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# Insurance - Insurer's Duties to Insured - Liability of Insurer for Judgment in Excess of Policy Limits

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states where the insurer may be and is joined as a defendant, or sued directly by the injured party, the issue is triable as a part of the main cause and the courts deny declaratory relief.[5]

The propriety of a declaratory judgment where another action is pending involving the same set of facts is a matter of dispute.[6] Generally such relief will be granted, provided (1) the trial of the main cause will not determine the matter in controversy,[7] (2) such relief will not prejudicially affect the injured party by a trial of the issue,[8] and (3) the parties and facts are not identical in both actions.[9]

North Dakota would presumably follow the reasoning of this case in granting declaratory relief although no cases directly in point were found.[10] There is a plausible policy argument against permitting such an action on the part of an insurer.[11] In a case of this nature the insurance company must in effect attempt to prove the insured to be liable, i. e., a drunken driver, and upon failing must turn around and defend against that which they had formerly sought to establish.[12] However, the weight of authority allows such actions to be brought, and it would appear that where an actual controversy exists an insurance company should be entitled to have its rights determined without the expense of an unwarranted claim.

WILLIAM J. MCMENAMY.

INSURANCE — INSURER'S DUTIES TO INSURED — LIABILITY OF INSURER FOR JUDGMENT IN EXCESS OF POLICY LIMITS. — Action against insurer, who had agreed to indemnify insured for damages to insured's employees, to recover amount in excess of policy limit paid by insured in discharge of judgment against it for injury to employee. The Supreme Court of Oklahoma *held*, two justices dissenting, that the finding that insurer had not exercised good faith in handling claim for less than the policy limit was sustained by the evidence, and hence insurer was liable for excess over policy limits. *Ameri-*

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5. Auto Mut. Indem. Co. v. Moore, 235 Ala. 426, 179 So. 368 (1938); New Amsterdam Cas. Co. v. Simpson, 238 Wis. 550, 300 N.W. 367 (1941).

6. 1 Anderson, Declaratory Judgments § 209 (2nd ed. 1951).

7. Continental Cas. Co. v. National Household Distributors, 32 F.Supp. 849 (E.D. Wis. 1940); Strawn v. Sarpy County, 146 Neb. 783, 21 N.W.2d 597 (1946).

8. United States F. & G. Co. v. Savoy Grill, 51 Ohio App. 504, 1 N.E.2d 946 (1936). N. D. Rev. Code § 32-2311 (1943): "PARTIES. When declaratory relief is sought, all persons who have or claim any interest which would be affected by the declaration, shall be made parties, and no declaration shall prejudice the rights of persons not parties to the proceeding . . ."; see Northern Pac. Ry. Co. v. Warner, 77 N. D. 729, 45 N.W.2d 196 (1950).

9. See note 4 *supra*.

10. *Cf.*, Iverson v. Tweeden, 78 N. D. 132, 48 N.W.2d 367 (1951); Northern Pac. Ry. Co. v. Warner, 77 N.D. 729, 45 N.W.2d 196 (1950); Great Northern Ry. Co. v. Mustad, 76 N.D. 84, 33 N.W.2d 436 (1948); Asbury Hospital v. Cass County, 72 N.D. 359, 7 N.W.2d 438 (1943); Langer v. State, 69 N.D. 129, 284 N.W. 238 (1939); G. W. Jones Lumber Co. v. City of Marmarth, 67 N.D. 309, 272 N.W. 190 (1937). Minnesota has followed the rule of the principal case in State Farm Mut. Auto. Ins. Co. v. Skuluzacek, 208 Minn. 443, 294 N.W. 413 (1940).

11. McFarland v. Cremshaw, 160 Tenn. 170, 22 S.W.2d 229 (1929). See also Heller v. Shapiro, 208 Wis. 310, 242 N.W. 174 (1932).

12. In the instant case the dissenting justice stated, "Here the insurance company tried and did prove its own assured to be a drunkard to the satisfaction of the trial judge, who made findings to that effect, and now that we reverse the case; the selfsame insurance company is duty-bound to reverse its role and do everything in its power to prove that the assured was as sober as the trial judge, under the very covenant from which unsuccessfully it attempted to extricate itself."

*can Fidelity & Casualty Co. v. L. C. Jones Trucking Co.*, 312 P.2d 685 (Okla. 1958).

It is generally agreed that in an indemnity or liability policy, where the insurer reserves the exclusive right to contest or settle any claim brought against the insured, and prohibits him from voluntarily assuming any liability or settling any claim without the insurer's consent, except at his own cost, the insurer has the option either to compromise or settle such claims.[1] These provisions impose no contract obligation either express or implied to settle or compromise. The insurer's failure or refusal to settle or compromise such a claim for an amount within the policy limits permits no action in assumpsit or on the contract against the insurer if a judgment is recovered against the insured in excess of the policy limits.[2]

The power vested in the insurer to settle or compromise claims brought against the insured must be used in good faith.[3] In exercising good faith, the insurer is generally held to that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business affairs.[4] The decision to refuse settlement, to be a good faith conclusion, must be honest and intelligent; in order to be honest and intelligent, it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they can be reasonably ascertained.[5] Thus, an insurer is not liable for failure to make a settlement in a situation where a reasonably prudent person exercising due care from the standpoint of the insured would not have made it.[6] The insurer's refusal of settlement is deemed in good faith if made in the honest belief that it has a fair chance of victory in the event of litigation;[7] that the verdict may be kept within the policy limits;[8] that the compromise offer is excessive;[9] that it has "legal defenses as yet undertermined by a court of last resort, which fairly seem applicable."[10]

The instant case, however, is in accord with the majority of jurisdictions. They hold that where the insurer is guilty of bad faith, it may be liable in tort for failing or refusing to compromise or settle a claim brought against the

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1. See, *e. g.*, State Auto Mut. Ins. Co. v. York, 104 F.2d 730 (4th Cir.), *cert. denied*, 308 U. S. 591 (1939); Kingan and Co. v. Maryland Cas. Co., 65 Ind. App. 301, 115 N.E. 348 (1917); Johnson v. Hardware Mut. Ins. Co., 108 Vt. 269, 187 Atl. 788 (1936).

2. See, *e. g.*, Averbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); Streat Coal Co. v. Frankfort General Ins. Co., 237 N.Y. 60, 142 N.E. 352 (1923); Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643, 644 (1929) (dictum).

3. See, *e. g.*, Davis v. Maryland Cas. Co., 16 La. App. 253, 133 So. 769 (1931); Norwood v. Travelers Ins. Co., 204 Minn. 595, 284 N.W. 785 (1939).

4. Auto Mut. Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938); American Fidelity & Casualty Co. v. L. C. Jones Trucking Co., 312 P.2d 685, 687 (Okla. 1958) (The fairest method of balancing the interests is for the insurer to treat the claim as if he alone were liable for the entire amount.); G. A. Stowers Furniture Co. v. American Indemnity Co., 295 S.W. 257 (Tex. Civ. App. 1927).

5. Brown v. Guarantee Ins. Co., 319 P.2d 69 (Cal. 1958); Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931).

6. Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 10 N.E.2d 82 (1937).

7. New Orleans & C. Ry. Co. v. Maryland Cas. Co., 114 La. 154, 38 So. 89 (1905).

8. Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); G. A. Stowers Furniture Co. v. American Indemnity Co., 295 S.W. 257 (Tex. Civ. App. 1927).

9. Mendota Electric Co. v. New York Indemnity Co., 173 Minn. 440, 211 N.W. 317 (1926); Brassil v. Maryland Cas. Co., 210 N.Y. 235, 104 N.E. 622 (1914).

10. Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643, 645 (1929) (dictum).

insured for an amount within the policy limits.[11] That liability is measured by the excess of a judgment recovered against the insured over the amount payable by the terms of the policy.[12]

Ordinarily, the question of bad faith is within the jury's province, but the various higher courts have held that such bad faith must be clearly and reasonably shown in order to sustain a verdict against the insurer.[13]

Bad faith has been demonstrated to be a complete disregard of the insured's financial interests,[14] an arbitrary refusal to settle for a reasonable sum where it is apparent from an honest perusal of the facts and the law that a suit would result in a verdict in excess of the policy limits,[15] or a refusal to compromise upon grounds which depart from the grant of power to the insurer to exclusively conduct settlement negotiations.[16]

Whether or not the insurer is liable for the difference in a recovery over the excess of the policy limits depends on the judgment and the good faith of the insurance company and its representatives.

DENNIS M. SOBOLIK.

INTOXICATING LIQUORS — CIVIL DAMAGE LAWS — INJURIES TO PERSON. — In an action under the Illinois Dram Shop Act against defendants who allegedly sold liquor to the driver of the car in which plaintiff was injured, a summary judgment was granted for the defendants on the ground that plaintiff was not an innocent party inasmuch as he participated in the drinking of liquor with the driver. The Appellate Court, Third Division, of Illinois, *held* that whether or not plaintiff was an innocent party under the law was a question of fact for the jury and that the motion for summary judgment should have been overruled. *Ness v. Bilbob Inn*, 15 Ill. App. 2d 340, 146 N.E.2d 234 (1957).

At common law, no legal liability was imposed on a seller of intoxicating liquor for damages resulting from intoxication.[1] Many jurisdictions have, however, created such liability by enacting so called "Dram Shop" or "Civil Damage Acts".[2] These acts have several purposes: they are designed, pursuant to the police power, to promote the public health, safety, morals and welfare by affording a remedy for injuries resulting from the wrongful conduct of intoxicated persons;[3] they promote temperance in the use of intoxicating beverages; and they provide a necessary check on the liquor traffic. Such acts, in this way, shift the burden of potential loss from the defenseless public to the owner of the dram shop who has the choice of bearing the

11. Mendota Electric Co. v. New York Indemnity Co., 175 Minn. 181, 221 N.W. 61 (1928); Aycock Hosiery Mill v. Maryland Cas. Co., 157 Tenn. 559, 11 S.W.2d 889 (1928); Burnham v. Commercial Cas. Ins. Co., 10 Wash.2d 624, 117 P.2d 644 (1941) (A mistake of judgment is not bad faith).

12. *Ibid.*

13. See, *e. g.*, Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); Mendota Electric Co. v. New York Indemnity Co., 175 Minn. 181, 221 N.W. 61 (1928).

14. Johnson v. Hardware Mut. Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938).

15. Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643, 645 (1929) (dictum).

16. Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931).

1. Hyba v. C. A. Horneman Inc., 302 Ill. App. 143, 23 N.E.2d 564 (1939); Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889).

2. *E. g.*, Minn., Mich., Iowa, Wis.

3. See Gibbons v. Cannaven, 393 Ill. 376, 66 N.E.2d 370 (1946).