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Recent Decisions

FEDERAL CIVIL PROCEDURE — DISCOVERY OF AMOUNT OF LIABILITY INSURANCE COVERAGE — RULE 33 INTERROGATORIES TO PARTIES

Vollmer v. Szabo, 17 Ohio Misc. 143 (N.D. Ohio 1969).

The divergence in the federal courts over the discoverability of insurance limits has been acute.[1] While many district courts have held that the scope of discovery includes liability limits, at least an equal number have held that it does not.[2] The recently proposed discovery amendment compelling disclosure of insurance coverage[3] represents an effort to resolve these conflicting interpretations of rule 26(b).[4] The potential impact of the proposed rule may be seen in the recent decision of *Vollmer v. Szabo*.[5] In this case the defendant refused to comply with the plaintiff's request that he answer interrogatories under rule 33[6] relating to the existence and amount of his liability insurance. Thereupon, the plaintiff moved to compel the defendant to answer. The court granted the plaintiff's motion. In denying the defendant's subsequent motion for rehearing, the court held that rule 26(b) is broad enough to permit disclosure of

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[1] *Compare, e.g.*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961) (insurance policy limits discoverable), *with* McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952) (insurance policy limits not discoverable). *See also* 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 647.1 nn.45.5, 45.6 (Wright ed. 1961); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.16[3], at 1188-92 (2d ed. 1966); Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits*, 28 FORD. L. REV. 215 (1959); Frank, *Discovery and Insurance Coverage*, 1959 INS. L.J. 281; Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59 (1965); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 ALA. L. REV. 355 (1958); Comment, *Discovery of Insurance Coverage: Hazy Frontier of Insurance*, 35 TENN. L. REV. 35 (1967).

[2] *Id.*

[3] PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 43 F.R.D. 211, 225 (1968) [hereinafter cited as PROPOSED AMENDMENT].

> 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 . . . . *Id.*

[4] FED. R. CIV. P. 26(b).

[5] 17 Ohio Misc. 143 (N.D. Ohio 1968).

[6] FED. R. CIV. P. 33, which provides that "[a]ny party may serve upon any adverse party written interrogatories to be answered by the party served . . . . Interrogatories may relate to any matters which can be inquired into under Rule 26(b) . . . ."

liability insurance for purposes of rule 33 even where its only relevance was to settlement negotiations.[7]

Under the traditional view automobile policy limits have not been discoverable on the theory that such information was neither admissible in evidence nor likely to lead to admissible evidence.[8] The foundation of this conclusion is an adherence to a literal interpretation of rule 26(b), which provides that a deponent may be examined regarding any matter "which is relevant to the subject matter involved in the pending action."[9] Implicit in this reasoning is a reluctance by the courts to expand the meaning of "subject matter" beyond issues to be litigated at trial.[10] Since, with few exceptions,[11] the amount of liability insurance is inadmissible in evidence,[12] it follows that a literal interpretation of "subject matter" forecloses discovery of insurance coverage.[13] On the other hand, an increasing number of federal cases have permitted discovery,[14] reasoning that rule 26(b) should be read liberally in light of the broad purpose of modern discovery which is directed toward enhancing settlement prospects by informing the parties of the realistic value of their claims before trial.[15]

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[7] Vollmer v. Szabo, 17 Ohio Misc. 143, 145 (N.D. Ohio 1968). Note that *Vollmer* must be qualified to the extent that its discussion was limited to the scope of discovery language of rule 26(b) as it related to discoverable items under rule 33. *Vollmer* did not purport to hold that its interpretation would be controlling for other discovery devices. For example, although rule 26(b) determines the scope of discovery for purposes of rule 34, discovery of things within the possession of a party, the latter rule still requires a showing of good cause before the item is discoverable.

[8] *E.g.*, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958). *See generally* J. MOORE, *supra* note 1, at 1191.

[9] FED. R. CIV. P. 26(b).

[10] In Hooker v. Raytheon Co., 31 F.R.D. 120 (S.D. Cal. 1962), the court held that rule 26(b) did not permit disclosure of insurance policy limits even though an issue in the case could be resolved by reference to the defendant's insurance policy. To hold otherwise, the court reasoned, would constitute a judicial amendment of rule 26(b).

[11] For exceptions to the rule that an insurance policy is inadmissible into evidence, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 168, at 355-57 (1954).

[12] *Id.* at 355.

[13] *E.g.*, Gallimore v. Dye, 21 F.R.D. 283, 285 (E.D. Ill. 1958), where it was stated that when the "subject matter" is the claim of negligence, insurance coverage would not be relevant to show negligence, nor would it be reasonably calculated to lead to the discovery of admissible evidence showing negligence. *See generally* Thode, *Some Reflections on the 1957 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery*, 37 TEX. L. REV. 33, 40-41 (1958).

[14] *See* Cook v. Welty, 253 F. Supp. 875 (D.D.C. 1966); Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951).

[15] *Compare* Roembke v. Wisdom, 22 F.R.D. 197, 199 (S.D. Ill. 1958), *with* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 236, 145 N.E.2d 588, 592 (1957). In *Roembke* the court accepted the view that the sole purpose of discovery is to detect evidence or

Ohio federal courts have little decisional law with respect to the discoverability of liability insurance limits. The only federal decision prior to *Vollmer, McDaniel v. Mayle*,[16] held that the language of rule 26(b) precluded pretrial inquiry into insurance coverage. Nevertheless, *McDaniel* implied that another court, adhering to a broader interpretation, could reach the contrary result without abusing its discretion.[17]

The *Vollmer* court, while recognizing the sharp conflict in the existing law, was persuaded by the argument that the present wording of rule 26(b) is broad enough to permit discovery of policy limits pursuant to rule 33.[18] The court pointed out that the relevance of liability insurance to the subject matter was not to be found in its dubious relation to litigable issues of negligence or damages. Rather, it indicated that insurance coverage is relevant to the subject matter in the sense that such information bears greatly upon the conduct of pretrial settlement negotiations.[19] In sustaining the relation of insurance to the conduct of such negotiations, the court observed that the defendant's insurance company is normally the real party in interest, in that the company directs the defense as well as makes the decision to disclose policy limits;[20] and that the nondisclosure of this information represented an unwarranted tactical advantage for the

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information leading to admissible evidence. In construing a state discovery rule patterned after federal rule 26(b), the *Terry* court reasoned that discovery rules were adopted to effectuate prompt disposition of litigation by fully educating parties in advance of trial as to the real value of their claims.

[16] 30 F.R.D. 399 (N.D. Ohio 1962).

[17] The court stated that, in view of the conflict in the federal courts, the result in a given case was merely "a matter of determining that school of thought which one considers to represent the proper interpretation of [rule 26(b)]." *Id.* at 400.

[18] 17 Ohio Misc. at 144.

[19] *Id.* at 145. It should be noted that the court also alluded to arguments that (a) discovery of insurance is not an area of special privacy, and (b) discovery would not lead to open inquiry into a defendant's other assets. *Id.* Apparently, the court mentioned these points to discredit prior cases which had adopted these contentions. Some cases had reasoned, in terrorem, that discovery of a defendant's insurance coverage would lay bare all of his other assets. *See, e.g.*, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952). *But see* Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961). As to the former point, in Gallimore v. Dye, 21 F.R.D. 283, 285 (E.D. Ill. 1958), it was stated that discovery of a defendant's insurance presented a tempting invasion of the right of privacy. This theory has never gained popularity, and has been severely criticized. *See* Jenkins, *supra* note 1, at 78.

[20] It should be noted that the meaning of "real party in interest" is not to be confused with its technical meaning in FED. R. CIV. P. 17(e). The *Vollmer* court apparently intended to use the term in the sense that the insurer, though not joined as a party, has a financial stake in the defendant's judgment and, thus, is active in the conduct of the defendant's cause. *See* Williams, *supra* note 1, at 358; Comment, *supra* note 1, at 46 n.61.

defense.[21] Thus, the court concluded that compulsory disclosure would avoid the element of surprise and enhance the prospects of a speedy and just determination of the controversy through settlement.[22]

In reaching its conclusion the court did not enumerate the fact patterns under which insurance coverage would be deemed relevant to the subject matter of the pending action. *Vollmer* seems to suggest that disclosure may be compelled in situations where a realistic appraisal of the plaintiff's case based upon knowledge of the amount of insurance would advance the probability of settlement.[23] But, critics have emphasized situations where discovery would realistically protract negotiations.[24] For example, assume that *A* brings an action against *B* and *B's* insurer, *X*, for $30,000 damages arising out of an automobile accident in which *B's* liability is questionable. Assuming, further, that *B* is solvent and that *A* has an even chance of recovery, there is a theoretical settlement value of $15,000. If *A* discovers that *B* is insured for $25,000, it is arguable that *A* would be unwilling to settle for the theoretical settlement figure, $15,000. Conversely, *X* is not likely to entertain a settlement offer from *A* much higher than the settlement value to the company. Thus, the opponents of discovery contend that a greedy plaintiff could thwart the opportunity for settlement if he knew the extent of the defendant's liability limit.[25] But, criticism on this ground is not appropriate in every case because, in addition to the amount of insurance coverage, several other elements effect the conduct of settlement talks.[26] Furthermore, by court rule, a safeguard could be employed in situations where disclosure of policy limits could foreseeably lead to protracted negotiations. For instance, in camera inspection by the district judge as a condition precedent to permitting discovery of

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[21] *See* text accompanying note 30 *infra.*

[22] 17 Ohio Misc. at 145.

[23] *Id.* On this point, the court did not elaborate. But generally, if the plaintiff's damages are set higher than the policy limits, the case would usually be settled within the policy limits if known to the plaintiff. *See* Jenkins, supra note 1, at 78-79.

[24] *E.g.*, Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962). *See also* Carman v. Fishel, 418 P.2d 963 (Okla. 1966); State *ex rel.* Bush v. Elliott, 363 S.W.2d 631 (Mo. 1963).

[25] *See* 34 TEX. L. REV. 129, 131. *See generally* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

[26] Other significant factors are: (1) the question of liability; (2) the nature of the plaintiff's injuries; (3) the type of plaintiff and defendant (*e.g.*, corporate defendants are often considered "targets" of high jury verdicts); (4) the trial judge; (5) a congested trial docket, where delay might be advantageous for either party. *See* Groce, *Personal Injury Cases: Reaching Reasonable Settlements Before Trial and Minimizing Recovery at Trial*, 20 ARK. L. REV. 18, 19 (1966).

the dollar limits of a policy is one device available to facilitate settlement.[27]

Notwithstanding the absence of articulated guidelines as to the proper circumstances for allowing discovery,[28] the *Vollmer* rule should generate practical ramifications effecting the conduct of personal injury litigation. Knowledge of the amount of a defendant's insurance fund will equalize the plaintiff's bargaining position by facilitating a realistic appraisal of the value of the plaintiff's claim for settlement purposes.[29] Conversely, the defense will no longer have its tactical advantage of withholding the policy limits until the most strategic moment in the negotiations.[30] The upshot of tactical parity should result in more frequent and, in many instances, higher settlement agreements.[31]

From the standpoint of the federal courts, *Vollmer*, in departing from the result in *McDaniel v. Mayle*,[32] has clearly expanded the scope of discovery with respect to written interrogatories in Ohio. Moreover, by attaching a broader meaning to subject matter than earlier courts were willing to do, *Vollmer* has impliedly recognized that settlement is a part of the judicial process and should be guided by court rules.[33] Nevertheless, the extent of change wrought by this

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[27] *See* Comment, *supra* note 1, at 73; *Cf.* Hooker v. Raytheon Co., 31 F.R.D. 120 (S.D. Cal. 1962), where the court, though refusing discovery of policy limits, allowed inquiry into the existence of a policy. The court proposed that, if a policy were disclosed, the court would inspect the policy in camera to determine if it contained any provision relevant to a litigable issue.

[28] The absence of any dicta regarding the proper circumstances for permitting discovery is surprising. It should be noted that the court quoted with approval the comments of the Advisory Committee which expressly recognized that discovery of insurance under the Proposed Amendment could hamper, as well as aid, settlement negotiations. Vollmer v. Szabo, 17 Ohio Misc. 143, 144 (N.D. Ohio 1968), *citing* PROPOSED AMENDMENT, Advisory Committee's Note, 43 F.R.D. 211, 229, (1968).

[29] *E.g.*, Landkammer v. O'Laughlin, 45 F.R.D. 240 (S.D. Iowa 1968); Slomberg v. Pennabaker, 42 F.R.D. 10 (M.D. Pa. 1967). *Contra* Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962). *See generally* J. MOORE, *supra* note 1, at 1190-91; Fournier, *supra* note 1, at 228.

[30] *See* Jenkins, *supra* note 1, at 79.

[31] *See* Note, *Proposed 1967 Amendments to Federal Discovery Rules*, 68 COLUM. L. REV. 271, 274 (1968).

[32] *See* text accompanying notes 16-17 *supra.*

[33] It is important to distinguish *Vollmer* from prior decisions reasoning that the defendant's policy is relevant to litigable issues because of the existence of a state financial responsibility enactment. These cases argued that the presence of a comprehensive legislative scheme relating to insurance afforded the plaintiff a discoverable interest in the defendant's policy. *See* Slomberg v. Pennabaker, 42 F.R.D. 8 (M.D. Pa. 1967); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961) (alternate holding); Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951). In essence, the distinction is that the prior decisions looked to the pervasive presence of insurance in the case in general, whereas *Vollmer* emphasized the pervasive presence of the insurance company

decision is unclear. For example, a narrow reading would seem to exclude from the purview of discovery the entire contents of the defendant's policy, except for the dollar limit;[34] and discovery might be denied with respect to other important types of insurance such as professional malpractice and property damage insurance.[35] Further, the court's emphasis upon the active role of the insurer in the defense might be utilized to argue that discovery will be denied where the insurance company disclaims liability under the defendant's policy.[36] Finally, if the court's approval of the proposed amendment is indicative of the court's intention not to limit its decision to the facts, *Vollmer* may purport to establish a broader range of discovery than earlier cases reaching the same result with respect to insurance coverage.[37]

It seems that the relevance of liability to tort litigation, especially automobile tort litigation, is beyond cavil.[38] Ironically, many of the cases denying discovery expressly recognized the importance of such information to the plaintiff.[39] But, caught in the strictures of con-

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in the case. In holding that a plaintiff had a discoverable interest derived from insurance legislation, the earlier cases lost sight of the language of rule 26(b) which alone governs the scope of federal discovery. On the other hand, *Vollmer* reasoned directly from the language of rule 26(b), theorizing that insurance is relevant to pretrial settlement, which the court deemed to be as much a part of the subject matter of a pending suit as are litigable issues.

[34] The proposed amendment of rule 26(b) would permit discovery into the "contents" of a defendant's policy, which would presumably include more than the policy limits. PROPOSED AMENDMENT, 43 F.R.D. 211, 225 (1968).

[35] *But see* 2 F. HARPER & F. JAMES, TORTS § 13.6, at 777-82 (1956). Additionally, since neither *Vollmer* nor the proposed amendment of the present rule 26(b) allude to automobile financial responsibility enactments, it is arguable that the *Vollmer* rationale would permit discovery in cases which do not involve an automobile tort.

[36] Although modern insurance law provides that an injured party's chances of recovery are no longer in danger of being thwarted by the insured's insolvency, a victim's right to collect from the insurance company is still conditioned upon the insured defendant's performance of policy terms. *Id.* at 778-81. Therefore, discovery of terms and conditions, in addition to policy limits, may be of great importance to the plaintiff.

[37] *See* note 35 *supra.*

[38] In Clauss v. Danker, 264 F. Supp. 246 (S.D.N.Y. 1967), the court observed the importance of disclosure to judicial administration:

> This court has witnessed the dismal waste of time and effort, both on the part of the parties and the court, in cases where an early disclosure of limited policy limits would have led to prompt settlements that were not reached until the eve of trial, when such information was first revealed after needless pretrial discovery and preparation for trial. Aside from such unnecessary consumption of time and effort resulting from inability to learn such crucial information until the very last minute, the effect frequently is to disrupt the court's schedule and cause loss of trial time for many needy prospective litigants. *Id.* at 248.

[39] *E.g.*, Flynn v. Williams, 30 F.R.D. 66, 67 (D. Conn. 1958); McClure v. Boeger, 105 F. Supp. 612, 613 (E.D. Pa. 1952).