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Civil Procedure -- Consent Judgments and Settlements -- Right of Liability Insurer to Bind Insured

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When, after a thorough examination by the trial judge as to the facts and circumstances surrounding the misconduct of the jury, he finds that justice would be better served if the jury were discharged, the general rule is that such a decision will not be disturbed on appeal, and on subsequent retrial, double jeopardy will not attach.³⁷

In view of the constitutional and common law prohibitions against double jeopardy, and consistent with the basic theory that such mistrial is to be used only in cases of manifest necessity, it is submitted that the decision in the instant case is sound.³⁸

GEORGE M. BRITT

Civil Procedure—Consent Judgments and Settlements—Right of Liability Insurer to Bind Insured

The North Carolina motorist who reads his liability policy carefully will probably notice that it contains a clause substantially as follows:

The Company shall (a) defend any suit against the insured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; *But the Company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient.*¹ (Italics added.)

The usual policy also includes an express condition precedent to the insurer's obligation to indemnify the insured which requires him to forward immediately to the insurer any process, demand, notice, or pleading served on him because of an accident in which the insured was involved.²

to their fitness and competence to serve as jurors when court convened on Friday morning.") [Italics added.]

³⁷ See notes 18-24 *supra*. In the majority of cases in which a mistrial has been sustained over defendant's objection, the trial judge has personally examined the jurors to determine the necessity for a discharge of the jury.

³⁸ *State v. Crocker*, 239 N. C. 446, 453, 80 S. E. 2d 243 (1954). "Our holding here is that the facts and circumstances set forth in the findings of fact are not of such compelling nature as to justify a further relaxation of a rule of such importance in safeguarding the life and liberty of a citizen against repeated prosecutions for the same offense. The preservation of the salutary principle underlying the plea of former jeopardy in capital cases is of far greater importance than the service by this defendant of the prison term imposed by the judgment . . . upon her conviction for manslaughter."

¹ Because of this wording the standard indemnity policy is more than a mere contract of indemnity against actual loss in the sense of money paid. It is a contract of insurance against liability for damages, and the insurer adopts the liability of the insured, within policy coverage. *State ex rel. Boney v. Central Mutual Ins. Co. of Chicago*, 213 N. C. 470, 196 S. E. 837 (1938).

If the plaintiff and the defendant are both insured by the same company, the insureds must engage their own attorneys, and the policies become mere indemnity policies. *O'Morrow v. Borad*, 27 Cal. 2d 794, 167 P. 2d 483 (1946).

² *Hendrix v. Employer's Mutual Liability Ins. Co.*, 102 F. Supp. 31 (E. D. S. C. 1952); *Martin v. Traders & General Ins. Co.*, 258 S. W. 2d 142 (Tex. Civ. App. 1953). See *Stephens v. Childers*, 236 N. C. 348, 72 S. E. 2d 849 (1952).

These provisions seem reasonable enough, but their combined legal effect can result in harsh injustice to the insured. For example, let us suppose that an insured motorist was involved in an automobile collision caused by the negligence of the other party. The insured's damage was considerable, while the other motorist's injuries to person and property were slight. Before the insured had engaged an attorney to prosecute his claim against the other motorist, he was made defendant in an action by the other party. In order to avail himself of the benefits of his policy, he forwarded the process immediately to his insurer. Pursuant to its contract right to control the defense³ the insurer employed attorneys to defend the action against the insured. These attorneys settled with the plaintiff and consented to an entry of judgment against the insured which the insurer satisfied. May the insured, who had no knowledge of these proceedings, now sue the negligent party?

Alabama, Massachusetts, Missouri, and Ohio have held that the insured is barred by this consent judgment when he undertakes to sue the other motorist,⁴ and New Jersey has held that, even when no con-

³ U. S. A. C. Transport, Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621 (10th Cir. 1942); Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917); Abrams v. Factory Mutual Ins. Co., 298 Mass. 141, 10 N. E. 2d 82 (1937); Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931); Wynnewood Lumber Co. v. The Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917).

The right to control carries with it several correlative duties. The insurer is liable to the insured when in bad faith it refuses to defend a claim within policy coverage. Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621 (10th Cir. 1942). It is also liable for the negligence of the attorneys engaged to defend the action. Attleboro Mfg. Co. v. Frankfort Marine, Accident, & Plate Glass Ins. Co., 240 Fed. 573 (1st Cir. 1917). The insurer is liable to the insured if its attorneys negligently allow a judgment in excess of policy coverage to be entered against the insured. Abrams v. Factory Mutual Liability Ins. Co., 298 Mass. 141, 10 N. E. 2d 82 (1937). It has been said that the insurer owes a duty to the insured to assert every proper and available defense in his behalf. Jewtrav v. Hartford Accident & Indemnity Co., 280 App. Div. 150, 112 N. Y. S. 2d 727, 730 (3d Dep't 1952). See State Automobile Ins. Co. v. York, 104 F. 2d 730 (4th Cir. 1939), *cert. denied* 308 U. S. 591 (1939).

However, in Wynnewood Lumber Co. v. The Travelers Ins. Co., 173 N. C. 269, 91 S. E. 946 (1917) where the injured party recovered against the insured an amount in excess of the value of the policy, it was held that the insurer was not liable for refusing to settle with the injured party at a figure within policy coverage, such settlement being within the discretion of the insurer, who would be liable only for fraud, negligence, or failure to act in good faith.

⁴ A.B.C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946). This case is a good example of how the rule sometimes works injustice. While the insured's action against the owner of the other vehicle was pending in the Alabama trial court, the defendant rushed over to Georgia and served agents of the insured with process. The insured's agents called in the insurer, which defended the action in the Georgia trial court. However, defendant obtained verdict and judgment against the insured. Then the defendant pleaded this Georgia judgment in bar of insured's suit in Alabama. The plea was allowed, and the insured lost its day in court. Its officers had no knowledge of the Georgia proceedings. The principal factor working against the insured was that the Alabama court could not set aside a Georgia court's judgment unless the judgment was void on its face. Brown, J., dissented vigorously.

sent judgment was entered, a settlement in and of itself is nevertheless a bar to any subsequent action initiated by the insured, arising out of the same transaction.⁵ However, both as to settlements and consent judgments, the majority rule is *contra*.⁶ Thus, most jurisdictions which have considered the question hold that the attorney hired by the insurer to *defend* the action against the insured has no authority, express or implied, to impair any substantive rights of the insured.⁷

Some of the courts among the majority rely on the limited nature of the authority of the insurer's attorney,⁸ while others have held that the insurer's attorney cannot in any way be considered an agent of the in-

Long v. Union Indemnity Co., 277 Mass. 428, 178 N. E. 737 (1931); Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951) (settlement coupled with "dismissal with prejudice"); Ross v. Stricker, 153 Ohio St. 153, 91 N. E. 2d 18 (1950) (verdict rendered against insured, judgment entered on the verdict; insured not allowed to set aside judgment satisfied by the insurer without his consent).

⁵ Kelleher v. Lozzi, 7 N. J. 17, 80 A. 2d 196 (1951), *rehearing denied*, May 14, 1951. See Note, 51 COL. L. REV. 1062 (1951).

⁶ Settlement by insurer's attorneys no bar: U. S. A. C. Transport Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Fikes v. Johnson, 220 Ark. 448, 248 S. W. 2d 362 (1952); Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 540, 196 S. E. 279 (1938); Last v. Brams, 238 Ill. App. 82 (1925); Emery v. Litchard, 137 Misc. 885, 245 N. Y. Supp. 209 (Sup. Ct. 1930); Jetton v. Polk, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933); Owen v. Dixon, 162 Va. 601, 175 S. E. 41 (1934); Paternoster v. Swick, 43 Luz. L. REG. 119 (Pa., June 5, 1953).

The New Jersey lower courts have twice held that an unauthorized settlement by the insurer's attorneys is no bar to an action by the insured, distinguishing Kelleher v. Lozzi, 7 N. J. 17, 80 A. 2d 196 (1951). Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); DeCarlucci v. Brasley, 16 N. J. Super. 48, 83 A. 2d 823 (L. 1951).

Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917) held that the settlement by the insurer's attorneys did not bar the insured's claim. Keller v. Keklikian, 362 Mo. 919, 244 S. W. 2d 1001 (1951) did not expressly overrule this decision, but involved the question of failure to assert a compulsory counterclaim before the "dismissal with prejudice."

See also American Trust & Banking Co. v. Parsons, 21 Tenn. App. 202, 108 S. W. 2d 187 (1937) (insured never served with process).

Where the insurer's attorneys settled with claimant, and insurer became insolvent before payment, it has been held that the settlement was not binding on the insured, when the claimant undertook to collect from the insured. Countryman v. Breen, 241 App. Div. 392, 271 N. Y. Supp. 744 (4th Dep't 1934); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941). Also, when the insurer's attorneys withdrew from the case because of the insurer's sudden insolvency and what was in effect a judgment by default was entered against insured, this default judgment was vacated. Fessler v. Weiss, 348 Ill. App. 21, 107 N. E. 2d 795 (1952).

⁷ Even in the jurisdictions in the minority on this point there is no problem where the policy is a combined collision-liability policy, for the insured then has no substantive rights to be impaired. Upon full payment to the insured of damages suffered by him, the insurer is subrogated, and as the real party in interest may maintain suit against the other motorist. Burgess v. Trevathan, 236 N. C. 157, 72 S. E. 2d 231 (1952); Underwood v. Dooley, 197 N. C. 100, 147 S. E. 686 (1929). Of course, the insured may still lose his cause of action for any damage to person or property not covered by the policy or for which the insurer has not made him whole.

⁸ Fikes v. Johnson, 220 Ark. 448, 248 S. W. 2d 362 (1952); Fessler v. Weiss, 348 Ill. App. 21, 107 N. E. 2d 795 (1952); Burnham v. Williams, 198 Mo. App. 18, 194 S. W. 751 (1917); Countryman v. Breen, 241 App. Div. 392, 271 N. Y. Supp. 744 (4th Dep't 1934); Jetton v. Polk, 17 Tenn. App. 395, 68 S. W. 2d 127 (1933); Paternoster v. Swick, 43 Luz. L. REG. 119 (Pa., June 5, 1953).

sured.⁹ The courts adopting the limited agency view (*i.e.*, holding that an attorney cannot without express authority bind his client by a settlement or entry of a consent judgment) are supported by the weight of authority.¹⁰ On the other hand, the courts rejecting the agency argument are also supported by authority, for it is a cardinal principle of agency that the principal is allowed some measure of control over his agent,¹¹ and under the terms of the policy it would seem clear that the insured has no control over the conduct of the litigation.¹² Furthermore, the insurance company is only incidentally acting on behalf of the in-

⁹ U. S. A. C. Transport Inc. v. Corley, 202 F. 2d 8 (5th Cir. 1953); Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 540, 196 S. E. 279 (1938); Last v. Brams, 238 Ill. App. 82 (1925); Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); DeCarlucci v. Brasley, 16 N. J. Super. 48, 83 A. 2d 823 (L. 1951); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941). *But cf.* Stephens v. Childers, 236 N. C. 348, 72 S. E. 2d 849 (1952) which holds that the insurer's attorney is the agent of the insured, and that the attorney's negligence is imputable to insured, for the purposes of vacation of judgment on the grounds of excusable neglect. N. C. GEN. STAT. § 1-220 (1953).

In Emery v. Litchard, 137 Misc. 885, 245 N. Y. Supp. 209 (Sup. Ct. 1930) it was said that a settlement was not an admission of liability, since the question of liability of the parties was for the jury to decide.

¹⁰ Crawford v. Tucker, 258 Ala. 658, 64 So. 2d 411 (1952); Fresno City High School Dist. v. Dillon, 34 Cal. App. 2d 636, 94 P. 2d 86 (1939); DeLong v. Owsley's Executrix, 308 Ky. 128, 213 S. W. 2d 806 (1948); Sudekum v. Fasnachts' Estate, 236 Mo. App. 455, 157 S. W. 2d 264 (1942); Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1940); Smith v. Land and Mineral Co., 217 N. C. 346, 8 S. E. 2d 225 (1940); Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Early v. Burns, 142 S. W. 2d 260 (Tex. Civ. App. 1940).

However, it is often said that the attorney is presumed to have authority to bind his client, and the party seeking to avoid the settlement, compromise, judgment or stipulation has the burden of overcoming this presumption. City of Medford v. Corbett, 302 Mass. 573, 20 N. E. 2d 402 (1939); Renken v. Sidebotham, 227 S. W. 2d 99 (Mo. App. 1950); Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Wadden v. Sanger, 250 S. W. 2d 312 (Tex. Civ. App. 1952).

Some courts hold that an attorney has authority to bind his client by a settlement or entry of a consent judgment, implied from the nature of his employment. Ferrara v. Genduso, 214 Ind. 99, 14 N. E. 2d 580 (1938); Bielby v. Allender, 330 Mich. 12, 46 N. W. 2d 445 (1951); Rader v. Campbell, 134 W. Va. 485, 61 S. E. 2d 228 (1949). See Harrington v. Buchanan, 222 N. C. 698, 24 S. E. 2d 534 (1943).

¹¹ Isaacson v. Boswell, 18 N. J. Super. 95, 86 A. 2d 695 (App. Div. 1952); Haluka v. Baker, 66 Ohio App. 308, 34 N. E. 2d 68 (1941); RESTATEMENT, AGENCY §§ 1(1); 14, *comment b* (1933). See also RESTATEMENT AGENCY §§ 2(3), 385 (1933).

It should be noted here that for the purposes of privileged communications between attorney and client, the insured is considered the client of the insurer's attorney. N. Y. Casualty Co. v. Superior Court In and For the County of San Francisco, 30 Cal. App. 2d 130, 85 P. 2d 965 (1938); State v. Krich, 123 N. J. L. 519, 9 A. 2d 803 (Supt. Ct. 1939); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N. Y. Supp. 631 (Sup. Ct. 1931); Westminster Airways, Ltd. v. Kuwait Oil Co. (1951) 1 K. B. 134. But the policy giving rise to the privilege is obviously not incompatible with a holding that an insurer contracting to *defend* an action against the insured may not prejudice his substantive rights; it does not follow that because of the attachment of the attorney-client relationship for purposes of the privilege, the insured stands to lose his cause of action because of the attorney's default.

¹² See note 3 *supra*.

sured, but is furthering its own interests¹³ in fulfilling its express contract obligations to the insured.¹⁴

North Carolina has never decided the question of the authority of the insurer's attorney to bind the insured by a settlement or consent judgment which prejudices the insured's substantive rights. In two cases the question could have been decided, but the counsel for the insured collaterally attacked the consent judgments which had been entered against the insured, and the question was therefore not properly raised.¹⁵ Since there has been no definite holding by the North Carolina Court that the insurer's attorneys are authorized to bargain away the substantive rights of the insured, the way seems clear for a successful attack against the judgment by means of a motion in the cause.¹⁶ Forasmuch

¹³ *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 Fed. 573 (1st Cir. 1917); *Hayes v. Gessner*, 315 Mass. 366, 52 N. E. 2d 968 (1944); *Long v. Union Indemnity Co.*, 277 Mass. 428, 178 N. E. 737 (1931).

¹⁴ *Goldstein v. Bernstein*, 315 Mass. 329, 52 N. E. 2d 559 (1943); *Abrams v. Factory Mutual Liability Ins. Co.*, 298 Mass. 141, 10 N. E. 2d 82 (1937).

¹⁵ *LaLonde v. Hubbard*, 202 N. C. 771, 164 S. E. 359 (1932); *Stone v. Carolina Coach Co.*, 238 N. C. 662, 78 S. E. 2d 605 (1953). In the first cited case, counsel for the insured took a voluntary nonsuit when the trial judge refused to allow the plaintiff to introduce evidence that the former judgment had been rendered without his consent, and then appealed to the Supreme Court. In the second cited case counsel for the insured filed a reply to defendant's amended answer which set up the consent judgment as a bar to plaintiff's cause of action, the trial judge overruled defendant's demurrer to the reply, but the Supreme Court reversed, on the ground that a consent judgment cannot be collaterally attacked.

It is well settled in this state that a consent judgment entered without authority cannot be collaterally impeached. *Coker v. Coker*, 224 N. C. 450, 31 S. E. 2d 364 (1944); *Gibson v. Gordon*, 213 N. C. 666, 197 S. E. 135 (1938); *Cason v. Shute*, 211 N. C. 195, 189 S. E. 494 (1937); *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25 (1920). The proper procedure for setting aside consent judgments is by a motion in the cause. *Hall v. Shippers Express, Inc.* 234 N. C. 38, 65 S. E. 2d 333 (1951); *King v. King*, 225 N. C. 639, 35 S. E. 2d 893 (1945); *Gibson v. Gordon*, 213 N. C. 666, 197 S. E. 135 (1938); *Boucher v. Union Trust Co.*, 211 N. C. 377, 190 S. E. 226 (1937); *Dietz v. Bolch*, 209 N. C. 202, 183 S. E. 384 (1936); *Bizzell v. Auto Tire & Equipment Co.*, 182 N. C. 98, 108 S. E. 439 (1921). *But see State ex rel. Jones v. Griggs*, 223 N. C. 279, 25 S. E. 2d 862 (1943); *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25 (1920). See also N. C. GEN. STAT. § 1-207 (1953).

If the consent judgment is attacked in the same county by independent action, the court may treat the action as a motion in the cause, rather than to dismiss. *Coker v. Coker*, 224 N. C. 450, 31 S. E. 2d 364 (1944).

A judgment which is irregular is also open to attack only by a motion in the cause. *Collins v. State Highway Commission*, 237 N. C. 277, 74 S. E. 2d 709 (1953); *MACINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES* § 653 (1929). As regards vacating a judgment because of surprise or excusable neglect under authority of N. C. GEN. STAT. § 1-220 (1953) see Note, 31 N. C. L. REV. 324 (1953), and *Moore v. Deal*, 239 N. C. 224, 79 S. E. 2d 507 (1954).

When the record shows the judgment to be void, a motion in the cause is not necessary to vacate it. *Williams v. Trammel*, 230 N. C. 575, 55 S. E. 2d 81 (1949); *Powell v. Turpin*, 224 N. C. 67, 29 S. E. 2d 26 (1944) (collateral attack allowed); *Clark v. Carolina Homes, Inc.*, 189 N. C. 703, 128 S. E. 20 (1925) (may be quashed *ex mero motu*). And see *Ledford v. Ledford*, 229 N. C. 373, 376, 49 S. E. 2d 794, 796 (1948), and *Town of Bath v. Norman*, 226 N. C. 502, 505, 39 S. E. 2d 363, 364 (1946) for dicta that a consent judgment is void if such consent does not exist at the time the court gives the judgment contract its sanction.

¹⁶ The present Chief Justice Barnhill stated in *Stone v. Carolina Coach Co.*, 238 N. C. 662, 665, 78 S. E. 2d 605, 607 (1953) that: "If plaintiff wishes to proceed

as a consent judgment is nothing more than a contract between the parties spread upon the records and given the court's sanction,¹⁷ it would seem that consent by both parties is necessary to make this contract binding,¹⁸ and it is well recognized in this state that insufficient authority in an attorney to consent to judgment is sufficient reason for setting it aside.¹⁹ Furthermore, North Carolina follows the weight of authority in holding that an attorney by reason of his office has no implied authority to compromise away his client's cause of action,²⁰ or consent to entry of judgment against him.²¹

Yet arguments can be made that the insured should not be allowed to escape the full effect of the settlement or consent judgment. *First*, although by the terms of the policy the insured has no control over the insurer's attorneys and cannot demand that he be notified of the developments in the case, in some situations he will have sufficient notice. If the claimant's complaint is verified, then verification of the answer is mandatory in North Carolina,²² and since the verification is an affidavit of the party it is to be made by the party himself.²³ If the insured is

further in this cause, he must first have the Parker judgment vacated by independent action or motion in the cause, as he may be advised. It is not proper for us at this time to express an opinion as to which is the appropriate remedy."

¹⁷ King v. King, 225 N. C. 639, 35 S. E. 2d 893 (1945); State *ex rel.* Jones v. Griggs, 223 N. C. 279, 25 S. E. 2d 862 (1943); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916).

¹⁸ Pack v. Newman, 232 N. C. 397, 61 S. E. 2d 90 (1950); Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); Gibson v. Gordon, 213 N. C. 666, 197 S. E. 135 (1938); Dietz v. Bolch, 209 N. C. 202, 183 S. E. 384 (1936); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

¹⁹ Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1946); Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Dietz v. Bolch, 209 N. C. 202, 183 S. E. 384 (1936); Peoples Bank of Burnsville v. Penland, 206 N. C. 323, 173 S. E. 345 (1934); Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Chavis v. Brown, 174 N. C. 122, 93 S. E. 471 (1917); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); Hoell v. White, 169 N. C. 640, 86 S. E. 569 (1915); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

Where both parties actually consent to the judgment, it is necessary to obtain the consent of both parties before setting it aside. Ledford v. Ledford, 229 N. C. 373, 49 S. E. 2d 794 (1948); King v. King, 225 N. C. 639, 35 S. E. 2d 893 (1945); Keen v. Parker, 217 N. C. 378, 8 S. E. 2d 209 (1940); Boucher v. Union Trust Co., 211 N. C. 377, 190 S. E. 226 (1937).

There is some language in the reports to the effect that a consent judgment obtained by fraud and mistake, being nothing more than a contract, may be attacked in an independent action. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25 (1920); Gardiner v. May, 172 N. C. 192, 89 S. E. 955 (1916); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

²⁰ Town of Bath v. Norman, 226 N. C. 502, 39 S. E. 2d 363 (1946); Bizzell v. Auto Tire & Equipment Co., 182 N. C. 98, 108 S. E. 439 (1921); Chavis v. Brown, 174 N. C. 122, 93 S. E. 471 (1917).

²¹ Morgan v. Hood, 211 N. C. 91, 189 S. E. 115 (1937); Bank of Glade Spring v. McEwen, 160 N. C. 414, 76 S. E. 222 (1912).

²² N. C. GEN. STAT. § 1-144 (1953). But in Stone v. Carolina Coach Co., 238 N. C. 662, 78 S. E. 2d 605 (1953) the complaint in the former action was verified, but the answer filed by the insurer's attorneys was not. Transcript of Record, pp. 12, 15.

²³ McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 367

called upon to verify the answer, or any other pleadings, he would have sufficient notice of the progress of the action to be represented by his *own* attorney, who would be charged with prevention of any compromise prejudicial to the insured's interests.²⁴ Furthermore, most policies of liability insurance contain as an express condition a "cooperation clause"²⁵ providing that the insured must cooperate in the defense, else the insurer is relieved of liability.²⁶ If the cause is tried doubtless the insured will cooperate and his presence would give him sufficient opportunity to object to any compromises detrimental to his interests.

Second, one court which has consistently refused relief to the insured in this situation has said that the insured cannot accept on the one hand the benefit of the defense of the action and the satisfaction of the claim against him, and on the other hand contest the insurer's actions which work to his detriment.²⁷

Third, an attorney engaged contemporaneously by the insured to assert his claim against the other party within the framework of the action against the insured should certainly keep in contact with the insurer's attorneys to prevent action prejudicial to his client's interests, for such default might be chargeable to the client.²⁸

(1929). When the action or defense is founded upon a written instrument for the payment of money and the instrument is in the possession of an agent or attorney, or if all the material allegations of the pleadings to be verified are within the personal knowledge of the agent or attorney, such agent or attorney may make the affidavit. N. C. GEN. STAT. § 1-146 (1953). These two exceptions seem to be inapplicable in an action for damages arising out of a motor vehicle collision.

²⁴In *La Londe v. Hubbard*, 202 N. C. 771, 164 S. E. 359 (1932), the insured defendant had engaged his own attorney. However, the attorney knew nothing of the agreement to enter the consent judgment and therefore he did not sign it. The court held that a consent judgment was not open to attack just because it was not signed by all of the insured's attorneys of record.

If insured's own attorney arranges a dismissal of the action against his client, upon agreement that a settlement will be made out of court, the wording of the stipulation may constitute a *retraxit*, which would operate to bar insured's claim much as would a consent judgment. *Steele v. Beaty*, 215 N. C. 680, 2 S. E. 2d 854 (1939). This opinion also includes an excellent discussion of types of dismissals, etc., which will and which will not operate as *res judicata*. *Id.*, at 682-685, 2 S. E. 2d at 855-857 (1939).

²⁵These clauses typically state that the insured is to cooperate with the insurer, and upon request of the insurer is to attend hearings and trials, and assist in effecting settlements, giving evidence, obtaining the attendance of witnesses, and so forth.

²⁶*Shafer v. Utica Mutual Ins. Co.*, 248 App. Div. 279, 289 N. Y. Supp. 577 (4th Dep't 1936); *MacClure v. Accident & Casualty Ins. Co. of Winterthur, Switzerland*, 229 N. C. 305, 49 S. E. 2d 742 (1948); *Hoffman v. Labutzke*, 233 Wis 365, 289 N. W. 652 (1940).

Yet, it is clear that this clause is for the convenience of the insurer, and when the parties reach a compromise agreement early in the case, the clause never comes into play, and the insured has no notice of the developments in the case.

²⁷*Hayes v. Gessner*, 315 Mass. 366, 52 N. E. 2d 968 (1944). See *Keller v. Keklikian*, 362 Mo. 919, 244 S. W. 2d 1001 (1951).

²⁸Among other things, the attorney must know that a counterclaim is in effect compulsory in such actions, and that if a counterclaim is not pleaded his client will be forever barred from recovery. *McLean Trucking Co. v. Carolina Scenic Stages, Inc.*, 95 F. Supp. 437 (M. D. N. C. 1951).

The principle of *res judicata* was established to prevent needless litigation, and

Fourth, in addition to being an express grant of authority to settle, might not the words "but the Company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient" be construed as granting authority²⁹ to consent to entry of judgment against the insured? Massachusetts has so held.³⁰

In 1932 the Massachusetts legislature, recognizing the unfairness to the insured resulting from this decision binding him,³¹ enacted a statute to the effect that a judgment entered by agreement, secured by bond or liability policy, would not operate as a bar to any subsequent action by the insured or bonded defendant unless such agreement was signed by the defendant in person.³² Should the need become apparent, the North Carolina General Assembly might enact a comparable measure.

The General Assembly in 1953 adopted the Motor Vehicle Safety Responsibility Act which is in effect in most states and which provides, *inter alia*, that the insurer's liability is to become absolute whenever

bars not only all questions actually litigated, but those which could have been raised as well. *Angel v. Bullington*, 330 U. S. 183, 186 (1946). This principle bars the parties and their privies as to all questions litigated in one-transaction automobile accident cases. *Stone v. Carolina Coach Co.*, 238 N. C. 662, 78 S. E. 2d 605 (1953) (insured party barred from proceeding against employer of driver who had judgment against insured); *Pinnix v. Griffin*, 221 N. C. 348, 20 S. E. 2d 366 (1942) (injured party barred from suing employer where he had already obtained a judgment, although inadequate, against employee); *Leary v. Virginia-Carolina Joint Stock Land Bank*, 215 N. C. 501, 2 S. E. 2d 570 (1939) (plaintiff's agent-driver was adjudged negligent in action against him by bank's driver-employee; judgment against plaintiff's agent-driver estops plaintiff from proceeding against bank).

There are many cases dealing with the doctrine of *res judicata* as it applies to co-defendants who are also joint tort-feasors. Where *A* obtains verdict and judgment, or settlement, or consent judgment against *B*, and *B* is later sued by *C*, *A* may successfully plead *res judicata* when *B* joins *A* as co-defendant for contribution under N. C. GEN. STAT. § 1-240 (1953). *Stansel v. McIntyre*, 237 N. C. 148, 74 S. E. 2d 345 (1953); *Snyder v. Kenan Oil Co.*, 235 N. C. 119, 68 S. E. 2d 805 (1951); *Herring v. Queen City Coach Co.*, 234 N. C. 51, 65 S. E. 2d 505 (1951); *Tarkington v. Rock Hill Printing & Finishing Co.*, 230 N. C. 354, 53 S. E. 2d 269 (1949).

Where judgment is entered against co-defendant joint tort-feasors, and is satisfied by both, the plea of *res judicata* is available in subsequent actions between them. *Lumberton Coach Co. v. Stone*, 235 N. C. 619, 70 S. E. 2d 673 (1952). But where *A* sues *B* and *B* brings cross action against *C* as joint tort-feasor, but *A* does not amend his pleadings to state a cause of action against *C*, the question of *C*'s liability to *A* is not in issue, and *A* may sue *C* in a subsequent action. *Powell v. Ingram*, 231 N. C. 427, 57 S. E. 2d 315 (1950). As to the necessity for adversary pleadings between all the parties, see *Bunge v. Yager*, 236 Minn. 245, 52 N. W. 2d 446 (1952).

²⁹ In *Morgan v. Hood*, 211 N. C. 91, 189 S. E. 115 (1937) it was held that authority to compromise a case, and to consent to a judgment founded on such compromise, cannot be conferred upon an attorney by an agent who was authorized by his principal to employ an attorney to defend the action. *Accord*, *Attleboro Mfg. Co. v. Frankfort Marine, Accident and Plate Glass Ins. Co.*, 240 Fed. 573 (1st Cir. 1917). *But cf.* *A. B. C. Truck Lines Inc. v. Kenemer*, 247 Ala. 543, 25 So. 2d 511 (1946); *Petition of Preferred Accident Ins. Co. of N. Y.*, 273 App. Div. 993, 78 N. Y. S. 2d 674 (1st Dep't 1948).

³⁰ *Long v. Union Indemnity Co.*, 277 Mass. 428, 178 N. E. 737 (1931) (entry of consent judgment was an appropriate method of settlement).

³¹ Note 30 *supra*.

³² MASS. ANN. LAWS c. 231, § 140(A) (1933).

injury occurs, and that no violation of the policy shall defeat or void it.³³ This statutory provision would seem to be an unequivocal expression of public policy for the protection of injured parties³⁴ within policy coverage by making certain that the insurance company cannot avoid payment because of a breach by the insured of some of the policy conditions.³⁵ This provision, however, does not relieve the insured of any of the pressure which forces him to forward summons and other process immediately to the insurer. For, he would still be liable to the insurer for failure to fulfill his contract obligations if he allowed an unreasonable time to elapse in order to engage a personal attorney before forwarding the process.³⁶

R. G. HALL, JR.

Income Tax—Deductibility of Attorney's Fees for Tax Purposes

The deductibility of legal fees for income tax purposes is an important factor to be considered by lawyers and laymen alike. If a client is in the fifty per cent income tax bracket, the Federal Government will, in effect, pay one half of any fee deducted by the client. This may well be an influencing factor in determining the overall financial consequences of employing legal counsel.

In order to be deductible, the fee must fall into the category of business or non-business expenses as set out in the Internal Revenue Code. If the fee covers both deductible and non-deductible items, it should be allocated between the two, and failure to so allocate may result in the disallowance of the entire amount.¹ The provision for business expenses requires that an expense, to be deductible, must be both ordinary and necessary, and incurred in carrying on a trade or business.² The pro-

³³ N. C. GEN. STAT. § 20-279(f) (1953).

³⁴ Courts of other states have construed this provision as an absolute protection of injured third parties. *Century Indemnity Co. v. Simon*, 77 F. Supp. 221 (D. C. N. J. 1948); *Farm Bureau Automobile Ins. Co. v. Martin*, 97 N. H. 196, 84 A. 2d 823 (1951); *Atlantic Casualty Co. v. Bingham*, 10 N. J. 460, 92 A. 2d 1 (1952), affirming 18 N. J. Super. 170, 86 A. 2d 792 (App. Div. 1952); *Stonborough v. Preferred Accident Ins. Co. of New York*, 292 N. Y. 154, 54 N. E. 2d 342 (1944), affirming 266 App. Div. 838, 43 N. Y. S. 2d 512 (1st Dep't 1944), affirming 180 Misc. 339, 40 N. Y. S. 2d 480 (Sup. Ct. 1943).

³⁵ Such as breach of the "cooperation clause," or failure to forward immediately all summons and process received.

³⁶ Where the insurer is absolutely liable to make the injured party whole, because of a statute such as N. C. GEN. STAT. § 20-279(f) (1953), a cause of action accrues against the insured when he fails to fulfill the policy conditions to the prejudice of the insurer. *Illinois Casualty Co. v. Krol*, 324 Ill. App. 478, 58 N. E. 2d 473 (1944); *Service Mutual Liability Ins. Co. v. Aronofsky*, 308 Mass. 249, 31 N. E. 2d 837 (1941); *American Fidelity & Casualty Co. v. Big Four Taxi Co.*, 111 W. Va. 462, 163 S. E. 40 (1932).

¹ *Jordan v. Commissioner*, 12 B. T. A. 423 (1928).

² INT. REV. CODE § 23(a)(1)(A) provides for the deduction of "all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ."