INSURANCE LAW

Insurance Coverage? Don't Mention It

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It has for more than 100 years been recognized by the courts of this state that evidence that a defendant in a negligence or malpractice action carries liability insurance is generally inadmissible. Like Voldemort of Harry Potter fame, the word "insurance" has become known as "that which shall never be mentioned" at trial. Indeed, the practice of bringing before the jury the fact that the defense is being conducted by an insurance company and/or that the defendant might be reimbursed by insurance in the event of a verdict against him or her, has been repeatedly and soundly condemned by the Court of Appeals and the Appellate Divisions. See e.g., *Cosselmon v. Dunfee*, 10 Bedell 507 (1902) ("The inquiry into the matter of insurance is not material and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and where the trial court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby, it should, for that reason, set aside the verdict"); *Loughlin v. Brassil*, 187 NY 128 (1907) (remarks by plaintiff's counsel during summation concerning insurance "were entirely improper, and...they were designed to influence the jury by considerations which were not legitimately before them"); *Simpson v. Foundation Co.*, 201 NY 479 (1911) ("Evidence that the defendant in an action for negligence was insured in [sic] a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict"); *Wildrick v. Moore*, 66 Hun. 630 (4th Dept. 1892); *Manigold v. Black River Traction Co.*, 81 AD 381 (4th Dept. 1903); *Haigh v. Edelmeyer and Morgan Hod Elevator Co.*, 123 AD 376 (1st Dept. 1908); *Hordern v. The Salvation Army*, 124 AD 674 (1st Dept. 1908). Indeed, so verboten is the very mention of insurance before the jury that the prohibition similarly has been applied to the mention by defense counsel of the absence of insurance. See *Rendo v. Schermerhorn*, 24 AD2d 773 (3d Dept. 1965).

The rationale underlying this prohibition is, of course, in the case of the existence of coverage, that "it might make it much easier to find an adverse verdict [against the defendant] if the jury understood that an insurance company would be compelled to pay the verdict" (*Loughlin v. Brassil*, supra, 187 NY at 135), and, in the case of a lack of coverage, that it might engender sympathy for the defendant. In short, evidence of liability insurance injects an issue into the trial that is, or should be, collateral, and irrelevant, to the question of whether the defendant/insured acted negligently.

> The issue of mentioning insurance has recently come up again in two interesting decisions that were rendered just this past month.

"Despite the assumed common knowledge that defendants are usually insured" (Prince, Richardson on Evidence, 11th ed., §4-614, p. 214), the courts have continued to disallow the mention of insurance in recognition of the very real potential for prejudice. See *Oltarsh v. Aetna Ins. Co.*, 15 NY2d 111, 118-119 (1965) ("it is the rare individual who today does not know that 'defendants in negligence cases are insured and that an insurance company and its lawyer are defending'"); Barker and Alexander, Evidence in New York State and Federal Courts, §4:63, at 260-261 [5 West's N.Y. Prac. Series 2001] ("Because the prejudice quotient is obvious, the rule barring such evidence is one of the least controversial in the law of evidence"); *Krieger v. Ins. Co. of North America*, 66 AD2d 1025 (4th Dept. 1978) ("Although it is probably true that most jurors are aware that defendants in negligence cases are insured, it remains a rule in New York that evidence of insurance is usually irrelevant and prejudicial").

Rule Not Absolute

That being said, it has also long been recognized that the rule precluding disclosure of insurance is not absolute. As explained by the Court of Appeals in *Oltarsh v. Aetna Ins. Co.*, supra, "Reference to insurance is condemned only where the fact of its existence is irrelevant to the issues and where such reference is, in all likelihood, made for the purpose of improperly influencing the jury." 15 NY2d at 118. Thus, for example, in *Kowalski v. Loblaws Inc.*, 61 AD2d 340 (4th Dept. 1978), the court rejected the defendant's contention that the mention of the name of the insurer by defendant's former counsel, who was called as a witness by plaintiff, was a ground for reversal and a new trial, where "the insurance carrier's name was introduced, albeit only once and without elaboration, as a direct result of the dilatory, lax and improper conduct of the defendant and without any intention on the part of the plaintiff to elicit such information," and it appeared that "the jury's determination of liability was not influenced by the mere mention of the company's name."

Moreover, where "the fact of insurance or the existence of an insurer is properly or legitimately in the case, there can be no ground for complaint." 15 NY2d at 118. Thus, in *Leotta v. Plessinger*, 8 NY2d 449 (1960), rearg. denied, 9 NY2d 688 (1961), the » Page 9

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Court of Appeals noted that it was proper to admit evidence that the defendant insured the premises in question in order to prove that he either owned or controlled the premises, and extended that concept to the question of permission to use a motor vehicle where there was a provision in the vehicle lease requiring insurance. See also, *Rashall v. Morra*, 250 AD 474 (2d Dept. 1937).

In *DiTomasso v. Syracuse University*, 172 AD 34 (4th Dept. 1916), affd. 218 NY 640 (1916), the courts held that it was not improper to ask on cross-examination of a defense examining physician in whose interest his examination was performed, to which the witness responded, "the insurance company," insofar as that inquiry went to show the bias or interest of the witness.

Notably, by statute, in an action for injury to person or property, the Legislature has specifically provided that inquiry may be made of prospective jurors if they are stockholders, directors, officers or employees, or in any manner interested, in any insurance company issuing policies for protection against liability for damages. See CPLR 4110(a); *DiTomasso v. Syracuse University*, supra, 172 AD at 36; *Rinklin v. Acker*, 125 AD 244 (2d Dept. 1908); see also, *Wood v. New York State Electric & Gas Corp.*, 257 AD 172 (3d Dept. 1939), aff'd. 281 NY 797 (1939).

And, of course, "where an insurer is sued for damages stemming from its own breach of contract or commission of a tort, the plaintiff is not denied a right to trial by jury simply because his adversary happens to be an insurance company." *Oltarsh v. Aetna Ins. Co.*, supra.

It has also been held that "while the introduction of the fact of insurance coverage may be error, that error may not require a mistrial or reversal when, on the whole record, other evidence clearly establishes defendant's fault. *Simpson v. Foundation Co.*, supra; *DivCom Inc. v. F.J. Zeronda Inc.*, 136 AD2d 844 (3d Dept. 1988); *Rush v. Sears, Roebuck*, 92 AD2d 1072 (3d Dept. 1983)...." Prince, Richardson on Evidence, supra.

Recent Decisions

The issue of mentioning insurance has recently come up again in two interesting decisions that were rendered just this past month—in somewhat unusual contexts.

In *Grogan v. Nizam*, —AD3d—, —NYS2d—, 2009 WL 3298458, 2009 N.Y. Slip Op. 07375 (2d Dept. Oct. 13, 2009), a medical malpractice action, during the plaintiffs' case, their counsel inquired of their own expert witness whether he was involved in any risk management work. The expert responded as follows: "I am a risk management consultant to the Princeton Insurance Company, which is a professional liability carrier, in obstetrics and gynecology." Upon defense counsel's objection to this question and answer, the trial judge excused the jury, and defendants moved for a mistrial.

Prior to the court's decision on the defendants' motion, out of the presence of the jury, the defendants withdrew their motion for a mistrial and, instead, moved to strike from the record the question asked of the plaintiffs' expert and his answer. The trial court granted this motion and advised counsel that no further questioning along those lines would be allowed. Although the court attempted to cure the error by striking the offending question and answer, the jury was never advised of this upon returning to the courtroom, nor was it given a curative charge.

During the course of deliberations, the jury sent the judge an inquiry regarding the verdict sheet interrogatory concerning damages. After some discussion about the question, the foreperson stated, "I don't know if I should ask this or not, is this award given as a whole or is it given yearly by the insurance company to the individual?" In response, the trial court advised the jury, "I can't even tell you whether or not there is an insurance company involved, so I can't tell you that. That's not something that you need to be concerned with. I can't tell you, if there is an insurance company. I can't tell you that."

In affirming the trial court's subsequent order, which granted the defendant's motion for a mistrial and set the case down for a new trial, the Second Department observed that:

> Evidence of insurance on the part of a defendant in a medical malpractice action is inadmissible [citations omitted]. Where testimony concerning insurance is elicited during trial, even innocently by counsel, and where, as here, the opposing party makes a postverdict motion for a mistrial, it is appropriate to grant that motion, even where such offending testimony has been stricken from the record, if it cannot be determined that the offending testimony clearly did not have an influence on the verdict [citation omitted]. "The decision to grant or deny a mistrial is within the sound discretion of the court, and is to be made on a case-by-case basis" [citation omitted].

The court in 'Grogan v. Nizam' concluded that under the circumstances of the case, 'Although there was only the one mention of insurance by the plaintiffs' expert, it cannot be said that this one instance did not have an influence on the jury.'

Under the circumstances of this case, the court concluded that "Although there was only the one mention of insurance by the plaintiffs' expert, it cannot be said that this one instance did not have an influence on the jury. The jury's inquiry to the trial court, along with the foreperson's questions regarding that inquiry, revealed, not only that the jury was aware of the defendants' insurance coverage, but also that the defendants' insurance coverage was the subject of its deliberations. Although the trial court gave a curative instruction, in light of the circumstances, the instruction was insufficient to cure prejudice to the defendants."

Court of Appeals Decision

In *Salm v. Moses*, —NY3d—, —NYS2d—, 2009 WL 3378506, 2009 N.Y. Slip Op. 07479 (Oct. 22, 2009), a dental malpractice action, the defendant made a motion in limine to preclude the plaintiff from cross-examining defendant's expert regarding the fact that he and defendant were both shareholders of, and insured by, the same dental malpractice insurance company. Although the plaintiff's counsel opposed the motion, he did not request a voir dire of the expert to inquire into his connection with the insurer. The trial court granted the defendant's motion, finding that the probative value of the inquiry would be outweighed by the prejudicial effect of having defendant's insurance coverage revealed to the jury. That decision was affirmed by the Appellate Division (see 57 AD3d 370 [1st Dept. 2008]).

In affirming the grant of the defendant's motion in limine, a four-judge majority of the Court of Appeals noted the general rules pertaining to evidence of insurance coverage discussed above, and

concluded that there was "no abuse of discretion in Supreme Court's evidentiary ruling." Although the majority noted that the plaintiff's counsel had speculated during colloquy that a verdict in the defendant's favor could result in a $100 benefit to the expert based upon his shareholder status in the insurance company, it concluded that the trial court's finding that any such financial interest was likely "illusory" and that the possibility of bias was attenuated was reasonable on the Record.

As stated by the Court, "Absent a more substantial connection to the insurance company—or at least something greater than a de minimis monetary interest in the carrier's exposure—the court did not engage in an abuse of discretion in precluding the testimony." Notably, the Court added that "a voir dire of an expert outside of the presence of the jury can better aid the court in exploring the potential for bias."

In a thoughtful concurring opinion, Judge Eugene F. Pigott, joined by Chief Judge Jonathan Lippman and Judge Carmen Beauchamp Ciparick, wrote that, in his view, "courts should no longer treat insurance coverage as the third rail of trial practice such that it can neither be mentioned, even incidentally, nor be the basis of appropriate inquiry as to possible bias, as in the ruling here." Judge Pigott noted that "[i]t is routine—even statutory—that jurors be asked if they are a shareholder, director, officer or employee...in any insurance company issuing policies for protection against liability for damages for injury to person or property (CPLR 4110[a]). The reason for the question is obvious. Someone who is so situated may have a tendency to find for a defendant even though, according to the way we conduct our trials, insurance may never be mentioned again."

The defendant in this case sought to prevent the jury from learning that defendant's expert "suffers from the very disability that would have subjected them to a challenge to the favor"—not only did he own stock in a company that writes liability insurance, but, in fact, that company was the very insurer that would be required to pay any judgment rendered against the defendant.

Judge Pigott concluded, "The jury should be made aware of that fact. To keep this information from them means they are arriving at a verdict without all the material facts before them—something every court seeks to prevent." He recognized that "It is common knowledge that most defendants carry insurance. Indeed, most prospective jurors are cognizant of the significant role in litigation that liability insurance plays."

Judge Pigott then went on to state that evidence of insurance should not be admitted as a matter of course, but, rather, a legitimate basis must still be required for its admission. Still, in Judge Pigott's view, "there are appropriate instances when insurance evidence should be admitted to establish a party's or a witness' bias or interest, and trial courts should not shy away from admitting it if, after conducting the appropriate balancing test, they think that its admission is relevant under the circumstances. The admission of such evidence can be accompanied by a limiting instruction if the court believes it appropriate. Moreover, because trial courts have the discretion to place limitations on the scope of the questioning relative to such evidence, defendants can be assured that the admission of such evidence will serve its intended, relevant purpose of showing potential bias or interest without undue prejudice to the defendants."

It remains to be seen how the courts will deal with the issue of mentioning insurance in the future, and whether the policy will continue to be in the nature of "Don't ask, Don't tell," or something a bit more flexible.