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Pre-Trial Discovery of Liability Insurance Policy Limits

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PRE-TRIAL DISCOVERY OF LIABILITY INSURANCE POLICY LIMITS

I. INTRODUCTION

An unresolved procedural question, yet to be passed upon by the Supreme Court of North Dakota, arises in a situation which can best be elucidated by a hypothetical case. The plaintiff files an action seeking compensation for personal injuries sustained in an automobile collision allegedly caused by the defendant's negligence. In taking a discovery deposition of the defendant the plaintiff propounds the question—Did you have, on the automobile involved herein, a liability insurance policy in force and effect at the time of the accident and, if so, what are the limits of that policy, as well as the name and address of the company? The defendant objects to the question as not being reasonably calculated to lead to the discovery of evidence admissible at trial.[1] Assuming this to be a federal court, or a state court which has adopted the Federal Rules of Civil Procedure, the court must decide whether, pursuant to Rule 26(b) governing scope of discovery depositions, the objection should be sustained.

II. SCOPE OF EXAMINATION

Rule 26(b) of the Federal Rules of Civil Procedure provides:

> "Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible

1. See Bischoff v. Koenig, 100 N.W.2d 159 (N.D. 1959) where mention of insurance before a jury is not allowed and when it occurs the defendant may be granted a mistrial.

> at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[2]

The last sentence of this Rule was added by the 1946 Amendments to make clear that the scope of examination may cover inquiry into matters inadmissible as evidence at the trial.[3]

The tenor of the Rules as set forth in Rule 1 indicates that a liberal construction is required.[4] In the light of this intended construction, as well as the direction provided by the 1946 Amendment, the test of relevancy for taking a deposition is much broader than relevancy at the trial, since the discovery of evidence or any other matter which may help a party in preparing or presenting his case lies within the purview of the discovery rules.[5]

III. NARROWING THE CONTROVERSY

Whether or not discovery questions pertaining to a defendant's liability insurance limits satisfy the "relevancy" test of the Rules, as amended, is a question which has divided both federal and state courts for the past decade. It is settled law that where insurance for some reason would be admissible at trial, discovery is permitted. Thus, before analyzing the cases which account for the split of authority on discovery of policy limits it is necessary to dissociate the cases which should not be considered as authority for either allowing or disallowing disclosure.

In *Layton v. Cregan & Mallory Co.*,[6] where ownership of an automobile was put in issue, the plaintiff was allowed to discover the insurance policy to enable him to ascertain the owner thereunder. The court said, insurance is inadmissible only

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2. Fed. R. Civ. P. 33 provides in part: "Interrogatories may relate to any matters which can be inquired into under Rule 26(b). . ." N.D.R. Civ. P. 26(b) and 33 are identical to the Federal Rules.

3. Amendments to Federal Rules of Civil Procedure, 329 U.S. 839, 854 (1947). For cases which interpreted Rule 26(b) liberally prior to the adoption of the 1946 Amendment, See Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943); Mackerer v. New York Cent. R.R., 1 F.R.D. 408 (E.D.N.Y. 1940).

4. Fed. R. Civ. P. 1 states: "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

5. Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50, 53 (S.D.N.Y. 1951). See also 4 MOORE, FEDERAL PRACTICE § 26.16, at 1067 (2d ed. 1950) where stated:

> "The Rules contemplate that ordinarily the deponent shall answer all questions except those to which he objects on the ground of privilege, and that all other objections shall be saved until the actual trial."

6. 263 Mich. 30, 248 N.W. 530 (1933).

where it is not relevant and injected for the sole reason to prejudice the jury. Thus insurance is admissible when put in issue and consequently discoverable. In a more recent case, *Christie v. Board of Regents of Univ. of Michigan,*[7] production of a liability insurance policy for inspection was ordered on the theory that the policy would possibly be admissible in evidence as tending to establish that a university board of regents had waived its immunity from liability to the extent of the insurer's monetary obligation. The case of *Goheen v. Goheen*[8] was decided prior to the adoption of the 1946 Amendment and hence cannot be considered as authority for refusing discovery. Likewise, the case of *Bean v Best*[9] is inappropriate, as South Dakota had adopted the Rules prior to the 1946 Amendment and had not subsequently incorporated the Amendment into their Rules. The court expressly set this forth as the reason for refusing discovery. Equally inappropriate are state court decisions arising in jurisdictions which have rules narrower or broader in scope than the Federal Rules.[10]

IV. CASE ANALYSIS

The first case concerning disclosure of insurance limits, without regard to insurance being at issue and decided under the Rules as they now exist, was *Orgel v. McCurdy.*[11] The court in overruling the defendant's objection stated that information sought by an examination of the policy need only be generally relevant to the subject matter of the pending action.[12] This case has stood for a liberal construction of the Rules in determining the scope of discovery.

In *Brackett v. Woodall Food Products,*[13] the plaintiff sought to discover, in an interrogatory, the defendant's insurance policy for the reason that punitive damages were sought and hence inquiry into the defendant's assets would be permissi-

7. 364 Mich. 202, 111 N.W.2d 30 (1961).
8. 9 N.J. Misc. 507, 154 Atl. 393 (1931).
9. 76 S.D. 462, 80 N.W.2d 565 (1957).
10. See Iowa R. Civ. P. 141(a) (Prohibits discovery of policy limits); N.J.R. Civ. P. 4:16-2 (Requires disclosure of policy limits). See also Verrastro v. Grecco, 21 Conn. Supp. 165, 149 A.2d 703 (1958).
11. 8 F.R.D. 585 (S.D.N.Y. 1948).
12. **Id.** at 586 "Under Federal Rule 26(b) it is not necessary to establish admissibility of testimony; it is sufficient that the inquiry be made as to matters generally bearing on the issue and relevant thereto."
13. 12 F.R.D. 4 (E.D. Tenn. 1951).

ble. The court held that insurance was not an asset of the insured, but rather was purchased for the sole purpose of protection against claimants of the insured. Nevertheless, on the broad viewpoint that insurance limits are relevant to the subject matter of the litigation and within the purview of Rules 26(b) and 34, it can be discovered. The modern trend of financial responsibility legislation in the direction of requiring motor carriers to maintain liability insurance[14] and operators of motor vehicles to establish proof of financial responsibility[15] greatly influenced the *Brackett* decision. The court said:

> "From the tenor and purpose of such legislation it is obvious that such insurance policies are definitely relevant to the subject matter of pending actions growing out of accidents covered by such policies, especially in view of the fact that this legislation apparently would require the defendant to disclose to the state authority the information concerning the insurance which plaintiffs seek, and this would be a matter of public record."[16]

A "gathering storm" of opposition to discovery of policy limits arose after the *Brackett* decision. This is evidenced by *McClure v. Boeger*,[17] wherein discovery was disallowed. The court conceded that in a case where a passenger is suing for medical pay it is possible to discover the policy as the plaintiff's claim arises out of contract and he need not prove liability to recover. But in the absence of a medical pay provision discovery of insurance limits should not be allowed until judgment is secured.

> "Of course, the fact that the information would not be relevant and that the fact of liability insurance could not be introduced at the trial does not necessarily forbid discovery, but 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."[18]

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14. Federal Motor Carriers Act, 68 Stat. 528, 49 U.S.C. 315; Tenn. Code § 5501.9 (Williams 1951).
15. Tenn. Code §§ 2715.49-68 (Williams 1951).
16. Brackett v. Woodall Food Products, Inc., **supra** note 13, at 6.
17. 105 F. Supp. 612 (E.D. Penn. 1952).
18. **Id.** at 613.

The lines were now drawn and the courts lined up behind the two irreconcilable holdings, numerically equal in strength.

When the question next came up it was the proponents' turn to score a victory. The Court of Appeals of Kentucky[19] held that the standard automobile liability policy evidences a contract which inures to the benefit of every person injured due to the insured's negligence and is discoverable. The court said the insurance company is in fact one of the real parties in interest—in view of the fact they control the investigation and subsequent litigation from the outset. Furthermore, an insurance contract is no longer a secret, confidential arrangement between the insurance company and the insured but is an agreement that embraces those whose person or property may be injured by the negligent act of the insured. "If the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends?"[20] This court thought it was.

After a decisive majority of Minnesota judges had held discovery of policy limits proper,[21] the Minnesota Supreme Court in *Jeppesen v. Swanson*[22] refused disclosure.

> "It would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit."[23]

McNelley v. Perry[24] followed the *Jeppesen* case refusing discovery on the basis that "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."[25]

The Supreme Court in Illinois[26] determined that insurance was discoverable in light of the intended purpose of the Rules and the financial responsibility legislation which provides that the insurer's obligation becomes absolute after the occurrence of the insured's accident. The court reasoned

19. Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954). See also Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959).
20. Maddox v. Grauman, **supra** note 19, at 942.
21. WRIGHT, MINNESOTA RULES 165 (1954).
22. 243 Minn. 547, 68 N.W.2d 649 (1955).
23. **Id.** at 658.
24. 18 F.R.D. 360 (E.D. Tenn. 1955).
25. **Id.** at 361.

that refusal of discovery would deprive the injured party of knowledge of his rights against the insurer and would permit avoidance of statutory obligations by the insurer. Defendant contended that insurance is like all other assets of the defendant, and if discovery is allowed in respect to insurance then discovery of other assets would follow. The court, in rejecting this argument, pointed out that insurance exists for no other purpose than satisfying the liability it covers and hence can not be categorized with other assets. However, a year later two federal court decisions in Illinois refused discovery of insurance limits on the basis of insurance being an asset of the defendant[27] and not being evidentiary matter to be used at trial.[28]

The Supreme Courts of Colorado[29] and Montana[30] have allowed discovery on the basis of their respective financial responsibility acts,[31] as well as the spirit and purpose of the Rules. The Montana decision states discovery should be allowed *even* if there were no legislative provisions purporting to give an interest in insured's policy to the injured party. In support of this statement the court referred to Volume I of Insurance Policy Annotations,[32] where in provisions of a standard automobile liability insurance policy are set forth as follows:

> "Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured."[33]

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26. People **ex rel.** Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957). See also Laddon v. Superior Court, 167 Cal. App. 2d 391, 334 P.2d 638 (1959) wherein the court relied on California's discovery act which is patterned after the Fed. R. Civ. P. in allowing discovery of limits.
27. Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).
28. Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958).
29. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).
30. Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961).
31. Colo. Rev. Stat. art. 7, § 13-7-23(2) (1953); Mont. Rev. Code ch. 4, § 53-438(f) (1947). Both statutes contain the following provision:
"Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: (1) The liability of the insurance carrier with respect to the insurance required by this act (chapter) shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. . . ."
32. ABA I Insurance Policy Ann. 108 (1941).
33. **Ibid.**

Therefore it was concluded that this provision gives the plaintiff a discoverable interest in the insured's policy as much as does a statutory provision rendering insurer's obligation absolute after an accident has occurred.[34]

The most recent cases indicate that the controversy is nowhere near being a dead issue. Three of these cases have refused discovery,[35] two have allowed it,[36] and a sixth case[37] refused disclosure only because there was little evidence to prove liability of the defendant.

V. CONCLUSION

There is no weight of authority for either refusing or allowing discovery of policy limits but it appears that the weight of reason is on the side of interpreting the Rules as permitting such disclosure. Refusal to allow discovery does little to advance the "just, speedy, and inexpensive determination of every action." Without knowledge of the policy limits there is no possible way the plaintiff can accurately weigh the merits of settling his case or proceeding to trial and incurring additional litigation costs. If the policy limits are low and his damages substantial, then it would be to his advantage to settle for a sum less than his case merits, particularly when the defendant is judgment proof. This disclosure would also afford the defendant some protection where the plaintiff, not knowing the policy limits, proceeds to trial and obtains a judgment in excess of the policy limits. Here, the defendant is burdened with the excess liability whereas if the plaintiff had been apprised of the policy limits he would probably have accepted a settlement figure within them and avoided the resultant hardship on the defendant as well as saving himself the costs of trial. A noted authority on insurance law believes the insurer's refusal to disclose policy limits is unconscionable and that the excess liability should be shouldered by the insurer.[38] For this reason, at least one defense

34. Johanek v. Aberle, **supra** note 25, at 275.
35. Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Langlois v. Allen, 30 F.R.D. 67 (D. Conn. 1962).
36. Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961); Novak v. Good Will Grange No. 127, 28 F.R.D. 394 (D. Conn. 1961).
37. Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Penn. 1962).
38. Appleman, **Circumstances Creating Excess Liability,** ABA Insurance, Negligence and Compensation Law 315 (1960).

attorney has come out strongly in favor of requiring disclosure of policy limits.[39]

There is also merit in the practical utility of disclosure in the way of relieving crowded court calendars by encouraging settlement before trial.

> "In the matter of eliminating or avoiding calendar congestion, the great service of pre-trial discovery . . . procedures lies in the impetus they produce toward voluntary settlement . . . . The reason that the contribution toward settlements is great is simply that the procedures create an atmosphere necessarily conducive to voluntary settlements."[40]

Refusal to allow discovery of policy limits is hardly conducive to settlement.

It is submitted that when the courts of this state are confronted with this question, discovery of insurance policy limits should be allowed. The contention that insurance is not relevant to the issue of liability and cannot lead to evidence admissible at trial is more than adequately answered by those cases which have given the Rules a liberal construction as was intended.[41] Those few cases which have mistakenly categorized insurance with other assets of the defendant are not persuasive.[42]

The statutory provisions which led many courts to believe that the plaintiff had a discoverable interest in the defendant's insurance policy can be found in the North Dakota statutes. The North Dakota Financial Responsibility Laws are essen-

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"A fifth situation is closing the door to settlement negotiations by refusal to disclose the policy limits. It is a known fact that an attorney handling a case worth $30,000 in settlement will be willing to settle for perhaps, $22,500 if he knows the policy limit is only $25,000, in order to avoid imposing a personal loss upon the insured. The company has no right to protect itself from excess liability by stating that it will not disclose its policy limits. Such constitutes bad faith exercised in complete derogation of the rights of the policyholder. Many states now require the disclosure of policy limits; but, even in those jurisdictions which do not, the company is playing with fire when it cuts off the possibility of receiving an offer within the policy limits by its refusal to open the door to reasonable negotiations."

See also Keeton, **Liability Insurance And Responsibility For Settlement,** 67 Harv. L. Rev. 1136 (1954).

39. Sedgwick, **Personal Injury Litigation from the Insurance Company—Defendant Viewpoint,** 23 Utah B. Bull. 101, 111 (1953).

40. Justice Brennan, **Seminar on Practice and Procedure under the Federal Rules of Civil Procedure,** 28 F.R.D. 42, 49 (1960).

41. **Supra** notes 3, 5. See generally Williams, **Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,** 10 Ala. L. Rev. 355 (1958).

42. **Supra** note 23. See also Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962).

tially the same as the Illinois statutes and are identical to the Colorado and Montana statutes.[43]

Where the injured party is a minor it appears to be even more imperative that discovery be allowed. The guardian ad litem is the representative of the court to look after the interests of the minor and it is the court's duty to see that all the minor's rights are protected.[44] If the guardian ad litem is not allowed to apprise himself of the rights the minor has, the court has not accorded the minor the protection to which he is entitled.

Justice Drew's dissent in *Brooks v. Owens*[45] provides an enforcing epilogue.

> "I can see no harm which will come from requiring a defendant to disclose the limits and conditions of the policy of insurance which he carries for the obvious benefit of the injured party. Moreover in negotiations or litigation both sides should have access to all of the facts. The administration of justice should not be a game of hide and seek. One party should not be blindfolded in negotiating a settlement or a compromise. It is a fundamental concept that both sides should have all the facts in the settlement of disputes and this can never be achieved unless some method is provided of requiring the full disclosure by a process which will afford protection to the party entering into a settlement of the terms and extent of liability insurance policies."

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43. N.D. Cent. Code § 49-18-33 (Insurance or bond required of common or contract carrier); N.D. Cent. Code § 39-16-17 (Proof of financial responsibility); N.D. Cent. Code § 39-16-20(6) (Motor vehicle liability policy).
44. Shuck v. Shuck, 77 N.D. 628, 44 N.W.2d 767 (1950).
45. 97 So. 2d 693, 701 (Fla. 1957).