Case Western Reserve Law Review

Volume 24 | Issue 1 Article 9

1972

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Recommended Citation

Charles R. McDonald, *Joinder of Liability Insurers as Parties-Defendant--An Old Issue Reconsidered under Ohio's Civil Rules*, 24 Case W. Rsrv. L. Rev. 201 (1972)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol24/iss1/9

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Joinder of Liability Insurers as Parties-Defendant—An Old Issue Reconsidered Under Ohio's Civil Rules

The propriety and legality of joining a liability insurer as a party-defendant have long been the subjects of debate. This Note reconsiders the issues within the framework of the newly-enacted Ohio Rules of Civil Procedure. The author submits that such joinder would eliminate unnecessary procedural inefficiences and would further the scheme of liberal discovery envisaged by the Rules. He argues that the new Ohio Rules establish a departure from prior case law, and that under existing law joinder of liability insurers is not only permitted, but is often required for the effective operation of the Rules.

I. INTRODUCTION

Liability insurance companies ought to be named as parties defendant because in all sincerity — and measured by all honest tests — they are the real parties defendant.[1]

[T]he controversy in the personal injury action is a controversy as to whether the insured is legally liable — . . . . not whether he will be able to pay, but whether he was at fault.[2]

THESE CONFLICTING STATEMENTS briefly summarize the major policy bases underlying both sides of the question of whether liability insurance companies should be made parties in personal injury litigation. Although joinder of an insurance company as a party-defendant is certainly not a new controversy, the recent adoption of a new Code of Civil Procedure in Ohio[3] mandates a thorough reconsideration of both the propriety and the legality of such joinder.

Ohio law prior to the adoption of the new Rules did not permit the joinder of an insurer as a party-defendant.[4] Under this traditional approach a plaintiff can bring an action against the defendant's insurance company only after he has secured a judgment against the defendant which has remained unsatisfied for 30 days.[5]

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[1] *Shall Insurance Companies Be Named Parties Defendant in Actions for Injury or Death?*, 23 Ohio Op. 75, 77 (1942) (remarks of Marvin C. Harrison).

[2] *Id.* at 82 (remarks of Robert Guinther). *But see* note 66 *infra* & accompanying text.

[3] The Ohio Rules of Civil Procedure became effective July 1, 1970. These rules are substantially the same as the Federal Rules of Civil Procedure.

[4] *See* notes 98-108 *infra* & accompanying text.

[5] OHIO REV. CODE ANN. § 3929.06 (Page 1971). *See* notes 99-101 *infra* & accompanying text.

However, the passage of the new Ohio Rules raises significant questions concerning the continued validity of prior Ohio law in this area.[6]

It has been suggested that the adoption of the new Rules may permit a liability insurer to be joined with the tortfeasor as a party-defendant, at least at the pleading stage of litigation.[7] The possibility of joinder arises primarily under Ohio Rule 18(B), which provides in pertinent part:

> *Whenever 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.* . . . In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.[8]

Although this Rule specifically refers to the fraudulent conveyance situation, the broad language appears sufficient to embrace the typical tort claim involving an insured defendant.[9]

Litigation involving an insured defendant would clearly be facilitated by allowing an injured plaintiff to initially join the insurer as a party-defendant, at least for the purposes of pleading and pretrial discovery.[10] Not only would the multiplicity of suits currently necessary under section 3929.06, Ohio Revised Code (O.R.C.), be eliminated by allowing such joinder,[11] but in addition, and perhaps more importantly, the plaintiff's ability to adequately prepare his case would be greatly enhanced.

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[6] *See* notes 112-40 *infra* & accompanying text.

[7] 1 S. JACOBY, OHIO CIVIL PRACTICE UNDER THE RULES 167 (1970); J. McCORMAC, OHIO CIVIL RULES PRACTICE § 5.05, at 98 (1970).

[8] OHIO R. CIV. P. 18(B) (emphasis added).

[9] Rule 18(B) encompasses the joinder of remedies, or more properly, the joinder of claims, one of which is contingent upon the outcome of the other. Although it is possible that the claims sought to be joined will be against different persons, Rule 18(B) does not deal with the joinder of parties. Where the claims which 18(B) permits to be joined are against different persons, Rule 20(A) may be used to join them as parties. *See* 1 S. JACOBY, *supra* note 7, at 195. The crucial inquiry, therefore, remains whether the claims may be joined under 18(B), which, on its face, appears applicable to the contingent insurer-insured situation. The Ohio Rules Advisory Comm. Staff Notes to Rule 18(B), however, state that "Rule 18(B) is not intended to permit the joinder of a defendant's liability insurer in the original tort action. See *Pennsylvania R.R. v. Lattavo Brothers, Inc.*, 9 F.R.D. 205 (N.D. Ohio 1949)." In spite of this Staff Note, which is neither official nor dispositive, OHIO REV. CODE ANN., CIVIL RULES VOL. at xi (Page 1971), it seems clear that *Lattavo* is no longer controlling. *See* notes 133-40 *infra* & accompanying text.

[10] Permitting joinder merely for the purposes of pleading and discovery may be accomplished through the use of separate trials under Ohio Rules 20(B), 21, or 42(B).

[11] *See generally* Comment, *Direct Actions Against Insurance Companies: Should They Join the Party?*, 59 CALIF. L. REV. 525, 543 (1971).

II. DISCOVERY AND JOINDER: THE NEED FOR THE INSURER TO BE A "PARTY"

Rules 26 through 37 and Rule 45 govern the scope and procedure of discovery. The broad function of the discovery devices set forth in these Rules is to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[12] Indeed, one of the fears of adopting the Federal Rules in Ohio at an earlier date was that such broad discovery devices would force adversaries to reveal too much of their trial preparation material.[13]

Although the new Ohio Rules broaden the range of permissible discovery, they by no means allow a generalized raid into opposing counsel's files. A general statement to this effect is made in Ohio Rule 26(A), which attempts to define and formulate policy regarding the interpretation and scope of the discovery Rules.[14] No corresponding statement accompanies Federal Rule 26. The Staff Notes to Ohio Rule 26(A)[15] indicate that the purpose of the addition of such a policy paragraph was to reaffirm the principles of discovery enunciated in the celebrated case of *Hickman v. Taylor*.[16]

Undoubtedly, the broad import of Rule 26(A) may be read into many situations, especially in regard to the general scope of discovery[17] or that applicable to trial preparation materials.[18] Although

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[12] United States v. Procter & Gamble, 356 U.S. 677, 682 (1968). *See generally*, C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 81 (2d ed. 1970).

[13] Shumaker, *Should Ohio Adopt the Federal Rules of Civil Procedure?*, 29 OHIO BAR 43, 54 (1956).

[14] OHIO R. CIV. P. 26(A) provides:

> It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

[15] Ohio Rules Advisory Comm. Staff Notes to Rule 26(A) (1970).

[16] 329 U.S. 495 (1947). Under the *Hickman* holding, although the discovery Rules are to be liberally interpreted, the "work product" of an attorney is to receive a qualified immunity, and the party seeking disclosure of information so protected must show the existence of special circumstances in order to obtain it. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2022 (1970).

[17] OHIO R. CIV. P. 26(B)(1).

[18] *Id.* 26(B)(3). This Rule permits a party to discover "documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor." This is a codification of the *Hickman* rule, extending the qualified immunity to representatives other than the party's attorney. *See* note 16 *supra* & accompanying text. It should be noted that while Rule 26(B)(3) sets forth the scope of discovery applicable to trial preparation materials, it does not provide the method for obtaining such materials. Therefore,

the scope of allowable discovery may be tempered somewhat by Rule 26(A), the broad purpose underlying discovery clearly remains to provide parties with the opportunity to obtain the information necessary to adequately prepare and conduct their respective cases. The inability to join insurance companies as parties-defendant may often have the effect of thwarting the scheme established by the various discovery Rules for the satisfaction of this purpose.

The scheme established by the discovery Rules provides several methods by which a party may seek to obtain the information he desires, some of which are available only as to parties[19] while others have general application.[20] To illustrate the problems caused in insurance litigation by the distinctions between the party and non-party methods of discovery, let us assume a hypothetical set of facts: a collision has occurred between an injured plaintiff and a defendant who carries liability insurance. Further, the insurance company conducting the case for the defendant — a normal function of a liability insurer[21] — has taken witnesses' statements and photographs, gathered all the pertinent facts relating to the accident, and retained defense counsel. The injured plaintiff then hires an attorney and a lawsuit is initiated.

Plaintiff's attorney may want to know whether the defendant is insured. As a practical matter this information allows the attorney to know who is directing the defense of the suit and who in reality will be making possible offers of settlement. Both the Federal and Ohio Rules explicitly allow discovery of the existence and contents of an insurance agreement.[22] By utilizing Ohio Rule 26(B)(2) to discover the existence of insurance, the plaintiff's at-

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although it expressly mentions "insurers," providing their "work-product" with a qualified immunity, Rule 26(B)(3) does not provide a basis for joining insurers as parties, even during discovery. Furthermore, use of another of the discovery Rules, such as Rule 34, to obtain such materials, requires a showing of "good cause" under Ohio Rule 26(B)(3). The Federal Rules discarded the good cause standard in 1970. Now the moving party in the federal system must show "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3). The different wording of the respective Rules should not provide different results, however, since the stricter standards of the Federal Rules should be weighed against the policy statements in Ohio Rule 26(A), which similarly restrict discovery in various circumstances. *See* 1 S. JACOBY, *supra* note 7, at 260.

[19] OHIO R. CIV. P. 33, 34.

[20] *Id.* 30, 31.

[21] *See* Comment, *Direct Actions*, *supra* note 11, at 542 & n.105.

[22] OHIO R. CIV. P. 26(B)(2); FED. R. CIV. P. 26(b)(2). Prior to the adoption of this Rule the courts and commentators were split on the issue of allowing discovery of insurance policies. *See* 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2010, at 85-89.

torney is better able to make some important practical decisions regarding settlement and trial preparation.

Normally the plaintiff's attorney will also seek other information which will be valuable to the preparation of his case. Several methods of discovery may be used. He may acquire this information by sending interrogatories to the defendant pursuant to Ohio Rule 33.[23] It is permissible to request the names and addresses of all witnesses to the accident.[24] Further, he can inquire as to the name and address of any person who was present, or claims to have been present, at the scene of the accident. Since the defendant's insurance company has conducted the investigation of the accident, it is extremely unlikely that the defendant will have this information. If this is the case, he may technically answer that he cannot provide any names or addresses, though the requested information is within the knowledge of the non-party insurer. Obviously, permitting the insurer to be joined as a party-defendant, at least during discovery, would rectify this inequitable situation. It may be argued that this result can be achieved by liberally construing the party limitation of Rule 33 to include the insurer within the definition of "party." Many courts, however, have construed Rule 33 in a technical, literal sense, thereby precluding the plaintiff from effectively using the interrogatory as a discovery tool. For example, the court in *Ju Shu Cheung v. Dulles*[25] held that a next friend was not a party subject to interrogation under Rule 33, and that the proper method to use was the deposition upon written questions.[26] Similarly, where the Labor Department brought a suit on behalf of two persons, they were not considered parties, and the court therefore held that they could not be required to answer interrogatories.[27]

Fortunately, not all courts have assigned such a restrictive interpretation to the word "party" in Rule 33. In a situation the con-

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[23] OHIO R. CIV. P. 33 provides that any *party* may serve any other *party* with written interrogatories to be answered by the party served. Therefore, assuming the plaintiff cannot join the defendant's insurer, he may serve interrogatories only on the defendant. The matters which may be explored are subject to the scope of discovery set forth in Rule 26(B).

[24] OHIO R. CIV. P. 26(B)(1). *See* 1 J. MCCORMAC, ANDERSON'S OHIO CIVIL PRACTICE § 6.85, at 416 (1971).

[25] 16 F.R.D. 550, 552 (D. Mass. 1954).

[26] FED. R. CIV. P. 31. Ohio Rule 31, in pertinent part, is the same as its federal counterpart. Rule 31 provides a poor substitute for discovery by means of interrogatories, however, due to the additional time and expense involved in the requirement that an officer implement the Rule and administer the questions. *See* OHIO R. CIV. P. 31(B).

[27] Wirtz v. I. C. Harris & Co., 36 F.R.D. 116 (E.D. Mich. 1964).

verse of our hypothetical, a federal district court, noting that the wrong was done to the assignor and that the plaintiff-insurer would need the assignor's testimony to prove its claim anyway, held that an insurer-assignee suing as a plaintiff was required to answer interrogatories concerning the operation of the assignor's company.[28] Since in subrogation cases the assignee-insurer rarely has personal knowledge of the operative facts, the court felt that "[t]o allow [the insurance company] to be insulated from answering these interrogatories on the basis of lack of personal knowledge would not be in accord with the objective of the Rules."[29]

Thus it is arguable that even though Rule 33 is technically limited to parties, this fact should not preclude a plaintiff from obtaining information otherwise discoverable and held by one in close relation to a party.[30] Such an extension of the "party" requirement was made in *Wycoff v. Nichols*[31] where the plaintiff's interrogatory sought only the *personal* knowledge of the defendant. The court stated that had the question sought merely the "identity and location of persons having knowledge of relevant facts" without reference to the defendant's personal knowledge, all available information would have to be supplied, including that possessed by the defendant's attorney, investigators, insurer, or other agent or representative "whether personally known to the defendant or not."[32] Similarly, the court in *Gaynor v. Atlantic Greyhound Corp.*,[33] approved an interrogatory calling for ". . . all the facts relating to the alleged accident to the plaintiff, his injuries and his claim for damages, as to which you *or your underwriters* have obtained information through witnesses, agents, or representatives."[34] This interrogatory was approved to facilitate pretrial discovery by eliminating overly detailed questions which were burdensome to answer.

Very few cases have been reported in Ohio that deal with the discovery procedures of the new Rules. One of particular significance is *Jira v. Erie-Lackawanna R.R.*,[35] which involved an auto collision in which the plaintiff sought the names of witnesses which

[28] Firemans Mut. Ins. Co. v. Erie-Lackawanna R.R., 35 F.R.D. 297 (N.D. Ohio 1964).

[29] *Id.* at 299.

[30] *See* Note, *1967 Proposed Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 288 (1968).

[31] 32 F.R.D. 370 (W.D. Mo. 1963).

[32] *Id.* at 371-72.

[33] 11 FED. RULES SERV. 26b.211 Case 6 at 554 (E.D. Pa. 1948).

[34] *Id.* (emphasis added).

[35] 25 Ohio Misc. 161 (C.P. 1970).

had been obtained by the defendant's representative. The court approved a broad interpretation of the Rules and ordered the names of the witness revealed, stating that "a party should not be forced to take depositions of the witnesses and seek to obtain copies of their statements by means of subpoenas duces tecum under Rule 45. Such procedure would only serve to promote circuity of pre-trial proceedings."[36]

Therefore, a liberal interpretation of the party limitation of Rule 33 will ensure that the plaintiff can obtain the information he seeks by permitting him to serve interrogatories on the defendant's liability insurer. However, conditioning the plaintiff's access to this information via the use of interrogatories on the vagaries of judicial acceptance of such a liberal interpretation has obvious shortcomings, as evidenced by the numerous courts which have given Rule 33 a narrow, technical reading. Clearly, permitting the joinder of the insurer appears to be the preferable method of ensuring the plaintiff's access to information held by the insurer.

A similar, yet more complex problem is involved in our hypothetical plaintiff's potential use of Rule 34 for the production of documents and tangible things. Again, this Rule literally applies only to parties, but it is further limited to documents or things within "the possession, custody or control of the party."[37] Therefore, in addition to definitional difficulties concerning who is or should be a "party," Rule 34 presents similar problems regarding the meaning and scope of "possession," "custody," and "control."[38] In *Thomas v. Nuss*[39] the plaintiff moved for production of statements made by prospective witnesses to the automobile accident involved, which information was in the hands of the defendant's insurer. The court of appeals affirmed the district court's denial of the request on the grounds that Rule 34 is limited to actual parties to the proceeding and that the plaintiff had failed to show good cause. A strict reading of Federal Rule 34 was also given by the court in

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[36] *Id.* at 168-69. *See* note 49 *infra.*

[37] OHIO R. CIV. P. 34(A).

[38] In addition, documents and tangible things sought to be obtained under Ohio Rule 34 must be within the scope of discovery set forth in Rule 26(B). Therefore the qualified work-product immunity provided to trial preparation materials by Rule 26 (B)(3) will be applicable to all requests for the discovery of such materials under Rule 34. This is also true under the current Federal Rule 34. Prior to the 1970 amendments, however, Federal Rule 34 contained a good cause requirement, applicable to the attempted discovery of all documents and tangible things, whether or not prepared in anticipation of litigation or trial. This requirement is now contained in Federal Rule 26 (b)(3), and is applicable only to trial preparation materials. *See* note 18 *supra.*

[39] 353 F.2d 257 (6th Cir. 1965).

Poppino v. Jones Store Co.,[40] where the plaintiff sought certain physicians' reports and statements obtained by an insurance company. The court stated that documents secured by the insurer need not be produced since they were in the possession of the insurer's attorney and there was no evidence that they were in the defendant's custody. Similarly, in *Bredice v. Doctors Hospital, Inc.*,[41] the court protected reports given by a hospital to its malpractice insurer after suit was filed.[42] The court reasoned that such reports from the insured to the insurer were going to be used by the insurer's attorney, and, therefore, fell within the attorney's "work product." Thus the work product rule was extended to cover material in the control of the insurer. It would seem that if the insurer had originally been joined as a party, the reports would have been available to the plaintiff under Rule 34.[43]

In a factual situation the converse of our hypothetical, the court in *Read v. Ulmer*[44] held that even though the insurer replaces the insured to the extent of the policy limits in litigation under Louisiana's direct action statute,[45] the insurance company does not control and cannot be required to produce things held by its insured. In *Read*, the defendant was the insurer, and the non-party controlling relevant information was the insured. The result, however, was the same as in our hypothetical: information could not be secured through Rule 34 from a non-party.

There is a parallel line of Rule 34 cases, however, which would allow the plaintiff to obtain the information sought from the defendant's insurer. For example, in *Bingle v. Liggett Drug Co.*[46] a literal, mechanical interpretation of Federal Rule 34 was expressly rejected. Realizing that as a practical matter the insurer was the real litigant, the court said: "To hold that statements obtained by [the

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[40] 1 F.R.D. 215 (W.D. Mo. 1940).

[41] 50 F.R.D. 249 (D.D.C. 1970).

[42] The court also refused to allow discovery under Federal Rule 34 of hospital staff meeting reports, invoking the policy of protecting the public interest in allowing doctors to self-criticize in privacy and thus attaching a qualified privilege to such reports. The court also noted that the plaintiff had failed to demonstrate the existence of good cause for the production of either set of reports.

[43] *Bredice* was decided before the 1970 amendments to the Federal Rules became effective. Today, under Federal Rule 26(b)(3), a qualified immunity might attach to the reports in the insurer's possession if they were prepared in anticipation of trial. *See* note 38 *supra.*

[44] 308 F.2d 915, 918 (5th Cir. 1962). *See* Security Mut. Cas. Co. v. Rich, 20 F.R.D. 112 (W.D. Pa. 1956).

[45] LA. REV. STAT. ANN. § 22:655 (1962).

[46] 11 F.R.D. 593 (D. Mass. 1951).

insurer] are immune from discovery would make possible the evasion of Rule 34 on the many occasions on which a defendant's case is actually prepared and controlled by a liability insurer."[47] Similarly, in *Simper v. Trimble*,[48] another automobile accident case, the court, taking a liberal view of both the party and control limitations, declared that the plaintiff's motion under Rule 34 would not be denied even if the material sought were in the hands of the insurer. Since "[f]or all practical purposes [the insurer] is . . . an actual party to the litigation . . . it should be subject to the . . . rules of procedure . . . especially with respect to discovery."[49] And in *State Farm Insurance Co. v. Roberts*,[50] where the plaintiff sought material within the possession of the defendant's insurer, the Supreme Court of Arizona held that for the purposes of discovery under Arizona Rule 34, the insurance company stood in the position of a party.[51]

The import of these cases which liberally construe the party and control limitations of Rule 34 is that even though the insurer is not joined, discovery of documents or tangible things is allowed, and the plaintiff is able to obtain the information he needs to adequately prepare and conduct his case.[52] These cases again demonstrate that a liberal judicial interpretation may aid the plaintiff and guarantee the realization of the rationale underlying discovery, while at the same time shielding the defendant's insurer from being joined as a party. However, the contrary decisions discussed earlier, which narrowly construed Rule 34, demonstrate equally well the inadequacy of leaving to the courts the decision as to whether the plaintiff can obtain information from the defendant's insurer under Rule

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[47] *Id.* at 594.

[48] 9 F.R.D. 598 (W.D. Mo. 1949).

[49] *Id.* at 600. Professor Moore, commenting on *Simper v. Trimble* and similar cases, noted:

> While these latter decisions stretch the concept of possession or control rather far, from a practical point of view they are believed to be sound. The party could obtain the documents by use of Rules 26 and 45 instead of Rule 34, but this seems unnecessarily complicated in such a situation.

4A J. MOORE, FEDERAL PRACTICE ¶ 34.17, at 34-100 n.9 (2d ed. 1972). *See* 107 U. PA. L. REV. 103, 105 (1958), which in discussing the meaning of "control" in Federal Rule 34, concludes that "within the control" of a party has been defined as anything which the party may legally obtain.

[50] 97 Ariz. 169, 177, 398 P.2d 671, 676 (1965).

[51] *See* Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959); Martin v. N. V. Nederlandsche-Amerikansche St. M., 8 F.R.D. 363 (S.D.N.Y. 1948); Rockett v. John J. Casale Inc., 7 F.R.D. 575 (S.D.N.Y. 1947).

[52] A liberal interpretation of the party and control requirements of Rule 34 will allow discovery only so long as the materials sought are within the scope of discovery set forth in Rule 26(B)(3). *See* note 38 *supra.*

34. Only by permitting the insurer to be joined, at least for the purposes of discovery, can the plaintiff be assured full discovery.

It may be argued, however, that the plaintiff has alternative means by which to obtain the information he seeks from the defendant's insurer since not all discovery devices are limited to parties. He may proceed by taking the deposition of the non-party insurer under Rule 30,[53] compelling the insurer's attendance by means of a subpoena if necessary.[54] The plaintiff may also subpoena tangible evidence to be presented at the deposition.[55] Or, alternatively he may take testimony by means of a deposition upon written questions under Rule 31.[56] These Rules are not limited to parties and may be used to acquire information from the non-party insurer. The exclusive use of these Rules, however, rather than the use of Rules 33 and 34, entails certain limitations and drawbacks for the injured plaintiff.

First of all, the use of non-party methods may prove more time-consuming and costly than the use of Rules 33 and 34.[57] For example, if the plaintiff desires to obtain documentary evidence, he must use a subpoena duces tecum under the non-party discovery Rules, whereas if the insurer were a party or were treated as one, an extra-judicial request under Rule 34 would preclude the unnecessary expense and procedure involved in using a subpoena.[58] The cost of an attorney's time and a transcript and the additional use of a subpoena necessitated by the use of Rules 30 and 45 is a circuitous and expensive route to information readily obtainable if the insurer were a party.[59] Therefore, assuming the plaintiff's needs may be satisfied by the use of Rule 34, preventing him from using it to obtain information from the defendant's insurer results in placing an increased burden on his attempted discovery. Secondly, the effectiveness of Rule 31 (applicable to parties and non-parties) is questionable. A relatively recent survey has shown that depositions

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[53] OHIO R. CIV. P. 30.

[54] *Id.* 45(A).

[55] *Id.* 45(B).

[56] *Id.* 31.

[57] *See* note 26 *supra.* Although it is more expensive, the use of an oral deposition (Rule 30) may be preferable to the use of written interrogatories (Rule 33) because it forces the deponent to answer spontaneously. Answers to interrogatories are normally prepared by the attorney representing the party served.

[58] OHIO R. CIV. P. 30(B)(4) provides that "[t]he notice to a *party deponent* may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition" (emphasis added).

[59] *See* note 49 *supra.*

upon written questions are used in only about 2 percent of all civil cases.[60] Again, an officer or notary expense will be incurred, and Rule 31 also prevents the plaintiff from acquiring spontaneous and unrehearsed answers to his questions.

The foregoing analysis of the relation of the discovery Rules to insurance litigation has noted that some courts may be disposed to apply the party Rules strictly. Sufficient authority exists, however, in *Jira v. Erie-Lackawanna R.R.*[61] and similar cases for the Ohio courts to avoid so technical a reading of these Rules. While this would moot the distinction between the party and non-party Rules, thereby permitting the plaintiff access to the defendant's insurer under any and all of the discovery Rules, there is no assurance that Ohio courts will follow this reasoning. For, as was noted by the Federal Advisory Committee, "While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex."[62] By allowing the plaintiff to join the insurer as a party-defendant, at least for pleading and discovery purposes, judicial discretion would be minimized and complete discovery maximized. By recognizing that, in reality, the insurer is a party,[63] pretrial discovery and procedure would be facilitated and unnecessary duplication of lawsuits would be avoided. A broad reading of Ohio Rules 18(B) and 20(A) may permit such a procedure. However, traditionally there has been slim legal support for such joinder both in Ohio and other jurisdictions.

III. General Arguments Concerning Joinder of or Direct Action Against an Insurer[64]

Since privity of contract generally does not exist between an injured plaintiff and the defendant's liability insurer, joinder of the in-

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60 Columbia University Project for Effective Justice, Field Study of Pretrial Discovery VII-4 (1965).

61 25 Ohio Misc. 161 (C.P. 1970). *See* text accompanying notes 35-36 *supra.*

62 Federal Advisory Comm. Note to Rule 34(c), 48 F.R.D. at 487 (1967).

63 *See* note 74 *infra.*

64 For an extensive discussion of the general problems involved when direct action against or joinder of an insurance company is attempted see 8 J. Appleman, Insurance Law and Practice § 4851 (1962); Lassiter, *Direct Actions Against the Insurer*, 1949 Ins. L.J. 411 (1949); MacDonald, *Direct Action Against Liability Insurance Companies*, 1957 Wis. L. Rev. 612 (1957); Comment, *Direct Actions*, *supra* note 11; Note, *Direct Action Against the Liability Insurer: A Legislative Approach for Florida*, 23 U. Fla. L. Rev. 304 (1971); Note, *Binding the Insurer*, 27 Wash. & Lee L. Rev. 93 (1970).

surer as a party has not been permitted.[65] The traditional argument against joinder has been that a liability insurance agreement is a private contract to protect and benefit the insured. This interpretation of the insurance contract has limited the plaintiff to an action originally only against the tortfeasor. Also, the fault concept of automobile litigation, present in most states, has limited the plaintiff's action to one solely against the tortfeasor.[66] Since the insurance company has committed no tort and is interested only financially in the outcome of the case, traditional procedure has not permitted joinder.

Not all states, however, have limited themselves to these interpretations. Some states by statute have permitted a direct action against the defendant's insurer.[67] The purpose of such statutes is to allow the injured party to directly sue the insurer in order to be compensated for his damages.[68] Other states have judicially recognized the right of the injured party to proceed directly against the insurer.[69] The vast majority of states, however, do not permit direct actions, and still adhere to traditional arguments against permitting the plaintiff to initially bring the insurer into the case under any circumstances.[70]

Perhaps the most comprehensive case negating many of the traditional reasons offered for disallowing joinder is the Florida Supreme Court decision in *Shingleton v. Bussey.*[71] In allowing joinder, *Shingleton* rejected the private theory of automobile insurance as

[65] Kowalski v. Holden, 276 F.2d 359 (6th Cir. 1960); Mertes v. Cent. Security Mut. Ins. Co., 103 Ill. App. 2d, 171, 242 N.E.2d 905 (1968); Sterns v. Graves, 61 Idaho 232, 242, 99 P.2d 955, 958 (1940).

[66] No-fault insurance plans, currently being adopted by several states, reject the fault concept, and, therefore, nullify the validity of this argument against joinder. *See* note 95 *infra.*

[67] *E.g.*, WIS. STAT. ANN. § 260.11(1) (Supp. 1969); LA. REV. STAT. ANN. § 22:655 (1962).

[68] A direct action against the insurer is slightly different from joinder, where both the alleged tortfeasor and his insurer are named as parties-defendant. Under a direct action statute, the plaintiff may proceed directly against the defendant's insurer; there may be no need to join the insured as a party.

[69] Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); James v. Young, 77 N.D. 451, 42 N.W.2d 692 (1950); Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809 (1933). *Cf.* Breeden v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954), in which the court did not overtly condone a direct action against the insurer but construed a city ordinance that required taxis to carry a surety bond or insurance policy as allowing a direct action by an injured party.

[70] There are signs, however, that the traditional role of the liability insurer is being questioned. The primary example of this new view is the current interest in no-fault insurance as an alternative to the present fault-based system. *See* note 95 *infra.*

[71] 223 So. 2d 713 (Fla. 1969). *See* Note, *Direct Action Against the Liability Insurer, supra* note 64, at 316.

inconsistent with public policy, and advanced several reasons for overturning the non-joinder approach the Florida courts had previously taken.[72] Primarily, the majority viewed the injured plaintiff as a third-party beneficiary to the contract between the insured and insurer.[73] Secondly, the court reasoned that because the insurance company hires the attorney, conducts the investigation, and controls the course of possible litigation, it is the real party in interest.[74]

The *Shingleton* court also addressed itself to one of the most persistent bars to the joinder of insurance companies, the "no-action" clause.[75] Hurdling this clause has been a constant problem facing the injured plaintiff. The effect of a "no-action" clause is to preclude any direct action against the insurer, or any joinder of the insurer as a party, until the insured's liability has been determined. No action may be taken to collect a judgment from the insurer until after the insured's liability is first established. Most jurisdictions have repeatedly recognized and affirmed the validity of the "no-

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[72] 223 So. 2d at 713. The court explicitly overruled Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936).

[73] 223 So. 2d at 715.

[74] *Id.* at 718. *See* remarks of Marvin Harrison, *supra* note 1:

> What part does the insurance company play?
> It investigates the accident.
> It talks with the witnesses.
> It hires the experts.
> It employs the lawyer.
> It controls the preparation of the pleadings.
> It determines the strategy of the trial and decides whether there shall be attempts at continuance — or attempts for immediate trial.
> It pays the costs of the trial.
> It controls the taking of depositions before trial.
> It controls all negotiations for settlement; and (subject to its policy limits) pays the amount of any settlement or judgment.
> It determines whether or not adverse judgments should be appealed.
>
> Anybody who does all of those things may perhaps be baptized with many different names. But there is one thing that is sure — no matter what else you may call him — *he is in fact the real defendant.* And if the law pretends that he is not, then the law, in the picturesque but forcible language of Mr. Bumble, is certainly an ass.

Id. at 78 (emphasis added).

[75] A standard "no-action" clause would read as follows:

> No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all 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. . . .
>
> 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 the Insured's liability, nor shall the Company be impleaded by the Insured or his legal representative.

See Comment, *Direct Actions*, *supra* note 11, at 540-42.

action" clause.[76] *Shingleton* disposed of this barrier on policy grounds, stating that:

> It is unrealistic that mass liability insurance coverage designed to afford protective benefits for the general public should contain such a condition precedent, [the "no-action" clause], as a barrier to the right of identified members of the protected class to pursue a speedy, realistic and adequate recovery action.[77]

The "no-action" clause has also been invalidated by some courts when faced with an impleader situation, which arises in cases where the insurer either disclaims coverage and refuses to defend the insured or insists it has no duty to defend under specific policy provisions. Although the insured may then implead his insurer under Rule 14,[78] the insurer can invoke the "no-action" clause to escape from being impleaded. Some courts have refused, however, to permit the use of the "no-action" clause to nullify the insured's right to utilize Rule 14.[79]

> [The no-action clause] poses a question as to whether the court should permit litigants to circumvent rules of court by contractual arrangements. Rule 14 was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. 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.[80]

Since "no-action" clauses may be negated in the impleader situation, it is arguable that an injured party should also be able to

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[76] Sumait v. Capital Fire & Cas. Co., 296 F.2d 108 (9th Cir. 1961); Joyce v. Central Sur. & Ins. Corp., 321 S.W.2d 272 (Mo. App. 1959); Crowley v. Hardman, 223 P.2d 1045 (Colo. 1950); Degnan v. Rhode Island Mut. Liability Ins. Co., 51 R.I. 366, 154 A. 912 (1931); Smith Storage Co. v. Eckert, 21 Ariz. 28, 184 P. 1001 (1919).

[77] 223 So. 2d at 717. *See* Oertel v. Williams, 251 N.W. 465 (Wis. 1933).

[78] OHIO R. CIV. P. 14 and FED. R. CIV. P. 14, in pertinent part, are identical. Impleading the insurer does not place it in the position of a joint tortfeasor, but merely joins the insurer as one who may be responsible for all or part of any judgment rendered. *See* 6 C. WRIGHT & A. MILLER, *supra* note 16, § 1449, at 267; DeParcq & Wright, *Impleader of Defendant's Insurer Under Modern Pleading Rules*, 38 MINN. L. REV. 229 (1954); Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 615-17 (1952).

[79] Government Employees Ins. Co. v. United States, 400 F.2d 172 (10th Cir. 1968); Green v. Shepherd Constr. Co., 46 F.R.D. 434 (D. Ga. 1969); Pioneer Mut. Compensation Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952); Hipp v. Kansas City Pub. Serv. Co., 237 S.W.2d 928 (Mo. Ct. App. 1951).

[80] Jordan v. Stephens, 7 F.R.D. 140, 142 (W.D. Mo. 1945). *See* Comment, *Direct Actions*, *supra* note 11, at 542.

circumvent such clauses in the joinder situation, especially in light of the policy arguments used in *Shingleton*. In both the impleader[81] and joinder[82] situations, the insurer is brought into the suit not as a tortfeasor but as a party whose liability is contingent. Therefore, the rationale for permitting the insurer to be impleaded in the face of a "no-action" clause would appear to apply equally to joinder.

Another traditional argument for non-joinder has been that the insurance company will be unduly prejudiced if the jury is aware that the defendant is insured.[83] This fear is certainly not groundless, given the fact that it is arguably much easier for the jury to render a higher verdict for a plaintiff if they feel the "deep pocket" of a large insurance company will be footing the bill. In most trials even the slightest mention of insurance coverage is prohibited.[84]

Although definitive empirical evidence concerning the thought processes of jurors is scanty, the University of Chicago Jury Project is of particular significance.[85] The study found that the lowest jury awards were against uninsured defendants. Awards were higher when the jury learned that the defendant was insured and highest when defense counsel objected to the mention of such insurance.[86] Although this study indicates that the presence of insurance affects the size of money judgments, the results should not be taken as definitive.[87] Professor Kalven, the project's director, indicated that knowledge of the existence of insurance may influence the outcome only when the jury is in serious doubt. Evidently the jurors would rather resolve their doubts against insurance companies than risk

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[81] *See* note 78 *supra*.

[82] *See* notes 118-19 *infra* & accompanying text.

[83] Jennings v. Beach, 1 F.R.D. 442 (D. Mass. 1940). *Contra* United States v. Cisco Aircraft, Inc., 54 F.R.D. 181 (D. Mont. 1972). *See generally* C. MCCORMACK, EVIDENCE § 168 (1954); Comment, *Direct Actions*, *supra* note 11, at 535-40.

[84] 8 J. APPLEMAN, *supra* note 64, at § 4861. *See* Comment, *Direct Actions*, *supra* note 11, at 537 & n.75.

[85] Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959). This study employed experimental juries who heard tape recordings of mock trials that were based upon actual trials. The case presented to the jury involved an auto accident in which the plaintiff, a 40-year-old stenographer, was injured when the car in which she was riding as a passenger collided with a car driven by the defendant.

[86] When the defendant revealed that he had no insurance, the average jury award was $33,000. The jury's award rose to $37,000 when the fact that the defendant was insured was revealed to the jury without defense objections. The highest awards, averaging $46,000, occurred when the judge sustained defense objections to the revelation of the fact that the defendant was insured and instructed the jury to disregard this fact. *Id.* at 754.

[87] Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 171-72 (1958). *See* Comment, *Direct Actions*, *supra* note 11, at 539.

error against the injured plaintiff.[88] Although the study adds credence to the "deep pocket" objection against joinder, several factors weigh against continued acceptance of this rationale.

First, it may be incorrect to assume that juries *now* do not consider, or are ignorant of, the presence of insurance.[89] The *Shingleton* court dealt with this problem by noting that the modern jury is sophisticated enough to render an honest judgment and that disclosure of the existence of insurance promotes intellectual honesty.[90] Secondly, there is no evidence that the verdicts in the direct-action states are significantly higher than in non-joinder states.[91] Thirdly, practically speaking, the existence of insurance may be indirectly interjected at trial by suggestive *voir dire* when impaneling the jury,[92] or, in certain instances, during the trial itself.[93] Fourth, there is no reason to assume that the jury will treat an insurance company any differently than any large corporation which is a defendant in a lawsuit. Finally, and perhaps most importantly, the insurer need not be prejudiced at all since the court may order separate trials under Federal Rules 20(b) and 42(b) or their state enacted equivalent.[94]

One strong argument against joinder remains: that the purpose and function of the trial is to determine fault and liability, not the ability to pay. Since the vast majority of jurisdictions still adhere to the fault concept for automobile accident litigation,[95] it may be argued that it is impossible to justify making the insur-

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[88] Kalven, *supra* note 87, at 171-72.

[89] *Id.*

[90] Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969).

[91] *See* Comment, *Direct Actions*, *supra* note 11, at 539-40.

[92] It has been held permissible for a plaintiff's attorney to ask prospective jurors, in good faith, whether they are interested in a particular insurance company or in any insurance company. *See* Mayer v. Sampson, 402 P.2d 185 (Colo. 1965); Brown v. Parker, 375 S.W.2d 594 (Mo. Ct. App. 1964); Swift v. Winkler, 307 P.2d 666 (Cal. Ct. App. 1957). *See generally* Kabb, *Insurance Questions in Voir Dire*, 17 CLEV.-MAR. L. REV. 504 (1968).

[93] *See* Comment, *Direct Actions*, *supra* note 11, at 536-38.

[94] United States v. Cisco Aircraft, Inc., 54 F.R.D. 181, 182 (D. Mont. 1972).

[95] It is not within the scope of this Note to examine the related controversy surrounding "no-fault" insurance. Suffice it to say that the adoption of some form of no-fault insurance would undoubtedly reduce the volume of cases in which joinder would be at issue, but since several of the no-fault plans have some dollar limit or option to sue for other damages, the issue of direct action or joinder would not be completely mooted. *See* Ghiardi & Kircher, *Automobile Insurance Reparations Plans: An Analysis of Eight Existing Laws*, 55 MARQ. L. REV. 1, 3-4 (1972). *See generally* W. ROKES, NO-FAULT INSURANCE (1971); *Symposium on No-Fault Automobile Insurance — Perspectives on the Problems and the Plans*, 21 CATHOLIC U. L. REV. 259 (1972); Comment, *No-Fault Insurance*, 39 TENN. L. REV. 132 (1971).

ance company a party when their fault, or lack thereof, is not at issue. In light of the impleader situation, however, where the insurer may be brought into the case notwithstanding the fault concept, the validity of this argument appears to be greatly diminished.[96] In any event, it is possible to remain true to the fault concept, while at the same time providing the plaintiff with the benefits of joinder — the opportunity to obtain all the information necessary for the preparation of his case in a non-burdensome manner — by permitting the defendant's insurer to be joined solely for the purposes of discovery. Moreover, since under Rule 18(B) relief can only be granted in accordance with the "relative substantive rights of the parties," permitting the insurer to be joined will have no adverse effects upon its rights.[97]

IV. JOINDER IN OHIO

A. *Prior to the New Rules of Civil Procedure*

As a general rule Ohio courts have consistently adhered to all of the traditional arguments against allowing joinder of insurance companies.[98] Actions involving liability insurers have been regulated by O.R.C. section 3929.06,[99] which provides that when a plaintiff obtains a judgment against an insured defendant, he has a right to have the insurance proceeds applied in satisfaction thereof. If the judgment is not satisfied within 30 days, the statute grants the plaintiff a direct cause of action against the insurer. In other words,

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[96] *See* notes 78-82 *supra* & accompanying text.

[97] *See* notes 118-119 *infra* & accompanying text.

[98] *See* notes 64-95 *supra* & accompanying text.

[99] OHIO REV. CODE ANN. § 3929.06 (Page 1971) provides:

> Upon the recovery of a final judgment against any firm, person, or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, or for loss or damage to a person on account of bodily injury to his wife or minor child or children, if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental petition in the action in which said judgment was rendered, in which the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action.

section 3929.06, in effect, operates as a codified "no-action" clause. It precludes the injured party from initiating any action against the insurer until a final determination of his claim against the insured is rendered.

The significance of the statute was evidenced in *Celina Mutual Insurance Co. v. Sadler*,[100] where the court in a declaratory judgment action stated that in the absence of provisions in the policy or an intention shown to the contrary, the provisions of this statute are to be considered a part of the *lex loci contractus* governing the insurance contract.[101] This holding indicated that the statute will govern any attempted action by an injured party who desires to proceed against the defendant's insurer prior to obtaining judgment against the insured. Thus the statute, its interpretation, and the "no-action" clause have had the identical result of precluding any action in Ohio against the insurer until the insured's obligation to pay has been finally adjudicated.

Prior to the enactment of the new Rules, an equally important impediment to the joinder of an insurance company in Ohio was O.R.C. section 2309.05,[102] which governed the joinder of causes of action. While the statute permitted the joining of legal and equitable claims against a party,[103] there was no indication that joinder of an insured and his insurer was permitted.[104] This pleading statute, read in conjunction with the statute governing procedure against insurance companies,[105] effectively prohibited any joinder or direct action against the insurer.

In addition to these statutes, the Ohio case law also seems to have precluded any possibility of joinder prior to the new Rules The arguments successfully advanced in *Shingleton v. Bussey*[106] have not been favorably received by Ohio courts. The court in *State Auto Mutual Insurance Co. v. Columbus Motor Express*[107] specifically declared that a liability insurance policy should not be construed as being for the benefit of a third person, and stated

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100 6 Ohio App. 2d 161, 217 N.E.2d 255 (1966).

101 *Id.* at 166, 217 N.E.2d at 258. The holding of *Celina* was heavily criticized in St. Paul Fire & Marine Ins. Co. v. State, 25 Ohio Misc. 26 (C.P. 1970).

102 OHIO REV. CODE ANN. § 2309.05 (Page 1963). This statute was replaced by OHIO R. CIV. P. 18.

103 Bingham v. Nypano R.R., 112 Ohio St. 115, 147 N.E. 1 (1925). *See* Comment, *Joinder of Causes of Action in Ohio*, 1 TOLEDO L. REV. 406 (1969).

104 *See* 1 S. JACOBY, *supra* note 7, at 167.

105 OHIO REV. CODE ANN. § 3929.06 (Page 1971).

106 223 So. 2d 713 (Fla. 1969). *See* notes 71-77 *supra* & accompanying text.

107 15 Ohio L. Abs. 747 (Ct. App. 1933).

that it was not intended to give the injured party a right of action against the insurer. In Ohio, the insurer's liability existed only if the claim against the tortfeasor had been reduced to a final judgment. Although Ohio courts have recognized that the injured party has a "substantial right or interest" in the contract,[108] they have been unwilling to allow a direct action to enforce the right. Similarly Ohio evidentiary law also conforms to the majority of jurisdictions in not allowing the fact of insurance coverage to be mentioned at trial.[109] However, proper *voir dire* questions which suggest the defendant is insured have been permitted.[110]

B. *Joinder in Ohio Subsequent to the New Rules*[111]

As discussed previously, the principal bar to the joinder of a liability insurer as a party-defendant in Ohio has been section 3929.06, O.R.C. However, the enactment of the new Rules, especially the broad language of Rule 18(B), coupled with Rule 20(A), may provide the means for allowing such joinder.

Article IV, section 5(B) of the Ohio Constitution provides that the "Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . *All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.*"[112] Therefore, if Rule 18(B) is a valid exercise of the Court's rule-making power, that is, if it does not affect any substantive right, and if section 3929.06 conflicts with it, the courts

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[108] Hartford Acc. & Indem. Co. v. Randall, 125 Ohio St. 581, 585-86, 183 N.E. 433, 435 (1932); Evans v. Grange Mut. Cas. Co., 12 Ohio Misc. 108, 230 N.E.2d 751 (C.P. 1964).

[109] Frank v. Corcoran, 25 Ohio App. 356, 158 N.E. 501 (1926).

[110] Krupp v. Poor, 24 Ohio St. 2d 123, 265 N.E.2d 268 (1970); Black v. Port, Inc., 202 N.E.2d 638 (Ohio Ct. App. 1963); Fout v. Holland, 7 Ohio Op. 2d 21, 145 N.E.2d 476 (1956).

[111] One ancillary problem to joining the insurer as a party which should be mentioned concerns service of process. The focus of this Note is on the Ohio Civil Rules and Ohio practice. To a certain degree such a discussion presupposes available service both on the tortfeasor-defendant and his insurer, if the insurer is to be joined as a party. An out-of-state insurer who maintains a policy covering an Ohio resident would be amenable to proper service under the "minimum contacts" theory of International Shoe Co. v. Washington, 326 U.S. 310 (1945). If, however, both the alleged tortfeasor and his insurer are fom out of state, the plaintiff may be unable to perfect service upon the insurer — the requisite minimum contact would be nonexistent. Perhaps the minimum contacts theory could be extended by arguing that if the insurer by contract is bound to defend the insured in Ohio then sufficient contact with the state has been established. For a more detailed examination of this particular problem see Note, *Direct Action Against Liability Insurer*, *supra* note 64, at 322-25.

[112] OHIO CONST. art. IV, § 5(B) (emphasis added).

have the authority and the responsibility to judicially disregard section 3929.06 and to allow the plaintiff to join his contingent claim against the insurer with his claim against the insured.[113] And if he can join these claims, the plaintiff can utilize Rule 20(A) to join the insurer as a party.

There is no doubt that the literal language of 18(B), "Whenever 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," encompasses the two-step procedure set forth in section 3929.06. Since the statute, therefore, conflicts with the Rule, the Rule, if valid in the joinder situation, will supersede it and be applicable. The relevant inquiry is whether allowing joinder under Rule 18(B) is substantive or procedural, which boils down to whether it will infringe any substantive right of the insurer.

The Ohio courts have not dealt directly with the issue of whether joinder of a particular party is substantive or procedural in nature. Attempts to define these nebulous and overlapping terms have occurred in situations where joinder was not involved. The Ohio Supreme Court applied a standard definition when it stated that "It is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress."[114] Under such a definition, joinder under Rule 18(B), in the abstract, is clearly procedural rather than substantive;[115] it covers the "who" and "how" of a lawsuit rather than the "what."[116] This provides no indication, however, of whether permitting the insurer to be joined will affect its substantive rights.

It can be argued that absent Rule 18(B) the plaintiff would be unable to join the insurer, and that, therefore, permitting joinder would negate the insurer's right not to be joined. In reality, how-

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[113] Although section 3929.06 was not expressly repealed or modified by the enactment of the new Rules, the General Assembly has declared that its "failure to repeal or amend any . . . section establishes no evidence concerning its conflict with [the] rules." H. 1201 § 1 (June 11, 1970). *See* OHIO RULES OF COURT 1972 at vii (West 1972).

[114] State *ex rel.* Holdridge v. Indus. Comm'n, 11 Ohio St. 2d 175, 178, 228 N.E.2d 621, 623 (1967). *See* Bagsarian v. Parker Metal Co., 282 F. Supp. 766, 769-70 (N.D. Ohio 1968); *In re* McCombs Estate, 52 Ohio L. Abs. 353, 375, 80 N.E.2d 573, 586 (P. Ct. 1948).

[115] *See* Huntress v. Estate of Huntress, 235 F.2d 205, 208 (7th Cir. 1956).

[116] *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 648 (1957).

ever, the insurer has no such right.[117] Furthermore, whatever rights the insurer has will not be affected by allowing joinder under Rule 18(B), for it expressly provides that, "the court shall grant relief . . . *only in accordance with the relative substantive rights of the parties*."[118] Joining the insurer would, therefore, not affect the substantive liability of the insurer, since it would still not be liable to the plaintiff unless and until he first obtained a judgment against the insured.[119] Moreover, the analogy to the permissibity of joinder in the impleader situation[120] provides yet another indication that the insurer does not have a substantive right not to be joined, especially since its liability under Rule 18(B) will remain contingent upon a judgment being rendered against the insured.[121]

In *Shingleton v. Bussey*,[122] the Florida Supreme Court was faced with the question of whether a court can utilize a Rule of Civil Procedure to permit a personal injury plaintiff to initially assert his claim against the defendant's insurer. By relying on its rulemaking power[123] and fashioning a direct action out of Florida Rule 1.210(a),[124] the court recognized, at least implicitly,[125] that the insurer had no substantive right not to be sued prior to the determination of the insured's liability. Although *Shingleton* involved a direct action rather than joinder, and a Rule different from Ohio Rule 18(B), it is clear that, at least by analogy, the application of

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[117] *See* 6 C. WRIGHT & A. MILLER, *supra* note 16, § 1594, at 833-34.

[118] OHIO R. CIV. P. 18(B) (emphasis added).

[119] *See* Miller's Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93, 104 (10th Cir. 1958); Comment, *Direct Actions*, *supra* note 11, at 527 n.14, 541-42.

[120] *See* notes 78-82 *supra* & accompanying text.

[121] *See* 6 C. WRIGHT & A. MILLER, *supra* note 16, § 1594, at 833-34.

[122] 223 So. 2d 713 (Fla. 1969).

[123] The Florida Supreme Court's rulemaking power, contained in article 5, section 3 of the Florida Constitution, has been construed as being subject to the limitation that Rules may neither abridge, enlarge, nor modify any substantive rights. State v. Furen, 118 So. 2d 6, 12 (Fla. 1960).

[124] FLA. R. CIV. P. 1.210(a) provides:

> Every action may be prosecuted in the name of the real party in interest. . . . All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest may be joined on the same side as plaintiffs or defendants, and when any one refuses to join, he may for such reason be made a defendant.

[125] The issue of whether the insurance company had a substantive right not to be sued directly was most clearly articulated by the *Shingleton* dissent. 223 So. 2d at 721-22.

Rule 18(B) to the contingent insured-insurer situation is mandated under article IV, section 5(B) of the Ohio Constitution.

While recognizing that joinder of parties is essentially procedural in nature, however, many courts, determining that the insurance company has a substantive right not to be joined, have not permitted joinder under Federal Rule 18(b) or its state-enacted equivalent.[126] While the specific reasons relied on by these decisions have varied, it is clear that plaintiffs have had little success in attempting to join insurance companies.

The most significant case in Ohio denying joinder is *Pennsylvania R.R. v. Lattavo Brothers, Inc.*,[127] in which a federal district court specifically held that joinder of an insurer was not permitted under Federal Rules 18(b) and 20(a). Several reasons were offered to sustain the court's holding. The court first observed that the questions of law and fact in the case were related to the collision, not to the insurance contract between the defendant and his insurer. It was noted that, therefore, the plaintiff only had a cause of action against the insurer *after* judgment was decided in his favor. Finally, the court found no statute in Ohio which permitted such joinder of the liability insurer.[128]

Joinder was similarly attempted in *Jennings v. Beach*,[129] where the plaintiffs' attempted use of the broad language of Federal Rule 18(b) was also rejected by the court. However, the reason for such rejection was slightly different than that offered in *Lattavo*. While the court recognized that the question of the joinder of an insurance company was primarily procedural, it did not permit such joinder on the ground that a jury would be unduly prejudiced knowing the verdict would be paid by an insurance company.[130]

[126] Headrick v. Smokey Mountain Stages, Inc., 11 F.R.D. 205 (E.D. Tenn. 1950); Pennsylvania R.R. v. Lattavo Bros., Inc., 9 F.R.D. 205 (N.D. Ohio 1949); Jennings v. Beach, 1 F.R.D. 422 (D. Mass. 1940); Pitcairn v. Rumsey, 32 F. Supp. 146 (W.D. Mich. 1940); Hertz v. Hudson Motor Car Co., 8 F.R.D. 431 (D.D.C. 1939); Crowley v. Hardman Bros., 223 P.2d 1045 (Colo. 1950). *See* Grier v. Tri-State Transit Co., 36 F. Supp. 26 (W.D. La. 1940), *aff'd*, 127 F.2d 719 (5th Cir. 1942). *Contra*, United States v. Cisco Aircraft, Inc., 54 F.R.D. 181 (D. Mont. 1972); Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969). *See* Hickey v. Ins. Co. of N. Am., 239 F. Supp. 109 (E.D. Tenn. 1965).

[127] 9 F.R.D. 205 (N.D. Ohio 1949). The action arose from a collision between defendant's truck and one of plaintiff's trains. Plaintiff joined defendant's insurer under Federal Rules 18(b) and 20(a) and the defendants moved to have the insurer dismissed as a party.

[128] *Id.* at 206. *Lattavo* was cited by the Ohio Rules Advisory Comm. Staff Notes to Rule 18(B) as precluding the joinder of liability insurers under that Rule. *See* note 9 *supra*.

[129] 1 F.R.D. 442 (D. Mass. 1940).

[130] *Id.* at 442.

Recently, however, such reasoning was rejected, and joinder permitted, in *United States v. Cisco Aircraft, Inc.*,[131] where the federal government was suing a governmental contractor and its insurer for damages allegedly caused by the contractor. While recognizing that Montana substantive law provided that the insurer's liability was contingent and that, therefore, it was not yet liable to the government, the court stated that

> Whether a complaint in a federal court states a claim is a matter of federal law and it is clear as a matter of federal procedure that a complaint may state a claim against a defendant before that defendant's contingent liability has become absolute. . . .
>
> The result reached is contrary to Pitcairn v. Rumsey, 32 F. Supp. 146 (W.D. Mich. 1940), and Jennings v. Beach, 1 F.R.D. 442 (D. Mass. 1940), but I believe it to be compelled by the language of Rule 18(b). The fears expressed in those opinions are more imaginary than real since under Rule 18(b) the court may grant relief only in accordance with the substantive rights and under Rule 20(b) and 42(b) the court can, where there is a state policy to that effect, prevent disclosure of the existence of insurance to the jury.[132]

It seems clear that in light of the Supreme Court's holding in *Hanna v. Plumer*,[133] the *Cisco* decision is correct.[134] *Hanna* was one of several federal cases following the landmark decision of *Erie Railroad v. Tompkins*,[135] which announced the broad proposition that in diversity cases the federal courts were to apply substantive state law and federal procedural rules. After this decision the federal courts faced the persistent problem of how to deal with the scope and application of *Erie*. The Court in *Hanna* distinguished *Erie*, stating that the rule set forth there was not the proper one when a Federal Rule of Civil Procedure was applicable. Chief Justice Warren stated:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment and the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[136]

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131 54 F.R.D. 181 (D. Mont. 1972).

132 *Id.* at 182.

133 380 U.S. 460 (1965).

134 *See* 1 S. JACOBY, *supra* note 7, at 167; 3A J. MOORE, *supra* note 49, ¶ 18.08[2], at 2013-14 (2d ed. 1970).

135 304 U.S. 64 (1938). *See generally* C. WRIGHT, *supra* note 12, §§ 54-60.

136 380 U.S. at 471.

In other words, in a diversity case a federal court must apply a Federal Rule of Civil Procedure, if valid, even in the face of contrary state substantive law. This is precisely what the court did in *Cisco*. While it is perhaps arguable that federal diversity cases such as *Lattavo*, which were decided before *Hanna*, were correct when decided, they clearly cannot be controlling today for they looked to factors other than validity of Federal Rule 18(b). Since 18(b) is a valid Rule of procedure,[137] a federal court must apply it in a diversity case and allow the joinder of the defendant's insurer even if doing so will conflict with state substantive law. And although a state court is not faced with the same problems facing a federal court in a diversity case, this is equally true of a state court in a state which has enacted the equivalent of Federal Rule 18(b).[138] This provides yet another means of distinguishing *Lattavo*, for by enacting Rule 18(B), Ohio has provided a statutory means for joining an insurer with its insured. Therefore, *Lattavo*, which rested in part on the fact that Ohio had no such statute and that Ohio law did not permit joinder in a contingent liability situation, can have no effect today, and the Ohio Rules Advisory Committee Staff Note to 18(B),[139] which cited *Lattavo* as authority for disallowing joinder, is clearly erroneous. Ohio Rule 18(B) is a valid procedural Rule which may be used by a plaintiff, along with Rule 20(A), to join the defendant's insurer.[140]

V. CONCLUSION

This Note has considered the desirability and legality of permitting plaintiffs in personal injury litigation to join the defendant's insurance company as a party-defendant. Although traditionally such joinder has not been permitted in Ohio, the new Ohio

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[137] Huntress v. Estate of Huntress, 235 F.2d 205, 208 (7th Cir. 1956).

[138] *See* notes 112-25 *supra* & accompanying text. Article IV, section 5(B) of the Ohio Constitution, which confers rulemaking power on the Ohio Supreme Court, is, in pertinent part, identical to the Rules Enabling Act, 28 U.S.C. § 2072 (1970), which confers such power on the United States Supreme Court. Since Federal Rule 18(b) is valid when measured against the requirements of the Enabling Act, Ohio Rule 18(B), when measured against the Ohio Constitution, is equally valid and must be applied.

[139] *See* note 9 *supra*.

[140] This conclusion is bolstered by considering other contingent liability areas where joinder under Federal Rule 18(b) has been permitted. *See, e.g.*, Miller's Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93, 103-04 (10th Cir. 1958); Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393 (N.D. Ga. 1967); Smith v. Ins. Co. of N. Am., 30 F.R.D. 540, 543-44 (M.D. Tenn. 1962). *Cf.* Ohio Rules Advisory Comm. Staff Note to Rule 19.1. *See generally* 3A J. MOORE, *supra* note 49, ¶ 18.08[1], at 2002-03 (2d ed. 1970); 6 C. WRIGHT & A. MILLER, *supra* note 16, § 1594, at 821-24.

Rules of Civil Procedure provide the legal means for now allowing it.

On balance, policy considerations dictate that the defendant's insurer be joined for the purposes of pleading and discovery. In most cases the insurer, for all practical purposes, is the real party in interest. By contract the insurer assumes the role of the named defendant and proceeds to conduct the investigation, gather information, and direct the defense of the insured. It is the insurer and not the defendant who has access to the relevant information needed by a plaintiff to adequately prepare his case. Yet, if a court is disposed to apply a literal and mechanical interpretation of the party Rules, the plaintiff's ability to utilize these liberal discovery provisions is significantly limited, since he is forced to use the more expensive, time-consuming, and burdensome non-party discovery devices to obtain the information. Whatever the relative merits of such a situation, it appears clear that it thwarts the general scheme established by the discovery Rules, which were intended to offer a litigant alternative methods to obtain the information he seeks. Limiting the use of some of these discovery methods to parties is ordinarily justifiable because the parties have the information sought and such restriction minimizes the burdens placed on non-parties. However, where the non-party is the real party in interest, and where the non-party rather than the named defendant has the necessary information, it is unrealistic and inequitable to permit the non-party to circumvent attempted discovery under the party Rules. Although a liberal interpretation of the party requirements will rectify this situation, and may moot the distinction between the party and non-party Rules, there is presently no way, absent joinder, to ensure such an interpretation. Thus, the only way to eliminate potential judicial hesitancy to liberally construe the party Rules and, therefore, the only way to accord the plaintiff the full benefit of *all* of the discovery devices, is to permit the joinder of the insurer for the purposes of discovery.

Ohio Rule 18(B), when measured against article IV, section 5(B) of the Ohio Constitution, is a valid procedural Rule since it does not "abridge, enlarge, or modify any substantive right." Since Rule 18(B) covers the joinder of the plaintiff's claim against the insured and his contingent claim against the insurer, it may be used, in conjunction with Rule 20(A), to join the insurer as a party-defendant.

Furthermore, the reasons advanced for not permitting joinder

are no longer persuasive. O.R.C. section 3929.06 conflicts with Rule 18(B), and, therefore, is no longer available as a means of precluding the joinder of the insurer. Nor should contractual "no-action" clauses be permitted to negate the effect of Rule 18(B), for to do so deprives the plaintiff of the advantages of joinder while providing the insurer with no real benefits since its liability will remain contingent even if joined. Similarly, any prejudice which the insurer may suffer as a result of being joined can be obviated through the use of separate trials under Rules 20(B), 21, and 42(B).

Thus, permitting the joinder of the defendant's insurer is mandated by the new Ohio Rules of Civil Procedure as well as by a balance of the policy reasons for and against such joinder. Only by allowing it can a result which is equitable to all parties be achieved.

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