

Insured May Not File Third-Party Action against His Liability Insurer for Negligent or Bad Faith Failure to Settle in the Same Suit in Which the Tort Plaintiff Tries to Establish Insured's Liability

Failure to Settle Claim May Await Establishment of Insured's Liability

Bryant v. EMCASCO Insurance Co., 153 P.3d 1277 (Kan. 2007)

Case at a Glance

Kansas law does not permit an insured tort defendant to implead his or her liability insurer to litigate the insurer's negligence or bad faith in failing to settle the plaintiff's claim while the insured's liability remains unresolved.

A plaintiff's agreement to accept a tort defendant's policy limits only if a hospital lien holder's name is removed from the settlement check does not create an binding, enforceable settlement agreement. The identity of the payees on the settlement check is an essential, material term of a settlement agreement about which mutual assent is required.

Summary of Decision

Accident & Hospitalization. The *Bryant* case

arose out of an automobile accident. The insured, Josh M. Bryant (JMB), failed to yield the right of way to a motorcyclist, Jimmy L. Nunguesor (JLN). JLN suffered serious brain injury in the resulting collision. JLN was hospitalized at Wesley Medical Center (Wesley). After JLN's discharge, Wesley filed notice of a hospitalization lien and served both drivers and JMB's liability insurer, EMCASCO Insurance Company (EMCASCO), with the notice.

Insurance Adjustment. BLI realized almost immediately that there was coverage, that there was liability, and that policy limits of \$300,000 would be devoured. The insurer immediately accepted the adjuster's recommendation to settle if possible.

The adjuster made an oral offer to JLN's wife to settle for policy limits. The offer included a check made out to JLN and Wesley together. JLN's lawyer consulted with the adjuster, discussed the lien, investigated the validity of the lien, and concluded that it was contrary to law. Although the opinion does explain the legal for questioning the lien, Wesley had a preferred provider contract with JLN's health maintenance organization which presumably limited Wesley's rights to collect from the JLN directly. The adjuster confirmed the insurer's offer in writing. JLN's lawyer drafted, but did not mail, a letter to the adjuster expressing his objections to the lien and stating that JLN was prepared to settle if the settlement check were made payable to JLN and his attorney, rather than JLN and Wesley.

Shortly after learning of Wesley's lien and EMCASCO's insistence on making EMCASCO a payee on any settlement check, the HMO sent JLN a statement indicating that the amount he owed Wesley was \$108. JLN's wife tried to pay that sum as "payment in full" to Wesley, but Wesley rejected the check because the HMO had not yet paid JLN's bill.

In a telephone conversation with EMCASCO's adjuster, JLN's attorney thereafter offered to settle claim in exchange for a \$300,000 check payable to JLN and the attorney rather than to JLN and Wesley. The lawyer offered to escrow the money, which might have to go to the hospital, in his trust account. The next day, however, the adjuster left a telephone message with JLN's lawyer indicating that the insurer would not agree to settle unless Wesley was named as a joint payee on the check. There were apparently no disputes as to this particular event, and it proved important for the resolution of one of the issues in

this case.

JLN sues JMB, and JMB files a Third-party Failure to Settle Claim against EMCASCO. JLN sued JMB on January 6, 2003. JLN's petition sought \$10 million in damages. The insurer retained counsel to defend JMB.

About six months later, JMB hired separate counsel to file a third-party petition against EMCASCO and Wesley. Wesley settled with JMB, and JMB proceeded against EMCASCO. JMB's petition sought "full indemnity" from EMCASCO based on EMCASCO's negligent or bad faith failure to settle JLN's claim within its \$300,000 policy limit before suit was filed.

EMCASCO moved to dismiss JMB's third-party claims. EMCASCO argued that "a direct action against an auto insurer was prohibited and that it should not be a party to [JLN]'s tort action against [JMB] unless and until judgment against [JMB] was entered." The district court denied EMCASCO's motion, holding that JMB's third-party claim was not a "direct action" but was rather an "indemnity claim" about which questions of fact remained.

EMCASCO also filed an interpleader action in federal court. It paid \$300,000 to the clerk for apportionment by the court. It asserted that JLN had entered into a legal binding settlement agreement before his suit against JMB was filed, and it sought enforcement of this agreement." Both JMB and JLN moved to stay the federal case, and the federal case was dismissed. However, the existence of a pre-suit settlement agreement became a central issue in the state court action.

The trial judge split the state court action into three separate serial sections. The court would first determine whether a binding settlement agreement came into existence before the suit was filed. Second, if there were no such agreement, the parties would then try the issue of JMB's negligence liability to JLN. Third, if JMB were liable to JLN, then "the parties would try whether [JMB] was entitled to indemnity through his third-party claims against [EMCASCO]."

Before trial, the parties narrowed the issues through two agreements. One of the agreements involved only JLN and JMB. The other one involved the two of them plus EMCASCO. In the bilateral agreement, JMB and JLN agreed to settle JLN's negligence claim through the entry of a confessed judgment in the amount of \$2 million. This agreement included hold harmless clauses and a

partial assignment of JMB's rights against EMCASCO. The second, separate agreement involving the tort litigants plus EMCASCO was designed to be effective if JLN prevailed on the settlement issue. It provided that \$2 million was a reasonable damage figure. EMCASCO also moved the \$300,000 on file with the federal clerk to the state court clerk.

On cross-motions for summary judgment with respect to whether there had been an early settlement, the trial court held that there had been no such binding agreement. Thus, JLN's recovery was not limited to \$300,000, and he could attempt to enforce the \$2 million consent judgment. The trial court recognized the validity and reasonableness of the \$2 million consent judgment between JMB and JLN, and proceeded to consider EMCASCO's motion for summary judgment on the third-party claims. The district court denied the motion, determining that "a jury must decide whether EMCASCO's failure to deliver a settlement check payable to [JLN] and his attorney rather than [JLN] and Wesley, was an act of negligence or bad faith.

The case was tried. The jury found that EMCASCO had not acted in bad faith but had acted negligently in failing to settle JLN's case against JMB before suit was filed. Judgment was entered in favor of JLN and against EMCASCO in the amount of the confessed amount, and the insurer immediately received a credit of \$300,000.

Issues on Appeal. There were two issues on appeal. The first issue was whether the third-party claim against the insurer could be litigated simultaneously with the underlying tort action. The second issue was whether there had actually been a settlement agreement. The Kansas Supreme Court answered "no" to both questions. Finding that EMCASCO's presence in the proceeding as a third-party defendant tainted the entire proceeding, the supreme court refused to characterize the trial court's denial of EMCASCO's motion to dismiss the third party claims as harmless error. Accordingly, the supreme court reversed the jury's verdict and vacated the entire judgment.

Timing of Failure to Settle Claim. "The key question," in the view of the Kansas high court, was not *whether* JMB could sue EMCASCO for failure to settle, "but *when*—the critical factor is timing." Although a few courts had permitted third-party actions against a tort defendant's liability insurer to

litigate coverage, the supreme court was unable to find a single example of a court litigating the appropriateness of an insurer's failure to settle before resolution of the insured's liability. In refusing "to be the first and only court in the country to permit an insured to implead his or her insurer to litigate its negligence or bad faith in failing to settle while the underlying liability of the insured is unresolved," the court relied on the policy's "No Action" clause and "basic insurance law" as stated in the following American Jurisprudence passage: "A claimant cannot bring an action against an insurer seeking damages for the insurer's allegedly wrongful refusal to negotiate in good faith with the claimants where no excess judgment has yet been rendered against the insured. Therefore, a *cause of action for the bad-faith [or negligent] failure to settle a claim does not arise until there has been a final determination of the insured's liability and the claimant's damages, including resolution of any appeals.*" (Emphasis added.) 44 AM.JUR.2d, Insurance § 1394, p. 622

Presuit Settlement. The court rejected EMCASCO's argument that JLN was bound by an agreement for EMCASCO's \$300,000 policy limits. The parties' inability to agree on whether Wesley should appear as a payee on the settlement check was fatal to the formation of a binding settlement agreement. The identity of the payee of settlement proceeds, in the court's view, is always an essential, material term that cannot be resolved at a later time. // Quinn