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DISCUSSIONS OF DEFENDANT'S INSURANCE COVERAGE DURING VOIR DIRE: AN ANALYSIS OF THE CURRENT PRACTICE AND ITS ORIGINS

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The practice of questioning potential jurors during voir dire about their knowledge of the defendant's insurance coverage has been utilized in Minnesota since the turn of the century. This practice has now been codified for use by the District Courts, but its continued use is questioned. In this Article, the history of this practice is traced from its origins through the present. After reviewing possible justifications for its use, the Article concludes that this practice should be eliminated during voir dire.

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INTRODUCTION

Every Minnesota district court judge has had to develop a practice governing discussions of a defendant's insurance coverage during voir dire in tort cases. Modern practice is based largely upon Rule 31 of Part I of the Code of Rules for the District Courts, and the modern practice based upon this rule is technically flawed and fails to address concerns raised in the appellate cases preceding it.

Many trial court judges habitually obtain the name of defendant's insurer from defendant's counsel either in chambers just before the start of trial or at the time of pretrial. Several Minnesota districts now require this information as part of pretrial statements.[1] At some point during voir dire, the trial judge typically asks the jurors, as a group, "Do any of you have an interest in the (name of defendant's insurance company) as policyholders, stockholders, officers, agents or otherwise?"[2] The question seems to be most frequently asked either just before the court allows juror questioning by defense counsel or at the end of all questioning, prior to preemptory challenges.

If no jurors respond, the inquiry ends. If one or more of the jurors raises a hand, the response varies. Some trial judges simply give counsel an opportunity to note which jurors responded. Other judges simply ask the responding jurors the specific nature of their interest and *then* end the inquiry. Still other trial judges ask those jurors expressing an interest in the company if that interest might cause them to be biased in deciding the outcome of the case.

This latter inquiry makes some sense when coupled with the

1. *See* MINN. 4TH DIST. CT. R. 4.04(c) (1987); MINN. 10TH DIST. CT. R. 4.05(b) (1987). The author is also aware that several judges in the Seventh District habitually include, as part of an order scheduling a case for pre-trial, a requirement that statements of the case be filed and that those statements list names of insurance carriers "involved" in the case.

2. If more than one insurer is disclosed, they are all named, usually in one single question. The form of the question appears to come from language contained in Rule 31. *See* MINN. CODE R. DIST. CT. Part I, Rule 31 (1987).

prefatory statement made by some judges in advance of the actual "insurance question," "the (name of defendant's insurance company) *may* have an interest in the outcome of this case." At least one district court judge tells the jury that the insurer "does," rather than "may," have an interest. Some trial judges, however, have asked jurors if their interest in the insurance company would cause them to be biased, without prefacing the question with the statement that the insurer may have an interest in the outcome. Some jurors respond that their interest in the company would *not* cause them to be biased, even though they have not been told what interest the company may have in the outcome.[3]

The "insurance question" can be raised in voir dire in a variety of ways.[4] A now deceased St. Cloud attorney once told this author of a case he tried in Hennepin County District Court about 25 years ago in which he represented the plaintiff. In the process of questioning the jury, he turned to the trial judge and asked, in front of and within the hearing of the jury: "Your Honor, would you please have counsel for defendant disclose the name of defendant's insurance carrier, so that I can ask the appropriate question of the jury?" Defense counsel was furious, but the judge ruled that plaintiff's approach was proper. The problem could have been avoided, the trial judge said, if defendant's counsel had disclosed the name of the insurer in chambers and requested that the court ask the "insurance question" of the jury.[5]

3. This author has seen this response occur. The author is unaware, through personal experience or through conversation with other lawyers and district court judges, of any judge telling the jury anything specific about the nature of the insurer's interest. Curiously, the author is also unaware of any situation where a juror asked the court what the insurer's interest was, though the Minnesota Supreme Court has suggested that jurors do not ask because they assume that the insurer named insures the defendant. *See* Lesewski v. Neilen, 254 Minn. 286, 288, 95 N.W.2d 13, 16 (1959).

4. If the issue is not raised during voir dire by either the court or counsel, the "insurance question" may not be asked at all. In one trial that this author participated in where the "insurance question" was not asked, after the jury had been impaneled but before opening statements, plaintiff's counsel asked the trial court to reopen voir dire to ask the "insurance question." The trial court refused, ruling that the plaintiff had waived the right to have the question asked. North Cent. Outdoor Equip. Co. v. Minnesota Mut. Fire & Casualty Co. and Citizens Agency, Inc., No. 41673 (Crow Wing County Dist. Ct., May, 1985). To avoid such a problem of waiver of the insurance question, some plaintiffs' counsel have a practice of requesting prior to trial that the trial judge ask the jury the "insurance question."

5. Interview with the late Bruce Sherwood, Esq. (March 1986).

The same attorney also told this author that some district court judges apparently believe that appropriate disclosure requires identifying the city where the home office of the insurer is located, and that he learned about this the hard way. He was defending a case and had given the name of the insurer in chambers. Then, in court and in front of the jury, the judge turned to the attorney and said, "What city is that insurer from?" Irate, the defense attorney was allowed to approach the bench, where the judge told him that the rule required disclosure of the name *and location* of the insurance carrier. The judge said he felt certain that, next time, counsel would be sure to provide *complete* disclosure in chambers.[6]

One St. Cloud lawyer had a practice — until discontinued at the direction of a trial judge — of drawing attention to the "insurance question," which would follow plaintiff's voir dire: "Jurors, I don't have any more questions for you, but if you'll turn your attention to the bench, his Honor now has one *very important* question for you."[7]

These variations in current practice are the reason for this article. The only consistent practice is that jurors are never informed of the specific nature of the insurer's interest in the outcome. The inconsistencies indicate a need to examine the origins of the practice and determine what conduct really is or is not authorized with respect to the insurance question. This article, then, will examine the aspect of trial practice which relates to discussions of defendant's insurance coverage during voir dire, the origins of that practice, the theories upon which it has been based, and the flaws that still plague it.

I. Origins of Current Practice — the Common Law

The earliest reported Minnesota case on the subject is *Spoonick v. Backus-Brooks Co.*[8] During voir dire, plaintiff's counsel asked each juror whether he was connected in any manner with a certain accident insurance company.[9] Defendant's counsel objected to this questioning.[10] Plaintiff's counsel was

6. *Id.*

7. Interview with the Honorable Paul Hoffman, Judge of Stearns County District Court (August 27, 1987).

8. 89 Minn. 354, 94 N.W. 1079 (1903).

9. *Id.* at 358, 94 N.W. at 1081.

10. *Id.*

then allowed to call one of defendant's counsel as a witness.[11] Defendant's counsel admitted under oath that the company named had issued defendant a policy of insurance for indemnity in case of accident and was the real defendant.[12]

The Minnesota Supreme Court ruled:

> In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudiced.[13]

The supreme court gave the following response to defendant's objections to the practice of disclosing the name of defendant's insurer and asking the jurors if any of them had a relationship with that insurer:

> Counsel contends, among other things, as a reason why such questions should not be permitted and the real facts shown, that, if it is brought to the knowledge of the jurors that an insurance company is indemnifying the defendant named, a verdict against the latter will be much more easily found. Possibly there is ground for this assertion, but we must assume, as a general rule, that jurors will treat all litigants fairly and impartially, will be guided by the testimony, and that they will not be influenced by any other consideration than that of justice and fair treatment to all.[14]

The *Spoonick* decision was followed in *Antletz v. Smith*.[15] In *Antletz*, plaintiff's counsel asked each of three jurors if "he was in any way interested in an accident insurance company."[16] Opposing counsel did not object.[17] Plaintiff's counsel, in the presence of the jury, then asked defendant's counsel, "What is the name of the insurance company defending this case, the Travelers', isn't it?"[18] Defendant's counsel objected and stated, "I wish it on record that I do not know whether they are

11. *Id.*
12. *Id.*
13. *Id.* at 359, 94 N.W. at 1081.
14. *Id.*
15. 97 Minn. 217, 106 N.W. 517 (1906).
16. *Id.* at 220, 106 N.W. at 518.
17. *Id.*
18. *Id.*

insured or not."[19] The trial court allowed plaintiff's counsel to inquire whether or not the jurors had an interest in *any* insurance company.[20] Referring to the dialogue about defendant's insurance, the supreme court noted that "the only question is whether the appellant was prejudiced by the mere discussion of the subject-matter in the presence of the jury."[21] Defendant claimed that the discussion in the presence of the jurors deprived him of a fair trial. The supreme court disagreed, relying upon and quoting at length from its opinion in *Spoonick*. The court again held that plaintiff's counsel had a right to determine whether or not prospective jurors had a relationship with defendant's insurer because such persons "by implication . . . would be biased and prejudiced."[22]

Interestingly, the supreme court in *Antletz* said, "[T]he right under some circumstances to call the defendant's attorney and interrogate him with reference to indemnity insurance was recognized in *Spoonick v. Backus-Brooks Co.*"[23] This is a stark contrast to the supreme court's admonition in other cases that attorneys expecting to be called upon as witnesses in a particular case should refrain from appearing as counsel in that case.[24]

In *Viou v. Brooks-Scanlon Lumber Co.*,[25] the discussion of defendant's insurance occurred during trial. After the jurors were seated, plaintiff's counsel asked defendant's counsel "whether it would be admitted that there was liability insurance in this case."[26] Defendant's counsel replied that it would not.[27] Plaintiff's attorney then called and questioned a witness who testified, over the defendant's objection, that he was an agent of a local company that worked for different accident in-

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 221, 106 N.W. at 518, *quoting Spoonick*, 89 Minn. at 359, 94 N.W. at 1081.
23. *Id.* at 220, 106 N.W. at 518.
24. *See In re* Meehan's Estate, 220 Minn. 1, 7, 18 N.W.2d 781, 784 (1945): "It is true, we have held that an attorney who expects to be called upon as a witness should refrain from appearing as counsel in the litigation, and we again stress our admonition to attorneys in this respect." *See also* Evans v. Blesi, 345 N.W.2d 775, 781 (Minn. Ct. App. 1984) (disapproving an attorney representing a client at trial in a situation where the attorney knew that his partners would be called as witnesses).
25. 99 Minn. 97, 108 N.W. 891 (1906).
26. *Id.* at 108, 108 N.W. at 895.
27. *Id.*

surance companies and had been directed by that local company "to come up here [presumably where trial was being held], interview the witnesses, and see that they attended court."[28] Plaintiff's counsel then asked a juror "whether he was in any way interested as a stockholder in that accident company — 'the company insuring the defendant in this case.' "[29] At that point in the trial, it had not been established that the named company actually insured defendant, and an objection on the ground that counsel's statement assumed facts not proven was sustained.[30]

Counsel for the plaintiff referred to a request that had been served upon defense counsel, seeking production of defendant's insurance policy.[31] The court, however, noted that the request had not been served upon defendant's counsel, but rather it had been served upon counsel not appearing at trial. The court ruled that this request proved nothing.[32]

Plaintiff's counsel then asked defendant's counsel if any officers or members of "the defendant company" were present. Defense counsel replied that none were present, and none were expected until later in the hearing.[33] Plaintiff's counsel then requested that the officers bring the policy when they came to court, to which defense counsel replied that he had not communicated with the defendant yet.[34] Plaintiff's counsel then examined the jurors for cause, apparently without further reference to defendant's insurance.[35]

On appeal, defendant moved for relief on the ground that plaintiff's interrogation of the witness "was not sought in good faith nor for the purpose of the action, but simply and alone for the purpose of calling to the attention of the jury that it was probable that the defendant was protected against any judgment which might be secured against it in the form of insur-

28. *Id.* at 108, 108 N.W. at 896. As described, the witness's role seems much like that of a modern insurance claims adjuster. *See id.*, at 108, 108 N.W. at 895-96.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 108-09, 108 N.W. at 896.

33. *Id.*

34. *Id.* It appears that the defense counsel was referring, in the latter statement, to the insurer. Also it is not clear from the appellate opinion whether or not this last exchange occurred in the jury's presence.

35. *Id.*

ance . . . ."[36] The supreme court noted that because of the manner in which the motion for new trial had been framed by defendant, the only issue before them was whether or not the questions put to the witness were in good faith.[37] The supreme court held that the trial court had not abused its discretion in ruling that the usual measure of good faith was present.[38]

Although exactly what happened before the trial court in *Viou* is unclear, and although the supreme court chose not to directly address the discussions of defendant's insurance, the court nevertheless addressed, at some length, the subject of defendant's insurance and voir dire. The discussion begins with the comment that relevant authorities revealed that:

> [a] definite recession from the original position that the connection of an indemnity insurance company is entirely collateral to the issues in an action to recover for personal injuries, and that such cases should be managed from the bench with a most scrupulous and constant regard to the suppression of the reprehensible practice of introducing such a distracting consideration, and that it would be prejudicial and reversible error to cause that interest of the insurance company to appear in course of the trial.[39]

The supreme court, itself, then proceeded to recede from that "original position."

The court also noted that other courts "generally recognized that the insurance company, being to a certain extent at least, the real party defendant in interest, cannot invariably conceal that interest."[40] One reaction to this statement is that nearly every plaintiff's attorney in a personal injury case proceeds on a contingent fee basis. Therefore, the plaintiff's attorney is, to a certain extent at least, a real party in interest.[41] Yet *that* fact is invariably concealed from the jury.

The one principle quite firmly stated in *Viou* is that:

> in order to secure to litigants unbiased and unprejudiced jurors . . . plaintiff's counsel ha[ve] a right to ascertain whether there [i]s such a relationship between the persons

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 105, 108 N.W. at 894 (citations omitted).
40. *Id.*
41. *Id.*

> called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify th[o]se persons because by implication they would be biased and prejudiced.[42]

In *Viou*, the court does not instruct how to properly go about the inquiry, but it suggests:

> Where, as in this case, counsel for defendant have been served with notice to produce the policy of indemnity, they are fully advised in the premises and can quietly bring the matter before the court in the presence of counsel for plaintiff so as not to call it to the attention of the jurors sitting in the box or in the courtroom.[43]

It also should be noted that everyone involved in the *Viou* case, including defendant's counsel, referred to the insurance company as "the defendant company."[44] This practice is not followed today unless, for some reason, an insurer is a named defendant.

Spoonick, *Antletz*, and *Viou* were cited with approval in *Granrus v. Croxton Mining Co.*[45] As in *Spoonick*, the *Granrus* opinion reflects that plaintiff's counsel was allowed to call defendant's counsel as a witness, over the latter's objection. Plaintiff's counsel thereby established that defense counsel was employed by an insurance company to defend the action. The supreme court found no error in this procedure.[46]

The supreme court seemed to back down somewhat from this position in *Gracz v. Anderson*.[47] Defendant had been called as a witness on his own behalf.[48] Plaintiff's counsel tried to show, on cross-examination, the extent of the defendant's financial interest in the case.[49] The exact extent of the questioning is not clear from the appellate opinion, but the supreme court noted that the trial court prevented plaintiff's counsel from continuing the subject.[50] The court inferred from plaintiff's brief and oral argument that the intent of the questioning was to establish that defendant carried indemnity insurance

42. *Id.* at 105-06, 108 N.W. at 894 (citations omitted).
43. *Id.* at 107-08, 108 N.W. at 895.
44. *See generally id.* at 109, 108 N.W. at 896.
45. 102 Minn. 325, 113 N.W. 693 (1907).
46. *Id.* at 329, 113 N.W. at 694.
47. 104 Minn. 476, 116 N.W. 1116 (1908).
48. *Id.* at 478, 116 N.W. at 1117.
49. *Id.*
50. *Id.*

and to show the extent to which the policy protected defendant in case of a recovery from plaintiff.[51]

The supreme court affirmed the trial court's rulings and discussed the insurance issue in somewhat contradictory language:

> Defendant in the case at bar, as a party to the action, was as a matter of course interested in the result, and it is a little difficult to understand just how his protective insurance, or the extent thereof, would affect his credibility as a witness. But, that aside, *the question of indemnity insurance was wholly and entirely collateral to the issues made by the pleadings, and the fact, if brought out, would have tended only to prejudice the minds of the jury in favor of plaintiff's recovery.* It has been held that the fact of insurance in cases of this kind is proper to be shown at the opening of the trial to enable the parties intelligently to select the jury. [citing *Spoonick* and *Antletz*]. But it certainly cannot be said to be an abuse of discretion for the trial court to exclude the matter when first suggested during trial, *when the only real or substantial effect can be to prejudice unconsciously the minds of the jury;* and we therefore hold that the discretion vested in the trial court on this subject fully justified the restriction of the cross-examination and the exlusion of the fact sought to be developed thereby.[52]

The supreme court distinguished *Gracz* from its other decisions regarding insurance and voir dire in *Heydman v. Red Wing Brick Co.*[53] In *Heydman*, counsel for plaintiff asked defendant's counsel during voir dire, to state whether they represented "the real defendant or an insurance company, and, if an insurance company is defending, the name of it."[54] The trial court refused to require defense counsel to answer.[55] Defense counsel stated that they had no objection to "any juror being asked whether he had any interest in any insurance company."[56] Plaintiff's counsel once again requested the name of the specific company that insured defendant, but defendant's objection that the request assumed a fact not shown and tended to prejudice the issues was sustained.[57]

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51. *Id.*
52. *Id.* at 479, 116 N.W. at 1118 (emphasis added).
53. 112 Minn. 158, 127 N.W. 561 (1910).
54. *Id.* at 163, 127 N.W. at 562.
55. *Id.*
56. *Id.*
57. *Id.*

On appeal, the supreme court affirmed, holding that, when impaneling the jury, the plaintiff has a right to know the name of the specific company, if any, insuring the defendant in order to properly determine if a prospective juror should be challenged.[58] The court distinguished *Gracz* as governing the questioning of a witness during trial for the purpose of testing credibility, rather than the questioning of prospective jurors during voir dire.[59] The court did not address its statements in *Gracz* indicating that the question of the defendant's insurance is collateral to the issues made by the pleadings and, if brought out, tends to only prejudice the minds of the jury in favor of the plaintiff's recovery.

In *Uggen v. Bazille & Partridge*,[60] there was a full discussion of the fact that defendant was insured, as well as an inquiry into the prospective jurors' relationships with the insurer or its local agent.[61] Defendant excepted to a statement that the local agent was the "real party in interest."[62] Defense counsel apparently called *himself* to the stand and testified that, though he had been retained by the insurer or its local agent as their attorney, he was paid by the defendant.[63] Plaintiff's counsel withdrew the question referring to the local agent as the "real party in interest," and he admitted that the local agent's interest was as shown by the testimony of defendant's counsel.[64] Defense counsel's motion to discharge the panel because of error was denied.[65] The supreme court affirmed this decision, finding "no basis for an imputation of bad faith on the part of plaintiff's counsel."[66]

Viita v. Flemming[67] also dealt with the issue of whether or not an attorney can mention, in the presence of the jury, the fact that the defendant has insurance. In *Viita*, defendant's counsel admitted the name of the insurer in the presence of the jury.[68]

58. *Id.*
59. *Id.*
60. 127 Minn. 364, 149 N.W. 459 (1914).
61. *Id.* at 368, 149 N.W. at 461.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. 132 Minn. 128, 155 N.W. 1077 (1916) (reported as Viita v. Dolan in NORTHWESTERN REPORTER).
68. *See id.* at 137, 155 N.W. at 1081.

Plaintiff's counsel then called defendant to the stand during voir dire, and asked, " 'And is it true, what counsel has just testified to, namely, that a certain company is interested in the defense of this case?' "[69] Defendant's objection was overruled, and the supreme court affirmed, stating:

> We are unable to see any chance that defendant was prejudiced by the ruling, as the fact that defendant was insured was admitted. But we wish to express our emphatic disapproval of the conduct of plaintiff's counsel in calling the witness and asking this question after counsel for defendant had admitted the fact. An answer to the question could add nothing, and could serve no legitimate purpose.[70]

A significantly different fact situation was presented in *Northwestern Fuel Co. v. Minneapolis Street Railway Co.*,[71] where the defendant brought a counterclaim. Plaintiff's counsel told defendant's counsel, outside the hearing of the jury, that plaintiff had no insurance.[72] Without proof, defendant's counsel remarked that he had information to the contrary.[73] He then asked each juror if they were acquainted with the Fred L. Gray Insurance Company, the London Guaranty and Accident Company, or the Massachusetts Bonding Company.[74] Plaintiff's objection was overruled, and the supreme court affirmed, reasoning:

> The questions asked the jurors did not intimate, at least did not directly intimate, that plaintiff was protected by insurance, and we think it was within the discretion of the trial court to permit them for the purpose of disclosing whether the relations between the jurors and the officials of companies insuring against liability upon similar claims, were such that the jurors might be biased against permitting the enforcement of such claims.[75]

In a stinging dissent, Justice Hallam wrote:

> The record does not show that plaintiff had any liability insurance at all, yet the questions asked of every juror assumed that it had. The apparent purpose of the line of

69. *Id.*
70. *Id.*
71. 134 Minn. 378, 159 N.W. 832 (1916).
72. *See id.* at 379, 159 N.W. at 832.
73. *Id.*
74. *Id.* at 379-80, 159 N.W. at 832.
75. *Id.* at 380-81, 159 N.W. at 833.

> questions asked was to create in the minds of the jurors an impression that plaintiff would be reimbursed by insurance for any damages it might be required to pay. I can conceive of no other purpose. This line of examination should not have been allowed.[76]

In another case involving the insurance question during voir dire, *Carlson v. Bernier,*[77] the Minnesota Supreme Court simply said that "[t]here was no reversible error committed by the inquiry made while impaneling the jury as to whether any of the jurors were interested in a certain insurance company."[78]

In *Storhaugen v. Motor Truck Service Co.*,[79] the supreme court allowed plaintiff's counsel's statement that the defendant was insured. Just before beginning voir dire, plaintiff's counsel asked defendant's counsel if the defendant was insured against the claimed loss and, if so, the name of the carrier.[80] After defendant's counsel answered the question, plaintiff's counsel turned to the jury and proclaimed, " 'It is an admitted fact . . . that the Ocean Accident & Guaranty Corporation, Limited, insures the defendant.' "[81] Defendant's counsel took exception and contended that his disclosure to plaintiff's counsel had been made out of the hearing of the jury to avoid plaintiff's counsel having to lay a foundation for interrogation of the jurors with regard to their interest in the insurance company.[82] Since such foundation was unnecessary, the defendant argued that the statement made to the jury by plaintiff's counsel was not one of the issues of the case and was highly prejudicial.[83]

The supreme court affirmed the trial court, holding that the statement made by plaintiff's counsel, even though it should be held improper, does not call for a new trial if found to have been made in good faith.[84] The court noted:

> Counsel for defendant sought the supposed advantage for his client resulting from the procedure suggested in the *Viou* case, namely to keep from the jury the fact that defendant was insured. It is thought that a jury is inclined to find a

76. *Id.* at 381, 159 N.W. at 833 (Hallam, J., dissenting).
77. 169 Minn. 517, 211 N.W. 683 (1927).
78. *Id.* at 518, 211 N.W. at 683.
79. 171 Minn. 47, 213 N.W. 372 (1927).
80. *Id.* at 50, 213 N.W. at 374.
81. *Id.*
82. *Id.* at 50-51, 213 N.W. at 374.
83. *Id.* at 51, 213 N.W. at 374.
84. *Id.*

> verdict upon less evidence and in a more generous amount if an insurance company rather than the wrongdoer has to pay it.[85]

In addition, the court concluded:

> [I]t is difficult to find anything which may be held prejudicial in the statement[,] [because] defendant is in precisely the same position as if the information it voluntarily gave had been elicited by calling its counsel to the witness stand and in the hearing of the jury asking if it carried insurance and name of the insurer. Again, assuming that the suggestion in the *Viou* case had been literally followed and questions had been put to prospective jurors as to their interest in the Ocean Accident & Guaranty Corporation, Limited, would not every juror of average intelligence infer that such corporation was an insurer and interested in the verdict to be rendered?[86]

The foregoing assumes that it would be appropriate to call counsel for defendant to the witness stand and ask in the hearing of the jury whether or not the defendant carried insurance and, if so, the name of the insurer. Would a modern court find such an inquiry relevant to a tort case?

Curiously, the court in *Storhaugen* stated:

> As a practical question it is submitted that justice and fair dealing would not suffer by a candid disclosure to the jury as to who are the real parties to the litigation, who is the real defendant or the one who must pay if a verdict is for the plaintiff . . . . In fact, the parties would be entitled to an instruction that in determining who is entitled to a verdict *the issues should be treated exactly as if there was no insurance*, nor should the recovery, if any, be lessened or increased one penny because of insurance.[87]

If we *really* want a jury to decide issues as though there were no insurance, why tell them it exists?

The court, in *Storhaugen*, also stated that there "may be cases of downright collusion between a plaintiff and a defendant to mulct the latter's insurer."[88] The court implied that the jury should know that the defendant has insurance because of the possibility of this collusion, though there was no indication that such collusion was suspected in *Storhaugen*.

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85. *Id.*
86. *Id.* at 51-52, 213 N.W. at 374.
87. *Id.* at 52, 213 N.W. at 374 (emphasis added).
88. *Id.* at 52, 213 N.W. at 375.

In *Scholte v. Brabec*,[89] the supreme court allowed the plaintiff to address the insuance question to both the jurors during voir dire and the witnesses during trial. In *Scholte*, defendant's counsel gave plaintiff's counsel the name of the insurer outside the jury's presence.[90] Plaintiff's counsel then asked the jurors if any of them had an interest in that insurance company.[91] Later, on cross-examination of two of defendant's medical experts, plaintiff's counsel asked *them* if they were members or policyholders of, or stockholders in the named insurance company.[92] Plaintiff's counsel did not at any time state that the named company insured the defendant.[93] The supreme court ruled that such questions of witnesses were permissible as it summarized the issue in the following commentary:

> It is ordinarily futile to take up the time of the court to ask each individual juror in one of our country districts whether he is interested in a foreign liability insurance company. If inquiry is to be made, the better practice would seem to be to ask one general question to all the jurors, without suggesting in any way that the matter of insurance has any bearing on any of the issues to be tried. But it is a matter for the discretion of the trial court. Where it is admitted that an insurance company is interested and carries insurance, proper inquiry as to the interest or membership of witnesses in the insurance company is permissible. The record here does not show misconduct or error in that regard.[94]

This type of question was also upheld in *Martin v. Schiska*.[95] In *Martin*, defendant sought a new trial based in part on the misconduct of plaintiff's attorney in inquiring about the defendant's liability insurer. In rejecting this error, the supreme court noted that "every person of sufficient experience and intelligence to be a fit juror" knows that most automobile owners of financial responsibility carry liability insurance.[96] The court stated:

89. 177 Minn. 13, 224 N.W. 259 (1929).
90. *Id.* at 16, 224 N.W. at 260.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. 183 Minn. 256, 264, 236 N.W. 312, 315 (1931).
96. *Id.* at 264, 236 N.W. at 315.

> It is hardly worth while to let the jury during the trial of such a case speculate on whether or not the defendant is insured. What juror in these days, when he hears an attorney in the case inquire of prospective jurors whether he is interested as a stockholder or otherwise in a named insurance company, but knows that that company has insured the owner of the automobile involved against liability.[97]

Though collusion between plaintiff and defendant was not alleged in *Martin*, the supreme court contemplated cases where the defendant owner has an interest in the plaintiff's success. The court stated that "[w]hen such is a defendant's attitude, ought the jury to remain ignorant of the fact during his testimony that an insurance company and not he, the witness, will have to pay the verdict?"[98]

In declining to grant a new trial, the court concluded that there is no attorney misconduct "[w]here it is apparent that the jury's information regarding the existence of insurance is not made use of to inflame or prejudice the jury." [99]

The practice of asking one question about a specific insurance company of the jury as a whole, rather than asking each juror individually, first suggested as appropriate in *Scholte*, was reiterated as desirable in *Prescott v. Swanson*.[100] The *Prescott* court relied on a Michigan case, *Holman v. Cole*,[101] which held that the practice of questioning each juror individually was to impress upon the jurors' that the defendant was protected by insurance and would not be personally liable for any judgment entered in the case.[102] The Minnesota Supreme Court agreed with the Michigan court's conclusion that this practice would not be tolerated and that an attorney must question the jurors collectively regarding any interest in the defendant's insurance

97. *Id.*

98. *Id.*

99. *Id.* The court also noted that after the defendant's witness testified to owning a half-interest in the car, the defendant was required to disclose that she had applied for liability insurance as sole owner of the car. *Id.*

100. 197 Minn. 325, 338, 267 N.W. 251, 258 (1936) (citing Holman v. Cole, 242 Mich. 402, 406-07, 218 N.W. 795, 797 (1928))(the purpose of asking each juror individually, as opposed to collectively, of any interest as a stockholder in the insurance company was not for the purpose of obtaining information but rather to impress upon the jurors' minds that the defendant was insured and would not be personally liable for any judgment entered in the case).

101. 242 Mich. 402, 218 N.W. 795 (1928).

102. 197 Minn. at 338, 267 N.W. at 258 (quoting 242 Mich. at 406-07, 218 N.W. at 797).

company.[103]

The *Prescott* court's opinion dealing with collectively questioning the jurors apparently resulted in some confusion. In *Santee v. Haggart Construction Co.*,[104] counsel for plaintiffs was permitted to ask the jurors collectively if they had any interest in the defendant's insurance company. Defendant claimed that the jurors should have been first asked a general inquiry "as to interest in any corporation, followed by a questioning of jurors answering in the affirmative as to the kind of corporation in which they had an interest."[105] The Minnesota Supreme Court admitted that it had approved such a procedure in *Prescott*.[106] It backed down from that prior approval, however, stating:

> While trial judges might well require counsel to follow this method of procedure, it was our purpose only to make a suggestion, and not lay down an ironclad rule. We certainly had no intention of implying that prejudicial or reversible error would necessarily result if the inquiry were permitted to follow some other course. The same procedure here complained of was followed and held not to constitute error in *Scholte v. Brabec*.[107]

In approving the approach followed by the trial court, the supreme court noted that there was "no evidence of bad faith of following the course of inquiry adopted by counsel. If the matter of insurance was unduly stressed before the jury it is attributable to the objections and arguments made by defense counsel at the time."[108]

In *Rom v. Calhoun*,[109] the court held that statements by defense counsel in the presence of the jury were prejudicial. Before trial, defendants' counsel told the court in chambers that defendants' insurance company had denied liability.[110] Defendants' counsel, therefore, objected to plaintiff's counsel

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103. *Id.*

104. 202 Minn. 361, 278 N.W. 520 (1938).

105. *Id.* at 363, 278 N.W. at 521.

106. *Id.*

107. *Id.* (citations omitted).

108. *Id.* at 363-64, 278 N.W. at 521. *Santee* was cited with approval in McKeown v. Argetsinger, 202 Minn. 595, 604, 279 N.W. 402, 407 (1938).

109. 227 Minn. 143, 34 N.W.2d 359 (1948). Rule 31 was adopted prior to the supreme court decision. *See id.* at 143, 34 N.W.2d at 359; MINN. CODE R. DIST. CT. Part I, Rule 31 (1987). However, the supreme court's decision was made without regard to the Rule because the district court's decision and the appeal were both made prior to the adoption of the Rule. *See* Record at 7, 81.

110. *Id.* at 146, 34 N.W.2d at 361.

questioning the jurors about their interest in the company, but counsel would not state that the insurance company was not interested in the case.[111] The trial judge decided to permit plaintiff's counsel to question the jurors generally as to any interest in the insurance company.[112] Plaintiff's counsel asked the jurors collectively if any of them had "business connections" with the insurer.[113] Despite the judge's decision in chambers, defendants' counsel objected to this question by making a speech in the presence of the jury, indicating that defendants were not insured.[114] Although the trial court denied plaintiff's motion for a new trial made after a jury verdict for defendants, the supreme court reversed, holding that defense counsel's actions constituted misconduct.[115] The supreme court noted that the trial court had determined in chambers, out of the presence of the jury and in conference with counsel how far plaintiff could go in questioning the jury. Therefore, the supreme court concluded:

> That should have ended the matter. There was no justification for imputing to plaintiff's counsel any impropriety or unfair tactics in following the trial court's decision on the matter. Improper statements of counsel to the jury such as we have here might well be sufficient to turn the jury in defendants' favor in a case close on the facts, as this one is.[116]

Although the supreme court's decision was based on defense counsel's misconduct, the court did not address the rationale behind allowing plaintiff's counsel to question the jurors about any "business connections" with a specific insurer.

These cases are the origins of modern practice of asking the jury the insurance question during voir dire. Together they

111. *Id.* at 146-47, 34 N.W.2d at 361.

112. *Id.* at 147, 34 N.W.2d at 361.

113. *Id.*

114. *Id.* at 147, 34 N.W.2d at 362. Defense counsel stated:

> May it please the court, I object to this procedure that on the ground of the state of the record that was made in chambers in the absence of the jury such a question is not justified and is made for the purpose of prejudicing the jury in this case. Particularly on behalf of defendant Strowbridge counsel has been advised that there is no insurance with respect to him, and with respect to the defendant Calhoun that though he carried an insurance policy with this company, the company has denied liability because of his violation of the terms of the policy. Counsel has been advised of that, and we object to such proceeding, to ask questions relating to it with reference to this case.

Id.

115. *Id.* at 148, 34 N.W.2d at 362.

116. *Id.* at 147-48, 34 N.W.2d at 362.

demonstrate the inconsistencies that existed in common law practice and raise concerns about that practice.

II. Comparison of the Stated Legitimate Function of the "Insurance Question" and Its Acknowledged Prejudicial Effect

These inconsistencies in the practice may have been, in part, due to the failure of the court to compare the legitimate purpose of the insurance question to the prejudice it causes. The supreme court noted in *Viou* that the "original position" of relevant authorities on the subject was that "the connection of an indemnity insurance company is entirely collateral to the issues in an action to recover for personal injuries" and that "it would be prejudicial and reversible error to cause that interest of the insurance company to appear in course of the trial."[117] Subsequently, in *Gracz*, the court condemned the practice of questioning a defendant during trial about the existence of any liabilty insurance.[118] Although it acknowledged that such a practice during trial would have tended only to prejudice the minds of the jury in favor of plaintiff's recovery, the court noted that it was appropriate to ask the same question during voir dire "to enable the parties intelligently to select the jury."[119]

The court gave no explanation in *Gracz* as to why the inquiry is thought to prejudice the minds of the jury only during trial, and not during voir dire. The supreme court has never made any attempt to compare the alleged legitimate purpose of the inquiry, which is to enable parties to intelligently select a jury, with its acknowledged harmful effect of prejudicing the minds of the jury in favor of a plaintiff's recovery.

The alleged legitimate purpose of the inquiry about insurance during voir dire is to determine whether a prospective juror would be biased because of a relationship with defendant's insurer — as a policyholder, shareholder, officer, agent, or employee. The threshold inquiry, however, is whether or not the juror even knows that the insurer with whom he or she has the relationship, whatever it may be, has an interest in the

117. 99 Minn. at 105, 108 N.W. at 894.
118. 104 Minn. at 478-79, 116 N.W. at 1117-18.
119. *Id.* at 479, 116 N.W. at 1118.

outcome of the case. This issue has never been addressed by the appellate courts.

III. The Attempted Codification of Common Law — Rule 31

A. Rule 31

In an apparent effort to codify the common law and establish a uniform practice applicable to discussions of defendant's insurance during voir dire, the Minnesota District Court Judges adopted Part I of Rule 31 of the Minnesota Code of Rules. Adopted in June 1948, and amended in June 1954, Rule 31 provides:

> CIVIL JURY CASES IN WHICH INSURANCE COMPANY INTERESTED IN DEFENSE OR OUTCOME OF ACTION — EXAMINATION OF JURORS
>
> In all civil jury cases, in which an insurance company or companies are not parties, but are interested in the defense or outcome of the action, counsel for such company or companies may, and upon request of the presiding Judge shall, disclose the name of such company or companies to opposing counsel, out of the hearing of the jury, as well as the name of the local agent of such companies. When so disclosed, no inquiry shall be permitted by counsel as to such names in the hearing of the jury, nor shall disclosure be made to the jury that such insurance company is interested in the action.
>
> In the examination of the jurors by counsel as to their qualifications, the jurors may be asked collectively whether any of them have any interest as policyholders, stockholders, officers, agents or otherwise in the insurance company or companies interested, but such question shall not be repeated to each individual juror. If none of the jurors indicate any such interest in the company or companies involved, then no further inquiry shall be permitted with reference thereto.
>
> If any of the jurors manifest an interest in any of the companies involved, then counsel may further inquire of such juror or jurors as to his or their interest in such company, including any relationship or connection with the local agent of such interested company, to determine whether such interest or relationship disqualifies such juror.
>
> The presiding Judge, in his discretion, may examine the jurors on this feature of the case and not permit counsel to

do so.[120]

Case law preceding the adoption of the Rule usually referred to counsel retained by the insurer for the defendant as counsel for that insurer, rather than counsel for the defendant.[121] The technical flaw in the Rule is that it calls for "counsel for such company"[122] to disclose the name of the insurance company and its local agent to the presiding judge. However, in modern practice, "counsel for such company" is not present in the typical personal injury case. Counsel for the defendant may have been retained by the defendant's insurer, but that retention was for the purpose of representing the insured, not the insurer, in the tort action.[123] Thus, defense counsel, even though hired by the insurance company, is counsel for the defendant, *not* counsel for such company.[124]

Trial court judges may overlook this technical flaw if they determine that justice requires it. Unlike the Minnesota Rules of Civil Procedure, which are used by district courts but promulgated by the Minnesota Supreme Court, the Minnesota Code of Rules is adopted by the district court judges themselves. Section 484.33 of Minnesota Statutes specifically authorizes the district courts to relax or modify these rules in the furtherance of justice.[125] Also, several Minnesota Supreme Court cases affirm trial court deviations from provisions of the Code of Rules; however, none of these cases are recent, and none involve an interpretation of Rule 31.[126]

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120. MINN. CODE R. DIST. CT. Part I, Rule 31 (1987).

121. *See, e.g., Viou*, 99 Minn. at 109, 108 N.W. at 896. In *Viou*, the opinion refers to the insurance company as "the defendant company" although the insured, Brooks-Scanlon Lumber Company, was the actual defendant. *Id.*

122. MINN. CODE R. DIST. CT. Part I, Rule 31. "Company" meaning an insurance company which is not a party but which is "interested in the defense or outcome of the action." *Id.*

123. Typically the insurer will have an interest in the outcome of the case because of its duties to indemnify and provide a defense. The Minnesota Supreme Court has noted that the duties to defend and indemnify are separate and distinct. *See, e.g.*, Nordby v. Atlantic Mut. Ins. Co., 329 N.W.2d 820, 824 (Minn. 1983).

124. *See, e.g.*, Crum v. Anchor Casualty Co., 264 Minn. 378, 392, 119 N.W.2d 703, 712 (1963) (attorney retained by an insurer to defend its insured is under the same obligations of fidelity and good faith as if the insured had retained the attorney personally); Newcomb v. Meiss, 263 Minn. 315, 322, 116 N.W.2d 593, 598 (1962) (counsel undertaking to represent an insurance policyholder owes the same "undeviating and single allegiance" that he would owe to the insured if retained and paid by him).

125. MINN. STAT. § 484.33 (1986).

126. *See* Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 77, 56 N.W. 576, 576 (1893) (affirming the trial court's discretionary suspension of the Rules of the District

If the trial court judge decides that justice requires overlooking the technical flaw in the rule, Rule 31 provides that when disclosure is made out of the hearing of the jury, "no inquiry shall be permitted by counsel as to such names in the hearing of the jury . . . ."[127] By implication, absent such disclosure, counsel will be permitted to inquire as to such names.

Rule 31 also states that if any juror responds affirmatively to the insurance question, "counsel may further inquire of such juror or jurors as to his or their interest in such company, including any relationship or connection with the local agent of such interested company, *to determine whether such interest or relationship disqualifies such juror.*"[128] This contemplates more than merely asking jurors whether or not the fact that they are policyholders of the named company will cause them to be biased. The Rule *implies* the right to tell the jury the nature of the insurer's interest, though no court currently allows that practice.

B. Interpretations of Rule 31

In 1951, the Minnesota Supreme Court referred to an inquiry about insurance during voir dire in *Hardware Mutual Casualty Co. v. Danberry.*[129] The supreme court said that it was apparent from the record that the Western Casualty and Surety Company was interested in the case to some extent at least.[130] A stipulation between the insurer and a car owner involved in the case provided that the insurer would defend the action on the part of the defendant.[131] This was clearly a "reservation of rights" situation, in which the insurer agreed to defend but not necessarily indemnify; the duty to indemnify

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Court of Hennepin County in issuing an order to set aside a default judgment); Nye v. Swan, 42 Minn. 243, 245, 44 N.W. 9, 10 (1889) (affirming an order vacating a default judgment where the affidavit of merit filed in support of the motion to vacate the default judgment did not comply with a rule of the district court); Gale v. Seifert, 39 Minn. 171, 172, 39 N.W. 69, 69 (1888) (affirming a district court's discharge of a writ of attachment upon the filing of a bond, though the bond did not bear a certificate acknowledging itself by the sureties as required by Rule 4 of the District Court).

127. MINN. CODE R. DIST. CT. Part I, Rule 31 (1987).

128. *Id.* (emphasis added). Rule 31 also expressly provides that "[t]he presiding Judge, in his discretion, may examine the jurors on this feature of the case and not permit counsel to do so." *Id.*

129. 234 Minn. 391, 401-02, 48 N.W.2d 567, 573 (1951).

130. *Id.* at 401, 48 N.W.2d at 573.

131. *Id.* at 402, 48 N.W.2d at 573.

would be decided, if necessary, in a subsequent action between the insurer and the insured.

The supreme court found no reversible error in the manner in which the trial court handled the inquiry of the jury with reference to the insurer, noting, "The court made it clear that the company might or might not have an interest in the outcome of the case and merely asked the jury panel whether any of them had stock in this particular company."[132] Although this case was decided after the adoption of Rule 31, the supreme court did not make any reference to the rule in its opinion.

In the first case to actually address Rule 31, *Lesewski v. Nielsen*,[133] the supreme court noted that the trial judge had asked the following of the prospective jurors, collectively:

> "[T]he court has been advised that a certain company known as the National Indemnity Company of Omaha, an insurance company, may be interested in the result of this action. If it happens that any one of you are connected with this company either as agents or employees, or if any member of your immediate family is connected with that company in any way either as agents or employees, will you indicate by holding up your hand."
>
> "Are any of you policyholders in that company? Have any policy of insurance as far as you know? I will ask you if any of you are agents or employees of any insurance company of any kind? The record may show that there was no response from the jury upon interrogation by the court."[134]

The supreme court, in commenting on this approach, noted:

> While the words used by the trial court in the instant case may not have represented the best choice, we realize that some latitude must be permitted the courts in such matters. In our opinion a better practice would be to ask whether a prospective juror has any interest as policyholder, stockholder, officer, or otherwise in the company or companies involved. However, it is our opinion that the questions in the instant case could not be considered prejudicial error on the basis of *Martin v. Schiska*, wherein it was recognized by this court that when a prospective juror hears inquiry as to interest in a named insurance company he knows that the

132. *Id.*

133. 254 Minn. 286, 95 N.W.2d 13 (1959).

134. *Id.* at 288, 95 N.W.2d at 15.

> named company has insured the owner of the automobile involved against liability.[135]

The supreme court concluded that since the record did not reflect that the information regarding the existence of insurance had been used to inflame or prejudice the jury, the statement did not constitute prejudicial error.[136]

In *Collins v. Bridgland,*[137] the trial court, following the "accepted practice," asked prospective jurors:

> "Do either of you or any of you, so far as you know, have an interest in the State Farm Mutual Insurance Company, either as stockholders, well, not stockholders as this is a mutual company, but as officers, agents, directors, policyholders, or employees?"[138]

One of the prospective jurors did not respond to the question, even though her husband was both a State Farm policyholder as well as the landlord of some property leased to a State Farm agent, and the juror herself was a co-signer on the mortgage on that building.[139] After the trial, plaintiff requested that the trial court conduct a hearing as to the propriety of that juror having served on the case, but the request was denied.[140] On appeal, the Minnesota Supreme Court affirmed without making any reference whatsoever to Rule 31.

In *Rosenthal v. Kolars,*[141] plaintiff's counsel in a medical malpractice action collectively asked the panel of prospective jurors during voir dire if they or any close relatives or acquaintances had ever been employed as a claims adjuster for a company that wrote medical malpractice insurance.[142] The Minnesota Supreme Court upheld the trial court's denial of defendant's motion for a mistrial "since the question, as modified by the court in admonishing the jurors to 'ignore any reference in that question to malpractice insurance,' sought to reveal implied bias beyond a juror's mere interest in a named indemnitor, previously asked by the court."[143] This statement implies that the trial court had asked the "insurance question"

135. *Id.* at 288, 95 N.W.2d at 16 (citations omitted).
136. *Id.* at 289, 95 N.W.2d at 16.
137. 296 Minn. 93, 206 N.W.2d 652 (1973).
138. *Id.* at 95, 206 N.W.2d at 654.
139. *Id.* at 95-96, 206 N.W.2d at 654.
140. *Id.* at 96, 206 N.W.2d at 654.
141. 304 Minn. 378, 231 N.W.2d 285 (1975).
142. *Id.* at 380, 231 N.W.2d at 287.
143. *Id.* at 381, 231 N.W.2d at 287.

of the jurors before plaintiff's counsel asked the question about employment as claims adjusters. The supreme court did not address in any detail either the basis for Rule 31 or the possibility that the jurors knew that the insurer named in the "insurance question" was the liability insurer for the defendant.

Recently, Rule 31 was cited by the Minnesota Court of Appeals in *McCarthy v. St. Peter Creamery, Inc.*[144] McCarthy Well brought an action against St. Peter Creamery to recover the balance due for work done on a well, and the creamery counterclaimed alleging negligent installation and removal of a pump in the well.[145] Although the specifics of the inquiry are not noted in the appellate opinion, the trial court apparently asked the jurors whether or not they had any relationship with McCarthy Well's insurer.[146] The court of appeals cited Rule 31 and *Hardware Mutual Insurance Co.*[147] as permitting the trial court to examine jurors about their contacts with an insurer that is not a party to the action but is interested in the defense or outcome of the action.[148] Citing *Viou*, the court noted: "The propriety and necessity of examining jurors about their potential affiliations with an insurer rests in the discretion of the trial court."[149]

The pretrial conference in which the trial court obtained the name of McCarthy Well's insurer and discussed the insurer's interest in the action was not transcribed.[150] Because these discussions were missing from the record and because the parties submitted conflicting affidavits on the pretrial conference proceedings, the court of appeals was prevented from determining what facts the trial court possessed that led it to examine the jurors about McCathy Well's insurer.[151] The court of appeals concluded: "In an area committed to the discretion of the trial court, this record is insufficient to find an abuse of that discretion."[152]

144. 389 N.W.2d 514, 519 (Minn. Ct. App. 1986).
145. *Id.* at 516.
146. *See id.* at 517.
147. 234 Minn. 391, 401-02, 48 N.W.2d 567, 573 (1951).
148. 389 N.W.2d at 519.
149. *Id.*
150. *Id.*
151. *Id.* at 519-20.
152. *Id.* at 520.

On appeal, the Minnesota Supreme Court also found that the trial court had not abused its discretion in asking the jurors the insurance question during voir dire.[153] The supreme court cited Rule 31, noting that the Rule permitted the trial court to collectively question the jurors about their relationship with "an interested insurance company."[154] The supreme court also cited *Viou* in stating that "the proper scope of such an inquiry lies within the discretion of the trial court."[155]

Several other cases address the subject of an attorney's conduct which suggests or implies the existence of insurance. Those cases, however, do not interpret Rule 31 or the common law precedents pertaining to discussions of insurance during voir dire.[156]

C. The "New JIG" Recommendation Regarding the Insurance Question — JIG 7

The new Civil Jury Instruction Guides, published in 1986 by the Civil JIG committee of the Minnesota District Judges Association, recommend that no instruction be given about insurance.[157] In the authorities section that follows JIG 7, it is noted that "[i]nquiry can properly be made during the voir dire examination of the jury regarding interest in specified insurance companies."[158] This JIG comment also cites Rule 31 which requires that the inquiry regarding interest in specified insurance companies must be made collectively to the jury, not to each juror individually.[159] Other mention of insurance coverage or interest in insurance is generally improper.[160] The

153. McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 316 (Minn. 1987).

154. *Id.*

155. *Id.*

156. *See, e.g.*, Purdes v. Merrill, 268 Minn. 129, 135-36, 128 N.W.2d 164, 168 (1964) (reversing trial court's denial of a new trial where plaintiff's attorney asked the jury for $40,000 and said that an award of anything more would be "punishing personally" either the plaintiff or one of the two defendants); Ostrowski v. Mockridge, 242 Minn. 265, 269, 65 N.W.2d 185, 188 (1954) (affirming trial court's decision to strike but not find prejudice in plaintiff's repeated testimony which referred to the defendant's insurance coverage); Clark v. Johnson Bros. Constr., 370 N.W.2d 896, 899-900 (Minn. Ct. App. 1985) (relating to defense counsel's reference to plaintiff's health insurance coverage).

157. 4 MINN. PRAC. CIV. JIG 7 (West 3d ed. 1986).

158. *Id.*

159. *Id.*

160. *Id.*

comment concludes that if insurance is not mentioned pursuant to Rule 31, "no general cautionary instruction should be given to the jury. Such instruction unduly emphasizes a matter that is of no concern in the case and which has not theretofore been improperly injected into the proceedings."[161]

IV. The Common Law Dilemma Remains Unaddressed

In cases preceding Rule 31, the supreme court acknowledged that "in determining who is entitled to a verdict the issues should be treated exactly as if there was no insurance, nor should the recovery, if any, be lessened or increased one penny because of insurance."[162] The court in *Gracz* condemned the practice of questioning a defendant during trial about liability insurance because the questioning "would have tended only to prejudice the minds of the jury in favor of plaintiff's recovery."[163] Yet in case law preceding Rule 31, the supreme court firmly established that a plaintiff has the right to ask the "insurance question" to determine if any jurors may be biased by a relationship with defendant's insurer.[164]

Modern practice fails to directly resolve this common law dilemma. The trial courts have "watered down," somewhat, the plaintiff's right to determine bias by refusing to allow any inquiry beyond a mere determination of whether or not any prospective juror has an interest in the named insurer. However, the alleged damage to defendant remains. As the supreme court has acknowledged, when the jury hears that a named insurance company has an interest in the outcome, they assume that the named company insures the defendant.[165] If jurors are expected to be prejudiced in favor of the plaintiff's recovery because of discussions of the defendant's insurance during trial, there is no reason to expect them to be any less prejudiced when the discussions occur during voir dire.

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161. *Id.*

162. *Storhaugen*, 171 Minn. at 52, 213 N.W. at 374.

163. *Gracz*, 104 Minn. at 479, 116 N.W. at 1118.

164. *Antletz*, 97 Minn. at 220, 106 N.W. at 518; *see also Spoonick*, 89 Minn. at 359, 94 N.W. at 1081.

165. *See, e.g.*, *Lesewski*, 254 Minn. at 288, 95 N.W.2d at 16; *Martin*, 183 Minn. at 264, 236 N.W. at 315; *see also Storhaugen*, 171 Minn. at 52, 213 N.W. at 374 (stating that whenever jurors are asked about an insurance company, they assume that the insurer has an outcome in the case).

V. Analysis of the Real Function of the "Insurance Question"

All the appellate opinions assume that all prospective jurors who have an interest in the defendant's insurer know that the insurer provides coverage to the defendant.[166] One of the first voir dire questions asked, however, is whether or not the juror has any knowledge about the facts of the case. If the jurors are not aware of the facts of the case, it is highly unlikely that any of the jurors would know who defendant's insurer is. Without that knowledge, jurors insured by the same carrier as defendant would not have a bias on that basis.

Jurors having a relationship with the company other than as policyholders would have a much greater likelihood of knowing that the insurer has an interest in the outcome of the case without having heard the "insurance question." This is particularly true of claims representatives, local agents or employees. The harm that defense counsel seek to avoid with such prospective jurors is having them blurt out that they know something about the case because they work for defendant's insurer. In reality, though, the likelihood of a local agent or employee of the defendant's insurer being on the venire panel is very small. Even if it occurred, counsel would discover it upon reviewing the jury list and could then move, in chambers, to excuse any such juror.

Therefore, the *real* function of the "insurance question" is to let the jury know that the defendant has insurance with which to pay any verdict. The following examples further illustrate this point.

In *Northwestern Fuel Co. v. Minneapolis Street Railway Co.*,[167] counsel asked the jurors if any of them had an interest in a named insurer even though the plaintiff did not have insurance.[168] In the dissenting opinion, Justice Hallam noted that "[t]he apparent purpose of the line of questions asked was to create in the minds of the jurors an impression that plaintiff [who was defending a counterclaim] would be reimbursed by

166. The supreme court explicitly stated this in *Lesewski*, 254 Minn. at 288-89, 95 N.W.2d at 16; *Martin*, 183 Minn. at 264, 236 N.W. at 315. This knowledge is also implied by the supreme court in several other opinions, see, *e.g.*, *Storhaugen*, 171 Minn. at 52, 213 N.W. at 374.

167. 134 Minn. 378, 159 N.W. 832 (1916).

168. *Id.* at 379, 159 N.W. at 832.

insurance for any damages it might be required to pay. I can conceive of no other purpose."[169]

One Minnesota district court judge reflected that he believes the question evolved when automobile insurance was not mandatory, and the plaintiffs' counsel wanted to let the jury know that, while not everyone had insurance with which to pay a claim, this particular defendant did.[170]

Many years ago, a St. Cloud attorney was about to begin a trial in Little Falls. He did not recall the name of his client's insurer and did not have that information with him. So the lawyers and the judge made up the name of the insurer. When the "insurance question" was asked of the jury, a couple of them raised their hands as having an interest in the named insurer, but they assured the court that their affiliation with the insurer would not prejudice their view of the case.[171]

More recently, in a case where a plaintiff company sued its insurance agent for failure to procure coverage, neither counsel nor the court mentioned the "insurance question," the jury was impaneled without it and the court recessed for lunch. Plaintiff's counsel returned from lunch, and commented to defendant's counsel[172] that his clients had asked over lunch how the jury would know that the defendant's insurer, rather than the defendant himself (whom they liked and assumed the jury would like), would pay any verdict for the plaintiff. Plaintiff's counsel then remembered that the "insurance question" had not been asked.[173]

If they did not feel threatened by the possibility of elimination of the "insurance question," even plaintiffs' counsel would probably admit that its real purpose is to let the jury know that the defendant has insurance with which to pay the verdict.

Whether or not jurors would fail to render an adequate verdict because of concern over the defendant's inability to pay *is* a legitimate voir dire concern. In letting the jury know that the defendant has insurance, plaintiff's counsel magnanimously

169. *Id.* at 381, 159 N.W. at 833.

170. Interview with Honorable Paul Hoffman, *supra* note 7.

171. Interview with Richard Quinlivan (September 1987) (regarding case tried by Ray Quinlivan); interview with Honorable Paul Hoffman, *supra* note 7.

172. The author was the defendant's counsel in this case.

173. North Cent. Outdoor Equip. Co., Inc. v. Minnesota Mut. Fire & Casualty Co. and Citizens Agency, Inc., No. 41673 (Crow Wing County Dist. Ct. May, 1985).

avoids this problem. However, if the court allows plaintiff's counsel to inform the jury of the defendant's ability to pay, the court should also allow defendant's counsel to notify the jury of the plaintiff's ability to pay for its own damages. If it is appropriate to tell a jury that the defendant has insurance, then it arguably is appropriate to tell them the coverage limits and the expected effect of a plaintiff's verdict on the defendant's rates or insurability.[174] Furthermore, if it is appropriate to tell the jury about the defendant's insurance, it also seems appropriate to tell them about the plaintiff's insurance, i.e., health insurance, workers' compensation, or, in a wrongful death case, life insurance. Yet all of these inquiries deviate from a true tort system.

Some plaintiffs' counsel view their clients as having a vested right as third party beneficiaries in defendant's insurance. They want the jury to know that their client's claim is really an insurance claim, similar to a person seeking reimbursement from a health insurance carrier. The problem with this contention, however, is that the two situations are dissimilar; the health insurer's duty to pay arises without fault while the liability insurer's duty to pay does not.

VI. Some Possible Side Effects of the "Insurance Question"

The following situations demonstrate the possible side effects of asking the insurance question.

A. Two Insurers In a Two Party Case

Suppose a plaintiff and a defendant are individuals. The plaintiff was injured in an automobile accident and received no-fault benefits. Is it appropriate for the court to name both the defendant's liability insurer and the plaintiff's own no-fault carrier? Presumably so, since the no-fault carrier would have an interest in a jury's finding of no need for additional medical treatment. In such a case, would the jury speculate that the plaintiff had already been paid insurance benefits, and that the plaintiff's insurer is now seeking reimbursement from the defendant's insurer? Probably not. It would seem more likely

174. Perhaps the insurer has given notice of a reservation of rights, in which case there might not be any coverage.

that the jury would believe that the defendant has two insurance policies, instead of just one (a lot of insurance with which to pay any judgment).

B. Multiple Parties

One district court judge recalls a case where the plaintiff was the son-in-law of a Becker County farmer. The farmer was putting in a basement under his house and the son-in-law was helping. Not knowing that exposing skin to wet cement may cause substantial burns, the son-in-law worked in the cement on his knees. The cement soaked through the son-in-law's pants, and he received severe burns to his legs and knees as a result.[175]

The son-in-law sued his father-in-law. The local supplier of the cement and the cement manufacturer from Mason City, Iowa were named as defendants or third-party defendants.[176]

The father-in-law appeared at trial in his bib overalls. The father-in-law did have significant insurance coverage. His insurance company did provide him with a defense in the case and would have indemnified him for a fairly substantial judgment against him. The local ready mix company also had insurance, and its representative appeared at the trial in a business suit. Three gentlemen in business suits appeared at trial on behalf of the Mason City cement company, which was essentially self-insured. During voir dire, the trial judge questioned the jury about two insurance companies — the insurer for the farmer and the insurer for the local cement company.[177]

The case ended in a mistrial. Later, the trial judge talked with several of the jurors about the case. The jurors indicated that their sympathies were with the poor "uninsured" farmer in his bib overalls.[178]

C. "The Insurance Crisis"

Since the advent of the media's reference to an "insurance crisis," plaintiff's counsel have sought the right to ask prospective jurors if reports of an "insurance crisis" or calls for "tort

175. Interview with Honorable Paul Hoffman, *supra* note 7.
176. *Id.*
177. *Id.*
178. *Id.*

reform" in the media have caused them to feel that plaintiffs should not bring lawsuits or should not "fully recover" if they do. The exact effect of such discussions is unknown. On the one hand, plaintiff's counsel receives assurance that the jury will "fully compensate" the plaintiff without regard to any "insurance crisis." On the other hand, such comments may cause jurors to remember negative effects of the "insurance crisis" such as the cancellation of recreational activities for children because of the cost of insurance. There are members of the defense bar who believe that such voir dire discussions, as well as the "insurance question," actually help defendants because they remind jurors that all of us pay for jury verdicts through insurance premiums. If these beliefs are correct, it would be plaintiffs, rather than defendants, who would benefit from elimination of the "insurance question" during voir dire.

Conclusion

The only recent appellate court examinations of the insurance question during voir dire are in the *McCarthy Well* opinions. As in the past, the courts have failed to address the contradiction that remains in the common law. This contradiction needs to be addressed and resolved.

The author of this article must acknowledge his inherent bias toward defendants, who he typically represents. Nevertheless, having thoroughly studied the case law and Rule 31, the author suggests that fundamental fairness dictates that the "insurance question" ought to be eliminated. In nearly every case, the legitimate function of the question can be met by simply asking the jury if any of them have heard anything about the case. Those who have learned about the case through a relationship with defendant's insurer will respond. The remaining jurors, then, will not be prejudiced by any discussion of the defendant's insurance.