Denver Law Review

Volume 29 | Issue 4 Article 5

June 2021

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A client comes to your office the victim, let us say, of an automobile collision in which he has suffered personal injuries, loss of wages, agonizing pain, and property damage. After relating the details surrounding the accident, the first question you'll probably ask is whether or not the prospective defendant has insurance. Assuming an affirmative answer is given to this inquiry, you proceed to advise your client that, notwithstanding the existence of insurance, unless a favorable settlement can be obtained from the insurance carrier, the matter of recovery must be presented to a court and determined by a jury wherein the question of insurance coverage cannot be affirmatively disclosed. A quizzical look clouds your client's face, and he answers that unless the fact of insurance is disclosed, any verdict he would receive would not reflect that the insurance company is the real adversary, to the exclusion of the thoughtless defendant who "ran" the inevitable red light. Thus begins the hopeless and ungratifying effort to explain to your client the "hide and go seek" method that presently prevails throughout the majority of the jurisdictions in the trial of negligence cases where the question of insurance coverage beclouds the problem.

The present status of the law permits parties litigant to exalt form over substance. On voir dire examination it is permissible to ask questions as to whether or not the prospective juror is a director, stockholder, employee, or is in any manner interested in any insurance company issuing policies for protection against liability for damages for injuries to persons or property. Or a more specific question may be asked in which a particular insurance company is named. Both questions as to form have been approved as proper on voir dire examination.[1] The Supreme Court of Colorado has approved the use of the specific question [2] and has not limited the scope of inquiry as to the matter of insurance in the form of questions on voir dire examination.[3] Thus in the case of *John's v. Shinall* [4] the Colorado Supreme Court stated:

> It is permissible to interrogate prospective jurors, some of whom may be selected to serve in the case, as to their connection with or interest in insurance companies, and we have held that questions touching this matter may be asked of every prospective juror.

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[1] 56 A.L.R. 1456 and 104 A.L.R. 1067.
[2] Vindicator Consolidated Gold Mining Co. v. Firstbrook, 36 Colo. 498 (1906).
[3] *Ibid.*
[4] John's v. Shinall, 103 Colo. 381, 86 P. 2d 605 (1939).

> It is permissible, and rightly so, that each of twelve prospective jurors in a case be asked on voir dire examination whether he is a stockholder, agent, or employee of an insurance company.

Here under the prevailing rules of procedure and controlling decisions, the "insurance question" is introduced into the trial by sly innuendo and indirection. With modern society, insurance has become a necessity to the home owner and automobile driver. The fact of insurance is notorious, not only to lawyers and judges, but to juries as well. Whether by specifically naming a particular insurance company or by general inquiry as to insurance, the jury is made aware that, notwithstanding the machinations of both court and counsel, some insurance company has a financial interest in the outcome of the litigation. Insurance companies generally, desire to avoid prosecuting actions in their own names we are told, because of the prejudicial effect disclosure of their identity and interest has upon the jury. It is a common and ordinary occurrence in the typical indemnity suit to find that both parties are insured, that the insurance carrier has provided both parties with counsel, and that the action is being conducted by the insurers. The realities of the controversy are thus hidden from the jury. The casualty company that is really defending or prosecuting the suit is immune from such disclosure and mention of the fact results in mistrial. In *Butera v. Donner* [5] a New York court said:

> "It is highly incongruous to observe the courts upon one hand guarding with direst of sanctions against the injection into a casualty case of the fact, even the suggestion, of liability insurance covering the defendant, and on the other hand welcoming with warm hospitality the injection into a casualty case of the fact of collision insurance covering the plaintiff. In both instances, the insurer is the real party in interest; it selects and retains counsel, controls the case and profits or loses by the outcome."

The New York court, cited *supra,* stated without unnecessary quibbling what every intelligent juror can be presumed to know. Disclosure of the fact of insurance is believed to arouse prejudice and consequently result in a denial of a fair and impartial trial. Under the guise of questioning propounded for the purpose of determining the bias, interest, or prejudice of a juror, the insurance question is insinuated into the trial and left dangling at the conclusion of the voir dire without further mention unless counsel for both sides inform the jurors that these questions are being asked to determine their fitness to serve as jurors in the trial. If the insurance question is belabored by detailed explanation,

[5] Butera v. Donner, 177 Misc. 966, 32 N.Y.S. 2d 633 (1942).

the basic reason and purpose for its exclusion is circumvented, and the question of insurance is squarely brought before the jury.

By now your client complains that all this legalistic hair-splitting is utterly incomprehensible. He informs you that all you have said thus far is that you can and you cannot inform the jury that the defendant does or does not have insurance. To pacify him you'll probably explain to him that there have been numerous proposals to remedy the situation. The first alternative being to exclude all references to insurance either by a general or specific inquiry, or as a second alternative a full disclosure should be made of the insurance carriers interest, or as a third alternative he or any injured party should by statute be authorized to bring the action directly against the insurance carrier without being forced first to obtain a judgment against the insured, which is the prevailing policy in some jurisdictions that are attempting to restore order in this area of the law where opinions run hot and fast. One illustration of the trend to relieve the injured party of the burden of maintaining an imaginary law suit is found in Chapter 155, General Laws of Rhode Island, Section 258, which provides as follows:

> Every policy hereafter written insuring against liability for property damage or personal injuries or both, and every policy hereinafter written indemnifying any person by reason of such liability, other than payment of compensation under Chapter 300, shall contain provisions to the effect that the insurer shall be directly liable to the injured party and, in the event of his death, to the party entitled to sue therefor, to pay him the amount of damages for which such insured is liable. Such insured party, or, in the event of his death the party entitled to sue therefor, in his suit against the insured, shall not join the insurer as defendant. If however, the officer serving any process against the insured shall return said process "non est inventus," the said injured party and in the event of his death, the party entitled to sue therefor, may proceed directly against the insurer. Said injured party, or, in the event of his death the party entitled to sue therefor after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against the insurer: Provided, however, that the payment in whole or in part of such liability by either the insured or the insurer shall, to the extent thereof, be a bar to recovery against the other of the amount so paid.
>
> All policies described in this section shall be deemed to be made subject to the provisions hereof, and all provisions of such policies inconsistant herewith shall be void.

Decisions construing the statute set out above indicate that the legislative policy is to give neither side of the controversy an unfair advantage and to provide for direct action against the insurance carrier only when certain conditions precedent occur. In *Luft v. Factory Mutual Liability Insurance Company of America*,[6] the Rhode Island court said:

> The insurer cannot be joined in any action against the insured, and only when the insured cannot be served with process may this action be brought directly against the insurer. The insurer's liability is in the nature of a surety whose obligation is limited to the contractual obligation under the insurance policy.

To further safeguard the insurer in an action brought directly against it, the plaintiff must establish his case exactly as though the insured was the defendant, and every defense available to the insured is available to the insurer.[7]

While the Rhode Island statute requires the "non est" return as a prior condition to bringing a direct action against the insurance carrier, direct action is allowed.

Judicial decisions and present rules of procedure, you explain to your client, mark a great advance over the common law and the code yet much remains to be desired. Finally, as your client succumbs to the tedium of your remarks, you inform him that the real party in interest in any negligence and casualty case remains the hidden foe beyond the pale of the real party in interest statutes, and with a final rhetorical flourish you ask him, is legislation the answer?

THE SELLER OF ONE MINK COAT v. PVT. JOHNNIE DOE

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Judgment for whom in the above designated action? '35 C.S.A. Ch. 83 Sec. 10 provides as follows:

> The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

The language in the decisions under the statute seems to leave no doubt that Johnnie would be liable for the purchase as a "family expense" if his wife bought and wore the coat herself during a time when they were living together.[1] But the Supreme

[6] Luft v. Factory Mut. Liability Insurance Co., 51 R.I. 452, 155 A. 797.
[7] *Ibid.*
[1] Gilman v. Mathews, 20 Colo. App. 170, 77 P. 366; Houck v. La Junta Hardware Co., 50 Colo. 228, 114 P. 645; Straight v. McKay, 15 Colo. App. 60, 60 P. 1106.