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DISCLOSURE OF INSURANCE POLICY LIMITS

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DISCLOSURE of defendant's insurance policy limits is today a highly controversial subject in the field of personal injury litigation. The liberal view, supported by the "plaintiff attorneys," advances the theory that knowledge of the defendant's insurance policy limits will accelerate the disposition of suits on a more realistic basis. The conservative view, supported by the "defendant attorneys," maintains that knowledge of the tort-feasor's financial worth, usually determined by the limits of his insurance policy, is irrelevant, immaterial and not germane to the issues in dispute.

This conflict of views and interests among lawyers raises the legal proposition as to whether the plaintiff's attorney can compel the defendant to disclose the limits of his insurance policy; whether he can employ the tools of discovery available under the rules of civil procedure of the state and federal courts to elicit this information (1) at a deposition hearing, (2) by written interrogatories or (3) by order of court to produce the liability policy for examination at a pre-trial conference.

A survey of the decisions in state and federal cases in the eight states (New Jersey, Pennsylvania, Minnesota, Tennessee, Michigan, California, New York and Kentucky) in which this issue has been decided evidences conflict. The first three states hold that such disclosures may not be compelled, the last four states reach the opposite conclusion, and two federal cases from Tennessee are not in accord.

There are eleven cases in point: with two each from Tennessee, California and New York. Of the eleven cases, four concern discovery, three involve pre-trial examination, two pertain to interrogatories, and two relate to orders for the perpetuation of testimony. These cases range in time from 1931 to 1955.

The Circuit Court of New Jersey in 1931 in *Goheen v. Goheen*,[1] a case concerning interrogatories, declared: "The interrogatories propounded are not material to the issue and are not relevant and compe-

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[1] 96 N.J. Misc. 507, 154 Atl. 393 (1931).

tent evidence for the plaintiffs. Therefore, the motion to strike out the interrogatories is granted."

The District Court of the United States for the Eastern District of Pennsylvania in 1952 in *McClure v. Boeger*,[2] a case dealing with discovery under Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., ruled:

> . . . Whatever advantages the plaintiff might gain are not advantages which have anything to do with his presentation of his case at trial and do not lead to disclosure of the kind of information which is the objective of discovery procedure. . . . [T]o grant this motion would be to unreasonably extend that procedure beyond its normal scope and would not be justified.

The Supreme Court of Minnesota in 1955 in *Jeppesen v. Swanson*,[3] a case involving discovery procedure, stated: "Our decision is intended to hold only that, where the information is sought for the sole purpose of evaluating a case for the purpose of determining whether it would be advisable to settle, it is not discoverable."

The District Court of the United States for the Eastern District of Tennessee in 1955 in *McNelley v. Perry*,[4] a case pertaining to interrogatories under Rule 33 of the Federal Rules of Civil Procedure, declared:

> As a general rule, the purpose of seeking information from an adversary, or a witness, is two-fold: (1) To use it in the trial, or (2) to use it as a lead to information for use in the trial. It is not shown in this case that the information sought about insurance would be relevant to either purpose.

Thus, under the authority of the preceding four cases from state courts in New Jersey and Minnesota and federal courts in Pennsylvania and Tennessee, to compel the disclosure of the defendant's policy limits would be improper because the evidence adduced by such disclosure would be immaterial, irrelevant, incompetent and beyond the objective of, and without the scope of, discovery machinery.

The District Court of the United States for the Eastern District of Tennessee in 1951 in *Brackett v. Woodall Food Products, Inc.*,[5] a case relating to discovery under Rule 34 of the Federal Rules of Civil Procedure, stated: "The Court is of the opinion, however, that the plaintiffs should have an opportunity to examine the liability insurance policy of their alleged tort-feasor on the broad viewpoint

[2] 105 F. Supp. 612, 613 (1952).

[3] 243 Minn. 547, 68 N.W. 2d 649, 658 (1955).

[4] 18 F.R.D. 360, 361 (1955).

[5] 12 F.R.D. 4, 5 (1951).

that it is relevant to the subject matter of the litigation, and within the purview of Rules 34 and 26(b) of the Federal Rules of Civil Procedure, even though such policy would not be admissible in evidence. . . ." The same federal court, but speaking through a different judge, four years later in the *McNelley* case attempted to reconcile the apparent conflict in the two decisions thus: "If the defendant is insolvent so that pro-ration of insurance may become an issue among various claimants, the question of insurance would become material. This was apparently the situation in the case of *Brackett v. Woodall Food Products, Inc.*"

The Supreme Court of Michigan in 1933 in *Layton v. Cregan and Mallory Company, Inc.*,[6] a case concerning discovery procedure declared that: "It is first contended by the defendant that the plaintiff is not entitled to a discovery because it calls for matters entirely foreign and irrelevant to the issue. We do not think so. The ownership of the car was put in issue by the pleadings. If the insurance policy shows ownership, it is admissible in evidence for that purpose." The holding in this case can be distinguished from the other cases compelling disclosure by the fact that if policy limits were disclosed, such disclosure was only ancillary to the issue, not of financial responsibility, but of the disputed ownership of the automobile.

The Supreme Court of California in 1937 in *Demaree v. The Superior Court in and for Ventura County*,[7] a case dealing with an order for the perpetuation of testimony, stated that: "We think it must be conceded that the provisions of the policy of insurance are germane to petitioners' cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy."

The Supreme Court of California in 1951 in *Superior Insurance Company v. The Superior Court in and for Los Angeles County*,[8] a case also involving an order for the perpetuation of testimony, declared:

> Mandate was granted to compel the trial court to issue the subpoena and order the witness to testify with reference to the policy . . . here it is the policy limits that are sought. . . . The holding is that the policy itself must be produced

[6] 263 Mich. 30, 32, 248 N.W. 539 (1933).

[7] 10 Cal. 2d 99, 73 P. 2d 605, 607 (1937).

[8] 37 Cal. 2d 749, 753, 235 P. 2d 833, 835 (1951).

and that the witness may not be permitted to confine his testimony to the fact that insurance exists.

The court ruled that the policy was subject to inspection saying:

> Petitioners here urge, however, that the sanctity of a private contract should not be subjected at this time . . . to inspection and review merely because someone alleges that some day he expects to sue another to enforce payment of a judgment expected to some day be obtained. A sufficient answer to such a contention is found in the fact that an automobile liability policy evidences a contractual relation created by statute which inures to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person has been specifically named in the policy, i.e., a contractual relation is created between the insurer and the third parties. The provisions of such a policy are not, therefore, a matter of sole knowledge of the named assured and the insurance carrier to the exclusion of the injured person; the very pendency of an action by the injured person brought in good faith against the named insured person gives the former a discoverable interest in the policy. . . .
>
> Petitioners further argument that knowledge of the policy limits is sought in order to provide an undue and oppressive advantage in negotiations for settlement of the personal injury suit also appears to be without merit. How the knowledge by the plaintiff in that action of facts which are known to the defendants therein, concerning the policy in which the plaintiff will have an enforceable interest if she recovers, could give her an undue and oppressive advantage in negotiations for a settlement, does not appear. And whether such knowledge by the plaintiff would tend to benefit plaintiff or defendant might depend to a material extent upon the relationship between seriousness of the injuries which resulted from the accident and the amount of insurance coverage provided by the policy; conceivably, knowledge of low policy limits might constitute a benefit to defendants by tending to discourage a seriously injured plaintiff from holding out for a settlement commensurate with the extent of the injuries.[9]

It is to be noted, however, that the state of California permits a direct suit against the insurer or the insured.

The Appellate Division of the Supreme Court of New York in 1946 in *Martyn v. Braun*,[10] a case pertaining to pre-trial examination, stated in the syllabus that: "In action for injuries plaintiff's motion for examination before trial of defendant on matter of liability insurance should have been allowed."

The District Court of the United States for the Southern District of New York in 1948 in *Orgel v. McCurdy*,[11] a case relating to pre-trial examination under Rule 26 of the Federal Rules of Civil Procedure, declared:

[9] Ibid., at 753, 754 and 835, 836.

[10] 59 N.Y.S. 2d 588 (1946).

[11] 8 F.R.D. 585 (1948).

This is a motion by plaintiff for an order requiring defendant Garford Trucking, Inc., by its office manager to testify on examination before trial on all issues relating to any liability insurance carried by said defendant upon the motor vehicle of defendant McCurdy at the time and place of the accident which is the basis of the cause of action. Defendant objects to examination on these matters on the ground that the "injection of this issue in the trial of this action will seriously prejudice the defendant Garford in its defense and would have no probative value on the contested issue of operation and control of the vehicle involved in the accident. . . ." Garford on the issue of liability insurance, is attempting to spell out operation and control from the fact of insurance liability coverage, when, as a matter of fact, whether the defendant Garford had liability insurance coverage on the vehicle in question at the time of the accident would depend on whether the said motor vehicle was under its operation and control. . . . The motion is granted because the testimony plaintiff seeks may be generally relevant to the issues in the case.

The Court of Appeals of Kentucky in 1954, in *Maddox v. Grauman*, a case concerning pre-trial examination, stated:[12]

The only issue raised in this action is: Must the defendant in an automobile negligence case in a pre-trial deposition for the purpose of discovery state whether or not he is insured and, if so, disclose the name of his insurance company and the limits of liability provided by his policy? . . . An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but it is an agreement that embraces those whose person or property may be injured by the negligent act of the insured. We conclude the answers to the propounded questions are relevant to the subject matter of the litigation. . . .

Thus, under the authority of the preceding seven cases from state courts in Michigan, California, New York and Kentucky and federal courts in Tennessee and New York to compel the disclosure of the defendant's insurance coverage would be proper because the evidence elicited by such disclosure would be relevant, within the purview of discovery and pre-trial examination.

It is noteworthy that the latest cases on the subject, both decided in 1955 (one by the Supreme Court of Minnesota and the other by a federal court in Tennessee) hold that the plaintiff in a pending law suit may not compel the disclosure of the policy limits of the defendant's insurance.

This legal proposition has not been decided in Illinois. It is difficult to predict how Illinois courts will rule. It is the writer's opinion, based on the pattern of legal thinking evidenced by decisions (1) on the subject of disclosure of insurance coverage during a trial, and (2) on the type of questions permitted to be asked by either attorney on the

[12] 205 Ky. 422, 265 S.W. 2d 939, 940, 942 (1954).

subject of insurance in the voir dire examination of jurors, that our courts will not permit the disclosure of the defendant's insurance policy limits unless the Civil Practice Act is liberalized further or the Insurance Code is modified.

A recent development which may have a far reaching effect was the introduction in the State Senate on February 26, 1957 of Bill No. 187 for the enactment of an addition to the Illinois Insurance Code. It reads:

> SECTION 1. Section 388*a* is added to the "Illinois Insurance Code," approved June 29, 1937, as amended, the added Section to read as follows:
>
> SECTION 388*a*. Any company issuing a policy of insurance against liability or indemnity for loss or damage to any person other than the insured, or to the property of any person other than the insured, for which any insured is liable, may be made a party defendant, as a co-party of the insured, in any suit involving injury, loss or damage covered by the policy.

If Bill No. 187 becomes a law at this session of the Illinois Legislature, its ultimate effect may very well be to compel more liberal ruling by our courts on this subject.

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