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Civil Procedure - Pre-Trial Discovery - Disclosure of Amount of Defendant's Liability Insurance

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CIVIL PROCEDURE—PRE-TRIAL DISCOVERY—DISCLOSURE OF AMOUNT OF DEFENDANT'S LIABILITY INSURANCE—In an action arising out of a highway collision, plaintiff sought disclosure of the amount of defendant's liability insurance in a pre-trial discovery proceeding. The defendant was adjudged to be in default for his refusal to disclose this information. On a writ of certiorari, *held,* the order of the trial court is quashed. Only matters which can actually be admitted and used as evidence or matters which might lead to the finding of such evidence are proper subjects of discovery under the Florida rule.[1] The amount of defendant's insurance is not relevant to the litigation since it will accomplish neither of these purposes. *Brooks v. Owens,* (Fla. 1957) 97 S. (2d) 693.

The use of pre-trial discovery to obtain information concerning the existence and amount of defendant's insurance in personal injury cases is an issue upon which the courts have disagreed because of differing interpretations of the requirement that matters to be within the scope of discovery must be relevant to the litigation. Some courts, like the one in the principal case, have held the amount of defendant's insurance to be not relevant to a trial on the merits,[2] to provide no lead to any admissible evidence and, therefore, not to be discoverable.[3] When the policy does have definite probative value, however, it is relevant and subject to dis-

1 30 Fla. Stat. Ann. (1956), Rules Civ. Proc. §1.21(b): ". . . [T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." This rule is essentially the same as the federal discovery rule, Rule 26(b), Federal Rules of Civil Procedure, 28 U.S.C. (1952), and that of many states which have copied it.

2 McNelley v. Perry, (D.C. Tenn. 1955) 18 F.R.D. 360 (although the name of the insurance company investigator was considered discoverable because it might lead to uncovering evidence); Jeppesen v. Swanson, 243 Minn. 547, 68 N.W. (2d) 649 (1955) (the Minnesota discovery rule is identical to the federal rule); McClure v. Boeger, (E.D. Pa. 1952) 105 F. Supp. 612; State v. District Court, 69 Nev. 196, 245 P. (2d) 999 (1952). Cf. Bean v. Best, (S.D. 1957) 80 N.W. (2d) 565, involving a less liberal discovery rule.

3 4 A.L.R. (2d) 761 (1949).

covery.[4] Other courts have not limited discovery to matters of evidentiary value but have held defendant's insurance to be relevant because of a state statute allowing suit against the insurer,[5] because of a state statute allowing suit against the insurer in case a judgment went unsatisfied against the insured,[6] because of compulsory liability insurance statutes,[7] and because defendant's insurance would be relevant after plaintiff prevails.[8] The most liberal interpretation of the relevancy requirement resulted in a holding that defendant's insurance was generally relevant and was therefore discoverable.[9] These latter courts have adopted the so-called plaintiff's approach to discovery.[10] Armed with knowledge of insurance limits, plaintiffs' attorneys can more realistically determine a collectable amount of damages, and the amount of time and money that should be expended on a given case. Of even greater importance is the fact that this knowledge often provides a basis for arriving at a pre-trial settlement.[11] The defendants' attorneys and the insurance companies are opposed to this disclosure of information because it tends to place a floor under negotiations for settlement. Furthermore, the companies are opposed to disclosure for the reason that an insurer who negligently or in bad faith[12] refuses to settle within policy limits is liable to the insured for the amount the insured was forced

[4] Thus, defendant's insurance policy was held to be discoverable when it could be used to prove ownership or control of property, which defendant had denied. McDowell Associates v. Pennsylvania R., (S.D. N.Y. 1956) 142 F. Supp. 751; Martyn v. Braun, 270 App. Div. 768, 59 N.Y.S. (2d) 588 (1946); Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933).

[5] Superior Ins. Co. v. Superior Court, 37 Cal. (2d) 749, 235 P. (2d) 833 (1951). Cal. Code Civ. Proc. (Deering, 1946) §§2083 to 2086, although not indentical to the federal rule, requires substantially the same relevancy to the contemplated action. *Contra,* State v. District Court, note 2 supra.

[6] People v. Fisher, (Ill. 1957) 145 N.E. (2d) 588. The Illinois rule permits discovery of any matter relating to the merits of the law suit.

[7] Brackett v. Woodall Food Products, (E.D. Tenn. 1951) 12 F.R.D. 4. The court in McNelley v. Perry, note 2 supra, suggests that the defendant in that case was insolvent and that the proration of insurance might be an issue among the claimants, therefore satisfying the relevance requirement.

[8] Maddox v. Grauman, (Ky. 1954) 265 S.W. (2d) 939; 41 A.L.R. (2d) 964 (1955) (discovery rule identical to federal rule).

[9] Orgel v. McCurdy, (S.D. N.Y. 1948) 8 F.R.D. 585. While the facts indicate that the defendant's insurance might have had probative value, the language of the opinion is quite broad and does not discuss this possibility.

[10] Lavorci, "Disclosure of Insurance Policy Limits," 1957 INS. L.J. 505, contends that approval or opposition to the disclosure of insurance depends upon whether it is viewed from a plaintiff's or defendant's standpoint.

[11] Dooley, "Preparation for Trial," 1953 UNIV. ILL. L. FORUM 167 at 188, discusses this aspect of discovery. He asserts that, in practice, cases are tried and settled on amounts of insurance coverage, and it would be to the advantage of both parties to disclose this information in order to bring about a settlement.

[12] Tully v. Travelers Ins. Co., (N.D. Fla. 1954) 118 F. Supp. 568; Auto Mutual Indemnity Co. v. Shaw, 134 Fla. 815, 184 S. 852 (1938). See 40 A.L.R. (2d) 168 (1955) for similar cases in all jurisdictions.

to pay over the policy limits. Thus, the plaintiff, after having discovered the limits of the policy, can force the insurance company to decide whether to settle at the upper limits of the policy or run the risk of being held liable for a larger judgment.[13] While it does not appear that the discovery procedures were primarily intended to bring about settlements,[14] non-litigious disposition of cases is a commendable by-product[15] or secondary objective of the pre-trial discovery.[16] Nevertheless, from the language of the discovery rules themselves and their judicial interpretation generally,[17] it would seem that the courts which have permitted discovery of insurance policy limits when not admissible in evidence or calculated to lead to admissible evidence have thwarted the intended limitations imposed upon the scope of the discovery procedure.

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13 The defendant in the principal case argued that the plaintiff was "attempting to 'entrap' the insurer into liability for damages set by a jury in excess of policy limits. . . ." Principal case at 700.

14 The purposes of discovery have been stated: (1) to narrow the issues; (2) to obtain evidence for use at trial; (3) to obtain leads to such evidence. Holtzoff, "Instrument of Discovery Under Federal Rules of Civil Procedures," 41 MICH. L. REV. 205 (1942).

15 NIMS, PRE-TRIAL 62 (1950), claims the Judicial Conference of the United States takes this view.

16 Speck, "The Practical Operation of Federal Discovery," 12 F.R.D. 132 at 139 (1952), contends that settlement gained by informing the parties of the strength of their respective cases is a definite objective of discovery procedure. It is suggested that the settlement intended to be brought about here is through realization of the substantive strength of the litigants' cases, not through discovery of their monetary worth.

17 Laurens Mills v. John J. Ryan & Sons, (S.D. N.Y. 1953) 14 F.R.D. 191; Sunbeam Corp. v. R. H. Macy & Co., (S.D. N.Y. 1952) 12 F.R.D. 323; Krupp v. Chicago Transit Authority, 8 Ill. (2d) 37, 132 N.E. (2d) 532 (1956); The Advisory Committee Report on Proposed Amendments to the Federal Rules of Civil Procedure, 5 F.R.D. 433 (1946), which amendment was adopted in rule 26(b), stated that the scope of the rule did not extend to matters not admissible as direct evidence or not leading to such evidence.