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Civil Procedure: Discovery -- Privilege, Relevancy, and Constitutionality in the Discovery of Automobile Liability Insurance Under the Federal Rules

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NOTES

Civil Procedure

DISCOVERY — PRIVILEGE, RELEVANCY, AND CONSTITUTIONALITY IN THE DISCOVERY OF AUTOMOBILE LIABILITY INSURANCE UNDER THE FEDERAL RULES.

I. *The Growth of the Problem: The Discoverability of Insurance*

Within the last eight years in the United States, there has been a marked increase in the number of automobiles using the nation's highways,[1] the number of accidental deaths and personal injuries resulting from automobile accidents,[2] and the value of property destroyed therein.[3] Most states have statutes similar to the one in Tennessee,[4] which require an owner or operator of a motor vehicle involved in an accident to file with a public official proof of insurance or other indicia of financial responsibility before he will be permitted to continue operating a motor vehicle within the state.[5] Since today most automobiles are insured, it is apparent that the insurance companies, which usually become, by virtue of the insurance contract, subrogated to the rights of the defendant and thereby real parties in interest to any lawsuits arising out of these accidents, are vitally interested in the outcome of these suits.

Plaintiffs, in determining the optimum amount of damages to seek, and in deciding the best amount to agree upon in an out-of-court settlement, find that a knowledge of the type and amount of the defendant's liability insurance is extremely valuable. Through the device of pre-trial discovery in the federal courts, and its counterpart in many states, they are often able to gain that knowledge. Their opponents, realizing the tactical advantage gained from such knowledge, have naturally objected to the use of the discovery device to obtain it. The question has thus arisen whether the existence of liability insurance, and the amount thereof, are discoverable under the Federal Rules of Civil Procedure and similar state provisions.

Courts which have had to pass on this problem have differed as to its solution. Holding that insurance is discoverable are such federal decisions as *Orgel v. McCurdy*[6] and *Brackett v. Woodall Food Products, Inc.*,[7] and state cases such as *People ex rel. Terry v. Fisher*[8] and *Maddox v. Grauman*.[9] *Maddox* exemplifies the reasoning often used in permitting discovery: since the existence of insurance is obviously relevant after a plaintiff has prevailed, why not before? The contract is not private; its very terms embrace those who may be negligently injured by the insured.

Taking the opposite view are such federal cases as *McClure v. Boeger*,[10] *McNelley v. Perry*,[11] *and Gallimore v. Dye*,[12] and such state decisions as *Jeppesen v. Swan-*

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1 Automobile sales rose from 6,665,863 in 1950 to 7,920,186 in 1955. WORLD ALMANAC AND BOOK OF FACTS 312 (Hansen ed. 1958). Automobile registrations increased from 49,161,691 in 1950 to 65,212,510 in 1956, and by 1957 had risen to an estimated 67,000,000. *Id.* at 682.

2 Automobile fatalities rose from 36,996 in 1951 to 40,000 in 1956, while non-fatal injuries rose to 1,400,000 in 1956. *Id.* at 312.

3 The cost of automobile accidents rose to $3,200,000,000 in 1956. *Ibid.*

4 Forty-three states are listed in addition to Tennessee. See TENN. CODE ANN. §§ 59-1201, 59-1204 (1955), especially p. 857.

5 *Ibid.*

6 8 F.R.D. 585 (S.D.N.Y. 1948).

7 12 F.R.D. 4 (E.D. Tenn. 1951). The information sought was held relevant because of a statute similar to the one cited at note 4, *supra.*

8 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

9 265 S.W.2d 939 (Ky. App. 1954).

10 105 F. Supp. 612 (E.D. Pa. 1952).

11 18 F.R.D. 360 (E.D. Tenn. 1955).

12 21 F.R.D. 283 (E.D. Ill. 1958).

son[13] *and Di Pietruntonio v. Superior Court.*[14] These cases assign a variety of reasons for the holding that the insurance contract is not discoverable under the facts presented. One of the most insistent of these reasons, recently relied on by a federal district court, is that an insurance policy is not relevant to the litigation because the presence or absence of liability insurance does not determine negligence in a tort action, and negligence is the only subject matter involved therein.[15] Further, and perhaps more importantly, the court, in unusually strong dictum, stated that to require a defendant to disclose his insurance coverage prior to the adjudication of his liability would contravene the fifth amendment of the United States Constitution. This is the first instance in which an argument against pre-trial insurance discovery based on the Constitution was favorably considered, although prior cases in state forums have rejected such an argument.[16]

There has been no pronouncement by the United States Supreme Court on either the propriety of using the Federal Rules to discover insurance, or the validity of any constitutional objections that might be raised against their use. It is the purpose of this Note, therefore, to (1) discuss the various interpretations courts have attached to the discovery rules, particularly as these interpretations affect the cases involving automobile insurance, and (2) explore the validity and ramifications of the constitutional objections which may be raised against the discovery of this insurance.

II. *The Pertinent Federal Rules and Their Application*

Of the eighty-six Federal Rules of Civil Procedure, three are of primary importance in any attempt to discover the amount of a defendant's liability insurance during pretrial. Rule 33 provides:

> Interrogatories may relate to any matters which can be inquired into under Rule 26(b). . . .

Rule 34 provides:

> Upon motion of any party showing good cause therefor, . . . the court in which an action is pending may (1) order any party to produce and permit the inspection . . . of any designated documents, . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of . . . Rule 26(b). . . .

Rule 26(b), which defines discoverable matters, provides:

> The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the existence, description, nature, custody, condition, and location of any . . . documents. . . . It is not ground for objection that the testimony will be inadmissable at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissable evidence.

The Federal Rules, and like state enactments, were adopted as procedural devices to effectuate the prompt and just disposition of litigation. As Chief Justice Hughes observed:

> It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities, and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances.[17]

When does the stripping of procedural encumbrances become an invasion of the litigant's substantive rights? This is the question which has confronted the various courts concerned with insurance discovery, and apparently a conclusive determination of the issue is still to be reached.

Rule 26(b) provides for inquiry into "any matter, not privileged, which is relevant to the subject matter involved in the pending action." This relatively succinct phrase has formed the basis for most of the conceptual difficulties encountered by the judiciary in approaching and answering this clearly defined issue. Until there is established uniformity in the definitions of (1) privileged matter, (2) the subject matter of an action,

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13 243 Minn. 547, 68 N.W.2d 649 (1955). *Accord,* Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

14 327 P.2d 746 (Ariz. 1958).

15 Gallimore v. Dye, 21 F.R.D. 283, 287 (E.D. Ill. 1958).

16 People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951).

17 Address, Annual Meeting, American Law Institute, reprinted at 21 A.B.A.J. 340, 341 (1935).

and (3) relevancy to the subject matter, there will continue to be a conflict of decisions concerning the propriety of pre-trial insurance discovery.

III. *The Apparent Inapplicability of the Privilege Exception*

Privileged matter, under the discovery rules, ". . . should be interpreted as it is in the law of evidence."[18] Historically, three types of privilege have been recognized as a defense to discovery:[19] privilege against self-incrimination,[20] professional privilege,[21] and privilege against making disclosures which would be injurious to the public interest.[22] It is significant that no case to date has treated the insurance contract as "privileged" within the meaning of the rules.[23] Indeed, it is difficult to imagine that the contract of insurance can be included in any of the recognized categories: production of the policy would in no sense "incriminate" a defendant; nor is the insurance company a member of any profession which is permitted to make use of the second privilege; nor can it be seriously contended that requiring the production of an insurance contract would jeopardize the national security, which is the kind of public interest usually thought of when this defense is used.[24] The fact that the privilege argument has not been seriously urged in any of the decided cases is a strong indication that there is not substantial weight to this argument.

IV. *The Essence of the Problem: "Relevancy to the Subject Matter"*

In an action for damages arising out of the alleged negligence of the operator of a motor vehicle, what constitutes the "subject matter" of the litigation? *Gallimore v. Dye*[25] determined that the case was a simple determination of the defendant's negligence or non-negligence, for only through such a determination can liability exist. Yet the court in *Brackett v. Woodall Food Products, Inc.*,[26] also interpreting this clause in Rule 26, included the amount of damages as an integral part of the litigation's subject matter. Obviously, the broader the definition of "subject matter" is made, the more likely it is that the interrogatory will be held "relevant," and therefore unobjectionable: this because what is not relevant when liability is the *sole* determining matter becomes relevant when the amount of damages is considered "subject matter."

The problem of defining "relevance," the final step in determining whether insurance discovery is within or without the scope of Rule 26, has given courts considerable trouble. Legislative history, which is often dispositive of questions of interpretation, has in this situation been the basis for added confusion:

> The amendments to subdivision (b) [of Rule 26] make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissable as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry. . . .[27]

18 Wild v. Payson, 7 F.R.D. 495, 499 (S.D.N.Y. 1946).

19 See 4 MOORE, FEDERAL PRACTICE 1085 (2d ed. 1950).

20 Hope v. Burns, 6 F.R.D. 556 (E.D. Ky. 1947).

21 Grauer v. Schenley Products Co., 26 F. Supp. 768 (S.D.N.Y. 1938). See Hickman v. Taylor, 329 U.S. 495 (1947), defining the "work product of lawyers."

22 Quirk v. Quirk, 259 Fed. 597 (S.D. Cal. 1919).

23 Howell v. Spatz, 27 U.S.L. Week 2030 (Pa.Ct.Com.Pl. June 25, 1958) held that "as between plaintiff and the parties to the insurance contract the policy is privileged. . . ." However, subsequent language indicated that the court was simply referring to the defendant's rights under the fourth amendment to "be secure in his . . . papers . . . against unreasonable searches. . . ." This is the only case found where a privilege argument was used.

24 *Cf.* Jencks v. United States, 353 U.S. 657 (1957).

25 21 F.R.D. 283 (E.D. Ill. 1958). "It is not the presence or absence of liability insurance . . . the defendant may have that creates liability in a negligence action. Negligence of the defendant is the gravamen in such actions." *Id.* at 286.

26 12 F.R.D. 4 (E.D. Tenn. 1951). People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957), apparently adopts the same theory when deciding the proper interpretation of a similar state statute.

27 Committee Note of 1946 to Amended Subdivision (b) of Rule 26, reprinted at 4 MOORE, FEDERAL PRACTICE § 26.01[7] (2d ed. 1950).

In relation to the insurance question, two views are possible: (1) the defendant's insurance policy is generally inadmissable as direct evidence in many states,[28] and probably will not lead to the discovery of admissable evidence, so that it is a matter "entirely without bearing" and therefore "not within the scope of inquiry"; (2) knowledge of the type and amount of a defendant's insurance undeniably aids a plaintiff in the preparation and/or presentation of his case, so that it is a matter within the "broad scope of examination." This dichotomy has required the courts to answer the relevancy question themselves, with a resulting divergence of opinion in their solutions.

Realizing that ". . . relevancy to the issue is still the test, . . ."[29] the courts, in their efforts to resolve the divergence, have turned to the judicial history of discovery under the common law. In chancery, discovery existed as an equitable bill in aid of an action at law rather than as a pre-trial device. Section 636 of the United States Code[30] was enacted to give the courts of law the power to do what equity courts had been doing for many years.[31] Discovery in chancery was limited to facts which supported the case of the party seeking it,[32] or to put it another way, to the party having the affirmative on the issue.[33] Thus, "relevance" amounted to "relevance to the material averments of the moving party." But from *Newcomb v. Universal Match Corp.*,[34] it is apparent that this limitation, and hence this definition of relevance, was done away with by the Federal Rules. Another limitation on discovery in chancery was that no "fishing expeditions" were permitted.[35] The interrogator had to know in advance what he expected to find, so that under this rule the definition of "relevance" might be characterized as "pertinence to the issues and within the knowledge of the moving party." Under the Federal Rules, "no longer can the . . . cry of 'fishing expedition' preclude a party from inquiring into the facts . . . ,"[36] so that no longer must the information sought be "within the knowledge of the moving party" as before. Thus, the second limitation, and thereby the second "definition," has also been abandoned.

Attempts at defining "relevant" have been many but success at arriving at an acceptable compromise definition has failed to materialize:

> The word 'relevant' as used in the Rule should be interpreted in the sense in which ordinarily it is understood, that is, referring to that which is material and competent *under the rules of evidence*.[37] (emphasis added).
>
> It has been held that Rule 26 . . . 'does not restrict the examinations to matters relevant to the precise issue' but only to matters 'relevant to the subject matters involved in the pending action.' Rule 34 has also been construed to the effect that it is not necessary to establish admissability of the documents, but that it is sufficient if the documents contain matters generally bearing on the issue and that there is reasonable probability the documents contain material evidence.[38]

Some of the courts that have treated insurance contracts as relevant have done so quite summarily.[39] The *McCurdy* case seemed to hold simply that insurance is relevant because it is relevant. In *Brackett v. Woodall Food Products, Inc.*,[40] the court was able

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28 See Colquett v. Williams, 264 Ala. 214, 86 So. 2d 381 (1956); Maddox v. Grauman, 265 S.W.2d 939 (Ky. App. 1954). For a general discussion of the problems in this area see Note 10 U. FLA. L. REV. 68 (1957).

29 Blumenthal v. Lukacs, 2 F.R.D. 427, 428 (S.D.N.Y. 1942).

30 REV. STAT. § 724 (1875), 28 U.S.C. § 636 (1928).

31 Indianapolis Amusement Co. v. Metro-Goldwyn-Mayer Distributing Corp., 90 F.2d 732, 734 (7th Cir. 1937) (dictum).

32 See 4 MOORE, FEDERAL PRACTICE 1063 (2d ed. 1950).

33 See Laverett v. Continental Briar Pipe Co., 25 F. Supp. 80, 82 (E.D.N.Y. 1938) (dictum).

34 25 F. Supp. 169, 171 (E.D.N.Y. 1938).

35 "It is not permissable to deliver interrogatories which are of a 'fishing' character. . . ." Griebart v. Morris, [1920] 1 K.B. 659, 664.

36 Hickman v. Taylor, 329 U.S. 495, 507 (1947).

37 Poppino v. Jones Store Co., 1 F.R.D. 215, 217 (W.D. Mo. 1940).

38 Rosseau v. Langley, 9 F.R. SERV. 34.41, Case 1, at 658 (S.D.N.Y. 1945).

39 Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951); Demaree v. Superior Court, 10 Cal. 2d 99, 73 P.2d 605 (1937).

40 12 F.R.D. 4 (E.D. Tenn. 1951).

to find relevancy from the tenor of state legislation requiring owners or operators of motor vehicles under certain circumstances to show "financial responsibility," and from the fact that if the information is filed with the state authority, as is required, it becomes public and open for inspection. This proposition, although apparently tenable, fails in several respects. First, the statute[41] does not demand the proof of insurance to be filed, except as a condition precedent to the continued operation of a motor vehicle within the state while a lawsuit is pending. While the distinction may be more nominal than substantial, it is significant that the statute does not *require* such showing where the defendant is unwilling to file it. But under the discovery procedure, production of the contract is required, whether the defendant agrees or not, so that it is different to say that a defendant who willingly files information about his insurance ought not complain when it is made public than it is to say that a defendant ought not complain when his insurance is made public even where he refuses to file, as is his right. Secondly, a defendant is not required to file information about his insurance contract under the Tennessee statute; he may merely deposit a specified sum of money if he so desires. Again, therefore, it becomes different to say that he ought not complain if, after he files, the contract is made public than it is to say that he ought not complain when the contract is made public after he chooses to deposit money instead, as is his right. Thus, the court's reasoning in *Brackett* fails in two important respects.

The difficulties inherent in reaching any uniform definition of "relevant" have found their culmination in Tennessee and Illinois. In *McNelly v. Perry*,[42] the same district court that decided the *Brackett* case four years earlier, reversed itself and held that under the particular factual situation before it there was no proof that insurance coverage was relevant to the outcome of the trial, and thus it was not discoverable under Rule 26. The court indicated that in unusual circumstances insurance would be material to the issues being litigated, and thus discoverable. In an apparent attempt to explain this holding in the face of the decision in *Brackett*, the court simply assumed that *Brackett* involved some of these unusual circumstances, although a reading of the case does not indicate what they are. Consequently, not only is there general disagreement among the various federal courts on this question, but apparently there is no unanimity of thought within a particular district. The next time the question arises in the district court for the eastern district of Tennessee, the presiding judge will again have to make an independent judgment as to the merits of the conflicting arguments, with little or no precedent to guide him.

In Illinois the situation, though factually different, is equally disturbing. In *People ex rel. Terry v. Fisher*,[43] the Illinois Supreme Court interpreted the state discovery statute[44] as including the discovery of liability insurance. Shortly thereafter, a federal district court for the eastern district of Illinois decided that under Rule 26 liability insurance was not relevant, and thus not discoverable, despite the fact that the Illinois statute is considerably narrower in its authorized scope of discovery than is Rule 26. The inevitable result of this situation is that the insurance companies in Illinois, many of whom are incorporated in eastern states, will seek and presumably obtain removal of any tort actions against their insureds to the federal court where the insurance policies will not be discoverable. Such an "open invitation to remove" is hardly conducive to an efficient system of judicial administration.

From the foregoing analysis, it is apparent that there is no uniformity in the way different courts answer the question "Is insurance 'relevant' within the meaning of Rule 26?" Both answers find considerable support among the judiciary, although those who favor relevancy are probably in the majority. It should be borne in mind, however, that

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41 TENN. CODE ANN. §§ 59-1201, 59-1204 (1955).
42 18 F.R.D. 36 (E.D. Tenn. 1953).
43 12 Ill. 2d 231, 145 N.E.2d 588 (1957).
44 ILL. ANN. STAT. ch. 110, §§ 101.19-4, 101.19-11 (Smith-Hurd 1956).

neither answer is dispositive of the constitutional questions which may be presented, although some of the relevancy arguments may closely parallel the constitutional arguments.

Courts generally prefer to reach constitutional considerations only when the case cannot be disposed of on some other ground.[45] For this reason, it is apparent that before the constitutional issues will arise, the court must decide in favor of relevancy and against the asserted privilege, and one is not dependent on the other. It is in this context that the subsequent discussion will proceed.

V. *Present Disposition of the Constitutional Arguments*

Where the plaintiff, under Rule 33, has filed interrogatories with respect to the amount of the defendant's insurance coverage, or has moved under Rule 34 for the production of the policy of insurance, the defendant will probably rely on one or more of four arguments in opposition to these motions. Each of the arguments alleges that one of the rights guaranteed to the defendant under the Constitution of the United States will be violated if the defendant is forced to answer the interrogatory or produce the insurance policy. In substance, the arguments take the following form:

(1) To require the defendant to disclose the amount of his automobile liability insurance would constitute an unreasonable search and seizure of his property, in violation of the rights guaranteed him under the fourth amendment;

(2) To require such disclosure would deprive him of his property without due process of law, in violation of the fifth amendment;

(3) To require such disclosure would abridge the privileges and immunities guaranteed him under article IV, section 2;

(4) To require such disclosure would amount to a denial of the equal protection of the laws, in violation of the fourteenth amendment.

Obviously, the fourth argument is applicable only where the action is brought in a state, rather than a federal, court, since the fourteenth amendment limits its application to the States,[46] and there is no corresponding provision applicable to the federal government, either in the body of the Constitution or in any of the amendments. Also when the action is brought in a state court, the substance of the second and third arguments, if valid, will apply by operation of the fourteenth amendment, while the first argument, search and seizure, is not an effective limitation on the states by virtue of the decision in *Wolf v. Colorado*,[47] although some state courts have indicated that they may accept the argument nonetheless.[48]

The possibility that certain provisions of the constitution of the state in whose courts the action is brought may also be applicable must be recognized, but any attempt to discuss any or all of these constitutions is beyond the scope of this Note.

In pertinent part, the applicable provisions of the Constitution of the United States are these:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.[49]
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .[50]
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .[51]
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> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of

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45 Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (concurring opinion of Brandeis, J.).

46 "No State shall make or enforce any law. . . ."

47 338 U.S. 25 (1949).

48 Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Di Pietruntonio v. Superior Court, 327 P.2d 746 (Ariz. 1958).

49 U.S. CONST. art. IV, § 2.

50 U.S. CONST. amend. IV.

51 U.S. CONST. amend. V.

> life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[52]

Apparently the first occasions on which a constitutional objection was raised to the discovery of liability insurance were in California. In *Demaree v. Superior Court*,[53] other issues were disposed of before the constitutional question was reached; the motion for production of the insurance policy was then held not violative of the Constitution by the mere statement that the defendant's authorities did not support his contention that the requirement of production would constitute unreasonable search and seizure.[54] And in a subsequent California case,[55] the problem was handled, and the objections dismissed, in much the same fashion. Although both these cases hold discovery constitutional, it is doubtful whether they should be treated as dispositive of the constitutional question because of the summary treatment afforded the allegation. They may, however, indicate how little weight was given to the argument.

The precursor of the constitutional argument in the federal courts was *McClure v. Boeger*,[56] which held that proposed interrogatories relating to insurance were objectionable. Although the decision was based primarily on the view that the interrogatories were not designed to lead to information of the kind contemplated by the Rules, and that they did not aid the plaintiff in the presentation of his case,[57] a further substantiation was added: that it is but a short step from requiring a defendant to disclose his insurance to requiring him to disclose *all* his financial resources, and even to permit an inspection of his bank account, safety-deposit box, etc.[58] Thus, while the court neither referred to the Constitution nor used constitutional language to present the argument, it utilized what is today the most widely-used theory upon which the constitutional argument is based: the fear that all a defendant's resources may become discoverable.

Three years later, the Supreme Court of Minnesota used the same theory to strike down a motion under Minnesota Rule 34 for the production of an insurance policy.[59] The court said, in part:

> If the amount of insurance coverage is discoverable under these rules, we see no reason why the defendant cannot be made to disclose the extent of his property as well. . . . As far as we can determine, [the proposition] is the same and would be useful for the same purpose. . . .
>
> Under the guise of liberal construction, we should not emasculate the rules by permitting something which was never intended or is not within the declared objects for which they were adopted.[60]

Again, the court failed to couch the argument in constitutional terms, but nevertheless the case serves to indicate that the argument was gaining wider recognition.

In 1957, the Supreme Court of Illinois rejected this constitutional argument in markedly summary language:

> Nor did those orders . . . infringe petitioner's constitutional rights against unreasonable search and seizure . . . or any other constitutional guarantee.[61]

In view of this terse comment, the same observations as were made concerning the California cases seem also to apply here.

The *McClure* argument was finally extended to a constitutional one in *Gallimore v. Dye*.[62] The court therein observed:

> Requiring the disclosure of the insurance policy, or other assets, which could very well be the next step, would give to all the world knowledge of the financial condi-

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52 U.S. CONST. amend. XIV, § 1.
53 10 Cal. 2d 99, 73 P.2d 605 (1937).
54 *Id.* at 607.
55 Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951).
56 105 F. Supp. 612 (E.D. Pa. 1952).
57 *Id.* at 613.
58 *Ibid.*
59 Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955).
60 68 N.W.2d at 657-58.
61 People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588, 594 (1957). For an interesting discussion of this case, see 33 NOTRE DAME LAW. 497 (1958).
62 21 F.R.D. 283 (E.D. Ill. 1958).

> tion of any given defendant . . . and this would certainly, in the opinion of this court, invade the privacy of an individual before any liability had been determined against him. A more tempting invasion of the right against unreasonable searches would be difficult to imagine.[63]
>
> It would further appear that to require a defendant to disclose his insurance coverage prior to adjudication of liability would also be a contravention of the Fifth Amendment.[64]

The court here did no more than to adopt the reasoning in the *McClure* case, advancing one more step into the constitutional realm. This case therefore represents the culmination of this argument, which has been the only one heretofore mentioned by the courts.

Two recent state-court cases have likewise held that interrogatories relating to insurance are improper. *Howell v. Spatz*[65] reasoned that such interrogatories were not relevant, forced disclosure of a document which was privileged as between the parties, and constituted an unreasonable search and seizure. Since the court was able to dispose of the case on relevancy grounds, the constitutional argument is little more than dictum. *Di Pietruntonio v. Superior Court*[66] is similar, although the court's opinion indicates that no actual constitutional issue was raised.

It is apparent from the foregoing that authoritative decisions as to the constitutionality of such discovery attempts are at a minimum. Neither the United States Supreme Court nor any of the federal courts of appeals have passed on the issue, while the federal district courts and the state courts which have pronounced on the question have not given a substantial answer. It is interesting to note that both the California and Illinois decisions are characterized by their summary treatment of the issue, while the courts which have adopted *McClure*-type reasoning in denying discovery of insurance have not precisely answered the question. What these latter cases have declared is not that such discovery is unqualifiedly a violation of the Constitution, but that it *may become* such if it is extended to other assets:

> If the plaintiff is permitted to discover the existence, amount, and provisions of liability coverage . . . , then it could logically follow that he should be permitted the same latitude in discovery of the defendant's other assets, such as stocks, bonds, real estate, bank account, and in general the total assets of the defendant of whatever nature or kind. . . . This, whether the party filing has a valid claim or has merely conjured up a claim for the sole purpose of discovering the assets of the party charged.[67]

Noting this distinction, it is difficult to conclude that any court has said that the discovery of insurance per se is unconstitutional. More likely is the possibility that these previous cases have been indications by the courts of how they would decide the constitutional issue should it ever arise in the future.

From this it might be suspected that the courts are still not certain precisely wherein the correct answer lies. There is an apparent reluctance on the part of these courts to define the limits of a problem which is not susceptible to ready solution. The subsequent discussion of the constitutional arguments will therefore proceed *de novo* as if the arguments are novel to the law.

VI. *The Theories Involved in the Constitutional Arguments*

The question of constitutionality raises many policy considerations which it is not the purpose of this Note to solve. Some of these considerations are: Is the civil lawsuit the kind of case in which we are willing to place the plaintiff in an advantageous tactical position even before the trial on the merits begins? Is the contract of insurance one which ought to be protected from a rigid application of the discovery rules? These and other questions of policy will have to be resolved before a final answer can be given to the issue of the constitutionality of the discovery of insurance coverage. It is with this in mind that a discussion of the four possible constitutional arguments will proceed.

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63 *Id.* at 285-86.
64 *Id.* at 287.
65 27 U.S.L. WEEK 2030 (Pa.Ct.Com.Pl. June 25, 1958).
66 327 P.2d 746 (Ariz. 1958).
67 Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).

A. *Unreasonable Search and Seizure*

In all of the cases dealing with the constitutional issue which have been decided to date, there has been a notable reliance on the unreasonable search and seizure argument. Despite this, little can be stated definitively as to the basis of such decisions. It is certain that the fourth amendment does not denounce all searches and seizures, but only such as are unreasonable.[68] Also, "what is a reasonable search is not to be determined by any fixed formula. . . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."[69]

Therefore, there can be no conclusion that if an action possesses factors a, b, and c, it will be deemed an unreasonable search, while in the absence of any one of them it will be permitted. What is "unreasonable" varies with each case, and presumably it is possible that the discovery of one man's insurance is unreasonable while the discovery of another's is not.

Despite the implication that there are no rules which apply to all search and seizure cases, various norms do exist. It is certain, for example, that where a greater public interest in the thing to be discovered exists, more latitude will be permitted in searches than in cases where the public interest is not so vitally affected.[70] It has also been observed that the search for and seizure of stolen goods is totally different from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained.[71] Presumably, there is a greater public interest in most criminal cases than there is in most civil cases, so that it might be correct to establish a gradation of the strictness with which the rule against unreasonable searches and seizures will be applied: most latitude will be permitted in a criminal case where the search is designed to recover stolen goods; less will be permitted in a criminal case where a man's books and papers are sought to be used against him; the same or less latitude will be permitted in a civil case where, for example, converted goods are sought to be recovered; and little latitude will be permitted in a civil case where a man's books and papers are sought to be used against him. Since the insurance policy in a damage suit falls into the last category, this may be the reason why some courts have exhibited an unwillingness to permit its discovery. Because of the fact noted previously, that the courts have failed to say that such discovery is per se unconstitutional, we might conclude that the search and seizure objection is somewhat tenuous. But to say that it is tenuous is not to say that it is invalid, so the process of discovery ought to be examined to determine if in fact it possesses attributes of unreasonableness.

Discovery does not fall within the traditional concept of unreasonable search and seizure in that it is neither forcible nor outside the legal process. Questions are propounded or production is requested, and the court in its discretion may enforce or deny the request. If the request is denied, no constitutional question is raised; if it is enforced, the defendant himself must supply the information. It is not suggested that simply because the defendant himself supplies the information no constitutional objections can be raised, but the situation then becomes somewhat analogous to an administrative hearing in which one of the parties is served with a subpoena duces tecum, and is required to bring in certain papers for examination. If the production is permitted in the latter case, it is difficult to say that it becomes "unreasonable" in the case of liability insurance. If it does, there must be something unique about the contract of insurance which requires a different result. But the contract of insurance does not differ materially from other contracts, so that it would seem that the same answer is required in both cases.

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68 On Lee v. United States, 343 U.S. 747 (1952).

69 United States v. Rabinowitz, 339 U.S. 56, 63 (1950). See also McKnight v. United States, 183 F.2d 977, 978-79 (D.C. Cir. 1950).

70 Harris v. United States, 331 U.S. 145 (1946).

71 *Id.* at 154. "This Court has frequently recognized the distinction between merely evidentiary materials . . . which may not be seized . . . and those objects which may validly be seized, including . . . fruits of crime such as stolen property."

Thus even if the requirement of production could be said to be a "search and seizure," it is doubtful whether the "unreasonable" test can be met, and for this reason the unreasonable search and seizure argument does not seem to be applicable to the situation under consideration.

B. *Deprivation of Property Without Due Process of Law*

Like "unreasonable" search and seizure, the question as to what constitutes lack of "due" process often depends on the circumstances of the individual case rather than on a general rule. In effect, this is what some courts have said when offering definitions of "due process";

> . . . [B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected.[72]
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> . . . [T]he guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[73]

States, by virtue of the fourteenth amendment, are no less bound to afford due process than is the federal government.[74]

It is indeed difficult to suppose that if the discovery of insurance is not "unreasonable" within the meaning of the fourth amendment, it will not be held "due" within the meaning of the fifth and fourteenth amendments. Discovery being an accepted "process of law," it is apparent that no different result should be reached under this argument than under the unreasonable search argument.

A second question is also presented by this argument: is a contract of insurance "property" within the meaning of the amendments? Or in other words, does the defendant have a property interest in the insurance contract which cannot be interfered with by a court of law? The *Maddox* case[75] has supplied, for Kentucky at least, an answer: the contract is not private; by its very terms it embraces those who may be negligently injured by the insured; these people should be permitted to know the terms of the contract made for their benefit.[76] This view, however, seems to misstate the problem. The plaintiff has no rights under the insurance contract until it is proved that he was in fact injured by the negligence of the defendant. The contract does not become "for his benefit" and therefore "public" until *after* liability has been determined. The reasoning in the *Maddox* case, speaking realistically, ought not apply until after the merits have been decided, not prior to such time. This latter view is in conformity with the one taken in *Gallimore v. Dye.*[77]

But it should be noted that even if the insurance contract is considered "property" within the meaning of the fifth and fourteenth amendments, the defendant can still be deprived of it if the court operates within a "due" legal process, so that in the end, the fact that the discovery process is probably not unreasonable, and therefore "due," will most likely be fatal to this argument. This result would seem to be the correct one for the courts to reach.

C. *Abridgement of Privileges and Immunities*

Both the federal government, by virtue of article IV, section 2, and the states, by virtue of the fourteenth amendment, are prohibited from abridging the privileges and immunities guaranteed to the citizens of the United States. Exactly what "privileges" fall within the protection of these guarantees has long been the subject of much discussion. That the "privileges and immunities" protected against federal action are those which arise from national citizenship is clear:

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72 Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708 (1884).
73 Nebbia v. New York, 291 U.S. 502, 525 (1934).
74 *Ibid.*
75 Maddox v. Grauman, 265 S.W.2d 939 (Ky. App. 1954).
76 *Id.* at 941.
77 21 F.R.D. 283 (E.D. Ill. 1958). "It would . . . appear that to require a defendant to disclose his insurance coverage *prior* to adjudication of liability would . . . be a contravention of the Fifth Amendment." *Id.* at 287 (emphasis added).

> The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States — those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources.[78]

The fourteenth amendment has extended this protection to any attempt by a state to interfere with these rights:

> . . . [T]he Fourteenth Amendment prohibits any state from abridging the privileges and immunities of citizens of the United States, whether its own citizens or any others.[79]

It is the opinion of some that, by virtue of subsequent decisions, privileges and immunities arguments are no longer of any substantial weight.[80]

If the arguments have any validity at all, they must rest on the premise that the contract of insurance is protected by some element of national citizenship, or that some protection inures from the Constitution or laws of the United States. This guarantee may very well be the right of a person to contract without interference,[81] and the argument under the privileges and immunities clause would presumably be the same as it was under the due process clause, with the same result: that disclosure would be a restraint on freedom of contract.

Again it must be observed that the insurance contract case does not seem to fall within the traditional concept of a privileges and immunities case, which might result in hesitancy by the higher courts to accept the argument. The same policy considerations will likewise be presented, so that it could be concluded that if the privileges and immunities clause is of any force whatever, the decision as to this argument should be the same as it is to the due process argument.

D. *Denial of the Equal Protection of the Laws*

It has been previously noted that the only place in the Constitution where the phrase "equal protection" is found is in the fourteenth amendment,[82] and therefore any argument based on this phrase is necessarily limited to state, rather than federal, courts. Thus, the argument is of no force in the very forum where it is most needed — a court in which the Federal Rules are applicable.

The equal protection clause in the amendment

> . . . only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.[83]

The clause, as is apparent from *Shelley v. Kraemer*,[84] is aimed at class equality as well as individual equality.

The constitutional arguments raised by defendants attempt to allege that a special, favored class is *created* by the requirement of production — the class comprising those who do not have automobile insurance. The theory rests on the assumption that a man

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78 Hamilton v. Regents, 293 U.S. 245, 261 (1934), quoting the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

79 Colgate v. Harvey, 296 U.S. 404, 427 (1935).

80 Edward S. Corwin, speaking of the import of the *Slaughter-House Cases,* states: "His [Justice Miller's] interpretation of the 'privileges and immunities' clause of the fourteenth amendment . . . , stands substantially unimpaired to this day; and what it did was to obliterate that clause to all practical intents and purposes from the amendment." CORWIN, LIBERTY AGAINST GOVERNMENT 122-23 (1948).

81 U.S. CONST. art. I, § 10. *But see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), which, while talking about following this clause, virtually reads it out of the Constitution.

82 The fifth amendment contains no equal protection clause, and restrains only such discriminatory legislation by Congress as amounts to a denial of due process. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

83 Kentucky Railroad Tax Cases, 115 U.S. 321, 337 (1885). The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." However, "the concept of equal protection . . . may in rare cases permit a state to single out a class of persons . . . for distinctive treatment. The crucial test in these exceptional instances is whether there is a rational basis for the particular kind of discrimination involved." Oyama v. California, 332 U.S. 633,663 (1948) (concurring opinion).

84 334 U.S. 1 (1948).

who does not have insurance cannot be put into a tactically disadvantageous position by the inquiring plaintiff, and therefore is better off than the defendant who does have insurance and is subject to all the pressures previously mentioned.

It is doubtful whether the "class" created by the operation of the law is of the kind contemplated by the framers of this amendment and by the courts which have interpreted it.

> . . . [I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law.[85]

The requirement of discovery cannot be said to be hostile in the sense in which it is used here, nor can it be said to be arbitrary in its classification, any more than a rule that any defendant who does not answer may have judgment entered against him is "hostile" and "arbitrary" with respect to all the defendants who do not have a single defense.

From the foregoing, it is suggested that the equal protection argument will probably fail if the defendant cannot allege that a class is being created of the kind traditionally recognized by the courts as falling within the protection of the clause. This consideration may well depend on whether the courts feel that insured drivers *ought to* constitute a protected class, so that the entire argument may depend on the treatment of this policy consideration.

VII. *Conclusion*

Although the question of the discoverability of automobile insurance is one of growing importance under the Federal Rules, neither the Rules themselves nor the exceptions of relevancy and privilege which they contain provide a satisfactory answer to the constitutional objections, so that recourse must be had to the Constitution itself and the judicial decisions thereunder.

The arguments based on the constitutional grounds of unreasonable search and seizure, denial of due process, abridgement of privileges and immunities, and denial of equal protection do not fall within the traditional areas of application of these clauses. They fail to embody the elements usually necessary to constitute a case a constitutional one. In view of the traditionalistic approach of the Supreme Court to constitutional questions, this failure will undoubtedly be fatal, and the Court can be expected to reject these arguments.

In view of the long history of these constitutional arguments, and in view of the situations usually involved, this result is probably the correct one. The fact that some of the courts have used constitutional language to strike down motions for discovery is at most an indication that some courts may be willing to decide a case on those grounds should the necessity ever arise. It is doubtful whether the Supreme Court or the federal appellate courts will be willing to do this.

To decide that a contract of insurance is relevant and not privileged, and at the same time to hold that the discovery of such a contract is unconstitutional, would necessarily be to hold that the applicable Federal Rules are unconstitutional in their operation, and therefore are invalid. Such a decision is highly unlikely. More likely is that the discoverability of liability insurance will continue to be determined solely on the basis of relevancy and privilege as in the past, so that the Federal Rules may remain intact and of benefit to all the parties to a lawsuit. It would be difficult to quarrel with such a result.

Richard D. Schiller

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85 Maxwell v. Bugbee, 250 U.S. 525, 543 (1919).