UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 2 Article 10

2-1-1967

Civil Procedure -- Discovery of Liability Insurance

Eugene W. Purdom

reluctance to allow federal "interference" with state regulation, the underlying thought being that insurance is still basically a matter for local regulation. Since Congress created uncertainties under the act, Congress should remedy them.

WALLACE C. TYSER, JR.

Civil Procedure—Discovery of Liability Insurance

In the recent case of *Cook v. Welty*,[1] the United States District Court for the District of Columbia held that the plaintiff, in an action brought to recover damages for personal injuries arising out of an automobile accident, should be granted discovery by deposition or interrogatories of the existence and coverage of defendant's liability insurance.[2]

Federal courts, and state courts that have procedural rules similar to the Federal Rules of Civil Procedure are almost evenly divided on whether automobile liability insurance is discoverable. This problem is relevant in North Carolina because a new code of civil procedure has been proposed by the General Statutes Commission and will be considered by the 1967 North Carolina General Assembly.[3]

Deposition and discovery under the Federal Rules are encompassed by Rules 26 to 37.[4] Rule 26(b) delimits the scope of this discovery.[5] It provides:

---

[1] 253 F. Supp. 875 (D.D.C. 1966).

[2] *Id.* at 878.

[3] GENERAL STATUTES COMMISSION, PROPOSED NORTH CAROLINA RULES OF CIVIL PROCEDURE (1966), [hereinafter cited as PROPOSED RULES.] The Proposed Rules are based on the Federal Rules of Civil Procedure and correspond numerically to rules of the Federal Rules.

[4] FED. R. CIV. P. 26-37.

[5] Whether discovery is by deposition (FED. R. CIV. P. 26, 30), interrogatories (FED. R. CIV. P. 33), or by production of documents and things for inspection, copying, or photographing (FED. R. CIV. P. 34), Rule 26(b) delimits the scope of examination both in the Federal Rules and the Proposed Rules for North Carolina. FED. R. CIV. P. 33-34 provide:

> [RULE 33] Interrogatories may relate to any matters which can be inquired into under Rule 26(b). . . .
>
> [RULE 34] the court . . . may . . . order any party to produce and permit the inspection and copying . . . of any . . . documents . . . which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Rule 26(b). . . .

Welty involved a motion to compel defendant to respond to questions asked while taking a deposition. It was stipulated by the parties that the issue would also arise if interrogatories covering the same subject matter had been served.

> **(b) 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. . . . 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.[6]

Almost all decisions, in determining whether liability insurance is within the scope of Rule 26(b), turn on whether insurance is

[6] FED. R. CIV. P. 26(b). PROPOSED RULE 26(b) is a copy of FEDERAL RULE 26(b) with the following addition:

> nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert.

FED. R. CIV. P. 30(b), (d), allow the court to limit or terminate discovery in order to protect the parties and deponents. They provide:

> (b). *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.
>
> (d). *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b).

relevant to the subject matter.[7] The courts that allow this discovery use three basic approaches.

(1) Some simply state that insurance is relevant to the subject matter.[8] They hold that the test of relevancy at discovery is not whether the information sought is admissible in evidence or is relevant to the precise issues in the case, but whether the information is relevant to the subject matter involved in the action.[9] In effect, these courts hold subject matter to include anything that will be helpful in preparing the case.[10]

However, this interpretation of relevancy does not seem valid in light of the history of Rule 26(b). In 1946, it was amended to add: "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."[11] In the Committee Note of 1946 to amended subdivision (b), it is stated:

> The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. . . . Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of the inquiry. . . .[12]

Thus, the test of relevancy to the subject matter contemplates discovery either to obtain evidence to be introduced at the trial, or to secure information as to where such evidence may be found. While liability insurance is admissible as evidence in certain situa-

[7] There are apparently no courts that consider whether insurance is privileged. Historically, there are three types of privilege recognized as a defense to discovery: privilege against self-incrimination, professional privilege, and privilege against making disclosures which would be injurious to the public interest. See Note, 34 NOTRE DAME LAW 78, 80 (1958). This Note expresses the view that in this historical context, automobile liability insurance is not privileged.

[8] See, *e.g.*, Hurley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965); Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963); 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., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951); Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948).

[9] *Ibid.*

[10] See, Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954).

[11] FED. R. CIV. P. 26(b).

[12] UNITED STATES SUPREME COURT, FEDERAL RULES OF CIVIL PROCEDURE, 65-6 (rev. ed. 1947).

tions,[13] it generally can neither be admitted as evidence nor be mentioned in front of a jury.[14]

Many courts hold that under the guidelines of the committee note above, insurance is irrelevant and not discoverable.[15] Although this conclusion seems valid, it is ignored by many courts. In *Welty*, for example, after recognizing that as a matter of strict logic insurance is irrelevant, the court dismissed this as too narrow a view.[16] In the case of *Orgel v. McCurdy*,[17] the court simply held that insurance may be generally relevant to the issues in the case.[18] However, it seems the valid test is whether it *is* relevant, not that perchance it *may* be relevant.[19]

(2) Other courts hold that insurance is relevant to the subject matter because plaintiff has a discoverable interest in the policy.[20] In *Maddox v. Grauman*,[21] the Court of Appeals of Kentucky held that the standard liability policy evidences a contract that inures to

[13] See, *e.g.*, Plyler v. Gordon, 25 F.R.D. 170 (D.N.J. 1960), where insurance could be used to show defendant was an independent contractor and thus not covered by the workman's compensation law; Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933), where a liability policy could be used to establish ownership of the vehicle; Modern Elec. Co. v. Dennis, 259 N.C. 354, 130 S.E.2d 547 (1963); Isley v. Winfrey, 221 N.C. 33, 18 S.E.2d 702 (1942); Davis v. North Carolina Shipbuilding Co., 180 N.C. 74, 104 S.E. 82(1920).

[14] See, *e.g.*, Luttrell v. Hardin, 193 N.C. 266, 136 S.E. 726 (1927); Lylton v. Marion Mfg. Co., 157 N.C. 331, 72 S.E. 1055 (1911). While upholding the general rule that liability insurance is inadmissible as evidence, dicta in *Welty* states that perhaps the time has come to change this rule. 253 F. Supp. at 878-79. The rationale is that most states now have compulsory automobile insurance and most jurors will assume that defendant has insurance.

[15] See, Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); 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); McDaniel v. Mayle, 30 F.R.D. 399 (N.D. Ohio 1962); Flynn v. Williams, 30 F.R.D. 66 (D. Conn. 1958); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952); Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964).

[16] 253 F. Supp. at 876-77.

[17] 8 F.R.D. 585 (S.D.N.Y. 1948).

[18] *Id.* at 586. While there is an indication that insurance was relevant in *Orgel* because there was a question of control of the vehicle, many cases use *Orgel* as authority where there is no issue of control. See, *e.g.*, Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951).

[19] DiPietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958).

[20] Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959); Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951); Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (Dist. Ct. App. 1960).

[21] 265 S.W.2d 939 (Ky. 1954).

the benefit of every person who may be negligently injured by the assured as completely as if such injured person had been named in the policy. This is because if there is judgment against the defendant and he does not pay, then plaintiff can go against the insurance company. The court concludes:

> If the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends? We believe it is. An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but is an agreement that embraces those whose person or property may be injured by the negligent act of the insured.[22]

In *Welty* the court extends this argument. It says that where liability insurance is present, the insurance carrier takes over the defense of the action and furnishes counsel to the defendant as well as investigating facilities. Thus, it concludes that insurance should be discoverable so that plaintiff can know his real foe.[23]

Those courts denying that there is a discoverable interest point out that before plaintiff has any rights against an insurance company, he must first recover a judgment against defendant. Therefore, as no enforceable claim accrues against the insurer until judgment against the insured becomes final, plaintiff has no rights under the policy at the discovery stage.[24]

In *Hardware Mut. Cas. Co. v. Hopkins*,[25] the New Hampshire Supreme Court held that plaintiff could examine the policies but that the policy amounts should be left off. This result would seem to answer the arguments of *Maddox* and *Welty*. A plaintiff would be able to determine his real foe as well as the rights and obligations of the insurer without reference to the amount of coverage provided.[26]

(3) The third ground on which courts hold insurance relevant and thus discoverable is that such revelation will lead to negotiations

---

[22] *Id.* at 942.

[23] 253 F. Supp. at 877.

[24] See, Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951) (dissent). See also, 2 WILLISTON, CONTRACTS § 403 at 1091 (3d ed. 1959). The courts holding that there is a discoverable interest seem to overlook the highly technical nature of a true third party beneficiary contract.

[25] 105 N.H. 231, 196 A.2d 66 (1963).

[26] *Id.* at 234, 196 A.2d at 68.

and settlement.[27] *Welty* rests its decision predominantly on the need for settlement. The court explains that dockets are crowded and accidents on the increase. If a number of cases cannot be settled out of court, there will be congestion and the number of courts will have to be greatly increased. The court feels that information concerning liability insurance and its limits is conducive to fair negotiations. It states, for example, that in cases where injuries are great and insurance coverage low, the plaintiff might well be led to accept a smaller settlement than the extent of the injuries would otherwise warrant.[28] Other courts hold that the mandate of Rule 1 of the Federal Rules of Civil Procedure[29] requires a construction of Rule 26(b) that will lead to speedy determination of actions by way of settlement.[30]

Many courts, however, deny that the interest in settlements makes liability insurance relevant to the subject matter. They feel that the fact that courts are congested has no bearing on the fundamental rights of a defendant to have his day in court.[31] They also assert that the opposite of the large injury-low insurance argument is equally valid. If there is a small injury or plaintiff has a weak case, his discovery that defendant has high insurance limits might result in greater demands by the plaintiff.[32]

In answer to the argument that, in light of Rule 1, Rule 26(b) should encompass discovery of insurance, some argue that while compromise may be a by-product of discovery, the true goal of discovery and the Federal Rules is adjudication of the merits.[33]

---

[27] See, Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966); Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961); Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961); Miller v. Harpster, 392 P.2d 21 (Ala. 1964).

[28] 253 F. Supp. at 877.

[29] "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

[30] *E.g.*, Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

[31] *E.g.*, Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958).

[32] See, Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962), where the court also advances a test that if liability is admitted and damages are high, defendant should reveal his insurance. But if liability is hotly contested, he should not.

[33] See, Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), where Mr. Justice Black states that "if rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Id.* at 373. *Contra,* Hill v. Greer, 30 F.R.D. 64 (D.N.J. 1961).

In addition to these arguments, a few courts have held that relevation of defendant's insurance at discovery violates his fifth amendment constitutional rights.[34] The argument is that insurance is an asset of defendant and that if discovery is allowed, there is no rational basis to deny discovery as to all of defendant's assets before liability is established.[35] Thus, *Hillman v. Penny*,[36] a Tennessee federal case, expressed the fear that a groundless claim might become the vehicle for making full inquiry into all the confidential affairs of any defendant involved in an automobile accident.[37]

The arguments for relevancy of insurance as illustrated by *Welty* thus seem to be answered both by the purpose of discovery, *i.e.*, to get to the merits, and the limitations on discovery, *i.e.*, to matters of evidence or matters that may lead to evidence. Nevertheless, the courts are almost evenly divided on this question. As a number of courts seem to disregard the purpose and language of Rule 26(b), an amendment or a definitive decision by the United States Supreme Court would seem desirable in order to have uniformity throughout the federal system. When the North Carolina General Assembly considers Rule 26(b), it specifically should either include or exclude liability insurance from discovery.

EUGENE W. PURDOM

Civil Rights Act of 1964—Public Accommodations—Private Club Exemption

In *United States v. Northwest La. Restaurant Club*[1] a three-judge federal court held that the acts and practices of the members of defendant club constituted an unlawful deprivation of rights secured to Negro citizens for the free and equal use and enjoyment of public accommodations guaranteed by Title II of the Civil Rights

[34] Gallimore v. Dye, 21 F.R.D. 283, 287 (E.D. Ill. 1958). For a thorough discussion of the constitutional problem see Note, 34 NOTRE DAME LAW. 78 (1958).

[35] See, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952). *Contra*, Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951), which holds that a liability policy is not an asset but purchase protection for both compensatory and punitive damages.

[36] 29 F.R.D. 159 (E.D. Tenn. 1962).

[37] *Id.* at 161.

[1] 256 F. Supp. 151 (1966).