1956

Liability Insurance and Reciprocal Claims from a Single Accident

Robert E. Keeton

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
Robert E. Keeton, Liability Insurance and Reciprocal Claims from a Single Accident, 10 Sw L.J. 1 (1956)
https://scholar.smu.edu/smulr/vol10/iss1/1

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
LIABILITY INSURANCE AND RECIPROCAL CLAIMS FROM A SINGLE ACCIDENT

By

Robert E. Keeton *

A SINGLE motor vehicle collision often results in several claims. If, as is usually true today, liability insurance coverage is in effect with respect to the operation of at least one of the vehicles, some special problems are presented as to the relationship between the reciprocal claims of the motor vehicle operators against each other, and as to the relationships among the persons interested in these reciprocal claims, including liability insurance companies.

A collision occurs between vehicles owned and operated by C and D respectively, both persons suffering personal injuries and both vehicles being damaged. C brings suit against D. Under the Federal Rules and those of some of the states, D's reciprocal claim against C is a "compulsory counterclaim" in the sense that it is barred if not asserted in the same proceeding. Even in the absence of such a requirement, the judgment in the suit of C v. D is likely to affect the claim of D against C; under the doctrine of collateral estoppel, the judgment may be conclusive between the

* B.B.A. 1940, L.L.B. 1941, University of Texas. Formerly Associate Professor of Law at Southern Methodist University; Assistant Professor of Law at Harvard since 1954.

1 The term "claim" in the singular form is here intended to include both the assertion of a right to damages for personal injury and the assertion of a right to damages to the vehicle. These assertions are sometimes treated as separate "claims" or "causes of action" when collision insurance has been in effect and the collision insurer is the assignee or subrogee of part or all of the right to recovery for damages to the vehicle. E.g., compare Travelers Indemnity Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947) with Farmers Ins. Exchange v. Arlt, 61 N.W.2d 429 (Sup. Ct. N.D. 1953). Also see Restatement, Judgments §62 (1942) and Notes, 64 A.L.R. 663, 668 (1929), 127 A.L.R. 1081, 1082 (1940), and 22 A.L.R. 2d 1455 (1952). The effect of collision insurance on the relationship between reciprocal claims and claimants is not discussed in this article, but generally the problems arising from divergent interests of the insured and the insurance company are analogous to the problems incident to liability insurance, with which this article is concerned.

2 E.g., Fed. R. Civ. Pro. 13(a); Tex. R. Civ. Pro. 97(a).
parties as to questions of fact, such as negligence, actually litigated and determined by the judgment.\(^8\) When no liability insurance is involved, this result is generally sound.\(^4\) Likewise sound in non-insurance cases is a rule of interpretation that a compromise by which D makes payment to C on account of C's claim against D will be construed as an accord and satisfaction barring also D's claim against C, in the absence of stipulation to the contrary.\(^5\)

If C, D, or both have liability insurance, however, the new factors incident to such insurance require reappraisal of rules concerning settlement, compulsory counterclaims and collateral estoppel by judgment. Has a liability insurance company the power to affect the claim of its insured against another? If so, in what ways can it do so, and has the company any responsibility to the insured regarding the exercise of this power?

### I. Settlement Without Court Proceedings

The typical automobile liability insurance policy contains a provision substantially as follows:

Defense, Settlement, Supplementary Payments.

With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof,

---

\(^8\) E.g., A.B.C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Restatement, Judgments §§ 68-72 (1942 and 1948 Supp.).

\(^4\) See Scott, Collateral Estoppel By Judgment, 56 Harv. L. Rev. 1 (1942). Application of this doctrine may be unsound, however, in the case of a judgment rendered by a court having jurisdiction limited as to amount. Suppose C sues D in a court having jurisdiction limited to claims not in excess of $200, and recovers judgment upon findings that C was not negligent and D was negligent. According to the rule stated in Restatement, Judgments, § 71, comment d, second paragraph (1942), collateral estoppel would not be applicable if D thereafter sued C in a court of general jurisdiction on a $25,000 claim arising from the same accident. But this paragraph was later omitted because inconsistent with the weight of authority. Restatement, Judgments, §§ 343-44 (1948 Supp.), citing Note, 147 A.L.R. 196, 226-232; Geracy, Inc. v. Hoover, 133 F. 2d 25 (D.C. Cir. 1942); and Forman v. Massoni, 176 S.W.2d 366 (Tex. Civ. App. 1943). Error ref., 141 Tex. 679 (1944). The rule supported by the weight of authority is subject to the criticism that it is inconsistent with the policy of establishing small claims courts having procedures which, though less expensive to pursue and more suitable for small claims, are not appropriate for adjudication of larger claims; see the dissenting opinion in the Geracy case.

\(^5\) For examples of such interpretation, see Giles v. Smith, 80 Ga. App. 540, 543, 56 S.E.2d 860, 862 (1949); Kelleher v. Lozzi, 7 N.J. 17, 24, 80 A.2d 196, 199 (1951).
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; . . .

This clause grants to the company the privilege of settling de-
spite the protest of the insured. It does not necessarily follow,
however, that the company may settle on any terms which can be
agreed upon by it and the claimant with whom it is settling. Obvi-
ously the company's power and privilege to represent the
insured would not extend to the release, as part of the considera-
tion for the settlement, of rights of the insured which are wholly
unrelated to the accident out of which arose the claim being
settled. But with respect to the reciprocal claim of the insured
arising out of the same accident, a conflict of views has developed.

A. Has the Company a Privilege or Power to Make a Settlement
Barring Insured's Reciprocal Claim?

Most courts confronted with this problem have held that the
insured's reciprocal claim is not barred by the company's settle-
ment, the insured not having joined in the agreement, ratified it,
or authorized the company to bind him. Some of the opinions
reaching this result may be interpreted as not supporting a rule
stated as broadly as the preceding sentence, the courts having
declined to pass on the broader question by stating narrowly
the description of the company's settlement as one made by the

---

6 See Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga. App. 500, 196 S.E. 279
(1938); Long v. Union Indemnity Co., 277 Mass. 428, 178 N.E. 737 (1931) (note,
however, that insofar as this opinion indicates that the company's privilege extends even
to causing the insured's reciprocal claim to be barred, it is a minority view; see cases
cited in notes 7 and 42 infra); Burnham v. Williams, 198 Mo. App. 18, 194 S.W. 751
(1917); Countryman v. Breen, 241 App. Div. 392, 271 N.Y. Supp. 744 (1934); aff'd. 268

7 U.S.A.C. Transport, Inc. v. Corley, 202 F.2d 8 (1953) (applying Georgia law);
448, 248 S.W. 2d 362 (1952); Foremost Dairies, Inc. v. Campbell Coal Co., 57 Ga.
App. 500, 196 S.E. 279 (1938); Last v. Brams, 238 Ill. App. 82 (1925); Burnham v.
Williams, 198 Mo. App. 18, 194 S.W. 751 (1917); Perry v. Faulkner, 102 A.2d 908 (N.H.
1954); Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695 (1952); De Carlucci v.
Brasley, 16 N.J. Super. 48, 83 A.2d 823 (1951); Emery v. Litchard, 137 Misc. 885, 245
N.Y. Supp. 209 (1930); Barron v. Smith, 33 Erie County L.J. 154 (Pa. 1949); Pater-
S.W.2d 127 (1933); American Trust & Banking Co. v. Parsons, 21 Tenn. App. 202, 108
S.W.2d 187 (1937); Wieding v. Kirch, 271 S.W.2d 458 (Tex. Civ. App. 1954); Hurley
company over the insured's protest that he was not at fault, or one made without the insured's knowing of it until after consummation. It may be argued that such references to protest or lack of knowledge imply that the insured's reciprocal claim would be barred if he knew of the proposed settlement and made no protest. Probably a more reasonable interpretation of each of these opinions is that the court was merely stating factors giving added support to its conclusion that the company's settlement was not a bar to the insured's reciprocal claim. If it is held that the settlement made over the protest of the insured does not bar the insured's reciprocal claim, or that one made without the insured's knowledge does not bar his claim, the same holding should be made as to any other settlement which the insured does not join in, ratify, or authorize. The insured should not be penalized for knowing about the negotiation and acquiescing in the company's exercise of its privilege to settle.

In other opinions there is support for the proposition that the liability insurance policy grants to the company the privilege of making a settlement which bars the insured's reciprocal claim,

---

8 See Burnham v. Williams, 198 Mo. App. 18, 194 S.W. 751 (1917); Jetton v. Polk, 17 Tenn. App. 395, 68 S.W.2d 127 (1933).
10 Cf. the interpretation placed on the Burnham and Jetton cases, cited supra note 8, in Keller v. Keklikian, 362 Mo. 919, 925, 244 S.W.2d 1001, 1004 (1951).
11 In Isaacson v. Boswell, 18 N.J. Super. 95, 86 A.2d 695 (1952), and De Carlucci v. Brasley, 16 N.J. Super. 48, 83 A.2d 823 (1951), the courts probably took this course of caution because it was being urged in each case that the result reached was in conflict with the decision of the Supreme Court of New Jersey in Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951), wherein it was held that a settlement of L's claim against K and dismissal of the suit of L v. K barred K's subsequent suit against L based on the same intersection collision. The opinion in the Kelleher case makes no reference to the effect of liability insurance coverage. After the decision by the Supreme Court of New Jersey, however, plaintiff Kelleher unsuccessfully sought a rehearing so she might show that the settlement had been consummated by the company's attorney without her consent. Docket No. 765 (N.J. 1951). See criticism of the decision in Note, 51 Col. L. Rev. 1062 (1951).
12 Cf. Countrman v. Breen, 241 App. Div. 392, 271 N.Y. Supp. 744 (1934), aff'd 268 N.Y. 643, 198 N.E. 536 (1935), wherein the company became insolvent after its attorney agreed on settlement in open court but before payment was made. The court held that the insured was not bound to pay the sum agreed upon by the company's attorney. In response to the argument that the insured knew of the settlement agreement and made no protest, the court, having noted the company's privilege of settlement without the insured's consent, remarked that the insured had no reason to protest since he had not agreed to pay anything. Id. at 394, 271 N.Y. Supp. at 747.
without regard to whether the insured consented or, though knowing of the proposed settlement, failed to protest. In an Alabama case, defendant Kenemer interposed pleas of res judicata founded on a Georgia judgment rendered in a suit which Kenemer had filed against the Alabama plaintiff, after the Alabama suit had been commenced. The Alabama plaintiff sought to attack collaterally the Georgia judgment on the ground that it was a consent judgment entered pursuant to a settlement made by the insurance company without the consent and over the protest of the insured (the Alabama plaintiff). Though the Alabama decision against the plaintiff was rested primarily on rules limiting collateral attacks on judgments, the court stated: "... it appears by affirmative averment that, by the contract of liability insurance, the appellant had authorized its liability carrier to employ counsel to defend any suit in its name and to make any settlement deemed expedient, which the insurance company did in the Georgia suit." It is a reasonable though not a necessary inference from this passage that the company has not merely the power but also the privilege to make a settlement by consent judgment which bars the insured's reciprocal claim. It has been so held in Massachusetts. If the company is privileged to accomplish this result of barring the insured's reciprocal claim by consent judgment, it should be privileged to accomplish the same result by an agreement not incorporated into judgment, since the significant issue is the substance of the privilege rather than the formal method of exercising it. It may be argued that the policy clause concerning defense applies only to a "suit" and therefore could be looked to only in support of the inference of a privilege to settle after suit was filed and not before. But the inference of a privilege

---

14 Id. at 549, 25 So. 2d at 516.
16 But cf. Ross v. Fishtine, 277 Mass. 87, 177 N.E. 811 (1931). Though this opinion probably should be interpreted as supporting the distinction criticized in the text above, it might be explained as not dealing with a plea of accord and satisfaction based on a settlement purporting to release the insured's claim, but instead with alleged error of the trial court in excluding an offer of proof of payment to the defendant by the insurer and in refusing to instruct the jury that if the plaintiff paid or caused such payment "this is such an acknowledgment of negligence and liability on the part of the plaintiff, Ross, that the plaintiff cannot recover against the defendant, Fishtine, in this action." Id. at 88, 177 N.E. at 811. This theory of admission of negligence was rejected by the court on the basis that the payments showed no more than a compromise.
to make a settlement which bars the insured's reciprocal claim is no more readily drawn from the clause concerning defense than from the clause concerning "settlement of any claim or suit as it deems expedient." 17

The better view is that the insurance policy does not grant to the company the privilege of barring the insured's reciprocal claim by an agreement which the insured has not otherwise joined in, ratified, or authorized. The purpose of the policy clause granting to the company the privilege of making such settlement as it deems expedient is to give the company control over the handling of the claim against the insured. Nowhere in the policy is the reciprocal claim referred to expressly. The error of inferring that the policy grants to the company the privilege of barring the insured's reciprocal claim is apparent when the consequences of such construction are envisioned. Suppose that C asserts a claim for $250 damages against D, the insured, and D makes a reciprocal claim for $100,000 damages which he has suffered. May the company release D's $100,000 claim in consideration of C's release of his $250 claim, with the result that the cost of settlement to the company is nothing and the cost to the insured is the value of his $100,000 claim? If so, the insured in these circumstances would be in much worse position with liability insurance than without it. Furthermore, if C also had liability insurance, recognition that a liability insurance company has a privilege to release its insured's claim would enable the two insurance companies (or the one company, if both motorists were insured in the same company) to cancel out the reciprocal claims of C and D, leaving each of them with no recovery though at least one may have had an otherwise valuable claim. Whether the matter be argued as one of "plain meaning of the language of the contract," as one of "giving effect to the intention of the parties," or as one of judicial interpolation to fill a gap in the policy terms, the answer should be the same: As between the company and the insured, the company is not granted the privilege of releasing the insured's reciprocal claim when making such settlement "as it deems expedient" of the claim against the insured.

17 The quotation is an excerpt from the standard clause, a more extended quotation from which appears supra, p. 2.
A negative answer should be given also to the question whether, as between the insured and the third party who settled with the company, the settlement bars the insured’s reciprocal claim. This question differs from the preceding one in that here the interests of the third party must be considered. If, however, he is not misled as to whether or not the company has the privilege of barring the insured’s reciprocal claim, due protection of the interests of such third party does not require recognition of power in the company any broader than its privilege. It is true that the third party (referred to as C) may be required to deal with two persons rather than one in order to effect a complete settlement of all tort claims between him and the insured (referred to as D) arising out of the collision. But that is normally an advantage to C, as compared with dealing with D only — the person with whom he would have to deal if there had been no insurance. Absent insurance, in whatever way C and D might adjust the apportionment of damages, together they would bear the full loss of their combined damages. That an insurance company is involved adds to the resources of C and D another source for payment or partial payment of C’s damages. Thus the chances for settlement favorable to C are improved. There is no sound reason for giving C the added advantage of a power in D’s insurance company to bar D’s claim against C.

Can C, the claimant dealing with the company, make out a case of apparent authority though he is unable to show that the company was in fact authorized to bind the insured, D, as to D’s reciprocal claim? This can be done only if D is responsible for C’s being misled into reasonably believing that the company or its representative was so authorized. The fact that D referred him to the company or its representative when C first presented his claim to D should not be misleading to C.18 If C does not know the relevant incidents of the liability insurance relationship, he should inquire. Similarly, the mere fact of representation of the insured by an attorney employed by the company, pursuant to its obligation to defend, should not mislead C as to the scope of

---

authority of such attorney with reference to D's reciprocal claim.\(^{19}\)

In the foregoing discussion of the two questions of whether or not it should be held that the company or its representative has (1) a privilege or (2) a power to make a settlement barring the insured’s reciprocal claim, the terminology of agency has been avoided. It merits consideration, however, since legal reasoning is often influenced by terminology. In terms of agency doctrine, the company and its representatives are not agents of the insured with respect to settlement of the insured’s reciprocal claim, unless there are special arrangements between them apart from the typical liability insurance policy.\(^{20}\) In fact, the company and its representatives should not be regarded as agents of the insured even with respect to settlement of the claim against the insured\(^{21}\) or with respect to defense,\(^{22}\) since the insured lacks

---

\(^{19}\) Compare the Countryman and Haluka cases discussed infra, note 21. These decisions support the proposition that a settlement of the claim against the insured, negotiated by an attorney employed by the company to appear as defense counsel in the suit against the insured, does not bind the insured. A fortiori, a purported settlement of the insured’s reciprocal claim negotiated by such attorney should not bind the insured in the absence of conduct of the insured beyond approval of the attorney’s representing him in defense.


The question whether the company is agent for the insured in settling the claim against the insured is relevant in those cases wherein the company has become insolvent after agreeing to settlement but before paying it, and the claimant then has sued the insured on such settlement agreement. The insured should not be bound by such agreement. Countryman v. Breen, 241 App. Div. 392, 271 N.Y. Supp. 744 (1934), aff’d 268 N.Y. 643, 198 N.E. 536 (1935); Haluka v. Baker, supra. Cf. Fessler v. Weiss, 348 Ill. App. 21, 107 N.E.2d 795 (1952) (insolvent company’s attorney permitting case to go to judgment without defense on behalf of insured; new trial granted to insured); Jones v. Noble, 3 Cal. App. 2d 316, 39 P.2d 486 (1935) (solvent company refusing, on ground of mistake, to make payment pursuant to settlement negotiated by the attorney employed by the company to represent the insured in suit against him; settlement held not binding on the insured in the absence of proof of his consent or approval). But cf. Zazove v. Wilson, 334 Ill. App. 594, 80 N.E.2d 101 (1948) (upholding an application by claimant’s attorneys to establish against the insured an attorney’s lien for 50% of the amount agreed upon in a settlement with the claimant negotiated by the company, the holding being based, however, not upon agency but upon insured’s knowledge of the settlement and failure to repudiate it or the benefits of the release); Selby v. Victoria Mines, Inc., 124 Mont. 321, 221 P.2d 423 (1950) (suit against the insured...
that power of direction and right of control which a principal has over an agent. Rather than right of control, the insured has at most a cause of action for negligence or bad faith in the handling of the defense or settlement of the claim against the insured. Though some courts have termed the relationship as to defense and settlement of the claim against the insured only on the settlement agreement, no showing of insolvency of the company being referred to; holding that the company's claims adjuster was an agent of the insured, and the insured was bound by his settlement agreement).

The results in the last two cases might be reconciled with the other cited cases on the ground that the company was not a named party and the formal procedure of a suit against the insured was approved as a means of obtaining payment from the company, the opinions not dealing specifically with the question whether such a suit could be maintained despite a showing by the insured that, because of insolvency of the company, he would be required to bear the loss personally. This theory of reconciliation is weak, however, since there is no obstacle to bringing suit on the settlement agreement directly against the company; the procedural rules and the policy clause against joinder of the company as a defendant in the tort action against the insured are inapplicable to the contract action on the settlement agreement.

Another factual distinction is that the company's adjuster negotiated the settlement involved in the Selby case, and the same may have been true in the Zazove case, whereas in each of the other cited cases an attorney employed by the company to represent the insured negotiated the settlement. In the Countryman case the decision of the Fourth Department was based upon want of authority of an attorney, even assuming the Company's attorney to be an attorney for the insured also; an adjuster might have greater authority. But arguably, on the other hand, there is more reason for holding the insured bound by an agreement made by an attorney, since in the suit against the insured the attorney appears as attorney for the insured, his employment by the company not being disclosed of record.

22 See Fessler v. Weiss, 348 Ill. App. 21, 107 N.E.2d 795 (1952). Contra, Stephens v. Childers, 236 N.C. 348, 72 S.E.2d 849 (1952), denying the insured's motion to set aside a default judgment which the company negligently allowed to be entered. It does not appear from this opinion whether the insured would be bound by a default judgment in excess of policy coverage. If so, the insured would have a cause of action against the company for the loss suffered by reason of such negligence with respect to the obligation to defend. Cf. Abrams v. Factory Mut. Liability Ins. Co., 298 Mass. 141, 10 N.E.2d 82 (1937). See Note, 131 A.L.R. 1499, 1510 (1941). As to supporting the result in the Stephens case on a basis other than regarding the company's representatives as agents of the insured, see infra note 26. Also compare Heller v. Alter, 143 Misc. 783, 257 N.Y.S. 391 (1932), wherein the attorneys employed by the company permitted default judgment after the company became insolvent, and the insured's attempt to set aside the default judgment failed, but the court did not base its reasoning on agency doctrine.

23 See RESTATEMENT, AGENCY §§ 1, 14 (1933).

sured one of agency, the results of the cases before such courts would have been the same had the courts recognized that the company was not an agent of the insured but rather a non-agent fiduciary holding a power to affect the interests of both the company and the insured, and not subject to a right of control by the insured. This type of power is referred to in the Restatement of Agency as a power given as security. One who is an agent may hold such a power for the protection of some interest he has as an incident of the agency relationship. But he does not hold it as agent. It is equally possible for such power to be granted to one who is not an agent. It is submitted that this is what has been done by the provisions of the typical liability insurance policy.

Demonstrating that the company and its representatives are not agents of the insured does not, of course, answer the question of whether they have the privilege or the power to make a settlement barring his reciprocal claim. But it does indicate that this question is not properly answered by the false as-

---


26 With the exception of Hayes, Selby and Stephens the cases cited in the preceding note were concerned with the company's liability in excess of policy limits because of its failure to settle. The company's duty in such cases is dependent on the fact that it is a fiduciary, holding a power to affect the insured's interests as well as its own. That duty may be found in the case of a non-agent fiduciary as readily as in the case of one who is an agent. The Hayes case was concerned with the question whether the insured was estopped to plead limitation because of his company's representations during settlement negotiations; the Selby case, whether the insured was subject to suit on a settlement agreement made by the company's adjuster; and the Stephens case, whether insured could get a default judgment set aside on the ground of excusable neglect despite the negligence of his company in failing to cause a timely appearance on his behalf. The result in each of these three cases, even if proper, is not dependent on a finding of agency but may be explained as readily on the basis of a power given as security to a non-agent. Only the power of the company's representative was at issue, and not whether it was held as agent or not as agent.

27 Restatement, Agency §§ 138, 139 (1933).

28 Cf. Restatement, Agency, § 138, comment d, (1933), pointing out that one may continue to hold such a power though the principal has terminated the authority which he held as agent.
assertions that they are agents of the insured and therefore must have such power. On the basis of factors apart from agency doctrine the conclusion has been reached above that, under the preferred view of the typical situation, the company and its representatives lack such power.

B. Settlement by the Insured

Closely related to the problem of power and privilege of the company to make a settlement barring the insured’s reciprocal claim is the question of whether the insured has any obligation to the company regarding settlement of his reciprocal claim. The typical policy contains, in addition to the provision concerning settlement already quoted, a provision as follows:

ASSISTANCE AND COOPERATION OF THE INSURED

The insured shall cooperate with the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

Insofar as it refers to settlement, this clause concerns only the claim against the insured. It does not prohibit the insured from making a settlement of his reciprocal claim in terms which leave the claim against the insured unaffected. Also, the insured would not commit a breach of the Assistance and Cooperation Clause by making a settlement purporting to dispose of all claims, both in his favor and against him, since such a settlement, if having any effect on the company interests, would be a benefit to the company.

C. Form of the Company’s Settlement

In the cited cases rejecting the contention that the company’s settlement bars the insured’s reciprocal claim, it does not

30 Supra note 7.
appear that the form of the settlement agreement influenced the courts. The supporting theory in these case is that there is a want of power in the company to bar the insured’s reciprocal claim by settlement. Thus, insofar as effect on such claim is concerned, it is immaterial whether the agreement is one in form purporting to bar it, or purporting to reserve it, or lacking any reference to it. But if it is held that the company has power to make an agreement barring the insured’s claim, the form of agreement becomes important since the company might decline to exercise such power in a particular case and make an agreement specifically reserving the insured’s claim.

D. Responsibility of Company to Insured

If, contrary to the conclusion urged in the foregoing analysis, one accepts the view that the company is empowered to make a settlement with a third party which bars the insured’s reciprocal claim against the third party, another question arises. Is the company responsible to the insured with respect to its exercise of this power? The analogy of responsibility of the company for failing to settle the claim against the insured, resulting in judgment against the insured for an amount in excess of policy limits, suggests that a court would hold the company responsible under the same standard of negligence or bad faith as it would apply to an excess liability claim. That is, the company’s privilege as between it and the insured probably would be held narrower than its power to make an agreement binding as between the insured and the third party. As to the relative weight which the company must give to its own and the insured’s conflicting interests, the most acceptable rule would be one requiring such consideration to the two reciprocal claims as it would give if it were responsible for the full amount of any judgment against its insured and entitled to receive the full proceeds collectible on any judgment in favor of its insured—as if it had liability policy limits at least as high as the claim against the insured and subrogation rights to the full amount collectible on the insured’s own claim.

31 See supra note 24.
II. Entry of Judgment in a Suit Defended by the Company on Behalf of the Insured

A. Judgment Upon Trial

Assume, again, a collision between vehicles owned and operated by C and D respectively, in which both parties suffer personal injuries and both vehicles are damaged. Assume also, for present purposes, that suit is first brought by C against D, and that D’s liability insurance company defends for D.

Suppose, first, the defense is successful and results in findings that C was negligent and D was not. Thereafter D brings a separate suit upon his reciprocal claim against C and asserts that C is collaterally estopped by judgment to deny that C was negligent or to assert that D was negligent. A “compulsory counterclaim” rule such as Federal Rule 13(a)\(^8\) probably would bar D’s suit.\(^8\) Absent such a requirement for presenting his claim in the first suit, D would have the benefit of collateral estoppel as to such questions of fact as were litigated and determined in the first suit. Under the view adopted by the Restatement of Judgments, this ruling would extend to both the finding that C was negligent and the finding that D was not negligent, if the judgment was based upon both as alternative grounds.\(^8\) If C also has liability insurance coverage, would the findings be binding upon C’s liability insurance company, as well as between D and C individually? Arguably not, on the theory that C’s insurance company is neither a named party nor a participant in fact in the litigation of C v. D.\(^5\) This theory leads to the conclusion that D could recover a judgment against C by relying upon collateral estoppel, but that before either D or C could collect against C’s insurance company it would

---

\(^8\) Rule 13. Counterclaim and Cross-claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

\(^8\) See infra at p. 15.

\(^8\) Restatement, Judgments § 68, comment n and illustration 8 (1942).

be necessary to relitigate with C's insurance company the mat-
ters bearing on C's liability to D. From the point of view of the
effect on D's interests in a case wherein the insured is not fi-
nancially responsible except for his insurance coverage, it would
be unfair to require such relitigation after D had won in the
first trial unless D were also free to relitigate after he had lost.
Collateral estoppel should be applicable both for and against
D, or in neither instance. A more satisfactory method of dealing
with these problems, which arise when C has liability insur-
ance, would be to bind not only D and C by collateral estoppel
but also C's insurance company. This rule, however, should be
subject to the company's defense of breach of the assistance
and cooperation clause of the policy if C has failed to notify
his insurance company of the litigation instituted by him, or
has improperly handled the litigation in view of its effect on
the reciprocal claim of D as well as C's own claim. Subject
to such policy defense, C's liability insurance company, hav-
ing agreed to insure C as to amounts he is legally obligated to
pay, should be bound by whatever is binding on C.

Suppose, next, that in the suit of C v. D the latter's liability
insurance company defends for him and loses. If D thereafter
asserts his reciprocal claim against C, is D's claim defeated
by the judgment in the suit of C v. D? On the theory of col-
lateral estoppel by judgment, this question has been answered
affirmatively by one court. 36 This result is supported by the
policy against multiplicity of suits, which policy also supports
application of a compulsory counterclaim rule such as Fed-
eral Rule 13(a). 37 Do the incidents of liability insurance make
this result unsound in insurance cases?

37 Under the view adopted in Restatement, Judgments § 68 (1942 and 1948 Supp.),
collateral estoppel applies only with respect to issues actually litigated and essential
to the judgment. The compulsory counterclaim risk, on the other hand, has more
sweeping effect. Where there is such a risk, one who fails to assert his counterclaim,
in the original suit wherein he is defendant, is thereafter precluded under a doctrine
in the nature of merger or bar. See Restatement, Judgments § 58, and § 68, comment
a (1942 and 1948 Supp.); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1,
10-15, 22-27 (1942). The claim and counterclaim are treated as if they were parts of
a single cause of action, and subject to the rule against splitting.
Federal Rule 13(a) appears on its face to apply to the hypothetical case of C v. D. D's reciprocal claim is a "claim which at the time of serving the pleading the pleader has against [an] opposing party," namely C, arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction," and the exception for a claim which is the subject of another action pending when this action was commenced is inapplicable. Typically the insurance company is not a formal party to the suit. Even where it is permissible to join the company, normally the insured (D) is also named as a party. It might be urged, however, that Federal Rule 13(a) should not be construed to apply to the reciprocal claim of D since, looking through the form which names only D as defendant, we find that the claim of C will be satisfied in whole or part by the company and is being defended by the company under a policy which grants to it control over that defense even as against D, the named defendant. In reality, though not in form, the defense pleader is the company, whereas it is D who has the claim in question against A. By the same line of reasoning, if C also has liability insurance, D's reciprocal claim is not a claim against the opposing party (C) since in reality the claim is to be satisfied wholly or partly by C's insurance company. In those jurisdictions where it is improper to join the company in the tort suit against its insured, it might also be argued that when we look through form to identify the parties interested, D's claim requires for its adjudication the presence of a third party of whom the court cannot acquire jurisdiction.

These arguments against application of Federal Rule 13(a) to the hypothetical suit of C v. D probably should not prevail, however. An important purpose of the rule is to consolidate into one proceeding the litigation of numerous claims from a single accident. That purpose is applicable whether only C and D are interested, or they and also their insurance compa-
nies are interested. As for the argument that the court may not acquire jurisdiction over the companies in this proceeding, the purpose of the rules declaring them not to be proper parties is to avoid jury bias against insurance companies. If we look through form to find that they are persons interested in the claims, we should also look through form to find that they are in practical effect parties to the litigation, since they are defending for their own interests and on behalf of the insureds, though only their insureds are named as defendants.

(2) Conflicting Interests of Company and Insured Concerning Trial

A conflict of interests may arise between the company and its insured, D, with respect to the conduct of (1) litigation in which both C’s claim against D and D’s claim against C are at issue or (2) litigation placing at issue one of these claims and collaterally affecting the other. Both the company and its insured, D, are interested in proving that C was negligent and that D was not. Their interests do not always coincide, however. For example, in a jurisdiction where contributory negligence is a complete bar, the company’s interests are as well served by findings of negligence against both C and D as by findings against C alone, but D’s interests in his reciprocal claim are served only by findings against C alone. This difference of interests might affect tactical decisions during trial. D would favor urging as negligence only those grounds with respect to which his conduct leading up to the collision was demonstrably superior to that of C; the company, on the other hand, might favor urging additional grounds of negligence as to which the conduct of C and D was equally subject to criticism. Suppose the collision occurred in dense fog and neither driver was on an emergency mission; D would not want to urge as negligence the mere fact of driving in such dense fog for other than an emergency mission, but the company might want to urge this ground (unless tactical considerations caused the company to prefer giving up the chance of winning the case on this theory in order to improve chances of winning on another theory).
Similarly, after trial and judgment, a conflict of interests may arise concerning the advisability of appeal. Assume a judgment against D for $5,000 on a claim as to which D has $5,000 coverage. It may be that the company desires to appeal, while D prefers that there be no appeal because the judgment on the new trial might be higher than his coverage. Or assume another situation, in which judgment has been entered that C recover $3,900 on his claim against D and that D take nothing on his reciprocal claim. Though the company may prefer to pay off the $3,900 and incur no more legal expense, D may prefer to appeal in the hope of obtaining a new trial and thereafter a favorable judgment on his claim against C.

In order to deal effectively with the problem of such conflicts of interest of the company and the insured, the courts might either (1) provide for separate trials of the two reciprocal claims of C v. D and D v. C, neither to affect the other by collateral estoppel, or else (2) provide for a single trial to determine both claims and recognize mutual obligations of D and his insurance company to respect each other's interests. The first alternative could be implemented by denying the applicability of a compulsory counterclaim rule (or else ordering a severance for trial purposes if the compulsory counterclaim rule is held applicable) and denying applicability of the doctrine of collateral estoppel on the theory that the interested parties are not the same. The second alternative could be implemented by applying a compulsory counterclaim rule and requiring a single trial, or else by applying the doctrine of collateral estoppel, and supplementing either of these methods of trial of the tort claims with a rule of mutual obligations of the company and the insured to respect each other's interests.

Probably the second of these two ways of dealing with the problem of conflicting interests of the company and the insured should be adopted, because the first is inconsistent with the

38 This situation was considered in the opinion in Davison v. Maryland Cas. Co., 197 Mass. 167, 83 N.E. 407 (1908); the court, applying the Massachusetts rule as to conflict between interests of the company and the insured, stated that the company had the privilege of appealing to protect its own interests, even though the insured's interests might be prejudiced by the additional legal proceedings.

policy in favor of litigation of a single fact question between the same parties only once—a policy underlying both the compulsory counterclaim rule and the doctrine of collateral estoppel. If this policy does not prevail, the same fact question may be decided with two conflicting results in the two different trials—a circumstance which, at the least, is a disturbing indication of the imperfection of our judicial processes. (That imperfection remains, though somewhat less obviously demonstrable, if the finding in the first trial is conclusive. Perhaps the risk of erroneous adjudication can be reduced, however, if the advocacy for all conflicting interest is brought to bear in a single proceeding, either directly by the appearance of separate attorneys for the company and the insured, or indirectly by cooperation of the company and the insured in choosing a single presentation acceptable to both, or, if one of the claims goes to trial ahead of the other, by a presentation at the instance of one who has been forced to give due consideration to the other’s interests because of the threat of liability for disregarding them.

Whether the single trial which affects both claims is one in which both claims are at issue, or instead is one in which one claim only is at issue and the other is collaterally affected, the company and the insured might be held to mutual obligations to give to each of their respective interests that degree of weight, relative to the conflicting interest, that would be given by an individual holding both interests. Though there are some opinions which in principle appear to be opposed to such a rule of mutual obligations, the analogy to the company’s obligation with respect to liability in excess of policy limits for failure to settle supports this rule. Admittedly such a rule presents difficulties of enforcement because many of the applications will concern matters of good judgment in the handling of claims. Recognition of such a rule of mutual obligation seems fairer, however, than giving priority to either the interests of the insured or the interests of the company, where the two have come into conflict with respect to a matter not governed by the ex-

41 See supra note 24.
pressions in the insurance policy. Also, because of the public interest and interest of litigants generally against multiple trials over a single fact situation, this rule seems preferable to elimination of the conflict of interests by providing a procedure for separate trials, neither of which would affect collaterally the claim at issue in the other.

B. Consent Judgment

(1) The Nature of the Problem

In a number of cases it has been urged that a prior consent judgment on the claim against the insured, agreed upon by the claimant and the attorney employed by the insurance company, defeats the insured's reciprocal claim. The insured responds by attempting to show that he did not personally participate in the agreement, and by urging that the judgment entered upon consent of the attorney employed by the company should not be binding upon him, the insured. In several cases concerned with the question, this contention of the insured has been sustained, but the contrary view has been applied elsewhere.

One theory offered against the insured and in support of a ruling that such a consent judgment defeats the insured's reciprocal claim is that the insurance policy grants to the company the privilege of extinguishing the insured's claim in this manner. Though having some judicial support, this theory is subject to substantially the same criticism as that offered above with respect to construing the policy as granting to the company the privilege of extinguishing the insured's reciprocal claim by settlement without entry of judgment. The reciprocal claim of the insured is not referred to in the policy; the clause concerning defense and settlement by the company is properly construed as relating only to claims against the insured. No policy

---


45 Supra text following note 17.
clause spells out a power in the company to cause its attorney to appear on behalf of the insured and consent to judgment against him; such power as is implied in the provisions concerning defense and settlement by the company is limited to the company's consenting to a judgment which affects only the claim against the insured, and not to one defeating the insured's reciprocal claim.\(^{46}\)

A second theory supporting the recognition of a consent judgment in the suit against the insured as defeating the insured's reciprocal claim is that the interests favoring stability of judgments require that the insured not be permitted to go behind a judgment to show that in fact it was entered under circumstances different from those indicated on the face of the judgment.\(^{47}\) This theory may lead to different collateral effects of various consent judgments depending on the circumstances and the recitations in the particular judgment. Several possibilities will be considered.

(2) Full Disclosure on the Face of the Judgment

Absent an applicable compulsory counterclaim rule,\(^ {48}\) if the consent judgment discloses on its face that it is entered pursu-
RECIPROCAL CLAIMS

ant to a compromise agreement between the claimant and the company only, the insured not being a party to the agreement, there is no sound reason for giving such judgment any greater or different effect on the insured's reciprocal claim than the settlement alone would have had. Such facts having been recited, it should be immaterial whether the consent judgment is, on the one hand, a dismissal or an adjudication that plaintiff take nothing, the consideration for settlement having been paid, or on the other hand is a judgment awarding the plaintiff a recovery and specifying that it is done upon the basis of the compromise agreement. In either of such cases the judgment on its face does not purport to adjudicate any issue not controlled by a compromise between the claimant and the company only.

(3) False Recitations that the Case Was Adjudicated on the Merits or that the Insured Consented to Judgment

Frequently the consent judgment does not disclose that it was entered pursuant to a compromise agreement to which the insured was not a party. If it purports to award plaintiff a recovery on the tort claim against the insured, as distinguished from awarding a recovery on the compromise agreement, the interest in stability of judgments points to the conclusion that, unless the judgment is subject to being reformed or explained, it should be given the same effect as a judgment which was in fact entered upon the merits after trial. Similarly, if it purports to be a judgment entered upon consent of the insured, this interest in stability of judgments points to giving such judgment that effect it would have had if the recitations of consent by the insured had been accurate.

There is some support, however, for the proposition that the insured may show collaterally, in the insured's suit on his reciprocal claim, that the consent judgment urged against his

*Cf. A.B.C. Truck Lines, Inc. v. Kenemer, 247 Ala. 543, 25 So.2d 511 (1946), where the majority treated the foreign judgment as if it had been entered after trial on the merits, refusing to permit collateral impeachment of the judgment by proof that it was a consent judgment pursuant to a compromise, by the defense attorney employed by the insurance company, without insured's participation or consent.
claim was entered by consent of his insurance company, the insured not being a party to the agreement, and therefore that it does not affect the insured's reciprocal claim.\(^{50}\) Probably such a collateral showing that the insured was not a party to the agreement should be permitted, even though opposed to rules generally applicable to collateral attack on a judgment,\(^{51}\) because of the prevalence of liability insurance coverage and of the practice of drafting judgments as if the insured were personally participating in the compromise when in fact the insurance company alone is exercising its privilege to settle as it seems expedient. These factors combine to cause false indications of consent by the insured in a substantially greater percentage of judgments than is true in non-insurance cases, and thus weightier considerations are presented than in non-insurance cases to counterbalance the interests in stability of judgments. If the requisites for a successful direct attack can be satisfied, however, the safer course for the insured to pursue is to bring a direct attack upon the consent judgment for the purpose of having it reformed to disclose that the insured was not a party to the settlement agreement.\(^{52}\)

A difficulty which the insured encounters in attacking a judgment entered against him by agreement between the plaintiff and the company is that the court may look upon the situation

---

\(^{50}\) Daniel v. Adorno, 107 A.2d 700 (Mun. Ct. App. D.C. 1954); *seem* American Trust & Banking Co. v. Parsons, 21 Tenn. App. 202, 108 S.W.2d 187 (1937). Cf. Kelleher v. Lozzi, 7 N.J. 17, 80 A.2d 196 (1951), not referring to the effect of insurance, but holding that extrinsic evidence may be received in a suit by A v. B to show that suit of B v. A was in fact a dismissal upon settlement and therefore not "without prejudice." Nevertheless, the effort to get a rehearing so plaintiff Kelleher might show that settlement had been consummated by the company's attorney without her consent was unsuccessful. Docket No. 765 (Sup. Ct. N.J. 1951).

\(^{51}\) Assume that the judgment was in favor of C against D, the insured. It is generally held that D may attack collaterally by showing that the judgment was rendered on the appearance of an attorney lacking authority though purporting to represent D. See *Restatement, Judgments*, § 12, comment c (1942). But the present problem involves not lack of any authority to appear for the attacking party, but rather conduct in excess of authority. The attorney has authority to appear on behalf of D as to defense, though it should be held that the insurance policy does not authorize him to act on behalf of D as to D's reciprocal claim.

\(^{52}\) Such direct attack on the consent judgment is required by the following decisions: Perry v. Faulkner, 102 A.2d 908 (N.H. 1954); LaLonde v. Hubbard, 202 N.C. 771, 164 S.E. 359 (1932). See *Comment*, 32 N.C.L. Rev. 531 (1954). As to the requisites for direct and collateral attacks on judgments generally, see *Restatements, Judgments* §§ 11, 12 (1942).
as analogous to the non-insurance case in which the attorney for a party agrees to entry of a judgment which the party thereafter attacks. There is a difference in that the company's right of control over the defense as it affects the reciprocal claim is subject to limitations not involved in the non-insurance case in which the party is represented by an attorney of his own selection. When the judgment has been entered upon an agreement between the third party and the company, the third party has not been misled by the insured with respect to the scope of the authority of the company and the attorney it has employed to represent the insured, reformation of the judgment upon attack by the insured should be favored, at least in the absence of want of reasonable diligence on the part of the insured to present his contentions before entry of the judgment.

If neither the requisites for collateral attack nor those for direct attack can be satisfied, there remains a possibility that the insured may get relief through a cause of action against the company. The proper handling of the defense by the company would require that it not agree to a type of judgment which would bar the insured's reciprocal claim, but rather that it insist on a judgment disclosing that it is entered merely on the basis of a compromise agreement not affecting the reciprocal claim. Subject to possible defenses (e.g., contributory fault in failing to make a timely attack on the judgment), the company should be liable to the insured for loss sustained by reason of such improper handling of the defense. An analogy supporting this result may be found in the cases imposing liability on the company for the loss to the insured in the form of liability to the claimant which he would not have suffered but for the improper handling of the defense or improper failure to settle. Liberalizing the provisions for attack on

---

53 E.g., see Hubley v. Goodwin, 91 N.H. 200, 17 A.2d 96 (1940). But cf. Perry v. Faulkner, 102 A.2d 908 (N.H. 1954). The two decisions can be reconciled on the basis of insufficiency of the evidence in Hubley to show that he did not consent to or that he did not know about the proposed settlement, or on the basis that one attorney represented defendants in the prior suit involved in Hubley, whereas the insured had her separate attorney to represent her in the prosecution of her reciprocal claim in Perry. The later (Perry) opinion may be interpreted, however, as indicating greater inclination toward favoring reformation of the former judgment to make it no bar to the insured's reciprocal claim.

54 See supra, note 24.
judgments is a more satisfactory solution to this problem, however, than the alternative of defeating the insured’s (D’s) reciprocal claim against C (the party settling with D’s insurance company) and allowing D a cause of action against the company. The alternative makes D whole, but it leaves the ultimate cost of D’s reciprocal claim on D’s insurance company, rather than on C or C’s insurance company, where it should fall unless D or D’s insurance company misled C as to the authority of the person he dealt with.

This troublesome problem of the consent judgment falsely indicating that the insured personally joined in the settlement agreement should arise less frequently as attorneys and insurance companies become increasingly aware of the risks involved in the practice of drafting judgments in this form.

(4) Effect of a Compulsory Counterclaim Rule

In jurisdictions having a “compulsory counterclaim” rule, such as Federal Rule 13 (a), a consent judgment presents added hazards for the insured. Frequently, when a minor is a claimant, settlement is effected by a “friendly suit” filed solely for the purpose of incorporating the compromise agreement into judgment, in order to make it binding on the minor. If the compulsory counterclaim rule is applied to such a situation, the insured’s reciprocal claim is barred because of his failure to assert it in the “friendly suit.” The rule should be held inapplicable to such a “friendly suit,” which is in fact not a suit in the ordinary sense but rather a procedure for having a compromise approved by a court. If the judgment does not disclose that such is the nature of the suit, it may be necessary for the insured to get it reformed, but, again, reformation should be favored.

A different problem is presented by a consent judgment entered after the insured was served, turned over the defense to the company, and filed no counterclaim. The interest in bringing all related claims into a single litigation supports a ruling that the insured’s reciprocal claim is barred in these circumstances unless he is able to litigate the claim under one of the
saving provisions of the compulsory counterclaim rule.\textsuperscript{55} Typically such rules contain a provision substantially as follows:

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.\textsuperscript{56}

Failure of the attorney employed by the company to advise the insured of the existence and effect of the compulsory counterclaim rule should not be held against the insured. If this view is accepted, and if the insured is permitted to have a consent judgment reopened to allow the filing of his counterclaim when he failed to file it "through oversight, inadvertence, or excusable neglect, or when justice requires," adequate protection for the interests of the insured is available. Probably such relief from the judgment is available in the federal courts under Rule 60(b).

If relief is not available to the insured and his reciprocal claim is barred because of the judgment to which the attorney employed by the company consented on behalf of the insured, the company should be subject to liability to the insured. Probably contributory fault of the insured should be a defense. But if the insured is unfamiliar with incidents of the liability insurance relationship and has been misled into relying on the attorney as his own, it would be reasonable to hold the company responsible unless its attorney makes known to the insured the limited scope of the attorney's representation of his interests; absent such notice, the insured may be misled to believe that the attorney will protect all his interests relating to the accident.

(5) Consent Judgment After Trial

What effect should be given to the consent judgment entered after verdict or judgment on the merits but before such judg-

\textsuperscript{55} Cf. Keller v. Keklikian, 362 Mo. 919, 244 S.W.2d 1001 (1951). See supra, text following note 37, as to the argument that a compulsory counterclaim rule should be held inapplicable to a tort defendant with liability insurance, on the theory that the liability insurance company and not the named defendant is the real party defendant.

\textsuperscript{56} FED. R. CIV. PRO. 13(f). Cf. TEX. R. CIV. PRO. 97, which is patterned after Federal Rule 13 but omits subdivision (f) of that rule; the omission may be of little or no significance in view of the liberal provision for amendments made in Texas Rules 62-67.
ment becomes final, or to a judgment from which the company declines to appeal though good grounds for appeal are available?

In *Ross v. Stricker*, judgment was entered on a verdict for Ross in the amount of $5,000 and against Stricker on his counterclaim. The trial court held that Stricker’s motion for new trial would be overruled if Ross filed a remittitur of $1,100, which he promptly did. Stricker’s insurer then paid the $3,900, and an entry of satisfaction of the judgment was placed on record. At that point an entry was made authorizing the withdrawal of the attorney employed by the insurance company, and the insured’s personal attorney took up the representation. He sought and obtained a modification of the entry of satisfaction of judgment to show that it was paid by the insurance company, and then he appealed. Though the Court of Appeals found that error had been committed in the admission of evidence over Stricker’s objection, and ordered a new trial, the Supreme Court of Ohio held for Ross on the cross-petition. The theory of the supreme court was that the judgment for Ross on his claim became final, and was conclusive between the parties as to the Stricker cross-petition since it determined that Stricker was negligent and Ross was not.

The *Ross* opinion may be interpreted as placing the decision not upon any procedural irregularity about the method of attempted appeal, but upon the proposition that, when the company chose to pay the $3,900 judgment, there was nothing Stricker could do to protect against the finality of the judgment and its conclusiveness on this cross-petition. Also, since the supporting theory is collateral estoppel, the result appears not to be dependent upon the fact that both reciprocal claims had been presented in one suit. This proposition that Stricker was helpless in the face of such settlement is subject to the criticism that it permits the company to defeat the insured’s reciprocal claim by a payment which is no more indicative of the proper determination of the insured’s reciprocal claim than would be the same payment by the company before trial. Suppose,

---

57 *Ohio St. 153, 91 N.E.2d 18 (1950).*
58 *Id. at 159, 91 N.E.2d at 22.* See, for subsequent developments, *State ex rel Ross v. Judges, 159 Ohio St. 444, 112 N.E.2d 325 (1953).*
as the Court of Appeals held, a reversible error had been committed during trial. Under these circumstances the effect is to give to the company's decision to waive new trial the effect of an adjudication on the merits. The opinion does not indicate whether a pre-trial settlement by the company would have barred the insured's reciprocal claim, but the court's reliance on the doctrine of collateral estoppel suggests that a distinction was being made between the Ross case and a settlement before suit, and perhaps also between the Ross case and a settlement after filing a suit but before judgment.

In another jurisdiction, Massachusetts, a distinction is made by statute between a consent judgment entered "without a hearing on the merits" and one entered after such hearing. The former does not bar the reciprocal claim unless the settlement agreement is signed by the insured in person. The distinction has grown out of a history of court decisions in that state giving a consent judgment the effect of barring the insured's reciprocal claim and of statutes modifying that rule.

In support of this distinction between the consent judgment without hearing on the merits and that after hearing, it may be noted that most settlements after hearing of the claim are the result of token reductions by the winning plaintiff in order to avoid the delay of appeal and a minimal chance of reversal. Also, such token reductions are agreed upon in a high percentage of the litigated cases, with the result that the doctrine of collateral estoppel by judgment, if inapplicable to this type of consent judgment, would rarely be operative against reciprocal claims. This would mean an increase in the number of instances in which a single accident would give rise to two or more trials. Furthermore, it is not unlikely that the results of the two trials would often be inconsistent, prejudice against insurance companies leading to results favorable to both claimants even though the legal effect of contributory negligence

---

would make this result impossible if the rights of the parties were determined on the basis of a single set of consistent findings. But giving the consent judgment after hearing the effect of defeating the reciprocal claim will also operate unjustly in some cases. For example, suppose a case in which there were substantial grounds for new trial and the plaintiff in the suit against the insured accepted a substantial reduction rather than risking appeal. Though it was doubtful whether the findings supporting the judgment on the merits were fairly and properly reached, and that fact was fairly reflected in the settlement between the plaintiff and the company, those findings would be given the effect of defeating the reciprocal claim. The trial was inconclusive as to the claim of the plaintiff against the insured; it should not be given conclusive effect as to the insured's reciprocal claim.

Perhaps the Ross case is to be explained on procedural irregularities, and in Ohio, absent such irregularities, consent judgment or an entry of satisfaction of judgment by the company would not be given the effect of defeating the insured's reciprocal claim in circumstances such as these. Perhaps even in Massachusetts the court will avoid giving a consent judgment the effect of defeating the insured's reciprocal claim in such circumstances, by holding that the judgment is entered "without hearing on the merits" if there were indications of real doubt as to whether the attempted hearing was effective; but that interpretation appears improbable in view of the history of the court's inclination to give the consent judgment the effect of defeating the reciprocal claim. In jurisdictions not concerned with this problem of statutory interpretation, however, a better solution for the problem would be a rule which would not give such effect to an agreed disposition of the case without the insured's participation, if there was substantial doubt about the granting of a new trial.

When both reciprocal claims have been presented in one suit, it should be held necessary that all interested persons join in
any consent disposing of the entire case, though (as to such consent judgment after hearing on the merits, at least) the opinion of the Ohio court in the Ross case may be interpreted as opposing this view. Settlement of one claim alone would not be precluded, however. Such settlement could be made after hearing on the merits, by agreement not incorporated into a judgment terminating the whole litigation, just as this could have been done before such hearing. Admittedly this leaves open the possibility of inconsistent results by way of recoveries by both claimants. This is a possibility, however, which is inherent in the opportunity to settle, even before suit is filed, and should be accepted to gain the many advantages to the public and to the litigants from the opportunities for compromising rather than litigating claims.

III. RECOMMENDED RULES OF DECISION

In each subdivision of this article a preferred solution has been suggested for the problem considered there. The several problems are so related that a sound solution for one is in many instances dependent on the answers given to others. If the recommended solutions are accepted, the following set of rules of decision would be effective where reciprocal claims arise from a collision and liability insurance coverage was in effect with respect to the operation of one or both of the colliding vehicles.

1. A compromise settlement, without court proceedings, of a claim against the insured, agreed upon by the insurance company and the person claiming against the insured, has no legal effect upon the insured’s reciprocal claim against such other person, unless such person has been misled by the insured as to the scope of authority of the company or its representatives to act on behalf of the insured. The unusual case in which the person settling with the company has been misled by the insured as to such scope of authority will be determined on the basis of doctrines generally applicable to claims of apparent authority.

2. The insured’s settlement of his own claim against a third

---

62 For examples of such settlement before hearing on the merits but after the filing of suit and counterclaim, see De Carlucci v. Brasley, 16 N.J. Super. 48, 83 A.2d 823 (1951); Barron v. Smith, 33 Erie County L.J. 154 (Pa. 1949).
person, either on terms which bar that person's reciprocal claim against the insured or on terms which reserve that reciprocal claim and make no other agreement concerning it, is not a breach of the assistance and cooperation clause of the liability insurance policy.

3. A judgment on the merits as to one claim has the same effect on the reciprocal claim as it would be accorded (under rules pertaining to collateral estoppel and compulsory counterclaims) if no liability insurance were involved.

4. Since, under the third rule, conflicting interests of the company and the insured are subject to being affected by an adjudication of either the claim against the insured or the insured's reciprocal claim, the company and the insured have mutual obligations, with respect to conducting such litigation, to give to the interests of each that degree of weight that would be given by an individual holding both interests.

5. A consent judgment indicating on its face that it was entered upon compromise of the claim against the insured by agreement between the claimant and the insurance company has no greater effect on the insured's reciprocal claim than the compromise settlement alone would have had. This rule applies regardless of whether the consent judgment is entered before trial, or after trial but before judgment has become final, except that as to a consent judgment against the insured after trial, collateral estoppel is operative unless there was substantial doubt that the adverse trial judgment or verdict would stand against a motion for new trial on behalf of the insured.

6. A judgment purporting to be an adjudication on the merits, or purporting to be entered pursuant to a compromise disposing of both the claim against the insured and the insured's reciprocal claim, is subject to reformation, either by direct attack, or by collateral attack in the suit of the insured on his reciprocal claim, for the purpose of showing that it was a consent judgment entered without the insured's agreeing that it should bar his reciprocal claim. The effect of the judgment, as reformed, is determined by the rules stated above.

7. A compulsory counterclaim rule is inapplicable to a
"friendly suit" filed solely for the purpose of consumating a settlement between the company and the claimant.

8. Except as to a "friendly suit," a compulsory counterclaim rule is applicable though one or both of the named parties have liability insurance. But failure of the company and the attorney employed by the company to advise the insured of the existence and effect of a compulsory counterclaim rule is not to be held against the insured, and a judgment is subject to being reopened at the instance of the insured for the purpose of setting up his counterclaim by amendment, if he failed to set it up through oversight, inadvertence or excusable neglect.