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Discovery of Liability Insurance under New Rules

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A question now dividing both federal courts and state courts which have adopted the Federal Rules of Civil Procedure is whether in a tort action the plaintiff can compel the defendant to disclose the limits of his liability insurance through pre-trial discovery. Usually the question develops in an action arising from an automobile collision and involves automobile liability insurance. The problem has developed around Federal Rule 33, which provides for written interrogatories between parties, and Federal Rule 34, which provides for examination of documents, as limited by Federal Rule 26(b) which delineates the scope of both Rules 33 and 34.[1] In particular the controversy centers around the interpretation of the last sentence in Rule 26(b) which was added to the Federal Rules in 1946 and which has been incorporated into the West Virginia Rules.

> "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought is relevant to the subject matter involved in the pending action and appears reasonably calculated, and intended in good faith, to lead to the discovery of evidence which will be admissible at the trial."

Courts permitting discovery of the limits of liability insurance have reasoned that the matter is relevant to the subject matter within the meaning of the rules, while those courts denying discovery conclude it is not relevant to the subject matter within the meaning of the rule.

Though the courts and legal writers have indicated majority holdings on the issue one way or the other, in accordance with the decisions as of that date, or the position they were taking, at this time the numerical division of the courts in deciding on the question is so slight that there is no apparent majority holding. In any event, an attempt at a statistical evaluation might prove misleading in view of the different circumstances under which the decisions were reached. Still a compilation and analysis of case decisions on point and a discarding of those proving inapplicable may provide some indication of the probable course the West Virginia court will follow. It is necessary to approach the prior decisions in an inductive manner because both the proponents and the opponents of allowing discovery in this area have been

[1] The same numbering is used in the West Virginia Rules.

guilty of misinterpreting and incorporating prior court decisions which did not conform with the immediate circumstances.

The California cases and in particular the case of *Superior Ins. Co. v. Superior Court*,[2] relied on by those who would permit discovery of the limits of liability insurance provide an object example of cases continually cited for this proposition, which are of little merit in courts following the Federal Rules of Civil Procedure. The *Superior* case and a prior California case,[3] both arose from a similar factual situation. The plaintiff brought an action for injuries resulting through an automobile collision. While that action was pending, he sought to discover the limits of the defendant's liability insurance under the California perpetuation of evidence statute, on the basis that he expected to be a party to an action against the defendant and the insurer on completion of the present action. The court in both cases in allowing discovery as to the limits of the defendant's liability insurance relied on a statutory provision governing insurance contracts to determine that an automobile liability policy evidences a contractual relationship inuring to the benefit of persons negligently injured by the insured. The court in the *Superior* case dismissed the defendant's contention that knowledge of liability limits would give the plaintiff a tactical advantage in negotiations for settlement. The dissent argued that the plaintiff had no discoverable claim against the insurer until determination of liability against the defendant, that the facts sought were not germane to any issue, that the sole and obvious purpose was to obtain information which would aid the plaintiff in negotiation for a settlement. Once the court decided that the plaintiff could use the perpetuation of evidence statute for discovery, no one would argue that the matter of the limits of liability insurance would not be relevant in a second proceeding joining the insured and the insurer after the liability of the insured had been determined. The question is whether the court was correct in deciding on the basis of the perpetuation of evidence statute, yet few adversaries or advocates in commenting upon these decisions refer to this underlying premise. California statutes of civil procedure at this time, though comparable to the Federal Rules of Civil Procedure, were not patterned after them. Had they been, an intervening federal decision[4] might have led the majority in the *Superior* case to develop

[2] 37 Cal.2d 749, 235 P.2d 833 (1951).
[3] Demaree v. Superior Court, 10 Cal.2d 99, 73 P.2d 605 (1937).
[4] Petition of Ferkauf, 3 F.R.D. 89 (S.D.N.Y. 1943).

another foundation on which to allow discovery. In *Petition of Ferkauf*[5] the federal court held that Rule 27, FED. R. CIV. P., was derived from old equity practice designed for the sole purpose of perpetuating evidence and was not to be used as a discovery statute. The *Ferkauf* decision should be applied in West Virginia as the principal provisions of Rule 27 existed even prior to the promulgation of the new rules of civil procedure under the West Virginia Code[6] as derived from equity. In 1958 California revised its procedure statutes, patterning them after the Federal Rules of Civil Procedure. In *Laddon v. Superior Court*[7] the question came back under these new rules to the California court in an action for malpractice. The court, while it acknowledged the weight of authority was to the contrary, felt bound by the two prior state decisions[8] but it discarded the premise on which they were based, stating that the plaintiff is no longer required to institute ancillary proceedings as a means of exercising discoverable interest in the defendant's policy.[9]

Was there really something unique about California's statute relating to insurance policies? Other jurisdictions, when confronted with the *Superior* case, distinguished decisions prohibiting the use of discovery on the basis that the California insurance statute was unique.[10] But in *Johanek v. Aberle*,[11] a federal court concluded that the policy requirements of the California statute exact nothing more than the normal provisions of the standard automobile liability policy.

Just as the California cases should be viewed with skepticism in states operating under rules similar to the Federal Rules of Civil Procedure, there are decisions denying discovery which are equally

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[5] *Ibid.*

[6] W. VA. CODE ch. 57, art. 4, § 7 (Michie 1961).

[7] 167 Cal. App. 2d 391, 334 P.2d 638 (1959).

[8] Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833 (1951); Demarre v. Superior Court, 10 Cal.2d 99, 73 P.2d 605 (1937).

[9] *Accord*, Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (1960), automobile liability insurance.

[10] State *ex rel.* Allen v. Second District Court, 69 Nev. 196, 245 P.2d 999 (1952). The court operating under similar code procedure refused to allow the plaintiff the right to obtain information regarding automobile liability insurance in a proceeding to perpetuate testimony. Peters v. Webb, 316 P.2d 170 (Okla. 1957). In this case, decided under similar code procedure, the court likewise distinguished its decision on the basis of the California insurance statute in disallowing discovery through the use of a perpetuation of evidence statute in a malpractice action.

[11] 27 F.R.D. 272 (D. Mont. 1961).

inappropriate as authority. In *Goheen v. Goheen,*[12] probably the earliest decision on point, the court denied the use of interrogatories to discover limits of automobile liability insurance because discovery at that time was limited to matters that would constitute relevant and competent evidence at the trial. This was prior to the 1946 amendment to the federal rules already considered. Similarly, *Bean v. Best,*[13] an action against a sheriff for false arrest, is equally inappropriate as South Dakota had adopted the Federal Rules of Civil Procedure prior to this amendment and it was not subsequently added to their rules. *McKee v. Walker,*[14] a malpractice action, and *Verastro v. Grecco,*[15] arising from an auto collision, are also without import as they were decided under procedural rules much more narrow than the federal rules.

No court denies that discovery of insurance is proper where it goes to the merits of the matter in litigation. Therefore, in *Layton v. Cregan & Mallory Co.,*[16] where the plaintiff brought an action against the defendant claiming his injuries resulted through the negligence of a driver employed by the defendant and the defendant denied ownership of the car, the court required the defendant to produce the insurance policy. The court based its decision on the circumstance that the ownership of the car was put in issue by the pleadings. In reply to the defendant's argument that the matter of insurance if presented before the jury would be prejudicial, the court stated that the matter of insurance is only prejudicial where not relevant and injected to prejudice the jury; the court will not allow irrelevant portions of the policy to be introduced. No subsequent decision has questioned the propriety of this holding on these facts, but one seemingly misconstrued the holding as authority for pre-trial discovery of liability limits.[17]

The question of discovery as to the extent of liability insurance first came to the courts operating under rules parallel to the Federal Rules of Civil Procedure, as they now exist in *Orgel v. McCurdy.*[18] Here, as in the *Layton* case, discovery was sought on the basis of a contested issue as to operation and control of the motor vehicle; however, the court went further than required and decided the

[12] 9 N.J. Misc. 507, 154 Atl. 393 (1931).
[13] 76 S.D. 462, 80 N.W.2d 565 (1957).
[14] 21 Conn. Supp. 168, 149 A.2d 704 (1958).
[15] 21 Conn. Supp. 165, 149 A.2d 703 (1958).
[16] 263 Mich. 30, 248 N.W. 539 (1933).
[17] Laddon v. Superior Court, 167 Cal. App. 2d 391, 334 P.2d 638 (1959).
[18] 8 F.R.D. 585 (S.D. N.Y. 1948).

question on the ground that it was relevant within the broad meaning of relevancy as used in Rule 26(b). Here was formed the nucleus that has split both the federal and the state courts in applying the discovery rules—an interpretation of the scope of relevancy in light of the purposes of the discovery.

In *Brackett v. Woodall Food Products, Inc.*,[19] the plaintiff, seemingly reluctant to rely on the sweeping decision of the *Orgel* case, sought to examine the defendant's automobile liability insurance contending that an examination was justified because punitive damages were sought and therefore inquiry into the defendant's financial condition was proper. The court dismissed this contention, stating that insurance is not an asset of the estate of the insured; rather it is purchased for protection against both compensatory and punitive damages. It then relied on the nationwide trend of state legislation through enactment of safety responsibility laws as manifesting an intent that automobile liability insurance become a matter of public record.

The following year a federal district court decision[20] rejected the holding of the *Brackett* case and denied the plaintiff's motion to examine the defendant's automobile liability insurance. The court reasoned that every argument that could be made in favor of disclosure could be made in any civil case to require the defendant to furnish the plaintiff with full information as to his personal wealth. The court admitted that the fact that the information sought could not be introduced at trial did not necessarily disallow discovery, but insisted that any advantages which the plaintiff might gain had nothing to do with the presentation of his case. With this decision the rift was formed. The difference in interpreting the meaning of relevancy within the purposes of discovery procedure was the wedge dividing the courts. Decisions which followed merely refined the reasoning of prior decisions or attempted to advance variations or new arguments in support of their determination as to relevancy.

Those courts favoring the use of discovery based their reasoning on a loose construction of the term relevant in advancing the following arguments. The insurance is relevant after the plaintiff prevails and should therefore logically be relevant during pre-trial

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[19] 12 F.R.D. 4 (E.D. Tenn. 1951).
[20] McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952).

investigation.[21] State safety responsibility statutes confer an interest in the defendant's liability insurance in every member of the public negligently injured by the insured, thereby distinguishing insurance from other personal assets.[22] Inquiry as to insurance is related to the merits of the matter in litigation since it may apprise the plaintiff of rights otherwise unknown arising out of the accident.[23] Discovery would encourage pre-trial settlements, thereby advancing the modern judicial policy of prompt, economic and just settlements of civil suits and relieve crowded court dockets.[24] The insurer not only defends the suit but also makes such investigation, negotiation and settlement as it deems expedient; this active role of the insurer is basis for allowing the plaintiff to discover his financial interest in the action.[25]

Those courts disallowing discovery of insurance reply to these arguments with equal logic. The discovery rules should be liberally construed, but the purpose of discovery information is for use at the trial or to lead to information for use at the trial; information regarding insurance is not relevant to either of these purposes.[26] A dissent of the other faction best refuted the argument that safety responsibility laws evidence a public policy conferring upon the plaintiff an interest in the defendant's automobile liability insurance. Safety responsibility laws do not require any individual motorist to obtain automobile liability insurance. They do not effect the motorist until he has become involved in an accident. Then the relationship created by such a statute is between the individual and the state and does not run to a third-party.[27] If after the plaintiff obtains a judgment against the insured the judgment execution is returned unsatisfied, the amount of insurance may then be discovered.[28] Every reason that can be advanced to the effect that such disclosure will aid in settlement can be rebutted with equal logic; disclosure would render settlement more difficult and increase the probability of trial.[29] Discovery rules are designed to secure the just, speedy and inexpensive determination of an action,

[21] Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); Maddox v. Grauman, 265, S.W.2d 939 (Ky. 1954).
[22] People *ex rel.* Terry v. Fischer, 12 Ill.2d 231, 145 N.E.2d 588 (1957).
[23] *Ibid.*
[24] *Ibid.*
[25] Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961).
[26] McNelly v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955).
[27] Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).
[28] Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955).
[29] Hillman v. Penny, 5 Fed. Rules Serv.2d 26b.31, Case 1 (E.D. Tenn. Jan. 1962).

but that does not mean placing one party in a more strategic position than another.[30] The subject matter is the charge of negligence. The plaintiff's claim must rise or fall on its own merits; the absence or presence of insurance has no probative value. If the plaintiff were allowed to discover the provisions of the defendant's liability coverage, it would follow that he should be permitted the same latitude as to the defendant's other assets. Though disclosure might be conducive to settlement without litigation, such advantage to the court and to the plaintiff does not outweigh the infringement on the rights of the defendant. The fact that the court dockets are congested has no bearing on the fundamental right of the defendant to come into court and to litigate his claim on an equal footing with the plaintiff.[31]

Worthy of note is the division in Illinois. After the state court[32] had determined discovery might be used to determine the amount of defendant's liability insurance, two federal courts in that jurisdiction held that the discovery rules could not be used for that purpose.[33] The federal courts in Tennessee are divided over the question.[34] Contrariwise, a federal court in Kentucky,[35] in the absence of decision on the matter by the appellate court for that circuit, felt bound by the state decision of *Maddox v. Grauman*[36] and permitted discovery of the defendant's liability insurance limits.

Two recent federal court decisions illustrate that the controversy is very much alive and the split very real. *Hill v. Greer*[37] held that the plaintiff in an automobile negligence action could compel the defendant through discovery procedure to reveal the amount of his automobile liability policy. There is some indication though that the court was influenced by a state statute requiring disclosure of policy limits of liability insurance. This is in sharp contrast to the *Goheen v. Goheen*[38] decision in that jurisdiction

[30] Ruark v. Smith, 51 Del. 420, 147 A.2d 514 (1959); Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

[31] Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958). See generally, Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958).

[32] People *ex rel.* Terry v. Fischer, 12 Ill. 2d. 231, 145 N.E.2d 588 (1957).

[33] Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958).

[34] Hillman v. Penny, 5 Fed. Rules Serv. 2d 26b.31, Case 1 (E.D. Tenn. Jan. 1962); McNelly v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (E.D. Tenn. 1951).

[35] Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959).

[36] 265 S.W.2d 939 (Ky. 1954).

[37] United States District Court of New Jersey, December 1961, opinion as yet unpublished.

[38] 9 N.J. Misc. 507, 154 Atl. 393 (1931).

which denied discovery on the basis that the information could not be introduced at the trial. *Hillman v. Penny*,[39] the latest decision, held that, while discovery rules are to be construed liberally, a rule of reasonableness should be applied in arriving at an interpretation and that the terms of an automobile liability policy cannot reasonably be said to be relevant to the subject matter in litigation.

In summary, decisions in the jurisdictions of California, Nevada, Oklahoma, Connecticut, and New Jersey should not be considered precedent in jurisdictions following rules like the present Federal Rules of Civil Procedure. The decision of *Layton v. Cregan Mallory Co.*[40] establishes that discovery procedure may be used where the absence or possession of insurance becomes relevant through issues raised by the pleadings. There is a division on the matter between the state and federal courts in Illinois, and between the federal courts in Tennessee. The following judisdictions permit the use of discovery to determine liability insurance coverage: Colorado, Kentucky, Montana and New York. The following jurisdictions disallow the use of discovery to determine the extent of liability insurance; Arizona, Delaware, Florida, Minnesota, Pennsylvania, South Dakota.

There is no weight of authority on the matter. The West Virginia court could conceivably follow the logic and reasoning advanced by either side when the question is presented. However, some anticipation may be afforded as to the course the West Virginia court will follow through the consideration that allowance of discovery to determine liability insurance limits is definitely a liberal approach to the rules and West Virginia has been a common law pleading state for a long time.

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[39] 5 Fed. Rules Serv. 2d 26b.31, Case 1 (E.D. Tenn. Jan. 1962).
[40] 263 Mich. 30, 248 N.W. 539 (1933).