PRETRIAL DISCOVERY OF DEFENDANT'S INSURANCE

Johanek v. Aberle
27 F.R.D. 272 (1961)

In a personal injury action resulting from an automobile collision, plaintiff sought by pretrial interrogatories[1] to ascertain whether defendant was covered by a liability insurance policy at the time of the accident, and if so, the identity of the insurer and the dollar limits of the liability coverage. Defendant objected to the interrogatories on the ground that the information sought was "immaterial, irrelevant, and outside of all the lawful issues." The District Court of Montana found the existence and limits of defendant's insurance "relevant to the subject matter" as required by Rule 26(b) of the Federal Rules of Civil Procedure[2] and thus discoverable.[3]

The general purpose of discovery is to eliminate surprise during a trial so that all relevant facts and information not privileged may be ascertained in advance.[4] The scope of discovery procedure is generally limited to facts within the knowledge of the adverse party which are relevant or pertinent to the issues.[5] The Federal Rules[6] also state that inadmissibility at the trial is not ground for objection to questions if the facts sought are reasonably calculated to lead to the discovery of admissible evidence.[7] Discoverable facts are thus divided into two categories, information which is admissible and information which is likely to lead to discovery of admissible evidence.[8] Of course, evidence of insurance is discoverable when the evidence would be admissible at the trial, *e.g.*, to prove defendant's ownership of an automobile,[9] to prove agency between driver and owner,[10] or to prove financial ability of a defendant to respond in punitive damages.[11] The test of relevancy is more difficult to satisfy, however, when the information sought would not be admissible at the trial. A sharp split of authority and strong dissenting opinions demonstrate that courts have had considerable difficulty with the

---

1 Fed. R. Civ. P. 33.

2 Rule 33 of the Federal Rules provides that interrogatories may relate to any matters which can be inquired into under Rule 26(b).

3 Johanek v. Aberle, 27 F.R.D. 272, 280 (1961).

4 Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); see 2 Barron & Holtzoff, Federal Practice and Procedure § 641, at 263 (1950).

5 Hickman v. Taylor, 329 U.S. 495, at 501 (1947); May v. Young, 125 Conn. 1, 2 A.2d 385 (1938).

6 Fed. R. Civ. P. 26(b).

7 Loews Inc. v. Martin, 10 F.R.D. 143 (N.D. Ohio 1949); Drake v. Pycope, Inc., 96 F. Supp. 331 (N.D. Ohio 1951); see Note, 32 Neb. L. Rev. 107 (1952); Jeppesen v. Swanson, *supra* note 4, at 559, 68 N.W.2d at 656.

8 G. & P. Amusement Co. v. Regent Theatre Co., 9 F.R.D. 721 (N.D. Ohio 1949); Brooks v. Owens, 97 So.2d 693 (Fla. 1957).

9 Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933).

10 Biggins v. Wagner, 60 S.D. 581, 245 N.W. 385 (1932).

11 Brackett v. Woodall Prods. Co., 12 F.R.D. 4 (E.D. Tenn. 1951).

problem of insurance discovery.[12] The cases have largely arisen under the Federal Rules of Civil Procedure or state statutes patterned after them.[13]

The arguments advanced for the discovery of insurance are: (1) this information would be conducive to settlement;[14] (2) plaintiff will be better able to appraise the enforceability of a judgment thus giving him more inducement to build an adequate case;[15] (3) an automobile liability policy inures to the benefit of those who are negligently injured by the insured;[16] (4) plaintiff would be able to discover whether the insurance company had been properly notified of the accident (notification is sometimes necessary before a judgment will be binding on the insurer);[17] and (5) the limits of defendant's insurance will be relevant in the enforcement of plaintiff's judgment.[18] The arguments against insurance discovery are: (1) the fact of insurance or the limits of insurance are not admissible nor do they lead to admissible evidence;[19] (2) insurance does not differ significantly from other financial resources which are not discoverable;[20] (3) non-relevant information is not made relevant because it aids evaluation of a case for settlement purposes;[21] and (4) insurance limits are not relevant *except* in the enforcement of a judgment for the plaintiff.[22] Thus the problem is whether there is a reasonable connection between the existence and extent of defendant's insurance and the issues involved in plaintiff's cause of action against the tort-feasor.

The court in *Johanek v. Aberle* found this connection because of the effect of Montana's Motor Vehicle Safety-Responsibility Law.[23] This law provides: (1) the insurer's liability becomes absolute whenever loss or damage covered by the policy occurs; (2) attempted satisfaction of final judgment against insured is not a condition precedent to the obligation of insurer; and (3) certain limitations are imposed against the cancellation of a policy.[24] The court argues that the tort-feasor is effectually replaced by the insurance

[12] Superior Ins. Co. v. Super. Ct., 37 Cal. 2d 749, 235 P.2d 833 (1951) (5-2 for allowing deposition asking for the terms of an insurance contract); Lucas v. Dist. Ct., 140 Colo. 510, 345 P.2d 1064 (1959) (4-3 for allowing discovery of insurance limits); Brooks v. Owens, *supra* note 8 (4-1 against discovery of insurance limits); Jeppesen v. Swanson, *supra* note 4 (6-1 against discovery of insurance limits).

[13] See Annot., 41 A.L.R.2d 968 (1954).

[14] People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

[15] Lucas v. Dist. Ct., *supra* note 12, at 515, 345 P.2d at 1064 (1959); Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954).

[16] Superior Ins. Co. v. Super. Ct., *supra* note 12.

[17] Lucas v. Dist. Ct., *supra* note 12, at 517, 345 P.2d at 1070.

[18] Maddox v. Grauman, *supra* note 15, at 942.

[19] McClure v. Boeger, 105 F. Supp. 612 (D.C. Pa. 1952).

[20] McClure v. Boeger, *supra* note 19, at 613; Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Jeppesen v. Swanson, *supra* note 4.

[21] Benal Theatre Corp. v. Paramount Pictures, 9 F.R.D. 726 (N.D. Ill. 1947).

[22] Jeppesen v. Swanson, *supra* note 4.

[23] R.C.M. 1947, § 53-418 to § 53-458 (1951).

[24] R.C.M. 1947, § 53-438(s) (1951).

company as the defendant.[25] The court mentions, but dismisses the argument used by other courts that the financial responsibility law was not intended to expand the test for discovery which requires the information to be admissible as evidence or reasonably calculated to lead to the discovery of admissible evidence.[26] While it is helpful for the plaintiff to have knowledge of defendant's insurance before the trial, this writer does not think plaintiff's desire should force courts to disregard the wording of the discovery statute. Other courts with similar responsibility laws have not permitted such discovery.[27]

Ohio has statutes which provide for discovery. However, these statutes are worded quite differently than the Federal Rules.[28] It is unlikely that Ohio courts would follow the holding of the principal case because of their more conservative view of the scope of discovery.

In permitting the discovery of defendant's policy limits, this court has ignored the Federal Rules requirement of relevancy to the issues.[29] While the policy limits are relevant to defendant's ability to pay, they are not relevant to the negligence action. Defendant's ability to pay has never been within the scope of discovery procedure.[30] However, the arguments used for discovery perhaps justify legislative or rule-making action. If discovery were allowed as to insurance, a plaintiff would be given some indication of the value of his claim, the identity of his actual opponent, and he could ascertain whether the insurer had been properly notified. ". . . Assuming . . . that discovery of insurance coverage in advance of trial would serve the public interest, nevertheless, any change, albeit desirable, should be effectuated by the proper rule making power, and not by judicial fiat."[31]

---

[25] See Note, 27 U. Cinc. L. Rev. 298 (1958).

[26] Allen v. Second Judicial Dist. Ct. 69 Nev. 196, 245 P.2d 999 (1952).

[27] DiPietruntonio v. Super. Ct., 84 Ariz. 291, 327 P.2d 746 (1958); Brooks v. Owens, *supra* note 8; Jeppesen v. Swanson, *supra* note 4.

[28] Ohio Rev. Code §§ 2309.43, 2317.07, 2317.33, 2317.48 (1953). An early *dictum* sought to limit discovery to the narrow scope of the old bill in equity. Chapman v. Lee, 45 Ohio St. 356, 366, 13 N.E. 736, 740 (1887). In another early case the test was expanded to matters "pertinent to the pleadings to which they (interrogatories) were attached." Russell v. Lakeshore & M.S. Ry., 6 Ohio N.P. (n.s.) 353, 17 Ohio Dec. 435 (1907). But see Sterling v. Hanley Motor Sales Inc., 87 Ohio App. 362, 95 N.E.2d 273 (1950). The test is now "pertinency to the issues." *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); McCoy v. Buckeye S.S. Co., 9 Ohio Op. 2d 240, 161 N.E.2d 245 (C.P. 1959). "Pertinency to the issues" is often restricted to admissible evidence. Eisman v. Wiemer, 70 Ohio L. Abs. 199, 126 N.E.2d 92 (C.P. 1954). But see *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1947); see Note, 27 U. Cinc. L. Rev. 298 (1958).

[29] See *supra* note 7.

[30] Lucas v. Dist. Ct., *Supra* note 12, at 525, 345 P.2d at 1073 (dissenting opinion).

[31] Founier, "Pre-Trial Discovery of Insurance Coverage Limits," 28 Fordham L. Rev. 215, 232 (1959).