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Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers

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CIVIL PROCEDURE: JUDICIAL CREATION OF DIRECT ACTION AGAINST AUTOMOBILE LIABILITY INSURERS*

Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969)

Plaintiff joined defendant's liability insurer in an automobile negligence action. The trial court on its own motion dismissed the insurer from the cause, and the First District Court of Appeal reversed,[1] holding that Florida's rule of civil procedure relating to real parties in interest[2] permitted joinder of the insurer with the insured in automobile liability cases. On certiorari the Supreme Court of Florida HELD, in light of prevailing public policy, automobile liability insurance policies should be construed as quasi-third party beneficiary contracts in favor of injured members of the public and, notwithstanding "no action" clauses therein,[3] a direct cause of action inured to such third party beneficiary at the time he became entitled to sue the insured.[4] Judgment affirmed, Justice Drew dissenting.

Prior to the instant decision, the weight of authority[5] and Florida law prohibited an injured party from maintaining an action directly against the tort-feasor's liability insurer until after such liability was established.[6] Thus, the plaintiff could not proceed solely against the insurer[7] or join the insurer in the action against the tort-feasor.[8] After judgment against the tort-feasor, the injured individual's remedy against the insurer required a separate action either by writ or garnishment as a judgment creditor of the insured,[9] or under the "entitlement" provision of the insurance policy.[10]

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*EDITOR'S NOTE: This case comment received the *George W. Milam Award* as the most outstanding case comment submitted by a junior candidate in the summer 1969 quarter.

1. Bussey v. Shingleton, 211 So. 2d 593 (1st D.C.A. Fla. 1968).

2. FLA. R. CIV. P. 1.210(a) in pertinent part provides: "[A]ny person may be made a defendant who has or claims an interest adverse to the plaintiff."

3. The standard policy used by casualty insurers on a nationwide basis provides that: "No action shall lie against the company . . . until the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNSEL J. 223, 232 (1966).

4. 223 So. 2d 713, 716 (Fla. 1969).

5. *See* J. APPLEMAN, INSURANCE LAW AND PRACTICE §4851 (1962).

6. Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), involving an indemnity policy, held that no privity existed between the plaintiff and the insurer, that the plaintiff could not maintain one declaration in tort and one in contract in the same action, and that the insurance contract was for the benefit of the insured and not the plaintiff as a third party beneficiary. Thompson v. Safeco Ins. Co., 199 So. 2d 113, 115 (4th D.C.A. Fla. 1967) held that no privity existed and that Florida did not recognize the third party beneficiary theory in liability insurance contracts. Hayes v. Thomas, 161 So. 2d 545, 546 (2d D.C.A. Fla. 1964) rejected the contention that Florida's Financial Responsibility Act, FLA. STAT. ch. 324 (1967), formed a basis for direct action against the insurer.

7. *See* Thompson v. Safeco Ins. Co., 199 So. 2d 113 (4th D.C.A. Fla. 1967).

8. *See* Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936).

9. *See* Grain Dealers Mut. Ins. Co. v. Quarrier, 175 So. 2d 83 (1st D.C.A. Fla. 1965); Conley v. Singleton, 171 So. 2d 65 (1st D.C.A. Fla. 1965).

10. *See* Peerless Ins. Co. v. Sheehan, 194 So. 2d 285, 286 (2d D.C.A. Fla. 1967) where

Clearly, the decision in the instant case overturns this established Florida view and expressly rejects the underlying reasons long proffered in support of it.[11] The insurer now *can* be joined with the insured in automobile liability insurance cases in Florida. Florida, by *judicially* permitting direct action,[12] joins those few jurisdictions that have adopted direct action through legislative enactment.[13] Deceptively simple at first glance, the instant holding is replete with far-reaching implications.

Previously, Florida made no distinction between an individual's rights arising under vehicular liability insurance and those arising under general liability insurance.[14] The Florida supreme court, relying primarily on the peculiar significance of automobile liability insurance as a means of public protection,[15] has created such a dichotomy. Whether the court will limit direct action to automobile cases[16] or will expand the right to include general liability insurance[17] is a matter for conjecture. The public interest and third party benficiary rationale of the instant case could easily prove applicable to any area of liability insurance where a strong public policy is involved.[18]

A second and very important question is whether the joinder of the insurance company and the insured is to be compulsory or permissive. Since the insurer is now a real party in interest within the meaning of rule 1.210 (a), which has consistently been construed as permissive in nature,[19] has the court

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the entitlement provision of the standard no action clause provided: "Any person . . . who has secured such judgment . . . shall thereafter be entitled to recover under this policy to the extent of the insurance afforded . . . ."

11. *See* note 6 *supra*.

12. Direct-action legislation was introduced in both houses of the 1969 Florida Legislature. Fla. S. 468, Reg. Sess. (1969) was recommended unfavorably and tabled May 6, 1969. Fla. H.R. 1120, Reg. Sess. (1969) died in committee June 6, 1969. A similar bill, Fla. H.R. 552, Reg. Sess. (1949), providing for impleading of the insurer as a defendant, failed passage in 1949.

13. GA. CODE ANN. §68-612 (1967) (permits joinder of the insurer where a regulated motor carrier has given a policy of indemnity in lieu of required bond); LA. REV. STAT ANN. §22:655 (1959) (applies to all liability insurance); R.I. GEN. LAWS ANN. §27-7-1 (1956) (1968 Reenactment) (provides for direct action prior to judgment only where service of process cannot be obtained on the insured); WIS. STAT. ANN. §260.11 (Supp. 1969) (limits direct action to motor vehicle policies). *See also* P.R. LAWS ANN. tit. 26, §§2001, 2003 (1958).

14. *Compare* Thompson v. Safeco Ins. Co., 199 So.2d 113 (4th D.C.A. Fla. 1967) *and* Hayes v. Thomas, 161 So. 2d 545 (2d D.C.A. Fla. 1964), *with* America Sur. Co. v. Smith, 100 Fla. 1012, 130 So. 440 (1930) *and* Bergh v. Canadian Universal Ins. Co., 216 So. 2d 436 (Fla. 1969). *But see* FLA. STAT. §455.06 (1967); Arnold v. Shumpert, 217 So. 2d 116 (Fla. 1968).

15. *See* Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (Ct. App. 1965), cited extensively in the instant decision.

16. *See* WIS. STAT. ANN. §260.11 (Supp. 1969).

17. *See* LA. REV. STAT. ANN. §22:655 (1959).

18. The prophylactic argument that the jury should be shielded from knowledge of the existence of insurance is less viable in automobile negligence cases, where juries tend to assume the existence of liability insurance, than in general liability cases, where insurance is not so prevalent, and juries may not so readily assume its existence.

19. *E.g.*, Gould v. Weibel, 62 So. 2d 47 (Fla. 1952); Marianna Lime Prods. Co. v. McKay, 109 Fla. 275, 147 So. 264 (1933). *But see* Cline v. Cline, 101 Fla. 488, 134 So. 546 (1931).

thereby necessarily implied that joinder is to be permissive? Decisions construing the direct action statutes of Louisiana and Wisconsin support retention of the view that joinder is necessarily permissive,[20] by allowing the plaintiff to proceed separately against the insurer.[21]

The primary advantage of permissive joinder is jurisdictional.[22] The injured party is not limited to a forum wherein he can obtain jurisdiction over the insured but may maintain his action in any jurisdiction where the insurer can be reached.[23] In light of the avowed purpose of the instant decision,[24] the jurisdictional advantage makes permissive joinder preferable to compulsory joinder. Under compulsory joinder if both the insured and insurer are considered "indispensable," as opposed to "necessary" parties,[25] the plaintiff could only bring his action in a forum where jurisdiction could be obtained over *both* insurer and insured.[26] This would result in an obvious inequity since the injured individual could be denied an action if unable to join both parties.[27]

Permissive joinder, as it relates to direct action, also has distinct disadvantages. It not only creates numerous collateral estoppel,[28] res judicata,[29] and statute of limitation[30] problems, but also promotes the same multiplicity of suits, circuity of action, and undue delay that direct action would otherwise curtail.[31] An alternative to permissive joinder would be to consider the

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20. Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (Ct. App. La. 1963); Elliott v. Indemnity Ins. Co., 201 Wis. 445, 230 N.W. 87 (1930).

21. Dowden v. Southern Farm Bureau Cas. Ins. Co. 158 So. 2d 399 (Ct. App. La. 1963); Tillman v. Great Am. Indem. Co., 207 F.2d 588 (7th Cir. 1953).

22. One early advantage in direct action states was the plaintiff's ability to create federal diversity jurisdiction by proceeding against the out-of-state insurer. The resultant backlog of cases in the federal courts prompted an amendment to the federal diversity statute, 28 U.S.C. §1332(c) (1964), which obviated this possibility by declaring the citizenship of the insurer to be the same as that of the insured for diversity purposes.

23. Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 362 (1960).

24. 223 So. 2d 713, 717 (Fla. 1969). "It [motor vehicle liability insurance] is a subject affected with a public interest and its regulation in a multiple of ways for the protection of the general public has become of more and more importance in the passage of years and changing times." *See also* Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (Ct. App. 1965).

25. *See generally* Shields v. Barrow, 58 U.S. (17 How.) 130 (1854); James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68 (1963).

26. James, *supra* note 25, at 75.

27. James, *supra* note 25, at 75.

28. *See generally* Note, note 23 *supra*, for a detailed discussion of these problems.

29. *See generally* Note, note 23 *supra*.

30. *See* Francis V. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968) (holding that suit under LA. REV. STAT. ANN. §22:655 (1959) against the insurer of one tort-feasor tolls the statute of limitations as to other joint tort-feasors); Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (Ct. App. La. 1964) (*ex delicto* period of prescription and not *ex contractu* period was applied to an insurer).

31. Note, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243, 246 (1961). For two cases epitomizing the multiplicity of actions and undue delay, which can occur in the absence of direct action, *see* Bettinger v. Northwestern Nat'l Cas. Co., 213 F.2d 200 (8th Cir. 1954) (required two lawsuits and three years for a final determination); Preferred Acc.

parties "necessary" but not "indispensable."[32] This would afford the plaintiff the jurisdictional advantage of permissive joinder,[33] yet avoid permissive joinder's numerous disadvantages.

A third issue, involving two related questions, is whether the principal case has overruled prior cases denying pretrial discovery of insurance coverage[34] and those cases prohibiting the disclosure of the existence and extent of insurance at trial.[35] If the insurer is to be joined in the action and if both policy defenses *and* liability are to be litigated therein, reference to insurance would have to be admitted in *automobile* insurance actions. Equally clear is that pretrial discovery of the existence and extent of insurance coverage should be allowed.[36] The unresolved issue is whether the decisions prohibiting reference to and pretrail discovery of insurance are still viable insofar as they pertain to litigation not involving automobile insurance.

An underlying rationale for excluding reference to insurance from litigation has traditionally been the fear that juries would be unduly swayed by such evidence, thereby increasing the size and number of plaintiffs' verdicts.[37] In rejecting this prophylactic argument, the instant decision has struck at the very roots of the Florida no-reference and no-discovery decisions in the area of liability insurance.[38] Permitting discovery of the existence and extent of liability coverage and the subsequent introduction of this information into *all negligence litigation* in Florida is a logical extension of the rationale of the instant case. Faced with this reasoning, the court will have to select from two alternatives: it may limit its rejection of the prophylactic argument to situations, such as automobile negligence, where a strong public policy outweighs the prophylactic purpose; or it may recognize that rejection of that argument has made evidence of insurance admissible and discoverable in all negligence litigation. The choice apparently would be determined by two considerations: the initial soundness of rejecting the prophylactic argument and the realization that the practical effect of allowing evidence of insurance at trial is to open the door for an extension of the direct action doctrine to general as well as vehicular liability insurance.

It has often been asserted that the prophylactic rationale for denying

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Ins. Co. v. Grasso, 186 F.2d 987 (2d Cir. 1951) (required three lawsuits and six years).

32. *See generally* 3A J. MOORE, FEDERAL PRACTICE §1919 (2d ed. 1968); James, note 25 *supra*.

33. J. MOORE, note 32 *supra*; James, *supra* note 25, at 75-76.

34. Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

35. Carls Markets, Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953); Crowell v. Fink, 167 So. 2d 614 (1st D.C.A. Fla. 1964).

36. Dictum in Brooks v. Owens, 97 So. 2d 693, 700 (Fla. 1957), *noted in* 13 U. MIAMI L. REV. 489, 492 (1959), indicates that pretrial discovery may be allowed where the question of insurance can be shown to be relevant.

37. Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953); Jeddoloh v. Hockenhull, 219 Minn. 541, 553, 18 N.W.2d 582, 589 (1945).

38. The presence of insurance has been generally deemed irrelevant. *See, e.g.*, Jeddeloh v. Hockenhull, 219 Minn. 541, 554, 18 N.W.2d 582, 589 (1945). Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969), clearly indicates that the existence of insurance coverage and its policy limits are to be candidly admitted at trial.

reference to insurance at trial is unsound because it fails to consider realities.[39] The existence of insurance is often brought before the jury during the *voir dire* examination[40] or in the examination of a witness for bias,[41] and inadvertent reference to insurance has been held to be cured by proper instructions from the court.[42] It is also true that even in states such as Florida[43] the general prevalence of liability insurance, though not compulsory, leads jurors to assume that an insurance company is involved.[44] With these considerations in mind, it would appear that the Florida supreme court has forthrightly faced the illusory nature of the prophylactic argument.

This is not to say, however, that disclosure of the existence of insurance does not result in augmented verdicts. There is at least some evidence that it does.[45] Proponents of direct action sometimes point out that Louisiana and Wisconsin, which have direct action statutes, are also among the states with the lowest verdicts.[46] This does not, however, necessarily lead to the implied conclusion that the prophylactic argument is impotent. The unique system of appellate review employed in Louisiana[47] and the existence of the compartive negligence doctrine in Wisconsin[48] probably account for the smaller verdicts in those jurisdictions.

While reference to insurance at trial may increase the size and number of verdicts for plaintiffs, the fact that such information is often brought before the court anyway suggests the rejection of the prophylactic argument is sound in both vehicular liability cases and general liability cases.[49] This is a question the court will ultimately have to decide.[50]

Since evidence of insurance may now be introduced, at least in automobile cases, some restrictions should be placed on the manner of presentation. References designed to sway the jury unduly and to encourage excessive

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39. *See* 2 J. WIGMORE, EVIDENCE §282 (a) (3d ed. 1940).

40. *Id.* §282 (a) at 134-35. Ryan v. Noble, 95 Fla. 830, 116 So. 766 (1928).

41. 21 J. APPLEMAN, INSURANCE LAW AND PRACTICE §12831 (1962); J. WIGMORE, *supra* note 39, §282 (a) at 135.

42. Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953); Crowell v. Fink, 167 So. 2d 614, 615 (1st D.C.A. Fla. 1964).

43. Lynch-Davidson Motors v. Griffin, 182 So. 2d 7 (Fla. 1966), *construing* FLA. STAT. ch. 324 (1967).

44. J. WIGMORE, *supra* note 39, §282 (a) at 146.

45. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959). "Where the defendant disclosed that he had no insurance the average award of all verdicts was $33,000. Where defendant disclosed that he had insurance but there was no objection the average award rose to $37,000. Where, however, the defendant said he had insurance and there was an objection and an instruction to disregard, the average award rose to $46,000 . . . ."

46. Note, *supra* note 23, at 358 n.12.

47. Louisiana permits the appellate court to reverse on issues of fact. LA. CONST. art. 7, §§10 (6), 27.

48. WIS. STAT. ANN. §331.045 (1958).

49. *See generally* J. WIGMORE, note 39 *supra* §282 (a).

50. The direct-action bill recently proposed before the Florida legislature, Fla. S. 468, Reg. Sess. (1969), which was recommended unfavorably on May 6, 1969, would not have restricted direct action to motor vehicles.

verdicts, low verdicts,[51] or liability based on the "deep pocket," should be closely scrutinized.[52]

A fourth question arising from the instant case concerns the effect it will have on those policy defenses and immunities previously available to the insurer. Traditionally, the injured party stood in the shoes of the insured so that policy defenses the insurer might have against the insured could be asserted to bar the injured individual's recovery.[53] Similarly, those immunities that the insured could effectively raise against the injured have been held to be available to the insurer.[54]

The public protection function and the vesting of the injured party's right against the insurer at the time he becomes entitled to sue the insured requires policy defenses to be viewed in a new perspective. This is especially true of conditions to be met subsequent to plaintiff's injury, such as the requirements of reasonable notice by the insured[55] and of cooperation.[56] To permit the insured, who may himself be judgment proof, to defeat the injured party's recovery by nonfulfillment of policy obligations defeats the underlying purpose of the instant decision.

Several decisions in other direct action states, or in states where public protection has been involved, have refused to permit the insured's breach of conditions to affect the insurer's liability to the injured party.[57] It has been suggested that the insurer's remedy for the breach would be a contract action against the insured.[58] This reluctance to eliminate a financially responsible source against which the plaintiff may proceed has by no means been confined to direct action states.[59] Even in those jurisdictions that recognize the insured's ability to eliminate the plaintiff's rights against the insurer, the courts examine the nature of the breach,[60] and closely scrutinize its reasonableness,[61] together with the good or bad faith involved.[62]

Where a breach of condition, such as fraudulent procurement of the contract or lack of payment, occurs *before* injury to the plaintiff, serious

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51. It is entirely possible that overemphasis on the fact that the public ultimately pays the cost of the verdict, through increased insurance rates, might be prejudicial.

52. *See* Odegard v. Connolly, 211 Minn. 342, 345-46, 1 N.W.2d 137, 139 (1941) (dictum); Roeske v. Schmitt, 266 Wis. 557, 571-73, 64 N.W.2d 394, 401-03 (1954) (dictum); Doepke v. Reimer, 217 Wis. 49, 54-55, 258 N.W. 345, 347 (1935) (dictum).

53. Royal Indem. Co. v. Rexford, 197 F.2d 83 (5th Cir. 1952).

54. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §4812 at 176-77 (1962).

55. West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950).

56. Comment, *A Solution to the Inequities from a Breach of the Cooperation Clause in Automobile Liability Insurance*, 2 HOUS. L. REV. 92, 101 (1964).

57. *E.g.*, West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950); Jackson v. State Farm Mut. Auto. Ins. Co., 211 La. 19, 29 So. 2d 177 (1946); Plummer v. Traders & Gen. Ins. Co., 183 So. 2d 467 (Ct. App. La. 1966), *application denied*, 249 La. 377, 186 So. 2d 627 (1966). *Contra*, Tillman v. Great Am. Indem. Co., 207 F.2d 588 (7th Cir. 1953).

58. West v. Monroe Bakery, 217 La. 189, 211, 46 So. 2d 122, 130 (1950) (dictum).

59. *See* Peerless Ins. Co. v. Sheehan, 194 So. 2d 285 (2d D.C.A. Fla. 1967); Allstate Ins. Co. v. Warren, 125 So. 2d 886 (3d D.C.A. Fla. 1961). *See generally* Comment, note 56 *supra*.

60. *See* Comment, *supra* note 56, at 96-98.

61. *See* Comment, *supra* note 56, at 98-99.

62. *See generally* Note, note 31 *supra*.

theoretical problems arise in denying the insurer the defense of the breach. The question is whether there was an insurance contract at the time of the injury. It is arguable that the insurer should not escape liability unless he has taken reasonable steps to rescind by reason of the breach.[63]

Direct action also has the potential substantially to affect immunities in Florida. Louisiana has held that governmental,[64] charitable,[65] and interspousal[66] immunity defenses are personal to the insured and may not be asserted by the liability insurer in direct action cases. Louisiana has held that the insurer's liability accrues not at the time of a judgment against the insured, but at the moment of the tortious act.[67]

Although Florida does not currently recognize charitable[68] or governmental immunity,[69] interspousal[70] and family immunity[71] have been staunchly preserved. Whether Florida will follow Louisiana's lead and deny such immunities to the insurer will ultimately depend on the relative balance between the public policy supporting these immunities[72] and the public policy behind direct action in automobile negligence actions.[73] Other available defenses, such as contributory negligence and the running of the statutes of limitation, will doubtless remain open to the insurer.[74]

The fifth question raised is whether the action against the insurer rests in contract or tort. Decisions in other direct action jurisdictions are in conflict.[75] Prior to the instant decision, the injured's action against the insurer rested in contract.[76] In fact, one reason given for denying direct action was that an action *ex contractu* and an action *ex delicto* could not be maintained

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63. Note, *supra* note 31, at 249.

64. Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (Ct. App. La. 1962).

65. Stamos v. Standard Accident Ins. Co., 119 F. Supp. 245 (W.D. La. 1954).

66. LeBlanc v. New Amsterdam Cas. Co., 202 La. 857, 13 So. 2d 245 (1943); Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (Ct. App. La. 1963).

67. Musmeci v. American Auto. Ins. Co., 146 So. 2d 496, 500-01 (Ct. App. La. 1962).

68. Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940); Annot., 133 A.L.R. 809 (1941).

69. Florida has waived governmental immunity on a one-year trial basis. 69-116 [1969] Fla. Sess. Laws 330.

70. Bencomo v. Bencomo, 200 So. 2d 171 (Fla. 1967); Corren v. Corren, 47 So. 2d 774 (Fla. 1950). *See* Note, *Interspousal Immunity in Tort: Its Relevance, Constitutionality, and Role in Conflict of Law,* 21 U. FLA. L. REV. 484, 487-90 (1969).

71. *See* Denault v. Denault, 220 So. 2d 27 (4th D.C.A. Fla. 1969); Meehan v. Meehan, 133 So. 2d 776 (2d D.C.A. Fla. 1961) (where the fact situations strongly hint that a liability insurer is involved).

72. *See* Corren v. Corren, 47 So. 2d 774 (Fla. 1950); Meehan v. Meehan, 133 So. 2d 776 (2d D.C.A. Fla. 1961).

73. *See* Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (Ct. App. 1965).

74. *See* Grimes v. American Motorists Ins. Co., 145 So. 2d 62 (Ct. App. La. 1962); Hidalgo v. Dupuy, 122 So. 2d 639 (Ct. App. La. 1960); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §4812 (1962).

75. *Compare* Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967), *with* Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (Ct. App. La. 1964) *and* Great Am. Indem. Co. v. Vickers, 183 Ga. 179, 188 S.E. 24 (1936).

76. Artille v. Davison, 126 Fla. 219, 170 So. 707 (1936).

in one action.[77] The reliance on the third party beneficiary rationale in the instant decision points toward classification of the new right against the insurer as contractual. This creates important problems in the area of statutes of limitation.[78]

If joinder is considered permissive, the possibility arises that the plaintiff, by relying on the longer contractual statute of limitations, will be able to proceed against the insurer as much as one year after the statute of limitation in tort has run.[79] Louisiana has solved this problem by construing the cause of action against the insurer as arising in tort.[80]

Another staute of limitations problem under permissive joinder arises independently of any *ex contractu* or *ex delicto* construction. Does the filing of an action against either insurer or insured toll the statute as to the other? Louisiana regards the insurer and insured as liable *in solido*[81] and holds that the statute is tolled.[82] This is neither necessary nor entirely equitable since it allows the plaintiff to delay unduly the speedy determination of the issues.

A sixth question of importance is whether the right created in the injured party is to be regarded as substantive or procedural. The principal court was faced with the contention that the right was substantive[83] and therefore beyond the court's rule promulgating power under the Florida constitution.[84] To escape this contention and to avoid conflict with the court's prior constitutional construction,[85] it may appear that the right must be considered procedural. However, the above argument assumes that rule 1.210 (a) [86] is the *sine qua non* of the court's ultimate holding. On the contrary, there is much that is substantive in the decision, especially the court's reliance on public policy and the third party beneficiary doctrine. It could be maintained that rule 1.210 (a) merely provides a vehicle for recognizing the substantive right that the court created on the basis of changing public policy.

The primary importance in determining the nature of the injured party's right involves the availability of direct action to the injured if he is forced to litigate in a foreign forum.[87] If the right is substantive, the foreign forum

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77. *Id.*

78. *See* Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (Ct. App. La. 1964); Frances v. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968).

79. FLA. STAT. §95.11 (3) (1967) (five-year period on contracts); FLA. STAT. §95.11 (4) (1967) (four years on torts); FLA. STAT. §768.04 (1967) (two years on wrongful death).

80. *E.g.*, Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (Ct. App. La. 1964).

81. *E.g.*, Finn v. Employers' Liab. Assurance Corp., 141 So. 2d 852 (Ct. App. La. 1962).

82. Frances v. Herrin Transp. Co., 432 S.W.2d 710 (Tex. 1968) (applying Louisiana law).

83. Brief for American Ins. Ass'n, American Mut. Ins. Alliance, and National Ass'n of Independent Insurors as Amicus Curiae at 3-10, Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

84. State v. Furen, 118 So. 2d 6 (Fla. 1960); Lundstrom v. Lyon, 86 So. 2d 771 (Fla. 1956).

85. State v. Furen, 118 So. 2d 6 (Fla. 1960); Lundstrom v. Lyon, 86 So. 2d 771 (Fla. 1956).

86. FLA. R. CIV. P. 1.210 (a).

87. *See generally* Note, *supra* note 23, at 374-92.

will probably permit direct action as part of the substantive law of Florida;[88] if the right is procedural, however, the law of the forum will prevail and deny direct action to the injured.[89]

A seventh question posed by the present case is whether the Florida invalidation of "no action" clauses may be applied to policies issued in states where such clauses are valid. Early decisions in Louisiana held such application to be an unconstitutional impairment of the obligation of contracts.[90] Having arrived at direct action *judicially,* Florida has avoided this issue.[91] In light of *Watson v. Employer's Liability Assurance Corp.*,[92] where the United States Supreme Court held that the state had a substantial interest in invalidating "no-action" clauses, it is also unlikely that the invalidation of such clauses entails any violation of due process[93] or full faith and credit.[94]

Since policy defenses are now to be litigated in the action determining the insured's liability, the final issue is whether the insurer may assert a policy defense inconsistent with the interest of the insured. May the insurer, for example, introduce evidence to establish that the insured's conduct was intentional and not negligent? If so, prior Florida decisions holding the insurer to good faith in the defense of the insured[95] would seem to be overruled. In such circumstances severing the issue of policy defenses from the issue of the insured's liability would afford a practical solution.[96]

The instant decision is among the most significant handed down in the areas of tort and insurance in recent years. It clearly reflects a new willingness on the part of the court to sacrifice the old talismans of insurance litigation to the realistic dictates of the speedy and efficient administration of justice. Ideally, the legislature should now move to enact carefully drafted direct action legislation and thereby answer many of the existing questions. Barring this, however, the courts must scrutinize each new question with a mind to its

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88. *See* Posner v. Travelers Ins. Co., 244 F. Supp. 865 (N.D. Ill. 1965); Oltarsh v. Aetna INS. Co., 40 Ill. 2d 327, 333-34, 15 N.Y.2d 111, 204 N.E.2d 622 (Ct. App. 1965). *Contra,* Marchlik v. Coronet Ins. Co., 239 N.E.2d 799, 803 (1968), (held direct action substantive but refused to allow direct action because it would contravene the public policy of the forum state).

89. *See* Mock v. Maryland Cas. Co., 6 So. 2d 199 (Ct. App. La. 1942).

90. *E.g.,* Bayard v. Trader & Gen. Ins. Co., 99 F. Supp. 343 (W.D. La. 1951). Subsequent cases have held that the state has a substantial interest in invalidating such clauses. *E.g.,* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954).

91. Moorehead v. City of Fort Lauderdale, 152 F. Supp. 131, 133 (S.D. Fla. 1957), *aff'd,* 248 F.2d 544 (5th Cir. 1957), is one of many cases holding that U.S. CONST. art. 1, §10 applies only to legislative impairment of contracts.

92. 348 U.S. 66 (1954).

93. *Id.* at 72-73.

94. *Id.* at 73.

95. Springer v. Citizens Cas. Co., 246 F.2d 123 (5th Cir. 1957); Automobile Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

96. Shingleton v. Bussey, 223 So. 2d 713, 720 (Fla. 1969). "If it should clearly appear in pre-trial procedures that joinder of the insurer interposes issues between insured and insurer in particular case situations likely to unduly complicate trial . . . it would be a simple process under our liberal civil rules for the trial judge on timely motion to sever such complicating issues between insurer and insured for separate trial or adjudication."