PRE-TRIAL DISCOVERY OF LIABILITY INSURANCE IN AUTOMOBILE NEGLIGENCE ACTIONS

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In *Di Pietruntonio v. Superior Court*,[1] facing for the first time the problem of whether in the ordinary automobile negligence action the plaintiff should be permitted to use discovery procedures to determine the existence and limits of any liability insurance policies held by the defendant, the Arizona Supreme Court joined the ranks of those jurisdictions which disallow such discovery. Upon defendant's request, the court granted an original writ of prohibition against an order of the superior court requiring the defendant to answer interrogatories concerning whether the defendant had insurance, the name of the insurer, and the limits of the policy. The court reasoned that the plaintiff was not entitled to such information under Rule 33 of the Arizona Rules of Civil Procedure, in light of the public policy of the state, and the limitations of Rule 26(b), which it interpreted as restricting discovery to evidence for use in the trial, or to information that will reasonably lead to the discovery of admissible evidence.

There is scarcely a more controversial and unsettled area in the law of discovery than that of disclosure of insurance. Although the discovery procedures of the states vary, many of them, like Arizona, have adopted the Federal Rules of Civil Procedure. Other states have a procedure similar enough that their case decisions can be considered along with a discussion of those of federal courts and states which have adopted the Federal Rules. The methods used for such discovery are, in general, limited to submission of interrogatories under Rule 33,[2] moving for production of the policy under Rule 34,[3] or use of oral examination under Rule 30.[4] The scope of the examination is governed by Rule 26(b) which reads as follows:

> Unless otherwise ordered by the court as provided by Rule 30(c) or (e), 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 party, including the existence, description, nature,

[1] 84 Ariz. 291, 327 P.2d 746 (1958), 25 INS. COUNSEL J. 479 (1958) (A short comment on the decision, written by the counsel who argued for the defense.) See also 1 ARIZ. L. REV. 140 (1959).

[2] FED. R. CIV. P. 33; ARIZ. R. CIV. P. 33.

[3] FED. R. CIV. P. 34; ARIZ. R. CIV. P. 34.

[4] FED. R. CIV. P. 30; ARIZ. R. CIV. P. 30.

> 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 trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[5]

THE CASE AGAINST DISCOVERY OF LIABILITY INSURANCE

Among the many courts which have passed upon the question and have held against discovery, there are several major grounds of common agreement. Two of the leading cases in the field, *McNelley v. Perry*,[6] and *Jeppesen v. Swanson*,[7] adequately present the case against discovery. In *McNelley v. Perry* the court stated that, generally, the purpose of seeking information from an adversary, or a witness, is either to use it in trial, or to use it as a lead to information for use in the trial.[8]

In *Jeppesen v. Swanson* it was said:

> The rationale of the great bulk of federal cases dealing with the discovery rules is that the information sought by discovery must either be admissible on a trial of the *issues* involved in the case or it must be such facts or information as will lead to the discovery of evidentiary information in some way related to the proof or defense of *issues* involved in the trial of the case.[9] . . . [Emphasis added]
> Where it is sought to discover information which can have no possible bearing on the determination of the action on its merits, it can hardly be within the rule. It is not intended to supply information for the personal use of a litigant that has no connection with the determination of the issues involved in the action on the merits.[10]

In its discussion the court also stated that the disclosure of insurance

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[5] FED. R. CIV. P. 26(b); ARIZ. R. CIV. P. 26(b).

[6] 18 F.R.D. 360 (E.D. Tenn. 1955).

[7] 243 Minn. 547, 68 N.W.2d 649 (1959), 40 MINN. L. REV. 183 (1956).

[8] 18 F.R.D. 360, 361 (E.D. Tenn. 1955); *accord*, Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962) (Same court reaffirming position); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958); Brooks v. Owens, 97 So. 2d 693 (Fla. 1957); Jeppeson v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Mecke v. Baher, 129 N.W.2d 573 (Neb. 1964); Hardware Mut. Cas. Co. v. Hopkins, 105 N.H. 231, 196 A.2d 66 (1963); Bean v. Best, 76 S.D. 462, 80 N.W.2d 565 (1957).

[9] 243 Minn. 547, 68 N.W.2d 649, 653 (1955); *accord*, Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); Flynn v. Williams, 30 F.R.D. 66 (D.Conn. 1953); State *ex rel.* Hersman v. District Court, 142 Mont. 139, 381 P.2d 799 (1963).

[10] 243 Minn. 547, 68 N.W.2d 649, 657 (1955).

would lead to allowance of discovery into all of the defendant's assets.[11] The court felt that to give the rules the desirable liberal construction for a speedy disposition of litigation[12] did not require that a party be permitted, for strategic reasons, to acquire information that had nothing to do with the merits of the action.[13]

In summary, it may be said that,

> The cases denying discovery in this area of insurance, while recognizing the broad scope of the rules and the right of a plaintiff to inquire into any relevant matter, not privileged, hold that the existence or non-existence of insurance has no relevancy to the issues of liability and damages in a negligence action; that such matter is not admissible as evidence at the trial; that an inquiry concerning such insurance is not reasonably calculated to lead to the discovery of admissible evidence; and that to permit such discovery is an invasion of defendant's right of privacy before there is any determination of liability.[14]

THE CASE FOR DISCOVERY OF LIABILITY INSURANCE

The reasons offered by the more liberal courts which allow discovery fall into one or more of several main categories: (1) That disclosure of insurance information educates the parties to the real value of their claims in advance of trial, and that this will promote settlements and thereby relieve congested court calendars;[15] (2) that discovery should be allowed if generally relevant to the subject matter of the action, rather than limited to matters relevant to the precise issues;[16] (3) that because disclosure of such information is prohibited at the trial, this

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[11] 243 Minn. 547, 68 N.W.2d 649, 657 (1955):

> If the amount of insurance coverage is discoverable under these rules, we see no reason why the defendant cannot be made to disclose the extent of his property as well. In evaluating a case for the purpose of determining whether it would be advisable to settle, we fail to see any distinction between knowledge concerning the extent of insurance coverage and similar knowledge as to the extent of defendant's financial ability to pay, . . .

Accord, McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952); Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1957); State *ex rel.* Hersman v. District Court, 142 Mont. 139, 381 P.2d 799 (1963).

[12] FED. R. CIV. P. 1; ARIZ. R. CIV. P. 1.

[13] 243 Minn. 547, 68 N.W.2d 649, 658 (1955).

[14] Bisserier v. Manning, 207 F. Supp. 476, 478-79 (D.N.J. 1962).

[15] See, *e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Pettie v. Superior Court, 3 Cal. Rptr. 267 (Cal. App. 1960); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); *cf.*, Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963) (airplane collision).

[16] See, *e.g.*, Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Brackett v. Woodfall Food Prod., 12 F.R.D. 4 (E.D. Tenn. 1951); Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948); Pettie v. Superior Court, 3 Cal. Rptr. 267 (Cal. App. 1960); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954).

still does not preclude disclosure to the parties in the action;[17] (4) that the automobile financial responsibility laws which have been enacted by many states indicate a public policy to provide compensation for injured persons, and therefore such persons have a discoverable interest in the insurance coverage,[18] or from the tenor and effect of such laws it is evident that the insurance policies are relevant to the subject matter of the pending action;[19] (5) that in reality the real party in interest in an automobile accident case is the insurance company, which conducts the investigation, negotiates settlement, and defends the action;[20] and (6) that such discovery secures the just, speedy, and inexpensive determination of litigation.[21]

The leading Illinois decision, *People ex rel. Terry v. Fisher*,[22] is typical of those in favor of discovery. In that case it was said that the discovery rules, "were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses."[23] Thus to construe the language of the rules "to refer only to isolated legal concepts such as negligence, proximate cause, and damages, divorced from the realities of litigation, would not be using this new tool 'with understanding of its purpose.'"[24] The court emphasized the necessity of insurance disclosure for plaintiff's preparation, and answered the

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[17] See, *e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Brackett v. Woodfall Food Prod., 12 F.R.D. 4 (E.D. Tenn. 1951); Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954).

[18] See, *e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Pettie v. Superior Court, 3 Cal. Rptr. 267 (Cal. App. 1960); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954).

[19] See, *e.g.*, Brackett v. Woodfall Food Prod., 12 F.R.D. 4 (E.D. Tenn. 1951); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

[20] See, *e.g.*. Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957). Compare, State Farm Ins. Co. v. Roberts, 398 P.2d 671, 676 (Ariz. 1965), in which the Arizona court reaffirmed its previous holding that the amount of insurance coverage is immaterial and irrelevant to the issues of the case, but held that for the purposes of discovery the insurance company "stands in the position of a party to the action and subject to a production order under Rule 34."

[21] FED. R. CIV. P. 1; ARIZ. R. CIV. P. 1, which states: "They [the rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." See Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954); *cf.* Furumizo v. United States, 33 F.R.D. 18 (D. Hawaii 1963) (airplane collision).

[22] 12 Ill. 2d 231, 145 N.E.2d 588 (1957), 46 ILL. B. J. 564 (1958); 33 NOTRE DAME LAW. 497 (1958).

[23] 12 Ill. 2d 231, 145 N.E.2d 588, 592 (1957); see 2A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURES § 647 (Rules Ed. 1961).

[24] 12 Ill. 2d 231, 145 N.E.2d 588, 592 (1957).

argument of the courts which feel this is the same as allowing discovery of any of defendant's assets, stating in part:

> Unlike other assets, a liability insurance policy exists for the single purpose of satisfying the liability that it covers. It has no other function and no other value. Litigation is a practical business. The litigant sues to recover money and is not interested in a paper judgment that cannot be collected. The presence or absence of liability insurance is frequently the controlling factor in determining the manner in which a case is prepared for trial. That there will be actual rather than nominal recovery conditions every aspect of preparation for the trial of these cases. . . . Ordinarily a plaintiff has many sources of inquiry by means of which he can appraise the likelihood that the judgment he seeks will be enforceable. In the case of an insurance policy, however, all the customary channels are cut off. . . .
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> In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, "Judges need not be more naive than other men." Inasmuch as the insurance company is virtually substituted as a party . . . , as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business.[25]

The decision in this case was based partially upon interpretation of the financial responsibility provisions of the Illinois Motor Vehicle Act, taken together with the provisions of the Illinois Insurance Code.[26] Illinois and California have somewhat peculiar statutes regarding insurance, made mandatory by their financial responsibility laws.[27] The courts of those jurisdictions have interpreted their statutes as creating a con-

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[25] 12 Ill. 2d 231, 145 N.E.2d 588, 593 (1957).

[26] The court specifically relied upon ILL. REV. STAT. ch. 95½, § 58(k)(1955) (Motor Vehicle Act), and ILL. REV. STAT. ch. 73, § 388 (1955) (Insurance Code). See People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588, 592 (1957).

[27] See, *e.g.*, CAL. INS. CODE § 11580, which states, in part:

> A policy insuring against losses . . . shall not be issued or delivered to any person in this State unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein. . . .
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> (b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:
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> (1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of the policy.

tractual relation which inures to the benefit of any person who might be negligently injured by the assured, as completely as if such injured person had been specifically named in the policy.[28]

The Arizona Supreme Court, in the *Di Pietruntonio* case[29] distinguished the holdings in the California and Illinois cases on the basis that there is no such mandatory provision in the Arizona statutes, and therefore the language of the above decisions favoring discovery would be inapplicable. In a recent federal case however, *Johanek v. Aberle*,[30] the court encountered no difficulty in reaching an opposite conclusion. Although Montana had no mandatory provision similar to those of California and Illinois, the court reasoned that in most insurance contracts such a provision nevertheless exists, and that the same result should therefore follow.[31]

> Whether based upon the statutory requirement or the provisions of the standard policy, the injured party may not institute any action against the insurer until after judgment. After judgment he has the same right of action under the standard policy as he would have under the statute.[32]

Subsequent to the *Johanek* case, the United States District Court for Montana applied the same reasoning to a personal injury negligence action arising out of a boat accident to which the Vehicle Safety-Responsibility Act did not apply.[33] Similarly, in a recent case in California involving malpractice[34] the court allowed discovery to enable the plaintiff "to determine whether there is any contractual relationship

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> (2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

[28] Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 P.2d 833 (1951); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

[29] Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958); *accord*, State *ex rel.* Allen v. Second Judicial District Court, 69 Nev. 196, 245 P.2d 999 (1952).

[30] 27 F.R.D. 272 (D. Mont. 1961); 22 OHIO ST. L. J. 760 (1961), 48 VA. L. REV. 122 (1962).

[31] This same reasoning could be applied in Arizona. We have no mandatory provision as discussed, but we do have a financial responsibility act similar to that of Montana. *Compare* ARIZ. REV. STAT. ANN. §§ 28-1101 to -1225 (1956) *with* REV. CODE MONT. §§ 53-418 to -458 (1947).

[32] 27 F.R.D. 272, 276 (D. Mont. 1961); *accord*, Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959). *But see*, State *ex rel.* Hersman v. District Court, 142 Mont. 139, 381 P.2d 799 (1963), where the Montana Supreme Court held against discovery.

[33] Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961).

[34] Rolf Homes, Inc. v. Superior Court, 9 Cal. Rptr. 142 (Cal App. 1960).

between plaintiff and the insurer."[35]

WHY NOT ALLOW DISCOVERY?

As has been pointed out, the major objections of the courts disallowing discovery of insurance are that such information is not relevant to the issues; is not admissible in evidence, nor calculated to lead to admissible evidence; would allow discovery of the defendant's other assets; and gives the plaintiff an unfair bargaining advantage.

One writer has dismissed the requirement that the information be relevant to the issues rather than merely relevant to the subject matter with this statement:

> The boundaries defining information which is relevant to the subject matter involved in the action are necessarily vague and it is practically impossible to state a general rule by which they can be drawn. Certainly the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. Indeed it is not too strong to say that discovery should be considered relevant where there is any possibility that the information sought may be relevant to the subject matter of the action. If protection is needed, it can better be provided by the discretionary powers of the court under Rule 30, rather than a constricting concept of relevance.[36]

It should also be noted that Rule 26(b) explicitly states that the examination may be had into any matter "relevant to the subject matter," rather than relevant to the issues.[37]

The courts that restrict discovery to information that would be admissible evidence or would lead to admissible evidence, have concluded that the last sentence of Rule 26(b), added as an amendment to the Federal Rules in 1946,[38] is meant to modify and restrict the language "relevant to the subject matter."[39] Other courts, however, argue equally as persuasively that this last sentence is not meant to restrict the language "relevant to the subject matter," but rather is liberalizing in effect and was added to promote more liberal applica-

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[35] *But see*, Hooker v. Raytheon Co., 31 F.R.D. 120 (S.D. Cal. 1962), where the United States District Court refused to allow discovery in a wrongful death action brought under the Jones Act.

[36] 2A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647 at 65, 67 (Rules Ed. 1961). This answers a criticism made by the Arizona court in the *Di Pietruntonio* case directed to the New York decision of Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948), because the New York judge allowed discovery on the premise that "it may be generally relevant." See Di Pietruntonio v. Superior Court, 84 Ariz. 291, 294, 327 P.2d 746, 747 (1958).

[37] FED. R. CIV. P. 26(b); ARIZ. R. CIV. P. 26(b).

[38] 329 U.S. 839, 854 (1946).

[39] FED. R. CIV. P. 26(b); ARIZ. R. CIV. P. 26(b).

tion of the rules.[40] A few courts have reasoned that the fact that such information would be relevant and subject to discovery after trial, if a judgment was returned unsatisfied, renders it discoverable before trial.[41]

The third major objection to the allowance of discovery in this area is that it will lead to, or be the same as, discovery of any of the defendant's assets, and that such knowledge would give the plaintiff an unfair bargaining position. Such a conclusion appears to this writer at least doubtful, if not untenable. It ignores the peculiar nature of insurance, and the fact that such policies exist solely to satisfy a judgment rendered against the defendant in an action.[42] Liability insurance is purchased with such an occurrence in mind, and is useless for all other purposes. Its existence and amount can be completely hidden from the plaintiff, whereas through private investigation and other methods, a plaintiff can appraise the wealth of a defendant. It appears highly unjust that a plaintiff with a serious injury could be placed in a position where, from all outward appearances, it would be better for him to settle for a sum less than that which would adequately compensate him for his injuries, merely because he does not know of any insurance held by the defendant. What harm can come to the defendant in an action from allowing disclosure of his insurance? Granting that the insurance company may be put in a less advantageous position for bargaining purposes, this does not answer the question. The insurance company is not a party defendant.[43] On the other hand, it is not in-

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[40] Pettie v. Superior Court, 8 Cal. Rptr. 267, 272 (Cal. App. 1960):

> If the legislative intent had been to specify that discovery was to be limited to matters relative to the issues determinable in the pending action, and as to matters reasonably calculated to lead to the discovery of admissible evidence, the Legislature could have so stated; . . .

Accord, Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); *But see,* 2A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647.1 at 78, 81 (Rules Ed. 1961): "This construction is difficult to defend in the light of the Advisory Committee Note to the amendment which states that 'of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of the inquiry. . . .'"

[41] See, *e.g.,* Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954); *accord,* 2A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 647.1 at 78, 81 (Rules Ed. 1961). *Contra,* Jeppeson v. Swanson, 243 Minn. 547, 68 N.W.2d 649, 654, which states: "Of course, the distinction is that, when an action is brought after an execution is returned unsatisfied, the amount of insurance may then be discoverable and would then be relevant to the subject matter of another action, whereas it is not relevant to the subject matter of the initial action."

[42] See, *e.g.,* Johanek v. Aberle, 27 F.R.D. 272, 278 (D. Mont. 1961); Brackett v. Woodfall Food Prod., 12 F.R.D. 4, 5 (E.D. Tenn. 1951).

[43] This, in itself, has been pointed out as another reason for allowing discovery, in that for all practical purposes, the insurance company is the real party in interest as it handles the investigation and litigation for the defendant. See People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588, 593 (1957): "[I]t would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary."

conceivable that a defendant could be injured by non-disclosure. A plaintiff might refuse to settle and thereafter recover a judgment over and above the defendant's insurance coverage, leaving the defendant with the excess liability to be paid from his other assets.[44] Some courts appear overly protective of insurance companies, considering that generally they are not parties to the action.[45]

ARIZONA'S POSITION

It is believed that the purpose of discovery and sound public policy is better served by allowing pre-trial discovery of the existence or non-existence of liability insurance. This writer cannot agree with the statement in the *Di Pietruntonio* case that the public policy of Arizona is diametrically opposed to such disclosure as evidenced by the case of *Tom Reed Gold Mines Co. v. Morrison.*[46] In that case, during voir dire of the jury, counsel for the plaintiff needlessly persisted in bringing to the jury's attention the matter of insurance. The court said as to this:

> It is very plain that this inquiry went further than was necessary, and that its purpose was, not merely to obtain information to guide counsel in selecting the jury, but rather to inform and impress upon the jurors the fact that the defendant was insured against loss from accidents to its employees. It is true that parties to any cause tried by a jury have the right to make such inquiries of those being examined as will enable them to select twelve fair and impartial men to decide the case, but this privilege does not permit them, under the guise of legitimate examination, to direct the attention of the jury to matters wholly irrelevant and which can serve no purpose other than to prejudice the defendant. . . . The fact that the defendant carried casualty insurance as a protection from loss in case of accident is a matter in which *neither the jury nor the plaintiff* had any concern whatever. The defendant's liability in no sense depended upon it, and the injurious effect knowledge of it by the jury was likely to have is so apparent that it is unnecessary to discuss it. [Emphasis added].[47]

This statement was limited to prohibiting information concerning insurance to be conveyed to the jury. The question as to whether or not the plaintiff had any interest in the defendant's insurance was not before the court, and therefore any reference to it by the court must be considered dictum. Merely because information as to insurance cannot go to the jury, does not necessarily preclude the plaintiff

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[44] See Johanek v. Aberle, 27 F.R.D. 272, 279 n.14 (D. Mont. 1961); Pettie v. Superior Court, 3 Cal. Rptr. 267, 273 (Cal. App. 1960).

[45] See, *e.g.*, Brooks v. Owens, 97 So. 2d 693 (Fla. 1957), 56 MICH. L. REV. 1006 (1958), 44 VA. L. REV. 623 (1958).

[46] 26 Ariz. 281, 224 Pac. 822 (1924).

[47] *Id.* at 290, 224 Pac. at 825.

from obtaining it for other reasons.[48] Even to state that there is a public policy forbidding any disclosure to the jury may be questionable. One writer, after careful examination of the Arizona decisions in this area, has indicated that reference to liability insurance in automobile negligence trials is not *per se* prejudicial, and that perhaps our court should reconsider the value of non-disclosure.[49]

CONCLUSION

The great quantity of automobile personal injury actions burdening our court dockets is one of the primary problems of modern judicial administration.[50] Should not every step be taken which may aid in the relief of this burden which does not deny to any plaintiff or defendant the right to have his day in court? It is respectfully submitted that justice would be better served with a reversal of the *Di Pietruntonio* decision, to allow pre-trial discovery of insurance.[51]

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[48] Johanek v. Aberle, 27 F.R.D. 272, 280 (D. Mont. 1961); Brackett v. Woodfall Food Prod., 12 F.R.D. 4, 6 (E.D. Tenn. 1951); Pettie v. Superior Court, 3 Cal. Rptr. 267, 272 (Cal. App. 1960); Maddox v. Grauman, 265 S.W.2d 939 (Ky. Ct. App. 1954); *contra*, Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); Ruark v. Smith, 51 Del. 420, 147 A.2d 514 (1959).

[49] 5 ARIZ. L. REV. 83 (1963).

[50] See Mecke v. Bahr, 129 N.W.2d 573 (Neb. 1964) (Dissenting opinion).

[51] *Accord*, 4 MOORE, FEDERAL PRACTICE § 26.16(3) at 1188, 1189 (2d ed. 1963):

> Decisions under Rule 26(b) are sharply divided on the issue of whether, in the ordinary negligence case, it is proper to require a party to disclose whether he has insurance, the name of the company, limits of liability, and terms of the policy. The sounder view, we submit, is to require that such disclosure be made.