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Insurance - Res Judicata

INSURANCE—RES JUDICATA

Right of Insurer to Effect a Binding Settlement on Insured

In the case of *Eller* v. *Blackwelder*,[1] the plaintiff filed a motion for judgment seeking damages sustained in an automobile accident with the defendant. The trial court upheld defendant's allegations of *res judicata* since the plaintiff's insurance company had effected a settlement with the defendant for damages for the same accident in a former action. A dismissed agreed order was entered in that action. On writ of error, the Supreme Court of Appeals held that an insurance carrier could settle a cause of action against it's insured, but had no "authority, express or implied, to settle a claim" which the insured might have against another where the insured did not participate, consent to, or have knowledge of the insurance carrier's settlement.[2]

The rule pronounced by the Supreme Court of Appeals is universally recognized when the settlement is consummated before a claim against the insured has been formulated in an action.[3] Even when the settlement is effected after the party has instituted an action against the insured, the majority of the courts have reached the same result.[4] The

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1 Eller v. Blackwelder, 204 Va. 292, 139 S.E.2d 426 (1963).

2 *Id.* at 295, 130 S.E.2d at 429.

3 Annot., 32 A.L.R.2d 937 (1957); Arkansas—Fikes v. Johnson, 220 Ark. 448, 248 S.E.2d 908 (1962); Kansas—Graves Truck Line, Inc. v. Home Oil Co., 181 Kan. 507, 312 P.2d 1079 (1957); Missouri—Burnham v. Williams, 198 Mo. App. 18, 194 S.W. 751 (1917); New Jersey—Klotz v. Lee, 36 N.J. Super. 6, 114 A.2d 746 (1955); North Carolina—Beauchamp v. Clark, 250 N.C. 132, 108 S.E.2d 535 (1959); Tennessee—Jetton v. Polk, 17 Tenn. App. 385, 68 S.E.2d 127 (1933).

4 Annot., 32 A.L.R.2d 939 (1953); Georgia—U.S.A.C. Transport v. Corley, 202 F.2d 8 (5th Cir., 1953); New Hampshire—Perry v. Faulkner, 98 N.H. 474, 102 A.2d 908 (1954); New Jersey—Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695 (1952); North Carolina—Lampley v. Bell, 250 N.C. 713, 110 S.E.2d 316 (1959); Tennessee—Chattanooga v. Ballew, 49 Tenn. App. 310, 354 S.W.2d 806 (1961); Wisconsin—Heineman Creameries, Inc. v. Milwaukee Auto Ins. Co., 270 Wis. 443, 71 N.W.2d 395, 72 N.W.2d 102 (1955). *Contra*, Massachusetts—Long v. Union Indemnity, 277 Mass. 428, 178 N.E. 737 (1931); changed by Mass. Ann. Laws, Ch. 231, § 140-A (1952); Missouri—Keller v. Keklikian, 362 Mo. 919, 244 S.W.2d 1001 (1951) insured's rights precluded due to compulsory counterclaim statute.

courts here reason that the insurance policy alone does not impliedly authorize the insurance company to make a settlement prejudicial to the insured's rights against a third party.[5] Furthermore, the mere existence of an independently negotiated settlement by the insurer with the third party does not constitute *prima facie* proof that the insurer acted as the insured's agent in consummation of the settlement.[6] However, three additional factors will establish *prima facie* evidence of an agency relationship thus barring the insured's cause of action even though the settlement was negotiated without his knowledge, participation, or consent.

The first essential factor to establish an agency relationship between insurer and insured is service of process on the insured in order to have jurisdiction over his person. In several cases where the courts held the insured's right of action was not barred by the insurance company's settlement, the insured was not served with process.[7] This prerequisite was met in the *Eller* case as the plaintiff was served personally and subsequently gave the process to the insurance carrier in accordance with the terms of the policy.

Next, there must be some consultation by the insurance carrier or its attorney with the insured. An agency relationship cannot be predicated on the mere relationship of insurer and insured. Therefore, the courts have negated any existence of agency where there was no consultation with the insured,[8] or if the "insurance agent stated that neither the witness nor anyone else with the company discussed with the insured the nature of the action."[9] On the contrary, in *Eller* v. *Blackwelder,* the insurance attorney filed defenses for the insured.

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5 Faught v. Washman, 329 S.W.2d 588, 594 (1959), Neineman Creameries, Inc. v. Milwaukee Auto Ins. Co., 270 Wisc. 443, 71 N.W.2d 395, 400 (1955).

6 Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695, 698 (1952).

7 American Trust & Banking Co. v. Parsons, 21 Tenn. App. 202, 108 S.W.2d 187, 190 (1937); Daniel v. Adorno, 107 A.2d 700, 701 (1954).

8 Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695, 697 (1952).

9 U.S.A.C. Transport v. Corley, 292 F.2d 8, 11 (5th Cir., 1953).

Finally, the insured must acquiesce and make no protestations of nonliability to the insurance company. The insured has reason to know by his contract of insurance that some action might be taken by the insurer against him without his consent.[10] A disclaimer of liability to the insurance carrier thus precludes the defenses of estoppel and *res judicata.* Although in the *Eller* case the insured protested his nonliability immediately by filing a motion for judgment against the third party, there is no evidence from the pleadings or record that a disclaimer of liability was directed to the insurance carrier.[11] The disclaimer of liability is the key to the rule that "where the insurer settles a claim against the insured over the latter's protest that he was not at fault, the insured may still maintain his action against the tort feasor."[12]

Service of process on the insured coupled with consultation by the insurance company with the insured as to the merits without any disclaimer of liability by the insured to the insurer should warrant an exception to the general rule that an insurance company has no authority, express or implied, to release a claim of the insured against a third party.[13] These factors are instrumental in determining the insurer's authority. The court's reasoning in the *Eller* case, however, only emphasized the fact that the insured did not consent to the insurer's settlement.

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[10] Keller v. Keklikian, 362 Mo. 919, 244 S.W.2d 1001, 1002 (1951).
[11] Eller v. Blackwelder, 204 Va. 292, 130 S.E.2d 426 (1963).
[12] Fikes v. Johnson, 220 Ark. 448, 248 S.W.2d 362, 364 (1952).
[13] Eller v. Blackwelder, 204 Va. 292, 130 S.E.2d 426, 429 (1963).