that the doctrine involves considerations which the federal courts must decide for themselves and, further, that the *Erie* doctrine does not foreclose all possibility of independence on the part of federal courts.[31] It might even be suggested that, since federal courts must now follow the conflict of laws rules of the state in which they sit[32] and since this at times leads to undesirable results,[33] especially where nation-wide service of process is available under the Interpleader Act,[34] the federal courts might use an independently developed forum non conveniens doctrine to relegate suits to a forum where a more appropriate law is available. It must be recognized, however, that this would be contrary to the present tendency to apply forum non conveniens less restrictively in the federal courts.[35]

Insurance—Cooperation Clause—Conflict of Interest between Insured and Insurer as Excuse from Compliance—[California].—Following an intersection collision between the automobiles of both insured parties, each of whom carried identical policies of liability insurance with the same insurers,[1] a negligence complaint was filed to which a cross-complaint was filed. The personal attorneys for the cross-complainant notified the insurer that they would also conduct the defense in the action. The insurer advised the defendant and cross-complainant in the negligence action that it was relieved of any liability under the policy because the defendant had violated the cooperation clause of the policy by not permitting the insurer to conduct the defense in the negligence action.[2] The plaintiff in the present suit (defendant and cross-complainant in the negligence action) instituted this declaratory judgment proceeding, naming the plaintiff in the negligence action and the insurer as defendants, to determine the rights of the parties under the policies. The trial court held that since the plaintiff in the instant case had violated the cooperation clause, the insurer was relieved of li-

[31] Clark, State Law in the Federal Courts; The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 267 (1945); Exceptions to Erie v. Tompkins: The Survival of Federal Common Law, 59 Harv. L. Rev. 966 (1946).

[32] Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941).

[33] Griffin v. McCoach, 313 U.S. 498 (1941), noted in 9 Univ. Chi. L. Rev. 141 (1941).

[34] 49 Stat. 1096 (1936) as amended, 28 U.S.C.A. § 41 (26) (Supp., 1945).

[35] Compare Williams v. Green Bay & Western R. Co., 326 U.S. 549 (1946), with Rogers v. Guaranty Trust Co. of New York, 288 U.S. 123 (1933); see note 18 supra.

[1] Under complementary policies both were insured by Firemen's Insurance Company and the Metropolitan Casualty Insurance Company. The two companies are referred to hereafter as the insurer.

[2] The policy provided that the insurer "shall defend in his name and behalf any suit against the insured . . . . ; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company. . . . . [The insured] shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suit. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical or surgical relief to others as shall be imperative at the time of the accident." O'Morrow v. Borad, 167 P. 2d 483, 485 (Cal., 1946).

ability. On appeal to the Supreme Court of California, *held*, compliance with the cooperation clause would be excused in view of the conflict of interest between the insured and insurer, and the insurer would be liable for any judgment entered in the negligence actions. *O'Morrow v. Borad.*[3]

In order to protect themselves from unskillful handling or collusion, insurers customarily insert a cooperation clause in all types of liability insurance,[4] thus affording the insurer control of all negotiation, settlement, and litigation of claims made by injured third parties. In the normal situation it is to the interest of the insured to place negotiation and litigation in the hands of the insurer. But where a conflict of interest between the insured and insurer occurs, a strict compliance with the cooperation clause would deny an insured the benefit of counsel dedicated exclusively to the insured's interests.[5]

Where the insurer's liability is limited and an offer of settlement from the injured party is close to that limited amount, there is a temptation to the insurer to reject the offer and risk litigation. If the insurer yields to this temptation to risk what in effect amounts to the insured's unlimited personal liability, an additional liability has been imposed upon the insurer for having rejected a fair settlement in bad faith.[6] If an insurer of joint defendants, each of whom it has insured separately, conducts the defense against the interest of one of the defendants, in order to limit its liability to one policy, it will be liable for the full amount of the judgment rendered against the neglected defendant.[7]

In general, the insurer is under a duty to exercise good faith and diligence in defending an action brought against the insured,[8] and is liable in damages for

[3] 167 P. 2d 483 (Cal., 1946), affirming in part O'Morrow v. Borad, 161 P. 2d 28 (Cal. App., 1945). "This case is .... peculiar in that .... it is the first case to reach an appellate Court in the United States where the questions involved are those of the respective rights of public liability insurers and their assureds where two participants in the identical accident happen to be insured in the same company. .... The most diligent search and a voluminous correspondence with the authors and publishers of texts on insurance law, all of whom express great interest in the outcome ...., fail to reveal any decided case involving this question. ...." Plaintiff-Appellant's brief, p. 7. In view of the widespread operations of liability insurance companies it is indeed strange that this problem has not previously been before the courts. The excellent position in which the insurance company finds itself in such a situation would indicate that the normal result is settlement.

The instant case provides an admirable illustration of the advantages of a declaratory judgment to a party uncertain of his contract rights. By a declaratory judgment he may obtain a determination of his rights in advance without having to take the risk of a forfeiture for acts which a court might afterwards determine were not permitted by the contract. See Borchard, Declaratory Judgments 312 (1934).

[4] The clause in question was standard in form, identical with that suggested in Sawyer, Automobile Liability Insurance 294 (1934).

[5] Cf. Pennix v. Winton, 61 Cal. App. 2d 761, 143 P. 2d 940 (1943).

[6] 13 Univ. Chi. L. Rev. 105 (1946), noting Halladay v. Olympia Fields Country Club, 295 Ill. App. 622, 15 N.E. 2d 345 (1938); Vance, Insurance 918 (2nd ed., 1930).

[7] New York Consolidated R. Co. v. Massachusetts Bonding & Ins. Co., 193 App. Div. 438, 184 N.Y. Supp. 243 (1920), aff'd 233 N.Y. 547, 135 N.E. 912 (1922).

[8] Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597, 15 N.W. 2d 834 (1944); Hilker v. Western Automobile Ins. Co. 204 Wis. 1, 231 N.W. 257 (1930); New York Consolidated R.

neglect of that duty. But where, as in the instant case, the duty is almost undischargeable, justice to the insured demands a more effective remedy. Literal compliance with the cooperation clause in the instant case would afford the insurer the opportunity of defending both the complaint and cross-complaint, in other words absolute control of the defenses of both parties to the litigation.[9] Under such circumstances it should be fairly easy for the insurer to demonstrate contributory negligence which would relieve the insurer of liability under both policies. To give such an unusual advantage by means of a form clause not intended to cover such a situation could hardly be conscionable. The solution of this problem so inherently fraught with inextricable conflict of interests demands that compliance with the cooperation clause be excused.

Labor Law—National Labor Relations Act—Employer's Speech during Working Hours as Unfair Labor Practice—[National Labor Relations Board].—The National Labor Relations Board had scheduled a run-off election[1] between an independent and a CIO union, to be held on the respondent's premises. The power in the plant was shut off and the employees were directed over the public address system and by foremen to convene on company time in the shipping room. There the president of the respondent company delivered an anti-CIO speech to them. The respondent had prohibited union solicitation and organizational activity at any time on company premises; but during the campaign it had enforced this rule only against the CIO. In addition, the respondent kept itself informed as to the progress of the campaign by reports from supervisors and through what an agent overheard at bars frequented by employees. On charges of unfair labor practices under Section 8(1) of the National Labor Relations Act,[2] *held*, the respondent violated the Act, (1) by promulgating the blanket no-solicitation rule, (2) by discriminating against the outside union in applying the rule, (3) by surveillance of pre-election activities, (4) by campaign state-

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Co. v. Massachusetts Bonding & Ins. Co., 193 App. Div. 438, 184 N.Y. Supp. 243 (1920); Brassil v. Maryland Casualty Co., 210 N.Y. 235, 104 N.E. 622 (1914); Vance, Insurance, 917 (2nd ed., 1930).

[9] In the negligence litigation the plaintiff could file his complaint by attorneys of his own choice, and likewise the defendant could file his cross-complaint by his attorneys. But the cooperation clause would require that the defendant permit the insurer to defend the complaint and the plaintiff permit the insurer to defend the cross-complaint. In this manner the insurer would have complete control of the defense in the litigation.

[1] An election had been held on January 19, 1945, with the following result: Association, 448; CIO, 444; neither, 34. Since no choice on the ballot received the required majority of the votes cast it became necessary to conduct a run-off election with "neither" dropped from the ballot and the employees left to choose between the two unions. Respondent, after having refrained from participating in the first pre-election campaign, began on February 3, 1945, an intensive five-day campaign favoring the Association. The run-off election of February 8, 1945, resulted in a clear majority for the Association with the following tabulation: Association, 584; CIO, 394; challenged ballots, 14. It should be noted that even though 53 more employees voted in the second election, the CIO received 50 votes less than in the first one.

[2] 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (1942).