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Discovery—Disclosure of Existence and Policy Limits of Liability Insurance*

The courts disagree about whether a plaintiff in a negligence action should be allowed discovery of the existence and policy limits of a defendant's liability insurance.[1] Where a definite relationship between the provisions of the policy and the issues in dispute can be clearly shown, courts generally agree that discovery should be permitted.[2] Morever, the presence of this relationship will mean that the discovered material will be admissible in evidence at trial.[3] Examples of the relationship between policy provisions and the issues in dispute are the relationship of the parties,[4] ownership of property,[5] and the defendant's previous accidents.[6]

The conflict in the decisions centers upon the situation in which a plaintiff seeks to discover the existence and amount of a defendant's liability insurance and yet the fact of insurance would not be admissible in evidence at trial. The typical situation in which the problem arises is the automobile accident. The injured plaintiff, moving under the appropriate discovery statute,[7] propounds ques-

* N.M. Stat. Ann. § 21-1-1(26) (1953); Cook v. Welty, 10 Fed. Rules Serv. 2d 26b.31-1, Case 1 (D.D.C. May 11, 1966).

1. Discovery of liability insurance allowed: Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963); 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); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961); Brackett v. Woodall Food Prods., 12 F.R.D. 4 (D. Tenn. 1951); Lucas v. Dist. Court, 140 Colo. 510, 345 P.2d 1064 (1959); People v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d (Ky. 1954).

Discovery of liability insurance not allowed: Bisserier v. Manning, 207 F. Supp. 476 D.N.J. 1962); Langlois v. Allen, 30 F.R.D. 67 (D. Conn. 1962); Hooker v. Raytheon Co., 31 F.R.D. 120 (D. Cal. 1962); Cooper v. Stender, 30 F.R.D. 389 (D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (D. Ill. 1958); Flynn v. Williams, 30 F.R.D. 66 (D. Conn. 1958); Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958); Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Bean v. Best, 76 S.D. 462, 80 N.W.2d 565 (1957); State v. Second Judicial Dist. Court, 69 Nev. 196, 245 P.2d 999 (1952).

2. American & Foreign Ins. Co. v. Richard Gibson & Sons, 1 F.R.D. 501 (D. Mass. 1940); Layton v. Cregan & Mallory, 263 Mich. 30, 240 N.W. 539 (1933); Martyn v. Braun, 270 App. Div. 768, 59 N.Y.S.2d 588 (1946); see Comment, 26 Cornell L.Q. 137 (1940).

3. McCormick, Evidence § 168 (1954).

4. Plyler v. Gordon, 25 F.R.D. 170 (D.N.J. 1960).

5. McDowell Associates v. Pennsylvania R.R., 142 F. Supp. 751 (S.D.N.Y. 1956).

6. Roth v. Bird, 239 F.2d 257 (5th Cir. 1956).

7. The New Mexico Civil Procedure Rules, N.M. Stat. Ann. §§ 21-1-1(26) to (37) (1953), are the discovery mechanisms, which are substantially the same as the Federal Rules of Civil Procedure. A party may request discovery of the defendant's

tions to the defendant, asking if he carries liability insurance and the extent of the coverage. The defendant declines to answer on the grounds that the queries are irrelevant.

About half[8] the courts hold that the existence of liability insurance is irrelevant to the negligence issue and therefore deny discovery of the policy; the others[9] reason that liability insurance is relevant to the "subject matter" of the action and therefore permit its discovery. The New Mexico courts have not decided this question.[10] Yet, with the increased volume of automobile negligence cases[11] and the increase in the number of vehicles, the New Mexico courts will inevitably be faced with the problem.

The subject of the conflict is the proper construction of Federal Rule of Civil Procedure 26(b), which is substantially the same as section 21-1-1(26)(b) of the New Mexico statutes.[12] The rule provides:

> 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,

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insurance by interrogatory under N.M. Stat. Ann. § 21-1-1(33) (1953); request the production of the insurance policy under N.M. Stat. Ann § 21-1-1 (34) (1953); or ask during oral deposition of the existence and policy limits under N.M. Stat. Ann. § 21-1-1(26)(b) (1953).

N.M. Stat. Ann. § 21-1-1(34) (1953), provides that a party may discover documents "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) . . . ."

N.M. Stat. Ann. § 21-1-1(33) (1953), provides: "Interrogatories may relate to any matters which can be inquired into under Rule 26(b) . . . ."

Therefore, N.M. Stat. Ann. § 21-1-1(26) (b) (1953), is the pertinent rule. The rule is set forth in the text accompanying note 13.

8. See note 1 *supra*; see also 9 Federation of Insurance Counsil Q. 58 (1958), where the constitutional objection to discovery of insurance coverage is discussed. This issue has generally been disregarded.

9. *Ibid.*

10. Neither has the Tenth Circuit nor the Federal District Court for New Mexico decided this issue.

11. In recent years personal injury suits comprised 60% of all new issues filed in the New York Supreme Court. It is estimated that each year in New York City about 193,000 claimants seek compensation for injuries arising out of someone else's negligence. About 162,000 of these cases end in ultimate recovery of judgement. Negligence cases are the greatest single source of log jam in the trial courts of New York with excessive delay becoming a major problem.

In the federal courts in 1958, 49% of all civil cases were personal injury actions. For further information concerning the increase and delay in personal injury cases see Rosenburg & Sovern, *Delay and the Dynamics of Personal Injury Litigation,* 59 Colum L. Rev. 1115 (1959), from which the previous information was taken.

12. N.M. Stat. Ann. § 21-1-1(26)(b) (1953).

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

Since no question of insurance as privileged material has been raised,[13] the policy's relevance to the subject matter becomes the first critical question in determining whether to allow or refuse its discovery. Early federal decisions interpreting the rule held that the information sought from the defendant must be evidence which would be admissible at trial.[14] Some courts persist in denying disclosure of a policy on the ground that such inquiry was not reasonably calculated to lead to the discovery of evidence that would be admissible on the issues raised by the pleadings.[15] However, in 1948 a specific amendment to rule 26(b) added the last sentence to the rule; the amendment makes clear the latitude which was to be accorded to the rule. The added language was not intended to limit the proposition, stated in the rule, that information relevant to the *subjejct matter* may be obtained by discovery.[16] Since the 1948 amendment, it seems that the greater number of courts use as the standard, relevancy to the "subject matter," not admissibility of the evidence at trial.[17] Thus, the federal court in *Kaiser-Fraser Corp v. Otis & Co.* said:

> 'Relevant' as used in Section 26(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is *not to be equated with 'relevant' as ordinarily used in determining admissibility of evidence upon a trial.* This is clear from the very rule which permits the examination of any party or person . . . '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 any other party . . . .' Thus it is relevancy to the subject matter which is the

13. Comment, 17 S.C.L.Q. 750, 751 (1965).

14. *E.g.,* Benevento v. A.&P. Food Stores, 26 F. Supp. 424 (E.D.N.Y. 1939); Poppino v. Jones Store, 1 F.R.D. 215 (W.D. Mo. 1940).

15. *E.g.,* Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); see also State *ex rel.* Bush v. Elliott, 363 S.W.2d 631 (Mo. 1963); McClure v. Boeger, 105 F.Supp. 612 (E.D. Pa. 1952).

16. Lucas v. Dist. Court, 140 Colo. 510, 345 P.2d 1064 (1959). The contrary view is stated in 3A Baron & Holtzoff, Federal Practice & Procedure, p. 456 (Rev. ed. 1961).

17. See 2A Baron & Holtzoff, *op. cit. supra* note 16, at § 647.

> test and subject matter is broader than the precise issues presented by the pleadings.[18]

Drawing the line about what is relevant to the subject matter involved in an action is obviously very difficult.[19] Yet, the requirement of relevancy should be construed broadly and with common sense, not in terms of narrow legalisms.[20] Indeed, a sound interpretation of rule 26(b) would permit discovery where there is any possibility that the information sought may be relevant to the subject matter of the action. Some courts,[21] while using the recommended liberal concept of relevancy, still refuse to permit discovery of liability insurance by giving the term "subject matter" a doctrinal and narrow construction. *Gallimore v. Dye*,[22] a federal case involving interrogatories seeking to discover policy limits, is an example of the reasoning that opposes discovery of such material. The court in *Gallimore* pointed out that the rules limited discovery to matters which are relevant to the subject matter of the action or are reasonably calculated to lead to discovery of matters which are relevant to the subject matter. The answer to the propounded interrogatory would do neither. The court, concluding that the "subject matter" was nothing other than the charge of negligence against the defendant which caused injury to the plaintiff, held that the answer to the propounded interrogatory was therefore irrelevant.[23]

The *Gallimore* court's reasoning is not incorrect as a matter of strict logic and is based on the strongest argument yet advanced for denying discovery of liability insurance. If the "subject matter" is only the charge of negligence against the defendant, it is obvious that information concerning liability insurance coverage is irrelevant to that issue.

But are the purposes of discovery merely to obtain evidence to be introduced at the trial, to secure information about where such evidence may be found, and to narrow the issues to be tried? Is the "subject matter" of a personal injury action arising out of an automobile accident the issue of negligence alone?

The recent federal case of *Cook v. Welty*[24] gave well-reasoned answers to the above questions. The action was brought to recover

18. 11 F.R.D. 50, 53 (S.D.N.Y. 1951). (Emphasis added.)
19. 2A Baron & Holtzoff, *op. cit supra* note 16, at § 647.
20. *Ibid.*
21. *E.g.*, Bean v. Best, 76 S.D. 462, 80 N.W.2d 565 (1957).
22. 21 F.R.D. 283 (E.D. Ill. 1958); see also Jeppesen v. Swanson, 242 Minn. 547, 68 N.W.2d 649 (1955); Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964).
23. Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).
24. Cook v. Welty, 10 Fed. Rules Serv. 2d 26b.31-1, Case 1 (D.D.C. May 11, 1966).

damages for personal injuries arising out of an automobile accident. The owner and operator of the vehicle involved in the accident died subsequent to its occurrence, and the suit was instituted against the administratrix of his estate. The defendant's depostion was taken with questions asked about what, if any, liability insurance had been carried by the deceased, and the limitations and extent of the coverage. The defendant refused to answer and the matter came before the court on a motion to compel her to respond. (It was stipulated at the argument that a similiar question would arise if interrogatories had been served covering the same subject matter.) The court held that a plaintiff in an action for negligence should be granted discovery either by depostion or interrogatories concerning the existence and extent of the defendant's liability insurance coverage.[25]

The first argument advanced by *Cook* is that the federal rules should not be limited to narrowing the issues for trial, but should also aid the parties in private settlement.[26] The opinion rejects as too narrow a view the *Gallimore* argument which limits discovery to obtaining evidence to be introduced at trial.[27] Rule I of the Federal Rules[28] declares that the rules shall be construed to "secure the just, speedy and inexpensive determination of every action." Judge Holtzoff states in the *Cook* decision that "information concerning liability insurance and the extent of its coverage is conducive to fair negotiations and to just settlements."[29] It seems reasonable to equate methods and procedures which encourage and facilitate settlement with a "just, speedy, and inexpensive determination of every action."

Certain courts have expressed the view that settlement is not the aim of the discovery rules.[30] They reason that the rules were not intended to supply information which has no connection with the determination of the issues at trial however desirable it may be to expedite settlement, thus relieving calendar congestion. Moreover, granting that the discovery rules are to be liberally construed to accomplish their general purpose, it must be realized that they have certain limitations and boundaries that the courts cannot ignore.

Have not those courts refusing to permit discovery of an insur-

25. *Ibid.*
26. *Ibid.*
27. Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958). See text accompanying notes 22 and 23 *supra.*
28. Fed. R. Civ. P. 1.
29. 10 Fed. Rules Serv. 2d 26b.31-2, Case 1 (D.D.C. May 11, 1966).
30. *E.g.*, Bisserier v. Manning, 270 F. Supp. 476, 479 (D.N.J. 1962).

ance policy misconstrued the limitations and boundaries of the discovery rules? Are not the objectives and purposes of modern discovery rules to eliminate secrecy, mystery, and surprise? The "sporting theory of justice" has been rejected.[31] "The central notion of the discovery practice set out in the rules is that the right to take statements and the right to use them in court must be kept entirely distinct."[32] By this method, discovery at the pre-trial state is not fettered with the rules about admissibility which apply at trial. Restrictions on the use of products of discovery are imposed at trial which greatly eliminates delay at the pre-trial stage. The rules have many objectives yet,

> Without minimizing the importance of any of the other objectives which the new rules will seek to attain, it seems safe to say that the ultimate success of the rules will be measured or judged more by the extent to which they eliminate delay than by any other single factor.[33]

Discovery rules were designed to eliminate delay. They are the procedural tools to effectuate the prompt and just disposition of litigation by allowing the parties in advance of trial to appraise the real value of their claims and defenses.[34]

If settlement negotiations are reasonably a part of the judicial process which should be guided by the court rules, does disclosure of policy limits in fact facilitate settlement? Will knowledge of the defendant's insurance coverage permit a more realistic appraisal of a case and lead to the settlement of cases which would otherwise go to trial? *Cook* answers affirmatively in a second argument for allowing discovery of a policy. In cases where injuries are very great, but insurance coverage low, and the defendant is otherwise impecunious, the plaintiff might well be led to accept a smaller settlement than the extent of his injuries would otherwise warrant. On the other hand, where the limits of the insurance policy are high, "there appears to be no fair reason for refraining to disclose such information to plaintiff's counsel."[35] Yet, some cases hold that allowing discovery of liability insurance coverage places the plaintiff in a more strategic position than he would have been without

31. Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958).

32. Wright, Federal Courts § 81, at 308 (1963).

33. Address by the Honorable H. Church Ford, "More Expeditious Determination of Actions Under The New Federal Rules of Civil Procedure," March 30, 1939, in 1 F.R.D. 223.

34. People v. Fisher, 2 Ill. 2d 231, 145 N.E.2d 588, 592 (1957).

35. 10 Fed. Rules Serv. 2d 26b.31-2, Case 1 (D.D.C. May 11, 1966).

discovery.[36] The *Cook* court was unable to perceive any disadvantage that would result to the defendant,

> except perhaps purely as a matter of tactics, which would not necessarily be conducive to a just disposition of the litigation. Refusal to require disclosure would help perpetuate 'the sporting theory of justice.' It is one of the objectives of modern reformed procedure to eliminate it.[37]

Irrespective of coverage, just compensation should be given for injuries, and if the parties cannot agree on a settlement figure, the jury (without knowledge of policy limits because it would not be admissible in evidence)[38] will resolve the issue for them. If the plaintiff has been injured to the extent of 12,000 dollars, this figure would not be increased because the defendant had 100,000 dollars of coverage. To say that it would is to seriously question the ethics and good judgment of the plaintiff's counsel and the value of the jury system—topics which are clearly beyond the scope of this Comment.[39]

A third reason *Cook* advances for allowing discovery of liability insurance is that by facilitating settlement, discovery of insurance effectuates the dispatch of the court's business. Experience shows that dockets of the courts, especially those in metropolitan centers, are crowded with negligence cases, the majority of cases arising from automobile accidents.[40] Most of these cases are disposed of without a trial.[41] The courts, especially in metropolitan areas, would

36. *E.g.*, Brooks v. Owens, 97 So. 2d 693 (Fla. 1957); but see the dissent by Justice Drew:

> 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 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 by 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.

Brooks v. Owens, 97 So. 2d 693, 701 (Fla. 1957). See also Jeppesen v. Swanson, 242 Minn. 547, 68 N.W.2d 649 (1955); Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964).

37. 10 Fed. Rules Serv. 2d 26b.31-2, Case 1 (D.D.C. May 11, 1966).

38. *Id.* at p. 26b.31-2.

39. For a complete discussion on the jury system see, Busch, 1 Law and Tactics in Jury Trials 13 (1959); Meagner, *Trial by Jury Deserves a Fair Trial,* 36 N.Y.S.B.J. 303 (1964).

40. See Rosenburg & Sovern, *supra* note 11.

41. *Id.* at 1121.

be confronted with an impossible task if a majority of cases were actually tried, instead of being either settled or dismissed. Judge Holtzoff points out that if most cases had to be tried, it would be necessary to expand courtroom facilities and increase the number of judges perhaps several times the present personnel.[42] But excessive delay is also rooted in unrealistic and ineffective work methods. In an address to the American Bar Association Chief Justice Warren stated that there is greater promise in better techniques than in more judges: "We cannot expect our strength to flow merely from expanding the judiciary . . . . Our strength must come mainly from improved methods . . . ."[43] Allowing discovery of liability insurance is a method that effectuates the dispatch of a majority of docketed cases. The court's appreciation of the congested condition of dockets and the resulting delay in justice was certainly a prime consideration in allowing discovery of liability insurance in *Cook*:

> Judicial administration comprises much more than merely trying cases one by one as they are reached. The court must also deal with dockets as a whole. It is in the interest of the administration of justice as well as beneficial to individual litigants from their personal standpoint that as many cases as possible be amicably adjusted without a trial, provided that this result can be reached on a fair and open basis.[44]

Aside from the reasoning previously discussed, *Cook* mentions the numerous other arguments for allowing discovery of liability insurance which other courts have advanced.

Litigation in automobile negligence cases is a practical business. One of the first questions that the claimant in an accident asks is: "Do you have insurance—how much"? He is faced with medical bills, loss of earning power, property damage, and possibly the death of a loved one. The claimant reasons that liability insurance exists for one purpose—to pay his legitimate claims.

The *Cook* decision shows that the courts have started to follow this kind of reasoning, recognizing that where insurance coverage exists, the insurer takes control of the defense of the insured. The insurer defends the suit, investigates the accident, and negotiates settlement. This fact may properly be considered in determining whether the plaintiff should be permitted discovery relative to

42. Cook v. Welty, 10 Fed. Rules Serv. 2d 26b.31-1, Case 1 (D.D.C. May 11, 1966).

43. Warren, *The Problem of Delay; "A Task for Bench and Bar Alike,"* 44 A.B.A.J. 1043, 1046 (1958).

44. 10 Fed. Rules Serv. 2d 26b.31-2, Case 1 (D.D.C. May 11, 1966); see also Johanek v. Aberle, 27 F.R.D. 272, 278 (D. Mont. 1961).

insurance information,[45] that is, to determine who is the real adversary. Courts have also concluded that since the question of insurance was relevant to the subject matter after the plaintiff prevailed,[46] it was relevant while the action was pending.[47] These decisions hold that:

> an insurance contract is no longer a secret, private, confidential arrangement between 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.[48]

Courts have also pointed out[49] that insurance, unlike any other asset of the defendant, exists for the sole purpose of satisfying claims arising by injury to third persons due to the defendant's negligence; allowing its discovery is not being unsympathetic to the doctrine of not revealing personal assets.

The sound reasons advanced by courts allowing discovery, the practical considerations of facilitating private settlement, and the relieving of congested dockets all assure the "just, speedy, and inexpensive determination of every action" pursuant to the policy of the rules.[50] The New Mexico courts are not restrained by precedent which denies discovery of liability insurance, and by adopting this sound procedural tool the New Mexico courts can more effectively administer their growing dockets. The benefit of allowing discovery of liability insurance to the individual litigants is the opportunity to candidly appraise the real value of their claims and defenses. This should aid in effectuating a prompt and just disposition of their litigation.

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45. Johanek v. Aberle, *supra* note 44, at 278.
46. *E.g.*, Jeppesen v. Swanson, 242 Minn. 547, 68 N.W.2d 649 (1955).
47. *E.g.*, Maddox v. Grauman, 265 S.W. 2d 939 (Ky. 1961).
48. *Id.* at 942.
49. *E.g.*, People v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).
50. Fed. R. Civ. P. 1.