Washington Law Review

Volume 40 | Issue 2

6-1-1965

Defendant's Insurance Policy and Written Witnesses' Statements Held Discoverable

anon

RECENT DEVELOPMENTS

DEFENDANT'S INSURANCE POLICY AND WRITTEN WITNESSES' STATEMENTS HELD DISCOVERABLE

Plaintiff sued to recover damages for injuries received while a passenger in defendant's automobile. Upon plaintiff's motion under *Alaska Rule of Civil Procedure* 34,[1] the trial court allowed discovery of defendant's automobile liability insurance policy, and of witnesses' written statements obtained by defendant's counsel, including any written statements of the defendant and plaintiff. On appeal,[2] the Alaska Supreme Court affirmed. *Held:* Under *Alaska Rule of Civil Procedure* 34, a plaintiff is entitled to discovery of defendant's insurance policy and any written statements of witnesses which were obtained by defendant's counsel. *Miller v. Harpster*, 392 P.2d 21 (Alaska 1964).

Decisions interpreting language similar to that of Alaska Rule of Civil Procedure 26(b)[3] and 34 have generally held that insurance contracts are not relevant to the "subject matter of the pending action."[4] Most federal district courts have denied discovery,[5] but no federal court of appeals has yet been presented with the question. The state courts, while formerly split on the issue, have tended recently towards denial of discovery.[6] Many state and federal courts have stated that insurance

[1] "Discovery and Production of Documents and Things for Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefor.... the court in which the action is pending may—

(1) order any party to produce and permit the inspection and copying or photographing... of any designated documents.... which constitute or contain evidence relating to any of the subject matter within the scope of examination permitted by Rule 26(b)...." Alaska Rule 34 is identical to FED. R. CIV. P. 34 and WASH. R. CIV. P. 34.

[2] Plaintiff did not appear nor submit a brief on defendant's appeal of the ruling.

[3] ALASKA R. CIV. P. 26(b). "Scope of Examination. . . . The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. . . ."

[4] *E.g.*, McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); Brooks v. Owens, 97 So.2d 693 (Fla. 1957).

[5] See Bisserier v. Manning, 207 F. Supp. 476 (D.N.J. 1962); McDaniel v. Mayle, 30 F.R.D. 399 (N.D. Ohio 1962); Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Flynn v. Williams, 30 F.R.D. 66 (D. Conn. 1958); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952). *Contra*, Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961); Orgel v. McCurdy, 8 F.R.D. 585 (S.D. N.Y. 1948).

[6] State decisions in which discovery has been denied are: Di Pietruntonio v. Superior Court, 84 Ariz. 291, 327 P.2d 746 (1958); Verrastro v. Grecco, 21 Conn. Supp. 165,

policies are not relevant, since discovery will not aid the purposes of proving liability or damages,[7] nor result in facts for use in a trial or as a lead to information for use in a trial.[8]

Following the formulation and adoption of the Federal Rules of Civil Procedure, it was not long before the question arose as to what extent the rules permitted discovery of written statements of witnesses.[9] An amendment to the rules had been proposed to the United States Supreme Court,[10] but it was never adopted, the Court instead attempting to solve the controversy by a judicial decision. This was accomplished in the case of *Hickman v. Taylor*,[11] where the Court set down the limits of discovery of attorney's work-product. However, since the *Hickman* case, the controversy has continued as to the application of the discovery rules to attorney's work-product, particularly in regards to written statements obtained from witnesses.[12]

In granting plaintiff's motion for discovery of defendant's insurance policy, the Alaska court reasoned that discovery would help plaintiff decide whether to litigate or settle, that such discovery would not confer any advantage on the plaintiff in the actual trial of the issues, and that insurance policies were relevant to the issues.[13]

Discovery of witnesses' statements was allowed to eliminate surprise at the trial, to preserve evidence, and thereby encourage settlement or expeditious trial of the litigation. The court narrowed the attorney work-product doctrine, by distinguishing the leading decision of *Hickman v. Taylor*, and stating that in the principal case, unlike *Hickman*, the defendant's counsel had not been requested to reduce oral statements of witnesses to writing. Plaintiff's failure to show good cause for

149 A.2d 703 (1958); Ruark v. Smith, 147 A.2d 514 (Del. 1959); Brooks v. Owens, 97 So.2d 693 (Fla. 1957); Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); State v. District Court, 142 Mont. 139, 381 P.2d 799 (1963); State *ex rel.* Allen v. Second Judicial Dist., 69 Nev. 196, 245 P.2d 999 (1952); Goheen v. Goheen, 9 N.J. Misc. 507, 154 Atl. 393 (1931); Peters v. Webb, 316 P.2d 170 (Okla. 1957); Bean v. Best, 76 S. D. 462, 80 N.W.2d 565 (1957). *Contra*, Laddon v. Superior Court, 167 Cal. App.2d 391, 334 P.2d 638 (1959); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); People *ex rel.* Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954); Layton v. Cregan & Mallory Co., 263 Mich. 30, 248 N.W. 539 (1933).

[7] The argument has been advanced that insurance is just one resource of several that defendant might have and if it may be discovered, all of his assets should be discoverable. Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); State v. District Court, 142 Mont. 139, 381 P.2d 799 (1963).

[8] McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955); Brooks v. Owens, 97 So.2d 693 (Fla. 1957).

[9] 4 MOORE, FEDERAL PRACTICE, ¶ 26.23 [4], at 1339 (2d ed. 1963).

[10] *Id.* ¶ 26.23[6], at 1358.

[11] 329 U.S. 495 (1947).

[12] 4 MOORE, FEDERAL PRACTICE, ¶ 26.23[8], at 1381 (2d ed. 1963).

[13] 392 P.2d at 22.

discovery was excused by a statement that good cause was "so obvious" that an extended formal showing was not necessary. The court denied that such a broad discovery policy would result in an "unjust use of the fruits of opposing counsel's labor" or discourage pre-trial research and investigation.

Discovery of Insurance Policies

In allowing discovery of insurance policies on the ground of encouraging settlement, the Alaska court went against the current development of both federal and state case law,[14] on a theory inapplicable to the Alaska statutes. Many of the state decisions allowing discovery, including *People ex rel. Terry v. Fisher*[15] and *Maddox v. Grauman*,[16] cited by the court, have granted disclosure on the theory that the insurance contract inures to the benefit of the injured party.[17] This theory has arisen from state motor vehicle financial responsibility statutes[18] and court construction of insurance policies stating that the injured person is a third party beneficiary of the insurance contract. Alaska has no similar interpretation of its insurance statute[19] nor case construction of insurance policies.

In granting discovery of insurance policies, the court failed to consider the consequences of and arguments against excessive encouragement of pre-trial settlements. Discovery may often encourage, rather than discourage, litigation, due to plaintiff's demands for settlements at dollar amounts higher than would have been demanded had discovery been denied.[20] This presents an insurance company with the dilemma of whether to take a chance with litigation or to make a higher settlement than is considered reasonable. Possible results include more

---

[14] In addition to the arguments subsequently stated in the text, several constitutional questions have been raised under Rule 34: (1) To require the defendant to disclose the amount of his insurance policy would constitute an unreasonable search and seizure; (2) to require such disclosure would deprive him of his property without due process of law; and (3) to require such disclosure would amount to a denial of equal protection of the laws. Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833 (1951); Demaree v. Superior Court, 10 Cal.2d 99, 103, 73 P.2d 605, 607 (1937). The arguments were rejected in both decisions. See Note, 34 Notre Dame Law. 78, 83 (1958).

[15] 12 Ill.2d 231, 145 N.E.2d 588 (1957).

[16] 265 S.W.2d 939 (Ky. 1954).

[17] *E.g.*, Superior Ins. Co. v. Superior Court, 37 Cal.2d 749, 235 P.2d 833 (1951); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959); People *ex rel.* Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954).

[18] *E.g.*, Ill. Rev. Stat. 1955, ch. 73, § 1000.

[19] Alaska Stat. 21.10.225.

[20] *E.g.*, Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); State v. District Court, 142 Mont. 139, 381 P.2d 799 (1963). See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1018 (1961).

litigation as insurance companies might be unwilling to give such settlements, or the insurance companies might settle rather than risk the the anticipated discovery and a resulting large claim. A sure consequence of either result would be rate increases to the public, due to costs of litigation or excessively high settlements. The purpose of discovery procedures, obtaining *evidence* relevant to the subject matter, may well become secondary to plaintiff's attempts to maneuver insurance companies into settlements. Accident cases may become battles of leverage, pressure, and maneuvering, rather than cooperative settlement or supervised ligation.

DISCOVERY OF WITNESSES' WRITTEN STATEMENTS

The Alaska court broadened the discovery rules further by allowing discovery of written witnesses' statements. In doing so, the court distinguished *Hickman v. Taylor*,[21] the leading work-product doctrine case, on erroneous grounds. *Hickman* concerned the discovery of statements made by survivors of a tug boat accident and obtained by counsel for the tug owners. The moving party made no showing of necessity or good cause for discovery. The Supreme Court held that the Federal Rules of Civil Procedure 26, 33, and 34 do not allow discovery as of right of *oral and written* statements of witnesses secured by counsel in the course of preparation for litigation.[22] *Hickman* was not limited to discovery of *oral* statements which must be put in writing by an attorney, as the Alaska court supposed.

The Court in *Hickman* attempted to clear up the confusion surrounding various discovery rules, and it did so by using the work-product doctrine as a means of placing certain documents beyond mere demand.[23] Before making use of discovery under Rule 34, other discovery techniques must be used, and reasonable amounts of investigation completed. Discovery of an attorney's work product under Rule 34 thus became the final method available for obtaining relevant evidence, and then only by making the proper showing of good cause.[24] The position taken by the Alaska court, that good cause need not be shown, is irreconcilable with decisions in the majority of other jurisdictions. Most have adopted the *Hickman* rule, and will allow discovery of witnesses' statements only after a showing of necessity and good cause.[25]

[21] 329 U.S. 495 (1947).
[22] *Id.* at 508-10.
[23] *Id.* at 513.
[24] See 4 MOORE, FEDERAL PRACTICE, ¶ 26.23[8], at 1381 (2d ed. 1963).
[25] Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958); Dritt v. Morris,

With the abandonment of the requirement of good cause, differences no longer exist in the showing required under discovery rules 26,[26] 33,[27] and 34.[28] Each rule was designed to serve a specific technique for the discovery of evidence. Without the need for showing good cause, however, it would seem that statements of witnesses in the hands of counsel are freely discoverable under any of the above rules. This broad discovery policy may eliminate surprise and make evidence more convenient to obtain, but the probable consequence will be that "much of what is now put down in writing would remain unwritten."[29] Further, counsel will endeavor to limit their records of witnesses' pre-trial statements to notes of counsel's personal observations.[30] Under Rule 34, as with all discovery rules, the interests of justice, as well as the adequate trying of the issues, are better fulfilled by two attorneys working independently in finding the evidence. A more complete finding of the evidence will result, and the adversary system will then operate at its fullest potential.[31]

The subject matter limits of discovery are no longer clear when the barrier of necessity and good cause is discarded. Does the court by its holding intend to grant discovery of the parties' statements which are requested by plaintiff's counsel? Generally, out of fairness, courts have granted discovery of any written statement of the plaintiff on a showing of good cause.[32] However, defendant's statements would clearly fall within the attorney-client privilege and be immune from discovery.[33] In the broad language of this opinion it is not apparent whether either or both are discoverable.

---

357 S.W.2d 13 (Ark. 1962); Frank C. Sparks Co. v. Huber Baking Co., 114 A.2d 657 (Del. 1955); Atlantic Coast Line R. Co. v. Allen, 40 So.2d 115 (Fla. 1949); Setzers Super Stores of Georgia Inc. v. Higgins, 104 Ga. App. 116, 121 S.E.2d 305 (1961); Self v. Employers Mut. Liability Ins. Co., 90 So.2d 547 (La. App. 1956); Brown v. Saint Paul City Ry. Co., 241 Minn. 15, 62 N.W.2d 688 (1954); Headrick v. Bailey, 365 Mo. 160, 278 S.W.2d 737 (1955); Hollander v. Smith & Smith, 10 N.J. Super. 82, 76 A.2d 697 (1950); Babcock v. Jackson, 40 Misc.2d 757, 243 N.Y.S.2d 715 (1963); Mower v. McCarthy, 122 Utah 1, 245 P.2d 224 (1952).

[26] ALASKA R. CIV. P. 26. Depositions Pending Action.

[27] ALASKA R. CIV. P. 33. Interrogatories to Parties.

[28] ALASKA R. CIV. P. 34. See note 1 *supra*.

[29] Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[30] Notes of counsel's personal observations, impressions, conclusions, and opinions have generally been non-discoverable. *E.g.*, Hickman v. Taylor, 329 U.S. 495, 516 (1947); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Dean v. Superior Court, 84 Ariz. 104, 108, 324 P.2d 764, 768 (1958).

[31] *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1033 (1961).

[32] *E.g.*, Taylor v. Central R.R. Co., 21 F.R.D. 112 (S.D. N.Y. 1957); Shupe v. Pennsylvania R.R. Co., 19 F.R.D. 144 (W.D. Pa. 1956).

[33] *E.g.*, People v. Ryan, 40 Ill. App.2d 352, 189 N.E.2d 763 (1963); Cranston v. Stewart, 184 Kan. 99, 334 P.2d 337 (1959); State *ex rel.* Terminal R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953).

PERSONAL JURISDICTION NOT IMPLIED BY PENDENT JURISDICTION

Plaintiffs' suit against a securities underwriter, and several individuals alleged to be associated with and to control the underwriter, was commenced in the Federal District Court of Colorado. Damages were claimed for alleged violations of both Rule 10b-5 of the Securities Exchange Act of 1934[1] and the Kansas Blue Sky Laws. Defendant in the principal case was a third-party defendant to the action and was personally served in Kansas pursuant to section 27 of the Securities Exchange Act,[2] which provides for extra-territorial services of process. Defendant conceded that the court had personal jurisdiction over him with respect to the federal claims, but moved for dismissal of the state claims on the ground that the court lacked personal jurisdiction. The court granted defendant's motion.[3] *Held:* Extraterritorial personal service upon a defendant pursuant to section 27 of the Securities Exchange Act does not give a federal district court personal jurisdiction over the defendant with respect to pendent state claims if service upon the defendant would have been insufficient had the pendent state claims been brought separately in the forum state. *Trussell v. United Underwriters, Ltd.*, 236 F. Supp. 801 (D. Colo. 1964).

The judicially-created doctrine of "pendent jurisdiction" has usually been attributed to *Hurn v. Oursler*.[4] In *Hurn*, the Supreme Court held that a federal district court with jurisdiction over federal claims may exercise jurisdiction over the subject matter of claims based upon state

---

[1] 17 C.F.R. § 240.10b-5: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[2] Securities Exchange Act of 1934 § 27, 48 Stat. 902, 15 U.S.C.A. § 78aa (1963), provides that "any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any ... district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process ... may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found...."

[3] This is the third reported decision on the pleadings arising out of claims alleged in this and related cases. See Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964); Trussell v. United Underwriters, Ltd., 228 F. Supp. 757 (D. Colo. 1964).

[4] 289 U.S. 238 (1933). The doctrine had its roots in earlier cases, however. See generally, Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

law which arise out of the same or substantially the same facts. Since *Hurn,* conflict has arisen as to whether personal jurisdiction with respect to pendent state claims may be implied from subject matter jurisdiction.[5] A majority of courts have reached the same result as did the court in the principal case.

The court in the principal case recognized that Congress is probably empowered to provide for extra-territorial service of process with respect to pendent state claims, but observed that Congress had not expressly done so in section 27 of the Securities Exchange Act or by Rule. Noting that the "explicit limits of service of process historically have been meticulously guarded,"[6] the court concluded that section 27 should not be extended by implication to give the court personal jurisdiction over defendant with respect to pendent state claims. Moreover, the court reasoned that it continued to be bound by the restrictive judicial attitude toward service of process statutes where, as in the principal case, the one hundred mile extension of service of process authorized by Rule 4(f) of the Federal Rules of Civil Procedure did not apply.[7]

The court cited *Robertson v. Railroad Labor Union*[8] and *United States v. Rhoades*[9] as support for the proposition that the explicit limits of service of process statutes have been judicially guarded. These cases should not have been persuasive because the judicial attitude toward service of process and personal jurisdiction has demonstrably changed since those decisions were handed down. In both *Robertson* and *Rhoades,* the court had held that they would not impliedly extend a federal service of process statute to allow extra-territorial service which would have given the federal court in personam jurisdiction. The Court in *Robertson,* following prior case law,[10] concluded that Congress, in setting up judicial districts, intended to enact the common law which had generally limited in personam jurisdiction to the territorial boundaries of the forum court. Since 1925, when *Robertson* was

[5] The conflicting cases are cited in 236 F. Supp. at 803-04. See, in addition, Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705 (D. Mass. 1964) (in accord with the principal case).

[6] 236 F. Supp. at 804.

[7] FEDERAL R. CIV. P. 4(f). This rule, as amended in 1963, provides that "persons who are brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties... pursuant to Rule 19, may be served...at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial. . . ."

[8] 268 U.S. 619 (1925).

[9] 14 F.R.D. 373 (D. Colo. 1953).

[10] Pennoyer v. Neff, 95 U.S. 714 (1877); Picquet v. Swan, 19 Fed. Cas. 600 (No. 11,133) (C.C.D. Mass. 1827).

decided, the limits of the in personam jurisdiction of courts have been defined by the constitutional notions of fundamental fairness,[11] rather than by arbitrarily drawn territorial boundaries. State legislatures and courts have taken advantage of this new power over non-residents.[12] Further, Congress has given the Supreme Court power to draft procedural rules for federal courts.[13] Personal jurisdiction over state claims in a federal court is, by rule 4 of the Federal Rules of Civil Procedure, normally determined by the laws of the state in which the court sits.[14] Since the power to create liberal procedural rules has been expressly given to the judiciary, it would appear that the federal courts need not deem themselves bound by the impractical and outmoded formalistic approach taken in *Robertson.*

In the principal case, sound policy considerations suggest that the court should have implied personal jurisdiction over the defendant with respect to the pendent state claims.[15] Development of the doctrine of pendent subject matter jurisdiction was based upon practical convenience and judicial economy.[16] Where the evidence necessary to a federal claim is the same or substantially the same evidence necessary to a state claim, and the court has personal jurisdiction over the defendant with respect to the federal claim, the interests of all are served by deciding the whole case at one time. Court congestion and piecemeal litigation is avoided, and expense to parties, as well as to taxpayers, is reduced. Plaintiff's inconvenience in having to present virtually the same evidence in a new trial in another court, perhaps three thousand miles distant, would seem to outweigh any inconvenience defendant might experience in having to defend both state and federal claims in the same suit. In the principal case, the court stated:

> We are not persuaded by these reasons because we do not agree that quashing the service of process . . . will necessarily require relitigation in another court of the same issues which will have been litigated in this court. Since the same questions of fact between the same parties are

[11] *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[12] See, *e.g.*, WASH. REV. CODE § 4.28.185 (1959); Northern Supply, Inc. v. Curtiss-Wright Corp., 397 P.2d 1013 (Alaska 1965).

[13] Judicial Code and Judiciary Act of 1948, 28 U.S.C. § 2072 (1958).

[14] However, where state and federal law differ as to the mode of service, federal law controls. Hanna v. Plumer, 85 Sup. Ct. 1136 (1965).

[15] See Cooper v. North Jersey Trust Co., 226 F. Supp. 972, 981-82 (S.D.N.Y. 1964); Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 634 n.138 (1964); Note, 73 HARV. L. REV. 1164, 1175-78 (1960).

[16] See concurring opinion of Chief Judge Magruder, Strachman v. Palmer, 177 F.2d 427, 433 (1st Cir. 1949).

involved, collateral estoppel should make a mere formality of a separate suit on the pendent claims.[17]

It is true that the doctrine of collateral estoppel presently operates to "preclude relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."[18] It is possible that the doctrine would apply in the principal case, but it is suggested that the court's reliance on it in this case is inappropriate. Indeed, the basic policy behind the doctrine of collateral estoppel is the same as that of pendent jurisdiction—judicial economy. By requiring plaintiff to institute a totally new suit the court in the principal case severely detracts from achieving that fundamental goal. Under the court's theory, plaintiff must commence a new trial, and at least be prepared to argue the merits. The costs in time and money to courts, parties, witnesses, and taxpayers under such a procedure is inconsistent with sound judicial policy. A plaintiff should not have to rely on the doctrine of collateral estoppel when his claims are truly pendent. To hold otherwise severely limits the entire doctrine of pendent jurisdiction.

[17] 236 F. Supp. at 805.

[18] Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1945). See EHRENZWEIG, CONFLICTS OF LAWS 226-32 (1962).