DIRECT ACTIONS AGAINST INSURANCE COMPANIES: SHOULD THEY JOIN THE PARTY?

Although the liability insurer is omnipresent in every automobile accident case, its hand remains invisible. The prevailing general rule is that, unless provided by statute or the policy itself, an automobile insurance company may not be made an original party to a lawsuit against its insured defendant.¹

The automobile liability insurance policy has traditionally been viewed by the courts as a contract between the insured and the insurance company.² The general rule reasons that no privity of contract exists between an injured party and the tortfeasor's automobile insurer,³ and therefore the injured party has no direct right of action against the insurer.⁴ Since the injured party has no direct right of action against


Some courts have created quasi-direct actions against the insurer. In Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), the insurance policy was held to be an attachable debt or an obligation sufficient for quasi in rem jurisdiction over the insured defendant prior to the plaintiff's obtaining a judgment against the insured. Id. at 113, 114, 216 N.E.2d at 314, 269 N.Y.S.2d at 101, 102. Since the insurance company will be conducting the defense and paying the judgment, it is the real party in interest and even though not named as a defendant, the practical effect, as Judge Burke noted in his dissenting opinion, "is to allow a direct action against the insurer." Id. at 117, 216 N.E.2d at 316, 269 N.Y.S.2d at 104 (Burke, J., dissenting).

Despite prodigious criticism [see Reese, The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild, 35 Ins. Counsel J. 118 (1968); Note,
such insurer, he may not join the liability insurer with the insured as a party defendant. There are two major exceptions to this general rule prohibiting direct action or joinder of the insured with his insurance company. The courts in many jurisdictions have allowed joinder of the tortfeasor and his insurance company when the tortfeasor is a common carrier which is required by the legislature or a city ordinance to carry liability insurance for the benefit of the public. Second, by express statutory provision, three states—Louisiana, Wisconsin, and


Another analogous development creating a semi-direct action is the appointment of an administrator for the estate of a nonresident who has been involved in an automobile accident in the domicile of the injured party but who has died before an action can be commenced against him. The courts hold that the automobile liability policy is a sufficient estate for purposes of administration and a suit is permitted against an administrator appointed by the court. See Degnan, Semi-Direct Action Against Liability Insurers, 13 VAND. L. REV. 871 (1960).


Some courts allow a direct action against the insurance company without requiring
Rhode Island—permit direct action against the insurance company alone. Wisconsin and Louisiana also allow joinder of the insurer with the insured, while such joinder is prohibited in Rhode Island.

The Florida supreme court recently rejected the general rule in *Shingleton v. Bussey*, and created a right in the injured party to join the insurance company as an original codefendant in the suit. The plaintiff, injured in an automobile accident, was allowed to bring an action naming both the insured tortfeasor and her insurance company as defendants despite a "no action" clause in the policy prohibiting any action against the insurance company until a judgment had first been obtained against the insured. The court directly attacked the "no action" provision of the policy and held it invalid as against the public policy of Florida: "[I]t is a contradiction of public policy to contract

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13. 223 So. 2d 713 (Fla. 1969).

14. The *Shingleton* decision was the first judicial creation of a right of direct action against an insurance company. Previously all such rights were created by state legislatures. See text accompanying notes 7-12 supra. This judicial creation of a direct action against the insurance company is especially interesting as a similar right of direct action had been rejected by both houses of the Florida Legislature a few weeks prior to the *Shingleton* decision. S. 468, Fla. Reg. Sess. (1969), recommended unfavorably and tabled May 6, 1969; H.R. 1120, Fla. Reg. Sess. (1969), died in committee June 6, 1969.

The *Shingleton* case thus raises the further question of the proper body to create a right of direct action against the insurer—the courts or the legislature. The general rule in such cases is for the legislature to decide the "what" (substance) and for the courts to decide the "how" (procedure). This results in a gray area of indefiniton where the rulemaking power of the legislature and the courts overlap. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich. L. REV. 623, 630 (1957). But see Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (arguing that the judiciary has exclusive rulemaking power). The dissent in *Shingleton* argues that a change in procedure of this nature is a substantive change, and hence subject to regulation only by the legislature. 223 So. 2d at 722. However, since the insurance company would still not be liable to the injured party until judgment against the insured is first obtained, the creation of a right of direct action would not change the substantive liability of the insurance company. Furthermore, the creation of a right of direct action by the courts can be sustained as within their rulemaking power. As Joiner and Miller conclude, the rulemaking power of the courts clearly extends to the determination of which causes of action and which parties should be included in a
for liability coverage for members of the public and simultaneously deny a beneficiary thereunder the ordinary rights of a litigant to sue for such coverage through the restraint of a 'no joinder' clause." The court concluded that the automobile insurance policy could no longer be viewed as "a private contract merely between two parties"; the injured party could therefore sue as a third-party beneficiary on the contract.

Because other courts may follow Florida's lead in judicially creating a right of direct action against the insurance company, this Comment discusses the merits of permitting an injured party to sue the tortfeasor's automobile insurance company directly. This discussion entails a new look, in part I, at the traditional reasons for prohibiting a direct action against the insurance company and an appraisal, in part II, of the purported benefits thought to accrue from making the insurance company an original party to the action.

It is important at the outset to distinguish clearly the three possible ways an insurance company can be made an original party to the suit since the shape of any given litigation may be a significant factor in its outcome. They are, one, permitting it to be sued directly as the sole defendant in the suit, two, permitting it to be joined with the tortfeasor in a single suit:

Nothing could be more a part of practice than a determination as to what causes should be joined in a single action. Whether a counterclaim should be permitted to be filed or required, whether a crossclaim should be permitted or required, whether third-party claims should be permitted, all involve the orderly dispatch of judicial business and fall within the court's rule-making power.

The same thing that was said about the joinder of causes can be said about parties. Who are required or permitted to be plaintiffs or defendants, are matters involving the orderly dispatch of judicial business. Intervention, substitution, interpleader, third-party practice, class actions, all are matters of judicial procedure and involve the how instead of the what. Court rules should cover these matters.

Joiner & Miller, supra at 648 (footnotes omitted). Since the creation of a right of direct action does not affect substantive liability, but merely determines which parties will be included within the suit, it could be encompassed within the court's rulemaking power.

15. 223 So. 2d at 718.
16. Id. at 716.
17. The primary emphasis of this Comment is limited to discussing joinder of and direct action against automobile liability insurance companies only. However, much of this discussion is also applicable to other insurance policies. Indeed the reasoning of the Shingleton case has been extended to apply to homeowners' policies as well as motor vehicle liability insurance [Liberty Mut. Ins. Co. v. Roberts, 231 So. 2d 235 (Fla. 1970)], and Louisiana allows direct actions against all liability insurers by statute. La. Rev. Stat. Ann. § 22.655 (1969).
18. The distinction is important when, because of the defendant's jury appeal or for jurisdictional purposes, it may be advantageous for the plaintiff to bring an action against the insurance company alone without requiring the tortfeasor to be made a party to the action. See text accompanying notes 115-20 infra.
feator as a co-defendant, or three, giving the injured plaintiff an option
to sue the insurance company alone or to join it as the tortfeasor's co-
defendant. Unfortunately, many of the text writers and the courts fail
to differentiate these three procedures and lump all three together under
the general heading of direct action.\textsuperscript{19}

I

THE TRADITIONAL PROHIBITION AGAINST DIRECT ACTION AND JOINER

The courts articulate four reasons for not permitting direct action
and joinder of insured and insurer. First, the contract between the
insured and the insurance company is seen as a private contract between
these two parties alone and the injured party must seek recovery di-
rectly from the insured.\textsuperscript{20} Second, it is improper to join an action in
tort with an action in contract.\textsuperscript{21} Third, bringing the insurance com-
pany into the action is thought to encourage the jury's tendency to
find negligence or to augment damages.\textsuperscript{22} Finally, the presence of the
"no action" clause in the policy prohibits bringing an action against
the company before first obtaining a binding judgment against the
insured.\textsuperscript{23}

A. Private Contract of Insured

Before the state legislatures began regulating automobile insurance
policies, such policies were regarded as private contracts primarily for

\textsuperscript{19} Shingleton v. Bussey, 223 So. 2d 713, 715 (Fla. 1969), illustrates the con-
fusion which may result when the distinction between joinder and direct action is not
made. The court states in dictum, "We conclude a direct cause of action now inures
to a third-party beneficiary against an insurer in motor vehicle liability insurance cov-
erage cases . . . ." However, the Shingleton court only held that a plaintiff may now
join the insurer as a defendant in an action against the tortfeasor. This language
raises the question of whether an injured party in Florida may proceed directly against
the liability insurer alone without first joining the insured tortfeasor as a co-defendant.

\textsuperscript{20} Van Derhoof v. Chambon, 121 Cal. App. 118, 8 P.2d 925 (4th Dist. 1932);
Shea v. United States Fid. & Guar. Co., 98 Conn. 447, 120 A. 286 (1923); Stearns v.
Graves, 61 Idaho 232, 99 P.2d 955 (1940); Haines v. Harrison, 357 Mo. 956, 211
S.W.2d 489 (1948); cf. Kowalski v. Holden, 276 F.2d 359 (6th Cir. 1960); Mertes v.

\textsuperscript{21} Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919); Russell v.
Burroughs, 183 Ga. 361, 188 S.E. 451 (1936); Stearns v. Graves, 61 Idaho 232, 99 P.2d
955 (1940); Ellis v. Bruce, 215 Iowa 308, 245 N.W. 320 (1932); Campbell v. Camp-
bell, 145 W. Va. 245, 114 S.E.2d 406 (1960); Conwell v. Hays, 103 W. Va. 69, 136
S.E. 604 (1927); see Kowalski v. Holden, 276 F.2d 359 (6th Cir. 1960).

\textsuperscript{22} Holman v. Cole, 242 Mich. 402, 218 N.W. 795 (1928); Cartagena v. Public
Adm'r., 43 Misc. 2d 950, 252 N.Y.S.2d 549 (1964); 8 J. Appleman, supra note 1,
§ 4861.

\textsuperscript{23} Sunait v. Capital Fire & Cas. Co., 296 F.2d 108 (9th Cir. 1961); Spencer v.
State Farm Mut. Auto. Ins. Co., 152 Cal. App. 2d 797, 313 P.2d 900 (1st Dist. 1957);
Van Derhoof v. Chambon, 121 Cal. App. 118, 8 P.2d 925 (4th Dist. 1932); Joyce v.
the benefit of the insured. As an early case expressed it, the contract "was made for the express benefit of [the insured] and not for the express benefit of any other person whomsoever." Based on this private contract theory, automobile insurance policies were generally viewed as indemnity-against-loss policies rather than as liability policies; thus the injured party could only seek recovery from the tortfeasor himself. This narrow view of the insurance contract led to such anomalous results as leaving the injured third party without a remedy if the defendant tortfeasor were insolvent. The insurance company could, through indemnity provisions, limit its obligation to loss actually sustained and paid for by the insured in satisfaction of a judgment after trial of the issue. If the insured tortfeasor under such a policy became insolvent or bankrupt during or even after the trial and could not pay the judgment against him, he would suffer no "loss" for which he needed indemnification. Since the injured party could look only to the insured for recovery, he was left with a worthless judgment.

Today, however, little vitality remains in the private contract theory of automobile insurance. Both the state legislatures and the courts have clearly manifested their intent that automobile insurance should protect all who use the highways rather than the insured alone. Virtually all the state legislatures have enacted remedial measures providing that no automobile insurance policy shall be issued which releases

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Some jurisdictions, however, held that an insurer who defended a suit on behalf of its insured was directly liable for an adverse judgment despite the provisions of the policy. Patterson v. Adan, 119 Minn. 308, 138 N.W. 281 (1912); Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N.H. 485, 57 A. 655 (1904).

the insurer from liability in the event of the insured's being insolvent. 29
Such measures commonly further require that the policy provide the
injured party with a right of action directly against the insurance com-
pany after a judgment has been obtained against the insured tort-
feasor. 30 Thus, liability insurers may no longer place themselves be-
yond the reach of those injured by insolvent policy holders by making
their obligation contingent upon actual payment by the insured. In
addition, every state has adopted some type of motor vehicle safety or
financial responsibility act which commonly requires all parties involved
in an accident resulting in bodily injury or property damage of a set
minimum, to evidence their ability to respond in damages by having se-
cured liability insurance, 31 posted an indemnity bond, 32 or deposited
cash or security with state officials. 33 Many states now allow cancella-
tion of the insurance policy only under certain conditions provided by
statute. 34 Most require that the automobile liability policy shall not
only insure the person named therein, but also any other person using
the insured's vehicle with his express or implied permission. 35 As-
signed risk plans, requiring insurance companies to provide insurance
to drivers who would be unable to procure insurance through ordinary
methods are common in most states. 36 The Supreme Court has upheld
other methods of legislative regulation of automobile liability policies,
designed to protect the public, including the requirement of an insurance
license and bond, 37 limitation of defenses, 38 and regulation of in-
surance rates. 39 Due in part to the extensive state regulation of the
insurance contract, the California Financial Responsibility Study Com-
mittee recently concluded that, "[r]eliance on the old concept that the
injured person must seek recovery directly from the judgment debtor

29. See, e.g., CAL. INS. CODE § 11580(b)(1) (West 1955); N.Y. INS. LAW
§ 167(1)(a) (McKinney 1966).
30. E.g., CAL. INS. CODE § 11580(b)(2) (West 1955); IOWA CODE ANN. § 516.1
(1949); N.Y. INS. LAW § 167(1)(b) (McKinney 1966). The Supreme Court has
upheld the constitutionality of these laws. Merchants' Mut. Auto. Liab. Ins. Co. v.
Smart, 267 U.S. 126 (1925). For a discussion of the development of these laws, see
46 HARV. L. REV. 1325 (1933).
32. Id. § 16434.
33. Id. § 16435. For a complete state-by-state listing of these statutes, see
Loiseaux, Innocent Victims 1959, 38 TEXAS L. REV. 154, 157 n.15 (1960); see Grad,
Recent Developments in Automobile Compensation, 50 COLUM. L. REV. 300 (1950),
for a discussion of how these laws operate.
34. See, e.g., CAL. INS. CODE § 660-69 (West Supp. 1971).
36. However, such plans do involve higher than normal insurance rates. See,
e.g., CAL. INS. CODE § 11620-27 (West 1955), as amended, (West Supp. 1971).
has been greatly reduced.\textsuperscript{40}

Similarly, the courts have recognized the moribundity of the private contract theory of automobile insurance. As Roscoe Pound observed 50 years ago:

\textit{[W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.\textsuperscript{41}}

Most courts now hold that the injured party has a "substantial right" in the policy from the moment of injury.\textsuperscript{42} This right is protected by allowing the injured party to comply with the terms of the policy himself and by placing numerous restrictions on both the insurer and insured. Hence, notice of the accident may be given to the insurance company by the injured party and need not be given by the insured himself as formerly required.\textsuperscript{43} Any declaratory judgment action brought by the insurance company to determine its liability on the insurance policy is not binding on the injured third party unless he is made a party to the action.\textsuperscript{44} Furthermore, no agreement between insurer and insured can impair the right of an injured person to recover under a liability policy,\textsuperscript{45} as was possible when the insurance

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\bibitem{40} CAL. DEP'T OF MOTOR VEHICLES FINANCIAL RESPONSIBILITY STUDY COMM., REPORT 48 (1967).
\bibitem{42} [A]n injured person has a potential interest and a substantial right in the policy from the very moment of his injury, and, although it does not develop into a vested right until a judgment is secured, his rights are such, even before judgment, as to entitle him to comply with the terms and conditions of the policy, and thus make them effective in his behalf . . . .
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policy was viewed as a private contract.\textsuperscript{46} Since the “insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but . . . an agreement that embraces those whose person or property may be injured by the negligent act of the insured,”\textsuperscript{47} Federal Rule 26(b)(2), which allows discovery of the “existence and contents” of an insurance agreement, has recently been adopted.\textsuperscript{48} Similarly, many state courts also permit discovery of the policy limits.\textsuperscript{49}

The California supreme court, in \textit{Barrera v. State Farm Mutual Insurance Co.},\textsuperscript{50} clearly recognized that an automobile liability policy protects injured members of the public rather than the tortfeasor alone. The court held that even though the insured materially misstated his past driving record, the insurer was liable on its policy because of the insurer's direct duty to protect those injured members of the public who stand to benefit from the insured's policy:\textsuperscript{51}

Because of the “quasi-public” nature of the insurance business and the relationship between the insurer and the insured . . . the rights and obligations of the insurer cannot be determined solely on the basis of rules pertaining to private contracts negotiated by individual parties of relatively equal bargaining strength. In the case of the standardized contract prepared by the economically powerful entity and the comparatively weak consumer we look to the reasonable expectation of the public and the type of service which the entity holds itself out as ready to offer.\textsuperscript{52}

The extensive regulation of automobile insurance by the legislature and the efforts of the courts to protect the injured party's accessibility to the tortfeasor's insurance fund reveal a substantial erosion of

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  \item Hall v. Armour Packing Co., 102 Ga. 586, 29 S.E. 139 (1897); Bain v. Atkins, 181 Mass. 240, 63 N.E. 414 (1902); Maahs v. Antigo Lumber Co., 156 Wis. 1, 145 N.W. 222 (1914).
  \item Maddox v. Grauman, 265 S.W.2d 939, 942 (Ky. 1954).
  \item \textit{Fed. R. Civ. P.} 26(b)(2). Prior to the adoption of this rule in 1970, the federal courts were hopelessly divided on this issue. \textit{See} 8 C. Wright & A. Miller, \textit{Federal Practice and Procedure § 2010 (1970).}
  \item 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969).
  \item \textit{Id.} at 676-77, 456 P.2d at 686, 79 Cal. Rptr. at 118.
  \item \textit{Id.} at 669, 456 P.2d at 681-82, 79 Cal. Rptr. at 113-14.
\end{itemize}
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the private contract concept of liability insurance. Both the legislature and the courts continue to mold the insurance policy into a partial "scheme of social insurance." To deny the injured party the right to proceed directly against the insurer or the right to join it as a party defendant because the insured made a private contract with the insurance company is to preserve an anachronism the foundation of which has been vitiates. Contemporary concepts of automobile liability policies derogating the private contract theory clearly militate toward direct action and joinder of the insurance company.

B. Joinder of an Action in Contract with an Action in Tort

Since the liability of the insured is predicated on a tort, while the duty of the insurer to compensate is predicated on a contract, many courts have followed the common law rule that joinder of the insurance company with the insured was improper joinder of two different causes of action. However, the courts have long departed from this common law prohibition when common carriers are required by statute or ordinance to carry insurance for the benefit of the public. In such cases a majority of the courts freely allow the insurance company to be joined as a defendant without mentioning the common law restriction. Such practice belies both the utility and necessity of this common law prohibition. Furthermore, adoption of the liberal joinder provisions of the Federal Rules of Civil Procedure and their counterparts by the states now permits joinder of an action in contract with an action in tort. Under rule 14 and its state counterpart the insured defendant may implead his liability insurer. Similarly, the language of rules 20 and 18 permits joinder of the insurance company

54. California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 110 (1951). "Here [in the field of automobile insurance] as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise."
55. See note 21 supra.
56. See note 6 supra.
61. Id. 18.
and the insured by the injured third party. Rule 20 permits joining, as defendants, all parties against whom there is asserted some right to relief which arises out of the same transaction or occurrence "if any question of law or fact common to all of these persons will arise in the action." 62 As the insurer's duty to pay is contingent on adjudication of the tort liability of the insured, the tort liability of both the insured and the insurer would present questions of fact and law common to all the parties involved. Rule 18(b) offers additional plausible grounds for joinder. It provides "[w]henever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action . . . ." 63 The claim of the injured party against the tortfeasor's insurer is contingent upon the former's first securing a judgment against the insured; thus such a claim is one "cognizable" after the injured party's claim against the insured has been determined. Now that liberal joinder rules have replaced the common law prohibition on joining an action in contract with one in tort, it is procedurally permissible to join an insured and his insurance company. If the courts invalidate the final protective barrier—the standard "no action" clauses in insurance policies—joinder would be a natural result. 64

C. Jury Prejudice

As Professor Kalven has observed, "Damages even more than negligence itself is law written by the jury." 65 Cognizant of the immense discretion given to the jury in determining damages, many courts fear that making the insurance company a party to the suit would encourage the jury to find negligence or to augment damages since an insurance company rather than the defendant will be paying the verdict. 66 Reasoning that a determination of legal fault should be made without such extraneous considerations as ability to pay, it is argued that the insurance company should not be brought into the suit.

Such arguments make the questionable assumption that the jury does not already know the defendant is insured. However, public ac-
quaintance with and attitudes toward automobile liability insurance differ vastly from those present when the rule against insurance disclosure was first enunciated. Today, most juries would assume that the defendant has insurance because it is the most common means of meeting the requirements of state safety responsibility acts. In fact, most jury members probably carry liability insurance on their own vehicles. Only naivete suggests that they are not already aware that the defendant is insured.

Often state statutes or city ordinances require common carriers to procure and maintain liability insurance or surety bonds for the benefit of passengers and members of the public injured as a result of the carrier's negligence. A slight majority of courts do permit bringing the insurer in as a party in cases involving common carriers, recognizing that their insurance has become a matter of public knowledge. The courts reason that since this insurance is required by a public act of which every citizen is presumed to have knowledge, the jury in such cases would not be prejudiced by the presence of the insurance company as a party to the suit. Yet, the courts have uniformly refused to apply this same reasoning to allow the injured party to bring the insurer into the suit as a defendant when the insured is an individual, even though this insurance is most often carried to satisfy the requirements of another public act—the state safety or financial responsibility law.

Even if one accepts the improbable notion that the jury does not know from the trial's outset that the defendant is insured, plaintiff's counsel has many opportunities to bring the existence of insurance to the jury's attention during the trial. On voir dire examination plaintiff's counsel may often ask prospective jurors if they are interested in any insurance company issuing policies for protection against liability for damages for injuries to persons or property. Even the particular insurance company may be mentioned. An empirical study of the

69. See note 6 supra.
70. Milliron v. Dittman, 180 Cal. 443, 446, 181 P. 779, 780 (1919).
71. See text accompanying notes 31-33 supra. There may be justification for this distinction, however, in cases involving large common carrier companies. Juries would be just as prone to assess damages on the basis of ability to pay when a large company is the defendant; and adding the insurance company would not increase the chances of possible prejudice as much as when the defendant is only an individual or a small business.
73. See cases cited note 72 supra.
voir dire as part of the Chicago Jury Project asked prospective jurors if they were connected in any way or had any interest in the defendant's insurer without mentioning that it was defendant's insurer. Later when asked if this question disclosed to them that the defendant was insured, 45 of the 86 jurors reported they fully caught the significance of the question.\footnote{Broeder, \textit{Voir Dire Examinations: An Empirical Study}, 38 S. CAL. L. REV. 503, 524-25 (1965). The author warns that use of this question during voir dire may not have been the major reason why the jurors knew the defendant was insured as no juror, when first asked why he thought the defendant was insured, give the voir dire as the answer. The jurors' thoughts about their reactions to the insurance question were discovered only on subsequent questioning.}

Although reference to the insurance company is forbidden during the trial,\footnote{Cotter v. McKinney, 309 F.2d 447 (7th Cir. 1962); Drake v. Ming Chi Shek, 155 F. Supp. 345 (D.N.J. 1957); Cosby v. Rimmel, 82 Cal. App. 2d 415, 186 P.2d 215 (2d Dist. 1947); Patillo v. Thompson, 106 Ga. App. 808, 128 S.E.2d 656 (1962); Wise v. Hayunga, 30 Ill. App. 2d 324, 174 N.E.2d 399 (1961); Herman v. Ploszczanski, 369 Mich. 252, 119 N.W.2d 541 (1963); Patton v. Franc, 404 Pa. 306, 172 A.2d 297 (1961).} there are numerous exceptions to this rule, which, by innuendo or indirection can be used to make the presence of the insurance company known. The fact that an employer or principal carries liability insurance on a vehicle operated by an employee or agent may be disclosed if there is a dispute as to the existence of an employer-employee, principal-agent relationship.\footnote{Eldridge v. McGeorge, 99 F.2d 835 (8th Cir. 1938); Mullanix v. Basich, 67 Cal. App. 2d 675, 155 P.2d 130 (3d Dist. 1945); Snider v. Truex, 222 Ind. 18, 51 N.E.2d 477 (1943); Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933); Hoover v. Turner, 42 Ohio App. 528, 182 N.E. 598 (1931).} If the defendant has made a statement amounting to an admission of liability and there is interwoven with such admission a statement that he carries liability insurance ("Don't worry, we are fully covered by insurance and I'm taking all the blame") such a statement will be admitted.\footnote{Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), \textit{cert. denied}, 313 U.S. 561 (1941); Nason v. Leth-Nissen, 82 Cal. App. 2d 70, 185 P.2d 880 (1st Dist. 1947); Hix v. Headrick, 97 Ga. App. 540, 103 S.E.2d 516 (1958) (admission against interest); Ward v. De Young, 210 Mich. 67, 177 N.W. 213 (1920); Humphreys v. Madden, 46 Ohio L. Abs. 33, 68 N.E.2d 562 (Ct. App. 1943); Reid v. Owens, 98 Utah 50, 93 P.2d 680 (1939).} If the defendant's counsel opens the door to a certain line of inquiry, he will not be heard to object if the inquiry, when pursued by the plaintiff's counsel, reveals the defendant is insured.\footnote{Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), \textit{cert. denied}, 313 U.S. 561 (1941); Adams v. Summers, 222 Ark. 924, 263 S.W.2d 711 (1954); Hatfield v. Levy Bros., 18 Cal. 2d 798, 117 F.2d 841 (1941); Flynn v. Grand Cent. Pub. Mkt. Inc., 176 Cal. App. 2d 243, 1 Cal. Rptr. 237 (2d Dist. 1959); Anderson v. Conterio, 303 Mich. 75, 5 N.W.2d 572 (1942). This is known as the "invited error rule."} Facts tending to impeach a witness or discredit his testimony may usually be admitted even though they disclose
that the defendant is insured. When the defendant claims he is unable to pay a large judgment, the court may consider that the subject of insurance has been opened and may be commented upon during the trial. If the mention of insurance at the trial is "unpredictable" and appears only incidentally, or inadvertently, the court in its discretion may ignore it or attempt to correct it in its instructions to the jury. When the insurance of an individual tends to prove an issue in the case, as when the defendant has insured a vehicle he denies owning, the fact of insurance is admissible. Finally, when a previously written statement is used to impeach a plaintiff, or his witnesses, it is permissible to show the statement was procured by a representative of the defendant's insurance company.

In these and numerous other ways, the jury may be informed during the trial that the defendant is insured. Even if insurance is improperly mentioned, the courts will often require a showing of actual prejudice before declaring a mistrial. Alternatively, the judge will


80. Stilson v. Ellis, 208 Iowa 1157, 225 N.W. 346 (1929); Huhn v. Ruprecht, 2 S.W.2d 760 (Mo. 1928).


84. Hoffecker v. Jenkins, 151 F.2d 951 (4 Cir. 1945) (jurors exposed to newspaper report stating defendants were covered by insurance; held curable by instruction to disregard); Guarneraccia v. Weissenski, 130 Conn. 20, 31 A.2d 464 (1943) (copy of accident report referring to insurance held properly admitted); Chapman v. Independent Laundry Co., 38 Ga. App. 424, 144 S.E. 127 (1928) (plaintiff permitted to show defendant's assignment of his right of action on counterclaim to his insurance company). The jury may also know the defendant's attorney frequently defends insurance companies, or that the defendant could not afford such counsel unless he was insured.

attempt to correct it by an instruction to disregard which will re-mind the jury of the presence of insurance. Prohibiting direct action and joinder of the insurance company as a party defendant will do little to prevent disclosure of the defendant's insured state if the plaintiff's counsel wants to make it known.

The courts' long homage to the notion that the insurance company will be prejudiced if the jury knows of its presence has been vindicated, however, by empirical studies in connection with the Chicago Jury Project. Tape recordings of mock trials based on actual trials were played to experimental juries composed of people actually on jury duty at the time of their participation. Where the defendant disclosed that he had no insurance, the average award was $33,000. Where the defendant disclosed that he had insurance, the award rose to $37,000. However, Professor Kalven, the head of the jury project, cautions that this data must not be taken too literally, as the jury consideration of insurance and ability to pay is likely to come into play only in cases of real doubt where the jury may feel it is better to risk error against the insurance fund than against the injured plaintiff.

Despite the findings of the jury project, many plaintiff's lawyers may not want the existence of insurance disclosed at the trial, since they believe jury prejudice in favor of the insurance company is as likely to result from the disclosure as prejudice against it. After all, jurors carry liability insurance on their own vehicles and are not immune to insurance propaganda claiming that excessive verdicts affect insurance rates. This latter factor may also provide some basis for further discounting the findings of the jury project regarding the prejudicial nature of insurance disclosure. There the experimental jury knew that no insurance company would actually be paying the judgment and their verdict would therefore be less likely to take insurance rates into account.

Some justification for the assumption that disclosure will favor the insurance company may be found in the experience of Wisconsin, a state which permits direct action against the insurance company. Applemam states that extensive studies have demonstrated that the injec-

88. Id. The case involved a 40-year old stenographer who was injured when the car in which she was riding as a passenger collided with the car driven by the defendant. It is interesting to note that when insurance was disclosed and no objection made, nor further attention given to the disclosure, the average award was $37,000. But when the defense counsel objected to the disclosure and the court directed the jury to disregard the fact of insurance, the average award rose to $46,000. Id.
89. Kalven, supra note 65, at 171, 172.
tion of insurance tends to diminish the size of jury verdicts and reports that Wisconsin has lower verdicts than states not allowing the insurer's presence to be mentioned.

However, the question of insurance disclosure and jury prejudice may be academic, as even Kalven admits, since the jury probably already thinks insurance is involved anyway, and, as has been pointed out, it is a rather unresourceful plaintiff who cannot find an appropriate method of bringing the fact of insurance to the jury's attention. The courts themselves recognize that it is common knowledge that automobile owners carry insurance and that the insurer defends automobile suits brought against the policy holder. In light of this widely acknowledged reality, prohibiting joinder of the insurance company as a party to the action in order to prevent jury prejudice by hiding the fact of insurance, borders on self-deception—a deception based on the tradition of an era when insurance was uncommon rather than on the factual realities of today's crowded freeways.

D. Presence of the "No Action" Clause

Perhaps the biggest obstacle to direct action against or joinder of the insurance company as a party defendant is the presence in virtually all automobile insurance policies of a "no action" clause. A typical clause provides:

No action shall lie against the company unless, as a precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine his liability.

91. J. Appleman, supra note 1, § 4861, at 294 n.18. Appleman does not indicate to which studies he is referring.

92. See also M. Bell, The More Adequate Award 2-3 (1952) (stating Wisconsin is generally regarded as a low verdict state). However, Wisconsin's comparative negligence system may also be an important factor in explaining the smaller verdicts. See Wis. Stat. Ann. § 331.045 (1958).

93. Kalven, supra note 65, at 171.


95. Some courts have barred joinder even without a "no action" clause in the policy. Baggett v. Jackson, 244 Ala. 404, 13 So. 2d 572 (1943); Matthews v. Underpinning & Foundation Co., 17 N.J. Misc. 79, 4 A.2d 788 (Sup. Ct. 1939); Mitchell v. Cadwell, 188 Wash. 257, 62 P.2d 41 (1936).

Such a clause, unless judicially invalidated, prohibits both direct suit against and joinder of the defendant's insurance company until a binding judgment has been obtained against the insured. The courts have consistently upheld "no action" clauses.97

There are, however, two notable exceptions allowing joinder despite the no action clause—cases involving common carriers98 and cases in which the insurance company is impleaded by the insured party himself.99 The reasoning underlying the common carrier exception appears to be equally applicable to cases involving insured individuals. Those jurisdictions which allow joinder of the insurance company when the insured is a common carrier have invalidated the "no action" clause, just as they have the common law prohibition against combining tort and contract action, as being against the public policy declared by statute.100 Such cases reason that since insurance coverage is required for the benefit of the public, it would frustrate the statute's intent to allow the public's right to sue on the insurance contract to be atrophied by a private agreement between the contracting parties.101 Since the safety responsibility laws also require the carrying of liability insurance for the benefit of the public,102 the same public policy which allows joinder to protect the injured public in cases involving common carriers should also be available to protect the public when the tortfeasor is an individual. Moreover, if the policy is intended for the benefit of the public, the insured should be entitled to waive his own rights of direct action and joinder, but not those of the general public who are not present to protect their rights at the time the contract is entered into.

Therefore, as Shingleton v. Bussey103 reasons, the law should protect the rights of the non-present public by invalidating the "no action" clause.104 Declaring the "no action" clause invalid and allowing joinder or direct action would have little prejudicial effect on the insurance company. It would not change the substantive liability of the company which would still not be liable to the injured party unless a judgment

97. See cases cited note 23 supra.
98. See cases cited note 6 supra.
100. See cases cited note 6 supra.
101. Id.
103. 223 So. 2d 713, 718 (Fla. 1969); see text accompanying notes 13-17 supra.
104. 223 So. 2d at 717-20.
against the insured is first obtained. Joinder would not force the insurer into needless litigation because the insurer is usually involved in the case already, having contracted to defend the insured in any action against him.\footnote{105}

Furthermore, the insurance company usually may be impleaded by the insured if it refuses to defend him.\footnote{106} It is in just such cases involving impleading that some courts have invalidated the "no action" clause as being out of harmony with the modern rules of civil procedure that seek to avoid multiplicity of suits and circuitous litigation. Jordan v. Stephens,\footnote{107} invalidating the "no action" clause in such an impleading case said: "The no-action provision of the policy is neither helpful to the third-party defendant, to the courts nor generally is it in the interest of the public welfare. Its object is to put weights on the already too slow feet of justice."\footnote{108}

However, many states have expressly prohibited joinder of, or direct action against, the insurance company by statute\footnote{109} and presumably do not depend on the presence of the "no action" clause in the policy to prevent joinder. In those states, judicial invalidation of a "no action" clause in the policy on public policy grounds would appear to be doubtful as, presumably, the legislature has already declared public policy to be against joinder and direct action.\footnote{110} Except in these states, the same public policy rationale which the courts have followed to invalidate "no action" clauses in common carrier and impleading cases is equally applicable and could be used as the court did in Singleton, to invalidate the "no action" clause in the ordinary automobile accident situation.

II

BENEFITS OF DIRECT ACTION

As has been shown, the traditional reasons for prohibiting direct

\footnote{105. Virtually every automobile liability policy contains a clause that the insurance company will defend the insured. A typical clause reads:
With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:
(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient . . . .


106. See cases cited note 99 supra.

107. 7 F.R.D. 140 (W.D. Mo. 1945).

108. Id. at 142.


110. But see Darr v. Buckley, 355 Mich. 392, 94 N.W.2d 837 (1959).}
action and joinder have retained no vitality, and the "no action" clause can be invalidated on public policy grounds. It is submitted, however, that few meaningful additional benefits are given to the public by permitting joinder of the insurance company to the suit, although in special circumstances, allowing a direct action against the insurer may enhance the injured plaintiff's chances of recovery.

There are three reasons for permitting joinder or a direct action against an insurer. First, multiplicity of actions would be avoided and the cost of litigation would be reduced. Second, the real party in interest would be brought into the suit. Third, the constant evasion and quibbling over the mention of insurance would be alleviated and resulting appeals would be reduced.

A. Avoiding Multiplicity of Actions

If the insurance company fails to pay a judgment obtained against its insured, the plaintiff must bring in a separate proceeding either a garnishment action as a judgment creditor of the insured or an action under the "entitlement" clause of the policy that permits a direct action against the insurance company after a judgment has been obtained against its insured. It is true that joining the insurance company will make a subsequent suit against the company unnecessary once judgment against the insured has been obtained, thus avoiding multiplicity of suits and reducing the cost of litigation. But even in the absence of joinder, two suits are seldom required before an injured plaintiff can recover his damages. Although no empirical data is available, practical experience indicates that cases requiring a second suit against the insurance company are extremely rare. The courts uniformly hold that if an automobile liability insurer has a duty to defend an action brought against the insured, and is given notice of the same, it is bound by any judgment obtained by the injured party. Since

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113. Cases requiring a second suit against the insurance company occur only in "exceptional circumstances." Interview with Wells Hutchins, Assistant General Counsel, California State Automobile Association, Dec. 5, 1969.
the insurance company is not liable until some judgment against the insured is obtained, it is difficult to see how making the insurer a party will actually further reduce the number of suits necessary to secure a final, enforceable judgment.

B. Bringing in the Real Party in Interest

Joining the insurance company would bring the real party in interest into the suit.115 Even the courts have recognized that the insured is only a nominal defendant while the real party in interest is the insurance company.116 The terms of the policy usually vest in the insurance company the power to employ counsel, to assume and control the defense, to conduct the settlement negotiations, and require it to bear the expenses of the defense and pay any settlement or judgment within the limits of the policy.117 But, conceding the insurer to be the real party in interest, how joining it as a codefendant will offer the injured public any greater protection or enhance any substantive rights not now available is not immediately apparent. Under current practice, the insurance company is bound by the judgment just as if it were a party to the suit.118 Further, the discoverability of the insurance policy and its limits,119 under present procedure in most states, already gives the injured party the main protections and advantages joinder would provide.

Although the general rule is that the insurer may assert against the injured party any defenses it could assert against its own insured,120 a direct action against the insurer alone may secure some additional benefits to injured plaintiffs. Since most insurance companies do business in several states, bringing the suit against the insurer alone might make it easier to secure jurisdiction in a forum more convenient

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115. The real party in interest rule, requiring that every action be prosecuted in the name of the real party in interest [see Fed. R. Civ. P. 17(a); Cal. Code Civ. Proc. § 367 (West 1968)], has traditionally only been applied to plaintiffs—the "party who has the right to enforce." See 3 J. Moore, Federal Practice ¶ 17.07, at 221 (1968). However, many of the same considerations which require a plaintiff to bring an action in his own name are equally applicable to require a defendant to defend in his own name. See Note, 41 Minn. L. Rev. 784 (1957).


118. See cases cited note 114 supra.

119. See text accompanying notes 47-49 supra.

for the injured party. Tactical considerations may also favor a direct action against the insurer alone if the insured might have some special appeal to a jury. Since the insurance company is not liable until a judgment has first been secured against the insured, a direct action against the insurance company may make recovery possible when the injured party has failed to make a claim against a decedent tortfeasor’s estate within the short nonclaim period of the probate code. If the tortfeasor disappears before an action against him can be commenced, a direct action against the insurance company would still allow the injured party to recover in those instances when the courts do not allow the insurer to use non-cooperation of the insured as a defense. Louisiana’s direct action statute has resulted in a partial erosion of the general rule that defenses available to the insured are also available to the named defendant insurance company. Adoption of direct action statutes may increase the opportunity for an injured plaintiff’s recovery by similarly encouraging partial abandonment of the insurer’s ability to assert defenses which would be available to its insured.

Thus while the insurer is an admitted real party in interest to the suit, permitting it to be joined as a party to the action may provide for increased procedural consistency, but it would not result in any meaningful advantage to the injured plaintiff. If direct action is allowed, however, there may be some additional procedural advantages in special circumstances.

C. Mention of Insurance

Finally, it is argued that bringing in the insurance company will

121. Until 1964, bringing a direct action against the insurance company alone also made it easier to establish diversity for federal jurisdiction. In Lumbermen’s Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954), the Supreme Court held that a direct action against an out of state insurer brought in the Louisiana federal district court qualified as a diversity action even though both the plaintiff and the insured were Louisiana residents. In 1964 Congress, perhaps alarmed over this holding, passed a statute which prohibits invoking diversity jurisdiction in a direct action brought by a local plaintiff against the out of state insurance company of a local insured. 28 U.S.C. § 1332(c) (1964). For diversity purposes in direct action cases, the statute provides that the insurance company is considered a citizen of the domicile of its insured.

122. See text accompanying note 1 supra.


125. See, e.g., Harvey v. New Amsterdam Cas. Co., 6 So. 2d 774 (La. App. 1942) (plea of coverture is a personal defense and not available to a husband’s insurer in a suit brought by the wife); Rome v. London & Lancashire Indem. Co. of America, 169 So. 132 (La. App. 1936) (defense that City Park Improvement Association was acting in a governmental capacity held to be personal with the Association and unavailable as a defense by the insurer).
alleviate the constant evasion and quibbling over the mention of insurance and reduce the number of resulting appeals. It is now usually reversible error to mention insurance during the trial unless such mention is permitted by one of the previously discussed exceptions. This exclusionary rule has resulted in much unneeded litigation and has increased the appellate work load. Making the insurance company a party to the action would obviate any need for the exclusionary rule. Still, permitting the insurance company to be formally joined in the action is not the only satisfactory solution to the confusion and mistrials engendered by the insurance exclusion rule. It would appear simpler and more effective to reduce the quibbling, evasion, and subsequent mistrials arising from the exclusionary rule by rejecting the rule itself, rather than attacking the problem through the back door by bringing the insurance company into the suit.

CONCLUSION

The traditional reasons given by the courts for not allowing the insurance company to be made a party to the action have retained little vitality. Problems of joining an action in tort with an action on the contract have been largely mitigated by the liberal joinder provisions of the Federal Rules of Civil Procedure and their counterparts in the states. Since the majority of jurors carry automobile insurance policies themselves and assume that others are similarly insured, the presence of the insurance company is also assumed, and making it a party to the action does not appear to foster jury prejudice or excessive verdicts. By legislation and court decision, the insurance contract is no longer seen as a private agreement between the insured and the insurer, but rather an agreement required by statute to be made for the benefit of the public at large. Therefore, the “no action” clause of the insurance contract, which does not permit action against the insurance company until a judgment has first been secured against the insured, may be invalidated on public policy grounds if it is found to deprive the public of the intended benefits of the insurance policy or if significant advantages will accrue from its invalidation. However, since the insurance company is now bound by the judgment secured against its insured, and a subsequent suit against it to collect on the judgment is rarely required, the public is now receiving the contractual benefits of the automobile insurance policy. Joining the insurer as a co-defendant to

126. See cases cited note 75 supra.
127. See text accompanying notes 76-84 supra.
128. Note, Permissive Joinder as a Substitute for Excluding Evidence that Defendant is Insured, 59 Yale L.J. 1160, 1164 n.23 (1950).
129. Id. at 1164.
the action will not ensure any meaningful additional protection not available under present procedures. In limited instances, however, allowing a direct action against the insurance company may enhance an injured party's opportunity of recovery.

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