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Direct Action Against Liability Insurer: A Legislative Approach for Florida

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NOTES

DIRECT ACTION AGAINST THE LIABILITY INSURER: A LEGISLATIVE APPROACH FOR FLORIDA*

In the substantial majority of American jurisdictions an injured plaintiff seeking compensation from an insured but otherwise insolvent tortfeasor faces numerous obstacles. As a prerequisite to recovery from the liability insurer, the plaintiff must establish the liability of the insured in a separate action.[1] If for some reason, such as lack of in personam jurisdiction, the tortfeasor proves inaccessible to suit, compensation from the insurer is precluded.[2] It may be, therefore, that the plaintiff, often already low on resources, must incur the additional expense of obtaining jurisdiction over the insolvent tortfeasor in a distant forum.[3]

Once over the jurisdictional hurdle, the plaintiff faces other obstacles. Despite the fact that the action against the insured is probably being defended by the insurance company's attorney, the plaintiff must assiduously avoid reference at trial to liability insurance or risk reversal of his judgment on appeal.[4] After a judgment is obtained against the insured, the plaintiff may need to seek satisfaction in a second action against the insurer.[5] If the insured, through negligence, lack of cooperation, or failure to give notice has provided the insurer with a sufficient policy defense, the plaintiff's action against the insolvent insured will have been to no avail.[6] It is not surprising

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1. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §4851, at 252-53 (1962). This was the law in Florida prior to the recent case of Shingleton v. Bussey, 223 So. 2d 713 (1969). *See* Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936); Thompson v. Safeco Ins. Co., 199 So. 2d 113 (4th D.C.A. Fla. 1967); Hayes v. Thomas, 161 So. 2d 545 (2d D.C.A. Fla. 1964).

2. *See* James, *Necessary and Indispensable Parties,* 18 U. MIAMI L. REV. 68, 75-76 (1963).

3. *See id.*

4. *See* J. WIGMORE, EVIDENCE §282(a) (3d ed. 1940). In some cases inadvertent reference to insurance at trial has been held cured by proper jury instructions. 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).

5. 8 J. APPLEMAN, note 1 *supra* §4851. This was the decisional law in Florida prior to *Shingleton v. Bussey*. *See* Peerless v. Sheehan, 194 So. 2d 285 (2d D.C.A. Fla. 1967); 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). Several states provide statutorily for such subrogation-type actions. *E.g.,* ARK. STAT. ANN. §66-4001 (1966); CAL. INS. CODE §11580 (West 1955); MASS. GEN. LAWS ANN. ch. 175 §§112-13 (1959; N.Y. INS. LAW §167 (McKinney 1966); OHIO REV. CODE ANN. §3926.06 (Baldwin 1964); R.I. GEN. LAWS ANN. §27-7-2 (1968); TENN. CODE ANN. §59-1223 (1968); VA. CODE ANN. §38.1-380 (1953); W. VA. CODE ANN. §17D-4-12(f) (1966). Inasmuch as some authorities are of the opinion that the judgment creditor has a right of subrogation in any event, 8 J. APPLEMAN, note 1 *supra,* §4831, it is questionable whether such statutes grant any rights not already possessed by judgment creditors against intransigent insurers. Note, *Judicial Creation of Direct Actions Against Automobile Liability Insurers*: Shingleton v. Bussey, 23 VAND. L. REV. 631, 635 (1970).

6. 8 J. APPLEMAN, note 1 *supra,* §4851.

that such obstacles to compensation may act as a strong inducement to settlement out of court.[7]

In order to insure compensation for plaintiffs, reduce the need for piecemeal litigation, and disclose insurers' interest in litigation a few states have permitted injured parties to sue insurers directly without first establishing the liability of the insured.[8]

Immediately following a legislative rejection of such "direct action,"[9] Florida took the somewhat unique step of *judicially* establishing it,[10] thereby creating a multitude of unanswered questions[11] and no small degree of confusion.[12] Other than by years of litigation, the unresolved problems and confusion can only be minimized by carefully drafted direct-action legislation.

This note will examine direct-action statutes and their major problems;[13] it will also propose direct-action legislation for Florida based on the experiences of other direct-action jurisdictions.[14]

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7. Especially where such settlement is unfair or inadequate, this might also appear violative of at least the spirit of FLA. CONST. Decl. of Rights §21: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

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

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

10. Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), *commented* on in 22 U. FLA. L. REV. 145 (1969), held that 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, a direct cause of action inured to such third-party beneficiary at the time he became entitled to sue the insured. For other cases that have permitted joinder of the insurer, *see* Dunn v. Jones, 143 Kan. 218, 53 P.2d 918 (1936); James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950); Vanderford v. Smith, 235 S.C. 448, 111 S.E.2d 777 (1960); Watts v. Baker, 233 S.C. 446, 105 S.E.2d 605 (1958). The effect of the statutes or ordinances in these cases was to require common carriers to insure against their negligence. The statutes were construed to make injured members of the public third-party beneficiaries under the insurance policy.

A relatively recent line of New York decisions has permitted direct action against the insurer on a garnishment theory, where the insured was not amenable to process. Minichello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968); Barker v. Smith, 290 F. Supp. 709 (S.D.N.Y. 1968); Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669 (1967); Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

11. Comment, *Judicial Creation of Direct Action Against Automobile Liability Insurers*, 22 U. FLA. L. REV. 145 (1969).

12. A notable area of confusion has been whether severance of insurance issues for separate trial is discretionary or compulsory. *Compare* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), *with* Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970).

13. A detailed discussion of each of the many problem areas created by direct action is not attempted here. Only those areas most essential to the drafting of a workable direct-action statute are treated at length. Considerations requiring only short comment will be treated in footnotes as they arise. One notable victim of selectivity has been direct action as it affects conflicts-of-law. For a discussion of this area *see* Note, *supra* note 8, at 374-92.

14. The text of that suggested legislation is set forth in appendices A and B [hereinafter cited as Suggested Florida Direct Action Statute (SFDAS)].

DIRECT ACTION AND PUBLIC POLICY

Direct action can be best understood in terms of four sometimes countervailing public policies: (1) insuring just compensation to injured members of the public, (2) avoiding multiplicity of litigation, (3) preventing excessive judgments, and (4) protecting the insurer's and insured's freedom to contract. The emergence of direct action has been dominated by a balancing, both conscious and unconscious, of these public policies.

Liability insurance was for many years written solely for the benefit of the insured.[15] If for some reason, such as insolvency, the insured was unable to satisfy the injured party's judgment, there could be no recovery from the insurer.[16] Gradually, however, courts and legislatures began to view liability insurance as a public-protection and loss-allocation vehicle.[17]

This changing attitude manifested itself in the decisional law that utilized the established distinction between two basic types of risk insurance: indemnity policies, which insure against loss actually sustained by the insured; and liability policies, which insure against the liability for loss.[18] Where insurance policies provided for settlement or control of litigation by the insurer, although otherwise purporting to be indemnity policies, courts tended to regard them as liability contracts binding upon the insurer as soon as judgment was obtained against the insured.[19] Where a contract was ambiguous, it was construed as a contract of liability rather than indemnity.[20]

To make certain their contracts would be construed as indemnity contracts, insurance companies began inserting "no-action-until-payment clauses."[21] Legislatures responded with statutes making the insurer liable regardless of the insured's insolvency or bankruptcy[22] and requiring that liability contracts waive such defenses.[23]

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15. *See, e.g.,* Bain v. Atkins, 181 Mass. 240, 63 N.E. 414 (1902).

16. Note, *supra* note 8, at 357.

17. This attitude is increasingly prevalent. *See* Shingleton v. Bussey, 223 So. 2d (Fla. 1969); Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (Ct. App. 1965); Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (Ct. App. La. 1962); Symposium, *Changes for Automobile Claims,* 1967 U. ILL. L.F. 361.

18. 8 J. APPLEMAN, note 1 *supra,* §4831; Comment, *The Insurer as Party Defendant in Auto Accident Cases,* 1953 WIS. L. REV. 688, 690 (1953).

19. Stephens v. Pennsylvania Cas. Co., 135 Mich. 189, 190, 97 N.W. 686, 687 (1903). The clause in this case provided: "The indemnity hereby provided for shall not be payable until the loss or damage has been adjusted and settled by the Company . . . ." Anoka Lumber Co. v. Fidelity & Cas. Co., 63 Minn. 286, 65 N.W. 353 (1895).

20. *See, e.g.,* Michel v. American Fire & Cas. Co., 82 F.2d 583 (5th Cir. 1936).

21. This clause barred action against the insurer until loss had actually been sustained by the insured by reason of payment of a judgment against the insured. *See* Kipkey v. Casualty Ass'n, 255 Mich. 408, 238 N.W. 239 (1931); Elliott v. Indemnity Ins. Co., 201 Wis. 445, 230 N.W. 87 (1930).

22. *E.g.,* CONN. GEN. STAT. ANN. §38-175 (1969); MO. ANN. STAT. §379.195 (1968); VA. CODE ANN. §38.1-388 (1950).

23. *E.g.,* ILL. ANN. STAT. §1000 (Smith-Hurd 1965); R.I. GEN. LAWS ANN. §27-7-1 (1968). As a part of the direct-action legislation introduced in the 1969 Florida Legislature (see note 9 *supra*) the insertion of insolvency defenses in Florida policies would have been prohibited. Such a prohibition would seem necessary to ensure the full effectiveness of direct action.

Today, bowing to the legislative trend, liability insurers have uniformly discarded insolvency defenses by policy provision.[24] A companion provision, however, prohibits any action against the insurer until the insured's liability is established by judgment.[25] The courts and legislatures of most states, apparently feeling that the opposing public policies are at this point in equilibrium, seem satisfied with this solution and have uniformly recognized such no-action clauses as valid.[26]

Direct-action jurisdictions, on the other hand, have rejected this solution and, in seeking a more suitable balance, have allowed direct suit against the insurer prior to a judgment against the insured.[27] Some direct-action jurisdictions, however, have been willing to apply direct action concepts more extensively than others.

Louisiana[28] and Puerto Rico[29] have enacted the broadest of such statutes, allowing direct action in all tort litigation. On a more limited scale, Wisconsin permits direct action only in cases involving automobile liability.[30] South Carolina,[31] Georgia,[32] Oklahoma,[33] and Vermont[34] provide for direct action against the insurers of various classes of carriers for hire. The approach taken by Arkansas allows direct action only in instances where the tortfeasor is a tort-immune organization[35] or where the claim against the insured arises outside the United States.[36]

Since Florida does seem to continue the distinction between liability and indemnity policies, *see* Da Costa v. General Guar. Ins. Co., 226 So. 2d 104 (Fla. 1969), it is possible that insurers might use the insolvency clauses to avoid the effects of direct action. *See* Appendix B *infra,* for the text of the insolvency defense prohibition introduced into the 1969 Florida Legislature. That prohibition is recommended herein as a companion to any direct action statute Florida might enact.

24. The standard policy used by casualty insurers on a nationwide basis provides: "Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder." Tarpey, *The New Comprehensive Policy: Some of the Changes,* 33 INS. COUNSEL J. 223, 232 (1966).

25. The standard policy provides: "No action shall lie against the company . . . until the amount of 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." *Id.*

26. 8 J. APPLEMAN, note 1 *supra,* §4861. *See also* authorities cited note 5 *supra.*

27. ARK. STAT. ANN. §§66-3250, 66-3244 (1966); GA. CODE ANN. §68-612 (1967); LA. REV. STAT. ANN. §22:655 (Supp. 1970); R.I. GEN. LAWS ANN. §27-7-2 (1968); S.C. CODE ANN. §10-702 (1962); WIS. STAT. ANN. §260.11 (Supp. 1969); P.R. LAWS ANN. tit. 26, §2003 (Supp. 1968).

28. LA. REV. STAT. ANN. §22:655 (Supp. 1970).

29. P.R. LAWS ANN. *tit.* 26, §2003 (Supp. 1968).

30. WIS. STAT. ANN. §260.11 (Supp. 1969).

31. S.C. CODE ANN. §10-702 (1962).

32. GA. CODE ANN. §68-612 (1967) provides: "If a policy of indemnity insurance is given in lieu of bond, it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract."

33. OKLA. STAT. ANN. tit. 47, §169 (Supp. 1969-1970).

34. VT. STAT. ANN. tit. 23, §§842, 882 (1967).

35. ARK. STAT. ANN. §66-3240 (1967). This statute has been held inapplicable to private individuals. Savage v. Spicer, 235 Ark. 946, 362 S.W.2d 668 (1962).

36. ARK. STAT. ANN. §66-3244 (1966).

Statutes in Alabama,[37] Kansas,[38] and New Mexico,[39] while not expressly permitting direct action, have been construed to do so. The courts of two states, California[40] and North Dakota,[41] have interpreted city ordinances requiring taxi companies to carry liability insurance as allowing direct action against such insurers.[42]

Rhode Island's statute affords the clearest example of the balancing of public policy behind direct-action legislation. This statute permits direct action where service of process cannot be obtained upon the insured, but expressly prohibits joinder of the insurer in all other situations.[43] In so doing, the state evidences both a recognition of the desirability of direct action in some situations and a basic distrust of the concept in general. With the possible exception of Louisiana, this ambivalence threads throughout all direct-action legislation.

Three arguments have been advanced in opposition to direct action: (1) causes *ex contractu* and *ex delicto* cannot be maintained in one action,[44] (2) the insurer is not the real party in interest,[45] and (3) revealing the presence of a "deep-pocketed" insurer at trial will result in augmented plaintiffs' verdicts, both in number and size.[46] Although the first two objections are more relevant to a discussion of judicially created direct action,[47] the third is of paramount importance in the area of direct-action statutes. So strong has been this fear of increased awards that courts have held reference to liability insurance at trial to be reversible error.[48] Legislatures have statutorily prohibited such reference,[49] and one state has even expressly made mere

37. ALA. CODE tit. 36, §74 (62) - (83) (Supp. 1968), *construed in* American Southern Ins. Co. v. Dime Taxi Serv., Inc., 275 Ala. 51, 151 So. 2d 783 (1963).

38. KAN. STAT. ANN. §66-1, 128 (1964), *construed in* Sterling v. Haetenstein, 185 Kan. 50, 341 P.2d 90 (1959).

39. N.M. STAT. ANN. §64-27-49 (Supp. 1969), *construed in* Deeg v. Lumbermen's Mut. Cas. Co., 279 F.2d 491 (10th Cir. 1960); Breeden v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954).

40. Butler v. Sequeira, 100 Cal. App. 2d 143, 223 P.2d 48 (1950). *See* Rupley v. Huntsman, 159 Cal. App. 2d 307, 324 P.2d 19 (1958).

41. James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950).

42. In North Dakota this decision was reached notwithstanding a statute to the contrary. N.D. CENT. CODE §39-16-11 (1960), *as amended*, §49-18-33 (Supp. 1969); Note, *supra* note 5, at 634.

43. R.I. GEN. LAWS ANN. §27-7-2 (1968).

44. *See* Artille v Davidson, 126 Fla. 219, 170 So. 707 (1936) *overruled by* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); Alpin v. Smith, 197 Iowa 388, 197 N.W. 316 (1924).

45. *See* Gould v. Weibel, 62 So. 2d 47 (Fla. 1952); *cf.* Hurley v. Finley, 6 Ill. App. 2d 23, 126 N.E.2d 513 (Ct. App. 1955); State *ex rel.* Farmers Mut. Auto. Ins. Co. v. Weber, 364 Mo. 1159, 273 S.W.2d 318 (1954).

46. *See* Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953); Morton v. Maryland Cas. Co., 1 App. Div. 2d 116, 123-27, 148 N.Y.S.2d 524, 530-33 (2d Dep't 1955); C. MCCORMICK, EVIDENCE §168 (1954).

47. *See* Comment, note 11 *supra*.

48. *See* authorities cited in note 4 *supra*.

49. *See* FLA. STAT. §455.06 (1969) (waives governmental immunity to the extent of liability insurance for certain state agencies and prohibits the suggestion of the existence of insurance at trial); IDAHO CODE ANN. §41-3505 (1961) (waiver of governmental immunity); MONT. REV. CODES ANN. §40-4402 (Supp. 1969) (waiver of governmental immunity); N.M.

reference to liability insurance at trial a ground for mistrial.[50]

Although there is some evidence that reference to liability insurance at trial does affect verdict size,[51] it does not follow that direct action will necessarily result in such increases. The vulnerability of this prophylactic argument (that shielding jurors from the knowledge of the insurer's presence will prevent increased verdicts) lies in the fact that a variety of ways already exists in which the presence of liability insurance may come to the jury's attention.[52] It may be revealed in the *voir dire* examination of the jurors,[53] in questioning a witness for bias,[54] or by inadvertent reference at trial.[55] Moreover, juries doubtless assume the presence of insurance in areas such as automobile litigation where liability insurance is compulsory or widespread.[56]

One potential of direct action is that it may actually reduce the number and size of plaintiffs' verdicts.[57] It has been argued that direct action promotes intellectual honesty at trial, makes it possible to instruct the jury as to the true function of liability insurance,[58] and prevents the possibility of juries

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STAT. ANN. §64-25-9 (1953) (waiver of governmental immunity); N.D. CENT. CODE §49-18-33 (Supp. 1969) (joinder of insurer with common carriers prohibited and comment concerning existence of insurance denied in action against common carrier); TEX. REV. CIV. STAT. ANN. art. 6252, §19 (1969-1970 Supp.) (waiver of governmental immunity).

50. NEV. REV. STAT. §41.490 (1965).

51. 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 . . . ." These same jury studies, though inconclusive, also indicate that absence of insurance may cause the jury to return an *inadequate* award. Note, *The Liability Insurer as a Real Party in Interest: Proposed Amendments to the Minnesota Rules of Civil Procedure,* 41 MINN. L. REV. 784, 788 n.33 (1957).

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

53. *Id.* at 134-35. *See* Ryan v. Noble, 95 Fla. 830, 116 So. 766 (1928). *See generally* Kabb, *Insurance Questions in* Voir Dire, 17 CLEVE.-MAR. L. REV. 504 (1968). For a Florida case subsequent to *Shingleton v. Bussey* dealing with insurance on *voir dire, see* Sutton v. Gomez, 234 So. 2d 725 (2d D.C.A. Fla. 1970).

54. 21 J. APPLEMAN, INSURANCE LAW AND PRACTICES §12831 (1962); 2 J. WIGMORE, *supra* note 52, at 135.

55. 2 J. WIGMORE, *supra* note 52, at 135. The fact of insurance may also be admissible as it relates to questions of: (1) ownership and control of the automobile or instrumentality involved; (2) the existence and scope of an employment relationship, or both; (3) charitable or governmental immunity waivers; and (4) payment of attorneys' fees. Stopher, *Should a Change Be Made in Discovery Rules To Permit Inquiry as to Limits of Liability Insurance?,* 35 INS. COUNSEL J. 53, 56 (1968).

56. 2 J. WIGMORE, *supra* note 52, at 146; Lassiter, *Direct Actions . . . Against the Insurer,* 1949 *Ins. L. J.* 411, 416.

57. Proponents of direct action have noted that Louisiana and Wisconsin, both direct-action jurisdictions, are among the lowest verdict areas in the United States. M. BELLI, THE MORE ADEQUATE AWARD 2-3 (1952). This argument is weakened somewhat, however, by the fact that Louisiana allows appellate review on questions of fact, LA. CONST. art. 7, §§10(6), 27 and that Wisconsin is a comparative negligence jurisdiction, WIS. STAT. ANN. §331.045 (1958). These peculiarities could contribute to the lower awards in these jurisdictions.

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

becoming antagonized by the insurance companies' secretive behavior.[59] It has also been contended that once defendants learn how to utilize direct action, it may serve as a weapon to prevent mulcting of insurers and insureds by unworthy plaintiffs.[60]

For these reasons direct action would probably not impose as undue a burden on insurers as proponents of the prophylactic argument might imagine. Moreover, use of this concept might avoid the occasional unduly low verdict that results when a jury, without knowledge of insurance, proves overly sympathetic toward the defendant.[61]

Direct action also allows the injured party a readily accessible source of compensation where jurisdiction over the insured proves difficult or impossible to obtain.[62] Service of process may be had upon the tortfeasor's insurance company either through the insurer's "minimum contacts" with the direct-action state or through the state's long-arm statute.[63] This would seem consonant with the public policy of affording injured persons the greatest possible protection, yet it would not be unduly burdensome to the insurer. The insurer will often have offices and resources within the direct-action state and usually will be able to defend the injured's suit in the direct-action state as readily as in any distant state wherein the insured might be located.[64] Indeed, in light of the fact that the accident giving rise to the action will likely have occurred within the direct-action state,[65] the insurer might experience difficulty in obtaining witnesses and presenting evidence at a trial in any other place.

Direct action also has the advantage of reducing piece-meal litigation.[66] Since, under direct action, the liability of the insured and the policy defenses of the insurer are normally litigated in one proceeding,[67] there is little need

59. Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 358 (1960).

60. Symposium, *Changes for Automobile Claims*, 1967 U. ILL. L.F. 361, 572. *See* Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969): "[A] candid admission at trial of the existence of insurance coverage, the policy limits of the same and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers in terms of diminishing their overall policy judgment payments than the questionable 'ostrich head in the sand' approach which may often mislead juries to think insurance coverage is greater than it is."

61. Note, *supra* note 59, at 359. *See* Note, note 51 *supra*.

62. *See* Oertel v. Williams, 214 Wis. 68, 251 N.W. 465 (1933). Rhode Island extends direct action only to those cases where the injured party is unable to obtain jurisdiction over the tortfeasor. R. I. GEN. LAWS §27-7-2 (1968).

63. *See* text accompanying notes 173-191 *infra*. *See generally* MacDonald, *Direct Action Against Liability Insurance Companies*, 1957 WIS. L. REV. 612.

64. Note, *supra* note 59, at 362.

65. *See* text accompanying notes 150-172 *infra;* LA. REV. STAT. ANN. §22:655 (Supp. 1970); WIS. STAT. ANN. §260.11 (Supp. 1969).

66. Note, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243, 246 (1961). For two cases epitomizing the multiplicity of actions and undue delay that 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. Ins. Co. v. Grasso, 186 F.2d 987 (2d Cir. 1951) (required three lawsuits and six years).

67. Note, note 66 *supra*. *But see* Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970).

for multiplicity of action.[68] Court economy will be promoted, and poor plaintiffs will not be denied just compensation because of a financial inability to pursue remedies in two successive actions.[69] The insurer also benefits from reduced litigation since insurance companies, in the absence of direct action, are often forced to defend the insured on the basis of liability even though policy defenses are available.[70]

Since reference to insurance at trial is openly allowed and controlled,[71] another reason advanced to justify direct action is that new trials, based on technical errors caused by quibbling over exclusionary rules of evidence, are reduced in number.[72] The insurer is thereby denied the chance for victory on error and retrial,[73] but the determination of cases on their merits is promoted.

Unless the legislature should now choose to enact anti-direct-action legislation, the question of whether Florida will permit direct action against the insurer is rendered moot by the Supreme Court of Florida's decision in *Shingleton v. Bussey*.[74] In light of the developments leading to the emergence of direct action procedure[75] and the continuing trend toward viewing liability insurance as a quasi-public system for protecting injured persons,[76] direct action is not a radical innovation.[77] Judicial development of this concept, however, is a slow procedure, and the numerous complex questions raised by direct action can result in confusion and a failure to fully achieve the

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68. It should be noted also that, since direct action enables all the issues to be litigated in one action, declaratory judgments may not be allowed. *See* New Amsterdam Cas. Co. v. Simpson, 238 Wis. 550, 300 N.W. 367 (1941).

69. See note 66 *supra* for situations that would promote undue financial burdens on plaintiffs with meager resources. Often, a plaintiff, faced with the necessity of obtaining a judgment against an insolvent tortfeasor in order to reach the insurer, might well decide to settle instead.

70. In non-direct-action jurisdictions, the insurer is sometimes faced with a dilemma. If the company defends the action against the insured, its policy defenses may be held waived. If it does not defend the action against the insured, it may be bound by the judgment rendered there. *See* Miller v. United States Fidelity & Guar. Co., 291 Mass. 445, 197 N.E. 75 (1935); Note, *Liability Insurance Policy Defenses and the Duty To Defend*, 68 HARV. L. REV. 1436, 1442-45 (1955).

71. *See* text accompanying notes 80-116 *infra*.

72. 2 J. WIGMORE, *supra* note 52, at 146-47.

73. The tendency of courts to hold reference to insurance at trial non-prejudicial where proper instructions have been given has already reduced somewhat the insurer's opportunity for retrial. *See* Carls Markets, Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953); Crowell v. Fink, 167 So. 2d 614 (1st D.C.A. Fla. 1964).

74. 223 So. 2d 713 (Fla. 1969).

75. *See* Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 386, 208 N.E. 2d 12, 20 (Ct. App. 1965), *cited in Shingleton v. Bussey, passim,* for a recognition of *automobile* liability insurance's importance today: "Automobile insurance has taken an important position in the modern world. *It is no longer a private contract merely between two parties.* . . . Many persons injured and disabled from automobile accidents would become public charges were it not for financial assistance received from the insurance companies." The basic argument would seem to apply with equal force to all liability insurance.

76. *See generally* Symposium, note 60 *supra*.

77. Louisiana first enacted the predecessor to LA. REV. STAT. ANN. §22:655 (Supp. 1970) in 1930 (La. Acts 1930, No. 55).

purposes for which direct action was created.[78] It is submitted, therefore, that the Florida legislature, after carefully taking into account the necessary balancing of public policies involved, should now enact direct-action legislation and set forth operational procedures and limitations.[79]

Reference to Insurance at Trial: Discovery

In the absence of direct action, any reference at trial to either the existence or limits of liability insurance is, with only a few exceptions,[80] uniformly prohibited.[81] This results not only from the fear of augmented verdicts, but also from the widely held view that the question of insurance is irrelevant.[82] The two questions for determination at trial are the insured's liability and damages, and the fact of insurance is felt to have no probative bearing on these issues.[83]

Under direct action the situation obviously changes. Where the insurer is a party defendant, the basic questions for determination are the liability of the insured, damages, and the liability of the insurer under the terms of the liability contract.[84] Clearly, the existence of coverage is relevant.[85] The more perplexing question involves the admissibility of policy *limits*.[86]

It has been contended that policy limits should not be introduced,[87] since except for punitive damage situations, policy limits bear no relevance to

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78. *See* comment, *Judicial Creation of Direct Action Against Automobile Liability Insurers*, 22 U. Fla. L. Rev. 145 (1969).

79. *See generally* SFDAS, Appendix A.

80. *See* Stopher, note 55 *supra.*

81. 8 J. Appleman, note 54 *supra*, §4861. For two earlier Florida cases, *see* Carls Markets, Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953); Crowell v. Fink, 167 So. 2d 614 (1st D.C.A. Fla. (1964).

82. *See, eg.*, Jeddeloh v. Hockenhull, 219 Minn. 541, 18 N.W. 2d 582 (1945).

83. *See, e.g.*, Stopher, note 55 *supra.*

84. *See* St. Paul Fire & Marine Ins. Co. v. Burchard, 25 Wis. 2d 288, 130 N.W.2d 866 (1964). *Compare* Degelos v. Fidelity & Cas. Co., 313 F.2d 809 (1963), *with* Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (Ct. App. La. 1962) *and* Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935).

85. *But see* Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 (Fla. 1970), in which the Florida supreme court states: "The existence or amount of insurance coverage has no bearing on the issues of liability and damages, and such evidence should not be considered by the jury." This decision appears to reject in part the court's earlier rationale in *Shingleton v. Bussey*, and to a great extent emasculates that decision. It is submitted that the *Shingleton* decision is the better reasoned of the two opinions and that, in any Florida direct-action legislation, reference to the existence of liability insurance should be allowed at trial. However, such reference should be subject to the trial court's discretion with regard to the manner of its introduction. *See* SFDAS Appendix A, ¶8.

86. Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969), contains language strongly suggesting that policy limits are to be admissible: "[A] candid admission at trial of the existence of insurance coverage . . . [and] . . . the policy limits of the same . . . ." Fla. Stat. §455.06 (1969), which waives governmental immunity for certain agencies to the extent of liability coverage, prohibits even the suggestion of the existence of insurance at trial.

87. Ferrero, *An Advocate Examines the Ramifications of* Shingleton v. Bussey, 93 J. Academy Fla. Trial Lawyers, Nov. 1969, at 2, 10. *Contra*, United States Fidelity & Guar. Co. v. Superior Court, 85 P.R.R. 124 (1962), holding that unless the *insurer* estab-

questions of the insured's liability, the damages, or to the liability of the insurer under the policy.[88] The situation is analogized to the prohibition against delving into the financial status of the tortfeasor.[89] However, some courts have stressed that liability insurance is unlike other assets in that it was purchased for the sole purpose of protection in the event of litigation.[90]

Those who favor admitting policy limits at trial apparently do so with a faith in the sophistication of the modern jury and in the interest of intellectual honesty at trial.[91] They are also aware that juries, made aware of the existence of insurance in the case and then blindfolded as to the extent of coverage, may return, by guessing, both unduly high and unduly low awards.[92] When the jury guesses high, the interest of not only the insurer, but also the insured, may be seriously affected.[93] It has been suggested, however, that in Kentucky, where inquiry into coverage limits is permitted,[94] there is often a definite resemblance between verdict size and policy limits.[95]

Although much of the argument concerning the evidential admissibility of policy limits is conjectural, it would seem wisest to exclude such reference. First, the many compelling reasons for joining the insurer as a defendant do not apply when considering the admissibility of policy limits.[96] Neither the jurisdictional advantages of direct action nor the elimination of piecemeal litigation would be furthered, and where policy limits are low, juries might be inclined to return unduly inadequate verdicts, thus defeating the direct-action purpose of protecting the public.

A simple solution would be to treat the extent of the company's liability in a manner similar to the way set-offs are presently handled in Florida.[97]

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lishes at trial its limits of liability under the terms of the policy, the limits are presumed to be coextensive with the judgment. FED. R. CIV. P. 26(2), as amended in 1970, although providing for discovery of insurance existence and contents, provides: "Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial."

88. Ferrero, note 87 *supra.*

89. *E.g.*, State *ex rel.* Hersman v. District Ct., 142 Mont. 139, 143-44, 381 P.2d 799, 801 (1963).

90. 4 J MOORE, FEDERAL PRACTICE §26.16[3], at 1191 (2d ed. 1966). *See, e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Terry v. Fisher, 12 Ill. 2d 231, 145 N.E. 2d 588 (1957); Maddox v. Grauman, 265 S.W. 2d 939 (Ky. 1954).

91. *See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); Ellis v. Gilbert, 19 Utah 2d 189, 429 P. 2d 39 (1967).

92. *See* authorities cited in note 51 *supra.*

93. It is assumed here that both the insured and insurer are either codefendants or that the party not involved in the action will be bound by principles of res judicata or collateral estoppel. *See* text accompanying notes 196-220 *infra.*

94. Maddox v. Grauman, 265 S.W. 2d 939 (Ky. 1954).

95. Stopher, *supra* note 55, at 59.

96. Ferrero, *supra* note 87, at 10.

97. FLA. STAT. §768.041(2), (3) (1969): "At trial if any defendant shows the court that the plaintiff . . . has delivered a release or covenant not to sue . . . in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly. The fact of such a release or covenant not to sue . . . shall not be made known to the jury."

Also, where the limits of coverage are themselves in dispute, severance of that issue would be possible.[98]

Since evidence concerning the existence of insurance will be allowed under direct action, questions involving the manner of its introduction become important in that *undue* emphasis upon the existence of an insurer could prove prejudicial. In both Louisiana and Wisconsin the fact of insurance is admissible.[99] However, decisions in both jurisdictions indicate that undue emphasis on such evidence may be prejudicial to the defendant.[100] On the other hand, it is possible that excessive emphasis on the fact that the jury ultimately pays the cost of the verdict, by increased insurance rates, may prejudice the plaintiff's case.[101] This problem could best be controlled by legislation providing for the exercise of judicial discretion in this area.[102]

A related question is that of jury instruction. Assuming the policy limits have not been introduced in evidence, it would seem that absent some query by the jury with respect to policy limits, no special instruction would be necessary.[103] Where the jury does ask a question concerning policy limits, the court could instruct the jury that questions of liability and damages should be determined without regard to policy limits.[104]

Necessarily intertwined with issues relating to admissibility is the question of discovery: May the plaintiff discover the existence of the tortfeasor's insurance company and the policy limits or both?[105] Even in the absence of

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98. The Florida supreme court, in Shingleton v. Bussey, 223 So. 2d 713, 720 (Fla. 1969), suggested severance, and has since expressly held in Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970), that severance may be granted. It is submitted that under direct action legislation, reference to policy limits at trial should be restricted to cases where such limits are clearly in dispute. In such cases the courts should have discretion to sever such issues for separate trials. See SFDAS, Appendix A., ¶¶6, 8. For situations where policy limits may be in issue *see* Wingerter v. Maryland Cas. Co., 313 F.2d 754 (5th Cir. 1963); Royal Transit v. Central Sur. & Ins. Corp., 168 F.2d 345 (7th Cir.), *cert. denied*, 335 U.S. 844 (1948).

99. New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323, 326 (5th Cir. 1960); Vuchetich v. General Cas. Co., 270 Wis. 552, 555-56, 72 N.W 2d 389, 391-92 (1955); Roeske v. Schmitt, 266 Wis. 557, 572-73, 64 N.W. 2d 394, 402-03 (1954).

100. *See* New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323, 326 (5th Cir. 1960) (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).

101. *Cf.* New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323 (5th Cir. 1960). *But cf.* Doepke v. Reimer, 217 Wis. 49, 258 N.W. 345 (1935).

102. *See* SFDAS, Appendix A, ¶8.

103. Ferrero, *supra* note 87, at 11.

104. *Id.*

105. A poll of Florida circuit court judges, taken shortly after the decision in *Shingleton v. Bussey* indicated that 97 out of 97 judges were allowing discovery of the insurance company's name, and 86 out of 98 judges were allowing discovery of policy limits. Ferrero, *supra* note 87, at 12. In a subsequent supreme court decision, discovery has been held available under Florida's judicial direct action procedure, Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970). However, the decision does not limit discovery to either coverage or limits, and the language suggests that either would be subject to discovery. The Fourth District Court of Appeal for Florida has extended discovery to both coverage and limits. Duran v. McPherson, 233 So. 2d 639 (4th D.C.A. Fla. 1970).

direct action there is a clear divergence of opinion among commentators[106] and federal[107] and state courts[108] with respect to such discoverability. Its opponents point out that discovery has as its purposes: (1) the narrowing of issues, (2) the obtaining of evidence, and (3) the securing of information leading to evidence.[109] Discovery of insurance coverage and limits, they maintain, falls into none of these categories.[110] Proponents of discovery argue that whatever helps to determine the dispute is relevant,[111] that discovery aids the plaintiff in a realistic appraisal of his case,[112] and that allowing such discovery will promote settlements.[113]

If relevancy is the key, under direct action there would seem to be no bar to discovery of the existence of insurance and policy terms. Since the insurer's liability under the insurance contract is at issue and the insurer is a party defendant in every sense of the word,[114] the fact of insurance is relevant and should be discoverable. Moreover, two major purposes of direct action are served by discovery of the insurer's interest. By appraising his chances of recovery at an early stage the plaintiff may, upon finding no insurer involved, save himself expensive and wasteful litigation.[115]

The discovery of policy *limits* poses a more difficult problem. If such limits are not to be introduced at trial, there can be no claim of relevance to support their discovery. Here again, however, such information could aid the injured party in appraising his case, thereby aiding in settlements or the avoidance of futile litigation.[116]

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106. *See* 2A W. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE, RULES EDITION 647.1 (1961); Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits*, 28 FORDHAM L. REV. 215 (1959); Frank, *Discovery and Insurance Coverage*, 1959 INS. L.J. 281.

107. *Compare* Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966) *and* Hodges v. Heap, 40 F.R.D. 314 (D.N.D. 1966), *with* Di Biase v. Rederi, 32 F.R.D. 41 (E.D.N.Y. 1963) *and* Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962).

108. *Compare* Brooks v. Owens, 97 So. 2d 693 (Fla. 1957), *with* Maddox v. Grauman 265 S.W. 2d 939 (Ky. 1954).

109. Stopher, *Should a Change Be Made in Discovery Rules To Permit Inquiry as to Limits of Liability Insurance?*, 35 INS. COUNSEL J. 53, 55 (1968).

110. *Id. See* Brooks v. Owens, 97 So. 2d 693 (Fla. 1957); Comment, *Civil Procedure—Pretrial Discovery of Existence and Amount of Defendant's Liability Insurance Policy*, 20 S.C.L. REV. 85, 92 (1968).

111. Ellis v. Gilbert, 19 Utah 2d 189, 191, 429 P.2d 39, 40 (1967).

112. People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 239, 145 N.E. 2d 588, 593 (1957).

113. *Id.*; Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966). As amended in 1970, FED. R. CIV. P. 26(2) now makes the existence and contents of liability insurance subject to discovery. The change in the Rule is said to reflect "a hope that knowledge of insurance limits will lead to more realistic negotiation and thus to more settlements." C. WRIGHT, FEDERAL COURTS 359 (2d ed. 1970). The Rule imposes the limitation, however, that "an application for insurance shall not be treated as part of an insurance agreement."

114. New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323, 326 (5th Cir. 1960).

115. It is submitted that under legislative direct action both policy coverage and limits should be subject to discovery. *See* SFDAS, Appendix A, ¶8. However, it should be the expressed legislative intent that discovery not be construed to extend to other assets held by the insured. *Id.*

116. *Id.*

SHOULD DIRECT ACTION BE LIMITED TO AUTOMOBILE LIABILITY INSURANCE?

A major question raised by the decision in *Shingleton v. Bussey*[117] was whether Florida's judicial direct action would be limited to automobile liability cases. The language of the opinion is susceptible to interpretations either favoring or negating such a limitation.[118] Recently the question was resolved[119] in *Beta Eta House Corp. v. Gregory*[120] wherein the court held that the principles announced in *Shingleton* were "applicable not only to automobile liability insurance but also to other forms of liability insurance."[121]

In Wisconsin, direct action has been restricted to damages "caused by the negligent operation, management, control, maintenance, use or defective construction of a motor vehicle,"[122] apparently on the basis of the peculiar importance of automobile liability insurance. Wisconsin regards such insurance as written, not for the protection of the insured, but for the protection of a third-party beneficiary.[123]

It seems, however, that the reasons for allowing direct action in automobile liability cases apply with equal force in other areas.[124] The following arguments, which were advanced by *Shingleton,* are the major ones supporting direct action generally:[125]

> (1) A party injured by the negligence of the insured is a third party beneficiary for whose direct benefit the policy of liability insurance was written.
>
> (2) The insurance company actively participates in litigation and thus is a real party in interest.
>
> (3) An injured party may be adversely affected (by the policy

117. 223 So. 2d 713 (Fla. 1969).

118. The Florida supreme court extensively cited Gathberg v. Nemerovski, 58 Ill. App. 2d 372, 208 N.E.2d 12 (1965), on the importance of *automobile* liability insurance in society. 223 So. 2d 713, 715-16 (Fla. 1969). A medical malpractice case, Bergh v. Canadian Universal Ins. Co., 216 So. 2d 436 (Fla. 1968), was cited to emphasize the importance of direct action to the injured litigant. 223 So. 2d 713, 719 (Fla. 1969). Immediately following the decision in *Shingleton v. Bussey* a poll of circuit court judges indicated that, of 93 judges responding, 62 were permitting direct action in nonautomobile situations. Ferrero, *supra* note 87, at 12.

119. Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970). Several district courts of appeal had previously extended *Shingleton* to nonautomobile liability cases: Maxwell v. Southern Am. Fire Ins. Co., 235 So. 2d 763 (3d D.C.A. Fla. 1970) (homeowner's liability insurance); Duran v. McPherson, 233 So. 2d 639 (4th D.C.A. Fla. 1970) (professional liability insurance); Shipman v. Kinderman, 232 So. 2d 21 (1st D.C.A. Fla. 1970) (medical malpractice); Liberty Mut. Ins. Co. v. Roberts, 231 So. 2d 235 (3d D.C.A. 1970) (homeowner's liability insurance); Ray v. Pfeiffer, 237 So. 2d 562 (2d D.C.A. Fla. 1970) (homeowner's liability insurance).

120. 237 So. 2d 163 (Fla. 1970).

121. *Id.* at 165.

122. WIS. STAT. ANN. §260:11 (Supp. 1969).

123. *Cf.* Mueller v. American Indem. Co., 19 Wis. 2d 349, 120 N.W. 2d 89 (1963). This view coincides with that expressed in Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

124. Ferrero, *supra* note 87, at 5-6.

125. *Id. See* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

breaches of the insured) if he cannot immediately align the insurer with the insured.

(4) Every litigant has a right to an open, speedy and realistic opportunity to pursue his right of an adequate remedy at law.

(5) It is desirable to avoid a multiplicity of suits.

(6) The maturity and sophistication of juries and the recent indication that jury verdicts are not increased by the injection of insurance into cases mitigates the possible prejudice to the defendant, which is considered the principal danger of direct action procedure.

All of these arguments are readily applicable to areas, such as medical malpractice,[126] where automobile insurance is not involved.[127] Since direct action rejects the prophylactic argument (that direct action procedure will increase verdict size) as a basis for excluding the insurer, there seems to be no rational argument for restricting direct action to automobile cases. It is submitted that direct action in Florida should be extended to all negligence actions.[128]

CONSTITUTIONALITY

Invalidation of the no-action clauses found in liability policies is the heart of direct action.[129] Such invalidation has led to the contention that direct-action legislation is an unconstitutional restraint upon the freedom of the parties to contract.[130] Because of the state's interest in regulating insurance, however, it has been held that such invalidation is within a direct-action state's regulatory power.[131]

A more serious objection relates to the retroactive application of such invalidation. A statute may be retrospective in nature even if it does not

126. The supreme court in *Shingleton v. Bussey* cited Bergh v. Canadian Universal Ins. Co., 216 So. 2d 436 (Fla. 1968), a medical malpractice case, to "emphasize the importance that an injured party plaintiff have the advantage of an ordinary litigant from the moment of injury . . . ."

127. In a state where automobile liability insurance is compulsory, there would seem to be a stronger basis for distinguishing between automobile insurance and other policies. It is significant, however, that Wisconsin, the only jurisdiction limiting direct action to automobile litigation, does not make the purchase of automobile liability insurance compulsory. WIS. STAT. ANN. ch. 344 (1958). Similarly, Florida has construed its Financial Responsibility Law as noncompulsory. Lynch-Davidson Dotors v. Griffin, 182 So. 2d 7 (Fla. 1966), *construing* FLA. STAT. ch. 324 (1969).

128. *See* SFDAS, Appendix A, ¶1.

129. The standard policy used by casualty insurers on a nationwide basis provides: "No action shall lie against the company . . . until the amount of 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).

130. *See* Bish v. Employers Liab. Assurance Corp., 102 F. Supp. 343 (W.D. La. 1952), *aff'd per curiam*, 202 F.2d 954 (5th Cir. 1953), *rev'd on rehearing per curiam*, 217 F.2d 953 (5th Cir. 1955), *noted in* 13 LA. L. REV. 495, 506 (1953).

131. Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954); Michael v. St. Paul Mercury Indem. Co., 92 F. Supp. 140 (W.D. Ark. 1950).

purport to govern events prior to its enactment;[132] this would be true of a direct-action statute that declares preexisting obligations unenforceable in the future.

In order to overcome the constitutional objection that retroactive direct action constitutes an impairment of the obligation of contracts, Louisiana courts have frequently construed the direct-action statute of that state as procedural in nature.[133] The reasoning has been that since only the timing of the remedy against the insurer is affected, the obligations of contracts are not sufficiently impaired to bar retroactivity on constitutional grounds.[134] Wisconsin, although viewing direct action as procedural,[135] has nonetheless barred direct suits on contracts predating the statute.[136]

However, in light of the decision by the Supreme Court in *Watson v. Employers Liability Assurance Corp.*,[137] there would seem to be no constitutional impediment to construing a direct action statute as both retroactive and substantive. Although it held Louisiana's direct-action statute constitutional against equal protection[138] and due process objections,[139] the Supreme Court in *Watson* never reached the issues of the retroactive impairment of the obligation of contracts because the statute in that case predated the contract.[140]

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132. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960).

133. Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Gager v. Teche Transfer Co., 143 So. 62 (Ct. App. La. 1932); Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (Ct. App. 1932). However, some cases have construed the statutory right as substantive. *E.g.*, West v. Monroe Bakery, Inc., 217 La. 189, 46 So. 2d 122 (1950).

134. Churchman v. Ingram, 56 So. 2d 297, 304-06 (Ct. App. La. 1951); Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183, 188 (Ct. App. 1932).

135. *E.g.*, Miller v. Wadkins, 31 Wis. 2d 281, 283, 142 N.W.2d 855, 857 (1966); Ritterbusch v. Sexmith, 256 Wis. 507, 510, 41 N.W.2d 611, 612 (1950); Oertel v. Williams, 214 Wis. 68, 72, 251 N.W. 465, 466 (1933). In construing the Wisconsin right for conflict-of-law purposes many other jurisdictions have treated direct action as substantive. *E.g.*, Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 330-32, 239 N.E. 2d 799, 801 (1968); Posner v. Travelers Ins. Co., 244 F. Supp. 865, 868-69 (N.D. Ill. 1965); Kertson v. Johnson, 185 Minn. 591, 595, 242 N.W. 329, 330 (1932).

136. Pawlowski v. Eskofski, 209 Wis. 189, 193-96, 244 N.W. 611, 612-14 (1932), held the insurer's right to conceal its presence from the jury was substantial.

137. 348 U.S. 66 (1954).

138. *Id.* at 70. The Court held the equal protection argument to be "wholly void of merit."

139. *Id.* at 72. "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundary which are no concern of hers. Persons insured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. . . . [an injured litigant] but for the direct action law, could not get [his] case tried without going [to another jurisdiction] . . . . What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process."

140. *Id.* at 70.

The language of the *Watson* opinion suggests, however, that retroactive invalidation of no-action clauses would be upheld.[141] The determinative factor of the decision was the substantial interest of Louisiana in protecting persons injured within her borders.[142] The Court has consistently held that retroactive statutes are unconstitutional only when, upon balancing of the state and individual interests involved, they are unreasonable.[143] If the direct-action state can demonstrate a substantial interest — and *Watson* indicates that the states do have sufficient interest — there should be no objection on account of retroactivity even though direct action might quite literally impair the obligations of contracts.[144]

To minimize constitutional objections and prevent the confusion that has arisen in other direct-action states, a Florida direct-action statute should set forth explicitly:

(1) the public purpose to be served by the statute;[145]
(2) the retroactivity of the right;[146]
(3) whether such right is substantive or procedural;[147] and
(4) a severability provision as to retroactivity clauses.[148]

To provide the greatest possible protection for the public, the statute should be retroactive in application. Companion provisions preventing the insertion of no-action clauses and clauses requiring the consent of the insurer to be sued would also be desirable, though not absolutely essential.[149]

JURISDICTION

Subject Matter

Both Louisiana and Wisconsin, seeking to afford injured residents the greatest possible protection while avoiding objections of unconstitutional

141. *See* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954).
142. *Id.* at 72.
143. Hochman, *supra* note 132, at 694-95. *See, e.g.,* Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945); League v. Texas, 184 U.S. 156 (1902).
144. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
145. *See* SFDAS, Appendix A, Introductory paragraph.
146. *See* SFDAS, Appendix A, ¶2.
147. *See* SFDAS, Appendix A, ¶1.
148. *See* SFDAS, Appendix A, ¶9.
149. These measures would serve the purpose of minimizing constitutional objection. Where an insurer, in exchange for doing business in the direct-action state, consents to direct action, there is no basis for later complaint. *See* Talbot v. Allstate Ins. Co., 76 So. 2d 76 (Ct. App. La. 1955). Moreover, in preventing the insertion of no-action clauses, the direct-action state affects the "freedom to contract" instead of affecting existing "obligations of contract." Decisions indicate that the state, because its retroactive power is somewhat united, enjoys greater regulatory power in the former area. *See* Bankers & Shippers Ins. Co. v. Phoenix Assurance Co., 210 So. 2d 715 (Fla. 1968); Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (2d D.C.A. Fla. 1964). However, in light of Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), which suggests that the invalidation of no-action clauses, standing alone, is within constitutional bounds, these provisions would seem superfluous.

extra-territorial effect, have wandered through a virtual labyrinth of statutory interpretation and revision. The problem can be best understood by looking at four hypothetical situations involving a mythical direct action state.[150]

(1) *P*, a domiciliary of Louconsin, is injured by *D* in an accident occuring in Loucinsin. *D* is insured by *X* Company under a policy containing a no-action clause and issued in a state where such clause would be valid. *P* brings suit against *X* Company in Louconsin.

(2) *P*, a domiciliary of Louconsin, is injured by *D* in an accident occurring outside Louconsin. *D* is insured by *X* Company under a policy issued in Louconsin. *P* brings suit against *X* Company in Louconsin.

(3) *P*, a domiciliary of Louconsin, is injured by *D* in an accident occurring outside Louconsin. *D* is insured by *X* Company under a policy containing a no-action clause and issued in a state where such clause would be valid. *P* brings suit against *X* Company in Louconsin.

(4) *A*, a resident of a non-direct-action state, is injured in an accident outside Louconsin. *B*, the tortfeasor is insured by *Z* Company under a policy issued in Louconsin. *A* brings suit against *Z* Company in Louconsin.

In each of these hypothetical situations the availability of direct action is dependent upon the interpreted legislative intent of the statute and the constitutionality of the exercise of jurisdiction.

Where, as in hypothetical (1), the accident or injury occurs within the direct-action state, there appears to be little difficulty. Both the Louisiana and Wisconsin statutes contain provisions explicitly extending direct action to out-of-state policies in this situation.[151] Moreover, the occurrence of the accident within the direct-action state establishes sufficient state interest to overcome constitutional objections.[152]

The situation in hypothetical (2), where the accident occurs outside the direct-action state, has been the main source of confusion. An examination of the Louisiana and Wisconsin experiences is worthwhile.

Under Louisiana's Act 55 of 1930,[153] direct action was available both for accidents occurring outside the state, if the policy sued upon was written and delivered in Louisiana,[154] and for accidents occurring within the state whether or not the policy was delivered in Louisiana.[155] In 1950 the federal

150. The following cases are on their facts similar to the respective hypotheticals: (1) Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954). (2) Michel v. Bahn, 207 So. 2d 150 (Ct. App. La. 1968); Miller v. Wadkins, 31 Wis.. 2d 281, 142 N.W. 2d 855 (1966). (3) Kay v. Lumbermen's Mut. Cas. Co., 158 So. 2d 422 (Ct. App. La. 1964). (4) Cases with facts similar to this situation seem not to have reached the appellate level. This probably indicates that the nonapplicability of direct action stautes to these circumstances is generally accepted.

151. LA. REV. STAT. ANN. §22:655 (Supp. 1970); WIS. STAT. ANN. §260:11 (Supp. 1969).

152. *See* Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954).

153. La. Acts 1930, No. 55.

154. *See* Bouis v. Aetna Cas. & Sur. Co., 91 F. Supp. 954 (W.D. La. 1950) (*semble*); Hudson v. Georgia Cas. Co., 57 F.2d 757 (W.D. La. 1932) (dictum).

155. *See* Rogers v. American Employers' Ins. Co., 61 F. Supp. 142 (W.D. La. 1945); Stephenson v. List Laundry & Day Cleaners, Inc., 182 La. 383, 162 So. 19 (1935); Robbins v. Short, 165 So. 512 (Ct. App. La. 1936).

district court in *Belanger v. Great American Indemnity Co.*[156] limited direct action to Louisiana policies on two grounds: (1) that extra-territorial effect would be unconstitutional if applied to policies of non-direct-action states;[157] and (2) that the legislature had, by changing the wording of the statute when reenacted as part of the Insurance Code, intended to so limit the statute.[158] In 1951 the United States Court of Appeals, Fifth Circuit, without considering the constitutional issue, affirmed the district court's decision solely on the basis of legislative intent.[159]

In response to the district court's decision in *Belanger* and while the case was before the court of appeals, the Louisiana legislature amended the statute by adding that the right to sue the insurer directly "shall exist whether the policy of insurance sued upon was written and delivered in the state of Louisiana or not . . . *provided that the accident or injury occurred within the State of Louisiana.*"[160] Apparently, this was added to overcome the *Belanger* presumption that the legislature did not intend to permit direct actions on out-of-state policies.[161] The geographical restriction was added to insure that Louisiana would have an interest in the litigation sufficient to overcome any constitutional objection.[162] Nonetheless, all cases arising since the 1950 amendment have read the geographical restriction as qualifying the *entire* statute and have refused to allow direct action when an accident occurs outside Louisiana, even where the policy was issued in Louisiana.[163] When an accident occurs in Louisiana, however, it does not matter that the policy was issued in another state.[164]

In Wisconsin, a series of decisions and revisions similar to that of Louisiana has occurred.[165] However, in response to a court decision limiting direct action *in all cases* to accidents occurring within Wisconsin,[166] the Wisconsin Legislature in 1967 amended its direct-action statute to apply the geographical restriction only to out-of-state policies.[167]

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156. 89 F. Supp. 736 (E.D. La. 1950).

157. *Id.* at 739.

158. *Id.* at 737-38. La. Acts 1930, No. 55 stated: "It shall be illegal for *any* company to issue *any* policy against liability . . . ." (Emphasis added.). The Insurance Code changed the language to read: "No policy or contract of liability insurance shall be delivered *in this State* . . . ." La. Acts 1948, No. 195, §14.45 (emphasis added).

159. Belanger v. Great Am. Indem. Co., 188 F.2d 196 (5th Cir. 1951). The opinion seemed to assume, however, that direct actions for accidents occurring outside the state would come within the statute if the policy sued upon were issued in Louisiana.

160. La. Acts 1950, No. 541 (emphasis added).

161. Note, *Civil Procedure—Louisiana Direct Action Statute—Accidents Outside State,* 42 TUL. L. REV. 883, 884-85 (1968).

162. *Id.* at 885.

163. *See, e.g.,* Guess v. Read, 290 F.2d 622 (5th Cir. 1961); Nicholson v. Atlas Assurance Corp., 156 So. 2d 245 (Ct. App. La.), *cert. denied,* 245 La. 461, 158 So. 2d 612 (1963).

164. *See, e.g.,* Talbot v. Allstate Ins. Co., 76 So. 2d 76 (Ct. App. La. 1955).

165. In chronological order *see* Ritterbusch v. Sexsmith, 256 Wis. 507, 41 N.W.2d 611 (1950); WIS. STAT. ANN. §260.11 (i) (1959); Miller v. Wadkins, 31 Wis. 2d 281, 142 N.W. 2d 855 (1966); WIS. STAT. ANN. §260.11 (Supp. 1969).

166. Miller v. Wadkins, 31 Wis. 2d 281, 284, 142 N.W.2d 855, 856-57 (1966).

167. WIS. STAT. ANN. §260.11 (Supp. 1969).

If hypothetical (2) were to occur in Louisiana, *P* would have no right of direct action; in Wisconsin *P* would have such a right. The Wisconsin approach seems better conceived for purposes of protecting the injured direct-action resident. Moreover, since the Supreme Court decision in *Watson v. Employers Liability Assurance Corp.*,[168] the earlier presumed constitutional objections would not seem to be an obstacle.

Hypothetical (3) is a situation in which neither the accident nor the insurance policy can be linked to the direct-action state. It has been argued, however, that the mere domicile of the injured party in the direct-action state provides sufficient state interest for assuming jurisdiction.[169] Courts could dispose of cases where the sufficiency of state interest is questionable by use of the doctrine of *forum non conveniens* or simply by interpreting the direct-action statute inapplicable.[170]

In hypothetical (4), where neither the accident nor the injured plaintiff can be linked to the direct-action state, a consideration other than constitutionality becomes determinative. Even assuming that the issuance of the policy in the direct-action state might provide an interest sufficient for jurisdiction by the direct-action state, it can be argued that extending direct action to this situation would be unwise, since it might open the door to making the direct-action state a national center for tort litigation.[171] The ability of insurers within the direct-action state to contract outside the direct-action jurisdiction would thus be unnecessarily fettered. Moreover, the primary purpose of direct action, the protection of injured *residents,* would not be served.

Therefore, it is suggested that direct action in Florida be allowed in all cases where: (1) the injured party is a domiciliary of Florida; *or* (2) where the accident occurs within Florida. Direct action should not be permitted where the only connection with Florida is the issuance of a policy in this state.[172]

Service of Process

Having established subject matter jurisdiction, an injured party, unable to obtain service upon the insured tortfeasor, may be able to litigate in the direct-action state by suing an accessible insurer. This is a purpose of direct action.[173] Where it can be established that the insurer maintains constitutionally sufficient minimum contacts with the direct action state, there should be no bar to service of process.[174] Even if jurisdiction is based on as little as a

168. 348 U.S. 66 (1954).

169. Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems,* 74 HARV. L. REV. 357, 361 (1960).

170. *Id.*

171. *Id.* at 360.

172. *See* SFDAS, Appendix A, ¶2. The effect would be to allow direct action only in hypothetical Nos. 1, 2, and 3 set forth in text accompanying note 150 *supra.*

173. It is assumed here that joinder is not compulsory. See text accompanying notes 196-220 *infra.*

single policy written within the direct-action state, constitutional requirements would apparently be satisfied.[175]

Where the insurer has written no policies within the state, but is linked thereto only by the tortious conduct of the insured, it is not clear whether he can be served. It has been argued that an analogy exists between mail-order insurance cases, where the mailing of policies into a state has made the insurer amenable to service,[176] and situations where the insured tortfeasor comes into the direct-action state.[177] However, the fortuitousness of the insured's entering the state seems to distinguish the situation from mail-order insurance.[178]

Despite objections to service that is justified only by the writing of a policy in the direct-action state, at least one case has permitted such process. In *Pugh v. Oklahoma Farm Bureau Mutual Insurance Co.*[179] the court, reasoning that the insurer had undertaken by the policy to defend the insured in whatever jurisdiction the insured might be sued, held that no undue burden was placed upon the insurer by defending the action in its own right.

Where the insurer's only contact is the tort of the insured, it has also been suggested that the long-arm statute of the direct-action jurisdiction be utilized to obtain service of process over the insurer.[180] This method of obtaining personal jurisdiction over defendant tortfeasors was approved by the United States Supreme Court in *Hess v. Pawloski.*[181] It is based on the theory that a person using the highways of the forum state, or committing a tort in the state, may legitimately be required to appoint some designated state official as his agent to receive service.[182]

There are conceptual and practical considerations, however, that make the utilization of long-arm statutes against the insurer questionable. First, long-arm statutes are couched in terms of a *quid pro quo* arrangement.[183] For example, the out-of-state traveler, in exchange for the privilege of using the visited state's highways, agrees to submit to service within that state. Of course, it is all a fiction, but the fiction is more difficult to apply in the case of the insurer. It is difficult to see what privilege the insurer derives by the insured's journey into the direct-action state, unless the insurer can be said to contemplate such journey upon entering into the insurance contract. Moreover, to view the insured as an agent for the insurer, and then to say that that

174. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

175. Note, *supra* note 169, at 362. *See id.*

176. Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir.) *cert. denied,* 346 U.S. 877 (1953).

177. *See* MacDonald, *Direct Action Against Liability Insurance Companies,* 1957 WIS. L. REV. 612, 612-16.

178. Note, *supra* note 169, at 326 n.39.

179. 159 F. Supp. 155 (E.D. La. 1958).

180. MacDonald, *supra* note 177, at 624-26.

181. 274 U.S. 352 (1927).

182. FLA. STAT. §§48.171, 48.19 (1969), provide for service upon the Secretary of State of Florida.

183. *See id.*

agent appoints another agent to receive service of process upon the insurer, carries legal fiction somewhat further than reality may be able to withstand.

On the other hand, since the insurer under direct action may be regarded as jointly liable with the insured,[184] it is at least arguable that the use of the long-arm statute is constitutional when applied to the insurer.[185] Also, because of the peculiar importance of liability insurance in modern society, it may be that the minimum contact requirements for service of process in insurance cases should be less rigorous than in some other areas.[186]

A practical consideration in using long-arm statutes for purposes of direct action is their limited applicability. Most such statutes apply only to motorists,[187] and liability policies not falling within this category would not be affected.

The problem of service upon an out-of-state insurer might be solved by allowing the injured party to obtain such service in any state where the insurer *can* be reached and guaranteeing the right of direct action to the injured party in the foreign forum.[188] This could be done under the traditional theory of conflicts of law. Having created a new right of action against liability insurers where no right previously existed, direct action would seem to have created a substantive right rather than a procedural rule.[189] Based on this substantive right, parties injured within the direct-action state should be able to bring direct action against the insurer of the tortfeasor in any state in which they are able to serve process.[190] This could be accomplished if the foreign jurisdiction applies the direct-action statute as substantive law of the direct-action state under a conflict-of-law theory. Under traditional choice of law principles, the only bar to this right would be a strong contrary public policy in the forum state.[191]

In light of Florida's position as a center for tourism, it is likely that injured residents will encounter problems with service of process. Situations where

184. This has been the effect of the Louisiana, Wisconsin, and Puerto Rico statutes. *E.g.*, Lumbermen's Mutual Cas. Co. v. Elbert, 348 U.S. 48, 51 (1954); Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186, 187-88 (1st Cir. 1967); Shaw v. New York Fire & Marine Underwriters, Inc., 252 La. 653, 654-58, 212 So. 2d 416, 418 (1968). *See* Lubow v. Morrissey, 13 Wis. 2d 114, 108 N.W.2d 156 (1961); Sievert, *The New Insuring Agreement and the Louisiana Direct Action Statute*, 33 INS. COUNSEL J. 418 (1966).

185. *See* MacDonald, *supra* note 177, at 624-26.

186. Note, *supra* note 169, at 362.

187. FLA. STAT. §48.171 (1969), applies to out-of-state motorists. FLA. STAT. §48.19 (1969), applies to out-of-state watercraft.

188. MacDonald, *supra* note 177, at 619-23.

189. *See* Posner v. Travelers Ins. Co., 244 F. Supp. 865, 868-69 (N.D. Ill. 1965). *But cf.* Finn v. Employers' Liab. Assurance Corp., 141 So. 2d 852, 864 (Ct. App. La. 1962); Ritterbusch v. Sexmith, 256 Wis. 507, 513-15, 41 N.W.2d 611, 614-15 (1950).

190. Barrios v. Dade County, 310 F. Supp. 744 (S.D.N.Y. 1970), is the first case to apply *Shingleton v. Bussey* in a forum outside of Florida.

191. Some non-direct-action forums, although viewing the right of direct action as substantive, have refused to apply the law of the direct-action state, holding it to be contrary to the public policy in the forum. *E.g.*, Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 333-34, 239 N.E.2d 799, 802 (1968); Lieberthal v. Glen Falls Indem. Co., 316 Mich. 37, 41-43, 24 N.W.2d 547, 548-49 (1946). *Contra* Reishus v. Maryland Cas. Co., 411 F.2d 776 (7th Cir. 1969).

nonresidents are insured by out-of-state insurers writing no policies within Florida and are inaccessible to service of process may be easily anticipated. Unless the insurer can be served, the primary advantage of direct action is negated.

Because of inherent problems, the utilization of Florida's long-arm statutes is not recommended. It is suggested instead that Florida recognize by statute the substantive nature of the right of direct action.[192] This may afford the injured resident a modicum of protection by enabling him to pursue his right of direct action in foreign jurisdictions. It is, of course, possible that other forums may choose to characterize the right as procedural anyway. Statutory characterization of the right as substantive will, however, preempt legitimate doubt in a foreign forum's interpretation of the statute. Unfortunately, it will also provide a strong argument for denying direct action in a Florida forum where the cause arose in a non-direct-action state. Where the plaintiff is a domicilliary of Florida and the cause arises in a non-direct-action state, the resulting tension between traditional choice of law rules (which would apply the substantive law of the non-direct-action state) and the proposed direct-action statute could be resolved by using either a traditional public policy approach or modern choice of law theories to choose Florida law.

Diversity

One early advantage of direct action was the plaintiff's ability to create federal jurisdiction by proceeding solely against the out-of-state insurer even though the plaintiff and the insured were residents of the same state.[193] However, the resultant backlog of cases in the federal courts prompted an amendment to the federal diversity statute, which obviated this possibility.[194] That amendment declares that, for diversity purposes, the citizenship of the insurer is the same as that of the insured. Although the amendment has been attacked as inconsistent with the purposes of federal jurisdiction,[195] its present applicability is clear.

The Problem of Joinder

A major question raised by direct action is whether the plaintiff *must* join the insurer and insured, or whether he may proceed separately against each. Most direct-action jurisdictions, viewing the insured and insurer as jointly and severally liable,[196] have treated joinder as permissive.[197] The

192. *See* SFDAS, Appendix A, ¶1.

193. *See* Lumbermen's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1954).

194. 28 U.S.C. §1332(c) (1964).

195. *See* Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws,* 1965 Wis. L. Rev. 268 (1965).

196. *See, e.g.,* Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967) (Puerto Rico); Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp. 823 (E.D. La. 1966), *aff'd,* 383 F.2d 46 (5th Cir. 1967); Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W.2d 611 (1950) (*semble*). *Cf.* Behling v. Rivers, 74 F. Supp. 350, 352 (E.D.S.C. 1946).

197. *E.g.,* Fraticelli v. St. Paul Fire & Marine Co., 375 F.2d 186, 187-88 (1st Cir. 1967)

question is presently unanswered in Florida,[198] although there are indications that Florida trial courts, in construing *Shingleton v. Bussey*,[199] view joinder as compulsory.[200] However, at least one district court of appeal has held joinder permissive.[201]

The very vitality of direct action is in one way dependent upon noncompulsory joinder. If joinder is not permissive, and both the insured and insurer are considered "indispensable" as opposed to "necessary" parties,[202] the injured party may bring his action only in a forum wherein jurisdiction can be obtained over *both* the insured and the insurer.[203] This would not only emasculate the jurisdictional advantage of direct action, but also leave the plaintiff in a worse position than he occupied prior to direct action because his pre-direct-action right to proceed solely against the insured would be denied.

If only the insured is viewed as an indispensable party, the plaintiff's burden ceases to be so onerous. He is returned to his pre-direct-action status and may proceed against the insured alone; however, he is still deprived of direct action's jurisdictional advantages, since the easily accessible insurer becomes protected when the insured is not susceptible to process.[204]

In short, the effectiveness of direct action, in providing a source of compensation for the plaintiff, seems to require that neither the insured nor the insurer be considered indispensable parties. Moreover, it is arguable that under direct action neither insurer nor insured need be regarded as indispensable parties within the traditional definition of the term. As defined by the United States Supreme Court in *Shields v. Barrow*,[205] indispensable parties are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[206]

Although the insurer definitely has an interest in the action, there is no apparent reason why an effective final decree, compatible with good con-

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(Puerto Rico); Tillman v. Great Am. Indem. Co., 207 F.2d 588, 590 (7th Cir. 1953) (Wisconsin); Finn v. Employers Liab. Assurance Corp., 141 So. 2d 852 (Ct. App. La. 1969).

198. Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969), holds that the insurer is now a real party in interest within the meaning of FLA. R. CIV. P. 1.210(a). Since this rule has been consistently construed as permissive, *see, e.g.*, Gould v. Weibel, 62 So. 2d 47, 49 (Fla. 1952), joinder under direct action may be necessarily permissive.

199. 223 So. 2d 713 (Fla. 1969).

200. A poll of circuit court judges in Florida indicates that, of the 43 responding, 33 required joinder of the insured. Ferrero, *An Advocate Examines the Ramifications of* Shingleton v. Bussey, 93 J. ACADEMY FLA. TRIAL LAWYERS Nov. 1969, at 2, 12.

201. Maxwell v. Southern Am. Fire Ins. Co., 235 So. 2d 768, 770 (3d D.C.A. Fla. 1970).

202. *See* Shields v. Barrow, 58 U.S. (17 How.) 130 (1854).

203. *See* James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68, 75-76 (1963). In Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954), where the plaintiff sued the insurer alone in federal court, it was held that the insured was not, for diversity purposes, an indispensable party.

204. *See* James, note 203 *supra*.

205. 58 U.S. (17 How.) 130 (1854).

206. *Id.* at 139.

science, cannot be rendered in a case where the plaintiff chooses to sue the insured alone. Indeed, this has been done for years on the theory that the plaintiff becomes by the first judgment a judgment creditor of the insured.[207] Since the insurer and insured are regarded as jointly and severally liable to the injured party,[208] the judgment creditor theory is no longer workable when the insured is sued alone under direct action. However, the theory of collateral estoppel should serve to bind the insurer effectively on the question of the insured's liability.[209] Such a final, effective decree does not seem inconsistent with good conscience since the insurer had the ability to control the defense of the action against the insured.[210]

Where the plaintiff chooses to sue the insurer alone, there is a strong argument for considering the insured indispensable. Since the insured would have no right to control the litigation, binding him through collateral estoppel with an adjudication of his negligence in the action against the insurer alone, would smack of inequity. However, there is no need to apply collateral estoppel where it would operate unjustly.[211] Thus, if the insured were not bound by the earlier determination of his negligence, he might relitigate that issue if sued in a second action by the plaintiff. At the same time, the judgment in the first action would be effective only to the extent of the policy limits of the insurer. Here, as in the situation of the insurer above, there seems to be no compelling reason for considering the insured an indispensable party.

Unlike compulsory joinder, *permissive* joinder promotes the jurisdictional advantages of direct action. If either the insured or insurer is unavailable, the plaintiff is able to sue the accessible party. However, under direct action a new cause of action is created to remedy a given wrong[212] without a corresponding elimination of the old remedy; therefore, duplicative litigation may result.[213] This would not only be inequitable but also it would promote the same multiplicity of suits, circuity of action, and undue delay that direct action was created in part to prevent.[214] Clearly it is both unfair and wasteful

207. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §4831 (1962). *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).

208. *See, e.g.*, Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967) (Puerto Rico); Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp 823 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967); Cunningham v. Hardware Mut. Cas. Co., 228 So. 2d 700, 703 (Ct. App. La. 1969); Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W.2d 611 (1950) (*semble*). *Cf.* Behling v. Rivers, 74 F. Supp. 350, 352 (E.D.S.C. 1946).

209. *See* Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 329 (1896); Lawrason v. Owner's Auto Ins. Co., 172 La. 1075, 136 So. 57 (1931), *appeal dismissed*, 284 U.S. 591 (1931). This is essentially the pre-direct-action situation. Only the theory changes.

210. *See* Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 329 (1896); Lawrason v. Owner's Auto Ins. Co., 172 La. 1075, 136 So. 57 (1931), *appeal dismissed*, 284 U.S. 591 (1931).

211. RESTATEMENT OF JUDGMENTS §70, Comment *f* (1942). *See* Commissioner v. Sunnen, 333 U.S. 591 (1948); Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951).

212. *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 51 (1954).

213. Note, *supra* note 169, at 367.

214. Note, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243, 246 (1961).

to permit a plaintiff, after losing in an action against the insured, to take a "second shot" at recovery by suing the insurer.[215]

One means of preventing such duplicative litigation would be to consider the plaintiff's remedies as alternative rather than cumulative, and thus force the plaintiff to elect his remedy at the outset.[216] This would seem harsh, however, in cases where the first judgment proves unsatisfiable or is lost on the basis of a defense that would not be available to the defendant in the second action — especially if jurisdiction over the second defendant was unavailable at the time of the first action.[217]

The doctrine of collateral estoppel provides another means of preventing duplicative litigation. By denying relitigation of previously decided issues, collateral estoppel would be an effective, although complex, method of reducing duplicative litigation of issues; however, it would not entirely eliminate *multiplicity* of action. Where the plaintiff, for instance, proceeds first against the insured and loses, collateral estoppel would prevent his relitigating the issue of the insured's negligence. Should the plaintiff *win* in the first action, however, there is nothing to prevent him from seeking satisfaction from the insurer on the basis of the policy coverage.[218]

While compulsory joinder seems wholly unacceptable insofar as it nullifies the jurisdictional advantage of direct action, unlimited permissive joinder gives rise to multiple actions and many unnecessary complexities of collateral estoppel. A better approach is to view the insurer and insured as merely "necessary" parties,[219] and to require joinder except where such requirement would deprive the plaintiff of jurisdiction within the direct-action state.[220]

DEFENSES

Personal Immunities

In both Wisconsin and Louisiana it has been held that the liability of the insured is prerequisite to any liability of the insurer, even though the insurer

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215. There should, however, be no objections to a second suit against either insurer or insured where the plaintiff *wins* in the first suit. It may be that in the first action against the insurer the policy limits prevented the plaintiff from obtaining full compensation. It may also occur that, where the first action is against the insured, the insured's insolvency prevents satisfaction. In either circumstance it would seem unfair to deny to the plaintiff his second action. The second defendant can be adequately protected by setting off the amount collected in the first trial.

216. This has been suggested in some decisions: Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 52 (1954); Lews v. Manufacturers Cas. Ins. Co., 107 F. Supp. 465, 474 (W.D. La. 1952) (dictum); Emmco Ins. Co. v. Globe Indem. Co., 237 La. 286, 290, 111 So. 2d 115, 117 (1959) (dictum).

217. Note, *supra* note 169, at 367-68. *See* note 215 *supra*.

218. The number of such dual actions might of course be reduced by the ability of the insured to implead the insurer, FED. R. CIV. P. 14, and by the ability of the insurer to intervene, FED. R. CIV. P. 24.

219. *See* 3A J. MOORE, FEDERAL PRACTICE §1919 (2d ed. 1968); James, note 203 *supra*.

220. *See* SFDAS, Appendix A, ¶1.

may be sued alone.[221] Consequently, the insured's defenses of contributory negligence and the running of the statute of limitations have been avail to the insurer.[222] Louisiana, however, has also held that governmental,[223] charitable,[224] and interspousal[225] immunities are personal to the insured and therefore unavailable to the insurer in direct action cases. This represents a potential problem area for Florida. Although Florida does not currently recognize charitable[226] immunity, it has preserved intrafamily immunity[227] and governmental immunity.[228] The question thus arises as to the propriety of denying these immunities to an insurer.

The generally recognized purposes of intrafamily and governmental immunities are, respectively, the preservation of family harmony and the protection of the public fund.[229] Louisiana and some non-direct-action states have apparently questioned whether the purposes of these immunities are served where the insurer is the defendant.[230] This reconsideration is exemplified by statutes waiving governmental immunity to the extent of liability coverage.[231] On the other hand, it has been contended that to deny the insurer these immunities, especially intrafamily immunities, leaves the insurer vulnerable to collusive suits.[232]

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221. Musmeci v. American Auto Ins. Co., 146 So. 2d 496, 501-02 (Ct. App. La. 1962); Gager v. Teche Transfer Co., 143 So. 62 (Ct. App. La. 1932). *Compare* St. Paul Fire & Marine Ins. Co. v. Burchard, 25 Wis. 2d 288, 130 N.W.2d 866 (1964), *with* Schwenkhoff v. Farmers Mut. Auto Ins. Co., 11 Wis. 2d 97, 104 N.W.2d 154, *cert. denied,* 364 U.S. 903 (1960), *and* Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W.2d 611 (1950).

222. *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, *supra* note 207, §4812. Louisiana has, however, denied the insurer the defense of imputed contributory negligence. *See* McDowell v. National Sur. Corp., 68 So. 2d 189 (Ct. App. La. 1954), *appeal dismissed,* 347 U.S. 995 (1954).

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

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

225. 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).

226. Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940).

227. *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) (fact situations strongly hint that a liability insurer is involved).

228. FLA. STAT. §455.06 (1969) (waives governmental immunity to the extent of liability insurance coverage for certain governmental agencies operating motor vehicles). In 1969 Florida waived governmental immunity for one year, FLA. STAT. §768.15 (1969). This statute has lapsed by its own terms.

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

230. *See, e.g.,* O'Connor v. Boulder Colo. Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835 (1939); Le Blanc v. New Amsterdam Cas. Co., 202 La. 857, 13 So. 2d 245 (1943); Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (Ct. App. La. 1962); Lusk v. Lusk, 113 W.Va. 17, 166 S.E. 538 (1932).

231. FLA. STAT. §455.06 (1969); IDAHO CODE ANN. §41-3505 (1961); MONT. REV. CODES ANN. §40-4402 (Supp. 1969); N.H. REV. STAT. ANN. §412:3 (1968); VT. STAT. ANN. tit. 29, §1403 (Supp. 1969).

232. Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems,* 74 HARV. L. REV. 357, 365 (1960).

It must be remembered that the growth of direct action has been governed by the balancing of several public policies.[233] In the area of immunities, the insurer's freedom to contract is set against the desire to compensate injured persons. Although a legislature could easily strike a different balance, it is suggested for any Florida legislation that in this instance the insurer's interest should prevail. To allow direct action to create liability where there was none before appears excessive unless Florida is willing to adopt a no-fault insurance system. The liability of the insured should remain prerequisite to the insurer's liability.[234]

Policy Defenses

Traditionally, the injured party has stood in the shoes of the insured so that any policy defenses the insurer might have against the insured could be asserted to bar the injured party's recovery.[235] The injured person for the most part recovered, if at all, as a judgment creditor of the insured.[236] Since the insurer under direct action is to be regarded as liable in its own right, the possibility is raised that policy defenses may be substantially affected.

Even in non-direct-action states there has been a reluctance to deny compensation to the injured party because of the insured's breach of policy conditions.[237] These jurisdictions, although recognizing the insured's ability to eliminate the plaintiff's rights against the insurer, examine the nature of the breach, closely scrutinizing its reasonableness and the good or bad faith involved.[238]

Louisiana's direct-action statute provides:"[A]n action may . . . be maintained *within the terms and limits of the policy* . . . .[239] and policy defenses, although closely scrutinized, have been allowed.[240] Wisconsin, although viewing liability insurance as written for the benefit of injured persons,[241] has allowed the insurer to utilize policy defenses.

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233. *See* text accompanying note 15 *supra.*

234. *See* SFDAS, Appendix A, ¶4.

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

236. *See* Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936); 8 J. APPLEMAN, note 207 *supra.* It was also possible for the plaintiff, after obtaining a judgment against the insured, to recover under the entitlement provision of the liability policy. *See* Peerless Ins. Co. v. Sheehan, 194 So. 2d 285, 286 (2d D.C.A. Fla. 1967), where 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 entent of the insurance afforded . . . ."

237. 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) (pre-direct-action Florida cases). *See generally* Comment, *A Solution to the Inequities from a Breach of the Cooperation Clause in Automobile Liability Insurance,* 2 HOUSTON L. REV. 92 (1964).

238. Comment, *supra* note 237, at 95-100.

239. LA. REV. STAT. ANN. §22:655 (Supp. 1970) (emphasis added).

240. *E.g.,* Hallman v. Marquette Cas. Co., 149 So. 2d 131 (Ct. App. La. 1963), afforded the insurer a breach-of-notice defense where a default judgment had been obtained against the insured. The decision distinguishes, however, between failure to give notice of *suit* and failure to give notice of the *accident.*

241. *Cf.* Mueller v. American Indem. Co., 19 Wis. 2d 349, 120 N.W.2d 89 (1963).

To deny the insurer some defenses, such as breach of the cooperation clause, might open the way for collusion between plaintiffs and insureds, especially where a family relationship exists. However, the insurer is afforded some protection in that the insured may be compelled to testify in discovery proceedings[242] and called as an adverse witness at trial.[243]

It would seem that a distinction should be drawn between policy breaches, such as fraud in procurement, which occur before the plaintiff's injury, and breaches, such as failure to give notice and lack of cooperation, which occur after such injury. Where the latter are involved the purpose of the policy provisions should be kept in mind. They serve to protect the insurer's ability to defend its interests effectively.[244] Therefore, as long as the policy breach results in no substantial impairment of that ability the injured party should not be defeated on the basis of that breach.

Where the breach occurs before the injury to the plaintiff, serious theoretical difficulties arise. The question is often whether there was an effective insurance policy at the time of the injury. Some writers have suggested that the insurer should not be able to avail itself of the breach unless reasonable attempts to rescind the contract have been made prior to the injury.[245]

It is submitted that for any Florida direct-action legislation the insurer should not be denied defenses based on policy breaches occurring before the event causing plaintiff's injuries, provided that the insurer has taken reasonable steps to rescind the policy sued upon.[246] Breaches occurring subsequent to the insured's negligent act should not afford a defense unless the insurer's ability to defend has been substantially affected thereby.[247] Where the injured party himself gives notice to the insurer of the accident, the purposes of the notice provision are served as well as if the insured himself had provided the notice; therefore, where the injured party has given such notice within a reasonable length of time after the accident, the insurer should not be permitted to successfully assert lack of notice as a defense.[248]

STATUTES OF LIMITATION

Prior to direct action in Florida, it was held that a cause *ex contractu* and a cause *ex delicto* could not be maintained in one action.[249] Under direct action such a combination is now permitted.[250] This creates some peculiar problems. Assuming that the plaintiff joins the insured and insurer in one

242. FED. R. CIV. P. 26.

243. Maryland Cas. Co. v. Kador, 225 F.2d 120 (5th Cir. 1955). *See* American Fidelity & Cas. Co. v. Drexter, 220 F.2d 930 (5th Cir. 1955).

244. *See* Comment, *supra* note 237, at 93-94.

245. Note, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243, 249 (1961).

246. *See* SFDAS, Appendix A, ¶4.

247. *See* SFDAS, Appendix A, ¶4.

248. *See* SFDAS, Appendix A, ¶4.

249. Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), *overruled*, 223 So. 2d 713 (Fla. 1969).

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

action, will the contractual or tort statute of limitations apply?[251] Where joinder is permissive, may a plaintiff whose claim against the insured is barred by the statute of limitations for tort recover from the insurer under the longer contractual statute of limitations period for contracts? Louisiana has solved this problem by labelling the new cause of action as tortious in nature.[252] Puerto Rico acknowledges that the cause of action is in contract but applies the tort or wrongful death statutes of limitation since the damage arises from the commission of a tort.[253] "This approach would place the insurer and insured on equal footing by barring the direct action against the insurer whenever the statute has run as to the insured."[254]

Another question is whether the filing of an action against either the insured or insurer tolls the running of the statute with regard to the other. Louisiana has held that the statute is tolled.[255] It has been contended that to hold otherwise would disserve many policies promoted by direct action since the plaintiff would be unable to join the insurer as a defendant after bringing suit within the statute of limitations.[256] However, the Louisiana approach appears neither equitable nor supportive of the purposes of direct action, since it allows the plaintiff to unduly delay the determination of the issues.[257]

CONCLUSION

This discussion of direct action has of necessity been dominated by considerations of public policy. Often, in discussing issues involved in drafting a workable and fair direct-action statute, the author has been forced to make policy decisions that could just as easily have been decided to the contrary. Notable areas are the treatment of personal immunities, policy defenses, and policy limits.

It is precisely because of these many complex and highly debatable policy considerations that direct-action legislation is needed. If Florida intends to expand the protections available to persons injured within her borders, the expansion should be accomplished on a comprehensive basis.

In the balancing process, the interests of the insurer should not be taken lightly. Since Florida already permits direct action, one very legitimate pur-

251. FLA. STAT. §95.11 (3) (1969) (five-year period on contracts); FLA. STAT. §95.11 (4) (1969) (four years on tort); FLA. STAT. §768.04 (1969) (two years on wrongful death). Thus, if the contract statute is applied to an action against the insurer, it would seem possible to recover from the insurer as much as three years after the applicable tort statute has run.

252. *E.g.*, McDaniel v. Fireman's Fund Ins. Co., 211 So. 2d 120 (Ct. App. La. 1968); Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (Ct. App. La. 1964).

253. Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967).

254. Note, *Judicial Creation of Direct Actions Against Automobile Liability Insurers:* Shingleton v. Bussey, 23 VAND. L. REV. 631, 648 (1970). It is submitted that any direct-action legislation in Florida take this approach. *See* SFDAS, Appendix A, ¶7.

255. Saxon v. Fireman's Ins. Co., 224 So. 2d 560 (Ct. App. La. 1969). Hidalgo v. Dupuy, 122 So. 2d 639 (Ct. App. La. 1960); Sewell v. Newton, 152 So. 389 (Ct. App. La. 1934).

256. Note, note 254 *supra.*

257. *See* SFDAS, Appendix A, ¶7.

pose of direct-action legislation is to provide adequate safeguards for the insurer. Direct action with such safeguards should work far less hardship on the insurer than many have feared.

The suggested statutes set forth in the appendices are not intended to provide ultimate solutions but to serve as illustrations. They are points of departure for a legislative inquiry into direct action. An attempt has been made to anticipate major problem areas. Ultimately, the legislature of Florida must determine exactly, for each area, where the balance between the countervailing public policies must be struck.

HOWARD R. MARSEE

APPENDIX A

SUGGESTED FLORIDA DIRECT ACTION STATUTE

WHEREAS is is in the vital interests of the State of Florida to insure just compensation for all persons domiciled or injured within the borders of this state, and WHEREAS it is the public policy to avoid multiplicity of litigation and to insure every litigant the right to an open, speedy, and realistic opportunity to pursue his adequate remedy of law, be it enacted that:

(1) Any person who suffers damages or losses caused by the negligence of a person insured under a liability insurance policy shall have the substantive right to join both the insured and the insurer in one action. The injured party shall not bring action against the insurer alone unless such injured party is unable to obtain service of process upon the insured or, unless the injured party shall have first obtained a judgment against the insured establishing said insured's liability under the law.

(2) The right of direct action shall exist whether the policy sued upon was written in this state or not, and whether or not such policy contains a provision forbidding such direct action, except that, where the policy of insurance sued upon was issued or delivered outside the State of Florida, the insurer is by this section made a proper party defendant only if the accident or injury occurred in the State of Florida. Moreover, the right of direct action shall extend to all liability policies not otherwise excepted whether written or issued before or after the effective date of this enactment. Nothing herein shall be construed so as to allow a non domiciliary of this state, whose injuries shall not have arisen in Florida, to sue the insurer directly in this state.

(3) Where, in an action brought under this section, the insured and insurer shall be joined, such action may be brought in the county where the negligence occurred or in the county of the insured's domicile. Where an action brought under this section is solely against the insurer, such action may be brought in the county where the negligence occurred or in the county where the insurer maintains a customary place of business.

(4) In defending an action brought under this section, the insurer may employ any defenses available to the insured, including immunities, provided that the employment of such defenses is not inconsistent with the laws of this state. The insurer may also employ any defenses that would arise in a suit by the insured against the insurance company, provided such defenses are not inconsistent with the laws of this state, and provided further that such defenses arise out of a breach by the insured that substantially impairs the insurer's ability to defend. In no case, may an insurer who has been given reasonable notice by the injured party of the occurence giving rise to the action, assert the insured's failure to give notice as a defense. Where any breach by the insured occurs prior to the negligent act giving rise to an action brought hereunder, the insurer may employ such breach as a defense, provided said insurer has taken reasonable steps to rescind the policy sued upon prior to the insured's negligent act.

(5) The right of direct action set forth in this section shall survive the death of any person entitled to bring suit hereunder, and may thereafter be brought by the heirs or personal representatives of the deceased person, or others entitled to bring an action as survivors according to law. Moreover, any insurer of the injured party who is by reason of payment subrogated to the insured party's right of action may bring an action under this section as though such subrogated insurer were the injured party.

(6) Where it shall appear in an action brought under this section that joinder of the insurer interposes issues between insured and insurer likely to unduly complicate trial, the trial judge may, on timely motion, sever such complicating issues between insurer and insured for separate trial and adjudication. Moreover, such severance shall be granted whenever it shall appear that a good faith defense by the insurer is in derogation of the interest of the insured on the question of the insured's liability.

(7) Actions brought under this section shall be governed by those statutes of limitation designated by law as applicable to actions in tort, except that, where the injured party has first obtained a judgment solely against the insured, an action against the insurer to satisfy said judgment shall be governed by the statutes of limitation applicable to judgments. An action brought solely against either the insured or insurer shall not, unless otherwise provided by law, toll the running of the applicable statute of limitation as to the party not joined in the action.

(8) In an action brought under this section, evidence relevant to questions of the existence of insurance coverage shall be both admissible at trial and subject to discovery, provided that, no undue emphasis upon the existence of insurance coverage shall be permitted at trial. Facts relating to the policy limits of the insurance sued upon shall be subject to discovery but shall not be admitted at trial unless such policy limits are themselves clearly in dispute. Nothing herein shall be construed to permit discovery of any assets of the insured, where not otherwise permitted by law, other than those assets represented by the insurance policy sued upon.

(9) If any subsection, subdivision, paragraph, sentence, or clause of this section is held invalid or unconstitutional, such decision shall not affect the remaining portions of this section.

APPENDIX B

SUGGESTED COMPANION STATUTE TO SFDAS

(1) No policy of liability insurance shall be issued or delivered in this state unless it provides that the insurer consents to direct action as provided by Florida law, and the insolvency or bankruptcy of the insured shall not release the insurer from liability for the payment of damages for injuries sustained or loss occasioned during the existence of the policy.

(2) Any judgment against the insured for which the insurer is liable under the policy and which has become subject to execution, shall be deemed prima facie evidence of the insolvency of the insured. An action may thereafter be maintained against the insurer, within the terms and limits of the policy, by the injured person or his heirs, personal representatives or other survivors entitled to bring an action.