

OUTSIDE COUNSEL

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Standoffs Over Standing Down an Attorney's Right to Withdraw

Dillon v. Otis Elevator Co. and New York Law on Motions by Counsel to Withdraw. For numerous years in New York, motions to withdraw by counsel retained by insurers for parties have been summarily denied by invoking the rule established in *Brothers v. Burt*, that “a motion to withdraw as counsel is a poor vehicle to test an insurer’s right to disclaim liability” 27 NY2d 905, 906 (1970).

Generally, “[t]he decision to grant ... or deny permission for counsel to withdraw lies within the discretion of the trial court, and the court’s decision should not be overturned absent a showing of an improvident exercise of discretion.” *Cashdan v. Cashdan* 243 AD2d 598 (Second Dept. 1997).

Recently, the First Department Appellate Division in reviewing a motion to withdraw by a defense firm retained by a liability insurer, emphasized that the effectiveness of counsel dictates that the insured must cooperate in their defense and it was not an improvident exercise of discretion for the trial court to grant counsel’s motion. It has been long established that lawyers retained by insurers may not be permitted to withdraw from representing a party if the court believes that counsel is only making a motion to withdraw in order to further an insurer’s goal of denying coverage.

‘Burt’ Not Bright-Line Rule

However, in *Dillon v. Otis Elevator Co.*, the court disagreed that *Burt* should be credited with enunciating a bright line rule of law concerning the circumstances establishing an attorney’s right to withdraw from representation. No. 06173, slip op. (N.Y. App. Div. First Dept. July 28, 2005).

The New York Disciplinary Rules allow counsel to withdraw if the client’s “conduct renders it unreasonably difficult for the lawyer to carry out employment effectively.” 22 NYCRR §1200.15 (c)(1)(iv) (2005). Recognizing the fact that *Brothers v. Burt* was ambiguous and susceptible to misapplication, the court clarified the law in *Dillon* by clearly stating that counsel should not be compelled to represent an uncooperative client who refuses to assist or communicate with the

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attorney. While “[a]ttorneys should not be placed in such a trap,” at the same time the court reaffirmed that motions to withdraw should not be misused by insurers seeking to deny coverage.

In *Dillon*, the liability insurer retained counsel to represent the insured, Bush Elevator Co. The designated defense attorneys moved to withdraw as counsel because Bush failed to cooperate in the

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defense of the case. The law firm pointed to the fact that Bush’s failure to cooperate had resulted in the preclusion of documents and a witness. Bush failed to supply counsel with the documents requested during discovery and at one point, even denied that Mr. Glick, a witness and principal of Bush, existed. An investigator for counsel was also forcefully commanded to leave Bush’s premises when attempting to gather information for the defense of the case. In recognition of “Bush’s repeated and intentional refusal to cooperate,” the Appellate Division affirmed the granting of counsel’s motion. *Id.* In doing so, the court recognized the *Brothers v. Burt* holding that a motion for “the withdrawal of counsel is an inappropriate vehicle for testing the propriety of an insurer’s disclaimer of coverage” but clarified that *Brothers v. Burt* “did not enunciate a bright

line rule ... of law.” *Id.* (citing *Brothers*, 27 NY2d 905). Unlike in *Brothers*, in *Dillon* there was a “repeated and intentional refusal to cooperate with counsel.” *Id.*

In rendering its decision, the court noted that counsel was not using the motion to withdraw in order to further the interests of the liability carrier’s disclaimer of coverage. The insurer had already started a declaratory judgment action against Bush to disclaim coverage. The court thus held that counsel’s motion was supported by “Bush’s absolute refusal to communicate and to cooperate ...” with counsel. *Id.* Since Bush refused to cooperate with counsel and the court did not believe that the motion was a test of the insurer’s coverage (given the separately pending declaratory judgment action) withdrawal was allowed. The court concluded that to automatically apply the rule in *Brothers v. Burt* would force attorneys “to continue representing a client who refuses to cooperate or assist or even communicate with the attorney.”

If Wish Is Not to Pay for Defense

A motion to withdraw will be denied if the court believes that counsel is trying to withdraw merely because the insurer which retained them does not wish to provide coverage or pay for defense costs.

In *Flans v. Martini* the Appellate Division, First Department stated that a motion to withdraw as counsel “is not an appropriate way to establish an insurer’s right to disclaim liability or deny coverage.” 136 AD2d 498, 499-500 (1988) (citing *Brothers*, 27 NY2d 905). The court stated:

the insurer has a heavy burden of demonstrating lack of cooperation on the part of the insured and must show that it acted diligently in attempting to bring about the insured’s cooperation.... *Id.* at 499.

There must be “willful and avowed obstruction,” and “nonaction” on the part of the insured is inadequate by itself to show obstruction. *Id.*

In *Sojka v. 43 Wooster*, the insurer advised the defendant it would not indemnify liability or pay defense costs. 797 NYS2d 474 (2005). Faced with the insurer’s refusal to pay legal fees, counsel moved to withdraw. In denying counsel’s motion the court held that the issue of coverage “can only be resolved by a declaratory judgment action....”

which would afford the insured the opportunity to litigate the facts related to the insurer's denial of coverage. *Id.*

In *Monaghan v. Meade*, the attorneys sought withdrawal on the basis that the carrier contended the insured did not appear for several pretrial examinations and did not stay in regular contact with the insurer. 91 AD2d 1014, 1015 (1983). Refusing to allow counsel to withdraw based upon the insurer's contentions regarding lack of cooperation, the court acknowledged the insurer's intention to disclaim coverage and restated that the only proper way to establish the lack of coverage would be a declaratory judgment action. *Id.*

'Dillon's' Difference

Dillon differed from *Flans*, *Sojka* and *Monaghan* because counsel was not acting to further the insurer's denial of coverage. The insurer had acted on its own and started a separate declaratory judgment action. Furthermore, the lack of cooperation was blatant and directly impeded counsel's effectiveness. Not only did Bush fail to provide documents which were then excluded from the case, but Bush also lied about the existence of a witness and outright denied the defense attorney's investigator the opportunity to speak with them or get information.

In instances where the actions of the client have impaired the effectiveness of counsel whether for the plaintiff or the defendant, motions to withdraw have been granted. *Dillon* is thus similar to *Kraus* and *McCormack*. In *Kraus v. Botti*, the plaintiff not only failed to pay legal fees but also interfered with counsel's ability to represent her. 267 AD2d 564 (1999). There the court noted that the attorney-client relationship had "deteriorated to such an extent that continued representation would be inappropriate." *Id.* In *McCormack v. Kamilian*, the Appellate Division allowed the firm representing the plaintiff to withdraw since the client "rendered it unreasonably difficult for the lawyer to carry out employment effectively." 10 AD3d 679 (2004) (citing NYCRR 1200.15 (c)(1)(iv)).

In *Dillon*, the insured directly interfered with the defense of the case by depriving counsel of documents and the ability to speak with individuals who could provide useful information. If the attorneys representing Bush were forced to remain in the case they would be locked in a position where failure would be inevitable, crippled by the inability to submit important evidence against the opposition and unable to deal with an uncooperative client. As the *Dillon*

court noted, it would not be fair to force lawyers into this sort of "trap." slip op. No. 06173.

Prerequisites to Withdrawal

The decision in *Dillon* clearly sets out the prerequisites necessary for counsel retained by an insurer to successfully withdraw from a case. The client must have acted in a way that directly affects the attorney's ability to represent the client. Simply failing to cooperate with the insurer is not proper grounds and must be handled by a separate declaratory judgment action. The court must believe that the client's actions have made it "unreasonably difficult" for the attorney to work properly in the case.

While the cases have held that a client's refusal to pay agreed to fees or retainers are a permissible reason for counsel to withdraw, where a plaintiff's attorney seeks to withdraw, the court has directly intertwined the client's refusal to pay with the client's uncooperativeness. In *Kraus v. Botti*, the Third Department held that plaintiff's failure to

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pay legal fees and engaging in behavior which impeded counsel's proper representation of her interests were sufficient grounds for withdrawal. The court found that the plaintiff's actions had caused the deterioration of the attorney-client relationship to such an extent that the continued representation would be inappropriate. Similarly, in *Kay v. Kay*, the Second Department stated that "it is undisputed that the plaintiff made no payment to the appellant other than the initial retainer fee..." and that the attorney advised the plaintiff that he "would exert every effort to be relieved if the plaintiff did not pay the initial fees due pursuant to the retainer agreement between the parties." 245 AD2d 549. The court further stated that "[a]lthough there may be circumstances in which a court may properly compel an attorney to continue to represent a client who is in arrears, there is no basis, in the case before us, to force the appellant to continue to finance the litigation or to render gratuitous services." But in *Cashdan v. Cashdan*, the Second Department held

that the "[n]onpayment of counsel fees alone will not entitle an attorney to withdraw from representation." 243 AD2d 598. In *Cashdan*, the client's simple assertion that she intended to honor her obligation to pay the fees due and owing was sufficient to deny the motion.

The other recent First Department decision of *Sojka v. 43 Wooster LLC* (*infra*) thus establishes that a liability insurer's unilateral decision that it can disclaim coverage and as such will no longer pay to defend the claim or indemnify the insured in the case of liability is insufficient to support counsel's motion to withdraw. The court held that moving

to be relieved as counsel on the grounds that withdrawal is permitted if the client refuses to pay ... revolve primarily around the validity of the [insurer's] disclaimer ... and that the right of an insurer to deny coverage, can only be resolved by a declaratory judgment action in which the defendant would be able to adequately litigate the facts of the insurance company's disclaimer. 797 NYS2d 474

It is unlikely that an insurer would be successful in its efforts to disclaim coverage by simply refusing payment of fees to designated defense counsel. Based upon *Dillon* and *Sojka*, that is a matter to be addressed in a declaratory judgment action.

If Insured Is Uncooperative

Defense attorneys retained by liability insurers to defend parties in legal actions will not be permitted by the courts to withdraw as designated counsel unless the insured fails to cooperate and assist the attorney in their defense. If the court believes that counsel is trying to withdraw merely because the insurer which retained them does not wish to provide coverage and or pay for defense costs their motions will be denied. The only proper means to establish the insurer's rights and obligations to the insured is by commencing a declaratory judgment action.

Liability carriers must also consider the attendant risks of designated defense counsel being permitted to withdraw from representing the insured. Should the carrier be unsuccessful in its declaratory judgment effort to deny coverage and the insured's interests are not defended, the carrier may bear the cost of a judgment for plaintiff.

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