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Ilene D. Napp*

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Abstract

In 1978 Florida Statutes section 627.7262 was declared unconstitutional in *Markert v. Johnston*as an invasion of the Florida Supreme Court's rulemaking authority.

KEYWORDS: interest, real, party

Will the Real Party in Interest Please Stand Up? Florida Statutes Section 627.7262 as Amended

In 1978 Florida Statutes section 627.7262[1] was declared unconstitutional in *Markert v. Johnston*[2] as an invasion of the Florida Supreme Court's rulemaking authority. The statute prohibited joinder of motor vehicle liability insurance companies at the commencement of lawsuits against insured persons, but also provided for possible joinder of the insurer at a later stage in the proceedings.[3] Therefore the court determined that the statute involved procedural aspects of trial and was in

1. FLA. STAT. § 627.7262 (1977) read:
Nonjoinder of Insurers.
(1) No motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability. However, each insurer which does or may provide liability insurance coverage to pay all or a portion of any judgment which might be entered in the action shall file a statement, under oath, of a corporate officer setting forth the following information with regard to each known policy of insurance:
(a) The name of the insurer.
(b) The name of each insured.
(c) The limits of liability coverage.
(d) A statement of any policy or coverage which said insurer reasonably believes is available to said insurer filing the statement at the time of filing said statement.
(2) The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to said statement.
(3) If the statement or any amendment thereto indicates that a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.
(4) After the rendition of a verdict, or final judgment by the court if the case is tried without a jury, the insurer may be joined as a party and judgment may be entered by the court based upon the statement or statements herein required.
(5) The rules of discovery shall be available to discover the existence and policy provisions of liability insurance coverage.
2. 367 So. 2d 1003 (Fla. 1978).
3. FLA. STAT. § 627.7262(3) (1977).

violation of Article II, Section 3, of the Florida Constitution.[4]

Prior to this 1976 statute, joinder of liability insurers in actions against the insured tortfeasor was permitted as a result of the landmark Florida Supreme Court decision in *Shingleton v. Bussey*.[5] This case established that a direct cause of action[6] against insurers in motor vehicle liability insurance coverage cases inures to injured persons as third party beneficiaries of the insurance contract. The court declared this to be the result of the prevailing public policy of Florida.[7] The legislature's first attempt to reverse this direction of the court was struck down by the *Markert* decision. Apparently determined not to be thwarted, the legislature re-enacted Florida Statute Section 627.7262,[8] albeit revised,[9] in an attempt to cure the prior constitutional defects.

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4. FLA. CONST. art. II, § 3 provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

5. 223 So. 2d 713 (Fla. 1969).

6. The court relied upon rule 1.210(a), of the Florida Rules of Civil Procedure, which provides for joinder of parties. *See* Russell v. Orange County, Florida, 237 So. 2d 192 (Fla. 4th Dist. Ct. App. 1970); Kephart v. Pickens, 271 So. 2d 163 (Fla. 4th Dist. Ct. App. 1972)(holding that the insured is an indispensable party in such actions).

7. *Shingleton,* 223 So. 2d at 715.

8. FLA. STAT. § 627.7262, (Supp. 1982) (effective October 1, 1982). On Apr. 7, 1982, during the fourth special session of the 1982 Legislature, the Revised Insurance Code was passed by unanimous vote in both Houses. HOUSE COMMITTEE ON INSURANCE, STAFF REPORT, 1982 Ins. Code Sunset Revision (HB4F; As Amended by HB 10G), at 4 (1982) [hereinafter cited as STAFF REPORT].

9. FLA. STAT. § 627.7262 (Supp. 1982) now provides:

> Nonjoinder of insurers.
>
> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract, that such person shall first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (2) No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third party beneficiary or otherwise, prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (3) Insurers are affirmatively granted the substantive right to insert in lia-

Joinder of liability insurers as codefendants has been the subject of debate for well over a decade in this state. On the one hand, insurance and defense counsel vigorously oppose joinder of the liability insurer (the company) in actions against their insureds (the tortfeasors), and therefore support the amended statute. Their principal objection to joinder of the insurer centers on the supposedly negative impact on the jury of knowledge of the defendant's insurance coverage. On the other hand, plaintiffs' counsel just as vigorously favor joinder of the liability insurer, and therefore oppose the amended statute. Their principal contention is that the insurance company investigates the case, hires the attorneys, controls the negotiations, settlements and litigation, and has a direct financial interest in the outcome. Therefore, it is argued, the liability insurer is a real party in interest and should be included in the lawsuit.

Further debate on the joinder issue has occurred between the legislature and the judiciary, as evidenced by the re-enactment of this nonjoinder statute in response to the *Market* decision. These legal arguments involve the separate powers of the legislature and the judiciary, and are based on the nebulous distinction between substantive and procedural law.

This article focuses on the history of these arguments and the public policy and constitutional issues involved. The amended statute is examined in light of these issues, and an attempt is made to answer the current question of whether the statute will withstand judicial scrutiny under the substantive-procedural test.[10]

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bility insurance policies contractual provisions that preclude persons who are not designated as insureds in such policies from bringing suit against such insurers prior to first obtaining a judgment against one who is an insured under such policy for a cause of action which is covered by such policy. The contractual provisions herein authorized shall be fully enforceable.

10. The current questions of whether the statute can be applied retroactively, and whether retroactive application of the statute violates a plaintiff's constitutional rights are not within the scope of this article.

Development Of The Law

Prior to *Shingleton,* Florida followed the majority view[11] which prohibits maintenance of a cause of action directly against the insurer until the tortfeasor's liability is established.[12] At common law, the joinder of the insurer was often denied on the ground that an action *ex contractu* cannot be joined with an action *ex delicto.*[13] In most jurisdictions today, however, denial of direct actions against the liability insurer is generally based on "no action" or "nonjoinder" clauses contained in the insurance policies.[14] Generally, unless the policy specifically provides for direct action against the liability insurer, or is construed to so provide, direct action by the injured party is only permitted by statute.[15]

The *Shingleton* court hurdled the obstacles of both a "no action - nonjoinder" clause in the policy[16] and prior decisions which had refused to recognize the injured persons as third party beneficiaries of the insurance contract.[17] The court recognized that the majority of jurisdic-

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11. *See* 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4861 (Rev. 1981).

12. Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), *overruled* in Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); Hayes v. Thomas, 161 So. 2d 545 (Fla. 2d Dist. Ct. App. 1964); Thompson v. Safeco Ins. Co., 199 So. 2d 113 (Fla. 4th Dist. Ct. App. 1967).

13. *See, e.g.,* Jennings v. Beach, 1 F.R.D. 442 (D. Mass. 1940); Conwell v. Hays, 103 W. Va. 69, 136 S.E. 604 (1927); Ellis v. Bruce, 215 Iowa 308, 245 N.W. 320 (1932); Baggett v. Jackson, 244 Ala. 404, 13 So. 2d 572 (1943).

14. *See* 8 J. APPLEMAN, *supra* note 11.

15. For a discussion of direct action statutes see 8 J. APPLEMAN, *supra* note 11; Comment, *The Louisiana Direct Action Statute,* 22 LA. L. REV. 243 (1961); Comment, *The Insurer as Party Defendant in Automobile Accident Cases,* 1953 WIS. L. REV. 688. Direct action legislation was introduced in both houses of the 1969 Florida Legislature. Fla. S. 468, Reg. Sess. (1969) was tabled May 6, 1969. Fla. H.R. 1120, Reg. Sess. (1969) died in committee June 6, 1969. Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers,* 22 U. FLA. L. REV. 145, 146 n.12 (1969).

16. The insurance contract provided that: "No action shall lie against the Company . . . until the amount of the obligation of the Policyholder . . . shall have been finally determined by judgment after trial. . . . This policy shall not give any right to join the Company in any action to determine the liability of an insured person or organization." Brief for Federation of Insurance Counsel and Florida Defense Lawyers Association, amici curiae at 9, Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

17. Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936)(under an indemnity

tions sustained such clauses as a bar to joinder in actions to determine the insured's liability. Nonetheless, after emphasizing Florida's public policy favoring elimination of multiplicity of suits, the court construed the policy restriction to grant to the insurer only the right to assert nonliability; the policy restriction did not grant the right to assert nonjoinder.[18] The court further reasoned that securance of motor vehicle liability insurance "is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle. . . ."[19] Finding this intent, the court determined that motor vehicle liability insurance is "amenable to the third party beneficiary doctrine"[20] by operation of law.

After thus rejecting the insurance company's assertion that the no action clause prohibited joinder, the court accepted the appellate court's analysis and conclusion that the insurer is a real party in interest in litigation brought against the insured.[21] The appellate court reached this decision after taking notice of the policy provisions whereby the insurance company (1) reserves the right to control litigation against its insured, (2) is obligated to defend the litigation, and (3) will be liable for any resulting assessment of damages up to the policy

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policy, no action could be maintained by a third party since no breach of contract which would create in the insured a right to maintain an action on the policy); Hayes v. Thomas, 161 So. 2d 545 (Fla. 2d Dist. Ct. App. 1964) (contention that a liability policy obtained pursuant to Florida's Financial Responsibility Act, FLA. STAT. ch. 324 (1967) permitted maintenance of a direct action against the insurer rejected); Thompson v. Safeco Ins. Co., 199 So. 2d 113 (Fla. 4th Dist. Ct. App. 1967)(court noted Florida does not recognize the third party beneficiary doctrine under automobile liability insurance policies in the absence of a policy provision).

18. *Shingleton,* 223 So. 2d at 718.

19. *Id.* at 716.

20. *Id.* Appellate courts soon expanded this rationale to other forms of liability insurance. Duran v. McPherson, 233 So. 2d 639 (Fla. 4th Dist. Ct. App. 1970) (*Shingleton* applied to professional liability insurance); Shipman v. Kinderman; 232 So. 2d 21 (Fla. 1st Dist. Ct. App. 1970)(*Shingleton* applied to medical malpractice insurance); Liberty Mut. Ins. Co. v. Roberts, 231 So. 2d 235 (Fla. 3d Dist. Ct. App. 1970)(*Shingleton* applied to homeowners liability insurance). Finally in Beta Eta House Corp., Inc., of Tallahassee v. Gregory, 237 So. 2d 163 (Fla. 1970), the Florida Supreme Court expressly held the *Shingleton* principles applied to other forms of liability insurance.

21. Bussey v. Shingleton, 211 So. 2d 593 (Fla. 1st Dist. Ct. App. 1968).

limits.[22] Therefore, as a real party in interest, the insurer may be joined as a codefendant under the liberal joinder provisions of rule 1.210(a) of the Florida Rules of Civil Procedure.[23] Recognizing that this rule promotes the goal of "providing an efficient and expeditious adjudication of the rights of persons possessing adverse interests in a controversy,"[24] the Florida Supreme Court illustrated how an injured plaintiff may be adversely affected if he cannot immediately align the insurance company with the insured. Citing *Bergh v. Canadian Universal Insurance Co.*[25] and *Sellers v. United States Fidelity & Guaranty Co.*,[26] the court emphasized the importance of joinder to prevent defeat of a plaintiff's recovery. Assertions of policy defenses by the insurance company based on the possible negligence of the insured or absence of his motivation to protect the injured party are examples of when an injured person's recovery is defeated.

22. *Id.* at 596. The court also relied heavily on briefs filed in *In re* Rules Governing Conduct of Attorneys in Florida, (which was referred to as Case No. 35,524 by the *Bussey* court). This case involved a petition filed in 1966 by the Florida Bar Association seeking additional rules governing the conduct of "in house" counsel; the rule would have precluded attorneys for insurance companies from defending the insured. In opposing the adoption of the rule, counsel for the insurance industry openly admitted the " 'direct financial interest" of the insurer, ... "an identity and community of interest in the defense of any suit brought against the insured," . . . . [and] that the insurer . . . "has or claims an interest adverse to the plaintiff.' " Bussey v. Shingleton, 211 So. 2d at 595-96 (quoting various briefs filed in *In re* Rules Governing Conduct of Attorneys in Florida, Case No. 35,524).

23. Rule 1.210 provides:

> PARTIES (a) Parties Generally. Every action may be prosecuted in the name of the real party in interest. . . . All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and *any person may be made a defendant who has or claims an interest adverse to the plaintiff.* Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.

(emphasis added).

24. *Shingleton,* 223 So. 2d at 718.

25. 216 So. 2d 436 (Fla. 1968). The fact that the court cited this malpractice case was an indication that the *Shingleton* joinder principles were not limited to motor vehicle liability insurers.

26. 185 So. 2d 689 (Fla. 1966). This was an uninsured motorist case involving policy questions.

After Shingleton

Shingleton's initial impact was described as "almost cataclysmic"[27] and as creating "near chaos in tort litigation in this State."[28] Although clearly reversing Florida law on joinder of automobile liability insurers, *Shingleton* left a number of questions unanswered;[29] most of these questions have been answered, albeit by a number of supreme court decisions on the same issues.

In *Beta Eta House Corp., Inc. of Tallahassee v. Gregory,*[30] while purporting to extend the principles announced in *Shingleton* to other forms of liability insurance, the court actually appeared to recede from some of them. In *Shingleton,* the court had advocated a "candid admission *at trial* of the existence of insurance coverage, the *policy limits* of same, and an otherwise aboveboard revelation of the interest of the insurer. . . ."[31] However in *Beta Eta,* the court maintained that *Shingleton* merely requires "the *parties* to 'lay their cards on the table' in discovery proceedings, settlement negotiations, and *pre*-trial hearings. 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."[32] Within only a few months, the court translated candid admissions at trial into concealment of insurance.

Furthermore, *Singleton* indicated that if it should clearly appear in pretrial procedures that joinder of the insurer would interpose issues between the insured and insurance company that would unduly complicate the trial on the negligence issue, a motion to sever these issues for separate trial could be granted.[33] Yet in *Beta Eta,* the court held that the trial judge *may,* upon motion of either party, order separate trials

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27. Jurisdictional Brief for Respondent at 2, North Miami Gen. Hosp., Inc. v. Roach, 237 So. 2d 173 (Fla. 1970)(consolidated with *Beta Eta* for oral argument purposes).

28. Brief for Petitioner at 8, North Miami Gen. Hosp., Inc. v. Roach, 237 So. 2d 173 (Fla. 1970).

29. *See generally* Comment, *Civil Procedure: Judicial Creation of Direct Action Against Automobile Liability Insurers,* 22 U. FLA. L. REV. 145 (1969).

30. 237 So. 2d 163 (Fla. 1970).

31. *Shingleton,* 223 So. 2d at 718 (emphasis added).

32. *Beta Eta,* 237 So. 2d at 165 (emphasis added).

33. *Shingleton,* 223 So. 2d at 720.

whenever the insurance company is joined.[34] Based on this holding, all an insurer codefendant needed to do was file a timely motion to sever, and the trial judge would grant it. Thus it appeared for a time that the remedial principles announced in *Shingleton* had quickly fallen into desuetude.[35]

The severance issue was substantially resolved in *Stecher v. Pomeroy*.[36] After reaffirming the *Shingleton* conclusion that the insurer is a real party in interest in actions to determine the insured's liability,[37] the court concluded that *Shingleton* referred only to severance of issues between the insured and the insurer — *not* on the negligence issue. "[A]bsent a justiciable issue relating to *insurance*, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, there is no valid reason for a severance and it should NOT be granted."[38]

In *Godshall v. Unigard Insurance Co.*,[39] the court further clarified the issue of severance in holding that in absence of a justiciable issue relating to insurance, severance could not be regarded as harmless

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34. *Beta Eta*, 237 So. 2d at 165. The appellate court, at 230 So. 2d 495,500 (Fla. 1st Dist. Ct. App. 1970), concluded that

> [p]ursuant to the provisions of this rule [Fla. R. Civ. P. 1.270(b), *Separate Trials*] the trial court *should* on motion of a party order that the issues relating to the cause of action sued upon be first tried under circumstances which exclude any reference to insurance, insurance coverage or joinder in the suit of the insurer as codefendant. After this trial has been concluded and a verdict rendered for the plaintiff, a second trial confined solely to the issue of insurance cverage should be held if such an issue has been raised. If no such issue is present, judgment against the insurer within the policy limits would follow the verdict rendered in the first trial on the merits.

(emphasis added).

35. *See Beta Eta*, 237 So. 2d at 166 (Boyd, J., dissenting in part and concurring in part) ("The decision distorts the law of severance and offends equal protection and due process by requiring special treatment of liability insurers not afforded other codefendants").

36. 253 So. 2d 421 (Fla. 1971).

37. *Id.* at 423. The court again cited the insurance counsel's arguments in *In re* Rules Governing Conduct of Attorneys in Florida, (Case No. 35,524). *See supra* note 22.

38. *Stecher*, 253 So. 2d at 424.

39. 281 So. 2d 499 (Fla. 1973).

error.[40]

Underlying Rationale: Fear of Prejudicial Impact on Juries

The underlying rationale for prohibiting mention, and thus joinder, of liability insurance has traditionally been the assumption that juries are unduly swayed by knowledge that the defendant is insured.[41] Supposedly, such knowledge increases both the size and number of plaintiff's verdicts. Based on this assumption, evidence of a defendant's liability insurance is not relevant as evidence of negligence, and is inadmissible.[42]

Prior to *Shingleton,* Florida courts generally followed this traditional view, and held that deliberate injection of insurance into a tort trial was prejudicial error.[43] As previously noted,[44] the *Shingleton* court embraced a more modern view. "[T]he stage has now been reached

40. *But cf.* Damico v. Lundberg. 379 So. 2d 964 (Fla. 2d Dist. Ct. App. 1979)(Although the circuit court erred in dismissing the defendant's insurer, it was not reversible error. No amount of emphasizing the defendant's financial responsibility could have countered plaintiff husband's admission of his own negligence in entering the intersection.).

41. *See, e.g.,* International Co. v. Clark, 147 Md. 34, 42, 127 A. 647, 650 (1925); Jeddeloh v. Hockenhull, 219 Minn. 541, 553, 18 N.W.2d 582, 589 (1945); W. PIERSON, THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS § 140 (1956); Appleman, *Joinder of Policy Holder and Insurer as Parties Defendant,* 22 MARQ. L. REV. 75, 91 (1938); In Texas Co. v. Betterton, 126 Tex. 359, 88 S.W.2d 1039 (1936), adherence to this assumption approached absurdity when the court reversed the plaintiff's judgment against one of the largest oil companies in the world because the defendant's liability insurance coverage was brought to the attention of the jury.

42. *Compare* Jeddeloh v. Hockenhull, 219 Minn. 541, 554, 18 N.W.2d 582, 589 (1945), *with* Herschensohn v. Weisman, 80 N.H. 557, 558, 119 A. 705, 705 (1923)(defendant's reply to a caution about his driving shortly before the accident, "Don't worry; I carry insurance for that," was competent evidence bearing directly upon his negligence). *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 168 (1954); Note, *Evidence: Proper disclosure during trial that defendant is insured,* 26 CORNELL L.Q. 137 (1940)(discussion of exceptions to the general rule of inadmissibility).

43. Carls Markets v. Meyer, 69 So. 2d 789, 793 (Fla. 1953); Rose v. Peters, 82 So. 2d 585, 586 (Fla. 1955); Seminole Shell Co. v. Clearwater Flying Co., 156 So. 2d 543, 545 (Fla. 2d Dist. Ct. App. 1963).

44. *See supra* text accompanying note 31.

where juries are more mature."[45] Although the court confusingly receded from this position in *Beta Eta*,[46] it concluded in *Stecher v. Pomeroy*[47] that in order to "reflect the presence of financial responsibility, . . . [the presence of the insurer as the real party in interest] should be left apparent before the jury (without other express mention, of course). . . ."[48] Again, the court clarified its position in *Godshall v. Unigard Insurance Co.*,[49] by announcing that a legitimate purpose of joinder of the insurance company is to reflect the presence of financial responsibility.[50] "The interest which plaintiff has in presenting to the jury the truest possible picture of the existence of financial responsibility is much too important to allow the loss of that interest. . . ."[51]

Notwithstanding this neoteric posture of Florida courts, insurance and defense counsel staunchly assert that injection of insurance into trial unduly influences jury findings of liability and damages.[52] Empirical studies do lend some support to this "prejudice theory," and to the belief that a judge's curative instructions are ineffective.[53] On the other

45. *Shingleton*, 223 So. 2d at 718.

46. *See supra* text accompanying note 32.

47. 253 So. 2d 421 (Fla. 1971).

48. *Id.* at 424. The court reasoned:

> This offsets any indulgence by counsel or the jury with unfounded arguments like, "This poor, hard working truck driver and his family" approach, when in fact there is an ability to respond. It is probably not a factor in other instances where there is an obviously responsible principal defendant as in *Compania Dominicana de Aviacion.*

Id. at 423.

In Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (Fla. 3d Dist. Ct. App. 1971), the court rejected the defendant's contention that reference made during trial to a collateral settlement by Lloyd's of London could not be remedied by a curative instruction.

49. 281 So. 2d 499 (Fla. 1973).

50. *Id.* at 501.

51. *Id.* at 502.

52. *See* Brief for American Insurance Association, amicus curiae at 6, O'Quinn v. Thompson, No. 52577 (Fla. 1978)(one of three consolidated cases in Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978)).

53. *See* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, (1959), which reports of experiments with juries and insurance.

> 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.

hand, evidence also exists indicating that lower awards result when insurance coverage is known by the jurors.[54] Assuming *arguendo* that juries return higher awards when insurance coverage is known, no evidence exists to determine whether such award is merely adequate rather than excessive.[55] In other words, whether *justice* or *injustice* is achieved by concealment of liability insurance coverage is an unanswered question.

Realism requires acceptance of the fact that most if not all juries become aware of the defendant's insurance coverage at some point during trial. This is particularly true in automobile litigation where the average juror assumes, rightly or not, that an insurance company will eventually bear the cost of an adverse judgment.[56] An able plaintiff's

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> 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. . . .

Id. at 754. *See also* Neitzert, *Jury Trials of Insurance Companies and Large Corporations,* 18 CHI. B. REC. 87 (1937).

54. *See* Gladewater Laundry & Dry Cleaners v. Newman, 141 S.W.2d 951 (Tex. Civ. App. 1940)(evidence of insurance policies was introduced in the first trial, and the jury awarded $7,500. After reversal, in the second trial in which no evidence of insurance was permitted, the jury awarded $12,000.). *See also* 8 J. APPLEMAN, *supra* note 11, § 4861, at n.1 ("extensive studies have demonstrated that injection of insurance tends to diminish the size of jury verdicts; and states like Wisconsin which have permitted direct action have lower verdicts than neighboring states not permitting mention of the insurer's presence"); W. PIERSON, THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS § 145 at 325 (1956); Note, *Direct Action Statutes: Their Operational and Conflict-of-Law Problems,* 74 HARV. L. REV. 357, 358 n.12 (1960).

55. *See* 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)(Citing a letter from Professor Harry Kalven, Jr., Director of the Jury Study Project, Jan. 8, 1957. In the Chicago Jury Study Project, interviews with experimental jurors indicated the effect of insurance knowledge was to impel rendering of what they thought was an adequate award. The absence of insurance knowledge caused the jurors to award what they considered to be less than adequate.).

56. *See Beta Eta,* 237 So. 2d at 167 (Fla. 1970)(Ervin, C.J., concurring in part and dissenting in part)

> The universality of insurance protection explodes the out-moded concept that to avoid prejudice an insured's applicable insurance must be isolated from the jury's knowledge. The feature of insurance has become an integral factor in the modern jury's actual approach to the discharge of its role in assessing personal injury litigation issues, notwithstanding contrary the-

attorney has many "legitimate" ways of indirectly communicating to the jury the existence of insurance.[57] Therefore, it is submitted that arguments for and against joinder of liability insurers should not be premised upon illusory and theoretical foundations of prejudicial impact on juries.

The Power Behind *Markert v. Johnston:* The Supreme Court's Rulemaking Authority

The Florida Constitution authorizes the supreme court to promulgate rules regulating practice and procedure in all Florida courts.[58] In 1973, in response to the legislature's enactment of various laws which related to practice and procedure, the court held that the mandate to regulate practice and procedure was an *exclusive* grant to the supreme court.[59] The legislature may veto or repeal a court rule by a general law enacted by a two-thirds vote in each house of the legislature,[60] but it may not amend or supersede a rule.[61] If a statute is subsequently

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> oretical considerations. It is general public knowledge that in a world fraught with personal risks most of our citizens have the protection of insurance.

Accord Schevling v. Johnson, 122 F. Supp. 87, 89 (D. Conn. 1953); *See also* Kalven, *The Jury, the Law, and the Personal Injury Damage Award,* 19 OHIO ST. L.J. 158, 171 (1958); Lassiter, *Direct Actions. . .Against the Insurer,* 1949 INS. L.J. 411, 416.

57. The most widely used method is to examine jurors on *voir dire* regarding their interest in the defendant's insurance company. *See, e.g.,* Ryan v. Noble, 95 Fla. 820, 822, 116 So. 766, 768 (1929); City of Niceville v. Hardy, 160 So. 2d 535, 538 (Fla. 1st Dist. Ct. App. 1964); Purdy v. Gulf Breeze Enters., Inc., 403 So. 2d 1325, 1331 (Fla. 1981)("Since there is no longer any reason for not mentioning insurance in front of jurors, an attorney may question prospective jurors about any possible prejudice or bias they may have whether it be for or against insurance companies.").

58. The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by a general law enacted by a two-thirds vote of the membership of each house of the legislature. FLA. CONST. art. V, § 2(a).

59. *In re* Clarification of Florida Rules of Practice & Procedure, 281 So. 2d 204, 205 (Fla. 1973).

60. *See supra* note 58.

61. *In re Clarification,* 281 So. 2d at 205.

adopted by the court as a rule of practice and procedure, no attempt by the legislature to amend the statute is valid.[62] The supreme court has interpreted the last sentence of article V, section 2(a)[63] as requiring knowledge and specific intent on the part of each house to override a specific rule.[64] No such specific intent was evinced in the passage of the Revised Insurance Code. Therefore, the re-enactment of section 627.7262 is not a constitutional repeal of rule 1.210(a).[65]

That neither the constitutional language nor the intent of the framers mandates the court's holding of *exclusive* authority to regulate practice and procedure has been the subject of recent commentary.[66] Nevertheless, the court remains firmly entrenched in the notion of its exclusive power to promulgate rules of practice and procedure.[67] Nor is Florida unique in constitutionally granting exclusive power to the supreme court over rules of practice and procedure.[68]

The Boundaries of the Court's Rulemaking Authority

It is fundamental that court rules cannot contravene constitutional provisions, extend or abridge jurisdiction, or abrogate or modify substantive law.[69]

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62. *Id.* 1955 Fla. Laws 265, ch. 29737, § 3 similarly provided in part: "When a rule is promulgated and adopted by the supreme court concerning practice and procedure, and it conflicts with the statute, the rule supersedes the statutory provision."

63. FLA. CONST. art. V, § 2(a).

64. Carter v. Sparkman, 335 So. 2d 802, 808 (Fla. 1976)(England, J., concurring), *cert. denied,* 429 U.S. 1041 (1977).

65. *See supra* notes 8 & 23 and accompanying text.

66. *See* Means, *The Power to Regulate Practice and Procedure in Florida Courts,* 32 U. FLA. L. REV. 442 (1980), for a history of the rulemaking authority and a cogent urging of the abandonment of the idea of exclusivity.

67. *See* School Bd. of Broward County v. Surette, 281 So. 2d 481 (Fla. 1973); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977); Avila South Condominium Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978); Cozine v. Tullo, 394 So. 2d 115 (1981).

68. *See, e.g.,* ARIZ. CONST. art. VI, § 5; MICH. CONST. art. VI, §§ 4, 5; PA. CONST. art. V, § 10(c). No provision is made in these constitutions for legislative veto or repeal of court promulgated rules.

69. *See* Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?,* 26 A.B.A. J. 482, 482 (1940); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 MICH. L. REV. 623,

The constitutional grant of the court's rulemaking authority is expressed in the terms "practice and procedure."[70] Since "practice" and "procedure" are generally considered synonymous,[71] the actual distinction is between procedural and substantive law.

Florida has drawn the boundaries, if boundaries are to be drawn, according to the definitions expressed by Justice Adkins:

> Practice and procedure pertains to the legal machinery by which substantive law is made effective. . . .[S]ubstantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights.
> . . .The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.
> . . .Practice and procedure encompasses the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
> . . .
> . . .The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[72]

These broad statements supposedly define the distinction between substance and procedure. Article II, section 3[73] expressly restricts the exercise of authority by one branch in areas of power belonging to another. Since the supreme court has exclusive authority over practice and procedure,[74] the legislature may not enact statutes which are procedural.[75] If the subject matter is substantive, the legislature may act

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634 (1957).

70. *See supra* note 58.

71. Poyser v. Minors, 7 Q.B.D. 329, 334 (1881).

72. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 65 (Fla. 1972)(Adkins, J., concurring).

73. FLA. CONST. art. II, § 3, *Branches of Government. See supra* note 4.

74. *See supra* text accompanying notes 59-62.

75. Chappell v. Florida Dept. of Health & Rehabilitative Services, 391 So. 2d

upon it.[76]

Joinder of Liability Insurers: Substantive or Procedural

One *Shingleton* question remains unanswered: whether joinder and nonjoinder of liability insurers is procedural or substantive? The answer is of paramount importance in determining whether the new statute will withstand supreme court scrutiny, as undoubtedly the issue will be decided there.[77] If joinder of insurers is deemed procedural and in conflict with rule 1.210(a),[78] the statute will be struck as an invasion of the supreme court's exclusive rulemaking authority.[79] If joinder (and nonjoinder under the new statute) is deemed to involve substantive rights, the legislature has acted within its authority, and the statute will be held valid.

Unfortunately, when squarely faced with an opportunity to resolve this issue, the court demurred. Instead, the court in *Markert v. Johnston*[80] decided that resolution of the issue was not essential since the language of the statute provided "rather clearly that joinder of insurers is merely a procedural step in the conduct of a motor vehicle tort lawsuit."[81] The statute before the court[82] provided for both nonjoinder, at the commencement of the suit, and joinder, at a later stage. Consistent

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358 (Fla. 5th Dist. Ct. App. 1980); Military Park Fire Control Tax Dist. No. 4 v. DeMarios, 407 So. 2d 1020, 1021 (Fla. 4th Dist. Ct. App. 1981). *See* cases cited *supra* note 67.

76. *See supra* note 75.

77. Since the effective date of the re-enactment of the nonjoinder statute, Florida circuit courts have been deluged with defendant liability insurers' motions to dismiss in reliance on the new statute. To the author's knowledge, most courts have denied the motions and concluded that the new statute is unconstitutional under the authority of Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978). *See, e.g.*, Shields v. Richardson, No. 82-3503-CA (Fla. 4th Cir. Ct. Oct. 8, 1982); Feldman v. Boyd, No. 81-5515-CA(L)01-C (Fla. 15th Cir. Ct. Dec. 9, 1982); Scioli v. McClean Trucking Co., No. 82-632 CA-10 (Fla. 15th Cir. Ct. Dec. 29, 1982); Shurtleff v. Sunstream Equip. Co., Inc., No. 82-5578 CA(L)01-K (Fla. 15th Cir. Ct. Jan. 12, 1983); Moran-Hernandez v. North East Ins. Co., No. 82-3455 CA(L)01-B (Fla. 15th Cir. Ct. Jan. 17, 1983).

78. FLA. R. CIV. P. 1.210(a), *see supra* note 23.

79. *See* FLA. CONST. art. II, § 3, and art. V, § 2(a).

80. 367 So. 2d 1003 (Fla. 1978).

81. *Id.* at 1005.

82. *See supra* note 1.

with *Shingleton,* the insurer would at some point be joined. The statute thus attempted to control the "timing of joinder during the course of a trial, . . . [which] is, without question, a matter of practice or procedure. . . ."[83] However, in his specially concurring opinion advocating adoption of the substance of the invalid statute as a court rule, Justice Alderman indicated that joinder or nonjoinder, not merely timing of joinder, of insurers is procedural.[84]

Two years later, in *Cozine v. Tullo,*[85] the court again faced the issue with an equivalent statute prohibiting joinder of all liability insurers.[86] Similarly begging the substantive-procedural question, the majority held the statue unconstitutional "[f]or the reasons expressed in *Markert v. Johnston.* . . ."[87] In his dissent, Justice McDonald expressed the view that neither section 627.7262(1)[88] nor section 768.045[89] was entirely procedural so as to encroach upon the court's exlusive domain. In concluding that "substantive rights are affected by the nonjoinder statutes,"[90] he relied upon specific language in *Shingleton,*[91] and the fact that the insurance industry and the plaintiffs' bar show such opposing interests in the joinder issue. This "fact" is undoubtedly correct. However, such reasoning does not compel the conclusion that nonjoinder statutes are substantive rather than procedural.

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83. *Markert,* 367 So. 2d at 1006.

84. *Id. See also,* Piccolo v. Hertz Corp., 421 So. 2d 535, 536 (Fla. 1st Dist. Ct. App. 1982)("The question of joinder is different from the question of whether a suit may be maintained in the first place; the former is procedural, whereas the latter is substantive.")

85. 394 So. 2d 115 (Fla. 1981).

86. FLA. STAT. § 768.045 (1977). The principal difference from section 627.7262 (1977) was the inclusion of "liability" in the title, and the exclusion of "motor vehicle" in the first sentence.

87. 394 So. 2d at 115 (1981).

88. FLA. STAT. § 627.7262 (1977).

89. FLA. STAT. § 768.045 (1977).

90. *Cozine,* 394 So. 2d at 116.

91. [U]nless the legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert "no joinder" clauses in liability policies there is no basis in law for insurers to assume they have such contractual rights as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

Id. (quoting *Shingleton,* 223 So. 2d at 718-19 (Fla. 1969)).

The fact that the joinder issue is considered crucial does not render it substantive. Furthermore, the *Shingleton* logic supports the conclusion that there was no alteration of substantive law.[92]

The court's refusal to resolve the substantive-procedural controversy involved in nonjoinder statutes impels extraction of its views on the issue from other cases. Virtually all of these decisions rely on principles announced in *Shingleton.*

The *Beta Eta* decision shed the first light on the substantive-procedural issue. By affirming the decision of the first district,[93] the supreme court impliedly accepted the statement that the *Shingleton* decisions "were not intended to nor do they have the effect of changing the substantive law of this state. These decisions have merely created a *procedural innovation* which permits a direct action against a liability insurance carrier as a codefendant in a suit brought against its insured. . . ."[94] Since the supreme court modified the district court's decision on the severance issue,[95] a debatable question existed as to the supreme court's approval of the district court's statement that the *substantive* law of Florida prohibits any reference at trial to the defendant's insurance coverage. (Joinder of the insurer necessarily involves reference at trial to the defendant's insurance coverage).

The next venture into the "twilight zone" of substance and procedure as it relates to joinder of insurers was in *School Board of Broward County v. Surette.*[96] At issue was section 455.06(2), Florida Statutes,[97] which dealt with the liability and insurance of local governmental units. Pursuant to the statute, a condition precedent to automatic partial waiver of governmental immunity was that no attempt to suggest the existence of insurance be made at trial. The su-

92. *See Shingleton,* 223 So. 2d at 718. The case was based primarily upon the joinder provisions of 1.210(a) of the Florida Rules of Civil Procedure. *See supra* note 23 and accompanying text.

93. Beta Eta House Corp., Inc. of Tallahassee v. Gregory, 230 So. 2d 495 (Fla. 1st Dist. Ct. App. 1970).

94. *Id.* at 499 (emphasis added). *Accord* Durrett v. Davidson, 239 So. 2d 46, 48 (Fla. 2d Dist. Ct. App. 1970); Kephart v. Pickens, 271 So. 2d 163, 164 (Fla. 4th Dist. Ct. App. 1972).

95. *See supra* note 34 and accompanying text.

96. 281 So. 2d 481 (Fla. 1973).

97. FLA. STAT. § 455.06(2)(1977).

preme court agreed this provision was unconstitutional as contrary to article V, section 2(a),[98] in light of the joinder and severance rules. "This portion of Fla. Stat. § 455.06(2) which provides for severance of a political body's insurer relates to joinder and severance, truly a procedural matter, and is therefore superseded and rendered ineffective. . . ."[99] Although the invalid portion of the statute referred to *references* to insurance at trial, the court did not discuss any substantive rights, indicating that none was involved. Thus it appeared the *Beta Eta* district court's statements that references to insurance involved substantive law were not accepted by the supreme court.

This became explicitly clear in *Carter v. Sparkman,*[100] where the court confronted another statute prohibiting references to insurance. Section 768.47(1), Florida Statutes,[101] prohibited "any reference to insurance, insurance coverage or joinder of an insurer as a codefendant in the suit."[102] The court concluded the legislature intended only to bar "any reference" to joinder of insurers rather than joinder itself.[103] Furthermore, the court held that "references" to insurance or insurance companies during the course of a trial "is a purely procedural matter having to do with the conduct of trial proceedings. To the extent the Legislature has attempted to control 'references' during the course of trial . . . it has acted beyond its power."[104]

In *School Board of Broward County v. Price,*[105] the court stated

98. FLA. STAT. art V, § 2(a).

99. *Surette,* 281 So. 2d at 483.

100. 335 So. 2d 802 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977).

101. FLA. STAT. § 768.47(1)(1977), formerly FLA. STAT. § 768.134(1)(1975), enacted as part of the Medical Malpractice Reform Act of 1975.

102. FLA. STAT. § 768.47(1), formerly FLA. STAT. § 768.134(1).

103. Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977). The court could have addressed the substantive-procedural aspect of joinder here too.

104. *Id.* at 806(Fla. 1976)(footnote omitted). In view of the legislature's special finding of a "crisis" in skyrocketing medical malpractice premiums (Preamble to ch. 75-9, 1975 Fla. Laws 15), the court adopted the substance of the "reference" provision as rule 1.450(c) of the Florida Rules of Civil Procedure. Adoption of a nonjoinder rule was unsuccessfully urged upon the *Markert* court. *See* Brief for Respondent at 14, Markert v. Johnston, 367 So. 2d 1003 (1978).

105. 362 So. 2d 1337 (Fla. 1978).

specifically it was receding from the *Surette*[106] holding. Section 230.23(9)(d)(2), Florida Statutes,[107] contains a provision substantially identical to the statute in *Surette* and conditions waiver of governmental immunity upon no suggestion at trial of the existence of insurance. Adhering to the precedent of *Surette*,[108] *Sparkman*,[109] and *Godshall*,[110] the Fourth District Court of Appeal concluded the statute was unconstitutional. In its reversal, the supreme court distinguished the *Sparkman* statute since it was "part of an enactment, under the Legislature's police power, to meet a public health crisis in Florida. The prohibition of insurance references at trial, although undoubtedly designed to reduce the crisis, was clearly not part of any substantive right."[111] Furthermore, the statute at issue in *Price* waives sovereign immunity for school boards. This is specifically within the constitutional power of the legislature.[112] The prohibition of the statute "sets the bounds of the substantive right to sue a political subdivision of the State."[113] Thus, the legislature's constitutional authority to waive sovereign immunity and its implicit power to condition the waiver "saved" the statute by injecting substantive rights.[114]

Although not involving insurance companies, *Avila South Condominium Association, Inc. v. Kappa Corp.*,[115] also sheds light on the court's views of substance and procedure. The court held that the legislative attempt to confer standing on a condominium association to bring a class action on behalf of its members was an impermissible violation of article V, section 2(a). Citing Justice Adkin's standard for

106. 281 So. 2d 481 (Fla. 1973).

107. FLA. STAT. § 230.23(9)(2) (1979).

108. 281 So. 2d 481.

109. 335 So. 2d 802.

110. Godshall v. Unigard Ins. Co., 281 So. 2d 499 (Fla. 1973).

111. *Price*, 362 So. 2d at 1339.

112. FLA. CONST. art. X, § 13 authorizes the legislature to enact provisions for bringing suit against the state.

113. *Price*, 362 So. 2d at 1339.

114. The court "excused" the incompatible *Surette* decision because it didn't appear that this constitutional argument had been advanced before the *Surette* court. On the contrary, this argument was cogently urged upon the court. *See* Reply Brief for Petitioner at 3-5, and Brief for Amicus Curiae at 4, School Bd. of Broward County v. Surette, 281 So. 2d 481 (Fla. 1973).

115. 347 So. 2d 599 (Fla. 1977).

distinguishing between substance and procedure,[116] the court concluded that "[e]ssentially the statutory sections seek to define the proper parties in suits litigating substantive rights. Clearly this has to do with 'the machinery of the judicial process as opposed to the product thereof.' "[117]

These decisions indicate the court continues to adhere to "strict" substantive-procedural definitions. The fact that a rule of procedure may reflect prevailing public policy does not enable the legislature to invade the court's rulemaking authority.[118] The court has specifically stated that joinder is truly a procedural matter,[119] that references at trial to insurance coverage is clearly not part of any substantive right,[120] and that the determination of proper parties in suits litigating substantive rights is a procedural matter.[121]

The New Statute - Section 627.7262

The new section was "substantially reworded to permit insurers to insert non-joinder clauses in their contracts."[122] Subsection (1) states, in essence, that a plaintiff may not sue a liability insurer until a judgment first has been obtained against the insured for a cause of action covered by the policy. Subsection (2) provides that no person shall be considered a third party beneficiary under a liability insurance policy until a judgment first has been obtained against the insured for a cause of action covered by the policy. Subsection (3) "affirmatively" grants to insurers the "substantive" right to include provisions in policies which preclude a noninsured person from filing an action against the insurer until a judgment first has been obtained against the insured for a cause

116. *See supra* text accompanying note 72.

117. 347 So.. 2d at 608. Observing that "the peculiar features of condominium development, ownership, and operation indicate the wisdom of providing a procedural vehicle for settlement of disputes affecting condominium owners,. . ." the court adopted the substance of the stricken statute as Rule 1.220 of the Florida Rules of Civil Procedure. *Id.*

118. *See Markert,* 367 So. 2d at 1005, n.8.

119. *See supra* text accompanying note 104.

120. *See supra* text accompanying note 111.

121. *See supra* text accompanying note 117.

122. STAFF REPORT, *supra* note 8, at 92.

of action which is covered by the policy.[123]

Subsections (1) and (2) are in direct opposition to *Shingleton* principles. The *Shingleton* court viewed the injured party's cause of action against the insurer as vesting in or accruing at the same time the party becomes entitled to sue the insured.[124] Thus, initial joinder was permissible. Subsection (2) is an attempt to abrogate the third party beneficiary principles first articulated in *Shingleton.* As previously discussed,[125] *Shingleton* and *Beta Eta* established that liability insurance is secured with the intent to benefit injured third parties. Based on this doctrine, joinder of liability insurers was permissible.

At first blush, subsection (3) appears to receive support from *Shingleton.* The *Shingleton* court noted that the joinder rule "raises the presumption that unless the Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert 'no joinder' clauses in liability policies there is no basis in law for insurers to assume they have such contractual right. . . ."[126] However, much of the opinion indicates that the legislature cannot constitutionally grant such right to the insurance companies. In striking these no joinder clauses, the court relied upon the Flor-

123. By use of the terminology "for a cause of action which is covered by such policy," the statute should have no effect on an injured person's right to bring a direct action against the insurer for recovery of judgment in excess of policy limits, based on alleged fraud or bad faith of insurer in conduct or handling of suit. *See, e.g.,* Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971); Boston Old Colony Ins. Co. v. Gutierrez, 388 So. 2d 54 (Fla. 1980), *cert. denied,* 450 U.S. 922 (1981); Travelers Ins. Co. v. Perez, 384 So. 2d 971 (Fla. 3d Dist. Ct. App. 1980).

124. *Shingleton,* 223 So. 2d at 716. *Accord* Travelers Ins. Co. v. Perez, 384 So. 2d 971, 973 (Fla. 3d Dist. Ct. App. 1980). *But cf.* Davis v. Williams 239 So. 2d 593, 595 (Fla. 1st Dist. Ct. App. 1970) and Clemons v. Flagler Hosp., Inc., 385 So. 2d 1134, 1135-36 (Fla. 5th Dist. Ct. App. 1980)(for statute of limitations purposes, the injured party's cause of action against the insurer does not accrue until entry of judgment against the tortfeasor).

125. *See supra* notes 19-20 and accompanying text.

126. *Shingleton,* 223 So. 2d at 718-19 (Fla. 1969). *But see* J. Drew's dissenting opinion at page 722 ("The majority opinion, in relying solely upon Rule 1.210. . . and our rule-making power under the Constitution for the conclusion there reached necessarily holds that the Legislature is wholly devoid of power to enact laws prohibiting joinder of insurance companies as parties defendant under the circumstances presented in this case.").

ida Constitution's guarantee of access to the courts.[127] Furthermore, in discussing the procedural effects of these clauses, whereby a plaintiff would have to first recover a judgment against the tortfeasor and then file another action against the insurance company to enforce the judgment, the court stated:

> The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to *due process* that it can rarely be curtailed or restricted by private contract between potential defendants.
>
> . . . It is an anomaly in the law and discriminatory for parties to a contract to attempt to deny nonconsenting members of the public a full, complete, adequate remedy at law which is *constitutionally* guaranteed all citizens.
>
> . . . [I]t seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer.[128]

The constitutional overtones are clear. If due process is violated by the insertion of nonjoinder clauses in insurance policies, the fact that the legislature grants the power to do so does not eliminate the violation. In other words, the legislature has no more authority to violate due process than have insurance companies.[129]

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127. *Id.* at 718.("The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties.").

128. *Shingleton,* 223 So. 2d at 717-19 (emphasis added).

129. If a law is passed by unanimous legislature, clamoured for by the general voice of the public, and a cause is before [a judge] on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believe it to be against the constitution, he must so declare it, — or there is no judge.

Brief for Respondent at 5, O'Quinn v. Thompson, 367 So. 2d 1003(Fla. 1978)(consolidated case in *Markert*)(quoting address of Attorney General Rufus Choate, given before the Constitutional Convention of 1853).

Conclusion

Most likely the court will scrutinize the new statute to determine whether it is substantive or procedural. Although the word "nonjoinder" has been excluded from the *text* of the statute,[130] the effect of the new statute is identical to that of the old statute: to prohibit initial joinder of the insurer by making a judgment against the insured a condition precedent to maintenance of a cause of action against the insurer. As such, the legislature has again attempted to prescribe the timing of joinder. The supreme court has clearly held that any such attempt is an unconstitutional usurpation by the legislature of the judicial function. The new statute, like the old, will not withstand judicial scrutiny on this point.

Liability insurers control the litigation, choose the attorneys, defend the case, and have a direct financial interest in the outcome. The Florida judiciary has recognized that realism dictates continued acknowledgement of liability insurers as real parties in interest in actions to determine the insured's liability. Keeping this reality in mind, the court should directly address the substantive-procedural issue and make a definitive statement. Since *Shingleton,* the court has not expressed a clear policy, and in fact has gone to great lengths to avoid the issue. Should the court determine the new statute substantive rather than procedural, the due process issues expressed in *Shingleton* surely deserve further attention — much more than the court has been willing to give.

Ilene D. Napp

130. The statute is still entitled *"Nonjoinder of Insurers".* FLA. CONST. art. III, § 6 requires the text of a statute to come within the scope of its title.