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Compromise and Settlement -- Release -- Insurance -- Liability Carrier's Settlement as a Bar to Insured's Suit

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Compromise and Settlement—Release—Insurance—Liability Carrier's Settlement as a Bar to Insured's Suit

In a recent Georgia decision[1] the insured was involved in an automobile collision with a motor vehicle owned by the Garden Lakes Company and driven by Spector. The insurer entered into a settlement agreement with Garden Lakes and Spector, paying them a sum of money in consideration for a general release executed by them, releasing the insured from all consequences of the collision. The settlement was made without the insured's knowledge or consent, under a provision of the policy providing that "the company may make such investigation and settlement of any claim or suit as it deems expedient." Thereafter the insured brought an action for damages against Garden Lakes and Spector. The defendants pleaded the release as a defense. The trial court held this defense untenable since the insured had neither acquiesced in nor ratified the release. The defendant, Garden Lakes, then amended its answer to set up a counterclaim against the insured.

The insurer, being obligated to pay any judgment rendered on the counterclaim against the insured, sought to plead the release as a defense to the counterclaim. The insured contended that to allow the insurer to plead the release would defeat her claim against Spector and Garden Lakes. The insurer brought the present action seeking a declaratory judgment of its rights, naming Spector, Garden Lakes, and the insured as defendants. The Court of Appeals of Georgia held that the insured could prevent the insurer from pleading the release, and that the release was void when repudiated by the insured.

A release for money payment may take either of two forms. It may provide either that the payee releases the payor, or that each releases the other.[2] Generally it is held that the legal effect of either form is the same. Although the former provides only that the payee releases the payor, it is generally held that it will bar the payor's claims as well.[3] In reaching this result, it is reasoned that the parties

[1] Aetna Cas. & Sur. Co. v. Brooks, 106 Ga. App. 427, 127 S.E.2d 183 (1962).

[2] See 38 N.C.L. Rev. 81, 83 (1959).

[3] Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949); Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Graves Truck Line, Inc. v. Home Oil Co., 180 Kan. 594, 305 P.2d 1053 (1957); Cannon v. Parker, 249 N.C. 279, 106 S.E.2d 229 (1958); Traveler's Indem. Co. v. Home Mut. Ins.

made a complete settlement of all their claims, and that the payor admitted his liability by making payment to the releasor.[4] This result has been reached even where the release contained an express provision that it was not to be considered an admission of liability.[5]

A few courts, however, hold that a release does not bar the payor's claims unless it so provides by its terms. Reasons given for this view are (1) that it is difficult to construe the language to be an admission of liability by the payor,[6] and (2) that the payor should be able to "buy his peace" without defeating his own cause of action.[7]

It is suggested that the preferred rule would be to make the release prima facie evidence of the parties' intention to make a final settlement of all claims arising out of the accident.[8] If it could be shown that the payee knew or should have known[9] of the payor's intention to maintain a suit against him, the presumption would be overcome. Since it would seem that in most instances the parties intend a release to be a final settlement of all the claims of both

Co., 15 Wis. 2d 137, 111 N.W.2d 751 (1961); *cf.* Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); England v. Yellow Transit Co., 240 Mo. App. 968, 225 S.W.2d 366 (1949); Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951); Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N.W.2d 395, *rehearing denied,* 72 N.W.2d 102 (1955). *Contra,* Schledewitz v. Consumers Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960); Ruf v. Wittenberg, 13 Pa. D.&C.2d 672 (1957); *cf.* Crawford v. McLeod, 64 Ala. 240 (1879); Baldwin v. New York Central & H.R.R.R., 2 N.Y. Supp. 481, 56 N.Y. Super. Ct. 607, *aff'd* 121 N.Y. 684, 24 N.E. 1098 (1888); Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953); Wade v. Southern Ry., 89 S.C. 280, 71 S.E. 859 (1911).

[4] See, *e.g.,* Giles v. Smith, *supra* note 3; Cannon v. Parker, *supra* note 3; *cf.* Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., *supra* note 3.

[5] Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Graves Truck Line, Inc. v. Home Oil Co., 180 Kan. 594, 305 P.2d 1053 (1957); *cf.* Mensing v. Sturgeon, 250 Iowa 918, 97 N.W.2d 145 (1959); Heinemann Creameries, Inc. v. Milwaukee Auto. Ins. Co., 270 Wis. 443, 71 N.W.2d 395 (1955). As stated in Giles v. Smith, 80 Ga. App. 540, 543, 56 S.E.2d 860, 862 (1949), "it would be anomalous indeed for the plaintiffs to pay Jackson the $275 and then sue him to recover the very money they had paid him."

[6] See Schledewitz v. Consumers Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

[7] See 1956 WIS. L. REV. 305; *cf.* Crawford v. McLeod, 64 Ala. 240 (1879); Wade v. Southern Ry., 89 S.C. 280, 71 S.E. 859 (1911).

[8] This was the rule used in Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951). See Brown v. Hughes, 251 Iowa 444, 99 N.W.2d 305 (1960); Cannon v. Parker, 249 N.C. 279, 106 S.E.2d 229 (1958).

[9] What an "ordinarily reasonable and reasoning man" in the place of the releasor at the time of the execution of the release would take the settlement to mean was the measure for the objective test used in Mensing v. Sturgeon, 250 Iowa 918, 930, 97 N.W.2d 145, 151 (1959).

parties,[10] such a rule would have the desired result of effectuating the intent of the parties. Although injustice might occasionally result from the application of such a rule, due to the difficulty of proving what the parties actually intended, such a result would seem less likely than under alternative rules. To hold a release to be a final settlement between the parties as a matter of law—as appears to be the rule in the principal case[11]—would deny the parties the right to give effect to a contrary intention, even though they might be able to prove it. On the other hand, to hold that a release gives rise to either a conclusive or a rebuttable presumption that the parties did not intend to bar the payor from bringing later claims would be to ignore the findings of the great majority of courts that the release was intended as a final settlement. A third alternative, that it be left to the court or jury to decide what the parties intended by the release in a given situation, would leave the law uncertain as to the effect of a release and would do nothing to solve the problem in the absence of any evidence as to the intention of the parties.

It is a well-settled rule in Georgia[12] and the United States[13] that an insurer cannot bind its insured by settling without his knowledge and consent. Where such settlement is made, however, and the insured brings suit against the releasor, who in turn counterclaims, it has been the subject of speculation whether the release could be used as a defense to the counterclaim. A recent law review note[14] suggested that since the releasor had received all to which he was legally entitled under the circumstances, it would seem bound to forego suing the insured. Consequently, the insured should be able to

[10] This statement is made on the assumption that a majority of the courts which have considered the question have correctly decided that the parties intended the release to be a complete settlement of all claims. See, *e.g.*, Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

[11] The concurring opinion suggests a different interpretation of the release if the defendant knew that the insurer was not representing the insured in making the settlement, and suggests that this was a factual issue which should be determined before the effect of the release was decided. However, the majority decided the effect of the release without any determination of the actual intent of the parties. From this it may be inferred that the court held the effect of the release to be the same, no matter what the intent of the parties.

[12] See Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 279 (1938).

[13] See, *e.g.*, Fikes v. Johnson, 220 Ark 448, 248 S.W.2d 362 (1952); Campbell v. Brown, 251 N.C. 214, 110 S.E.2d 897 (1959).

[14] Note, 38 N.C.L. Rev. 81 (1959).

defeat the releasor's counterclaim by setting up the release as a counterclaim.

Since the writing of that note, however, two cases have been litigated where an insured set up a release in defense of the releasor's counterclaim. Neither case was decided on the grounds suggested.

In *Faught v. Washam*[15] the Supreme Court of Missouri recognized the rule that ordinarily a release is ratified by one pleading it. However, the court reasoned that the general rule would not apply so as to bind the insured in this case because the release was pleaded for the benefit of the insurer and not the insured.[16]

In *Cochran v. Bell*[17] the insured's attorney elicited from the releasor on cross-examination the fact that he had signed a release of all claims against the insured. This release was made the basis of a motion to dismiss the counterclaim. The Court of Appeals of Georgia stated that the insured had relied on the release to obtain a legal advantage for herself and that this constituted ratification "as effectively as though the release had been pleaded in the plaintiff-insured's petition."[18]

The principal case extended the holding of *Cochran* to the situation where the insurer pleads the release in defense to the counterclaim. In such a case, the court reasoned that the insured would be barred in the action against the releasor.[19] This result would have

[15] 329 S.W.2d 588 (Mo. 1959).

[16] The court pointed out that the insurer was obligated under the policy to pay any damages against the insured, resulting from the counterclaim, since the damages sought were less than the limit of the insurer's liability under the policy. Consequently, according to the court, the insured had no financial interest in pleading the release in defense but was pleading it for the sole benefit of the insurer who, under Missouri practice and procedure, could not be joined as a party to the action.

It would seem, however, that it would be to a plaintiff's benefit to defeat the defendant's counterclaim to his complaint. The fact that he had a collateral contract with a third party providing that the third party would pay any judgments against him should have no bearing on the action between the plaintiff and the defendant. In that respect the defense would benefit the plaintiff-insured, even though the insurance contract would prevent it from benefiting him monetarily.

[17] 102 Ga. App. 617, 117 S.E.2d 645 (1960).

[18] *Id.* at 619, 117 S.E.2d at 646.

[19] In a concurring opinion it was suggested that the effect of the release being used as a defense should depend upon whether or not the releasor knew that the insurer was acting without authority in making the settlement. If the releasor had such knowledge, he would be presumed to know that the insurer could not defeat any claim that the insured might have against the releasor. On the other hand, if he assumed the insurer to be acting as an agent of the insured, the releasor would have thought that the insured

allowed the insurer to defeat the insured's action for substantial damages by settling even a small claim against the insured arising out of the same cause of action. Thus the court held that the insured *could* prevent the insurer from pleading the release as a defense.

The principal case would seem to deny the insurer the right of settlement and the right to control litigation—rights which were given to it by the policy. However, since the insurer is chargeable with knowledge that an insurer cannot bind its insured by making settlement without his knowledge and consent,[20] it should know that the effect of the provisions in the contract would not give it those rights. If it wanted a final settlement of the claim against its insured, the insurer would be forced to get the insured's permission.[21] When compared to the alternatives,[22] it would seem that the court made the preferred choice.

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Constitutional Law—Cruel and Unusual Punishment—Criminality of a Status

The eighth amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The origin of this provision of the Bill of Rights can be traced to the Magna

would be bound by the settlement. When he learned otherwise, the releasor could repudiate the settlement by returning the consideration to the insurer. To so hold would qualify the holding of *Cochran* and lend support to the contention of the law review note where the releasor executed the release for money consideration only. In such a case, ratification by the insured should not release him, since the release was not part of the settlement.

The concurring judge probably assumed that by making a settlement with the releasor, the insured impliedly held itself out to be an agent of the insured. *But* see Note, 38 N.C.L. REV. 81, 83 (1959), where it was suggested that the releasor would be chargeable with knowledge that an insurer cannot bind the insured without his consent and, therefore, could not be misled by the insurer's making the settlement.

[20] See Parham v. Robins, 197 Ga. 386, 29 S.E.2d 608 (1944).

[21] Unless a release is held to be conclusive evidence of the intent to settle all claims of both parties arising from the same cause of action, the insurer could also make a final settlement of the claim against the insured by first notifying the releasor that it was not an agent of the insured. Of course the insurer could still get authority from the insured to make such settlement.

[22] Other alternatives would be to allow: (1) a release to bar only the claims of the releasor; (2) an insurer to bind its insured by settling without his knowledge and consent; (3) the insurer to plead the release without it being considered a ratification by the insured.