Mention of Defendant's Liability Insurance in the Presence of a Jury

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Comment

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I. INTRODUCTION

Lawyers use every available means to persuade juries to find for their clients. This comment deals with one aspect of negligence practice—attempts by a plaintiff’s attorney to introduce evidence of a defendant’s liability insurance. The plaintiff’s attorney may attempt to introduce such evidence in the belief that a jury’s knowledge of a defendant’s coverage will make it easier for the jury to find liability and to make damages larger than it otherwise would.

A general rule prohibits references to the defendant’s liability insurance. Although the general rule is basically sound, there are instances in which it must give way to overriding considerations. Unfortunately, many courts’ delineations of the exceptions, because of the imprecision with which they are stated and the improper manner in which they are applied, have done more harm than good. The general rule should be scrutinized, and the exceptions stated and applied in such a manner as to allow deserving plaintiffs to prove their cases. What is required is a definitive statement as to what the exceptions should be and how they should be applied.

Generally, information about liability insurance coverage is admitted (1) when the fact of insurance is relevant to a disputed issue; (2) when the fact of insurance is relevant to the credibility of a witness; (3) when an integral part of an admission by the defendant alludes to the fact of insurance; (4) when the fact of insurance is elicited unintentionally or by way of a witness’s voluntary or unresponsive answer; (5) when counsel in good faith on voir dire questions prospective jurors with respect to their insurance companies; and (6) when the courts have adopted miscellaneous exceptions.\footnote{1}{Barrett v. Bonham Oil & Cotton Co., 57 S.W. 602, 603 (Tex. Civ. App. 1900); McCormick’s HANDBOOK OF THE LAW OF EVIDENCE § 201 (2d ed., E. Cleary 1972) [hereinafter cited as McCormick].} \footnote{2}{These exceptions will be used for purposes of illustration only. This comment does not discuss the situation in which the defendant, in
II. WHEN THE FACT OF INSURANCE IS RELEVANT TO A DISPUTED ISSUE

One of the primary exceptions to the rule forbidding disclosure of the defendant's liability insurance is applied when the existence of that insurance is relevant to some disputed issue. A common example of this exception is when the plaintiff introduces evidence of the defendant's insurance covering the party whose alleged negligence caused the plaintiff's injury, and who allegedly is an agent or employee of the defendant. Here, where the defendant disclaims liability for the negligent individual's conduct, rules and statutes provide that evidence of insurance coverage of the negligent operator is relevant and hence admissible to show that the disputed relationship does exist. This evidence derives its probative value from the fact that one generally does not take out liability insurance for the acts of another unless he believes that he may be liable for the negligent acts of the other.

The apparent purpose of this exception is to assist the injured plaintiff in fastening liability on a solvent defendant who denies responsibility for the injury-producing act. This desire to find a solvent defendant conflicts with the defendant's need to keep prejudicial information from the jury. It is frequently the defendant's contention that any reference to insurance, no matter how oblique, is so prejudicial that he cannot obtain a fair trial.

To a large extent, the defendant's arguments lack persuasiveness because insurance coverage is so common today that many jurors assume that it is involved. In addition, there are several other ways in which the plaintiff can directly or indirectly inform the jury of the defendant's coverage.

order to show that the plaintiff is malingering, seeks to reveal the existence of the plaintiff's insurance, although the discussions dealing with relevance, prejudice, and probative value may be of value to the lawyer confronted with that situation.


7. By 1959, 83% of the motorists in 28 states had liability insurance coverage. Ames, The Auto Accident Commission Proposal: An Irrational Concept, 14 U. Fla. L. Rev. 398, 400 (1962). This figure does not include New York and Massachusetts, which had compulsory insurance. The percentage of motorists carrying liability insurance is no doubt much higher today.

This particular exception to the nondisclosure rule should be expanded to admit evidence of the defendant's liability insurance whenever it is relevant to any disputed issue. The traditional approach limits the exception to disputed agency, ownership, and control issues. Thus, it excludes evidence of insurance needed to prove, for example, that the negligent operator of the injury-producing instrument was acting with (or without) the permission, consent, or authorization of the defendant. Furthermore, this exception, if broadened to allow the admission of evidence of the defendant's liability insurance whenever it is relevant to a disputed issue, would place it in harmony with modern tort principles in that it would aid the plaintiff in fastening liability on a solvent defendant.

Under the proposed rule, employed with the proper safeguards, any prejudice created by evidence revealing a defendant's insurance coverage would be counterbalanced by the probative force of the evidence.

The most important safeguard needed is a requirement that proffered evidence meet a certain standard of relevance. That standard should, at a minimum, place two requirements on the admission of evidence: first, that the issue actually be in dispute, and second, that the evidence tend to resolve or prove the issue. Where the

9. In Robinson v. Hill, 60 Wash. 615, 111 P. 871 (1910), the Supreme Court of Washington held that the rule of nondisclosure will be relaxed when it can be shown that the person disclaiming liability secured the insurance to protect himself against "the very thing which had happened." Id. at 618, 111 P. at 871. For another expansion of the exception see Leotta v. Plessinger, 8 N.Y.2d 449, 461-62, 171 N.E.2d 454, 460, 209 N.Y.S.2d 304, 313 (1960). See also Biggins v. Wagner, 60 S.D. 581, 586-87, 245 N.W. 385, 387 (1932).


12. See W. Prosser, THE LAW OF TORTS (4th ed. 1971), in which the author notes the "strong and growing tendency, where there is blame on neither side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault." Id. § 75, at 494.

13. In this comment, "rule" and "exception" are used interchangeably. In number and importance, the exceptions have virtually attained the status of rules. When used, the terms "general rule" and "nondisclosure rule" refer to the rule barring the introduction of evidence of a defendant's liability coverage.


issue or relationship has already been admitted, or established, evidence of the defendant's liability insurance is not admissible to prove such an issue or relationship. Also, when the defense so requests, the court should promptly instruct the jury that the evidence of the defendant's insurance should be considered only with respect to whether or not the disputed relationship exists, and should not be considered as evidence of the actor's negligence.

The attorney of the party supposedly harmed by the introduction of evidence of insurance should be able to prevent the court from giving any such instruction if he believes that the limiting instruction may only serve to reinforce in the minds of the jurors the fact that the defendant has insurance coverage.

Although there is no Nebraska case law directly on point, it is clear from analogous cases that Nebraska follows the proposed rule and its accompanying safeguards. The specific mention in the Nebraska statutes of the agency, ownership, and control exceptions should not be construed as limiting the Nebraska rule to those exceptions. Rather, the words of the statute, when read

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Some courts apply a very low threshold of admissibility. In Van Drake v. Thomas, 110 Ind. App. 586, 38 N.E.2d 878 (1942), the court stated: "[T]he fact that such evidence [of insurance] may have but a slight bearing upon the issue does not render it incompetent but merely affects its weight." Id. at 601, 38 N.E.2d at 883. The fault in this standard is that it permits the admission of any statement containing a reference to insurance, no matter how lacking in probative value, so long as the statement meets the nebulous "slight bearing" standard. It is submitted that the better test is that of whether the evidence tends to resolve an issue. See Muckenthaler v. Ehinger, 409 S.W.2d 625, 628 (Mo. 1966). Though this standard is vague, it is a significant improvement over the Van Drake standard, and it is in basic agreement with the Federal and Nebraska rules quoted above.

17. FED. R. EVID. 411 and NEB. REV. STAT. § 27-411 (Reissue 1975) provide: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully . . . ."
19. NEB. REV. STAT. § 27-411 (Reissue 1975) provides in part:

This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.
carefully and in conjunction with the relevant case law, must be construed as words of illustration. So interpreted, the Nebraska rule is in accord with the proposed rule, and would admit evidence of the defendant's insurance coverage whenever it would tend to resolve a disputed issue.

III. WHEN THE FACT OF INSURANCE IS RELEVANT TO THE CREDIBILITY OF A WITNESS

Evidence of insurance coverage is also commonly admitted when the fact of insurance is relevant to the credibility of a witness. This problem may arise when the witness has some interest in the defendant's insurance company, usually pecuniary, which may influence his testimony. Where a witness has such an interest, courts generally have allowed the other party to reveal it so that the jury may more accurately ascertain the weight to give his testimony. Here, the competing interests are (1) the plaintiff's interest in reducing the weight given to the testimony of an adverse witness by showing his potential for bias, and (2) the defendant's interest in keeping from the jury irrelevant and prejudicial information.

In this area, there are two lines of cases. The better, but minority, rule allows the plaintiff to show only that the adverse witness has an interest in or is employed on behalf of the defendant. The majority rule allows the plaintiff to show that the witness has an interest in or is employed by a named insurance company that is the insurer of the defendant. Under the majority's version of the rule, a showing of the defendant's insurance coverage is permissible so long as the evidence is not introduced for the primary purpose of prejudicing the jury.

22. McCormick § 201, at 480; see Pickett v. Kolb, 250 Ind. 449, 237 N.E.2d 105 (1968) (error for trial court to exclude evidence that would have revealed that the defendant's insurance company paid an inspector who served as a witness at the trial).
An incisive statement concerning this exception is found in *O'Donnell v. Bachelor*, where the plaintiff brought an action for personal injuries suffered as a result of being struck by the defendant. In an attempt to show the bias of an employee of the defendant's insurer, the trial court permitted the plaintiff's counsel to establish only that he was employed by an attorney whose interest in the matter was not disclosed. In reversing the trial court, the appellate court stated that "[o]nce a witness commits himself to the ocean of legal controversy, he must, under cross-examination, disclose the flag under which he sails." To this, the dissent responded that such a revelation discloses "not only the flag but the seamstress who sewed it."

It is submitted that the minority rule and the dissent in *O'Donnell* represent the better view. Under this view, the plaintiff has a chance to show that the agent is employed by or on behalf of the defendant, and thus that the agent is biased. The plaintiff's interest in showing bias is not furthered by permitting him to show that the witness is an employee of the defendant's insurer. Once this additional fact is disclosed, its sole effect is to prejudice the defendant's case. Furthermore, use of the majority rule necessitates a determination by the court of whether or not the plaintiff's introduction of the defendant's insurance coverage was done for the purpose of prejudicing the jury.

If the majority rule is retained, a court should, upon the defendant's request, instruct the jury that the insurance coverage is not to be considered in its determination of the defendant's negligence, but is relevant only for the purpose of evaluating the defense witness's credibility. Some courts have held that it is reversible error for the plaintiff to fail to strike the objectionable matter and request that the court admonish the jury. This portion of the rule is objectionable, because the defendant may feel that he is harmed less by ignoring the reference to insurance than by the request to strike and admonish.

Nebraska follows the majority rule. It permits a full-blown cross-examination of defense witnesses, and thus allows the plaintiff to unnecessarily disclose the fact of the defendant's insurance

27. Id. at 502, 240 A.2d at 486.
28. Id. at 509, 240 A.2d at 489 (dissenting opinion).
30. Note, supra note 3, at 94.
DEFENDANT'S INSURANCE COVERAGE. One of the few Nebraska cases dealing specifically with this second exception is Lyons v. Joseph. In Lyons, the court held permissible the cross-examination of the defendant's expert witness regarding his employment by the defendant's insurer. In a similar case, the Nebraska supreme court, in Gleason v. Baack, held that the admission of evidence of insurance was not error where the defendant attempted to impeach the witness with a statement he had made to an insurance agent. In so holding, the court cited cases that relied on the interest of the plaintiff in refuting an attack on his credibility by showing all relations of the adverse witness which tended to show the witness's interest or bias.

The rule followed by Nebraska results in unfair and unnecessary prejudice to the defendant. To adequately protect the plaintiff's interest, it is necessary to show only the flag under which the witness sails, i.e., that he is employed on behalf of the defendant. To go beyond this and show that the witness is engaged by an insurance company, particularly a named company, is to inject irrelevant and prejudicial matters into evidence.

IV. WHEN AN INTEGRAL PART OF THE ADMISSION BY THE DEFENDANT ALLUDES TO THE FACT OF THE DEFENDANT'S INSURANCE COVERAGE

A third exception to the general rule of nondisclosure applies when a defendant makes a statement amounting to an admission of liability that also tends to apprise the jury of the fact that the defendant is covered by insurance. Such statements are generally admissible in their entirety. They are not admitted to allow a plaintiff to prove the fact of the defendant's coverage, but rather because the reference to insurance is part of the admission.

This particular exception needs clarification because present guidelines are often unclear or ignored. Illustrative is Reid v. Owens, in which the Utah supreme court set down this apparently clear rule:

Though references to insurance be made in connection with an admission of liability, unless the reference to insurance is itself

32. 124 Neb. 442, 246 N.W. 859 (1933).
33. 137 Neb. 272, 289 N.W. 349 (1939).
36. 98 Utah 50, 93 P.2d 680 (1939).
freighted with admission, counsel should be required to so elicit the testimony as to preclude revelation of the irrelevant fact. 37

The plaintiff was permitted to introduce, in a suit for negligent entrustment against the automobile operator's father, the following statements: "My boy is careless, and he drives too fast and it worries us. . . . We have taken out insurance to protect him . . . ." 38 Although the rule was well stated, it was grossly misapplied when the court used it to let in the second statement that had the sole purpose and effect of prejudicing the case against the defendant. Reid indicates a need for a more refined rule.

Although the courts often articulate what seem to be acceptable rules, 39 something more analytical is required to achieve fair and consistent results in the various situations in which this issue presents itself. The most definitive and preferable version of this exception would require (1) that the statement containing a reference to insurance be in fact an admission of fault; (2) that the statement have a direct bearing on a disputed issue; and (3) that the word "insurance" be so interwoven in the admission that it would be impracticable to remove it.

By admission of fault it is meant that the statement must, at a minimum, contain an inference adverse to defendant's claim of non-negligence. 40 The second requirement contemplates two conditions: the statement must (1) have a direct bearing on (2) a disputed issue. The direct-bearing condition would be satisfied by any statement, the introduction of which makes the existence of any fact more or less probable than it would have been without the evidence. 41 The disputed-issue requirement demands that the issue be one that has not been conceded or otherwise established. The third requirement can be satisfied by excising the objectionable part of the admission if that may be done without damaging the probative force of the admission. 42

This proposed rule provides concrete guidelines that would, if adopted, promote more certainty and consistency of result than heretofore realized. In close cases, the evidence should be ad-

37. Id. at 61, 93 P.2d at 685.
38. Id. at 60, 93 P.2d at 685.
39. See id.
42. Reid v. Owens, 98 Utah 50, 60, 93 P.2d 680, 685 (1939).
This proposed rule is justified, at least in part, by the notion that a party should not be denied the opportunity to prove his case merely because an admission of fault contains an incidental reference to insurance. The defendant should have the option of requesting—or not requesting—a limiting instruction from the bench.

With regard to this third exception to the general rule of nondisclosure, there appears to be no Nebraska law on point. It is submitted that Nebraska should adopt the three-point test as set out above. This proposed rule achieves the purpose of the exception, while reconciling the conflicting considerations. It does not preclude deserving plaintiffs from proving their cases merely because an admission of fault contains an incidental reference to the defendant's insurance coverage.

V. WHEN THE FACT OF INSURANCE IS ELICITED UNINTENTIONALLY OR THE WITNESS GIVES A VOLUNTARY OR UNRESPONSIVE ANSWER

When the fact of insurance is elicited unintentionally or a witness gives a voluntary or unresponsive answer, another important exception to the general rule of nondisclosure arises. The weight of authority in this area holds that if the plaintiff's counsel asks a question which calls for an admissible answer, the fact that the witness inadvertently or unresponsively refers to insurance will not be grounds for sustaining a motion for mistrial.44

The competing considerations here are the plaintiff's interest in a final adjudication in the matter without unreasonable delay and expense, and the defendant's interest in obtaining a verdict not unduly influenced by avoidable prejudice.

There are four common settings in which this exception may arise: where the fact of insurance is mentioned by the plaintiff on direct examination; where a defense witness mentions it on cross-examination; where the plaintiff or one of his witnesses mentions it on cross-examination; and where the defendant or one of his witnesses mentions it on direct examination.

43. A jury's knowledge of the defendant's insurance coverage is probably not as prejudicial as it once was. Indeed, judges often assert that the jury is aware that the defendant is insured: “Any juror who doesn't know there is liability insurance in the case by this time [after voir dire] should probably be excused by virtue of the fact that he or she is an idiot.” Young v. Carter, 121 Ga. App. 191, 192, 173 S.E.2d 259, 261 (1970) (concurring opinion).

44. Annot., supra note 8, § 12.
The latter two examples are of less importance, because the defendant rarely has any motivation to reveal the fact of insurance and hence will not attempt to do so while examining a witness. Regarding the more important settings, any test for determining whether or not the plaintiff's attorney committed reversible error must begin with an examination of his conduct. The better-reasoned opinions state as a basic premise that the test involves a determination of whether or not the plaintiff's attorney's question called for admissible evidence.\(^4\) Thus, if it appears that the plaintiff's injection of the element of insurance was not deliberate, its admission may be cured by an order striking the evidence, with prompt instructions to the jury to disregard it.\(^4\) Determining whether or not the reference to insurance was inadvertent is, of course, often a difficult task.\(^4\)

Although the majority of courts has condemned attempts to inform the jury that the defendant has insurance, this condemnation usually extends only to cases where there is an "avowed purpose and successful attempt"\(^4\) to present this fact to the jury. As a corollary, the majority holds that the prohibition does not extend to cases where insurance is mentioned incidentally, in the attempt to prove other facts, or where there was no indication that the objectionable answer was sought or anticipated.\(^4\) Even where the objectionable answer is the result of the plaintiff's misconduct, courts are slow to declare mistrials if opposing counsel did not make a timely objection and the trial court could have, by proper admonition, removed the prejudicial effect. This is so because the litigants, and not the attorney, are made to suffer for the latter's misconduct.\(^5\) But, if the statement is extreme in its effect, the court, under some rules, may declare a mistrial even if no specific objection is made.\(^5\)

50. Id. See also NEB. REV. STAT. § 27-103 (Reissue 1975).
51. FED. R. EVID. 103; NEB. REV. STAT. § 27-103 (Reissue 1975).
A few decisions have viewed the inadvertent mention of insurance in a dimmer light. In *Consolidated Motors, Inc. v. Ketcham*, the Arizona supreme court set out the following rule:

[U]nless it appears that the plaintiff was entirely without blame in creating the situation which caused the reference to the question of insurance, we have always reversed the case whenever the matter was in any way brought to the attention of the jury, regardless of whether it came through a witness for plaintiff or defendant, or upon direct or cross-examination. It is not sufficient that plaintiff did not mean to bring out the prohibited matter, but he must mean not to.53

This standard is clearly unreasonable in placing such an onerous burden on the plaintiff. It does nothing to reconcile the competing interests, and it clearly does not advance the plaintiff's interest in obtaining an economic and speedy resolution of the dispute. Further, this rule does not necessarily promote the interests of the defendant, because where the existence of his liability insurance has not been emphasized, there very well may be no undue prejudice to guard against. Some courts contend that everyone assumes that the defendant is insured, and that the mere mention of the defendant's liability insurance is, therefore, not harmful.54

Because the proper conduct of counsel is an important consideration, a mistrial generally should be declared if the plaintiff's counsel in bad faith sought to inform the jury of the defendant's insurance. In this area of the law, however, the trial judge must not allow the mere mention of the world "insurance" to provoke the conditioned response—"mistrial."55

It is important here to distinguish the situation in which a plaintiff's witness is under direct examination from that in which a defense witness is under cross-examination. In the first situation, the plaintiff has had the opportunity and the obligation to prepare his witnesses so that they do not improperly inject insurance into the evidence. Therefore, he should be held to a high standard of care in keeping out evidence of insurance. Conversely, when the plaintiff's attorney elicits the fact of insurance on cross-examination, he should be held to a lower standard of accountability. Cases supportive of a varying standard of care include *Ernest Yeager & Sons v. Howell*.56 During the course of this personal-injury

52. 49 Ariz. 295, 66 P.2d 246 (1937).
53. Id. at 303, 66 P.2d at 249.
55. 93 Ariz. at 65, 378 P.2d at 744.
56. 234 So. 2d 899 (Miss. 1970).
trial, an employee of the defendant referred to the defendant's insurance in the following exchange:

Q. Did you make any investigation to determine why she [the plaintiff] fell?
A. No, I did not, but the doctor, we got insurance, and my job is to call a doctor and to get her to a doctor, I mean it [sic] wasn't any point in me trying to find out.57

In upholding the denial of the defendant's motion for a new trial, the Mississippi supreme court cited the rule that where an attorney asks a question that calls for admissible evidence, the fact that the witness gives an unresponsive or inadvertent answer containing a reference to insurance will not be grounds for ordering a new trial. In approving of the rule the court stated, "This rule is necessary; otherwise, every defendant who desired a new trial might obtain it by simply saying 'we got insurance.'"58 Yeager and similar decisions59 have suggested that the responsibility for insuring that the defendant's witnesses do not bring up the forbidden topic rests with defense counsel, not with the plaintiff's attorney. Thus, where the plaintiff's attorney's question calls for a proper response, no mistrial should be granted.60 Where, however, the plaintiff's attorney improperly cross-examines the defense witness with the obvious intent to disclose the existence of the defendant's insurance, a different result must obtain.

_Lubbock Bus Co. v. Pearson_61 is an excellent example of such an impermissible intent.62 In _Lubbock_, the defendant's bus ran into and injured the plaintiff. On cross-examination of the bus driver, who was not made a party to the case, the plaintiff's attorney repeatedly harangued the driver as to his duty to pay for the plaintiff's damages, and elicited the following testimony:

Q. Well, what is your testimony now? Do you say that you said that over there in Kyle Rotseseau's [the insurance adjuster] office or don't you say it?
A. I don't believe that I said I was responsible for it and that I was supposed to pay for it because the insurance takes care of that.
Q. The What?
A. The insurance takes care of that.63

57. Id. at 901.
58. Id.
60. See id. at 66, 378 P.2d at 744.
62. See also Colqueth v. Williams, 264 Ala. 214, 86 So. 2d 381 (1956).
63. 266 S.W.2d at 445.
In determining whether or not the defendant's witness voluntarily mentioned insurance, and whether such information was brought to the jury's attention through the fault of the plaintiff's attorney, the appellate court looked at the entire record. In making its determination, the court stressed the following elements: the witness was not adroit, while the attorney was; the bus driver was not joined as a defendant; the plaintiff's attorney knew that the defendant had insurance; and the attorney repeatedly harangued the witness as to his duty to pay for the plaintiff's damages. In finding that the witness did not volunteer the reference to insurance and that the plaintiff's attorney was trying to prejudice the defendant's case, the court stated:

   In repeatedly haranguing the bus driver . . . as to his duty to pay for the plaintiff's damage he could but expect to finally put the driver on the defensive and the only logical answer that appellee's attorney could expect from the driver under his gruelling examination . . . was the answer given by the driver that he did not believe he was under the duty to fix appellee's car because the insurance company was supposed to fix it.64

In cases where the plaintiff's attorney has grilled the defense witness as was done in Lubbock, it is clear that the only remedy is to declare a mistrial.

   Safeguards to prevent the improper introduction of evidence of insurance include, in addition to the threat of mistrial, the court's power, upon the defendant's request, to strike the objectionable testimony and admonish the jury to totally disregard it.

   This exception occurs with much less frequency where the defense attorney, on cross-examination of the plaintiff's witness, discloses the existence of the defendant's insurance. Here, no mistrial should result if it appears that the witness's disclosure was unintentional. This rule should apply with greater force where the disclosure is attributable, at least in part, to the defense's persistent questioning.65

   This exception is also pertinent where the defense attorney elicits the defendant's insurance coverage from one of his own witnesses.66 As discussed above, each attorney has the burden of preparing his own witnesses, and no mistrial should be declared where neither the plaintiff nor his attorney had any part in bringing the fact of the defendant's coverage before the jury.67

64. Id. at 447.
The Nebraska supreme court does not appear to have considered any cases similar to those above. However, it has dealt with two somewhat analogous cases. In *Segeber v. Gregory*, the court was faced with a situation in which a witness for the defendant volunteered the fact that the plaintiff was insured. Upon motion by the plaintiff, the court had the statement stricken, and admonished the jury. After the jury found for the defendant, the plaintiff moved for a mistrial. The Supreme Court of Nebraska upheld the denial of the delinquent motion for mistrial, stating that "it was incumbent upon the plaintiff to make such objection and motion at that time." From the court's discussion, it is not clear whether its decision rested upon an estoppel or waiver theory, or whether it rested upon a belief that the trial court cured the irrelevant reference to insurance by striking it and admonishing the jury. It is submitted that either theory is proper where it is the plaintiff's and not the defendant's coverage that is revealed.

A second case, *Litwiller v. Graff*, involved codefendants who, upon cross-examination of each other, elicited the fact of one another's liability insurance. The court held that under these peculiar circumstances no mistrial could be granted upon the defendant's motions, because the plaintiff was without fault, and had in fact moved to strike the irrelevant statements.

Nebraska case law would seem to be in accord with the above proposals. These general principles hold the attorney to a much higher standard in keeping evidence of insurance out when he is examining his own witnesses. Conversely, when counsel is examining an adverse witness, he should bear little, if any, responsibility for that witness's responses to questions asked in good faith.

VI. WHEN COUNSEL IN GOOD FAITH ON VOIR DIRE QUESTIONS PROSPECTIVE JURORS WITH RESPECT TO THEIR INTEREST IN INSURANCE COMPANIES

When counsel, in good faith, questions prospective jurors about their relationships with insurance companies, courts often recognize an exception to the general rule of nondisclosure. One court has stated that the purpose of *voir dire* "is to enable the court and counsel to select as fair and impartial a jury as possible," and has suggested that counsel not only has the right to inquire if a juror

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68. 160 Neb. 64, 69 N.W.2d 315 (1955).
69. Id. at 73, 69 N.W.2d at 321.
70. 124 Neb. 460, 246 N.W. 922 (1933).
has any relationship with the defendant's insurance company, but may, if such a relationship is disclosed, go further and inquire into the nature of it.\textsuperscript{72} In this area, the courts must strike a balance between the plaintiff's interest in having an impartial jury, and the defendant's interest in preventing insurance from distracting the jury.\textsuperscript{73} If the purpose of the interrogation, however, is to inform the jurors of the existence of the defendant's insurance coverage, such questions constitute reversible error.\textsuperscript{74}

Courts often look at the record to determine if the plaintiff's attorney willfully, or persistently, attempted to impress upon the jury the fact of the defendant's insurance coverage.\textsuperscript{75} If no insurance is in fact involved, then any interrogation of jurors that tends to create a suspicion in their minds of the defendant's coverage amounts to a lack of good faith.\textsuperscript{76} Likewise, some courts hold that if there is no reasonable probability of any of the jurors being interested in the company, then the inquiry should not be made.\textsuperscript{77} This determination of good faith is to be made by the trial court in its sound discretion. In the absence of an abuse of discretion, the trial court's ruling will not be disturbed.\textsuperscript{78}

Not all courts, however, view the presence or absence of the plaintiff's counsel's good faith as determinative. Thus, in \textit{Green v. Ligon},\textsuperscript{79} a Texas court stated:

\begin{quote}
It makes little difference as to the good faith of counsel in asking the question for the purpose of obtaining needed information—the result and effect of the question were the same as if he had made the inquiry for the deliberate purpose of accomplishing the end that it obviously brought.\textsuperscript{80}
\end{quote}

This approach seems harsh, particularly where the evidence does not show that the plaintiff's attorney attempted to highlight the fact of the defendant's liability insurance. As the Iowa supreme court recognized:

\begin{itemize}
\item \textsuperscript{72} Id. at 507, 507 P.2d at 885.
\item \textsuperscript{73} Robinson v. Faulkner, 163 Conn. 365, 375, 306 A.2d 857, 863 (1972).
\item \textsuperscript{75} Anderson v. City of Council Bluffs, 195 N.W.2d 373, 377 (Iowa 1972); Montanick v. McMillan, 225 Iowa 442, 450, 280 N.W. 608, 612 (1938).
\item \textsuperscript{76} Wheeler v. Rudek, 397 Ill. 438, 74 N.E.2d 601 (1947); Bennett v. Cauble, 167 S.W.2d 959 (Mo. Ct. App. 1943).
\item \textsuperscript{77} Ewing-von Allmen Dairy Co. v. Godwin, 304 Ky. 161, 163, 200 S.W. 2d 103, 104 (1947); Wheeler v. Rudek, 397 Ill. 438, 442, 74 N.E.2d 601, 603 (1947).
\item \textsuperscript{78} Meadors v. Gregory, 494 S.W.2d 860, 863 (Ky. 1972); Hays v. Proctor, 494 S.W.2d 758, 760 (Mo. Ct. App. 1966).
\item \textsuperscript{79} 190 S.W.2d 742 (Tex. Civ. App. 1945).
\item \textsuperscript{80} Id. at 748.
\end{itemize}
If a litigant were denied the right to propound the question asked the jurors [about their interest in a certain insurance company] . . . , he might be compelled to accept a juror who is a stockholder in an insurance company, and probably the very one having defendant's liability insured.\textsuperscript{81}

Assuming that the plaintiff may inquire as to prospective jurors' interests in insurance companies, the question is, "What is the permissible form of inquiry?" The Oklahoma supreme court in \textit{Safeway Cab Service Co. v. Minor,}\textsuperscript{82} suggested the following method:

\begin{quote}
[I]f a juror is asked if he owns stock in any corporation or is employed by one, and answers in the negative, further questions are unnecessary. If the juror answers in the affirmative, inquiry as to the type of corporation is proper. If the answer discloses that it is a corporation other than one engaged in insurance business, further questions are unnecessary. If the answer discloses that it is an insurance corporation, then pertinent and specific questions are proper in order to establish the prospective jurors' partiality, etc.\textsuperscript{83}
\end{quote}

This method adequately protects the interests of both parties. It allows the plaintiff the opportunity to learn of the jurors' interest in insurance without unduly stressing it when such an interest is present. When an interest is not present, the mention of insurance will not be made, and the defendant will in no way be prejudiced. When a juror does have an interest in the insurance company, the plaintiff's \textit{voir dire} is structured in such a manner as to minimize its prejudicial effect, and thus to render a new trial unnecessary.

Another line of cases, while allowing questions on insurance without the preliminary questions used in \textit{Minor}, would limit them to the subject of the veniremen's connections to insurance companies in general. Thus, in \textit{Elliot v. Paul,}\textsuperscript{84} the Arkansas supreme court held that the following reference to a particular insurance company was reversible error: "Do any of you know Mr. Louis Logan with the People's Indemnity Insurance Company?" The basis for the objection appeared to be that the question suggested the defendant's insurance coverage more strongly than a mere reference to insurance companies in general. Other courts do not agree with this distinction, and would allow the plaintiff to interrogate the prospective jurors as to their interest in the named company defending the case.\textsuperscript{85}

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\textsuperscript{81} Montanick v. McMillan, 225 Iowa 442, 450, 280 N.W. 608, 612 (1938).
\textsuperscript{82} 180 Okla. 448, 70 P.2d 76 (1937).
\textsuperscript{83} Id. at 449, 70 P.2d at 78.
\textsuperscript{84} 235 Ark. 98, 357 S.W.2d 292 (1962).
\textsuperscript{85} Id. at 99, 357 S.W.2d at 293.
\end{flushleft}
The rule allowing inquiries as to the jurors' interest in a particular named insurance company has been extended by some courts to allow the plaintiff to ask the question of each juror individually if the question could be asked of the jury collectively. This extension unjustifiably prejudices the defendant's case by continually reinforcing the jury's suspicion not only that the defendant insured, but that he is insured by a particular company. If the safeguards suggested in Minor are not followed, it seems preferable to ask the jurors collectively, rather than individually, if they have any insurance connections. Those jurors so indicating could then be questioned as to the nature of that interest. This would result in less emphasis on the question of insurance, especially where only one or two members of the prospective jury have insurance connections.

There is one important caveat to remember in this area. Where the plaintiff improperly introduces insurance into the case, the jury may get an instruction from the court that tends to indicate that the defendant has no insurance. This corrective measure may very well swing the pendulum of prejudice in the defendant's favor. The plaintiff, having instigated the matter, has little ground for objection.

Preliminary to voir dire, it would be desirable for plaintiff's counsel to set forth, in an affidavit, facts showing a reasonable probability of jurors' interests in insurance companies. In some jurisdictions, however, this would be impossible, because the attorneys do not learn of the jury panelists' names in time to make the necessary investigations. Assuming that it would be possible to make the necessary investigations prior to voir dire, the court should permit those jurors indicating an interest in insurance to be examined in some detail so that the exact nature of that interest may be disclosed.

The Nebraska law on this exception appears to be quite sparse. In Bergendahl v. Rabeler, the plaintiff's counsel, on voir dire, asked each prospective juror several questions as to whether or not he was a policyholder, stockholder or agent of State Farm Insurance. The Nebraska supreme court strongly disapproved of this questioning. The court acknowledged that this type of questioning may at times be valid, but an unrestricted right to so examine jurors

88. See p. 168 supra.
90. 131 Neb. 538, 268 N.W. 459 (1936).
would "allow the unscrupulous and unethical to use it under a false guise for a purpose that no ethical lawyer would desire to attain." This strong condemnation is no doubt largely responsible for the lack of litigation in this area in Nebraska.

Bergendahl held that on voir dire, counsel scrupulously should avoid any reference to insurance. With respect to this rule, the court further stated:

A violation of such rule is error prejudicial to the party offended, unless the circumstances of the entire case affirmatively show lack of prejudice thereby or affirmatively show that such information was a necessary incident to securing information that is needed for use in making challenges and that reasonably could not otherwise be secured. To ask of the juror whether or not he is an agent of or stockholder in any corporation and, if he is either, to make inquiry of him as to the kind of corporation to which he bears such relation will usually give all the information needed without use of the word "insurance." Thus, in this area, it is clear that Nebraska has adopted the more desirable Minor procedure set out above. This procedure, when followed, adequately protects the interests of both parties without prejudicing either.

VII. MISCELLANEOUS EXCEPTIONS

There are a number of miscellaneous exceptions by which the plaintiff may, either directly or indirectly, show the existence of the defendant's liability insurance coverage. Below are a few examples.

Under one exception, if the defendant injects the fact of insurance into evidence, he may not complain if the plaintiff also refers to insurance. It is not always necessary for the defendant to make the first reference to his insurance in order to bring this exception into play. A mistrial may, however, be warranted where the plaintiff's counsel repeatedly and calculatedly tries to elicit further references to insurance, when his purpose in so doing is to prejudice the jury.

91. Id. at 543, 268 N.W. at 461.
92. Id. at 544, 268 N.W. at 462.
93. A second Nebraska case dealing with voir dire involved a juror's mention of insurance, which, when clarified, showed that the juror was referring to life insurance, and not liability insurance. That being the case, no prejudice was found. See Nama v. Shada, 150 Neb. 362, 367, 34 N.W.2d 650, 653 (1948).
94. See Annot., supra note 8, §§ 5-11, 13, 14.
96. See id.
A document that is otherwise admissible may not be rendered inadmissible merely because it contains an incidental reference to insurance, unless the defendant comes forward and shows that prejudice will result. Thus, in a Pennsylvania personal injury case, it was held that the sending of a lease, containing references to liability insurance, to the jury room did not warrant a mistrial absent a showing of prejudice. At times, courts will allow documentary evidence referring to insurance to be viewed by the jurors if the reference is excised, or if the jury is instructed to consider it only for the purpose for which it is relevant.

Another exception to the rule of nondisclosure may be found when insurance coverage is compulsory. Thus, in Scott v. Wells, where the defendant was the owner of a taxicab, the court stated that the nondisclosure rule was inapplicable because the insurance was required by statute, and the insurer could be joined in the action. Other courts have been unwilling to recognize this exception, especially where the plaintiff's reference to insurance is made in a highly prejudicial manner.

When the plaintiff manages to inject the fact of insurance without expressly mentioning it, another exception to the nondisclosure rule arises. Thus it has been held that no declaration of mistrial was in order where the plaintiff told the jury that the “defendant wouldn't have to pay for it,” and where the trial court had admonished the jury not to consider the statement and no further ruling was requested. However, where the reference to insurance becomes too blatant, courts may declare mistrials. Where plaintiff's counsel, in referring to the defendant, stated, “She's in good hands, gentlemen,” or “the verdict will not personally punish the defendants” reversible error has been found. Though there has been little litigation in this area in Nebraska, the Nebraska supreme court has held similar references to insurance to be reversible error.

Other miscellaneous exceptions include cases where the defendant is a large corporation and hence just as vulnerable to a

100. Olson v. Sharpe, 36 Tenn. App. 557, 571, 259 S.W.2d 867, 873 (1953).
105. Purdes v. Merrill, 268 Minn. 129, 128 N.W.2d 164 (1964).
big damage award as the insurance company. The courts may reason that a reference to insurance cannot harm the insurer, because the jury is already prejudiced against the defendant due to its large size. Bench trials or cases where the references to insurance can be cured by proper instruction may give rise to other exceptions to the nondisclosure rule.

VIII. CONCLUSION

The general rule of nondisclosure of defendant's liability insurance is subject to numerous exceptions. Many questions relating to those exceptions may be answered by looking to two basic watchwords: "relevance" and "prejudice." Where the fact of insurance is not relevant to any disputed issue, it may not be shown. Where the fact of insurance is relevant, it may be shown for the limited purpose of proving the disputed issue, if its relevance outweighs its prejudicial effect. One additional element that the courts refer to is the good faith of counsel. Where a lack of good faith is found, the remedy is generally a mistrial.

In summary, the existence of defendant's liability insurance may be proved if it tends to resolve a disputed issue, or if it is relevant to the credibility of a witness. However, with regard to the latter, the interests of the plaintiff are satisfied if he is limited to showing that the witness is employed on behalf of the defendant without going beyond and showing that the witness is employed by a named insurance company. The defendant's liability insurance may also be shown if it is an integral part of an admission or if a witness unresponsively volunteers it in reply to a proper question. Similarly, in addition to the numerous miscellaneous exceptions, several jurisdictions allow plaintiff's counsel to question prospective jurors on voir dire relative to their insurance connections, provided that counsel is acting in good faith. Other jurisdictions, in better-reasoned opinions, do not permit plaintiff's counsel to mention the word "insurance" without taking a cautious step-by-step approach to reveal that a juror in fact has a close relationship with an insurance company. This approach is the better approach because it does not give plaintiff's counsel an opportunity to bring up the forbidden topic unless one or more jurors actually have a close relationship with an insurance company.

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