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Rule 26 - The Procrustean Bed

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Whether the plaintiff should be allowed to discover insurance facts of the defendant under Rule 26 (b) of the Wyoming Rules of Civil Procedure is a question that rarely fails to raise heated arguments between plaintiff and defense attorneys. Mr. Wilkerson, a well known plaintiff's attorney, presents in an advocate's style, new and interesting insights (including recent case trends and a poll of Wyoming judges) into the argument that Rule 26 (b) should be expanded. He also provides the reader the amendment of Rule 26 (b) now being offered by the Federal Rules Advisory Committee.

RULE 26 - THE PROCRUSTEAN BED

*Ernest Wilkerson**

THE PROPOSITION

PLAINTIFF should be allowed to discover or obtain under Rule 26 (b):[1]

1. The existence or non-existence of defendant's liability insurance;

2. The policy limits of the defendant's insurance policy;

3. Any policy defenses which the insuror asserts of which the insured has knowledge;

4. The delivery of the complete contract of insurance together with any riders.

THE LAW IN WYOMING

During October, 1969, I polled the Wyoming State District Judges on the question of whether they did or did not al-

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1. Wyo. R. Civ. P. 26 (b).

low discovery of liability insurance limits under Rule 26 (b).[2] Interestingly and perhaps predictably, there is no unanimity of opinion among them. There are twelve State District Judges. Of the twelve, nine responded; of those who responded three permit such discovery, one refuses it. The remaining jurists have not been called upon to pass on the question. This latter fact reflects no credit on the plaintiffs' Bar since some of the judges before whom the question has never been raised have been on the bench for several years.

The United States District Court for Wyoming has traditionally never permitted such discovery under Rule 26 (b). Tenth Circuit judges in other Federal Courts are split on the question.

None of the judges indicated that he was considering changing his present interpretation of Rule 26 (b) to, in effect, reverse himself on this question. One of the newer judges to whom the question had not yet been presented, made the apt observation that he felt that he would likely permit such discovery under the philosophy of the rules as enunciated by Rule 1, W.R.C.P., which declares that all rules shall be construed "to secure the just, speedy and inexpensive determination of every action."

Another offered:

> I can see no possible harm or prejudice to an insurance company which results from the revelation of the amount and terms of the policy. I know there are arguments about this, but I am talking about a substantial prejudice rather than a lawyer's irritation. I can conversely see where the revelation of the limits may be of real advantage to the insured, as

2. The poll was carried out in the form of a letter which read as follows:

> Dear Judge .....:
>
> I have been asked by the Land and Water Law Review to submit an article for publication. I have chosen for my subject "The Discoverability under Rule 26 or otherwise of the Existence and Policy Limits of Liability Insurance," my general theme being that both as a matter of justice and administrative expedition, such should be discoverable in any case.
>
> I would appreciate you and your fellow Judges advising me for the purpose of background for the article:
>
> 1. Do you allow plaintiffs to discover insurance and policy limits under Rule 26?
> 2. Do you have any particular attitude or philosophy about this either way which might be helpful in preparing the article?
>
> I shall not attribute your remarks without your permission.
>
> Thank you for your help.

> plaintiff's attorneys are interested in cash, and if they know the cash limit, a settlement is much more apt to ensue. I am thinking of a young man just starting life who might have such an accident with a minimum coverage, and say a $20,000 judgment with a $10,000 pay off, certainly the pending judgment would not be of much help to the young man in starting a business. I am somewhat embarassed that these are more gut reactions than statements of law, but I do think they are basic philosophies in connection with this question which are worthy of consideration.

But contra:

> The contract of the insurance company is to defend and if necessary to pay a judgment. That contract is with the assured and not with a prospective claimant. I suppose the insurance company does not want its presence known, or if the coverage is large, to encourage the seeking of even larger judgments in an area in which claims more frequently run to excess rather than to moderation or reasonbleness. But whatever their reasons, it would seem in the traditional sense, to be a matter strictly between the insurance companies and their assured, but not with the Court or opposing counsel, at least until the matter reaches judgment.

Another judge who requires the disclosure says: "My particular attitude or philosophy about this is that it tends to bring about settlement and tends to bring about at the pretrial a more realistic approach as to what the lawsuit is worth and opens the matter for discussion at the pretrial."

Generally the judges who permit the discovery do so for the primary reason that in their view it leads to settlement of lawsuits. We will discuss this later.

So far as I know there have been no Wyoming State or Federal court cases dealing with the subject of whether or not the insurance existence and limits are discoverable in this state. The Wyoming case of *Ulrich v. Ulrich*,[3] however, discussed in the context of submitted interrogatories the question of whether interrogatories could be used to elicit a legal opinion of the opponent as to the effect of a property settle-

3. 366 P.2d 999 (Wyo. 1961).

ment agreement. Justice Harnsberger, speaking for the court, held that such was not discoverable saying:

> Although a proper interpretation of Rule 26 (b) and Rule 33, Wyoming Rules of Civil Procedure, admits of a great latitude in the examination of a party by interrogatory, that privilege is not without its limitations. If the answer to a question may lead to the discovery of evidence or enlighten as to some phase of the issues, the interrogatory is permissible. It is as true that interrogatory may be used to obtain admission as to a relevant fact, but this does not extend to its use to elicit an expression of opinion as to existence of what may become a fact only by virtue of a correct legal conclusion.[4]

This case, which reiterates familiar language which has been said in different ways many times, is probably not greatly helpful in determining the scope or discovery under Rule 26 (b) in Wyoming. Talking about Rule 26 at all, in fact, might have been a bit of judicial overkill. Obviously a question asking a witness his opinion as to the legal effect of a contract is objectionable completely apart from Rule 26 (b). The contract speaks for itself, the court is the arbiter of what it means.

In the slightly earlier Wyoming case of *Barber v. State Highway Commission,*[5] which was a condemnation case, the Wyoming Supreme Court speaking through Mr. Justice Parker said: under the Wyoming Rules of Civil Procedure, the bar and bench of this State are dedicated to a full and fair disclosure of all the facts in a case at or prior to the time of trial, with no withholding of certain matters to be used as secret weapons.[6]

Insofar, thus, as the Wyoming Supreme Court has spoken about Rule 26 (b), it has spoken essentially truistically.

THE ARGUMENT

It is my belief that both as a matter of expedition and as a matter of justice, Rule 26 (b) should be interpreted to permit the discovery in the four areas indicated above. Based partly on the comments of judges, partly on the exchange of

4. *Id.* at 1001.
5. 80 Wyo. 340, 342 P.2d 723 (1959).
6. *Id.* at 726.

anecdotes with other lawyers and partly on personal experience, I think it surely must be said (and can be said safely) that plaintiff's knowledge of the insurance coverage which is available to the defendant is a very strong factor in the submission of a settlement offer to settle the case at an early stage. There are various reasons for this, of course. One among them, which is perhaps irrelevant to more abstract concepts of justice for the client, is the fact that the lawyer himself makes his living out of his processing of lawsuits. Normally, until his client gets paid in personal injury litigation, he doesn't get paid. His interest, thus, is coincident with that of his client in obtaining a rapid termination of his client's claim.

Personal injury lawyers, generally, are sufficiently experienced and skilled to have a pretty realistic idea of what a given lawsuit is worth in terms of what a jury is likely to award if the case is tried. Though at times we nod. For example, a personal injury case within the writer's knowledge was offered for settlement before trial at $60,000.00 which was within the policy limits. No insurance company settlement offer was received at all nor were the policy limits known to plaintiff. The plaintiff ultimately recoverd $204,000 of which only $100,000 was covered by insurance, the insured paying the balance himself. It seems likely in this case that a full and fair knowledge of the policy limits, together with a more realistic appraisal of the case by the insurance company might have effected a settlement which would would have been beneficial to the insurance company, and emphatically to its insured.

We may say, thus, for the sake of argument at least, that the least important consideration, that is the attorney's own interest in rapid processing of tort claims, is best served if he knows what the resources are that are available to satisfy a jury verdict if one is obtained.

The basic problem, I believe, in trying to mesh Rule 26 (b) and insurance revelation is that in determining whether insurance coverage should be permissibly discovered under 26 (b), we are trying to put the traditional square peg in the round hole. We are guilty of a conceptual rigidity which

doesn't allow us to see this. Whether or not insurance coverage should be made known to a plaintiff is a completely different question in a completely different area from the problem of discovery measured in terms of production of admissible evidence at a trial. No one proposes that the existence and amount of insurance should be made available to a jury in determining the question of alleged negligence of the insured. Thus, when we try to discuss whether or not the information should be given and try to discuss it within the framework of Rule 26 (b), we are starting out with an impossible situation. The judges who have adopted what is submitted to be the more enlightened viewpoint have simply had to step outside the framework of Rule 26 (b) and as indicated above, find refuge in Rule 1 or otherwise, to permit the discovery of information which obviously is not "calculated to lead to the discovery of admissible evidence."

One of our problems, thus, in evaluating this is a semantic problem. Another problem is that of the overly easy analogy. To illustrate: The United States District Court of Tennessee in the case of *Hillman v. Penny:*

> If insurance can be discovered, then logically it should follow that all assets which may be available to satisfy any judgment should likewise be discoverable. The basic issue is therefore whether the resources of the defendant should be fully disclosed upon discovery in an automobile accident case prior to judicial determination of liability or damages. It seems to the Court that not only is such inquiry going considerable astray from the issues of liability and damages, but that the plaintiff's interests in and reasons for acquiring this information are considerably outweighed by the defendant's right to privacy and right to refrain from disclosing his confidential affairs until such time as such disclosure may be relevant or necessary in the interests of justice. It seems to the court that the interpretation contended for by the plaintiff would unduly invade the right of privacy prior to a determination of any liability. A groundless claim might then become the vehicle for making full inquiry into all of the confidential financial affairs of any luckless defendant involved in an automobile accident. It is more reasonable to believe that

> such a result was not contemplated in the drafting and adoption of the rules. The right to individual privacy is of necessity being curtailed and reduced with the growth of the population and government in general. The courts should not unnecessarily contribute to this process. This court does not believe that even a liberal interpretation of Rule 26 (b) F.R.C.P., requires any different result.[7]

And again from our sister state to the north in the case of *State ex. rel., Hersman v. District Court:*

> In our view, the resources of a defendant in a negligence action are not germane before a judicial determination of liability and assessment of damages. We think to hold otherwise constitutes an invasion of privacy and a delving into the confidential affairs of a defendant which is neither relevant nor necessary to determine any issue in the litigation, prior to entry of judgment.[8]

The fallacy, of course, of this kind of judicial oversimplification should be quickly apparent. The right of an insured to indemnity against judgments under a liability insurance policy which he has bought is a different kind of asset from any other asset he has for two elemental reasons:

1. The asset becomes such only when vitalized by a judge ment against him for his negligence, and

2. The asset was acquired precisely against the possibility of a contingency occuring: that is, his being found liable for damages inflicted by him on a third party.

No other asset that he owns, not his house, not his stocks or bonds, nor the cash value of his life insurance, nor his jewelry nor his car was bought by him for the express purpose of satisfying a judgment against him (for which reason he purchased liability insurance). Accordingly, let us discard this particular faulty analogy because it is imprecise and fuzzy legal thinking to say that if you will require a defendant to disclose the value of his liability insurance, you will logically have to compel him to disclose the value of his other assets.

This leads us to the question: why does a person acquire liability insurance in the first instance? Let us talk about

7. 29 F.R.D. 159, 161 (Tenn. 1962).
8. 142 Mont. 139, 381 P.2d 799, 801 (1963).

public liability and property damage insurance as being the most important and as being generically the kind of insurance we are talking about. Most states require public liability and property damage insurance at either one of two stages from drivers. Some states (for example, Massachusetts) require that a driver must submit a certificate of insurance before he can be issued a license to drive. Other states (for example, Wyoming) require no evidence of insurance in order to be issued a license to drive but should the driver have an accident with attendant incipient liability, then the driver must establish that he has insurance in required amounts (or establish financial responsibility by other means or secure a release) failing in which he will lose his license to drive. In the latter class of states, the great bulk of drivers secure liability insurance as a matter of course and only a small number rely upon luck in avoiding accidents or their own personal assets to be able to establish financial responsibility.

Why, then, does one who wants to drive an automobile secure insurance against his negligent harm to the person or property of others? He does it for three reasons: First, the law either directly or in effect requires that he have insurance.

Second, he wants to protect himself and his assets from the potential impact of a personal injury or property damage claim against him.

Third, he is creating a fund for the benefit of the person whom he injures because the state has determined as a matter of policy that such a fund shall be available to compensate persons injured by the negligence of others.

If, then, one of the reasons for entering into the insurance contract is the protection of a third party, why should not the protected third party be able to know the terms of the contract created for his benefit? The concept of third party beneficiaries under and to contracts is well established. The fact that an injured party may proceed against an insuror under his contract with his insured following adjudication of liability is well established as is the concept that the third injured party has rights as such under it.[9] It is submitted, thus, that laying aside the stylized strictures of Rule 26 (b) an injured

9. Phoenix Assurance Company v. Latta, 373 P.2d 146 (Wyo. 1960).

party should be able to secure possession of a copy of the insurance contract between the person who injured him and the injuring party's insurance company entered into for his benefit.

Essentially what we are saying here again is that dealing with the matter of revelation of insurance policy limits within the framework of Rule 26 (b) is simply unrealistic. What we must do is to acknowledge that independent of this "evidentiary" rule, it is good public policy to have full disclosure of the contents of the liability insurance policy and this policy need not be tied to any other policy or principal but will stand on its own. The proposed change in the Federal Rules of Civil Procedure properly adopt this approach. As reported by Judge Roszel Thomson at the Fourth Circuit Judicial Conference, July 1, 1967, and as reprinted in the *Insurance Counsel Journal,*[10] the Advisory Committee on the Federal Rules has proposed amendments which are now receiving consideration by the United States Supreme Court and which it is believed will be adopted. Judge Thomson in commenting on the proposed amendment to Rule 26 (b) says this:

> One important change deals with the discovery of insurance coverage. Both the cases and the commentators are sharply in conflict on the question whether a defendant's liability insurance coverage is subject to discovery in the usual situatiion when such coverage is not itself admissible in evidence and does not bear on some other issue in the case.
> The proposed amendment resolves that issue in favor of disclosure. Most of the courts denying discovery have felt themselves bound by the provision of the Rules that permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions which lawyers make about settlement and trial preparation.
> The Committee believes that disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case; it will lead to settlement in some cases and will avoid protracted litigation in others. The amendment is limited to insurance or indemnity coverage, as distinguished from

10. Thomson, *Proposed Changes In The Federal Rules of Civil Procedure,* 35 INS. COUNSEL J. 290 (1968).

> any other facts concerning defendant's financial status; first, because insurance is an asset created specifically to satisfy the claim; second, because the insurance company ordinarily controls the litigation; third, because information about it is available only from defendant or his insurer.
> Disclosure will *not* make the insurance coverage admissible in evidence.[11]

States in our area which have decided the question of insurance limits discovery within the last few years include in favor of allowance, California and Utah; against allowance, Montana and Arizona. This division of authority in the Western area is typical of the situation throughout the nation.[12] As the judge observed in the case of *Wood v. Todd Shipyards:*

> Very few questions involving discovery are as unsettled as is the discoverability of the defendant's liability insurance.[1] The decisions of the Federal District Courts are divided on this point. Many of them allow such discovery.[2] Many do not.[3] Commentators are also divided on whether or not insurance can be discovered.[4]

1. 2A Barron and Holtzoff § 647.1 (Wright ed. 1961).
2. Vetter v. Lovett, 44 F.R.D. 465 (W.D. Tex. 1968); Woldum v. Roverud Construction, Inc., 43 F.R.D. 420 (N.D. Iowa 1968); DeVeau v. Millis Transportation Co., Inc., 43 F.R.D. 505 (D. Conn. 1967); Goldenberg v. Wolfe, 44 F.R.D. 17 (D. Conn. 1967); Cf. Mahler v. Drake, 43 F.R.D. 1 (D. S.C. 1967). Earlier cases are collected at 4 Moore 26.16 [3], n. 4.
3. Gangemi v. Moor, 268 F. Supp. 19 (D. Del. 1967); Pruitt v. M/V Patignies, 42 F.R.D. 647 (E.D. Mich. 1967); Cf. Beal v. Schul, 383 F.2d 401 (3d Cir. 1967). Earlier cases are collected at 4 Moore 26.16 [3], n. 4.
4. Citations are collected at 2A Barron and Holtzoff § 647.1 (Wright ed. 1961).[13]

The thought recurs that Rule 26, into which we are attempting to fit too large a subject, is not dissimilar to our hang-up as lawyers with regard to the anachronistic proceedings required in a divorce action. We insist that we go through the ritual of proving fault with the full panoply of an "adversary procedure" in a divorce matter because we feel that we must adhere to this standard patterned behavioral conduct. The question we should ask ourselves is, "why?" Why trans-

11. *Id.* at 291.
12. See Annot., 41 A.L.R.2d 968 (1955); 4 A.L.R. Later Case Service 756 (1965); McCurn, *Battleground: Liability Insurance and the Rules of Discovery*, 1 FORUM 3 (1966); Fournier, *Pretrial Discovery of Insurance Coverage and Limits*, 28 FORDHAM L. REV. 220 (1960).
13. Wood v. Todd Shipyards, 45 F.R.D. 363 (S.D. Tex. 1968).

form into a charade what should be a simple administrative task of terminating an unsatisfactory marriage contract?

And this is the question we should ask ourselves in terms of the discoverability of insurance limits. Why not leave Rule 26 out of it? Let us simply say as a matter of good policy that Rule 26 may remain as it is or as it is proposed to be amended by the advisory committee on the Federal Rules of Civil Procedure (see below) and stop torturing ourselves with the dialectics of trying to grind the question of insurance coverage (which really under any logical analysis is not relevant to the "issues" of the negligence case) into the framework of the discovery rule.

The recent case of *Vollmer v. Szabo*,[14] illustrates the kind of judicial realism and flexibility of which, it is submitted, we need more. The Ohio Court, noting the conflict in cases as to discoverability of liability insurance coverage, observed that the trend appeared to be in favor of permitting discovery of the coverage, and then went on to an extrapolation of the Court's reasoning (which is of interest because it is a somewhat different approach to the problem), saying:

> This Court is of the opinion that the discovery by the plaintiff of the defendant's automobile liability insurance is a proper exercise of the discovery rules. In an automobile case in which insurance is present, *the real party in interest on the defense side is the insurance company*. It is the insurance company which provides counsel for the defense. It is the insurance company which directs the defense; and it is the insurance company which normally pays the cost of the defense and of the judgment, if any. The extent of the interest of this real party to the litigation is a matter of great concern to the plaintiff. The non-disclosure of this information represents at best a tactical interest and advantage of the defense. Permitting disclosure will further the purpose of the Federal Rules in providing a speedy and just termination of the issues on the merits. It will avoid the element of surprise which the Federal Rules seek to eliminate from litigation, and it will further the amicable resolution of the conflicting interests of the parties. The discovery of liability insurance bears no

14. 46 F.R.D. 472 (N.D. Ohio 1968).

> real relation to the financial condition of the defendant or of his insurance company. It is not an area of special privacy irrelevant to the litigation. Although the issue of liability insurance does not relate to the merits of the particular issues of the accident or collision itself, it does bear a great relation to the conduct of this litigation. [Emphasis supplied.][15]

The further we progress in legal pragmatism, the more quickly and the more predictably justice will be done. The recognition by the Ohio Court that in liability litigation the insurance company is the real party in interest is a long step forward toward that legal pragmatism. Such acuity is, regrettably, rare.

Two recent cases, one requiring disclosure and one denying disclosure, serve to point up the semantic shoals which our courts find themselves tumbled in, trying to resolve the question. Both decisions are, however, gracefully written and both deserve consideration in the context of this article which, even though it constitutes a special pleading in favor of allowing discovery, takes note of the fact that other people at other places and other times as well as today differ.

Let us first look at the case of *Muck v. Claflin.*[16] This was a case in which the trial judge had required that the defendant answer questions dealing with the existence and policy limits as well as the name of the company in her liability insurance policy. The defendant sued out a writ of mandamus in the Supreme Court of Kansas to forbid the trial judge from requiring that answer be given to the questions, (the court holding initially, incidentally, that mandamus was proper inasmuch as the normal appeal procedures would not have given relief to the defendant since the policy limits once revealed would be known forever). The court said:

> The decisions concerning the discovery of liability insurance or policy limits are in irreconcilable conflict. The federal district courts are in conflict on the question as are the courts of the various states. This holds true as to the federal district courts of this state and the district courts of this state.
> Judicial precedent will furnish little aid in determin-

15. *Id.* at 473.
16. 419 P.2d 1017 (Kan. 1966).

ing the question. We must look to the statutes relating to the discovery.[17]

The court then quoted from the Kansas Statutes, section 60-226 (b) which is essentially the same as Federal Rules of Civil Procedure 26 (b), and quoted from Fleming James, Jr., Civil Procedure section 6.11, pg. 214 in summarizing some of the arguments in favor of the discovery:

> The only issues to be tried in such an action are those pertaining to the liability of the insured (e.g., negligence, proximate cause, contributory negligence, extent of injuries). Once this judgment has been obtained, a proceeding against the insurance company is provided for in most states, and in this proceeding the facts concerning insurance are admissible on trial and fully discoverable before trial. Plaintiff, however, wants to know early in the first action whether there is insurance and what the policy limits are for two reasons: (1) As a rule a judgment of this kind is collectible only if there is insurance, and if the judgment will not be collectible it is usually not worth while to pursue the action further. (2) The settlement value of the case will usually be very much affected by the fact of insurance and, if there is insurance, by the amount of coverage (policy limits). These are legitimate reasons from the plaintiff's point of view. Moreover, the social interest will be served by the giving of information which will facilitate settlement and enable plaintiff to make an intelligent judgment whether it is worth while to pursue litigation. Defendant and his insurer seem to have no legitimate counter-interest in concealment, and indeed the information under discussion is given voluntarily in most cases.[18]

The Kansas court rather tautologically concluded that:

> under the guise of liberal construction, we should not emasculate the discovery 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 be permitted to cause us to lose sight of the limitations of the discovery rules or boundaries beyond which we should not go.... Information which

17. *Id.* at 1020.
18. *Id.* at 1021.

> could have no possible bearing on the determination of the action on its merits could hardly be within the rule. It is not intended to supply information for the personal use of the litigant that has no connection with the determination of the issues involved in the action on their merits. There is nothing contained in the pleadings or in the contention of the parties indicating that information pertaining to insurance or insurance coverage will have anything whatsoever to do with the trial of any one of the three lawsuits concerned herein. Information of the nature requested could not be 'reasonably calculated to lead to the discovery of admissible evidence.'
>
> Whatever advantages the plaintiff might gain are not advantages which have anything to do with the presentation of his case at trial and do not lead to disclosure of the kind of information which is the objective of discovery procedure. We think that to grant discovery of policy limits would be to unreasonably extend discovery procedure beyond its normal scope and would not be justified. If this form of discovery is to be allowed, there should be an amendment of the discovery statutes by an authorized body rather than a change by way of judicial construction.[19]

This theme suggesting an amendment of Rule 26 (b) recurs in the judicial decisions denying the discovery. Probably hardly any judge deciding the matter is unaware of the fact that factually and "in real life" the existence of liability insurance and the knowledge on the part of the plaintiff of its limits *does* materially affect the settlement and trial of negligence cases. To believe otherwise would be extremely naive and judges, generally, are not that.

Parenthetically, as a comment both on the hyperbole and the strength of feeling of commentators who have denied the discovery or urged its denial, they have for some anthropomorphic reason of their own most often protested against the "emasculation" of Rule 26 (b) by the adoption of the discovery allowance. In a flight of metaphor, one such went even

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19. *Id.* at 1022.

further. In an article appearing in the *Insurance Counsel Journal,*[20] the author sternly invokes other images:

> [T]he discovery processes should not be prostituted under the guise of liberal and broad construction so as to emasculate the rules by permitting something never intended and not within the declared objects for which they were adopted.[21]

And again:

> [t]he god of procedural expediency should not be worshipped to such an extent that the god of substantive law and rights will be desecrated.[22]

Now, to grope out of the turgid penumbra of the past and into the brightly enlightened present, let us pass over to Utah. The case of *Ellis v. Gilbert,*[23] similarly came on in an interlocutory appeal under Utah practice from an order of the trial judge requiring the defendant in a personal injury case to answer questions concerning his insurance coverage. In a coruscatingly well-reasoned (the writer is prejudiced, of course) opinion by Chief Justice Crockett, the Utah Supreme Court said that the trial judge had the right to require the answers to these interrogatories concerning liability insurance under Rule 26 (b) of the Utah Rules of Civil Procedure which is the same as ours. The court said:

> It will be noted . . . that there are two aspects of the discovery permitted by this rule. The latter one, which relates to 'testimony' and provides that it is not objectionable because it would be 'inadmissible at the trial,' is not a restriction upon the former and broader inquiry allowed into 'any matter . . . which is relevant to the subject matter' of the action.
>
> In considering what is the 'subject matter' of the law suit we keep in mind that the ultimate objective of any lawsuit is the determination of the dispute between the parties, and that the earlier and easier this can be accomplished, with justice to both sides, the better for all concerned. Whatever helps to attain that objective is 'relevant' to the lawsuit.

20. Stopher, *Should A Change Be Made In Discovery Rules To Permit Inquiry As To Limits Of Liability Insurance,* 35 INS. COUNSEL J. 53 (1968).
21. *Id.* at 54.
22. *Id.*
23. 429 P.2d 39 (Utah, 1967).

Any lawyer or judge who is confronted with the duty of dealing with a claim for personal injuries will surely agree that there are involved two main aspects of the problem: The first is whether there is liability; and the second, of equal or perhaps more importance, is what is the prospect of actually recovering damages. A candid and forthright approach to the disposition of such a case demands recognition of the fact that the parties are more concerned with what money might actually be recovered by the plaintiff, or saved by the defense, than they are with the mere obtaining of a paper judgment as to whether there is or is not liability. The recognition of these facts is undoubtedly the reason that our rule describes the scope of inquiry in the broader term: 'the subject matter of the action,' rather than the more limited one: the 'issues' to be tried in the case.

Cognate to the thought just expressed is the fact that among the proper purposes of the proceedings prior to trial is the exploration of the possibility of resolving the dispute without trial. [This is a good and important point in evaluating the relevancy of insurance coverage to the trial. Reread Rule 16 in the light of the obligation of the court at the pretrial conference to try and simplify and, if possible, to settle the case there—Author's note] It seems quite indisputable that the court and counsel should have the benefit of all the material facts bearing upon both of the essential aspects of the total lawsuit just mentioned, so that there can be a more realistic and meaningful discussion concerning any prospect of settlement. . . .

We here observe that neither in the order of the trial court, nor in this decision, is it postulated that information concerning insurance should be disclosed to the jury. The reasons for this appear to be that because of their lack of professional training and experience in such matters the jurors might be motivated by improper considerations in resolving the issues. But this should not be true of the judge and the attorneys. They are presumably conditioned by education, training and experience to render service of a professional character under a discipline which should involve a high degree of integrity.

> It is indeed true that the lawyer has an obligation to discharge his duties of this character in loyalty and fidelity to the interest of his client. But he also has over-arching responsibilities of the same nature to the court as one of its officers, and to the profession itself, in its duty to serve the public according to the ideal which is the purpose of all procedure: to seek the truth and to do justice. It runs contrary to this purpose and casts an unfavorable reflection upon the integrity of the court and the attorneys if they must treat such an essential aspect of the case as the existence of insurance as though it would corrupt the whole procedure if the lawyers and the court knew about it.
>
> We do not regard it as an insuperable objection to the discovery in question that it would violate the defendant's rights as unwarranted intrustion into his private affairs. There are valid reasons why to inquire into insurance coverage is of a different character than to inquire into his other assets. Of perhaps minor importance, but worthy of noting, is the fact that insofar as defendant's other assets are concerned, plaintiff may have other means of knowing something about defendant's financial responsibility, whereas, insurance is but a special type of resource the defendant may possess, whose only value is to protect defendant's other assets in persons he might wrongfully injure.[24]

The Utah court then goes on to the fact that under their safety responsibility act, the legislature has indicated as a matter of public policy that the public has a right to protection by insurance from the hazards of injury and destruction on the highways.

> When one is so injured, he becomes in effect a third-party beneficiary of the insurance of a wrongdoer who injures him.
>
> Such policies often have various covenants which are of no concern to the injured plaintiff, e.g.: relating to voluntary medical coverage; that the insured must give notice of an accident; that he must extend cooperation to the company. It is only reasonable that the plaintiff should have some means of discovering

24. *Id.* at 40.

whether a policy exists, and what its provisions are so he can know whether covenants upon which his rights may depend are being complied with. This is especially true since the plaintiff charges the defendant with carelessness in injuring him, and may suspect he would be careless about other duties.

There are further considerations which we regard as having some cogency and persuasiveness in support of the discovery. The court is concerned with the rights of the parties: the plaintiff and the defendant. The bare facts of life may as well be faced and reckoned with. If we look behind the facade it is to be seen that where there is insurance, the company actually takes over, employs counsel, investigates the case, interviews the witnesses, controls offers of settlement, and in fact, handles the entire matter. Thus the arguments against discovery concerning insurance are actually made by and for the benefit of the insurance company rather than of the insured.

Whereas, from the standpoint of the defendant, in most cases there would be no reason why he would have any objection to allowing the discovery. In fact, it may prove advantageous to him, since the likelihood is that it would lessen his individual concern with the lawsuit, increase the possibility of settlement, and reduce the risk of a judgment in excess of the policy limits.

Finally, there are some very practical reasons why the refusal to disclose whether insurance exists seems like almost useless shadow boxing anyway. Due to the almost universal carrying of liability insurance on automobiles because of financial responsibility acts, there is very little likelihood that the court and lawyers will think otherwise than that the defendant is insured. Furthermore, our statute requires a person involved in an automobile accident to file proof of insurance or financial responsibility, or have his driver's license suspended. This information can be obtained by the parties. Refusal to disclose serves the cause of neither efficiency nor fairness. It just adds to the difficulty and delay by forcing the plaintiff to resort to other sources than court procedure to get necessary information. However, fairness does suggest taking note of the fact that in actual practice some insurance companies and their attorneys wil-

> lingly make such disclosure, while others decline to do so. The position taken by the trial courts puts them all in equal footing and puts the control in the court where it belongs.[25]

I have quoted the *Ellis* case at some length because it is the kind of case that cuts through the cliches and truisms which sometimes pass for thought. This kind of pragmatism should be one of the bases of judicial reasoning if not the most important one. Human experience and the human condition should be the yardsticks by which any given legal proposition is measured. Judge Crockett evidences this kind of thinking in his majority opinion in *Ellis.*

It might be mentioned tangentially and somewhat off the subject that a good many of the courts which have refused divulgence of insurance policy limits have noted that they feel that the litigants should come into court on an "equal basis." The irony of this should be apparent even to those who enunciate this nonsensical proposition. The equality with which an injured plaintiff approaches litigation with an insurance company is to say the least unenviable. It would take another article to discuss this phenomenon but the abuses of insurance companies in wearing down legitimate claimants are legion and notorious and one of the abuses is refusal to reveal policy limits.

There was a dissent in the *Ellis* case which while somewhat beguiling, illustrates the vacuity (it is submitted) of the thinking behind the refusal to be realistic about revealing to the real beneficiary of a liability insurance policy what the policy is. Justice Henriod in dissenting says:

> If the main opinion stands, there is absolutely no reason why a plaintiff, who might have a phony claim, could not require the author of the main opinion, or anyone else, to open up his safety box and divulge how green it is. Even the Supreme Court has said something about the right of privacy. A man's contract is his own, whether it be with his lessor, banker, wife or insurance company.
>
> The main opinion says that a candid and forthright approach requires that we recognize that people are

25. *Id.* at 41.

> more concerned about what money they can recover than a paper judgment. True, but so were the money-changers in the Temple more concerned with money than the Sermon on the Mount. That does not justify the courts in seeing that the money-changers have an advantage in the courts.
>
> There are thousands of fake suits instituted in this country. I don't think this is one of them, but if you lay down a precedent that any tramp, for $17.00, can force a decent person [sic] to divulge his assets,—for the purpose of nudging him into a settlement of a possible cooked-up case, we and the courts are in trouble,—and in concluding so we have cooked the sweet rules of procedure into a bitter brew of 'boil and bubble, toil and trouble.'[26]

Q.E.D., say I.

In another but allied realm, let's talk about the discovery of policy defenses which the insurer might assert.

The same considerations which would dictate revelation of the existence and limits of a liability policy would similarly dictate that any policy defenses asserted by the insurance company and known to the insured should be made available to the plaintiff. Factually, the insurance company is the real party in interest in a litigation between an insured plaintiff and a potentially liable insured. This is recognized from the time the accidents happen: the filing of the SR 21 form (under Wyoming statutes); the assignment of the case for investigation and adjustment; the writing of the customary letter to the insured advising him of the pending litigation; the expense of hiring attorneys, discovery, trials, appeal and the multitude of motions all along the way (which insurance company attorneys seem unusually adept at devising). The insurance contract, thus, is not merely an indemnity contract but is also a contract to undertake and to pay for a defense of actions against the insured. See the recent unreported case of *Boston Insurance Company v. Maddux Well Service.*[27]

The injured party, the third party beneficiary under the insurance contract, if he establishes negligence on the part of the insured, is thus entitled to know whether there are policy

26. *Id.* at 43.
27. Civil No. 3767 (Wyo., filed Oct., 1969).

defenses which might defeat his right of recovery and to know it at the earliest possible time. This for the apparent reason, again, that the assertion of such policy defenses would be one of the factors which would have to be weighed by both defense counsel and plaintiff's counsel in trying to arrive at a settlement of the case. The courts do not generally look with favor on insurance company policy defenses which are asserted following a verdict in favor of the plaintiff.[28] The courts rather take the view that when an insurance company undertakes the defense of an action it may well be estopped to assert at a later time its non-liability under the policy.

Discovery should also extend, for the purpose of putting the parties into realistic bargaining positions, to the communication in which the insurance company advses he insured that it is undertaking the defense of the action. A practice which is sometimes followed by liability carriers and which in my view is unconscionable, is to undertake the defense of the insured but with a "reservation of rights" which means that the insurance company is saying to its insured that by defending him they are not admitting that he has any insurance with them. Not only is this practice unfair to the insured since it gives him a lawyer and very likely an entire theory of the case which may not be beneficial to him (but which may be beneficial to the disclaiming insurance company) but it is also unfair to the plaintiff.

There are probably few cases, if any, in which the plaintiff's attorney does not know whether the opposing attorney appears because he represents the insurance company or appears because he represents solely the insured. When the insurance company deputes its attorney, thus, to try the lawsuit as it normally has the right to do under the contract, there is a holding out to the plaintiff that there is valid insurance to cover his loss if he can prove that it was caused by the negligence of the insured. The plaintiff should have complete latitude to find out the details of the contractual obligation between the insured defendant and his insurance company. This would include any asserted policy defenses.

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28. *See* Phoenix Assurance Company v. Latta, *supra* note 9.

THE PROGNOSIS

It is my opinion that if the Wyoming State Supreme Court were presented today with the question of discoverability of insurance limits under Rule 26, it probably would hold that the rigidity of the language of the rule is such that the discovery could not be had. It is further guessed, however, and my hope would be, that if Rule 26 were amended to conform to the amendment now being offered by the Federal Rules Advisory Committee our Supreme Court would be willing to adopt the new language and to incorporate it within our rules. Insofar as this article is concerned, in the preliminary draft of the proposed amendment to Rule 26 (b) as offered by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in November, 1967 is as follows:

> (b) SCOPE OF ~~EXAMINATION~~ *DISCOVERY.* Unless otherwise ordered by the court ~~as provided by Rule 30 (b) or (d), the deponent may be examined~~ *in accordance with these rules, the scope of discovery is as follows:*
>
> (*1*) *In General. Parties may obtain discovery* regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the ~~examining~~ party *seeking discovery* or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of *any discoverable matter* ~~relevant facts.~~ It is not ground for objection that the ~~testimony~~ *information* sought will be inadmissible at the trial if the ~~testimony~~ *information sought* appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (*2*) *Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the*

insurance agreement is not by reason of disclosure admissible in evidence at trial.[29]

The comments of the Committee on the proposed Rule 26 (*b*) (2) deserve reprinting:

> *Subdivision (b) (2)—Insurance Policies.* Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook v. Welty,* 253 F. Supp. 875 (D. D.C. 1966) (cases cited); *Johanek v. Aberle,* 27 F.R.D. 272 (D. Mont. 1961); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases,* 10 Ala. L. Rev. 355 (1958); Thode, *Some Reflections on the 1957 Amendments to the Texas Rules,* 37 Tex. L. Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: *Bisserier v. Manning,* 207 F. Supp. 476 (D. N.J. 1962); *Cooper v. Stender,* 30 F.R.D. 389 (E.D. Tenn. 1962); Frank, *Discovery and Insurance Coverage* 1959 Ins. L. J. 281; Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits,* 28 Ford. L. Rev. 215 (1959).
>
> The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.
>
> The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26 (b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calcu-

29. 43 F.R.D. 224 (1967).

lated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspect of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker,* 264 F. Supp. 246 (S.D. N.Y. 1967) the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning the defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer 'may be liable' on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment. The provision applies only to persons 'carrying on an insurance business' and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y. Ins. Law, Mek. Consol. Laws, C-28, § 41. In no instance does disclosure make

the facts concerning insurance coverage admissible in evidence.[30]

Procrustes, if you recall, was an antic, Attic thug who lashed his victims to an iron bed and cut off or stretched the victim's members as seemed to be indicated to fill the bed. Thus, the Procrustean bed concept which is significant in terms of our attempts to chop off or stretch the question of insurance coverage and limits within the framework of Rule 26. The Committee on the Federal Rules has, (not to labor the classical allusions too much), cut the Gordian knot which has been tied ever more tightly by court decisions logically holding that insurance coverage is not properly discoverable under Rule 26 (b) as it now exists, but then wistfully saying by way of dicta that they wish it could be because it would be a good thing for the jurisprudence and for the litigants if it were.

We in Wyoming should not await the outcome of the Federal Rules proposal. It is modestly suggested that we should move forward in the Bar through our Continuing Rules Committee and into our Supreme Court with language which would be equivalent to the quoted language of the proposed amendment contained in Rule 26 (b) (2) above. The sooner the better, I submit, for everyone concerned, including, surprisingly enough, the insurance companies. This may sound odd, considering the adamantine opposition of insurance companies and their attorneys to the "emasculation" of Rule 26; but I am not being wholly facetious when I say that the adoption of the new provision would assist the insurance industry in at least two regards:

First, it would render *passe* the childish cat and mouse game played with human pawns by the grown men whom they hire (as lawyers, adjusters, or what have you). The injured, the wrongful death heirs, and all the traumatized victims simply ask to be told whether there is insurance money avail- to make them whole if some insured negligently has caused their problem. An unreasonable request?

Second, it would relieve the insurance company of an increasingly well-founded suspicion that the insurance folks are

30. 43 F.R.D. 229 (1967).

taking the same position as the moneylenders did when they fought the "truth in lending" legislation. You will recall that these laws were designed only to require that in their business dealings, the lenders tell people the truth. An unreasonable request?

We inevitably approach the day when uniformly, as a matter of good policy, injured parties will be able to find out what insurance coverage exists in favor of the defendant. Wyoming, a pioneer in some areas, a laggard in others, should as I posit move ahead now on its own to take this one step to make the insurance business protect the people it is well paid to protect—its policyholders and its policyholder's victims.