¹¹ It is submitted that such an analogy is not apropos in the instant case where insurer has made a good faith offer to defend, which insured has refused.¹² Attention should also be called to the situation where insurer conducts the defense but insured has his own attorneys participate for added protection. All such expenditures are incurred at insured's own expense, unless authorized by insurer.¹³ In the instant case the court seems to overlook the purpose of the clauses giving control of litigation to insurer and requiring the cooperation of insured. The insurance companies write these clauses into their policies to protect themselves from collusive and carelessly defended suits¹⁴ and not, as intimated by the court, to give the policyholder more for his money. Nevertheless, the insured would suffer a forfeiture if the insurer did not have to meet the expense, and it is no secret that courts dislike forfeitures in insurance contracts. Consequently, the result reached in the principal case will probably be followed in subsequent decisions. It is suggested that the doctrine could have been squared with the result reached by the court by implying a negative covenant on the part of the insurance company not to control both sides of the litigation. If the parties had thought about this matter, this probably would have been their intent.¹⁵

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⁹ Suit brought by insured against third person is not within provision of policy reserving to insurer defense of insured. *Utterback-Gleason Co. v. Standard Accident Ins. Co.*, (Albany Co. S. Ct. 1920) 179 N.Y.S. 836, affirmed, 193 App. Div. 646, 184 N.Y.S. 862 (1920), affirmed, 233 N.Y. 549, 135 N.E. 913 (1922).

¹⁰ The District Court of Appeals offered no citation of authorities to support its opinion. *O'Morrow v. Borad*, 70 A. Cal. A. 497, 161 P. (2d) 28 (1945).

¹¹ *Greer-Robbins Co. v. Pacific Surety Co.*, 37 Cal. App. 540, 174 P. 110 (1918); *Kelley v. Kass*, 154 Pa. Super. 267, 35 A. (2d) 531 (1944); *Conroy v. Commercial Casualty Ins. Co.*, 292 Pa. 219, 140 A. 905 (1928); 8 APPLEMAN, INSURANCE LAW AND PRACTICE, § 4691 (1942); 45 C.J.S., § 933 at 1059, § 934 at 1061; 29 AM. JUR., § 1077.

¹² *Fidelity & Casualty Co. v. Highway Construction Co.*, 48 Ohio App. 522, 194 N.E. 456 (1934); 8 APPLEMAN, INSURANCE LAW AND PRACTICE, § 4691 at p. 43 (1942); 45 C.J.S., § 926.

¹³ *Fidelity & Casualty Co. v. Beeland Bros. Mercantile Co.*, 242 Ala. 591, 7 S. (2d) 265 (1942); *McCabe v. Employers' Liability Assur. Corp.*, 212 N.C. 18, 192 S.E. 687 (1937); *Tulare County Power Co. v. Pacific Surety Co.*, 43 Cal. App. 315, 185 P. 399 (1919).

¹⁴ *Buckner v. Buckner*, 207 Wis. 303, 241 N.W. 342 (1932) (purpose of cooperation clause); *Lindsey v. Gulf Ins. Co.*, (La. 1942) 7 S. (2d) 757 (reason for control of litigation by insurer); 29 AM. JUR., § 1075.

¹⁵ In recent years the courts have worked out a doctrine of constructive promises, more or less collateral to the established field of constructive conditions. See *Parev Products Co., Inc. v. L. Rokeach & Sons, Inc.*, (C.C.A. 2d, 1941) 124 F. (2d) 147; *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, 89 S.E. 12 (1916); *Kirke LaShelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933), noted, 33 MICH. L. REV. 299 (1934).