

North Dakota Supreme Court Upholds Agreement by Policyholder to Assign Claim against Insurer to Underlying Plaintiff

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The Supreme Court of North Dakota has held that a settlement in which a policyholder stipulates to a judgment in an underlying action in exchange for a covenant by the plaintiff to execute against only the policyholder's insurer is valid and that the underlying plaintiff was therefore entitled to bring a negligence claim against the insurer and the insurer's agent for failure to issue proper coverage. *Wangler v. Lerol*, 2003 WL 22674285 (N.D. Nov. 13, 2003). The court also held that based on the facts at issue, the insurer was not estopped from denying coverage.

An employee of the policyholder company was injured while working on a turkey farm. In July 1999, the employee brought a negligence action against the company, which then submitted the claim to its insurer, under a farm liability policy. After the insurer withdrew coverage on the grounds that the company (unlike two of its affiliates) was not a named insured under the policy, the company filed suit against the insurer and its agent, alleging that they negligently failed to procure insurance on its behalf. Subsequently, the underlying litigation settled pursuant to an agreement in which the company and the injured employee stipulated to a judgment in favor of the employee in an amount of \$200,000, the company assigned its right against the insurer and the agent to the employee and the employee agreed "in no way to collect this judgment" from the employer. The court referred to this settlement as a *Miller-Shugart* settlement. See *Miller v. Shugart*, 316 N. W.2d 729 (Minn. 1982).

The court first rejected the argument that the insurer was estopped from denying coverage because the insurer's agent never expressly denied that the company was insured when asked during the company's annual review of its insurance policies. The court reasoned that "the doctrines of waiver and estoppel will not operate to create an insurance contract that never existed" and that the cases where a court has estopped an insurer from denying coverage have "involved situations in which the misrepresentations were in the form of a definite statement or act indicating that a particular insurance policy provided a specific type of coverage." Here, the court found there was no allegation of any definite statement by the insurer or its agent that could create coverage by estoppel.

The court then turned to the question whether the insurer and its agent had been negligent in issuing the policy. The insurer argued that the employee could not pursue the negligence claim because he released his claim against the company when he entered into the *Miller-Shugart* agreement, which meant that the company no longer had a basis for seeking coverage. The court first explained that under a typical liability policy, an insurer must only reimburse an insured for amounts that the insured becomes "legally obligated to pay." The court noted that other courts have taken differing views as to how this language impacts stipulated judgments and covenants not to execute. It noted, however, that the majority of courts have held that a stipulated judgment coupled with a covenant not to execute is merely a contract, and not a release, so that the underlying tort liability remains and the insurer retains its obligation to pay. The court adopted the majority rule, holding that a stipulated tort judgment coupled with an agreement not to execute against the insured is not a release of the insured's liability. The court explained that any other interpretation would render *Miller-Shugart* type agreements useless because an insured abandoned by its insurer "would be precluded from settling within policy limits with injured third parties." The North Dakota Supreme Court therefore remanded the case to the trial court to determine whether the insurer and its agent had, in fact, acted negligently.

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