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Liability Insurer as a Real Party in Interest: Proposed Amendments to the Minnesota Rules of Civil Procedure

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NOTES

**THE LIABILITY INSURER AS A REAL PARTY IN
INTEREST: PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF
CIVIL PROCEDURE**

The Committee on Court Rules of the Minnesota State Bar Association has recommended, despite a dissenting minority report,¹ two highly controversial amendments to the Minnesota Rules of Civil Procedure² which are based on the concept of the liability insurer as a real party in interest³ in negligence litigation. The Committee has suggested that the Rules be amended so that: (1) any party may join as a party defendant "an insurance company which has a financial interest adverse to him in any action arising out of the negligent operation of a motor vehicle"⁴ and (2) that "the claimant in a negligence action [be given] an absolute right to discover the insurance coverage and policy limits" of his adversary.⁵

The purpose of this Note is to evaluate these two proposed amendments in light of present law applicable to the liability insurer and with a view toward determining what should be the status of the liability insurance company in negligence litigation.

TRADITIONAL JUDICIAL ATTITUDE TOWARD THE LIABILITY INSURER

At common law the right of an injured party to recover against the tortfeasor's liability insurer was extremely limited. Such a right existed only if the policy was construed as insuring the tortfeasor against liability for injuries to third persons. However, the ordinary liability insurance contract was generally construed merely to in-

1. 13 Bench & Bar of Minn., No. 10, p. 61 (1956).

2. The rules, which are substantially equivalent to the Federal Rules of Civil Procedure, were promulgated by the Minnesota Supreme Court on June 25, 1951, pursuant to authority granted by the Minnesota Legislature to regulate practice, pleading and procedure for civil actions in all courts except those of probate. Minn. Stat. § 480.051 (Supp. 1956). The rules are set out in full with extensive commentaries by the authors in Wright, Minnesota Rules (1954); Youngquist and Blacik, Minnesota Rules Practice (1953). For a comprehensive discussion of their practical application see Symposium, 36 Minn. L. Rev. 565 (1952).

3. "Real party in interest" as it is used in this note is not to be confused with the term as it is used in Minn. R. Civ. P. 17.01, which provides that every action shall be *prosecuted* in the name of the real party in interest and thus applies only to the plaintiff. Herein the term will be used to denote all parties who are "actually and substantially interested in the subject matter" of the litigation. See Caughey v. George Jensen & Sons, 74 Idaho 132, 134-35, 258 P.2d 357, 359 (1953); Froling v. Farrar, 77 N.D. 639, 642-43, 44 N.W.2d 763, 765 (1950).

4. 13 Bench & Bar of Minn., No. 6, p. 42 (1956).

5. *Ibid.*

demnify the insured against his actual pecuniary loss.⁶ In this type of policy, the injured party secured *no* rights against the tortfeasor's insurer since no privity of contract existed between the injured person and the insurer. The insurer did not become indebted to the insured until a judgment was secured against, and paid by, the insured. Thus, if the insured was bankrupt or insolvent, the insurer was relieved of liability under the policy.⁷ In response to the inequitable results of this construction,⁸ most states enacted statutes which, broadly speaking, prevent the insurer from conditioning his liability on the insured's ability to pay the judgment.⁹ These statutes, by giving the injured person access to the tortfeasor's insurance funds, have transformed the technical indemnity-type policy into a form of liability insurance contract.¹⁰

To perpetuate the indemnity theory and thus protect the insurer from *direct* liability to third persons, most liability insurance contracts specifically provide that no action may be brought on the policy until a judgment has been secured against the insured and returned unsatisfied.¹¹ Although the solvency of the insured is no longer a condition precedent to the insurer's liability,¹² the concept of the insurer as an indemnitor has been retained by judicial acceptance on this "no-action" clause. Thus, in order to recover against the insurer, the injured person must initially bring an action on the merits against the tortfeasor. He may then have to institute proceedings against the insurer to enforce the judgment against the insured. Absent statute¹³ or contractual agreement other-

6. A technical distinction is made between a "liability" policy and an "indemnity" policy. The former gives rise to a right in the injured person against the insurer as soon as the injury occurs, while the latter indemnifies the insured after he has satisfied the claim. See, *e.g.*, *Anoka Lumber Co. v. Fidelity & Cas. Co.*, 63 Minn. 286, 292-93, 65 N.W. 353, 355 (1895); *Vance, Insurance* § 135 (3d ed. 1951). Cases recognizing this distinction are collected in *Annot.*, 117 A.L.R. 239 (1938); 83 A.L.R. 677 (1933); 37 A.L.R. 644 (1925).

7. See *Vance, op. cit. supra*, note 6 at 801.

8. *Id.* at 802. See *Legis. Note*, 22 Minn. L. Rev. 236 n.42 (1938).

9. See *e.g.*, *Cal. Ins. Code* § 11580 (Deering 1950); *Minn. Stat.* § 60.51 (1953); *Vance, op. cit. supra*, note 6 at 804 & § nn. 22-24.

10. See *Vance, op. cit. supra*, note 6 at 804.

11. *Id.* at 800.

12. The National Standard Automobile Liability Policy specifically so provides. See *Patterson, Cases and Materials on the Law of Insurance* 784 (3d ed. 1955); *Vance, op. cit. supra*, note 6 at 804-05.

13. Three states have enacted direct action statutes. A Louisiana statute permits the injured party to sue the insurer directly, without the requirement that judgment must first be secured against the insured tortfeasor. *La. Rev. Stat.* § 22.655 (1950). A Wisconsin statute permits the injured party to join the insurer in the original action in automobile accident litigation. *Wis. Stat.* §§ 85.93, 260.11 (1955). A Rhode Island statute permits direct action against the insurer when the insured tortfeasor cannot be served within the state. *R.I. Gen. Laws* § 155.1 (1938).

wise, the insurer may not be joined as a party in the original suit against the insured tortfeasor.¹⁴

Traditionally the liability insurer has not been considered to be a real party in interest to the litigation even though it may assume complete control of the defense of the action brought against the insured. That the defendant is insured is considered irrelevant to the substantive issues,¹⁵ and the fact that an insurer is involved in the litigation is concealed from the jury, even though ordinarily the identity of parties involved in litigation, and their interests to litigation are disclosed to the court and the jury.

JOINDER OF THE INSURER UNDER THE RULES

Adoption of the Federal Rules of Civil Procedure,¹⁶ and their counterparts in the states,¹⁷ has raised the question whether the liberal provisions for joinder of parties and claims¹⁸ would permit consolidation of the action against the tortfeasor with the action to recover on the policy against the tortfeasor's insurer. Such a result has been achieved where under Rule 14¹⁹ the defendant has been permitted to implead his liability insurer. In these cases, it is reasoned that since the insurer "is or may be liable" to the insured tortfeasor for any judgment secured by the injured party, the defendant may bring in his liability insurer as a third party defendant in the original action, in order to have all rights and liabilities determined in one lawsuit.²⁰

It might be argued that, applied literally, Rule 20²¹ would permit the injured person similarly to consolidate the two actions. The Rule provides for permissive joinder, as defendants, of all parties

14. *E.g.*, *Charlton v. Van Etten*, 55 F.2d 418 (D. Minn. 1932); *Smith Stage Co. v. Eckert*, 21 Ariz. 28, 184 P. 1001 (1919); see *Anderson v. State Farm Mutual Automobile Insurance Co.*, 222 Minn. 428, 24 N.W.2d 836 (1946), 31 Minn. L. Rev. 492 (1947); *Appleman, Joinder of Policyholder and Insurer as Parties Defendant*, 22 Marq. L. Rev. 75-78 (1938); but see *Peterson v. Maloney*, 181 Minn. 437, 440, 232 N.W. 790, 791 (1930).

15. See *McCormick, Evidence* 168 (1954); 2 *Wigmore, Evidence* § 282a (3d ed. 1940).

16. These rules are set out in full with commentaries in *Moore, Federal Practice* (2d ed. 1948).

17. For a survey of the extent to which the states have adopted procedural reforms, see *Vanderbilt, Minimum Standards of Judicial Administration* 93-136 (1949).

18. Fed. R. Civ. P. 13, 14, 18-24; Minn. R. Civ. P. 13, 14, 18-24. For a discussion of the practical effect of these rules, see *Wright, Joinder of Claims and Parties Under Modern Reading Rules*, 36 Minn. L. Rev. 580 (1952).

19. Fed. R. Civ. P. 14(a); Minn. R. Civ. P. 14.01.

20. See, *e.g.*, *Jordan v. Stephens*, 7 F.R.D. 140 (W.D.Mo. 1945); *Pioneer Mut. Compensation Co. v. Cosby*, 125 Colo. 468, 244 P.2d 1089 (1952); *DeParcq and Wright, Impleader of Defendant's Insurer Under Modern Pleading Rules*, 38 Minn. L. Rev. 229 (1954). But see, *Auliso v. California Oil Co.*, 120 N.Y.S. 2d 582 (Sup. Ct. 1952).

21. Fed. R. Civ. P. 20(a); Minn. R. Civ. P. 20.01.

against whom there is asserted some right to relief which arises out of the same transaction or occurrence "if any question of law or fact common to all of them will arise in the action."²² Thus, in a personal injury action, the injured person might assert a right to relief — against both the tortfeasor and his insurer — which arose out of the same occurrence, namely the accident which caused the injury. The tort liability of the insured, and the insurer's liability under the policy, will certainly present questions of fact and law common to all the parties.²³ Also, it might be asserted that Rule 18, which provides for joinder of claims,²⁴ permits the injured person to join his claim against the tortfeasor with his claim against the tortfeasor's insurer. This Rule states that "whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action. . . ."²⁵ The claim of an injured person against the tortfeasor's insurer, even though contingent upon securing a judgment against the insured, would certainly appear to be "cognizable" after his claim against the insured was determined.

However, adherence to the indemnity theory by construction of the "no action" clause, has thus far precluded joinder by the injured party under these Rules.²⁶ These decisions are apparently based on the rationale that the injured party secures no claim against the insurer which he may join, or no right to relief which he may assert, until after final determination of the insured's tort liability.²⁷ Courts stress the contention that, absent legislation, the course of action which the injured party must follow is to be controlled solely by the policy terms.

THE PROPOSED AMENDMENT

The amendment which the Court Rules Committee has recommended provides for permissive joinder of the defendant's liability insurer in cases which arise out of the negligent operation of a motor vehicle.²⁸ The language of the proposed amendment would

22. *Ibid.*

23. *But see* Pennsylvania R. Co. v. Lattavo Bros., Inc. 9 F.R.D. 205, 206 (N.D. Ohio 1949).

24. Fed. R. Civ. P. 18(b); Minn. R. Civ. P. 18.02.

25. *Ibid.*

26. See *Pitcairn v. Rumsey*, 32 F. Supp. 146 (D. Mich. 1940); *Pennsylvania R. Co. v. Lattavo Bros., Inc.*, 9 F.R.D. 205 (W.D. Ohio 1949); *Jennings v. Beach*, 1 F.R.D. 442 (D. Mass. 1940); *Crowley v. Hardman Bros.*, 122 Colo. 489, 223 P.2d 1045 (1950); *cf. Allegheny County, Pa. v. Maryland Cas. Co.* 32 F. Supp. 297 (D. Pa. 1940). *But cf. United States Fidelity & Guaranty Co. v. Janich*, 3 F.R.D. 16 (D. Cal. 1943).

27. See *Crowley v. Hardman Bros.*, 122 Colo. 489, 223 P.2d 1045 (1950).

28. See note 4 *supra*.

also seem to permit a defendant in such an action, who files a counterclaim, to join the plaintiff's liability insurer.²⁹ The amendment apparently would permit the determination in one lawsuit of the rights of all the parties, which arise from the ordinary automobile accident. The principal objections to adoption of this amendment appear to be: (1) that it would cause prejudice to the insurer, and (2) that it would deprive the insurer of a substantive contractual right.

Disclosure of the Insurer as Prejudicial

The effect of joining the insurer in the original action is necessarily to reveal to the jury the fact that the defendant is protected by liability insurance. Courts have zealously guarded against such disclosure, principally by adoption of an exclusionary rule of evidence,³⁰ on the theory that such information will influence the jury in its determination of liability or its assessment of damages.³¹ The assumption is generally accepted by both attorneys and courts that if the jurors learn that insurance is involved in the case they are more likely to return a verdict for the plaintiff, or to return one for a larger amount.³² On principle, if knowledge of insurance results in such prejudice — although the assumption is not subject to verification, and appears to be a matter of pure conjecture³³ — it would seem that *whenever* information of insurance coverage is conveyed to the jury a new trial should be granted. However, as a practical matter, the jury is often informed of insurance coverage in a legiti-

29. *Ibid.*

30. See McCormick, Evidence § 168 (1954); 2 Wigmore, Evidence § 282a (3d ed. 1940). The exclusionary rule is uniformly followed. In *Jessup v. Davis*, 115 Neb. 1, 211 N.W. 190 (1926), the Nebraska Supreme Court refused to follow the rule but reversed itself in *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N.W. 726 (1936). The court was commended for the latter decision in *Beghtol, The Present Rule as to Disclosure of Insurance in Personal Injury Cases*, 15 Neb. L. Bull. 327 (1937); Note, 15 Neb. L. Bull. 185 (1936).

31. See, e.g., *Jeddeloh v. Hockenhull*, 219 Minn. 541, 552-54, 18 N.W.2d 582, 588-89 (1945); *Bergstein v. Popkin*, 202 Wis. 625, 633, 233 N.W. 572, 575 (1930).

32. See Pierson, *The Defense Attorney and Basic Defense Tactics* § 140 (1956). Adherence to this assumption has approached absurdity in some cases. See *Texas Co. v. Betterton*, 126 Tex. 359, 88 S.W.2d 1039 (1936), where the plaintiff had obtained a judgment against the Texas Company, one of the largest oil companies in the world. The court reversed because it was brought to the attention of the jury that the Texas Company carried liability insurance!

33. Although the University of Chicago jury studies are far from complete, some investigation is being done in this area. Some of the interview material suggests that the effect of insurance knowledge may be to cause the jury to give what it considers an adequate award, and the absence of insurance requires them to give what they consider to be a less than adequate award. Letter from Professor Harry Kalven, Jr., Director of the Jury Study Project, January 8, 1957.

mate manner due to exceptions to the rule. Thus, an inadvertent reference to insurance is generally not ground for mistrial or reversal.³⁴ And, in the fact of insurance tends to prove some material issue, the evidence will not be excluded, regardless of its "prejudicial" effect. For example, evidence of insurance may be admitted to show ownership or control of an automobile,³⁵ the existence of an agency relationship,³⁶ or to impeach the credibility of a witness.³⁷ A statement which tends to show liability will not be excluded merely because it contains a reference to the defendant's insurance coverage.³⁸ Moreover, plaintiff's counsel will probably convey the existence of insurance coverage to the jury on voir dire examination of prospective jurors. In order to exercise the right to challenge for bias, counsel may usually inquire of the jurors as to their interest in an insurance company,³⁹ although this right has been limited somewhat in a few jurisdictions.⁴⁰

Furthermore, it is common knowledge that an insurer is usually involved in the defense of a lawsuit concerning an automobile accident which is on its face merely a contest between two individuals. In view of the general prevalence of insurance coverage of automobiles today, and the existence of financial responsibility statutes,⁴¹ it is very likely that the jury will *assume*,⁴² rightly or wrongly,⁴³ that the defendant is insured. Nevertheless, some courts have refused

34. See, *e.g.*, *Anderson v. Enfield*, 244 Minn. 474, 70 N.W.2d 409 (1955); *Shork v. Higgins*, 157 N.Y.S.2d 19 (N.Y. City Ct. 1956).

35. *E.g.*, *Bash v. Hade*, 245 Iowa 332, 62 N.W.2d 180 (1954); *Martin v. Schiska*, 183 Minn. 256, 236 N.W. 312 (1931).

36. *E.g.*, *Luquire Ins. Co. v. McCalla*, 244 Ala. 479, 13 So.2d 865 (1943); *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044 (1941); *Barg v. Bousfield*, 65 Minn. 355, 68 N.W. 45 (1896).

37. *E.g.*, *Eppinger & Russell Co. v. Sheely*, 24 F.2d 153 (5th Cir. 1928); *Scholte v. Brabec*, 177 Minn. 13, 224 N.W. 259 (1929); See, *McCormick, Evidence* 356 (1954).

38. *E.g.*, *Garee v. McDonell*, 116 F.2d 78 (7th Cir. 1940), *cert. denied*, 313 U.S. 561 (1941); *North v. Vinton*, 17 Cal. App.2d 214, 61 P. 2d 950 (1936).

39. See *Seitz v. Claybourne*, 181 Minn. 4, 231 N.W. 714 (1930); *Belli, Modern Trials* § 118 (1954); *Pierson, The Defense Attorney and Basic Defense Tactics* § 141 (1956).

40. See *Wheeler v. Rudek*, 397 Ill. 438, 74 N.E.2d 601 (1947); *Note*, 17 Minn. L. Rev. 299, 309-12 (1933).

41. See, *e.g.*, *Ariz. Code Ann.* § 66-248 (1939); *Minn. Stat.* § 170.21-170.58 (1953). Generally stated, these laws require a driver who has been involved in an accident in which personal injury or property damage above a certain minimum was inflicted to prove that he is financially responsible for future accidents either by bond or by procuring liability insurance. See *Grad, Recent Developments in Automobile Accident Compensation*, 50 Colum. L. Rev. 300, 307 n.24 (1950). In 1956 all but three states had some form of financial responsibility legislation.

42. See note 33 *supra*. A substantial number of jurors interrogated in the Chicago jury studies believed, on the basis of their general experience, that insurance was involved in the case.

to permit joinder because of the possibility of prejudice due to open disclosure of the insurer's interest.⁴⁴

Concealment of the insurer to protect against possible prejudice seems a highly questionable reason to deny joinder, since it is likely that in a particular case the jury will either assume insurance coverage, or its existence will be disclosed during the course of the trial. Furthermore, knowledge of insurance coverage need not necessarily result in excessive or unwarranted verdicts. There is no evidence that verdicts are unusually high in states where statutes permit direct action. On the contrary, Wisconsin, which permits joinder of the insurer in automobile accident cases, is generally thought to be a "low-verdict" state.⁴⁵ Moreover, a distinguished defense attorney has stated that in his experience (in a state which permits joinder in certain cases) there apparently is no connection between the presence of the insurer as a party defendant and excessive verdicts.⁴⁶

If the insurer were formally joined as a party defendant the trial court could frankly disclose to the jurors that insurance is involved in the case; explain to them the theory of the indemnity policy;⁴⁷ and instruct them that in considering the liability of the defendant, and in assessing damages, they are not to be influenced by the fact that an insurance company may pay any judgment against the tortfeasor. The court could explain that it has discretion to interfere with any verdict which clearly appears to be excessive and to have been the result of prejudice.⁴⁸ There is no sound basis for belief that

43. If the assumption is wrong, that is, if the defendant is not protected by liability insurance, the exclusionary rule seems to work a hardship on the defendant. It is generally held that it is improper for the defendant to show that he does *not* have insurance, or that he is only partially covered. See, *e.g.*, *Avent v. Tucker*, 188 Miss. 207, 194 So. 596 (1940); *Brown v. Murphy Transfer & Storage Co.*, 190 Minn. 81, 88, 251 N.W. 5, 8 (1933); *but see*, *Vick v. Moe*, 74 S.D. 144, 49 N.W. 2d 463 (1951), where the court refused to reverse when plaintiff raised an inference of insurance and the trial court permitted defendant to rebut this inference.

44. See *Jennings v. Beach*, 1 F.R.D. 442 (D. Mass. 1940); *Hertz v. Hudson Motor Car Co.*, 3 Fed. R. Serv. 18b15, case 3 (D.D.C. 1939); *cf.* *Buchholz v. Michigan Motor Freight Lines, Inc.*, 19 F.R.D. 407 (E.D.Mich. 1956), (impleader denied to avoid prejudice); *Remch v. Grabow*, 70 N.Y.S. 2d 462 (Sup. Ct. 1947) (separate trials ordered to avoid jury prejudice).

45. See *Belli*, *The More Adequate Award* 3 (1952).

46. See *Pierson*, *op. cit. supra*, note 32 at 325.

47. *Id.* at 327; *Nilles*, *The Right to Interrogate Jurors With Reference To Insurance In Negligence Cases*, 3 Dak. L. Rev. 406, 409 (1931). These commentators suggest that jurors do not understand the difference between an "indemnity" and a casualty or accident insurance policy.

48. See *Berg v. Ullevig*, 244 Minn. 390, 396, 70 N.W. 2d 133, 137-38 (1955); *Litman v. Walso*, 211 Minn. 398, 402-03, 1 N.W.2d 391, 393 (1941). It appears doubtful that the Minnesota Supreme Court would refuse to adopt the proposed amendment on grounds of possible prejudice alone. Recent decisions have indicated a distrust of the prejudice argument. See *Sander v. Dieseth*, 230 Minn. 125, 126-27, 40 N.W.2d 844, 845 (1950); *Odegard v. Connolly*, 211 Minn. 342, 345-46, 1 N.W.2d 137, 139 (1941).

the jury would be influenced to a greater extent by information received under these circumstances than by information which the defendant attempts to conceal from them, and the plaintiff endeavors to get across to them in a devious manner.

The "No-Action" Clause

Another argument which may be advanced against amending the Rules to permit the plaintiff to join the defendant's liability insurer is that such a result may not be accomplished by adoption of a procedural rule. The enabling legislation⁴⁹ which granted to the Minnesota Supreme Court the power to regulate pleading, practice and procedure, expressly states that the rules promulgated "shall not abridge, enlarge, or modify the substantive rights of any litigant."⁵⁰ This argument assumes that the no-action clause gives to the insurer a substantive right — immunity from suit until the insured's liability has been determined by judgment — which may not be abridged by rules of court.

What is a "substantive" as opposed to a "procedural" right is far from clear, and it is considered to be impossible to make a clear-cut distinction for all purposes.⁵¹ For rule-making purposes, it would seem that procedure is best defined as the "method by which rights and duties are to be protected and enforced . . ."⁵² Although the no-action clause appears to affect merely the *method* by which the rights of the injured party, and the liabilities of the insured and the insurer are to be determined, courts have taken the position that the clause is a "substantive" contractual right of the insurer. In cases where the plaintiff has attempted to join the insurer under the Rules, this position has gained general acceptance,⁵³ although apparently without extensive analysis. In applying direct action statutes,⁵⁴ this question has also received some attention. Some courts consider the no-action clause to be substantive in nature; others assert that it involves merely procedural considerations.⁵⁵

49. Minn. Stat. Ann. § 480.051 (Supp. 1956).

50. *Ibid.*

51. See Vanderbilt, *op. cit. supra*, note 17 at 94-97; Curd, *Substance and Procedure in Rule Making*, 51 W.Va.L.Q. 34, 51 (1948); Joiner and Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L. Rev. 623 (1957).

52. Green, *To What Extent May Courts Under The Rule-Making Power Prescribe Rules of Evidence?* 26 A.B.A.J. 482, 483-84 (1940).

53. See Headrick v. Smoky Mountain Stages, Inc., 11 F.R.D. 205 (E.D. Tenn. 1950); Pitcairn v. Rumsey, 32 F.Supp. 146 (D.Mich. 1940); Crowley v. Hardman Bros. 122 Colo. 489, 223 P.2d 1045 (1950); *cf.* Allegheny County Pa. v. Maryland Cas. Co., 32 F.Supp. 297 (D.Pa. 1940).

54. See note 13 *supra*.

55. Compare Bayard v. Traders & General Ins. Co., 99 F.Supp. 343, 354-55 (D.La. 1951); Ritterbusch v. Sexsmith, 256 Wis. 507, 514-16 (1950).

As a practical matter, it could be argued that the no-action clause affects only the *method* by which the injured party may assert his claim; that is, it postpones the time of suit and the time of payment, and provides for payment to the insured alone, unless the latter is unable to satisfy the judgment. The substantive liability of the insurer could not be affected in any way by permitting joinder, since if no judgment is secured against the insured, no liability would result to the insurer. It might also be argued that joinder would force the insurer into needless litigation, but this contention has little force inasmuch as the insurer usually is involved in the defense of the suit against the insured anyway, or if it refuses to defend may, in most jurisdictions, be impleaded by the insured.⁵⁶

The procedure by which the injured claimant seeks to recover for his injuries should be regulated by the courts, not dictated by private contractual agreements. Clearly the court could find that the no-action clause serves no useful or substantive purpose, in that it merely determines the method by which rights and liabilities are to be decided. The result of its application is to slow up the judicial processes by requiring two suits where litigation could easily be disposed of in one suit without prejudice⁵⁷ or inconvenience to any of the parties. "[I]ts object is to put weights on the already too slow feet of justice."⁵⁸

The result which the proposed amendment seeks to achieve appears to be in accord with the philosophy behind procedural reform. It has been stated that one of the primary objectives of the Rules of Civil Procedure is to avoid multiplicity of suits and circuitry of action, by settling as many matters as possible in one lawsuit, "except where this may make the suit too many-sided and complicated for the jury to unravel, or where this free joinder may cause prejudice to some party or claim."⁵⁹

with *Robbins v. Short*, 165 So. 512, 514 (La.App. 1936). The Minnesota Supreme Court would apparently characterize the no-action clause as substantive in nature. In *Anderson v. State Farm Mutual Automobile Insurance Co.*, 222 Minn. 428, 24 N.W.2d 836 (1946), 31 Minn. L. Rev. 492 (1947), the court characterized the Wisconsin direct action statute as procedural for conflict of laws purposes, and refused to apply it in this state so as not to divest the insurer of his rights under the no-action clause.

56. See DeParcq and Wright, *Impleader of Defendant's Insurer Under Modern Pleading Rules*, 38 Minn. L. Rev. 229 (1954).

57. *But see* *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 75-76 (1954) (concurring opinion), where Justice Frankfurter argues that the clause protects the insurer from jury prejudice. The same argument is set forth in Comment, 23 Rocky Mt. L. Rev. 366, 367 (1951).

58. *Jordan v. Stephens*, 7 F.R.D. 140, 142 (W.D.Mo. 1945).

59. Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 581 (1952).

Adoption of this amendment would permit independent actions involving the same parties and the same subject matter to be tried and determined in one lawsuit. Perhaps as a practical matter two suits are usually not required,⁶⁰ but joinder would *facilitate* the determination of the insurer's liability and the insured's rights under the policy. It could spare the insured and the injured claimant unnecessary delay and expense in seeking recovery when there is a question of the insurer's liability under the policy terms.⁶¹ The financial protection afforded by the liability policy would be made directly available to the person by whom the loss is actually sustained without requiring unnecessary subsequent procedures. If simultaneous litigation of the plaintiff's claim and the insurer's defenses under the policy should unduly complicate the trial proceedings, the court could order separate trials under Rule 42.⁶²

Adoption of this proposed amendment would restore integrity to the trial courts, where an insurer is involved, by apprising the jury of the identity and interest of the insurer, who under the policy terms may have exclusive control of the defense of the suit, may supply counsel for the defendant, and may reserve to itself the right to settle or carry on the litigation.⁶³ The exclusionary rule, which has resulted in a great deal of unneeded litigation,⁶⁴ would be supplanted with frank and open discussion of the insurer's status in the litigation.

60. The number of instances where the injured party or the insured are forced into subsequent litigation to collect on the judgment does not appear to be great. If the insurer chooses to defend the insured, he may be estopped to deny liability. See *Nikkari v. Jackson*, 226 Minn. 393, 33 N.W.2d 36 (1948); *Patterson v. Adan*, 119 Minn. 308, 138 N.W. 281 (1912). If the insurer refuses to defend, he might be impleaded by the insured. *DeParcq and Wright*, note 56 *supra*. See *Coleman, The Defendant Insurance Company in Automobile Cases*, 19 Marq. L. Rev. 1, 8 (1934) (where it is "guessed" that only in 1 per cent of the cases is a second suit required).

61. See, e.g., *Bettinger v. Northwestern Nat'l Cas. Co.*, 213 F.2d 200 (8th Cir. 1954) (two lawsuits and three years required to determine insured's and insurer's liabilities); *Preferred Acc. Ins. Co. v. Grasso*, 186 F.2d 987 (2d Cir. 1951) (three lawsuits and six years); *Shelby Mut. Cas. Co. v. Richmond*, 185 F.2d 803 (2d Cir. 1950) (two lawsuits and five years).

62. Fed. R. Civ. P. 42(b); Minn. R. Civ. P. 42.02. See Note, 39 Minn. L. Rev. 743, 745-50 (1955).

63. Professor McCormick contends that the litigant is entitled to know the identity of his opponent, the court is entitled to know the parties that are using its officers and facilities, and the jury is entitled to know the identity of all the real parties in interest, which the insurer is all but name. McCormick, *Evidence* 358 (1954).

64. Some of the cases are collected in six extensive annotations. See Annot., 4 A.L.R.2d 764 (1949); 105 A.L.R. 1319 (1936); 95 A.L.R. 388 (1935); 74 A.L.R. 849 (1931); 56 A.L.R. 1418 (1928); 28 A.L.R. 516 (1924).

DISCOVERY OF THE DEFENDANT'S LIABILITY INSURANCE COVERAGE⁶⁵

The proper status of the defendant's liability insurer in negligence litigation has caused confusion and disagreement in another area since the adoption of the Rules of Civil Procedure.⁶⁶ It has been widely debated whether or not the discovery rules⁶⁷ provide for inquiry by the injured claimant into the existence and extent of the defendant's liability insurance coverage.⁶⁸ If the liability insurer were considered to be a real party in interest to the litigation, few would argue that the plaintiff should not be permitted to discover the existence of the defendant's insurance coverage under these Rules. However, the liability insurance policy traditionally has been considered to be merely a private contract between the insured and the insurer, and the fact that the defendant is insured has generally been thought to be "irrelevant" to the substantive issues of liability and damages.⁶⁹

In cases where the defendant's insurance coverage was technically relevant to a substantive issue in the case, discovery of insurance has been allowed.⁷⁰ But there is sharp disagreement as to whether or not the discovery rules may be used to elicit this information solely for the purpose of evaluating the case for trial or settlement.⁷¹

65. Although the discussion is here concerned primarily with discovery of the *defendant's* insurance coverage, the principles involved apply equally well to the plaintiff's liability insurer when the defendant files a counterclaim. The proposal for amendment reads: "that the rules be amended to give the claimant in a negligence action an absolute right to discover the insurance coverage and policy limits." 13 Bench & Bar of Minn., No. 6, p. 42 (1956).

66. See note 2, *supra*.

67. Fed. R. Civ. P. 26-37; Minn. R. Civ. P. 26-37. For a discussion of the scope and function of discovery see Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 Minn. L. Rev. 633 (1952); Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205 (1942); Notes, 36 Minn. L. Rev. 364 (1952), 31 Minn. L. Rev. 712 (1947).

68. Compare Note, 5 Stan. L. Rev. 322 (1953), with Wright, *Minnesota Rules 162-65* (1954).

69. See note 15 *supra*.

70. See *Roth v. Bird*, 239 F.2d 257 (5th Cir. 1956) (admission of fact and history of vessel); *McDowell Associates, Inc. v. Pennsylvania R. Co.*, 23 Fed. Rules Serv. 26b.31, case 1 (S.D.N.Y. 1956) (ownership of machinery); *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D.N.Y. 1948) (operation and control of automobile); *Layton v. Cregan & Mallory Co.*, 263 Mich. 30, 248 N.W. 539 (1933) (ownership of automobile); *Martyn v. Braun*, 270 App. Div. 768, 59 N.Y.S.2d 588 (Sup. Ct. 1946) (control of premises); cf. *Tobe Deut-schmann Corp. v. United Aircraft Products, Inc.*, 15 F.R.D. 363 (S.D.N.Y. 1953) (questions which seek to elicit information as to financial condition permitted when representation was made that financial condition was sound).

71. For cases permitting discovery, see *Kingdom of the Netherlands v. Ferrary Marine Repairs, Inc.*, 14 F.R.D. 14 (E.D.N.Y. 1953); *Brackett v. Woodall Food Products, Inc.*, 12 F.R.D. 4 (E.D. Tenn. 1951); *Maddox v. Grauman*, 265 S.W.2d 939 (Ky. App. 1954); *Superior Ins. Co. v. Superior Court*, 37 Cal.2d 749, 235 P.2d 833 (1951). For cases holding discovery is not

THE DISCOVERY RULE IN MINNESOTA

The district courts in Minnesota had been in disagreement over this question prior to 1955 when the supreme court decided in *Jeppesen v. Swanson*⁷² that discovery of insurance before judgment is obtained in an action on the merits is not within the purview of the discovery rules. In the district court, the plaintiff had obtained an order pursuant to Rule 34⁷³ for production of defendant's insurance policy. The affidavit in support of the motion stated only that plaintiff's attorneys could not properly evaluate a figure for settlement or trial without knowledge of the extent of insurance coverage. On application for a writ of prohibition to restrain enforcement of the order, the supreme court held that where the information sought is for the sole purpose of evaluating a cause of action, it is not discoverable.⁷⁴ Reasoning that the purpose of discovery is to ascertain facts which may be used for proof or defense of an action, the court concluded that it is not intended to be utilized to supply information for the personal use of the litigants that "has no connection with the determination of the issues involved in the action on their merits."⁷⁵ The court suggested that if discovery of insurance coverage is desirable, and it expressed doubts about that, then it could better be accomplished by an amendment than by a strained interpretation of the rules.⁷⁶

THE PROPOSED AMENDMENT

After the *Jeppeson* decision, a bill was introduced in the Minnesota Legislature to avoid its results but was dropped apparently because of a recommendation that the legislature should not interfere with the rule-making power of the court.⁷⁷ The proposed amendment, to give the claimant in a negligence action the right to discover the existence and extent of insurance coverage as a matter of course, was suggested in its place.

Relevancy

Perhaps the principal objection to permitting discovery of insurance coverage is that it is not considered "relevant to the subject

allowable, see *McNelly v. Perry*, 18 F.R.D. 360 (E.D. Tenn. 1955); *McClure v. Boeger*, 105 F. Supp. 612 (E.D. Pa. 1952); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955); *State v. Second Judicial District Court*, 69 Nev. 196, 245 P.2d 999 (1952).

72. 243 Minn. 547, 68 N.W.2d 649 (1955); 40 Minn. L. Rev. 183 (1956).

73. Minn. R. Civ. P. 34.

74. 243 Minn. at 562-63, 68 N.W.2d at 658.

75. *Id.* at 560, 68 N.W.2d at 657.

76. *Id.* at 562, 68 N.W.2d at 658.

77. See *Wright, Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 Harv. L. Rev. 839, 861 n.82 (1956).

matter of the pending action" as required by Rule 26.⁷⁸ Some courts have taken the position that information is subject to discovery only when it is technically relevant to the issues which are to be litigated or when it will lead to admissible evidence.⁷⁹ Accordingly, it is reasoned that information about insurance coverage is not discoverable since it would not be relevant for use at trial, or for use as a lead to information which might be used at trial, but relates solely to the collectibility of a judgment.⁸⁰

Certainly, if discovery is to be confined to inquiries which are technically relevant to the substantive issues, information about insurance coverage should not be susceptible to discovery procedures. Some courts have taken the position, however, that the "subject matter" of a lawsuit includes not only the questions of liability and extent of damages, but also the *chances of recovery*.⁸¹ Thus, for purposes of discovery, "relevancy" should perhaps be construed broadly, as applying to the entire scope of an action, from its origin to collection of the judgment. Discovery of insurance has been allowed under this theory, as information which is relevant to preparation of the case for trial, or arriving at a disposition other than trial.⁸²

In a very broad and realistic sense, the collectibility of a prospective judgment *is* relevant to the subject matter of a pending action, as "few litigations are undertaken solely to vindicate legal principles or philosophy. . . ."⁸³ Although the existence of insurance traditionally is not considered to be relevant to the issues which arise at a trial on the merits, and theoretically is of no legal interest to the injured party until after his claim has been successfully prosecuted, it seems unrealistic and hyper-technical to consider it irrelevant to the subject matter of a *pending* action.

It has also been suggested that permitting discovery of insurance would increase the danger of this irrelevant and "prejudicial" information getting to the jury.⁸⁴ There seems to be little merit

78. Fed. R. Civ. P. 26(b); Minn. R. Civ. P. 26.02.

79. See, e.g., *Stewart Stamping Corp. v. Westchester Products Co.*, 17 F.R.D. 248, 249 (S.D.N.Y. 1953); *General Motors Corp. v. California Research Corp.*, 8 F.R.D. 568, 570 (D. Del. 1948).

80. See *McNalley v. Perry*, 18 F.R.D. 360 (E.D. Tenn. 1955); *Jeppesen v. Swanson*, 243 Minn. 547, 554, 68 N.W.2d 649, 653 (1955).

81. See *Kingdom of the Netherlands v. Ferrary Marine Repairs, Inc.*, 14 F.R.D. 14 (E.D.N.Y. 1953); *Maddox v. Grauman*, 265 S.W.2d 939, (Ky. 1954).

82. See *Brackett v. Woodall Food Products, Inc.*, 12 F.R.D. 4 (E.D. Tenn. 1951).

83. *Kingdom of the Netherlands v. Ferrary Marine Repair, Inc.*, 14 F.R.D. 14, 15 (E.D.N.Y. 1953).

84. See Note, 5 *Stan. L. Rev.* 322, 331 (1953); 9 *Okla. L. Rev.* 412, 413 (1956).

in this contention—even if the assumption of prejudice to the insurer were valid—since information may be obtained by discovery even though it is not admissible at the trial.⁸⁵ “The determinative pre-trial inquiry . . . is not whether a possibility of trial prejudice [exists]. . . .”⁸⁶

Invasion of Privacy

In support of their refusal to permit discovery of the insurance policy, some courts have drawn an analogy to requiring disclosure of private information such as the defendant's financial worth, the property he owns, or his bank accounts.⁸⁷ It is asserted that courts should not permit the invasion of an individual's private financial affairs until a judgment has been obtained against him which remains unsatisfied.

Undoubtedly it is undesirable to permit the discovery procedures to be used as an excuse to conduct an unwarranted excursion into a defendant's private affairs, but it has been observed that the analogy is without practical significance.⁸⁸ The proposed amendment explicitly restricts the subject matter of discovery to liability insurance, which is unlike other general assets in that it is of no value to the insured until he incurs liability to third persons. When such an injured person inquires into the existence of insurance coverage, which is available only for a judgment secured against the insured, the inquiry does not have the objectionable connotations of one directed at purely private assets.

Enactment of safety responsibility legislation⁸⁹ adds weight to this contention. The apparent objective of such statutes is to require that individuals who drive motor vehicles be financially capable of satisfying claims for damages suffered in accidents.⁹⁰ Thus, the state has declared its policy that once an individual has become involved in an accident, his financial responsibility is no longer of purely private interest. Moreover, the general solvency of a defendant may usually be ascertained without difficulty by

85. Fed. R. Civ. P. 26(b); Minn. R. Civ. P. 26.02; see *Tobe Deutschmann Corp. v. United Aircraft Products, Inc.*, 15 F.R.D. 363, 364 (S.D. N.Y. 1953).

86. *Roth v. Bird*, 239 F.2d 257, 259 (5th Cir. 1956).

87. See *McClure v. Boeger*, 105 F. Supp. 612, 613 (E.D. Pa. 1952); *Jeppesen v. Swanson*, 243 Minn. 547, 560-61, 68 N.W.2d 649, 657 (1955).

88. See *Brackett v. Woodall Food Products*, 12 F.R.D. 4, 5 (E.D. Tenn. 1951); *Jeppesen v. Swanson*, 243 Minn. 547, 563, 68 N.W.2d 649, 659 (1955) (dissenting opinion).

89. See note 41 *supra*.

90. See *St. Paul v. Hoffmann*, 223 Minn. 76, 77, 25 N.W.2d 661, 662 (1946).

resort to private credit agencies, or garnishment proceedings,⁹¹ but there does not appear to be any satisfactory way that the existence or extent of insurance coverage may be ascertained without resort to discovery procedures.

Bargaining Position

It has been suggested that the true purpose of requesting discovery of insurance coverage is to give to the plaintiff a more advantageous position to force settlement than he enjoys without knowledge of the insurance limits.⁹² It is claimed that if such information were required to be disclosed, plaintiff's attorneys would place a value on their cases based not upon the extent of damages, but on the ability of the defendant or his insurer to pay.⁹³

There does not seem to be much doubt but that the plaintiff would be put in a better bargaining position by disclosure of the policy limits. His demands would most likely be tempered by the expediency of settlement when the policy limits are small in comparison with the claim. If, for example,⁹⁴ the plaintiff had a claim he valued at \$20,000, he would probably reject an offer of settlement for \$9,000 if he knew the policy limits were \$15,000. The \$9,000 offer would probably appear more satisfactory to him, however, if he knew that the policy limits were only \$10,000. On the other hand, he might press a larger claim if he knew the policy limits were high, and thought the insurer could be "badgered" into settlement.⁹⁵ However, since insurance companies handle a great number of such claims, and litigate frequently, it is reasonable to assume that they will not tolerate such tactics.

In any event, disclosure of the insurance limits would put the settlement discussion on a more realistic basis. Although the ability of a defendant to pay a judgment should not be a consideration in evaluation of a claim, it is certainly of paramount importance in determining the advisability of litigation. Unnecessary litigation could be avoided by frank and thorough discussion on a basis of mutual knowledge of all the facts. *Both* parties should have access to this information so that settlements may be achieved on a fair basis. It has been observed that disclosure of insurance may be a

91. See *Jeppesen v. Swanson*, 243 Minn. 547, 563, 68 N.W.2d 649, 659 (1955) (dissenting opinion).

92. See Young, *Discovery by Plaintiff of Defendant's Liability Insurance Coverage*, 1956 Ins. L. J. 503, 507.

93. *Id.* at 504, 508.

94. The example is based on the assumption that the tortfeasor does not have other sufficient liquid assets to settle a claim.

95. See Young, *supra* note 92, at 504.

bargaining advantage to either or both parties, depending upon the size of the claim in relation to the size of the policy.⁹⁶

There does not appear to be any serious possibility that the insured or the insurer would be prejudiced by discovery other than being deprived of the advantageous bargaining power they enjoy in possessing knowledge not within the reach of the plaintiff. Certainly one of the objectives which the Rules seek to attain is that of inducing pre-trial settlements whenever feasible. The discovery rules were intended to be construed liberally, with a view toward securing the "just, speedy and inexpensive determination of every action."⁹⁷ Permitting the plaintiff to discover the existence and extent of insurance coverage should help to realize that purpose more fully.

96. See *Superior Ins. Co. v. Superior Court*, 37 Cal.2d 749, 755, 235 P.2d 833, 836 (1951); *Belli*, *Modern Trials* § 18 (1954); *Pierson*, *The Defense Attorney and Basic Defense Tactics* 252 (1956).

97. Fed. R. Civ. P. 1; Minn. R. Civ. P. 1.