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Liability of an Insurer for More than the Policy Limits

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were raised. This qualification of the decision would seem to present another interesting problem, in view of the commonly accepted concept that if a former adjudication is held to be a bar to the prosecution of a subsequent action, it bars the subsequent action in every forum, whether that of a sister state or of the federal system.¹⁸

JOSEPH F. MAIER

LIABILITY OF AN INSURER FOR MORE THAN THE POLICY LIMITS

Defendant issued an insurance policy to plaintiff indemnifying it against loss to anyone injured in the operation of plaintiff's trucks. One of the trucks injured a minor child and a suit was brought against this plaintiff on behalf of the child and another suit on behalf of the child's father. Before the trial, insurer refused to accept an offer of settlement for \$5500 which was within the policy limit of \$10,000. The insurance company stated that it would only be liable for \$5000 in any event, since it was reinsured for \$5000, and refused to pay more than \$4250 toward settlement, the balance of \$1250 to be paid by the insured, which the latter refused to do. Plaintiff in the instant suit introduced evidence showing that the insurance company thought that this was a good offer of settlement in view of the serious injuries sustained by the child. Upon trial, verdict in excess of the policy limit was given, and again an offer to settle within the amount of the policy if no appeal was prosecuted was refused by the insurer. The plaintiff contends that insurer is liable for the total amount of the judgment. The lower court dismissed plaintiff's petition. *Held*, by the Court of Appeals of Ohio that judgment is reversed and remanded for further proceedings. An insurance company owes the duty of acting in good faith in conducting the settlement of claims within the limits of the insurance policy, and the negligent failure to settle may render insurer liable for the total judgment recovered against insured. *J. Spang Baking Co. v. Trinity Universal Ins. Co.*, (Ohio 1946) 68 N.E. (2d) 122.

A number of cases are in accord with the above decision in holding that the mere negligence of an insurer in failing to settle a claim within the amount of the policy will make the insurer liable for the total amount of the judgment although it exceeds the limitation of the policy.¹ The courts base their decisions on the ground that an insurer cannot act arbitrarily in refusing to make a settlement in absence of an explicit contract to that effect,² but must settle if that is

18. See *Chicago Cemetery Ass'n v. United States*, (N.D. Ill 1937) 19 F. Supp. 228, 229; *Bluefields S. S. Co., Limited v. United Fruit Co.*, (C.C.A. 3rd, 1917) 243 Fed. 1, 9; *Weigley v. Coffman*, (1891) 144 Pa. St. 489, 22 Atl. 919.

1. *Cavanaugh Bros. v. General Accident Fire & Life Assur. Corp.* (1919) 79 N.H. 186, 106 A. 604; *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, (1917) 153 C.C.A. 377, 240 F. 573; *Douglas v. United States Fidelity & Guaranty Co.*, (1924) 81 N.H. 371, 127 A. 708, 37 A.L.R. 1477.

2. See, *Douglas v. United States Fidelity & Guaranty Co.*, (1924) 81 N.H. 371, 127 A. 708, 37 A.L.R. 1477.

the reasonable thing to do.³ Negligence also consists of electing to defend rather than settle within the amount of the policy and negligent preparation and defense of a suit against insured;⁴ or failure to settle a claim within the policy limitations when a judgment against insured was certain to exceed the policy limitation.⁵

However, a majority of the courts hold that negligence alone will not render the insurer liable for more than the amount of the policy, but the insurer must have acted fraudulently or in bad faith.⁶ Various decisions have defined fraud and bad faith to be failure to settle within the policy limits when insurer's investigator and counsel concede that a recovery would be had greatly in excess of insurer's liability;⁷ failure to interview witnesses, to attempt to acquaint itself with the extent of the injuries, and rejection of reasonable offers of settlement before suit and during trial, and rejection of a reasonable offer of settlement during the trial because insured would not pay part of the settlement;⁸ failure to settle within the amount of the policy when insurer knew there was no reasonable prospect of reversing judgment by an appeal and in fact did not appeal;⁹ and arbitrary refusal to settle within the policy limits before and after trial.¹⁰ However, it is not bad faith where the insurer elects to defend rather than settle, where, upon full investigation, it concludes that it is a case of no liability¹¹ or believes that the action might be defeated or kept within the policy limits;¹² or if

3. *Cavanaugh Bros. v. General Accident Fire & Life Assur. Corp.*, (1919) 79 N.H. 186, 106 A. 604.
4. *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, (1917) 153 C.C.A. 377, 240 F. 573.
5. *Douglas v. United States Fidelity & Guaranty Co.*, (1924) 81 N.H. 371, 127 A. 708, 37 A.L.R. 1477.
6. *Best Bldg. Co., Inc. v. Employers' Liability Assur. Corp., Ltd.*, (1928) 247 N.Y. 451, 160 N.E. 911, 71 A.L.R. 1464; *Berk v. Milwaukee Automobile Ins. Co.*, (1944) 245 Wis. 597, 15 N.W. 2nd 834; *Noshey v. American Automobile Ins. Co.* (C.C.A. 6th Cir. 1934) 68 F. 2nd 808; *American Mut. Liability Ins. Co. of Boston, Mass., v. Cooper*, (C.A.A. 5th Cir. 1932) 61 F. 2nd 446; cert. denied (1933) 53 S. Ct. 595, 289 U.S. 736, 77 L.Ed. 1483; *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Md.*, (1916) 162 Wis. 39, 155 N.W. 1081, Ann. Cas. 1918C 399; *Johnson v. Hardware Mut. Casualty Co.*, (1936) 108 Vt. 269, 187 A. 788; *Georgia Casualty Co. v. Mann*, (1932) 242 Ky. 447, 46 S.W. 2nd 777; *Boling v. New Amsterdam Casualty Co.*, (1935) 173 Okl. 160, 46 P. 2nd 916; *City of Wakefield v. Globe Indemnity Co.*, (1929) 246 Mich. 645, 225 N.W. 643; *Lanferman v. Maryland Casualty Co. of Baltimore*, (1936) 222 Wis. 406, 267 N.W. 300; *Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp.*, (1938) 204 Minn. 50, 282 N.W. 481; *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, (1939) 186 Miss. 747, 191 So. 415; *Auto Mut. Indemnity Co. v. Shaw*, (1938) 134 Fla. 815, 184 So. 852; *Tiger River Pine Co. v. Maryland Casualty Co.*, (1931) 163 S.C. 229, 161 S.E. 491; *Maryland Casualty Co. v. Cook-O'Brien Const. Co.*, (C.C.A. 8th Cir. 1934) 69 F. 2nd 462, cert. denied (1934) 55 S. Ct. 81, 293 U.S. 569, 79 L.Ed. 668; *Maryland Casualty Co. v. Elmira Coal Co.*, (C.C.A. 8th Cir. (1934) 69 F. 2nd 616.
7. *Noshey v. American Automobile Ins. Co.*, (C.C.A. 6th Cir. 1934) 68 F. 2nd 808.
8. *American Mut. Liability Ins. Co. of Boston, Mass. v. Cooper*, (C.C.A. 5th Cir. 1932) 61 F. 2nd 446, cert. denied (1933) 53 S. Ct. 595, 289 U.S. 736, 77 L.Ed. 1483.
9. *Boling v. New Amsterdam Casualty Co.*, (1935) 173 Okl. 160, 46 P. 2nd 916.
10. *Tiger River Pine Co. v. Maryland Casualty Co.*, (1931) 163 S.C. 229, 161 S.E. 491; *Maryland Casualty Co. v. Elmira Coal Co.*, (C.C.A. 8th Cir. 1934) 69 F.2nd 616.
11. *Farmers Gin Co. v. St. Paul Mercury Indemnity Co.*, (1939) 186 Miss. 747, 191 So. 415; *Berk v. Milwaukee Automobile Ins. Co.*, (1944) 245 Wis. 597, 15 N.W. 2nd 834.
12. *City of Wakefield v. Globe Indemnity Co.*, (1929) 246 Mich. 645, 225 N.W. 643.

there has been a mere mistake of judgment.¹³ Whether the insurer acted in bad faith in refusing to settle is a question for the jury.¹⁴

Failure to notify insured of an offer to settle will not make insurer liable for an amount in excess of the policy limits, even though it had opportunity to settle within the amount of the policy, in the absence of fraud, negligence or bad faith.¹⁵

Neither of the above stated theories were relied upon by the courts in cases in which the injured party brought action against the insurer when a recovery could not be had from the insured. In *Duncan v. Lumbermen's Mut. Casualty Co.*¹⁶, where the injured party alleged that the insurance company failed to settle within the amount of the policy and that plaintiff could not recover the excess from the insured, the New Hampshire court held that plaintiff could not recover an amount in excess of the policy limitation from insurer on the ground that the insurer's duty to protect its insured against liability cannot be extended to include protection of one seeking to hold the insured liable, nor was there privity of contract between plaintiff and defendant. There seems to be a split of authority on this point, however, as the Supreme Court of Florida¹⁷ reached the opposite result on substantially the same facts. That court said: "the authorities are in harmony with the rule that one for whose benefit a contract is made, although not a party to the agreement and not furnishing the consideration therefor, may maintain an action against the promisor." A California statute was the basis for the decision that the insurer's liability is not limited to the amount named in the policy and that the injured party may sue insurer for the amount of the judgment recovered against insured, if the latter is insolvent.¹⁸ The California statute requires a liability policy to state that the insolvency of the insured shall not release the insurance company, and that in case judgment shall be secured against the insured, an action may be brought against the company.

In a Mississippi case,¹⁹ the insurance policy provided that insurer would settle all claims provided the offer of settlement was submitted by the injured person or his duly authorized representative. An employee of insured was killed and his widow offered to settle, but the offer was refused by insurer. The court held that insured could not recover an amount which he paid in excess of the policy limits because the widow was not a duly authorized representative of the deceased so insured could not accept the offer.

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13. *Burnham v. Commercial Casualty Ins. Co. of Newark, N.J.* (1941) 10 Wash. 2nd 624, 117 P.2nd 644; *Silverstein v. Standard Acc. Ins. Co. of Detroit, Mich.*, 175 App. Div. 639, 162 N.Y.S. 601.
 14. *Maryland Casualty Co. v. Elmira Coal Co.*, (C.C.A. 8th Cir. 1934) 69 F. 2nd 616; *Maryland Casualty Co. v. Cook-O'Brien Const. Co.*, (C.C.A. 8th Cir. 1934) 69 F. 2nd 642, cert. denied (1934) 55 S. Ct. 81, 293 U.S. 569, 79 L.Ed. 668.
 15. *Norwood v. Travelers Ins. Co.*, (1939) 204 Minn. 595, 284 N.W. 785, 131 A.L.R. 1496; *Streat Coal Co., Inc. v. Frankfort General Ins. Co.*, (1923) 237 N.Y. 60, 142 N.E. 352; *Olympia Fields Country Club v. Bankers Indemnity Ins. Co.*, (1945) 325 Ill. App. 649, 60 N.E. 2nd 896.
 16. *Duncan v. Lumbermen's Mut. Casualty Co.*, (1941) 91 N.H. 349, 23 A.2nd 325.
 17. *Auto Mut. Indemnity Co. v. Shaw*, (1938) 134 Fla. 815, 184 So. 852.
 18. *Pigg v. International Indemnity Co.*, (1927) 86 Cal. App. 671, 261 P. 486.
 19. *Georgia Life Ins. Co. v. Miss. Cent. R. Co.*, (1917) 116 Miss. 114, 76 So. 646.

An insurer must defend an action brought against insured whether or not the amount in controversy exceeds the amount named in the policy,²⁰ and is liable for the judgment recovered against insured where it fails or refuses to defend in bad faith, although the judgment exceeds the policy limit.²¹ However, an insurer will not be held for an amount in excess of the policy limit where the insured failed to co-operate or to act in good faith.²² Some courts base recovery on the theory that failure to defend was negligence,²³ while other courts rely on the "breach of covenant to defend" theory.²⁴

Most courts hold that an insurer will be liable for more than the amount named in the policy where it fails to appeal or prevents insured from appealing when there is a possibility of reversal, and insurer has knowledge of such facts, or tells insured it will appeal;²⁵ although the Washington Supreme Court held that insured could not recover unless it first payed the judgment.²⁶

Thus it would seem that the instant case is the majority rule as to result, but minority as to reasoning. In reality it makes little difference, as the factual situations and results are substantially the same whether the courts allow recovery on the theory of negligence or on the theory of fraud and bad faith. About the same standard of conduct is required of the insurer settling suits, defense of suits, and appeals from adverse judgments. The rule stated in the Duncan case, that the injured party may not recover an amount in excess of the policy limit from insurer where insured is insolvent, is, in the light of well-known contracts law, the only reasonable rule, unless altered or modified by statute as in California. It may be concluded, from the cases reported, that the courts, as a whole, take a liberal viewpoint in holding the insurer liable for more than the amount of the policy unless the facts clearly indicate that it would be against the principles of justice and good conscience to so hold.

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20. *Pacific Indemnity Co. v. McDonald*, (C.C.A. 9th Cir. 1939) 107 F. 2nd 446, 131 A.L.R. 208.
 21. *Hilker v. Western Automobile Ins. Co. of Ft. Scott, Kan.*, (1930) 204 Wis. 1, 231 N.W. 257, reheard 204 Wis. 1, 235 N.W. 413; *State Automobile Mut. Ins. Co. of Columbus, Ohio v. York*, (C.C.A. 4th Cir. 1939) 104 F.2nd 730, cert. denied (1939) 60 S.Ct. 120, 308 U.S. 591, 84 L.Ed. 495; *Ohio Casualty Ins. Co. v. Gordon*, (C.C.A. 10th Cir. 1938) 95 F.2nd 605.
 22. *Ohio Casualty Ins. Co. v. Gordon*, (C.C.A. 10th Cir. 1938) 95 F.2nd 605.
 23. *Ballard v. Ocean Accident & Guarantee Co., Ltd.*, (C.C.A. 7th Cir. 1936) 86 F.2nd 449; *Anderson v. Southern Surety Co.*, (1920) 107 Kans. 375, 191 P. 583, 21 A.L.R. 761; *Abrams v. Factory Mut. Liability Ins. Co.*, (1937) 298 Mass. 141, 10 N.E. 2nd 82.
 24. *Grand Union Co. v. General Accident, Fire & Life Assur. Corp., Ltd.*, (1938) 254 App. Div. 274, 4 N.Y.S. 2nd 704, affirmed 279 N.Y. 638, 18 N.E. 2nd 38; *London Guarantee & Accident Co., Ltd., v. Shafer*, (S.D. Ohio 1940) 35 F. Supp. 647; contra *Mannheimer Bros. v. Kansas Casualty & Surety Co.*, (1921) 149 Minn. 482, 184 N.W. 189.
 25. *McAleenan v. Massachusetts Bonding & Ins. Co.*, (1916) 173 App. Div. 100, 159 N.Y.S. 401, affirmed 219 N.Y. 563, 114 N.E. 114; *McAleenan v. Massachusetts Bonding & Ins. Co.*, (1920) 190 App. Div. 657, 180 N.Y.S. 287.
 26. *Sterios v. Southern Surety Co.*, (1922) 122 Wash. 36, 209 P. 1107.