

1959

## Pre-Trial Discovery of Insurance Coverage and Limits

Joseph N. Fournier

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Joseph N. Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits*, 28 Fordham L. Rev. 215 (1959).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol28/iss2/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Pre-Trial Discovery of Insurance Coverage and Limits

### Cover Page Footnote

Professor of Law, Fordham University, School of Law.

# PRE-TRIAL DISCOVERY OF INSURANCE COVERAGE AND LIMITS

JOSEPH N. FOURNIER\*

**A** DEFENDANT is sued for breach of contract. In advance of trial, is plaintiff entitled to discover the defendant's financial ability to respond in damages? Quite obviously the answer is no. A defendant is sued in tort for negligent operation of his automobile. In advance of trial, is plaintiff entitled to discover the defendant's financial ability to pay the anticipated judgment? Here too the answer is an obvious no. In personal injury litigation defendant may carry a public liability policy. In advance of trial should plaintiff be entitled to discover this fact—including the policy limits?

Recently, in California, a woman brought an action for malpractice against her doctor, seeking damages for personal injuries.<sup>1</sup> In a pre-trial examination, the plaintiff, through interrogatories, sought to elicit the following information from the defendant:<sup>2</sup>

(a) Do you have malpractice insurance?

(b) If so, state the name and address of the insurer and policy limits.

The defendant objected to the interrogatories propounded but was overruled. His petition for a writ of prohibition seeking to nullify the order of the lower court which compelled him to answer the interrogatories was denied by the Supreme Court of California.<sup>3</sup>

Is this result desirable or proper?

Under prevailing state and federal court procedures may the plaintiff compel the defendant to disclose the existence of insurance coverage and the extent of his policy limits in personal injury litigation by employing the three major methods of securing pretrial discovery, viz., (1) deposition, (2) written interrogatories, and (3) discovery and production of documents, in this instance, the insurance policy?<sup>4</sup> Discovery procedure also includes the order to perpetuate testimony in a contemplated action.

The purpose of this article is to examine the pertinent federal and state rules and statutes and survey the cases in point to ascertain whether pre-trial discovery of insurance coverage in personal injury litigation is proper under existing discovery procedure. Our study will not encompass the medical payment endorsement on a public liability policy which is

---

\* Professor of Law, Fordham University, School of Law.

1. *Laddon v. Superior Court*, 334 P.2d 638 (Cal. 1959).

2. *Id.* at 638.

3. *Id.* at 640.

4. See, e.g., *Young, Discovery by Plaintiff of Defendant's Liability Insurance Coverage*, 403 *Ins. L.J.* 503 (1956); *Lavorci, Disclosure of Insurance Policy Limits*, 415 *Ins. L.J.* 505 (1957); *Williams, Discovery of Policy Limits*, 26 *Ins. Counsel J.* 225 (1959).

not an indemnity for negligence but rather a contract for payment by the insurer though the insured may be without fault.

## I. RULES AND STATUTES ON DISCOVERY

### A. *History of Discovery*

Historically, discovery branched off from the auxiliary jurisdiction of the court of chancery. It was devised to overcome defects in the rigid common law procedure. Initially, discovery was used in equity in aid of the principal common law action, then for the taking of testimony of witnesses in advance of trial, and finally to perpetuate testimony in aid of a contemplated action.<sup>5</sup> These basic principles are today codified in most jurisdictions.<sup>6</sup> New York was the first state to embark on procedural reform by adopting the Code of Civil Procedure of 1848.<sup>7</sup> The Federal Rules of Civil Procedure<sup>8</sup> represent the most recent important procedural innovation. A majority of the states have patterned their practice after one or the other. To some the federal rules are a procedural utopia of liberalism, while New York practice, including discovery procedure, has been depicted as outmoded<sup>9</sup>—a view, however, not shared by all scholars.<sup>10</sup>

### B. *Applicable Federal Rules*

Rule 26(b) of the Federal Rules of Civil Procedure provides in part that the deponent may be examined regarding any unprivileged matter which is relevant to the pending action, whether the matter relates to the claim or the defense of the examining party or to the claim or defense of any other party. It is not a basis for objection that the testimony will not be admissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26 permits the taking of testimony by oral deposition or written

---

5. *State v. Second Judicial Dist.*, 69 Nev. 204, 245 P.2d 999 (1952); 1 Pomeroy, *Equity Jurisprudence* §§ 190-92 (5th ed. Symons 1941).

6. See, e.g., Fed. R. Civ. P. 26-37; N.Y. Civ. Prac. Act §§ 288-328. See also Annot., 66 A.L.R. 1264 (1930); Annot., 1910 L.R.A. 462. Prior to the merger of law and equity in New York, effected by the adoption of the Code of Civil Procedure of 1848, *infra* note 7, the procedural device for obtaining disclosure was the Equitable Bill of Discovery. N.Y. Civ. Prac. Act § 345 now provides that an ancillary action to obtain discovery under oath in aid of prosecuting or defending an action cannot be maintained. Therefore, the right to a bill of discovery no longer survives in view of the complete remedy afforded by existing statutes. *Fur & Wool Trading Co. v. George I. Fox, Inc.*, 245 N.Y. 215, 156 N.E. 670 (1927).

7. N.Y. Sess. Laws 1848, ch. 379.

8. 28 U.S.C. § 2072 (1952).

9. Clark & Wright, *The Judicial Council and The Rule-Making Power: A Dissent and a Protest*, 1 *Syracuse L. Rev.* 346, 352 (1950).

10. See, e.g., Rothschild, *Federal Wonderland*, 18 *Brooklyn L. Rev.* 16 (1952).

interrogatories while rule 33 provides that any party may serve upon any adverse party written interrogatories to be answered by the one upon whom such interrogatories have been served. Such interrogatories, however, are limited to matters which can be inquired into under rule 26(b).

Rule 34 states: "Upon motion of any party showing good cause therefor . . . the court in which an action is pending may . . . order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, any designated documents, papers, books, accounts . . . which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) . . ."

When the desired testimony is to be taken by oral deposition, rights under rules 26, 26(b), and 34 are limited by rule 30 which authorizes the court to order that the deposition not be taken, or the taking thereof be restricted, upon a showing of good cause, or bad faith on the part of the party taking the deposition, or upon a showing that the taking of the deposition will unreasonably annoy, embarrass, or oppress the deponent or a party. Rule 31 has the same effect when the desired testimony is to be taken by written interrogatories.

### C. *New York Statutes*

The relevant New York statutes are found in the Civil Practice Act Section 288 (testimony by deposition), Section 296 (production of books and papers), Section 302 (manner of taking testimony including written interrogatories), and Section 324 (power of court of record to order production, discovery and inspection of documents). The basic difference between the New York statutes and the federal discovery rules is that in the former the testimony or disclosure sought must be material and necessary to the prosecution or defense of the action and, hence, admissible as evidence. Thus, in a New York suit where recovery of exemplary damages is possible, plaintiff may not delve into defendant's financial status in a pre-trial examination.<sup>11</sup> Under the federal rules, it

---

11. *Wilson v. Onondaga Radio Broadcasting Corp.*, 175 Misc. 389, 23 N.Y.S.2d 654 (Sup. Ct. 1940). Cases are legion which have held that in actions for damages for injury to person or property, evidence that a defendant was insured against such damages is incompetent. See, e.g., *Simpson v. Foundation Co.*, 201 N.Y. 479, 95 N.E. 10 (1911). Even on voir dire examination the plaintiff may not carry to the jury the implication that liability insurance is carried by the defendant. *Gebo v. Findlay*, 257 App. Div. 66, 11 N.Y.S.2d 950 (4th Dep't 1939). Accord, *Tom Reed Gold Mines Co. v. Morrison*, 26 Ariz. 281, 224 Pac. 822 (1924); *Lord v. Poore*, 9 Terry 595, 108 A.2d 366 (1954). In a matrimonial action, the property interest of the husband will not be inquired into on a pre-trial examination for the purpose of ascertaining the amount of alimony which the husband should pay. Plaintiff wife must first establish that she is entitled to the matrimonial relief she seeks. 4 Carmody, *New York Practice* § 1236, at 2806 (2d ed. 1932). *Wenglinsky v.*

suffices if the information sought by an examination is relevant to the subject matter of the pending action, and it is not necessary to establish the admissibility of the testimony.<sup>12</sup>

## II. INJURED PARTY'S ACTION AGAINST WRONGDOER'S INSURER

There are several types of state statutes which regulate casualty insurance carriers. Louisiana<sup>13</sup> and Wisconsin<sup>14</sup> allow the victim of a personal injury to bring a joint action against the tortfeasor and the insurer or directly against the insurer alone. Louisiana courts have characterized the "direct action" statute as creating a separate and distinct cause of action against the insurer which the injured party may elect in lieu of his action against the tortfeasor.<sup>15</sup> The constitutionality of this statute has been upheld by the Supreme Court of the United States in a case where there was diversity of citizenship between plaintiff and the defendant-insurer but no such diversity between plaintiff and the insured tortfeasor.<sup>16</sup> It was also affirmed where the insurance contract was negotiated and delivered outside the state in which the action was brought, even though the policy expressly prohibited actions against the insurer until after a final determination of defendant's obligation to pay personal injury damages by judgment or agreement.<sup>17</sup> The Second Circuit Court of Appeals has held that where neither party is a resident of the state in which the action is brought, the substantive law is determined by the place where the cause of action accrued, while the law of the forum controls procedure.<sup>18</sup>

---

Wenglinsky, 282 App. Div. 1015, 126 N.Y.S.2d 249 (1st Dep't 1953); Safrin v. Safrin, 205 App. Div. 628, 200 N.Y.S. 51 (2d Dep't 1923); Van Valkenburg v. Van Valkenburg, 149 App. Div. 482, 133 N.Y.S. 942 (1st Dep't 1912). Cf. Kirshner v. Kirshner, 7 App. Div. 2d 202, 182 N.Y.S.2d 286 (2d Dep't 1959); Jasne v. Jasne, 10 Misc. 2d 59, 174 N.Y.S.2d 822 (Sup. Ct. 1952). The rationale of the latter two cases is that the plaintiff wife should try her right to matrimonial relief, alimony and the amount thereof at one and the same time.

12. *Stevenson v. Melady*, 1 F.R.D. 329 (S.D.N.Y. 1940). Although it is not necessary to establish the admissibility of the testimony sought, nevertheless, it should lead to facts or information which are themselves admissible in evidence.

13. La. Rev. Stat. § 655 (1950).

14. Wis. Stat. § 85.93 (1929), construed in *Kujawa v. American Indem. Co.*, 245 Wis. 361, 14 N.W.2d 31 (1944).

15. *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122 (1950); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 211 La. 19, 29 So. 2d 177 (1946).

16. *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48 (1954). Plaintiff, a Louisiana resident, brought an action in a Louisiana court against the insurer, an Illinois corporation. The contract was entered into outside the state.

17. *Watson v. Employers Liab. Corp.*, 348 U.S. 66 (1954).

18. *Collins v. American Auto. Ins. Co.*, 230 F.2d 416 (2d Cir. 1956). Plaintiff was a citizen of Virginia and defendant a Missouri corporation. The action was brought in a federal district court in New York to enforce rights accruing under Louisiana law. Cf. *Morton v. Maryland Cas. Co.*, 4 N.Y.2d 488, 151 N.E.2d 881, 176 N.Y.S.2d 329 (1958).

The second type of statute is represented by that of Minnesota<sup>19</sup> which permits an action against the insurer after an execution against the judgment debtor is returned unsatisfied, and also that of New York<sup>20</sup> which permits an action against the insurer where a judgment against the insured remains unsatisfied for 30 days or more. A third type statute, not directly touching an insurance carrier, is the New Jersey Unsatisfied Claim and Judgment Fund Law.<sup>21</sup> Here the victim of a personal injury holding an unsatisfied claim or judgment in the amount of \$200 or more may proceed against the Director of the Division of Motor Vehicles to recover from the fund. It is interesting to note that where a non-resident attempts to recover from the fund, the New Jersey court will look to the law of the plaintiff's residence to see if New Jersey domiciliaries are there afforded similar relief as that provided by New Jersey. If not, and reciprocity is not granted, the non-resident plaintiff cannot recover.<sup>22</sup>

### III. PURPOSE OF DISCOVERY

#### A. General

What is the purpose of discovery procedure?

In *Hickman v. Taylor*,<sup>23</sup> the Supreme Court of the United States stated that "discovery like all matters of procedure, has ultimate and necessary boundaries."<sup>24</sup> The several instruments of discovery "now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a

---

Plaintiff, a resident of New York, was injured in Louisiana and suit was brought in New York. The Louisiana statute providing for a direct action against the insurer includes a provision that "the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and insurer, jointly or in solido." La. Rev. Stat. § 655 (1950). Hence, the statute creates a substantive right and the action is local and not transitory.

As a condition precedent to doing business in Louisiana, the defendant insurer was required to consent to suits by persons injured in Louisiana accidents. In denying plaintiff the right to maintain the action in New York, the court of appeals said that "defendant was never asked to agree nor did it ever agree that a direct suit could be brought against it elsewhere than in Louisiana." 4 N.Y.2d 494, 151 N.E.2d at 883, 176 N.Y.S.2d at 331.

19. Minn. Stat. Ann. § 60.51 (1937).

20. N.Y. Ins. Law § 167(1)(b).

21. N.J. Stat. Ann. § 39:6-79 (1958).

22. *Betz v. Director of Div. of Motor Vehicles*, 47 N.J. Super. 449, 136 A.2d 53 (L. 1957).

23. 329 U.S. 495 (1947).

24. *Id.* at 507.

device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues."<sup>25</sup>

Barron and Holtzoff<sup>26</sup> state:

"Discovery has three distinct purposes and uses . . .

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

(3) To secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents or the names and addresses of persons having knowledge of the relevant facts."

In reference to the pre-trial examination of another party, Carmody states that "the matter upon which the examination is based . . . must be material. Therefore, it should ordinarily be confined to the issues raised by the pleadings."<sup>27</sup>

Materiality means relevancy and relevancy relates to evidentiary matter which tends to prove or disprove a proposition. Whether a proposition is provable in a particular case is determined by the pleadings, by the procedural rules applicable thereto, and by the substantive law governing the issues in litigation.<sup>28</sup>

### B. *Decisions*

Decisions in both state and federal courts on the question of whether insurance coverage and policy limits are subject to discovery under existing rules reveal large areas of disagreement.

In the New Jersey case of *Goheen v. Goheen*,<sup>29</sup> plaintiff attempted, through interrogatories, to elicit information as to (1) whether defendant was insured, (2) the name of the company, (3) whether the policy was in force or cancelled, (4) whether the premium was paid up, and (5) the amount of insurance. In granting defendant's motion to strike out the interrogatories, the court held that the desired interrogatories were not probative of the issue and thus irrelevant and incompetent evidence.<sup>30</sup>

On the other hand, the Michigan Supreme Court, in *Layton v. Cregan & Mallory Co.*,<sup>31</sup> in permitting discovery of insurance by requiring the

25. *Id.* at 501. (Emphasis added.)

26. 2 Barron & Holtzoff, *Federal Practice and Procedure* § 641, at 263 (1950).

27. 4 Carmody, *New York Practice* § 1236, at 2804 (2d ed. 1932).

28. James, *Relevancy, Probability and the Law*, 29 *Calif. L. Rev.* 689 (1941).

29. 9 N.J. Misc. 507, 154 *Atl.* 393 (Cir. Ct. 1931).

30. *Id.* at 508, 154 *Atl.* at 393.

31. 263 *Mich.* 30, 248 *N.W.* 539 (1933).



defendant to produce the policy for examination, stated the limited purpose of such discovery:

It is first contended by the defendant that the plaintiff is not entitled to a discovery because it calls for matters entirely foreign and irrelevant to the issue. We do not think so. *The ownership of the car was put in issue by the pleadings. If the insurance policy shows ownership, it is admissible in evidence for that purpose.*<sup>32</sup>

In 1937, the Supreme Court of California declared in *Demaree v. Superior Court*,<sup>33</sup> dealing with an order for the perpetuation of testimony in a contemplated action: "We think it must be conceded that the provisions of the policy of insurance are germane to petitioner's cause and material to their anticipated action, when and if brought. We are of the view, therefore, that the applicants laid a sufficient basis for the issuance of the order providing for the perpetuation of testimony and the production of the insurance policy."<sup>34</sup>

The Appellate Division of New York in *McGrath v. Vaccaro*<sup>35</sup> upheld the plaintiff's right to discover and inspect defendant's liability insurance policy where the defendant had denied control of the instrument which caused the injury. Hence, liability insurance was material and relevant to the issue of control raised by the pleadings and, therefore, admissible in evidence.<sup>36</sup>

In *Orgel v. McCurdy*,<sup>37</sup> a case involving pre-trial examination under rule 26(b), the District Court for the Southern District of New York stated:

Defendant objects to examination on these matters [liability insurance] on the ground that the 'injection of this issue in the trial of this action will seriously preju-

---

32. *Id.* at 31-32, 248 N.W. at 539. (Emphasis added.) It is to be noted that in producing the policy defendant may also be disclosing the policy limits. Even so, such disclosure is only ancillary to the real dispute which is the ownership of the automobile placed in issue by the pleadings. It is not in any way connected with defendant's financial responsibility.

33. 10 Cal. 2d 99, 73 P.2d 605 (1937).

34. *Id.* at 103, 73 P.2d at 607.

35. 270 App. Div. 948, 62 N.Y.S.2d 244 (2d Dep't 1946). *Accord*, *La Fata v. News Syndicate Co. Inc.*, 269 App. Div. 818, 56 N.Y.S.2d 199 (1st Dep't 1945).

36. The case of *Martyn v. Braun*, 270 App. Div. 768, 59 N.Y.S.2d 588 (2d Dep't 1946), was misconstrued in 415 Ins. L.J. 505, 507 (1957). Plaintiff fell on a stoop, control of which defendant had denied. The court held that plaintiff's motion for examination before trial of the defendant on the matter of liability insurance should have been allowed. However, the question of insurance was material and relevant since defendant had denied control of the premises. That being so, it was admissible in evidence as relevant. In *Milk Tank Serv., Inc. v. Wood*, 200 Misc. 333, 107 N.Y.S.2d 166 (Sup. Ct. 1951), an examination before trial of the plaintiff was disallowed in an action to recover property damage to a truck and cargo where the defendant sought to ascertain whether the truck and cargo were insured, and if so, the name of the insurance company and the amount of the insurance. *Accord*, *Rashall v. Morra*, 250 App. Div. 474, 294 N.Y.S. 630 (2d Dep't 1937).

37. 8 F.R.D. 585 (S.D.N.Y. 1948).

dice the defendant . . . in its defense and would have no probative value on the *contested issue of operation and control of the vehicle involved in the accident.*' . . . [Plaintiff] 'on the issue of liability insurance, is attempting to spell out operation and control from the fact of insurance liability coverage, when, as a matter of fact, whether the defendant . . . had liability insurance coverage on the vehicle in question at the time of the accident would depend on whether the said motor vehicle was under its operation and control.'<sup>38</sup>

Examination here was granted because the testimony sought by the plaintiff could be generally relevant to the issues in the case.

A wider latitude for examination in this respect was granted by a district court of Tennessee in *Brackett v. Woodall Food Prods., Inc.*,<sup>39</sup> a case concerning discovery under rule 34. The court believed that examination of the liability insurance policy of the alleged tortfeasor was proper because it was relevant and material to the subject matter of the litigation, and thus within the purview of rules 34 and 26(b).<sup>40</sup>

However, this liberal view was repudiated in *McClure v. Boeger*,<sup>41</sup> which also involved discovery under rule 34. The federal district court stated that "whatever advantages the plaintiff might gain are not advantages which have anything to do with his presentation of his case at trial and do not lead to disclosure of the kind of information which is the objective of discovery procedure. . . . [T]o grant this motion would be to unreasonably extend that procedure beyond its normal scope and would not be justified."<sup>42</sup>

38. *Ibid.* (Emphasis added.) The language used clouds the fact that the real issues in dispute were control and operation of the vehicle in question, making insurance coverage relevant and material, thus admissible evidence.

39. 12 F.R.D. 4 (E.D. Tenn. 1951).

40. *Id.* at 5. The court asserted that the policy "may afford the plaintiffs rights of which they would otherwise not be able to avail themselves." *Id.* at 6. This is the first instance in which the novel theory is advanced that knowledge of the details of the defendant's insurance coverage is material to the plaintiff in the preparation of his case for trial. This means plaintiff may discover insurance to evaluate his case. When Brackett was decided, Tennessee had in force a financial responsibility law. Tenn. Code Ann. §§ 2715.49-68 (1951). It required motorists, under certain circumstances, to show financial responsibility by posting bonds or carrying liability insurance. The court inferred from this a legislative intent to make insurance policies relevant in negligence cases. Comparable legislation was then in force in over 40 of the 48 states.

This same court declared in *McNalley v. Perry*, 18 F.R.D. 360 (E.D. Tenn. 1955), with regard to discovery of insurance through interrogatories under federal rule 26, that "as a general rule, the purpose of seeking information from an adversary, or a witness, is two-fold: (1) to use it in the trial, or (2) to use it as a lead to information for use in the trial. It is not shown in this case that the information sought about insurance would be relevant to either purpose." *Id.* at 361.

41. 105 F. Supp. 612 (E.D. Pa. 1952).

42. *Id.* at 613.

In *Superior Ins. Co. v. Superior Court*,<sup>43</sup> which dealt with an order for the perpetuation of testimony in a contemplated action, the California Supreme Court ruled that a witness could be compelled to testify with reference to an insurance policy. The court not only held that the policy itself must be produced, but also that the witness should not be permitted to restrict his testimony merely to the fact that insurance exists. Furthermore, the court observed that "an automobile liability policy evidences 'a contractual relation created by statute which inured to the benefit of any and every person who might be negligently injured by the assured as completely as if such injured person had been specifically named in the policy', i.e., a contractual relation is 'created between the insurer and the third parties'."<sup>44</sup> However, the majority of the court overlooked the fact that a suit against the insurer is not an action to recover a loss under the policy, but constitutes an action for reimbursement for damages sustained.<sup>45</sup> No liability under the policy accrues as an enforceable claim against the insurer until judgment against the insured becomes final,<sup>46</sup> and discovery of insurance may be had in a proceeding supplementary to judgment.<sup>47</sup>

---

43. 37 Cal. 2d 749, 235 P.2d 833 (1951). The Supreme Court of Nevada in *State v. Second Judicial Dist. Court*, 69 Nev. 196, 245 P.2d 999 (1952), distinguished the Superior case on the ground that in view of Cal. Ins. Code § 11580 which provides that insurance contracts must contain a provision to the effect that in the event of an unsatisfied judgment against the insured, the plaintiff could sue the insurer, the plaintiff therefore had a discoverable interest in the defendant's insurance policy, whereas, in Nevada, no similar statute was in force. Nevada, however, did have a financial responsibility statute similar to that in force in Tennessee. See *Brackett v. Woodall Food Prods., Inc.*, 12 F.R.D. 4 (E.D. Tenn. 1951).

Under the federal rules, to obtain discovery by an order to perpetuate testimony in a contemplated action, plaintiff is required to show a possibility that the testimony sought might otherwise be lost. *Petition of Ferkouf*, 3 F.R.D. 89 (S.D.N.Y. 1943). It can hardly be contended that this possibility exists when a large insurance company is involved, assuming, arguendo, that discovery is proper in the first instance. N.Y. Civ. Prac. Act § 295 provides: "Testimony which is material to an expected party in the prosecution or defense of an action about to be brought may be taken by deposition if the taking or the preservation thereof is necessary for the protection of his rights. Such testimony may be taken only in pursuance of an order of the court in which the action may be brought or a judge thereof."

44. 37 Cal. 2d at 754. 235 P.2d at 835.

45. *Olds v. General Acc. Fire & Life Assur. Corp.*, 67 Cal. App. 2d 812, 155 P.2d 676 (1945).

46. *Levy v. Superior Court*, 74 Cal. App. 171, 239 Pac. 1100 (1925).

47. Cal. Ins. Code § 11580 permits action against the insurer after judgment has been obtained against the insured. Cal. Ins. Code § 11581 provides: "Upon any proceeding supplementary to execution such judgment debtor may be required to exhibit any policy carried by him insuring against the liability for the loss or damage for which judgment was obtained." Minn. Stat. Ann. § 60.51 (1937) provides for examination of judgment debtor

The Kentucky Court of Appeals, in *Maddox v. Grauman*,<sup>48</sup> with respect to the discovery of insurance in a pre-trial examination under a statute similar to federal rule 26(b), declared that: "An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but it is an agreement that embraces those whose person or property may be injured by the negligent act of the insured. We conclude the answers to the propounded questions are relevant to the subject matter of the litigation . . . ."<sup>49</sup>

The Minnesota Supreme Court, in *Jeppesen v. Swanson*,<sup>50</sup> handed down an exhaustive, well-reasoned opinion on discovery procedure under a rule nearly identical with federal rule 34. Plaintiff's attorneys frankly stated in the moving papers that the motion to inspect defendant's liability policy was to place a value on the case for the purpose of settlement.<sup>51</sup> The Court denied the plaintiff's petition and, relying on the *Hickman*<sup>52</sup> and *McClure*<sup>53</sup> cases, stated:

The rationale of the great bulk of federal cases dealing with the discovery rules is that the information sought by the 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.<sup>54</sup>

Another state court, also construing a discovery statute similar to federal rule 34, denied a plaintiff pre-trial discovery of insurance coverage, reasoning that it was neither material nor relevant, and was hence inadmissible as evidence.<sup>55</sup> In so deciding, the South Dakota Supreme Court declared that the "plaintiff's suggestion that the policy may afford her rights of which she would not be able to avail herself unless she is permitted to inspect it, does not concern the pending lawsuit. *Rather it concerns a subsequent suit against the insurer—if she prevails in this one.*"<sup>56</sup>

A more liberal stand was taken by the Supreme Court of Illinois in

---

after execution is returned unsatisfied. N.Y. Civ. Prac. Act § 775 provides for the examination of a judgment debtor in a proceeding supplementary to judgment after the docketing of the judgment, and the examination need not await an execution being returned unsatisfied. N.Y. Civ. Prac. Act § 779 provides for examination of third parties, individual, partnership or corporation, who may be holding property of judgment debtor or be indebted to him.

48. 265 S.W.2d 939 (Ky. 1954).

49. *Id.* at 942.

50. 243 Minn. 547, 68 N.W.2d 649 (1955).

51. *Id.* at 548, 68 N.W.2d at 653.

52. *Hickman v. Taylor*, 329 U.S. 495 (1947).

53. *McClure v. Boeger*, 105 F. Supp. 612 (E.D. Pa. 1952).

54. 243 Minn. at 554, 68 N.W.2d at 653.

55. *Bean v. West*, 76 S.D. 462, 80 N.W.2d 565 (1957).

56. *Id.* at 465, 80 N.W.2d at 567. (Emphasis added.)

*People ex rel. Terry v. Fisher*.<sup>57</sup> The court denied defendant's petition for a writ of mandamus directed to the judge who had ordered the defendant to answer plaintiffs' interrogatories containing the following questions: (1) On the date of this lawsuit did you carry liability insurance? (2) If so, with what company? (3) If you did carry liability insurance, what is the policy limit for each person? The Illinois court, relying on the *Brackett*,<sup>58</sup> *Superior*<sup>59</sup> and *Maddox*<sup>60</sup> cases in arriving at its decision, stated:

It is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be 'related to the merits of the matter in litigation' . . . since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for, and afford a sounder basis for the settlement of disputes. We believe that such a construction is in accordance with the intention of the framers of the amended Rules to give a broader scope to the practice of discovery and thereby enable attorneys to better prepare and evaluate their cases.<sup>61</sup>

The liberal position exemplified by the *Superior* case has been explicitly rejected by the Supreme Courts of Oklahoma<sup>62</sup> and Florida.<sup>63</sup> In *Brooks v. Owens*,<sup>64</sup> wherein plaintiff had endeavored to discover defendant's insurance policy limits through interrogatories, the Florida Supreme Court specifically declined to follow the *Superior* and *Maddox* decisions and declared:

We adopt the view . . . that the limits of liability insurance on a policy covering an automobile of a defendant are not proper matters subject to discovery . . . . *It is our view that the rule is applicable only to those matters admissible in evidence or calculated reasonably to lead to the discovery of admissible evidence.*<sup>65</sup>

Two recent decisions<sup>66</sup> by federal district courts in Illinois demonstrate

57. 12 Ill. 2d 231, 145 N.E.2d 588 (1957). The court also observed that in personal injury litigation the insurer is virtually substituted as a party since it controls the investigation of the case and the conduct of the defense. Therefore, plaintiff has a discoverable interest in defendant's insurance coverage as a matter of public policy. Should it not then logically follow that plaintiff has the same discoverable interest in an uninsured defendant's assets, who controls the investigation of the case, and the conduct of the defense?

58. *Brackett v. Woodall Food Prods., Inc.*, 12 F.R.D. 4 (E.D. Penn. 1951).

59. *Superior Ins. Co. v. Superior Court*, 37 Cal. 2d 749, 235 P.2d 833 (1951). See note 43 supra.

60. *Maddox v. Grauman*, 265 S.W.2d 939 (Ky. 1954).

61. 12 Ill. 2d at 239, 145 N.E.2d at 593.

62. *Peters v. Webb*, 316 P.2d 170 (Okla. 1957). Involved here was the perpetuation of testimony by deposition in a contemplated action for malpractice. The Oklahoma Supreme Court denied plaintiff the right to discovery of insurance coverage.

63. *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957).

64. *Ibid.*

65. *Id.* at 699. (Emphasis added.)

66. *Roembke v. Wisdom*, 22 F.R.D. 198 (S.D. Ill. 1958); *Gallimore v. Dye*, 21 F.R.D.

a consistent denial of the use of interrogatories to discover the existence and limits of any insurance. In *Gallimore v. Dye*,<sup>67</sup> the federal court pointed out that the presence or absence of insurance by the defendant has no bearing on the issue of liability in negligence actions, for the defendant's negligence "is the gravamen in such actions."<sup>68</sup> The court went on to assert that "the plaintiff's cause must rise or fall on its own merits and on the ability of the plaintiff to prove liability against the defendant."<sup>69</sup> Adhering to the *Gallimore* case, the Federal District Court for the Southern District of Illinois in *Roembke v. Wisdom*<sup>70</sup> thus summarized the significance of the discovery procedure:

The purpose of discovery is for preparation for trial. A party by use of the discovery rules, may obtain direct evidence for use in trial, or may obtain pertinent information that will lead to evidence for use in trial. The scope of discovery is broad, and so long as information sought by interrogatories or deposition can reasonably be said to lead to the discovery of admissible evidence it must be given . . . . The existence or non-existence of liability insurance is not an evidentiary matter that may be used at the trial, nor is it relevant to the subject matter involved in the pending action.<sup>71</sup>

Arizona and Connecticut, whose procedural rules are patterned after the federal model, have similarly construed their rules as denying the plaintiff the right to elicit insurance information through interrogatories. As the Arizona Supreme Court stated in *Di Pietrantonio v. Superior Court*,<sup>72</sup> "the decisions holding against discovery . . . are better reasoned than those holding to the contrary."<sup>73</sup> The Superior Court of Delaware<sup>74</sup>

---

283 (E.D. Ill. 1958). Both cases concerned the discovery of insurance and policy limits through interrogatories under rule 33 of the Federal Rules of Civil Procedure.

67. 21 F.R.D. 283 (E.D. Ill. 1958).

68. *Id.* at 286.

69. Continuing this line of reasoning the court said it failed "to see how the presence or absence of liability insurance can have any probative value in this case. It does not, and could not have any bearing on the liability or non-liability of the defendant; nor does this court conceive how receiving answers to the interrogatories objected to here could lead to any matters having any probative force in deciding the issues in this case, nor aid the plaintiff in establishing his cause by a preponderance or greater weight of the evidence which, under the law, he is required to do, before he is entitled to collect anything from the defendant." 21 F.R.D. at 286.

70. 22 F.R.D. 198 (S.D. Ill. 1958).

71. *Id.* at 199.

72. 84 Ariz. 291, 327 P.2d 746 (1958). The court stated that: "Our public policy . . . is diametrically opposed to respondent's position and Rule 26(b) . . . construed most favorably in favor of the right of discovery in the instant case does not justify it." 84 Ariz. at 298, 327 P.2d at 751.

73. *Ibid.*

74. *Ruark v. Smith*, 147 A.2d 514 (Del. Super. Ct. 1959). The Delaware court in construing Del. Super. Ct. (Civ.) R.33, which is similar to the corresponding federal rule of procedure, denied plaintiff insurance coverage information sought by means of interrogatories. 147 A.2d at 515.

pointed out that the prejudicial nature of any mention of liability insurance in an automobile collision case, together "with a complete lack of any showing of relevancy to the issues as framed by the pleadings or otherwise indicated by the plaintiff" necessitated the denial of information relating to insurance coverage and policy limits by means of interrogatories.<sup>75</sup>

Disclosure of insurance coverage through depositions was rejected by the Connecticut Superior Court in *Verrastro v. Grecco*.<sup>76</sup> The court maintained that the "good cause" required by the prevailing rules of practice included a showing that the "disclosure sought would be of assistance in the prosecution of defense of such action."<sup>77</sup> Citing the *Verrastro* decision as controlling, this same court denied a motion for production of defendant's insurance policy in a malpractice suit where the plaintiff attempted to show "good cause" by alleging that she needed to discover whether a statutory violation was covered by the policy so that it might be determined whether or not to include the violation in her complaint as a cause of action.<sup>78</sup>

California has persisted in a liberal construction of its procedural rules so that plaintiffs have been able to elicit insurance coverage information, including policy limits, through the use of interrogatories. This is aptly manifested in the recent decision of *Laddon v. Superior Court*.<sup>79</sup> In following the position previously enunciated in the *Superior*<sup>80</sup> case, the *Laddon* court admitted that "the conclusion is inescapable that under this [*Superior*] decision the insurance policy is relevant to the subject matter involved in the personal injury action, although not strictly within the issues raised by the pleadings."<sup>81</sup> However, recognizing that its viewpoint was perhaps somewhat tenuous, the court conceded that "while the decisions favoring discovery are persuasive in their reasoning, we might be inclined to follow the majority view if the question were wholly new in California."<sup>82</sup>

### C. Summary of Decisions

Thus, according to the authority of the preceding cases taken from the federal district courts of Illinois, New York, Pennsylvania and Tennessee, and the state courts of Arizona, Connecticut, Delaware, Florida,

---

75. 147 A.2d at 515.

76. 21 Conn. Supp. 165, 149 A.2d 703 (Super. Ct. 1958).

77. Id. at 166, 149 A.2d at 704.

78. *McKee v. Walker*, 21 Conn. Supp. 168, 149 A.2d 704 (Super. Ct. 1958).

79. 334 P.2d 638 (Cal. 1959). See notes 1-3 supra and accompanying text. The pertinent rules were Cal. Civ. Proc. §§ 2016(b), 2030(b) (1957), which are based largely upon the federal rules of procedure.

80. 37 Cal. 2d 749, 235 P.2d 833 (1951).

81. 334 P.2d at 640.

82. Id. at 639.

Michigan, Minnesota, Nevada, New Jersey, New York, Oklahoma, and South Dakota, it is clear that a plaintiff cannot compel disclosure of defendant's insurance coverage.<sup>83</sup> It may be argued that the evidence elicited by such disclosure would be inadmissible, because neither material nor relevant, *unless* such disclosure is required to show ownership, agency or control of the vehicle or instrumentality involved. However, as has been seen, the rule is otherwise in the Federal District Court for the Eastern District of Tennessee and the state courts of California, Illinois and Kentucky.<sup>84</sup> These cases hold that disclosure of defendant's insurance coverage may be compelled since the evidence adduced thereby would be relevant to the issues in litigation and within the purview of discovery procedure.

The conflicting arguments may be summarized as follows: The proponents of insurance discovery contend that it is proper inasmuch as (1) discovery rules were adopted as procedural tools to effectuate the prompt and just disposition of litigation by informing the parties in advance of trial as to the real value of their claims and defenses, and should be liberally construed; (2) an automobile liability policy evidences a contractual relationship which inures to the benefit of any person who might be negligently injured by the insured;<sup>85</sup> (3) discovery of the existence and extent of a defendant's liability policy is related to the merits of the subject matter of the litigation and is thus material and relevant; and (4) such discovery, furthermore, would give plaintiff's

---

83. *Roembke v. Wisdom*, 22 F.R.D. 198 (S.D. Ill. 1958); *Gallimore v. Dye*, 21 F.R.D. 283 (E.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); *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D.N.Y. 1948); *Di Pietruntonio v. Superior Court*, 84 Ariz. 291, 327 P.2d 746 (1958); *McKee v. Walker*, 21 Conn. Supp. 168, 149 A.2d 704 (Super. Ct. 1958); *Verrastro v. Grecco*, 21 Conn. Supp. 165, 149 A.2d 703 (Super. Ct. 1958); *Ruark v. Smith*, 147 A.2d 514 (Del. Super. Ct. 1959); *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957); *Layton v. Cregan & Mallory Co.*, 263 Mich. 30, 248 N.W. 539 (1933); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955); *State v. Second Judicial Dist. Court*, 69 Nev. 196, 245 P.2d 999 (1952); *Goheen v. Goheen*, 9 N.J. Misc. 507, 154 Atl. 393 (Cir. Ct. 1931); *McGrath v. Vaccaro*, 270 App. Div. 948, 62 N.Y.S.2d 244 (2d Dep't 1946); *Peters v. Webb*, 316 P.2d 170 (Okla. 1957); *Bean v. Best*, 76 S.D. 462, 80 N.W.2d 565 (1957).

84. *Brackett v. Woodall Food Prods., Inc.*, 12 F.R.D. 4 (E.D. Tenn. 1951); *Laddon v. Superior Court*, 334 P.2d 638 (Cal. 1959); *Superior Ins. Co. v. Superior Court*, 37 Cal. 2d 749, 235 P.2d 833 (1951); *Demaree v. Superior Court*, 10 Cal. 2d 99, 73 P.2d 605 (1937); *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. 1954).

85. If an automobile liability policy evidences a contractual relation which inures to the benefit of any person who might be negligently injured by the insured as completely as if such person had been specifically named in the policy, as held in the Superior case, *supra* note 84, it would seem that the beneficiary of such contract must, as a condition precedent to bringing suit against the insurer, prove the negligence of the insured.



counsel a realistic appraisal of his case and allow a sounder basis for settlement. While the opponents of discovery concede that the rules should be liberally construed, they contend that discovery here is improper since (1) the purpose of existing discovery rules is to eliminate the possibility of surprise at trial by permitting all relevant facts and information to be ascertained in advance thereof; (2) facts which have no bearing on the determination of the action on the merits are not subject to discovery; and (3) information is not discoverable when its sole purpose is to evaluate a case for the purpose of settlement.<sup>86</sup>

From the foregoing, it can be readily seen that the crux of the conflicting views lies in whether or not *pre-trial discovery of the existence and extent of defendant's liability coverage touches the merits of the plaintiff's cause of action so as to affect the amount of damages plaintiff sustained.*<sup>87</sup> The cases holding affirmatively<sup>88</sup> contend that employment of investigators, expert witnesses, photographers, and even the taking of depositions, touches the merits of plaintiff's cause of action and, therefore, is material in evaluating one's case for the purpose of settlement. If this be so, may not one argue that a defendant in an action for damages, whether tort or contract, be made to furnish a financial statement,<sup>89</sup> even though he be an individual, partnership, or corporation? The cases supporting the negative contend that the purpose of discovery is to assist the parties and the court in disposing of the litigation, *not* to supply information for the personal use of the litigants.<sup>90</sup> Moreover, the affirmative argument appears to correlate the plaintiff's damages to the defendant's ability to pay,<sup>91</sup> or to put it in another way, as to how much the traffic will bear.

The law with respect to damages in the vast majority of jurisdictions has been stated as follows:

---

86. The argument is also made that discovery rules are to secure a just, speedy and inexpensive determination of every action, but that the word "determination" refers to the disposition of an action in some manner over which a court has control, hence, that "determination" does not encompass settlement. *Benal Theatre Corp. v. Paramount Pictures*, 9 F.R.D. 726 (N.D. Ill. 1947). Moreover, the type of settlements over which a court would have control involve claims of infants and incompetents.

87. In *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 238, 145 N.E.2d 588, 593 (1957), the court declared: "Plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he has no knowledge of any additional rights against the insurer."

The latter argument completely ignores the proceeding supplementary to judgment whereby examination of the judgment debtor may be had regarding his ability to pay which includes claims the judgment debtor may have against third parties.

88. See, e.g., *People ex rel. Terry v. Fisher*, *supra* note 87.

89. See, e.g., *McClure v. Boeger*, 105 F. Supp. 612 (E.D. Pa. 1952).

90. See, e.g., *Balazs v. Anderson*, 77 F. Supp. 612 (N.D. Ohio 1948).

91. See notes 39, 43, 48 and 57 *supra*.

The fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which gives rise to the action.<sup>92</sup>

In other words, the damages awarded should be commensurate with the injury sustained.<sup>93</sup> To advance the theory that damages for personal injury should be measured by the defendant's ability to pay is to introduce a startling concept in the field of jurisprudence, no matter how subtle the approach.

#### CONCLUSION

In states having direct action statutes,<sup>94</sup> discovery by the plaintiff of the existence of insurance coverage is proper and warranted by controlling state and federal discovery rules. By legislative mandate, the plaintiff here has a discoverable interest. In states having statutes which permit an action against the insurer only after a final judgment has been obtained against the insured,<sup>95</sup> no discoverable interest exists in advance of trial. In such states the plaintiff may obtain the desired information in a proceeding supplementary to judgment,<sup>96</sup> hence pre-trial discovery of insurance coverage is improper and unwarranted under existing discovery procedure. As a practical matter, whenever an accident is reported, the insurer, in most cases, takes over the investigation, interviews the witnesses, if any, and prepares the case for trial. The insured must cooperate from the very beginning or hazard a disclaimer by the insurer. Thus, the plaintiff may acquire knowledge of existing insurance through: (1) disclosure by the insured; (2) an offer to settle in advance of trial by the insurer; (3) at a pre-trial hearing; or (4) by the character and conduct of the defense during trial.<sup>97</sup> Disclosure of the

---

92. 15 Am. Jur. Damages § 12, at 400 (1938).

93. *Miller v. Robertson*, 266 U.S. 243 (1924); *Hanna v. Martin*, 49 So. 2d 585 (Fla. 1951).

94. See notes 13 and 14 *supra*. The situation in *Villars v. City of Portsmouth*, 100 N.H. 453, 129 A.2d 914 (1957), is analogous. Here the Supreme Court of New Hampshire, in a declaratory judgment action, held that the defendant city should produce the insurance policy upon request of the plaintiff. It is pointed out in this case that under the common law the city would not be liable, but by statute, if a policy of liability insurance had been procured by defendant city, liability might exist to the limit of the policy.

95. See notes 19, 20 and 47 *supra*.

96. See note 47 *supra*.

97. In states having compulsory insurance statutes in force the plaintiff will have knowledge of the existence of insurance coverage and at least the minimum of the policy limits as therein prescribed. See, e.g., *Teller v. Clear Service Co.*, 9 Misc. 2d 495, 173 N.Y.S.2d 183 (Sup. Ct. 1958). Here, plaintiff applied for preference at a pre-trial hearing under pre-trial procedure adopted by the Justices of the Appellate Division for the First Department on January 5, 1958. The court declared: "Refusal by a defendant to disclose

policy limits in advance of trial is difficult to justify. It can have no possible bearing on the issue of defendant's negligence even when ownership, agency or control are in dispute. Defendant's ability to pay or the evaluation of plaintiff's cause have never been within the purview of discovery procedure. While the rules should be given a liberal construction, they should not be prostituted for purposes not within the declared and recognized objectives for which they were adopted.<sup>98</sup>

It follows then that in the absence of a direct action statute, or where ownership, operation or control are not in dispute, pre-trial discovery of insurance coverage should be prohibited. Where ownership, operation or control are in dispute, or where a direct action or analogous statute is involved, pre-trial discovery should be limited to establishing the fact that insurance coverage existed.

The contention that compelling disclosure of insurance coverage in advance of trial violates defendant's constitutional rights<sup>99</sup> was decided adversely to defendant in *People v. Fisher*.<sup>100</sup> Furthermore, the Supreme Court of the United States held in *Watson v. Employer's Liab. Assur. Corp.*,<sup>101</sup> that Louisiana's direct action statute<sup>102</sup> did not contravene the equal protection and due process clauses of the Federal Constitution.

Discovery is a matter of procedure and the Supreme Court of the United States has held that a state has full power over remedies and proce-

---

the amount of insurance or reinsurance carried or the concealment of any facts concerning the financial standing of the defendant or, where there is a prima facie case and the injuries are severe (though there may be a disputed issue of liability), the offer of a mere nominal sum are deemed failures on the part of the defendant to cooperate and negotiate in good faith to reduce the negligence case load. Such conduct is held to warrant the granting of a preference or the taking of such other action as may be appropriate." *Id.* at 497, 173 N.Y.S.2d at 185. The defendant here was the corporate owner of a fleet of two taxicabs.

98. The Minnesota court, in *Jeppesen v. Swanson*, 243 Minn. 547, 562, 68 N.W.2d 649, 658 (1955), stated: "Under the guise of liberal construction, we should not emasculate the rules by permitting something which never was intended or is not within the declared objects for which they were adopted. Neither should expedience or the desire to dispose of lawsuits without trial, however desirable that may be from the standpoint of relieving congested calendars, be permitted to cause us to lose sight of the limitations of the discovery rules or the boundaries beyond which we should not go. If, perchance, we have the power under the enabling act to extend the discovery rules to permit discovery of information desired for the sole purpose of encouraging or assisting in negotiations for settlement of tort claims, it would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit."

99. Williams, *Discovery of Policy Limits*, 26 *Ins. Counsel J.* 225 (1959).

100. 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

101. 348 U.S. 66 (1954).

102. La. Rev. Stat. § 655 (1950). See note 13 *supra* and accompanying text.

ture in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants.<sup>103</sup> It would appear, therefore, that the objection of unconstitutionality is not well taken.

Judicial legislation regarding discovery of insurance coverage appears to have reached its peak in the *Fischer* case. It is noteworthy that with the exception of the *Laddon* decision,<sup>104</sup> subsequent cases<sup>105</sup> have held that discovery must remain within the limits of relevancy and materiality to the issues raised by the pleadings. This view is eminently sound.

Assuming, but not conceding, 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.

---

103. *York v. Texas*, 137 U.S. 15 (1890).

104. See notes 1-3 *supra*.

105. *Roembke v. Wisdom*, 22 F.R.D. 198 (S.D. Ill. 1958); *Gallimore v. Dye*, 21 F.R.D. 283 (E.D. Ill. 1958); *Di Pietruntonio v. Superior Ct.*, 84 Ariz. 291, 327 P.2d 746 (1958); *McKee v. Walker*, 21 Conn. Supp. 168, 149 A.2d 704 (Super. Ct. 1958); *Verrastro v. Grecco*, 21 Conn. Supp. 165, 149 A.2d 703 (Super. Ct. 1958); *Ruark v. Smith*, 147 A.2d 514 (Del. Super. Ct. 1959); *Brooks v. Owens*, 97 So. 2d 693 (Fla. 1957); *Peters v. Webb*, 316 P.2d 170 (Okla. 1957).