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Owen Russell

INSURANCE: JOINDER OF DEFENDANT'S INSURER, A RESOLUTION OF THE "SELLMAN" PROBLEM*

As the law in New Mexico stands today, an insurer who pays a claim to its insured under an indemnity policy is subrogated by operation of law to a proportionate part of the cause of action against the person who caused the loss. This is the rule irrespective of any agreement to the contrary between the insurer and its insured.[1] Loan receipts, which are recognized by nearly all states and the federal courts to be a valid method of avoiding subrogation,[2] have been generally ignored by everyone concerned. When the insurer pays its insured any amount of the loss, he is deemed to be an indispensible party in any subsequent action against the person responsible for the loss.[3] This has the anomalous effect of forcing a plaintiff's insurer to join in the action while disallowing any disclosure of the existence of the defendant's insurer, or even whether or not he is insured.[4] *Sellman v. Haddock,*[5] decided in 1957, established this rule, and it has been followed quite uniformly ever since.[6] The purpose of this Comment is to explore the effects of the *Sellman* rule and suggest possible solutions for some of the problems arising from this decision.

In *Sellman*, suit had been brought to collect damages caused to the plaintiff's automobile in an intersection collision with the defendant. Under the terms of his policy, the plaintiff had paid $50.00 of the cost of repairs and the insurer had paid the balance of $483.21. When the case was argued before the Supreme Court the defendant

*Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957).

1. The only exception to this rule would be if the subrogation had been waived for some reason. There is no authority on this issue in New Mexico and very little elsewhere. For a survey of this subject *see* 16 A.L.R.2d 1269 (1951).

2. 2 R. Long, Law of Liability Insurance § 23.09(1) (1966).

3. Note 11, *infra.*

4. The rule against disclosure of the defendant's insurer is well established in New Mexico. Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968); (prejudicial effect recognized); Falkner v. Martin, 74 N.M. 159, 391 P.2d 660 (1964) (mistrial if disclosure calculated to influence the verdict); Canter v. Lowrey, 69 N.M. 81, 364 P.2d 140 (1961) (mistrial on voir dire question on insurance if in bad faith); Garcia v. Sanchez, 68 N.M. 394, 362 P.2d 779 (1961) (no mistrial when disclosed by defense attorney examining his own witness); Stalcup v. Ruzic, 51 N.M. 377, 185 P.2d 298 (1947) (voir dire question as to possible interest in a particular insurance company is allowed); Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585 (1943) (form of question on voir dire is largely in the trial court's discretion); Theurer v. Holland Furnace Co., 124 F.2d 494 (10th Cir. 1941) (evidence relating to insurance inadmissible); Bass v. Dehner, 103 F.2d 28 (10th Cir. 1939) (plaintiff's counsel may not interrogate defendant's counsel on existence of insurance to obtain basis for interrogating jurors).

5. 62 N.M. 391, 310 P.2d 1045 (1957).

6. Evidenced by the fact that it apparently hasn't been challenged. *See infra.*

raised the issue of whether the plaintiff's insurer was an indispensible party. This proved to be the determinative question of the case. The evidence in the trial record led the court to conclude that the insurer was an indispensible party, which disposed of the case ". . . as if no attempt at a trial had been made."[7]

In answer to an interrogatory before trial, the plaintiff stated that he had given his insurer a loan receipt, but he did not have a copy of it to attach to his answer. As a result, no documentary evidence of the agreement by which the insurer had paid its part of the repair bill was ever introduced. Basing their decision on the oral testimony of the plaintiff given during the trial, the Supreme Court decided a subrogation had occurred. They reasoned that, since the plaintiff stated he had given his insurer ". . . the right to collect from the person who (had) caused the damage,"[8] this was enough to justify holding that the insurer had acquired a right against the defendant. The court decided that the plaintiff's declaration of the import of the agreement was more enlightening than calling it a loan receipt. Actually, this determination was exactly the opposite of what was intended in the loan agreement. One of the primary purposes of loan receipts is to allow the insurer to pay a claim without acquiring an interest in the cause of action.[9] But the plaintiff in this case had failed to prove that he had given a loan receipt to his insurer. Rather, his testimony supported the opposite conclusion; that he had assigned a part of his cause of action to the insurer. It is true that the court accepted a layman's interpretation of the legal effect of a written instrument, but since the document had not been entered in evidence they were probably justified in doing so. The court found itself faced with quite a dilemma. It had to choose whether to accept the plaintiff's testimony as to the effect of the agreement, or to disregard the testimony concerning the payment by the insurer and remand the case back to the trial court because of an inadequate judgment, or affirm the judgment without settling the loan receipt issue. They chose the former, and probably rightly so, since to have chosen one of the latter two would have required them to disregard the jurisdictional question of failure to join an indispensible party. After deciding that the transaction between the plaintiff and his insurer had given the insurer an interest in the cause of action, the court concluded that the insurer was thereby a "real party in

7. Sellman v. Haddock, at 393.
8. *Id.* at 394.
9. Couch on Insurance § 61:72 (2d ed. 1966).

interest"[10] and that there could be only a single cause of action.[11] Therefore the insurer was an indispensible party.[12] Thus, (1) subrogation; (2) real party in interest; (3) single cause of action; *ergo,* indispensible party.

Apparently the insurance companies in New Mexico are satisfied with this result, since as far as can be determined from subsequent appellate cases, there have been no objections made to this joinder requirement. In fact, they can probably afford to be ambivalent since they may be involved on either side (plaintiff or defendant), depending on the particular case.

One of the primary effects of the *Sellman* rule would seem to be a decrease in the average award of damages. There are at least two reasonably anticipated results of the rule in support of this conclusion. First, it creates an appearance of unequal parties. Because of this impression, the jury might be tempted to resolve some of the critical issues in favor of the defendant. This could lead to a lessening of the amount of the judgment, or in the case of a close question of negligence, it might cause their decision in favor of the defendant, thereby completely denying recovery to a truly deserving plaintiff. Next, this disclosure that the insurer has paid a certain amount to its insured would tend to determine the amount of damage suffered, thereby liquidating the claim to the amount paid by the plaintiff's insurer. This would be decidedly unfair to the plaintiff since the insurer usually pays only the immediate expenses. With the amount paid on the claim being continually brought to their attention by the defendant's attorney, the jury might be reluctant to award him any more than he had already received; which would deprive him of any additional amounts to which he might rightfully be entitled. This could be especially important in personal injury cases where medical payments coverage was involved,[13] because the loss of earning power

10. The tests for "real party in interest" are: (1) owner of right sought to be enforced; (2) in a position to release defendant from liability. Reagan v. Dougherty, 40 N.M. 439, 62 P.2d 810 (1936).

11. Based upon the claim of negligence on the part of the defendant. Sellman v. Haddock, at 403.

12. An additional holding of the Sellman case was that there is no distinction between necessary and indispensable parties, as in the case in the federal courts. For a discussion of this aspect of the case *see* Walden, *The "New Rules" in New Mexico,* 25 F.R.D. 107, 123.

13. In spite of the general rule that the doctrine of subrogation does not apply to personal injury claims, the courts have generally allowed subrogation in medical payments coverage when it was specifically provided for in the policy. Such was the ruling in a recent New Mexico case, Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969).

and future medical expense items would likely be valued lower than they should be.

It would seem possible that even if the plaintiff's insurer is unable to recover enough to cover its expenditures in the case, the shortage could eventually be recouped out of savings from cases when it is a defendant's insurer. Therefore, as far as the insurer is concerned, the average cost of doing business would have been reduced. On the other hand, if this balancing effect does not occur, the insurer would have to increase the premiums paid by the insured in order to recoup any actual losses. In fact, the mere existence of such shortages (cost to insurer less recovery) could afford an excuse for raising premiums whether or not there has been an actual economic loss. The net effect would be increased costs to the insured, which would discourage people from carrying accident coverage. From a public policy standpoint, this result should be avoided, because this coverage is often the only means for survival that an injured person has while the matter is being pursued through the courts. A serious accident could completely incapacitate the average person if he had to wait until after a judgment in his favor before he received any compensation at all. The only other alternative to such coverage is public aid in some form.[14]

The primary objection voiced against joinder of the defendant's insurer seems to be that it might prejudice the jury against the defendant which could lead to an excessive award.[15] It is hard to see the logic to this objection. Since the insurer would be the one who would have to pay the claim, it doesn't seem that the defendant, provided that his coverage was adequate to cover any possible award, would care one way or the other. Any prejudice that would occur wouldn't affect the defendant at all; it would only affect his insurer.[16] If the insurer is the one affected by the assumed prejudice, it would seem to take most of the weight out of the principal argument underlying the whole concept of exclusion, i.e., that the insurer is not interested in the action until a judgment is entered. More realistically, the insurer appears to have a substantial interest in the case from the outset. If not, why would the insurer be interested

14. This choice between private or public compensation is a political question that will have to be resolved according to whatever degree of public participation in the welfare of the individual is desired. Private insurance is more in line with the basic American concept of society, and is probably more efficient than a public enterprise would be, although the cost is not distributed as broadly as it would be under a public-financed system.

15. *See* McKenna, *Joining the Insurer and Insured in Automobile Cases,* 17 Marq. L. Rev. 114 (1932); and Appleman, *Joinder of Policyholder and Insurer as Parties Defendant,* 22 Marq. L. Rev. 75 (1938).

16. Bussey v. Shingleton, 211 So.2d 593, 595 (1st D.C.A. Fla. 1968).

in whether or not knowledge of its presence would prejudice the jury against the defendant? It seems that the very argument advanced for exclusion actually affirmatively establishes that the insurer is vitally interested in the litigation. If the plaintiff's insurer is an indispensible party because of its contractual relationship with its insured, a queer distortion of logic is required to maintain that the defendant's insurer, under basically the same contractual relationship with its insured, has no interest in the action.[17] This requires that the rights of the parties to the contract be interpreted as dependent on the parties' relationship with a third person. In other words, whether or not the insured is required to join an action in which its insured is involved depends on which side the insured is on; whether he is suing or being sued.

The concept of depriving the jury of information concerning the existence of insurance was apparently established through judicial notice of the prejudicial effects that could possibly be anticipated if such knowledge was disclosed.[18] As one author described it, "(I)t is the substitution of a judicial whim for a lawful right . . . producing a judicial wrong against a party who is in court to avoid an imaginary wrong to one who claims he is not in court."[19]

Disallowal of disclosure seriously hampers litigation of the issues by imposing substantial limitations on the manner in which the trial is carried out.[20] A litigant is continuously running a substantial risk of causing reversible error by inadvertently disclosing the existence of insurance during the trial.[21] He finds himself facing an awesome task in litigating such a case while being foreclosed in so many areas by procedural difficulties created by his being unable to mention anything concerning such an all-pervasive and prominent issue.

In summary, taking the present status of insurers in New Mexico as a whole, a few reasons why the situation needs to be changed are: (1) the prejudicial effects of requiring participation by the insurer on one side and not the other; (2) refusing disclosure of defendant's insurer is mere subterfuge which seems to have little real justification and seems to serve no useful purpose; (3) it seriously hampers litigation of the issues; (4) freedom of contract is not allowed, and; (5) it does not promote efficiency and economy in the administration of

17. It is anomalous, to say the least, that the plaintiff's insurer becomes an indispensable party by complying with the terms of its contract with its insured, and the defendant's insurer does not when it does exactly the same thing with its own insured.

18. Green, *Blindfolding the Jury,* 33 Tex. L. Rev. 157, 160 (1954).

19. Allen, *Why do Courts Coddle Automobile Indemnity Companies,* 61 Am. L. Rev. 77, 81 (1927).

20. Green, *supra* note 18, at 159.

21. *Id.*

justice through allowing complete settlement of the case in a single suit.

In devising a solution, the general principles to keep in mind are that the remedy should be as economic and efficient as possible while being oriented toward producing the most just and equitable result obtainable in line with the general evolution of the law in that particular area. In addition, the remedy should squarely meet the problem and be a substantial improvement over the existing situation.

The most obvious and simplest thing to do would be to revert back to the former practice of disallowing both insurers from openly participating in the action. This could be accomplished by litigating the validity of a loan receipt, an issue which is not settled.[22] The first case after *Sellman* to rule on a loan receipt was a 10th Circuit case, *Tyler v. Dowell, Inc.*,[23] which interpreted *Sellman* as holding the "... loan was in fact payment of the loss."[24] This reasoning doesn't seem to follow, because *Sellman* did not reach the issue of the determination of the legal effect of the loan receipt. The Circuit Court seems to have felt that *Sellman* meant that loan receipts would be held invalid if the issue was ever raised. This was not the case, however, since the next case to deal with the issue, *Home Fire & Marine Ins. Co. v. Pan American Petroleum Corp.*,[25] stated that the *Sellman* case was not authority on the validity of loan receipts.[26] Although this determination was not dispositive of the case, it provides good reason to believe that if a loan receipt is litigated, the court will probably hold it to be a valid loan. All the other cases citing *Sellman* have been on the indispensible party issue, and do not deal with loan receipts. Therefore, since the New Mexico Supreme Court has intimated that a loan receipt would probably be considered a valid loan, use of this device would allow the plaintiff's insurer to withdraw to the sidelines again. The objection to this remedy is that it is against the general trend of the law. The direction today seems to be toward more insurer involvement rather than less; which would indicate that such a solution will probably be relatively short-lived.[27] Besides, this would only reach part of the problem. It

22. The Sellman case did not rule on it. Rather, the case was determined in the absence of the loan receipt.

23. 274 F.2d 890 (10th Cir. 1960).

24. *Id.* at 894.

25. 72 N.M. 163, 381 P.2d 675 (1963).

26. *Id.* at 167.

27. There are quite a number of inroads that have been made in the doctrine of exclusion. In New Mexico and several other states, the insurer is a proper party and may be joined if the insurance coverage is required by law. Lopez v. Townsend, 37 N.M. 574, 25

would still leave the disclosure issue alive and would not contribute toward efficiency and economy.

A second possibility is to freely allow disclosure of insurance. In New Mexico, as the law on this subject stands today,[28] this is almost a necessity because of the obvious prejudice against the plaintiff that presently exists.

With all the literature on this subject that has already been written and the considerable overlapping with the joinder issue, it seems rather pointless to spend much time in this Comment discussing the reasons and justifications for allowing disclosure of the existence or limits of coverage to the jury as an independent subject.[29] Suffice it to say that it would be an improvement over the present situation.

In view of recent developments in the law in the federal courts and in several of the states,[30] allowance of disclosure is rapidly becoming a strong current in the general trend of the law. But even with disclosure there still remains a problem of duplication of effort and judicial wastes brought about by the necessity of separate suits (in some cases) to establish the liability of the defendant's insurer after a judgment is obtained against the defendant. Although disclosure would be a decided improvement, it does not extend nearly as far as it should to adequately provide a remedy to the situation.

The best all-around solution would be to eliminate the fiction of the disinterested insurer entirely by allowing compulsory joinder. This innovation would best satisfy the criteria of efficiency and economy, justice and equity, while squarely meeting the problem. It

P.2d 809 (1933); 2 R. Long, Law of Liability Insurance § 20.06(5) (1966). Two states, Louisiana and Wisconsin, have direct action statutes. Rhode Island has a limited one (direct action allowed if the insured cannot be served with process in the state). In 1968, the Florida Court of Appeals overruled prior precedents and allowed joinder of an insurer on a "quasi-3rd party beneficiary" theory. Bussey v. Shingleton, 211 So.2d 593 (1st D.C.A. Fla. 1968). And finally, Rule 26(b)(2), Fed. R. Civ. P., as amended March 30, 1970 (effective July 1, 1970) allows discovery of insurance. It does not affect its admissibility, though.

28. It is not allowed. *Supra* note 4.

29. *Pro:* Green, *A Rebuttal,* 34 Tex. L. Rev. 382 (1956); Green, *Blindfolding the Jury,* 33 Tex. L. Rev. 157 (1954); Comment, *The Insurer as Party Defendant in Auto Accident Cases,* 1953 Wis. L. Rev. 688; Note, 43 Ill. L. Rev. 650 (1948); Allen, *Why do Courts Coddle Automobile Indemnity Companies,* 61 Am. L. Rev. 77 (1927). *Contra,* Gay, *'Blindfolding' the Jury: Another View,* 34 Tex. L. Rev. 368 (1956); Appleman, *Joinder of Policyholder and Insurer as Parties Defendant,* 22 Marq. L. Rev. 75 (1937); McKenna, *Joining the Insurer and Insured in Automobile Cases,* 17 Marq. L. Rev. 114 (1932). For a good discussion of the subject without taking a position *see* Leigh, *Direct Actions Against Liability Insurers,* 1949 Ins. L. J. 633; and Lassiter, *Direct Actions: Against the Insurer,* 1949 Ins. L. J. 411. Two student works criticizing the Louisiana Direct action statute because it doesn't go far enough are: Note, 11 Tulane L. Rev. 443 (1937); and Comment, *Direct Actions–Insurance Contracts,* 13 La. L. Rev. 495 (1953). On how to properly disclose the insurer without prejudicing the plaintiff's case, *see* Comment, *Proper Disclosure During Trial that Defendant is Insured,* 26 Corn. L.Q. 137 (1940).

30. *Supra* note 27.

is probably not the ultimate answer, but it is the best available. Aside from the honesty of such an innovation, the strongest justification from a practical point of view would be the substantial savings that would ensue, both in legal fees paid by the respective parties and in reduced costs to the state through elimination of multiple suits. Such complete disposition of the case seems to be consistent with Rule 19(a)(1) which allows joinder of anyone in whose absence "complete relief cannot be accorded."[31] The argument that complete relief does not include execution of the judgment can be countered by the fact that in the situation under discussion, the remedy following judgment is not execution (if the insurer refuses liability) but a separate suit to establish the insurer's liability under its policy. Since this is the case there seems to be no logical reason for requiring the defendant, (or the plaintiff) to have to go through a separate suit dealing with the same facts that were litigated in the first case. It would be so much simpler to allow the insurer to present its defenses in the first suit.

Presently, the only way joinder is allowed is when the defendant is required by statute to carry liability coverage.[32] There is no authority in New Mexico on whether the Financial Responsibility Act would qualify as such a statute, but most likely it would not since it does not require a person to carry insurance; only that he be financially responsible to certain stated limits for injuries resulting from his negligent operation of an automobile.[33]

If the insurer does not voluntarily pay the judgment, the plaintiff may have direct recourse against the insurer in equity,[34] garnishment,[35] or in some cases, direct legal action.[36] But all of this would be unnecessary if joinder was allowed, since determination of who would be required to pay the judgment could be made without having to resort to further litigation. It would be more beneficial to all parties concerned to get this issue out of the way in the initial suit.[37] The savings in time and expense, along with the added incentives for settlement without trial,[38] are enough in themselves to justify implementing this procedural innovation.

31. N.M. R. Civ. P.

32. Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809 (1933).

33. N.M. Stat. Ann. §§ 64-24-1 to 64-24-104 (Repl. 1960). *But see* Shingleton v. Bussey, 223 So.2d 713, 717 (Fla. 1969).

43. 2 R. Long, Law of Liability Insurance, § 20.05 (1966).

35. *Id.*

36. *Id.* § 20.04, note 1, *citing* N.Y. Ins. Law § 167(7)(a) (1965).

37. This would lead to reduced costs for defending and administering the policy for the defendant's insurer, savings to the plaintiff's insurer in eliminating the multiplicity of suits, less wear and tear on the plaintiff, and less inconvenience for the defendant.

38. First, it would be an incentive to settlement since the insurers would be in a face-to-

Short of outright joinder, in some instances the insurer can be brought into the action by attachment. This procedure was upheld in New York as a device for obtaining jurisdiction over an out-of-state defendant.[39] There is no reason why it couldn't be used for other purposes, too. It should also be available as a security device,[40] particularly if the insurer is denying liability. The basic defect to this procedure is that it is limited to those cases which can satisfy the provisions of the attachment statute.[41]

There seem to be two basic arguments (other than the assumed prejducial effects issue) against allowing joinder of the defendant's insurer. First, it is contended that no cause of action exists between the plaintiff and the defendant's insurer. This contention is based on two grounds. The first ground is that there is no privity of contract between the plaintiff and the insurer. Therefore no direct action is possible because the plaintiff does not have a claim against the insurer arising out of the defendant's contract.[42] Secondly, it is argued that an action on a contract cannot be joined in a suit in tort. In light of the provisions in Rule 18(b),[43] it would seem the two actions could be joined, but the courts have held otherwise. They have ruled that 18(b) only applies to separate claims against the same party,[44] and that the insurer's right not to be joined is substantive so it cannot be affected by a procedural rule.[45] On this ground, the insurer appears to have a pretty strong argument against joinder, if public policy demands that Rule 18(b) is to be so strictly interpreted. Although some good arguments could be made that might alter the conclusions reached on these two points, the road to success in the face of so much directly opposed precedent would be long and rocky. It is a fact of life that a court is usually quite

face bargaining position, and second, the adverse public image the insurers (especially the defendant's insurer) would get by being continually in court should be an added incentive to settlement. As it is now, the defendant's insurer is not in the public limelight.

39. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

40. Garnishment would probably be the proper remedy in this case, on the theory that the insurer is holding *assets* of the insured. In Seider, *id.*, the theory was based on the *contractual rights* of the insured entitling him to a legal defense to be provided by the insurer, who was in the jurisdiction.

41. The grounds for attachment and garnishment are identical. N.M. Stat. Ann § § 26-1-1 (1953) (attachment), 26-2-1 (Supp. 1969) (garnishment).

42. *But see* Shingleton v. Bussey, *infra* n. 63 where the court solves this problem by applying a 3rd party beneficiary doctrine.

43. N.M. R. Civ. P.

44. Breeden v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954); and *see generally* 2 Barron & Holtzoff 80 *et sec.* (Wright Ed. 1961); annot., 76 A.L.R. 2d 385 (1958).

45. Breeden v. Wilson, *supra;* Headrick v. Smoky Mountain Stages, Inc., 11 F.R.D. 205 (E.D. Tenn. 1950). Both of these cases seem to add confusion to the substantive-procedural distiction by not explaining the basis of their reasoning.

hesitant in overruling its prior decisions even when presented with convincing reasons why the old cases should be disregarded.[46]

The second argument is based on the concept of the "disinterested insurer." This designation is a somewhat nebulous appellation that has been applied by the courts through judicial notice[47] at the insistence of the disinterested insurer who is not a party to the action. But, these allegations that the insurer is not an interested party become quite tenuous when its actions connected with the claim against its insured are taken into consideration. The insurer investigates, provides legal counsel, assumes complete control of litigation, negotiates settlements, and generally takes the initiative and responsibility of defending its insured against liability. All of these services are provided before a judgment is obtained against its insured. It is true that most of these services are provided for by contract, but since the insurer drafts the contract, it would be fair to assume that its terms were as he desired them to be. If the insurer is truly disinterested, it is the only private entity this writer is aware of that is allowed to act as a broker for legal services.

There have been some recent developments in Florida that go a long way toward putting this whole matter in the proper perspective. In 1966 the Florida Bar petitioned the supreme court for an additional rule governing the conduct of attorneys.[48] The proposed rule would have barred a lawyer employed by a lay agency, particularly an insurance company, from rendering services to or for persons other than his employer. It was primarily directed at the ethical conflict that could arise from representing two clients in the same action.

Liberty Mutual Insurance Company filed a brief in opposition to the proposed rule (which brief was subscribed to and adopted in a brief *amici curiae* filed by three associations purporting to represent 659 insurance companies in Florida).[49] In the brief, Liberty Mutual contended that their attorneys were not guilty of unethical conduct because they were defending the rights of the insurance companies, " . . . who had a real interest therein."[50] They cited such factors as the ". . . 'direct financial interest' of the insurer,"[51] and the "identity and community of interest in the defense,"[52] and that

46. The courts have developed a doctrine for application when such an issue arises that can best be described as "passing the buck to the legislature".

47. *Supra* note 18.

48. Bussey v. Shingleton, 211 So.2d 593, at 595 (1st D.C.A. Fla. 1968).

49. *In Re* Rules Governing Conduct of Attorneys in Florida, 220 So.2d 6, 8 (Fla. 1969).

50. Bussey v. Shingleton, at 597.

51. *Id.* at 595.

52. *Id.*

" . . . the interest involved in defense of liability suits is primarily and ultimately the interest of the insurance company,"[53] as further indications of their attorneys' propriety of conduct.

The court expressed their agreement with the Bar on the conflict of interest issue, stating that "(T)he announced motive of the Bar, which we accept, is to protect the public against the dangers of potentially duplicitous representation."[54] But, since the proposed rule dealt only with so-called "house counsel" and the court felt that the same problems existed with counsel hired for a particular case, they denied the rule, but invited future consideration of the issue.[55]

While the rules hearing was pending, a case came before the Florida district court of appeal asking that joinder of an insurer be allowed.[56] To show that the insurer was interested in the action, and thereby a proper party for joinder, the plaintiff referred to the Liberty Mutual brief.[57] In deciding the case, the court stated that it felt, because of recent developments in the law and public policy, the matter deserved fresh consideration.[58] Starting with the Florida rule on parties,[59] which allows any person who has or claims an interest adverse to the plaintiff to be joined, they concluded that whether or not the insurer was a real party in interest was a question of fact for the jury.[60] If the insurer was found to be a real party in interest, then it was properly joined. If it was not properly joined, then, based on the admissions in the Liberty Mutual brief, its attorneys were engaged in unauthorized practice of law.[61] In a dictum towards the end of their decision, the court concluded that public policy justified construction of the joinder rule so it would allow the insurer to be joined on the theory that injured persons should be considered quasi-third party beneficiaries of the policy.[62] So, they remanded the case back to the trial court with instructions to decide whether or not the insurer was a real party in interest.

The Florida Supreme Court granted certiorari[63] because of the

53. *In Re* Rules, at 8.
54. *Id.* at 7.
55. *Id.* at 9.
56. Bussey v. Shingleton.
57. *In Re* Rules.
58. Bussey v. Shingleton, at 594.
59. *Id.* at 595.
60. *Id.* at 594. If this holding is correct, it raises a substantial question in the Sellman case, *supra* note 5. If whether or not a person is a real party in interest is a jury question, why did the New Mexico Supreme Court decide it as a matter of law?
61. *Id.*
62. *Id.* at 596.
63. Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969). This is the Bussey v. Shingleton case, on certioari to the Florida Supreme Court.

conflict between the appeal court's holding and prior cases. They accepted the quasi-third party beneficiary theory of the court below as a basis for resolving the conflict. They ruled that, as a product of prevailing public policy, a direct cause of action inured to the third party beneficiary by operation of law at the time the plaintiff became entitled to sue the insured.[64] This third party beneficiary doctrine was held to encompass a cause of action against the insurer in favor of members of the public.[65] The court justified this holding on what they felt was the intent expressed by the legislature in enacting the Financial Responsibility Act;[66] that the policy was secured as a ready means of satisfying any obligations that may accrue to members of the public.[67] As a further justification they held that the injured person had a substantial interest in preventing the defendant from prejudicing his recovery by failing to cooperate with the insurer, or otherwise causing a breach in thepolicy contract.[68] In other words, the injured person should be allowed enough control over the defendant to prevent him from dissipating his assets. Closely connected with this was the conflict of interest issue of the attorneys representing two clients. The court also cited recent cases which emphasized the importance of allowing judicial oversight of the policy provisions to prevent prejudice to the plaintiff.[69] The decision of the appeals court was affirmed on the merits, and prior decisions in conflict therewith were overruled. The net effect of the ruling in this case was to establish a direct action against the insurer by judicial decision, based on the identical rationale that other states have used in enacting direct action statutes.[70]

This third party beneficiary doctrine appears to be a very practical method of accomplishing joinder. It has been well received in the Florida courts. In fact, there has been a veritable flood of cases that have followed the *Shingleton* rule in the brief period since the case was decided.[71] There seems to be no reason why this doctrine could

64. *Id.* 715 *passim.*
65. *Id.* at 716.
66. *Id.*
67. *Id.*
68. *Id.* at 719.
69. *Id.*
70. The rationale is that a direct action statute expresses the public policy that liability insurance is obtained for the benefit of all persons that are injured (within the limits of the intended purpose of the policy). 2 R. Long, Law of Liability Insurance § 20.06(1) (1966).
71. Cases following or citing Shingleton v. Bussey: Sutton v. Gomez, 234 So.2d 725 (2d D.C.A. Fla. 1970) (voir dire application); Duran v. McPherson *et al.*, 233 So.2d 639 (4th D.C.A. Fla. 1970) (Discovery of professional liability insurance allowed); Ross v. Bowling, 233 So.2d 415 (3d D.C.A. Fla. 1970); Rivenbark v. Ansley, 233 So.2d 157 (1st D.C.A. Fla. 1970); Shipman v. Kinderman, 232 So.2d 21 (1st D.C.A. Fla. 1970) (medical malpractice); Sherman v. Holzapfel, 231 So.2d 550 (2d D.C.A. Fla. 1970); Liberty Mutual Ins. Co. v.

not be applied in New Mexico. The New Mexico legislature has expressed the same policy in our version of the Financial Responsibility Law as Florida did.[72] The same conditions with respect to liability litigation exist here. Many of the same insurance companies are doing business in the state. The standard liability policy in use here is the same policy that is used in Florida. If for no other reason, the *Shingleton* rule should be adopted in New Mexico so the nature of the current situation would have a chance to mature into the sophisticated status our judicial system should possess. This is a chance for New Mexico to assume a leadership role in the Southwest, and to shift the burden of catching up to our sister states, instead of continually being the low man on the totem pole.

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Roberts, 231 So.2d 235 (3d D.C.A. Fla. 1970); Beta Eta House Corp. v. Gregory, 230 So.2d 495 (1st D.C.A. Fla. 1970) (premises liability insurance); Kilcrease v. Kilcrease, 223 So.2d 755 (1st D.C.A. Fla. 1969); Barrios v. Dade County, 310 F. Supp. 744 (S.D.N.Y. 1970) (direct action allowed in New York suit on Florida accident); U. S. v. United Bonding Ins. Co., 422 F.2d 277 (5th Cir. 1970).

72. N.M. Stat. Ann. §§ 64-24-1 to 64-24-104 (Repl. 1960); Fla. Stat. Ann. § 324 (1968).