

## **Right To Jury Trial re Reasonableness of Settlement**

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## § 18.02 Court or Jury Trial

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### [2] Determination of the Reasonableness of a Settlement

While the right to a jury trial on the duty to settle is rarely challenged (see § 18.02[1], *above*), such a right is rarely claimed with respect to a determination of whether a settlement agreed to by the claimant and the insured is reasonable. That question arises when the insured is, for one reason or another, regarded as freed from the contractual settlement restrictions. (See §§ 4.03–4.06, *above*.) But there are two cases in which such a right was claimed and rejected and two where it was found to exist.

In *Alton M. Johnson Co. v. M.A.I. Co.*,<sup>32</sup> the Johnson Co. was sued for personal injuries and discovered it had no insurance coverage. It defended the suit and suffered a judgment exceeding \$400,000. It then sued its insurance broker, M.A.I. for negligent failure to obtain tail coverage. M.A.I.'s errors and omissions insurer, Employers Reinsurance Corporation, denied coverage for want of notice of the claim within the policy period. M.A.I. then agreed to entry of a judgment against it for \$300,000, its errors and omissions policy limit, accompanied by a covenant not to execute. The Johnson Co. then filed garnishment proceedings against Employers.<sup>33</sup>

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<sup>32</sup> *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277 (Minn. 1990).

<sup>33</sup> 463 N.W.2d at 278.

The garnishment court, over Employers' objection, tried reasonableness without a jury, and found the settlement reasonable. It then tried the timely notice issue to a jury, which found for the Johnson Co. Employers appealed the refusal to try reasonableness to a jury. The Minnesota Supreme Court affirmed.<sup>34</sup>

The court recognized that the question of reasonableness was one of fact not law, but held that "it is an issue of fact ... to be decided by the court as factfinder."<sup>35</sup> Under Minnesota law, "[a] jury trial is guaranteed in those types of cases thought to be 'legal' rather than 'equitable' at the time of the adoption of our constitution."<sup>36</sup> While Employers argued that this was a simple contract action for recovery of money, the court instead characterized it instead as

an action to enforce an agreement against an indemnifier who was not a party to the agreement. The decisionmaker is being asked to apply its sense of fairness to evaluate a compromise of conflicting interests, a characteristic role for equity. In short, this action is more like an action in equity, which traditionally is tried to the court.

Moreover, the nature of the evidence does not lend itself well to appraisal by a jury. The ultimate issue to be decided is the reasonableness of a settlement which avoids a trial. Reasonableness, therefore, is not determined by conducting the very trial obviated by the settlement. Consequently, the decisionmaker receives not only the customary evidence on liability and damages but also other evidence, such as expert opinion of trial lawyers evaluating the "customary" evidence. This "other evidence" may include verdicts in comparable cases, the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried, and other factors of forensic significance. The evaluation of this kind of proof is best understood and weighed by a trial judge.<sup>37</sup>

The Washington Supreme Court reached a similar conclusion in *Bird v. Best Plumbing Group, LLC*.<sup>38</sup> Bird was injured by an eruption of sewage caused by Best's cutting of a pressurized sewage line, leakage from which also caused extensive damage to Bird's home. Bird's homeowners insurer, Allstate, paid \$262,000 for the property damage, which was much greater than that. Bird sued Best, and Allstate asserted a subrogation claim. Best's liability insurer, Farmers, defended without reservation. The trial court granted Bird summary judgment on liability and proximate cause, leaving the issue of damages for trial.<sup>39</sup>

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<sup>34</sup> 463 N.W.2d at 277–79.

<sup>35</sup> 463 N.W.2d at 279.

<sup>36</sup> 463 N.W.2d at 279.

<sup>37</sup> 463 N.W.2d at 279. See also *D.E.M. v. Allickson*, 555 N.W.2d 596, 602–03 (N.D. 1996) (dictum quoting *Alton M. Johnson*, but issue on appeal was correctness of trial court's finding of reasonableness, not how that issue should be tried).

<sup>38</sup> *Bird v. Best Plumbing Group, LLC*, 175 Wn. 2d 756 (2012).

<sup>39</sup> 175 Wn. 2d 756, at ¶¶ 2–6.

Bird made a settlement demand of \$2 million, the Farmers policy limit. Farmers offered \$350,000. Best consulted personal counsel, who negotiated with Bird, reaching agreement to a \$3.75 million stipulated judgment, with an assignment to Bird of Best’s claims against Farmers and a covenant not to execute. Best moved for a determination that this settlement was reasonable, and Farmers intervened to object. It demanded a jury trial, which the court refused. After a four-day hearing, it concluded that the settlement was reasonable. Farmers appealed.<sup>40</sup>

Under Washington law, “an insured defendant may independently negotiate a pretrial settlement if the defendant’s liability insurer refuses in bad faith to settle the plaintiff’s claims.”<sup>41</sup>

If the amount of the covenant judgment is deemed reasonable by a trial court, it becomes the presumptive measure of damages in a later bad faith action against the insurer. The insurer still must be found liable in the bad faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion.<sup>42</sup>

The court had previously approved this procedure as a matter of policy, but without addressing any claimed right to jury trial:

An insurer refusing to defend exposes its insured to business failure and bankruptcy. An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away. To limit an insurer’s liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured. We therefore hold that when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy.<sup>43</sup>

The court had also recognized “the danger for collusive or fraudulent settlements but concluded the reasonableness determination ‘protect[s] insurers from excessive judgments especially where ... the insurer has notice of the reasonableness hearing and has an opportunity to

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<sup>40</sup> 175 Wn. 2d 756, at ¶¶ 7–9.

<sup>41</sup> 175 Wn. 2d 756, at ¶ 14. (See § 4.03[2][a], *above*).

<sup>42</sup> 175 Wn. 2d 756, at ¶ 16 (citations omitted).

<sup>43</sup> 175 Wn. 2d 756, at ¶ 17, *quoting* *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn. 2d 751, 765–66 (2002). *VanPort Homes* involved a breach of the duty to defend, and a breach of the duty to settle arguably should be treated differently with regard to the insured’s right to settle. (See § 4.03[2][b] *above*.) Moreover, denial of the right to settle would leave the insured with the right to damages if the breach of the duty to settle resulted in an excess judgment, so of limiting the insurer’s liability to the policy limit. But neither of these points affects analysis of the right to jury trial.

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argue against the settlement's reasonableness.' ”<sup>44</sup> At a reasonableness hearing, the settling parties have the burden of proving reasonableness, which the court determines by considering the following factors:

(1) [T]he releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released.<sup>45</sup>

Turning to the jury trial analysis, the court summarized the applicable test:

We have long interpreted article I, section 21 as guaranteeing those rights to trial by jury that existed at the time of the constitution's adoption in 1889. Under this historical approach, “the court examines (1) whether the cause of action is one to which the right to a jury trial applied in 1889, and (2) the scope of the right to a jury trial.” It is well established that the right to a jury trial exists where a case is purely legal in nature but does not exist where a case is purely equitable. There is also no right to a jury trial “in statutorily created actions without common law analogues.”<sup>46</sup>

The court had previously held that there was no right to a jury trial in proceedings to determine the reasonableness of settlements vis-à-vis alleged joint tortfeasors.<sup>47</sup> Farmers urged that the difference in context required a different result, but the court disagreed, because it had

unambiguously concluded a procedure to determine the reasonableness of a proposed settlement is equitable in nature. ... In both settings, the determination directly affects the amount of damages recoverable in subsequent tort cases. In the contribution setting, the settlement figure is subtracted from the total damage amount; and in the insurance setting, the presumptive amount is added to any other damages found by the jury. We have even reasoned the similarities between the two scenarios require identical standards for determining reasonableness. There is “ ‘little difference between a determination of reasonableness in the context of the contribution statute and [a covenant judgment].

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<sup>44</sup> 175 Wn. 2d 756, ¶ 17, quoting *Besel v. Viking Ins. Co. of Wis.*, 146 Wn. 2d 730, 737 (2002).

<sup>45</sup> 175 Wn. 2d 756, ¶ 18, quoting *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn. 2d 255, 264 (2008). The test quoted was developed for use in evaluating the fairness of settlements in allocating liability among joint tortfeasors; the last factor has no relevance to a case where there are no such tortfeasors.

<sup>46</sup> 175 Wn. 2d 756, ¶ 26 (citations omitted).

<sup>47</sup> 175 Wn. 2d 756, ¶¶ 27–28, citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn. 2d 148, 159–61 (1990).

In both settings, similar concerns exist regarding the impact of a settlement on other parties and the risk of fraud or collusion.’ ”  
There is no material difference between the two settings.<sup>48</sup>

Analytically, these holdings appear questionable. There is no reason why a jury cannot determine the reasonable settlement value of an underlying case. In fact, juries do exactly that in cases alleging breach of the duty to settle.

Nor is the procedure for allocating damages among putative joint tortfeasors analogous. Settlement by one joint tortfeasor would be far less desirable (and therefore, less likely to occur) if the settling tortfeasor faced the risk of contribution claims from those who did not settle. At one time, there were no contribution rights among joint tortfeasors, so the problem did not exist. Once contribution rights were recognized, it became necessary to devise a procedure to facilitate just and speedy resolution of such cases. Requiring an ancillary jury trial of settlement reasonableness would derail further progress in litigation of the liability of the nonsettling defendants. And, precisely because the common law traditionally did not recognize contribution rights among joint tortfeasors, there had been no analogous proceeding at common law. Moreover, a determination of reasonableness did not remove any issue from those that would otherwise have been submitted to a jury at a future trial.

In contrast, having reasonableness determined by the court withdraws an issue of damages that would otherwise be determined by a jury in an action for breach of contract or bad faith. Under the Washington practice, the issue of reasonableness is artificially separated from the intertwined questions of fraud and collusion. Either the Minnesota or the Washington procedure contemplates a jury trial on liability (and, possibly, on other damages), and neither provides for resumption of the underlying litigation if the settlement is found unreasonable. So, the only function of the reasonableness hearing is to shield the settling parties from the need to submit reasonableness to the jury which will hear other aspects of the breach of contract or bad faith action.

Many insurers believe that judges are more generous in finding settlements reasonable than juries would be. They see the resistance of claimants and insureds to trying such issues to juries as suggesting a similar view on their part. Of course, claimants and insureds would say they only seek inexpensive and expeditious determination of the reasonableness issue. Be that as it may, insurers have stronger arguments on this issue than the cases have yet acknowledged.

Since *Bird*, two federal district courts, construing the Seventh Amendment to the U.S. Constitution, have found a right to jury trial of the issue of settlement reasonableness. The first of these is *Fox v. Admiral Insurance Co.*<sup>1</sup> The context for that ruling is provided by a prior decision.<sup>2</sup> Wexford provided medical services to the Illinois Department of Corrections and was sued for severe injuries Fox suffered while an inmate. Admiral insured Wexford and defended. It had two consecutive policies, each with a \$3 million limit. It agreed to settle with Fox for \$3 million on behalf of two Wexford employees, but not Wexford itself. Admiral then declared itself

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<sup>48</sup> 175 Wn. 2d 756, ¶ 29 (citations omitted).

<sup>1</sup> *Fox v. Admiral Ins. Co.*, 2016 U.S. Dist. LEXIS 83542 (N.D. Ill. June 28, 2016) (“*Fox I*”).

<sup>2</sup> *Fox v. Admiral Ins. Co.*, 2016 U.S. Dist. LEXIS 14609, at \*43 n.19 (N.D. Ill. Feb. 5, 2016) (“*Fox I*”).

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exhausted. But Fox and Wexford contended that another \$3 million remained available. When Admiral refused to contribute that amount to a \$3.3 million settlement, Fox and Wexford agreed to a \$14 million consent judgment, with a covenant not to execute and an assignment of rights.<sup>3</sup> The court determined that both policies were triggered, so an additional \$3 million remained available.<sup>4</sup> But the reasonableness of the consent judgment presented factual questions, requiring a trial.<sup>5</sup> Fox had demanded a jury trial on all issues, and it remained to be determined whether he had a right to such a trial.<sup>6</sup>

The right to jury trial depended on how similar actions were treated in 18<sup>th</sup> century England and on whether the remedy sought was legal or equitable; the latter factor is the more important.<sup>7</sup> Fox had claims for simple breach of contract (through an announced intent to terminate the defense prematurely) and a breach of the duty to act in good faith in response to settlement offers. Under the historical test, both were claims for legal relief.<sup>8</sup> As to the nature of the remedy, the court concluded that, while compelling Admiral to pay based on an agreement to which it was not party looked equitable, closer examination showed that it was legal.

The remedy sought by Fox—awarding an insured the amount of a reasonable settlement resulting from the insurer's breach of its duty to defend or duty to settle—is more akin to merely declaring Admiral's debt or monetary obligation to Wexford resulting from breaching its obligations, instead of commanding Admiral to do or refrain from a specific act. In essence, Fox seeks money damages, an adequate remedy at law.<sup>9</sup>

Moreover, equitable relief is discretionary, while legal relief is not. That also supports finding the relief here equitable, because, “[i]f the Fox-Wexford settlement is determined to be reasonable, and if Admiral breached its contractual duties or its tort duty to settle, awarding Fox (as Wexford's assignee) the settlement does not appear to be discretionary.”<sup>10</sup>

While doing so implicates fairness concerns,

this general sense of "equity" as fairness is not the same as an "equitable" remedy, as understood historically: "When the term 'equitable' is used only to describe the moral basis of a claim or defense, the conclusion that the claim is equitable has no necessary legal effect on the remedy or on the procedure . . . [Such a claim] appeals to 'the equities,' the sense of justice. It does not necessarily involve equity remedies, equitable defenses,

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<sup>3</sup> *Fox I*, 2016 U.S. Dist. LEXIS 14609, at \*3-9.

<sup>4</sup> 2016 U.S. Dist. LEXIS 14609, at \*14-36.

<sup>5</sup> 2016 U.S. Dist. LEXIS 14609, at \*39-50.

<sup>6</sup> *Fox II*, 2016 U.S. Dist. LEXIS 83452, \*23.

<sup>7</sup> 2016 U.S. Dist. LEXIS 83542, \*24.

<sup>8</sup> 2016 U.S. Dist. LEXIS 83542, \*25-27.

<sup>9</sup> 2016 U.S. Dist. LEXIS 83542, \*28 (citation omitted).

<sup>10</sup> 2016 U.S. Dist. LEXIS 83542, \*29



or equitable procedures like the non-jury trial.”<sup>11</sup>

While reasonableness determinations under the Illinois Joint Tortfeasor Contribution Act are not subject to any right to jury trial, that is because it is a new statutory right, which does not confer a right to jury trial under Illinois law. “An insured’s reasonable settlement, on the other hand, is considered money damages for breach of an insurer’s obligations.”<sup>12</sup>

One other federal case had found no right to jury trial,<sup>13</sup> But it did not address the key distinctions between legal and equitable remedies.<sup>14</sup> *Alton M. Johnson* did not apply federal procedural law and was contrary to Illinois law treating settlements of this type as damages for breach of the insurer’s legal obligations.<sup>15</sup> Other state cases were distinguishable for similar reasons.<sup>16</sup>

*Midwestern Indemnity Co. v. Laikin*<sup>17</sup> had resolved a reasonableness issue on summary judgment, but had predicted that “[t]he Indiana courts are not likely to adopt that approach of taking such an issue away from a jury where it is genuinely disputed, but they would set a high bar before allowing an insurer who, by definition, has breached its duty to its insured, to impose such a trial on the parties who thought they had settled their dispute.”<sup>18</sup> Thus, had there been an issue of fact under the predicted “high bar,” a jury trial presumably would have been required.<sup>19</sup>

Finally, a number of federal courts of appeals had affirmed judgments based on jury verdicts about reasonableness without suggesting that this was an unusual or inappropriate approach.<sup>20</sup>

In sum, the court concluded that there was a right to jury trial, because “[d]etermining whether an insured’s settlement is reasonable is most similar to determining money damages for an insurer’s breach of contract and therefore most similar to an action at law seeking a legal remedy.”<sup>21</sup>

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<sup>11</sup> 2016 U.S. Dist. LEXIS 83542, \*30, quoting 1 DAN B. DOBBS, LAW OF REMEDIES § 2.1(3) (2d ed. 1992).

<sup>12</sup> 2016 U.S. Dist. LEXIS 83542, \*31.

<sup>13</sup> *American Casualty Co. of Reading, Pennsylvania v. Kemper*, No. CV-07-1149-PHX-GMS, 2009 U.S. Dist. LEXIS 134192, 2009 WL 1749388, at \*2 (D. Ariz. June 18, 2009) (relying on fact that the issue was one of fairness).

<sup>14</sup> *Fox II*, 2016 U.S. Dist. LEXIS 83452, \*32-33.

<sup>15</sup> *Fox II*, 2016 U.S. Dist. LEXIS 83452, \*33.

<sup>16</sup> *Fox II*, 2016 U.S. Dist. LEXIS 83452, \*34.

<sup>17</sup> *Midwestern Indemn. Co. v. Laikin*, 119 F.Supp. 2d 831, 844-45 S.D. Ind. 2000).

<sup>18</sup> *Fox II*, 2016 U.S. Dist. LEXIS 83452, \*34-35, quoting *Laikin*, 119 F.Supp. 2d at 845.

<sup>19</sup> While *Fox II* did not make the point, it is also true that *Laikin* did not analyze the Seventh Amendment standard governing the right to jury trial in federal court.

<sup>20</sup> 2016 U.S. Dist. LEXIS 83452, \*36, citing *A. Kush & Assocs.*, 927 F.2d 929, 933, 942 (7<sup>th</sup> Cir. 1991); *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 534 Fed. App’x 926, 927-28 (11<sup>th</sup> Cir. 2013); *Vermont Mut. Ins. Co. v. Maguire*, 662 F.3d 51, 54-55 (1<sup>st</sup> Cir. 2011); *Crawford v. Infinity Ins. Co.*, 64 Fed. App’x 146, 147-48, 151 (10<sup>th</sup> Cir. 2003); *Atchison, Topeka & Santa Fe Ry. Co. v. Sherwin-Williams Co.*, 963 F.2d 746, 749 (5<sup>th</sup> Cir. 1992).

<sup>21</sup> 2016 U.S. Dist. LEXIS 83452, \*36,

Despite the contrary state law adopted in *Alton M. Johnson*, *Fox* was followed by *In re RFC*.<sup>22</sup> The court recognized that the state rule made considerable practical sense. “Not only is a trial judge better equipped to understand the kind of evidence relevant to the reasonableness of a pre-trial settlement, but, in a multi-defendant litigation like this one, a single judicial ruling on reasonableness avoids the specter of inconsistent verdicts.”<sup>23</sup>

But, as *Fox* had held, “because the reasonableness determination is so intertwined with the money damages ResCap seeks, it is more analogous to legal relief than equitable relief.”<sup>24</sup> “Second, to the extent this question presents a close call, federal law compels the Court to err on the side of a jury trial. The Supreme Court has repeatedly extolled the ‘federal policy favoring jury trials,’ especially with respect to disputed questions of fact.”<sup>25</sup>

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<sup>22</sup> *In re RFC*, 2018 U.S., Dist. LEXIS 160206, at \*22-31 (D. Minn. Sept. 18, 2018).

<sup>23</sup> 2018 U.S., Dist. LEXIS 160206, at \*27.

<sup>24</sup> 2018 U.S., Dist. LEXIS 160206, at \*27.

<sup>25</sup> 2018 U.S., Dist. LEXIS 160206, at \*28.