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## *The Right of An Insured to Appeal From a Judgment Satisfied by His Insurer*

Automobile liability insurance is a practical necessity today because the insurance companies through their method of risk distribution have relieved policy holders from the financial pitfalls which otherwise might leave the negligent driver open to ruinous liability. Viewed through the eyes of the insured, the indemnity contract is one solely for his benefit. The primary motive of the insurer, on the other hand, when one of its policy holders is in a position of possible liability, is not to protect the insured as much as it is to protect and minimize any liability which the insurer might incur because of the insurance contract. In other words, saving the insured from liability is a means by which the insurer is able to protect itself. This fact is particularly true in Ohio where by statute the insurer is liable along with the insured and subject to suit should a judgment against the insured not be satisfied within 30 days after its rendition.<sup>1</sup> The insurer, in pursuance of this motive, may, on some occasions, prejudice the rights of the insured by settling a suit which is pending against the insured, by allowing a consent judgment to be taken against him, or by refusing to appeal a judgment which is rendered against him.

Generally speaking, the insurance company in its contract has reserved the right to control any settlement or litigation in which the insured may be subject to liability. The extent to which the courts have looked with approval on such clauses is indicated by this statement of the highest court of Massachusetts:

An insurance company . . . has an absolute right to dispose of an action brought against its insured . . . in such a way as may appear to it for its best interest. It is not bound to consult the interests of the insured to the prejudice of its own interests in case of conflict between the two. . . .<sup>2</sup>

If there is an honest dispute as to who is liable in an auto collision, the insured or the party claiming against him, the insured may have his possible cause of action against the other party prejudiced by an over zealous insurance company which settles a claim or permits a judgment to be rendered

<sup>1</sup> OHIO REV. CODE § 3929.05 provides that in case of bodily injury or death the insurer is absolutely liable where it has insured the losing party. OHIO REV. CODE § 3929.06 provides that where the insured has suffered a judgment against him for bodily injury, death or damage to property if the judgment is not satisfied within 30 days the plaintiff may file a supplemental petition in the original suit and join the insurer as a party defendant. In *U.S. Cas. Ins. Co. v. Gilmore*, 6 Ohio L. Abs. 334 (1928) the court held that where the insured appealed the insurer was still liable under the statutes to satisfy the judgment against their insured. Apparently at that time an appellant had more than 30 days to file his appeal.

<sup>2</sup> *Long v. Union Indemnity Co.*, 277 Mass. 428, 430, 178 N.E. 737, 738 (1931).

against their insured. In such a case when the insured brings suit against the claimant for damages, he will be faced with the defense that the question has already been settled against him. He will find that he is estopped to bring his suit by the action of the insurance company on the theory of satisfaction of the claim, or on the theory of *res judicata*.

The Ohio Supreme Court's decision in the case of *Ross v. Stricker*<sup>3</sup> shows this problem in bold relief. (For purpose of simplicity, the plaintiff, Ross, will be referred to as "A," and the defendant, Stricker, "B") As the result of an automobile collision between the parties, A sued B for the personal injuries he sustained. B, in his answer, denied any negligence on his part, and counter-claimed alleging that A's negligence was the sole and proximate cause of the injuries suffered by B. At the trial a verdict and judgment were rendered in favor of A on his cause of action and against B on his cross-petition. B's insurance company, deeming it inexpedient to appeal, satisfied the judgment against their insured (B) over his protest.<sup>4</sup> B, by his own attorney, caused his protest to be entered on the record. B then appealed from the judgment against him on his cross-petition and in the court of appeals secured an order for a new trial. The court of appeals, for all practical purposes admitted that B had a good cause of action against A.<sup>5</sup> The Ohio Supreme Court took the case on A's motion to certify. In that court A contended that since B was enjoying the benefits of a satisfied judgment he was estopped to prosecute further his appeal on the cross-petition.<sup>6</sup> The court, however, felt that the problem was more involved than that presented by A and held that since the judgment for A was still standing, B could not appeal. Their theory was that the parties to that adjudication (the action by A against B) were the same and that the finding of B's negligence was undisturbed and still standing. Thus, B was estopped to assert that he was not negligent when the first finding of fact was based on the same transaction from which he now seeks to appeal.

The practical results are obvious. The court of appeals has all but said that B has a valid cause of action against A. However, in the view of the supreme court decision, B has no recovery. His insurance company, for all practical purposes, has destroyed his right to appeal. B obviously did not wish to appeal the judgment on A's cause of action because, had he done so and lost, the insurance company would claim that he failed to cooperate<sup>7</sup>

<sup>3</sup> 153 Ohio St. 153, 91 N.E.2d 18 (1950). The case is not so startling in view of the general law on the subject; however, as applied by the court it leads to disastrous results for the insured.

<sup>4</sup> See note 1 *supra*.

<sup>5</sup> *Ross v. Stricker*, 85 Ohio App. 56, 88 N.E.2d 80 (1949). This is the court of appeals decision.

<sup>6</sup> *Ross v. Stricker*, 153 Ohio St. 153, 156, 91 N.E.2d 18, 19 (1950).

<sup>7</sup> Generally all insurance contracts contain a clause which provides that if the assured

with them. Should the insurer prevail in this contention the policy would be voided and the insurer relieved of any liability under Ohio law. The insurance company cannot object, however, when *B* appeals on his cross-petition. If *B* appeals *A*'s case, the insurance company may wait for *A* to sue it, which, as previously noted, he may do.<sup>8</sup> The insurer would then raise the defense that *B* had breached the cooperation clause by appealing. If it were decided that *B* had done so, neither *A* nor *B* could recover from the insurance company because *A*'s right to collect from it depends upon *B*'s right to do so.<sup>9</sup>

The principle that where a judgment between two parties settles a disputed fact, one of the parties or his privy may not in a later action contend for a different result, is well settled.<sup>10</sup> Yet in line with the Ohio Supreme Court's policy of looking not only to the result of the case at bar but also to its effect on cases which may arise in the future, an exception to that principle would seem wise.

It is obvious that this is not the type of case in which a party seeks to take advantage of that part of the judgment favorable to him and have the unfavorable part reversed. For any judgment again *B* will be satisfied by the insurer. But the insurer, on the other hand, should not be able to destroy *B*'s right of appeal or force him to buy another lawsuit.

Nor is it possible for *B* to allow the insurance company to satisfy the judgment without informing it that he intends to appeal. The insurer is able to wait 30 days<sup>11</sup> before he is subject to suit, while the insured will be barred unless he files his notice of appeal within 20 days.<sup>12</sup>

In view of the *Ross* case, *B* is estopped from appealing on his cross petition alone when a judgment for *A* on the petition stands undisturbed. *B* is left with but one avenue of escape to protect his cause of action; he must appeal *A*'s case as well as his own.

When *B* appeals both causes of action he is faced with several problems. First, if the insurance company satisfies the judgment he has the problem of appealing from a satisfied judgment. Secondly, if the insurance company does not satisfy the judgment and *B* loses his appeal, he may have to litigate the question of whether or not his appeal was a violation of the

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does not cooperate with the company in preparing a defense, the company will not be liable for any judgment rendered against the insured.

<sup>8</sup> See note 1 *supra*.

<sup>9</sup> *Storer v. Ocean Acc. & Guarantee Corp.*, 80 F.2d 470 (6th Cir. 1935). Violation of the cooperation clause by the insurer will preclude liability of the insurance company in a suit by the third party against the insurance company.

<sup>10</sup> *Cf. State v. Martin*, 154 Ohio St., 539, 544, 96 N.E.2d 776, 779 (1951); *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 383, 109 N.E.2d 855, 859 (1952).

<sup>11</sup> See note 1 *supra*.

<sup>12</sup> OHIO REV. CODE § 2505.07.

cooperation clause of the insurance contract. In this respect *B* is "buying" another lawsuit. If *B* wins on his appeal, judgment could be rendered for him in the appellate court or a new trial could be granted. At the second trial, if *B* should lose, his position would still be perilous. Can he compel the insurer to satisfy the judgment? If so, can he compel full payment should the second judgment be for a greater amount than the first? The answers to these questions require further discussion.

#### APPEAL FROM A SATISFIED JUDGMENT

Generally speaking, a party may not appeal from a satisfied judgment where the satisfaction was voluntarily made with a view toward settlement or compromise.<sup>13</sup> But where the satisfaction is made under compulsion or coercion the right of appeal is not affected.<sup>14</sup> Perhaps the best example of legal coercion occurs when execution has been issued and the defendant's land is about to be sold. In such cases the courts of most states, including Ohio, have said that the payment was not voluntary and that the plaintiff's motion to dismiss the appeal because the question is moot will be overruled.<sup>15</sup> Some cases hold that execution need not be issued at the time the defendant satisfies the judgment and that the defendant may still appeal, the satisfaction being deemed involuntary.<sup>16</sup> The more modern view finds expression in the following words: the appellant "does not waive [his right of appeal] where [satisfaction] is made or done to avoid execution or contempt proceedings or under *other compulsion for the exercise or protection of legal rights*"<sup>17</sup> (emphasis supplied).

The following are some examples of specific cases in which satisfaction of the judgment did not prevent appeal: Payment of taxes will not waive the right of appeal where the tax is an annual levy and the appellant will be subject to the same tax in succeeding years.<sup>18</sup> Money paid into court which the clerk pays to the successful party on his promise to repay if the case is reversed will not waive appellant's right to appeal.<sup>19</sup> When funds of the appellant are attached and the garnishee pays the claim, such payment

<sup>13</sup> 2 OHIO JUR. 2d § 157; 4 C.J.S. §§ 221 et. seq.

<sup>14</sup> 4 C.J.S. §§ 221, 222.

<sup>15</sup> *Lake Shore Elec. Ry. v. Rohrbacker*, 48 Ohio App. 529, 186 N.E. 507 (1932); *Alimitos Land Co. v. Shell Oil Co.*, 217 Cal. 213, 17 P.2d 448 (1933); *Bank of Linn Grove v. Stults*, 93 Ind. App. 129, 176 N.E. 707 (1931); *Guin v. Security State Bank*, 74 Okla. 102, 168 Pac. 804 (1917).

<sup>16</sup> 2 AM. JUR. § 574. See cases cited n.17.

<sup>17</sup> 4 C.J.S. § 214 C. In *Beronio v. Pension Comm'r of Hoboken*, 130 N.J.L. 620, 33 A.2d 855 (1943) the court said in syllabus number six: "Even voluntary payment . . . unless made in compromise or settlement . . . does not necessitate . . . waiver of the right to appeal. . . ."

<sup>18</sup> *Pittsburg, Ft. W. & C. Ry. v. Martin*, 53 Ohio St. 386, 41 N.E. 690 (1895).

<sup>19</sup> *Felton v. Finley*, 68 Utah 412, 195 P.2d 360 (1948).

does not render the appeal moot.<sup>20</sup> And when a bank which holds funds allegedly conveyed to the appellant in fraud of her husband's creditors, payment of a judgment by the bank, which was joined as a party defendant, will not adversely affect the appellant's right of appeal.<sup>21</sup> In cases where the appellant's surety satisfied a judgment rendered against its assured the payment does not prejudice the appellant's right to appeal because a surety is subrogated to any rights the successful party had against the assured and may sue the assured to recover such a loss. If the appeal is successful the assured is relieved of any possible liability to the surety. Thus, the assured has a genuine interest to protect and satisfaction of the judgment by the surety will not defeat it.<sup>22</sup>

Though this rule has received general acceptance it is by no means universal. In following this procedure the insured would in all probability be "buying himself a lawsuit." In a Kansas case, the appellant's construction equipment was attached and, to prevent a sale, he paid the judgment and costs. The court said that by paying the costs he waived his right to appeal. By stressing the payment of costs the court intimated that had he paid the judgment less the costs he might have saved his appeal.<sup>23</sup>

While there is no case directly in point with the principal fact situation, by analogy *B* should be able to appeal from the judgment even though the insurance company had satisfied it. True, it may be that in the suretyship cases the surety is subrogated to any rights which the successful party had against the assured while in the insurance cases there is no corresponding right to sue the insured. However, the basic reason behind the rule which prevents an appeal from a satisfied judgment is that the appellant should not be able to appeal where he has settled or compromised the controversy. Surely where the insurance company pays the judgment over the insured's protest, the insured has not entered into a compromise or settlement. For this purpose the insurer should not be considered the agent of the insured so as to bind him to the satisfaction of the judgment. Of course the appellant can discharge his insurance company, but if he were to do so and then lose his appeal the insurance company would probably not have to satisfy the judgment. Since he has paid for his insurance coverage there is no reason why he should be forced at his own risk to hazard an appeal which if unsuccessful would destroy all his rights under the policy. Such a result allows the insurer to force the insured to bargain away his right of appeal.

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<sup>20</sup> *Hartke v. Abbot*, 106 Cal. App. 388, 289 Pac. 206 (1930).

<sup>21</sup> *La Borde v. Farmer's State Bank*, 116 Neb. 33, 215 N.W. 559 (1927).

<sup>22</sup> *Hartford Acc. & Indem. Co. v. Ankeny*, 261 P.2d 387 (Ore. 1953); *Mastel v. Rovira*, 164 La. 1099, 115 So. 283 (1928).

<sup>23</sup> *Sisk v. Edmonston*, 163 Kan. 394, 182 P.2d 891 (1947). The costs were about \$300 while the judgment was for some \$79,000.

### EFFECT OF SETTLEMENT BY THE INSURER BEFORE JUDGMENT

We have a similar problem when the insurance company settles the case before judgment. The insurer has an absolute right to control any settlements of litigation involving the policy holder even to the prejudice of the insured's rights. In such situations it has been generally held that the insurance company is not the agent of the insured,<sup>24</sup> and a settlement by it without the actual knowledge or consent of the insured is not binding upon him. Thus, when the insurer settled a claim without the knowledge of the insured and the insurance company was taken over by the state superintendent of insurance before the claim was paid, the insured did not have to respond in a suit against him based on the settlement. Since the insurer had complete control of the settlement to the extent that the insured could not intervene even if he wished to do so, he is not bound.<sup>25</sup> Even when a settlement was reached in open court with the knowledge of the insured a subsequent suit against him because the insurance company had become insolvent failed because the insured in settling did not personally agree to pay or admit liability.<sup>26</sup>

The same result follows when the insurance company settles with a party who raises the defence of settlement in a subsequent suit by the insured for damages arising out of the same transaction.<sup>27</sup> The insured may prosecute his case.

If the insured defendant denies any negligence on his part and counter-claims alleging negligence on the part of the plaintiff, a settlement by the insurance company may not be made the basis for a motion to dismiss by the plaintiff.<sup>28</sup> Although this situation differs from the principal case under discussion because there is no judgment against the insured, there is a great deal of similarity between the two. Since the court refused to allow the plaintiff in the one suit to take advantage of the settlement to the insured's disadvantage it appears that in the analogous situation where there is a satisfied judgment the insured should still be able to appeal.

### SUITS BY THE INSURED AGAINST HIS INSURER

Returning to our original fact situation it must be remembered that the insurer satisfied a judgment against its insured who was then precluded from appealing his counter-claim by reason of estoppel. A similar situa-

<sup>24</sup> *Foremost Daries v. Campbell Coal Co.*, 57 Ga. App. 500, 196 S.E. 279 (1938); *Haluka v. Baker*, 66 Ohio App. 308, 34 N.E.2d 68 (1941); *Jetton v. Polk*, 17 Tenn. App. 395, 68 S.W.2d 127 (1934).

<sup>25</sup> *Haluka v. Baker*, 66 Ohio App. 308, 34 N.E.2d 68 (1941).

<sup>26</sup> *Countryman v. Breen*, 211 N.Y. Supp. 744, *aff'd*, 268 N.Y. 643, 198 N.E. 536 (1935).

<sup>27</sup> *Foremost Dairies v. Campbell Coal Co.*, 57 Ga. App. 500, 196 S.E. 279 (1938).

<sup>28</sup> *De Carlucci v. Brasley*, 16 N.J.Super. 48, 83 A.2d 823 (1951).

tion arose in *Long v. Union Indemnity Co.*<sup>29</sup> which concerned an automobile collision. *A* sued *B* and *B* turned the matter over to his insurance company. Then *B* sued *A* in another county for his injuries. When *A* learned of this suit he demanded that the insurer of *B* enter a consent judgment against *B*. The insurer complied. Meanwhile *B* had won his suit in the other county. *A* then took the judgment to the court in which *B* had prevailed and made it the basis of a motion for judgment notwithstanding the verdict. *A*'s motion was granted. *B* then sued his insurance company because his rights had been prejudiced by their granting of the consent judgment. The court held that *B* was estopped by *A*'s judgment from suing *A* on his cause of action. Note that in *B*'s case against *A* he had won a verdict, thus establishing that *A* was at fault in causing the accident. The court held that *B* should have sought his relief against *A* in the original suit but failed to point out what avenue of attack would have been open to *B* in that action. The obvious inference is that *B* could have appealed.<sup>30</sup>

A unique case arose in New York<sup>31</sup> wherein the insured's policy indemnified him to the extent of \$1500. The plaintiff in an earlier suit had offered to settle for \$1500, but the insurance company chose to defend the action. A verdict and judgment were rendered against the insured in the amount of \$6000. The insured appealed and obtained a reversal. He then sued the insurer for his attorney fees and the costs of appeal, which together exceeded the limits of the policy. Held: the insured may recover. The court held that since the insurer would pay the insured only after he had satisfied the plaintiff's judgment it in effect prevented his appeal. Although this situation is distinguishable from the *Ross* case it does show the attitude of one court toward an insurer that tried to destroy the rights of its insured. We can only speculate whether, had the insured lost his appeal, the results would have been the same.

In another case against an insurer the insured alleged that the plaintiff in an earlier suit against him had offered to settle for \$5,000, the limit of the policy. The insurer refused the offer and went to trial. Judgment was rendered for \$12,500. The insured alleged that the insurer had exercised bad faith in refusing to settle. In overruling the insurer's demurrer, the court stated that the insurer could not deal in such a manner as to render

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<sup>29</sup> 277 Mass. 428, 178 N.E. 737 (1931).

<sup>30</sup> *Id.* at 430, 178 N.E.2d at 738. "An insurance company . . . has an absolute right to dispose of an action brought against its assured . . . in such a way as may appear to it for its best interests. It is not bound to consult the interests of the assured to the prejudice of its own interests in case of conflict between the two, and the fact of protest by the insured is immaterial."

<sup>31</sup> *Brassil v. Maryland Cas. Co.*, 210 N.Y. 235, 104 N.E. 622 (1914).

the insured liable for a judgment for more than the limits of the policy.<sup>32</sup> This decision again shows the willingness of the courts to protect the insured.

#### FAILURE OF AN INSURER TO SATISFY THE JUDGMENT

When the insurer has not paid the plaintiff, but awaits the outcome of the insured's appeal, the insured is faced with still another problem. If he loses the appeal the insurance company might claim non-cooperation and refuse to satisfy the judgment. It is unlikely the insured could compel the insurer to pay into court while awaiting the result of the appeal. More basic is the question of whether the appeal would constitute non-cooperation within the contemplation of the insurance contract. Cases have been found in which such an appeal by the insured was considered as not cooperating with the insured. But the spirit behind the clause does not seem to extend that far. Its main purpose is to protect the insurer against collusion between the claimant and the insured.<sup>33</sup> All that should be required is a full and frank disclosure of all the facts to the insurer.<sup>34</sup>

The question of what the insurer would do if the appellate court ordered a new trial must be considered. If the insured loses the new trial and the verdict is much larger will the insurer be held for this greater amount in view of the fact that it was willing to satisfy the prior judgment which was for a lesser amount? If the insurer awaits the appeal and the insured is successful both on appeal and at the new trial, the insurer will reap a large benefit. It does not seem logical, then, to allow the insurer to secure the benefit from the insured's appeal without taking a commensurate risk should the judgment be greater at the new trial.

It is interesting to note that in the reverse situation, *i.e.*, where the insurer appeals over the protest of the insured and wins a new trial at which the judgment exceeds the limits of the policy, the insurer is held liable for this excess.<sup>35</sup> Even though this is provided for in the contract it would be unjust if the law were to fail to provide a remedy for the insured where as a consequence of his appeal the new trial results in a larger judgment.

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<sup>32</sup> *Wisconsin Zinc Co. v. Fidelity Deposit Co. of Maryland*, 162 Wis. 39, 155 N.W. 1081 (1916).

<sup>33</sup> *State Auto. Ins. Co. v. York*, 104 F.2d 730 (4th Cir. 1939).

<sup>34</sup> See 9 WORDS & PHRASES, Cooperation, for further definitions.

<sup>35</sup> *Dawson v. Maryland Cas. Co.*, 298 Mass. 141, 83 N.E.2d 407 (1911). See 8 APPLEMAN, INSURANCE LAW & PRACTICE 4681 where the author categorically states that allowing control of the defense is for the benefit of the insurer "in the sense that where there is a conflict of interests the insurer may exercise the right to defend for his own interests, even though a different course would have been preferable from the standpoint of the insured."