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Judicial Creation of Direct Actions Against Automobile Liability Insurers: Shingleton v. Bussey

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NOTES

Judicial Creation of Direct Actions Against Antomobile Liability Insurers: *Shingleton v. Bussey**

I. INTRODUCTION AND FACTUAL SETTING

Elizabeth R. Bussey commenced a negligence action in a Florida state trial court against Frances R.B. Shingleton for damages sustained in an automobile mishap. The accident itself was a rather ordinary rear-end collision. Out of the ordinary, however, was the fact that the plaintiff joined as a party defendant Shingleton's liability insurer, Nationwide Mutual Insurance Company. The trial judge, following the insurance policy's non-joinder provisions[1] and the weight of authority in Florida[2] and elsewhere,[3] granted Nationwide's motion that it be dismissed as a party defendant. Plaintiff appealed this order to the Florida District Court of Appeal on the theory that, as a third-party beneficiary to defendant Shingleton's liability insurance contract with Nationwide, the Florida Rules of Civil Procedure permitted joinder of Nationwide as a real party in interest. Sustaining this contention, the court of appeal reversed the trial court's order of dismissal.[4] On certiorari to the Supreme Court of Florida, *held*, affirmed. Prevailing public policy demands that members of the general public be regarded as third-party beneficiaries of automobile liability insurance contracts and that the interest of the insurer in a suit against its insured be

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1. A typical provision may be found in Allstate's standard policy: "No action shall lie against Allstate until after full compliance 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 of the insured, the claimant and Allstate." Allstate Crusader Policy 16. *See* Tarpey, *The New Comprehensive Policy: Some Of The Changes*, 33 INS. COUNSEL J. 223, 232 (1966).

2. Jones v. United States Fidelity & Guar. Co., 19 F. Supp. 799 (N.D. Fla. 1937); Miami Jockey Club v. Union Assuranee Soc'y, 12 F. Supp. 657 (S.D. Fla. 1935), *aff'd*, 82 F.2d 588 (5th Cir. 1936); Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936), *aff'd sub nom.*, State *ex rel.* Davidson v. Parks, 129 Fla. 64, 175 So. 792 (1937); Thompson v. Safeco Ins. Co. of America, 199 So. 2d 113 (Fla. Dist. Ct. App. 1967); Hayes v. Thomas, 161 So. 2d 545 (Fla. Dist. Ct. App. 1964); Canal Ins. Co. v. Sturgis, 114 So. 2d 469 (Fla. Dist. Ct. App. 1959), *aff'd*, 122 So. 2d 313 (Fla. 1960).

3. 44 AM. JUR. 2d *Insurance* § 1575 (1969); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4861 (1962); 12 COUCH ON INSURANCE 2d § 45:763 (R. Anderson ed. 1964).

4. Bussey v. Shingleton, 211 So. 2d 593 (Fla. Dist. Ct. App. 1968), *noted in* 23 U. MIAMI L. REV. 652 (1968).

recognized as sufficient to permit its joinder as a real party in interest despite contract provisions to the contrary. *Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969).[5]

In view of existing precedent,[6] these two appellate decisions reversed a long-standing judicial trend in the treatment of liability insurers in personal injury litigation. While there are a number of states that have provided by statute for direct actions against such insurers,[7] the instant case is the first to permit joinder wholly without statutory authorization. These decisions, which were strenuously contested by the insurance industry,[8] bring into focus the conflicting policies and arguments which have surrounded the development of direct actions.

To provide the necessary background for examining this policy conflict, Part II will present a survey of the current status of direct actions in all their forms throughout the American jurisdictions while Part III will present an analysis of the *Shingleton* opinions. Against this background Parts IV and V will present an assessment of the significance of the instant case, an exploration of the potential problem areas likely to be encountered in the future application of *Shingleton*, and a suggestion of possible approaches to the difficulties raised.

II. THE CURRENT STATUS OF DIRECT ACTIONS

In addition to Florida's judicially authorized direct action, a considerable number of other American jurisdictions statutorily permit varying forms of direct action against insurers. These statutes, compiled in this section, proceed from those which are most comprehensive to those which are most limited.

A. Comprehensive Direct Action Statutes

The direct action statutes enjoying the widest renown are those of Louisiana[9] and Wisconsin.[10] In Louisiana, the insurer may be joined as

5. *Noted in* 43 FLA. B.J. 570 (1969); 22 U. FLA. L. REV. 145 (1969).

6. *See* notes 2-3 *supra*.

7. *See* notes 9-44 *infra* and accompanying text.

8. Appearing as amicus curiae were the American Insurance Association, the American Mutual Insurance Alliance, the National Association of Independent Insurors, the Federation of Insurance Counsel, and the Florida Defense Lawyers Association. 223 So. 2d at 714.

9. LA. REV. STAT. § 22:655 (Supp. 1970), *constitutionality upheld in* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); *see* Moorhead v. City of Ft. Lauderdale, 152 F. Supp. 131 (S.D. Fla.), *aff'd*, 248 F.2d 544 (5th Cir. 1957) (impairment of contracts objection applies only to legislative acts). *See generally* 22 LA. L. REV. 243 (1961); 13 LA. L. REV. 495 (1953).

10. WIS. STAT. ANN. § 260.11 (Supp. 1969). *See* MacDonald, *Direct Action Against Liability Insurance Companies*, 1957 WIS. L. REV. 612.

a party defendant with the insured or sued alone in the case of an accident occurring within the state, regardless of where the insurance policy was issued or delivered. Moreover, the terms of the statute do not limit its application to automobile accidents; all liability insurers are within its compass. Wisconsin, on the other hand, expressly limits the scope of its statute to insurers of motor vehicles and to injuries involving such vehicles. Unlike Louisiana, the accident need not occur in Wisconsin unless the insurance policy sued upon was issued or delivered outside of Wisconsin.

Important but less well-known direct action statutes are in force in the island territories of Puerto Rico[11] and Guam.[12] Puerto Rico permits direct action against any casualty insurer alone or jointly with the insured without limitation as to the type of accident. Likewise in Guam, any liability insurer may be sued alone or jointly, but contrary to the general trend of American authority, the action abates upon the death of the insured.[13]

A fifth jurisdiction, Alabama, has a Motor Vehicle Safety-Responsibility Act which has been interpreted to permit direct suit against motor vehicle insurers.[14] The case so interpreting, however, involved a motor carrier for hire and was further complicated by master-servant and subrogation issues which may well have reduced the significance of the case as declarative of Alabama law on the subject. For this reason Alabama may be better classified under the following section relating to carriers for hire.

B. Direct Actions Against Insurers of Motor Carriers for Hire

Almost every state recognizes the existence of a special relationship between the general public and carriers for hire. Nine states have carried this recognition to the point of permitting joinder of the carrier's insurer in an action brought for damage sustained in an accident involving the carrier. The rationale commonly given for this position is that since statutes or ordinances require these carriers to post insurance or indemnity bonds, this protective coverage inures

11. P.R. LAWS ANN. tit. 26, §§ 2001 (1958), 2003 (Supp. 1968).

12. GUAM GOV'T CODE § 23525, 43354 (1961). Pertinent portions of the statute may be found in Capital Ins. & Sur. Co. v. Kelly, 361 F.2d 567 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

13. Capital Ins. & Sur. Co. v. Kelly, 361 F.2d 567 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

14. ALA. CODE tit. 36, §§ 74(62)-(83) (1959) and (Supp. 1968), *construed in* American S. Ins. Co. v. Dime Taxi Serv., Inc., 275 Ala. 51, 151 So. 2d 783 (1963).

directly to the benefit of the public. The requirement of financial responsibility is also regarded as tending to lessen or eliminate potential jury prejudice because jurors are presumably aware of the compulsory law.[15]

The statutes of four states, Georgia,[16] Oklahoma,[17] South Carolina[18] and Vermont,[19] specifically provide for direct action against the insurers of various classes of carriers for hire; South Carolina also provides that indemnitors may be joined. The statutes of three other states, Alabama,[20] Kansas[21] and New Mexico,[22] do not expressly provide for the direct action but they have been so interpreted. The courts of two states, California[23] and North Dakota,[24] have interpreted city ordinances requiring taxi companies to carry liability insurance as permitting direct action against such insurers and, in North Dakota, this decision was reached despite a state statute to the contrary.[25]

C. *Direct Action Under Subrogation-Type Statutes*

The subrogation-type statutes of several states permit direct action against the insurer after the return of a judgment against the insured. Under statutes of this type, sometimes called semi-direct action laws,[26] the judgment creditor becomes subrogated to the insured's right to have the insurer satisfy the judgment to the limits of its poliey. Following this scheme, the statutes of Arkansas,[27] California,[28] Massachusetts,[29] New York,[30] Ohio[31] and Rhode Island[32] specifically provide for the

15. *See, e.g.*, 8 J. APPLEMAN, *supra* note 3, § 4862.
16. GA. CODE ANN. §§ 68-509, -612 (1967).
17. OKLA. STAT. ANN. tit. 47, § 169 (Supp. 1969-70).
18. S.C. CODE ANN. § 10-702 (1962).
19. VT. STAT. ANN. tit. 23, §§ 842, 882 (1967).
20. *See* note 14 *supra* and accompanying text.
21. KAN. STAT. ANN. § 66-1, 128 (1964), *construed in* Sterling v. Hartenstein, 185 Kan. 50, 341 P.2d 90 (1959).
22. N.M. STAT. ANN. § 64-27-49 (Supp. 1969), *construed in* Deeg v. Lumbermen's Mut. Cas. Co., 279 F.2d 491 (10th Cir. 1960), *and* Breeden v. Wilson, 58 N.M. 517, 273 P.2d 376 (1954).
23. Butler v. Sequeira, 100 Cal. App. 2d 143, 223 P.2d 48 (1950); *see* Rupley v. Huntsman, 159 Cal. App. 2d 307, 324 P.2d 19 (1958).
24. James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950).
25. N.D. CENT. CODE §§ 39-16-11 (1960), 49-18-33 (Supp. 1969).
26. Degnan, *Semi-Direct Action Against Liability Insurers: Current Problems*, 13 VAND. L. REV. 871 (1960).
27. ARK. STAT. ANN. § 66-4001 (Repl. Vol. 1966).
28. CAL. INS. CODE § 11580 (West 1955).
29. MASS. GEN. LAWS ANN. ch. 175, §§ 112-13 (1959).
30. N.Y. INS. LAW § 167 (McKinney 1966).
31. OHIO REV. CODE ANN. § 3929.06 (Baldwin 1964).
32. R.I. GEN. LAWS ANN. § 27-7-2 (1968).

action, but in Arkansas and New York suit may not be brought until 30 days after the judgment creditor has served upon the insurer or the insured notice of entry of the judgment. Ohio requires the same waiting period though without the necessity of giving notice of the judgment's entry. The statutes of three states, North Dakota,[33] Tennessee[34] and West Virginia,[35] contain clear subrogation language to the effect that upon damage to anyone by an insured, the liability of the insurer becomes absolute and that satisfaction by the insured of a judgment rendered against him is not a condition precedent to the insurer's duty to pay. While no direct action is expressly authorized, the statutory wording would seem to leave little doubt as to its permissibility. Five states, Illinois,[36] Iowa,[37] Maryland,[38] Michigan[39] and Virginia,[40] impose the additional requirement that before the direct suit may be brought there must have been an execution against the insured returned unsatisfied, and in Iowa the action must be brought within 180 days from the entry of the judgment.

The subrogation statutes cited in this section are generally utilized only in those situations in which the insurer refuses to pay the judgment rendered against its insured. Sinee this may require the plaintiff to resist the defenses of the insurer based upon its insurance contract, the subrogation action, with its two-lawsuit aspect, presents a remedy less attractive than direct action in the original suit brought to determine liability and damages. Moreover, inasmuch as some authorities are of the opinion that the judgment creditor has a right of subrogation in any event,[41] it is open to question whether the statutes discussed in this section grant any rights not already possessed by judgment creditors against intransigent insurers.[42]

33. N.D. CENT. CODE § 39-16.1-11(6) (Supp. 1969).
34. TENN. CODE ANN. § 59-1223 (Repl. Vol. 1968).
35. W. VA. CODE ANN. § 17D-4-12(f) (1966).
36. ILL. ANN. STAT. ch. 73, § 1000 (Smith-Hurd 1965).
37. IOWA CODE § 516.1 (1966).
38. MD. ANN. CODE art. 48A, § 481 (Repl. Vol. 1968).
39. MICH. STAT. ANN. § 24.13006 (Rev. Vol. 1957).
40. VA. CODE ANN. § 38.1-380 (Repl. Vol. 1953).
41. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962); 8 J. APPLEMAN, *supra* notc 3, § 4831.
42. *See* Peerless Ins. Co. v. Sheehan, 194 So. 2d 285 (Fla. Dist. Ct. App. 1967); Grain Dealers Mut. Ins. Co. v. Quarrier, 175 So. 2d 83 (Fla. Dist. Ct. App. 1965); Conley v. Singleton, 171 So. 2d 65 (Fla. Dist. Ct. App. 1965); Keeton, *Ancillary Rights of the Insured Against His Liability Insurer*, 13 VAND. L. REV. 837, (1960).

D. *Direct Actions in Special Situations*

Three states permit direct actions against insurers when special circumstances are present. In Arkansas, a liability insurer may be sued directly whenever its insured is clothed with sovereign or charitable immunity.[43] Rhode Island allows the direct suit whenever process cannot be served upon the insured in the state.[44] By a rule of court, Texas provides that joinder of a liability or indemnity insurer is permissible when such insurer is by statute or the terms of its policy liable to the injured party.[45] While each of these situations is potentially significant, the present dearth of reported cases seems to indicate a rather limited use of the available procedures to date.

III. THE *Shingleton* DECISIONS ANALYZED

A. *The Opinion of the District Court of Appeal*

Procedurally, the instant case reached the appellate courts on appeal from the trial judge's order dismissing Nationwide Mutual Insurance Company as a party defendant. In the District Court of Appeal,[46] plaintiff contended that Nationwide was properly joined as a real party in interest within the meaning of rule 1.210(a) of the Florida Rules of Civil Procedure[47] and that the policy of insurance issued by Nationwide was such as to make plaintiff, as a member of the general public, a third-party beneficiary thereto with a right to sue the insurer for damages covered by the policy. Nationwide pleaded in defense that (1) it was not a real party in interest within the meaning of the rules of procedure; (2) no privity of contract existed between it and plaintiff on the policy of insurance issued to its insured; (3) the direct interjection of insurance matters into personal injury cases before juries is prejudicial to insurers; and (4) plaintiff may not sue together one defendant on a cause of action sounding in tort and another defendant on a claim sounding in contract.

Faced with this array of contentions, the court turned first to a consideration of rule 1.210(a), which provides that ". . . any person may be made a defendant who has or claims an interest adverse to the plaintiff."[48] Then, to determine the nature of the insurer's interest the

43. ARK. STAT. ANN. § 66-3240 (Repl. Vol. 1966).
44. R.I. GEN. LAWS ANN. § 27-7-2 (1968).
45. TEX. R. CIV. P. 97(f).
46. Bussey v. Shingleton, 211 So. 2d 593 (Fla. Dist. Ct. App. 1968).
47. *See* note 48 *infra* and accompanying text.
48. FLA. R. CIV. P. I.210(a), quoted in full at 211 So. 2d 595.

court took notice of the terms of the typical automobile liability insurance policy: (1) the insurer reserves the right to handle and control litigation against its insured; (2) the insurer retains the right to settle out of court without the consent of the insured; (3) in case of suit the insurer is obligated to defend its insured, provide counsel, and pay the resulting costs; and (4) the insurer is liable, within policy limits, for the damages assessed against its insured.[49] In view of these policy provisions the court asked:

> . . . [H]ow can we honestly say that the insurance company *does not have such interest* adverse to that of the plaintiff that the insurance company can be brought out into the open as a real party in interest?[50]

In answer to this question the court said:

> Therefore, if the insurance company by the very nature of its contract of insurance has injected itself into the litigation as a real party in interest, then it should not be heard to deny the right of the plaintiff to point this out in a complaint for damages against an insured . . . .[51]

The quoted statement of the court seems to indicate that the insurance policy terms cited estop the insurer from asserting that it is not a real party in interest. To reinforce this view, the court looked to other evidence of an estoppel nature and found support in a petition filed in 1966 by the Florida Bar Association seeking additional rules governing the conduct of so-called "house counsel," particularly attorneys regularly retained by insurers to defend their insureds.[52] It was argued before the Supreme Court of Florida that such retainers constitute unethical practice of law unless the insurers possess an interest in the litigation. To counter the arguments thus made, attorneys for the insurance industry candidly admitted that insurers *are* real parties in interest in lawsuits defended for their insureds. These admissions posed an obvious dilemma for Nationwide in the instant case, and the court, in holding that a defending insurance company is unquestionably a real party in interest, refused to permit Nationwide to take an inconsistent position.[53]

As another basis for its decision the court held that automobile liability insurance policies are quasi-third-party beneficiary contracts

49. *See* Tarpey, *supra* note 1.
50. 211 So. 2d at 596.
51. *Id.*
52. *In re* Rules Governing Conduct of Attorneys in Fla., 220 So. 2d 6 (Fla. 1969).
53. For differing views on whether the insurer is a real party in interest, *compare* WIS. STAT ANN. § 260.11 (Supp. 1969), *and* New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323 (5th Cir. 1960) (involving LA. REV. STAT. § 22:655 (Supp. 1970)), *with* Stark v. Crowell, 117 Vt. 413, 94 A.2d 585 (1953) (involving VT. STAT. ANN. tit. 23, §§ 842 & 882 (1967)).

giving the injured third-party beneficiary a contract right to join the insurer as a party defendant.[54] Noting the existence of a state financial responsibility act,[55] the recognized public need for complete liability insurance coverage, and the injection of the insurance company as an interested party, the court concluded that members of the general public are third party beneficiaries of the insurance contracts. No attempt was undertaken to explain how, if at all, the third-party beneficiary theory is related to the real party in interest rationale.

Taking notice of the widespread public knowledge of existing state financial responsibility laws, the court rejected Nationwide's allegation that prejudice would occur if insurance matters were communicated to the jury,[56] and observed that numerous means are commonly utilized to communicate to the jury indirectly the presence of insurance in the case.[57] The court likewise dispensed with the contention that claims in tort and contract may not be joined in a single suit since, in the court's view, this prohibition had been swept away by the liberal joinder provisions of rule 1.210(a) and its policy against multiple suits. On these bases the court discarded all of the insurer's defenses and reversed the trial judge's dismissal of Nationwide as a party defendant to the cause.

B. The Opinion of the Supreme Court of Florida

Following the adverse decision by the District Court of Appeal, the Supreme Court of Florida granted Nationwide's petition for certiorari. The subsequent decision,[58] however, further weakened Nationwide's position by affirming the appellate court's decision on even broader grounds. Whereas the District Court of Appeal began its analysis with rule 1.210(a) before proceeding to other considerations, the supreme court commenced its reasoning with public policy considerations and then proceeded down to the rule. Considering the broad basis of the resulting decision, this change in emphasis may indicate that the supreme court would have reached the same result even without the support of the rule's language.

Opening its opinion, the court referred to the now classic opinion

54. LA. REV. STAT. § 22:655 (Supp. 1970) provides that injured persons are third party beneficiaries.

55. FLA. STAT. ANN. ch. 324 (1968).

56. *See* notes 79-85 *infra* and accompanying text.

57. *E.g.*, voir dire, cross examination. 21 J. APPLEMAN, *supra* note 3, § 12831; 2 J. WIGMORE, EVIDENCE § 282(a), at 135 (3d ed. 1940).

58. 223 So. 2d 713 (Fla. 1969).

of Judge (later Justice) Benjamin Cardozo in *MacPherson v. Buick Motor Co.*[59] and, borrowing from the great public policy basis of that decision, stated:

> We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the *prevailing public policy* of Florida.[60]

Throughout its opinion the court articulated a number of public policy grounds for its conclusion, but, of the many public policy aspects considered by the court, perhaps the most influential was the strong public interest in automobile liability insurance. Since such insurance is carefully regulated by law and is absolutely essential for the protection of the general public, the court determined that it is therefore unreasonable to limit or restrict lawsuits which so importantly affect the interests of the public generally. Additionally, the court took notice of the growing need to eliminate multiple suits arising out of a single incident and the desirability of disposing of all the parties' claims at once.[61] In view of these desired ends, the court found it contradictory, anomalous, and discriminatory for the parties to liability insurance contracts to attempt to deny non-consenting members of the public a complete and expeditious remedy by inserting non-joinder provisions in such contracts.[62] Moreover, in this era of more mature juries, the court felt compelled to conclude that full disclosure at trial of insurance matters is preferable to the questionable "ostrich head in the sand"[63] approach with its misleading innuendoes of insurance lurking guiltily in the background. Pulling together all these factors, the court decided that it is unrealistic and improper that mass liability insurance coverage designed to afford protective benefits for the general public should bar identified members of the protected class from the pursuance of a speedy, realistic and adequate action for recovery.

As a means of implementing these public policy objectives, the court further expanded the third-party beneficiary theory adopted by the District Court of Appeal. Beginning this analysis the court quoted with approval from a recent Illinois case: "[A]utomobile insurance has taken an important position in the modern world. *It is no longer a*

59. 217 N.Y. 382, 111 N.E. 1050 (1916).

60. 223 So. 2d at 715 (emphasis added).

61. *See, e.g.*, 22 U. FLA. L. REV. 145, 147 n.31 (1969).

62. The court also stated that such non-joinder provisions are incompatible with the state constitution. *See* FLA. CONST. art. I, § 21 (Revision 1968).

63. 223 So. 2d at 718.

private contract merely between two parties."[64] In this regard, the court cited a number of factors lifting such contracts out of the category of purely private contracts: (1) the peculiar significance of automobile liability insurance policies because of their essential protective coverage; (2) the presumption that persons obtaining insurance coverage contemplate possible injuries to others and therefore intend direct benefits to them; (3) the great and growing number of automobile accidents and consequent personal injury litigation; and (4) the proliferation of governmental regulation of automobile liability insurance through control of premium rates and the establishment of required policy provisions such as mandatory uninsured motorist coverage. Considering all these circumstances, the court concluded that the many interests involved transcend the limits of a personal contract between insurer and insured:

> Viewed in this light, we think there exists sufficient reason to raise *by operation of law* the intent to benefit injured third parties and thus to render motor vehicle liability insurance amenable to the third party beneficiary doctrine.[65]

Having reached this decision, the court found that its position was further buttressed by the liberal joinder provisions of rule 1.210(a). Determining that automobile liability insurers are indeed real parties in interest,[66] the court reasoned that they possess no special privilege to contract immunity from suit by third parties. Furthermore, the court ruled:

> . . . [o]ne of the fundamental goals of modern procedural jurisprudence is to secure a method of providing an efficient and expeditious adjudication of the rights of persons possessing adverse interests in a controversy.[67]

The court concluded that this fundamental goal may best be achieved by joining insurer and insured as defendants in the plaintiff's original negligence action notwithstanding prior case law prohibiting joinder of claims in tort with claims in contract.[68] Emphasized by the court were a number of situations in which potential insurance coverage questions between insurer and insured could operate to defeat a plaintiff's chance

64. Gothberg v. Nemerovski, 58 Ill. App. 2d 372, 386, 208 N.E.2d 12, 20 (1965), *quoting* Simmon v. Iowa Mut. Cas. Co. 3 Ill. 2d 318, 322, 121 N.E.2d 509, 511 (1954). This interesting case involved a suit against an insurance broker whose failure to procure liability insurance for another pursuant to their contract caused the broker to be subjected to direct action by parties injured in a collision with the prospective insured.

65. 223 So. 2d at 716 (emphasis added). See note 54 *supra*.

66. See note 53 *supra*.

67. 223 So. 2d at 718.

68. See cases cited note 2 *supra*.

of recovery.[69] Joinder of all parties and claims, the court stated, would materially reduce the dangers inherent in the insurer's assertion of policy defenses against the claims of injured third parties. It carefully noted, however, that particular complicating issues likely to unduly hamper the trial of an action may be severed for separate trial if necessary.

Two dissenting members of the court stated their belief that, contrary to the majority's view, the injection of insurance aspects into personal injury actions will impede rather than expedite the adjudication of claims because of the additional issues to be decided. As a second ground of dissent, the judges made the now familiar observation that the change decreed by the court was one better left for determination by the legislature.[70] Finally, it was argued that although rule 1.210(a) permits joinder of all persons having adverse interests, it is limited to those interests that are *independently actionable*; since, in their view, the injured party has no actionable claim against the insurer until the insured's liability has been established, the rule does not authorize the insurer's joinder in the original action.

In affirming the decision of the District Court of Appeal, the Supreme Court of Florida firmly established the first wholly judge-made direct action against automobile liability insurers in a broad-based public policy opinion touching significantly upon the subject areas of civil procedure, insurance, and torts.

IV. IMPLICATIONS OF THE *Shingleton* HOLDINGS

A. Policies in Conflict

In precise terms, the Florida Supreme Court's decision in the instant case is limited to direct actions against automobile liability insurers in Florida by persons injured in motoring accidents. However, because of the broad policy bases of the decision, it is certainly amenable to significant future extension. Almost certain to be tested by direct action are general liability policies and indemnity policies. Among those likely to be involved are homeowners' liability insurance, commercial property insurance, insurance carried by governmental and charitable bodies, products liability insurance and professional

69. *E.g.*, Bergh v. Canadian Universal Ins. Co., 216 So. 2d 436 (Fla. 1968) (insured's delay in giving insurer notice of accident); Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966) (insured's procurement of multiple coverage).

70. On several occasions direct action legislation has failed passage in the Florida Legislature. 22 U. FLA. L. REV. 145, 146 n.12 (1969).

malpractice insurance.[71] Of equal or greater importance is the prospect of *Shingleton's* adoption by those states which currently recognize only limited direct actions or no direct actions at all.[72] Significant also are the conflict of laws possibilities presented when states other than Florida have interests in and contacts with a particular case. One court, for example, has already held that the instant case grants to injured persons a substantive right permitting suit against a general indemnity insurer in New York for injuries sustained in a Florida accident.[73] Moreover, it appears from the information available that this court applied *Shingleton* to a case not involving an automobile accident.

Just how the courts will extend or limit the future application of *Shingleton* cannot be predicted since direct actions have consistently engendered conflicts at the public policy level. It is to be expected, therefore, that most of the decisions to come will hinge upon resolution of these policy conflicts. While this difficulty may make future cases unpredictable, it may also make their holdings more considered and meaningful. In the instant case, for example, the court decided that the public interest in expeditious litigation of automobile accident cases among all persons genuinely interested in a specific incident outweighs the insurer's interest in lessening the prejudice alleged to result from revealing the fact of insurance coverage to juries. Moreover, the court was of the opinion that full disclosure of insurance matters might tend to reduce the danger of jury speculation as to the existence and extent of insurance in any particular case. Of similar import is the possibility that such full disclosure could eliminate the opportunities presently

71. The Florida District Court of Appeal which first decided *Shingleton* in 1968 has recently held that direct actions may be applied ". . . with equal force to all types of liability insurance policies which protect and benefit injured third parties, and are not restricted exclusively to a consideration of automobile liability insurance contracts." Beta Eta House Corp. v. Gregory, 230 So. 2d 495, 499 (Fla. Dist. Ct. App. 1970). This case involved an accident in which it was alleged that there had been negligent maintenance of the premises insured by defendant General Accident Fire and Life Insurance Company, Ltd., and owned by the Beta Eta House Corp. But, while holding that the direct action applied to this case, the court then set out a procedure for separating the various claims so that the liability aspects would be tried with a complete exclusion of the insurance aspects of the case; insurance coverage, the court held, should be tried separately after the liability issues. The court stated that this procedure was necessary since the prejudice theory has not yet been conclusively disproven. Thus in one decision the court both significantly extended and limited *Shingleton*. The results seem quite incongruous and the case has been certified to the Supreme Court of Florida for its consideration. In Liberty Mut. Ins. Co. v. Roberts, 231 So. 2d 235 (Fla. Dist. Ct. App. 1970), another Florida appellate court extended *Shingleton* to a case involving a homeowner's insurance policy and, although the court cited with approval the *Gregory* case, *supra*, it did not apply the limitation discussed therein.

72. Barrios v. Dade County, 38 U.S.L.W. 1111, 2393 (S.D.N.Y. Jan. 7, 1970), is the first case to apply *Shingleton* in a forum outside of Florida. See text accompanying note 118 *infra*.

73. *Id.*

available for attorneys to communicate the fact of insurance to the jury in a manner calculated to damage the opponent's case. Indeed, jury awareness of soaring insurance premium rates could conceivably lead to an inverse prejudice against plaintiffs when insurance matters are brought to the forefront.

In addition to swift trial among all interested parties, other policy goals support the allowance of direct action. Of these, perhaps the most important is the presence in the case of a financially responsible defendant. Also, despite the presence of non-resident motorist statutes,[74] it is still considerably easier for the insured to escape service of process than it is for insurance companies that normally conduct multistate operations; and even when service is obtained on an absent insured there may be no assets within the jurisdiction to subject to any judgment rendered. Considerations of this sort led to the enactment of the direct action statutes of Puerto Rico and Guam where transient insureds often left injured persons without a practical remedy.[75] Certainly this interest is noticeably increasing as Americans continue to become an ever more migratory society.

A related policy goal served through direct action is the prevention of losses suffered from being shifted to the families of the injured or the general public of the state of injury or residence. Similarly, those receiving accidental injuries when traveling through a sister state frequently require care at the expense of that state's public funds. Response to this need resulted in the enactment of the direct action statutes of Louisiana and Wisconsin.[76]

A final policy issue, and one which concerned the court in *Shingleton*, is that of preventing loss of the injured party's chance of recovery through the insurer's assertion of defenses arising from the insured's misconduct in failing to comply with the terms of his insurance policy after the happening of the liability-creating accident. Citing illustrative cases,[77] the court stated that this undesirable result could be reduced or avoided by requiring the insurer to present and substantiate any such defenses in the original action against its insured. The judicial direct action of *Shingleton* greatly facilitates the achievement of this policy goal.

74. *E.g.*, FLA. STAT. ANN. § 48.171 (1969). *See generally* Gibbons, *A Survey of the Modern Nonresident Motorist Statutes*, 13 U. FLA. L. REV. 257 (1960).

75. *See* Capital Ins. & Sur. Co. v. Kelly, 361 F.2d 567 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

76. *See* 22 LA. L. REV. 243, 244 nn. 1 & 2 (1961).

77. *See* cases cited note 69 *supra*.

It is submitted in conclusion that these policies should be considered fully by the courts when called upon to extend or adopt *Shingleton*; it is further submitted that the growing public interest in the various forms of liability and indemnity insurance may be such as to outweigh all other competing interests in view of the rapidly expanding acquisition of such insurance to cover a widening range of potential risks. In the instant case the court forthrightly met the issues presented and ably set forth a procedure by which it felt the conflicting interests might best be served. Authorization of the direct action may result, however, in more recoveries by more plaintiffs and consequent higher insurance rates;[78] these results are really a by-product of the basic fact that through direct action insurers will be called upon more often to perform according to the terms of their insurance contracts. Despite the possibility of higher premium rates, such a situation is difficult to label undesirable. Nevertheless, many potential problem areas confront *Shingleton's* future application. In the following section, a number of these areas will be examined and some solutions suggested, particularly in light of the experience of other jurisdictions that have dealt with direct actions.

B. Problem Areas of Future Application

1. *Prejudice and Jury Verdicts.*—Although examined to some cxtent above, the prejudice theory deserves additional attention in view of its continued vitality and staunch assertion by insurance counsel. In American jurisprudence the general rule continues to be that insurance matters must be hidden from the jury because of their alleged prejudicial effect.[79] However, eminent authorities have subjected the rule to much criticism.[80] One commentator even states that injection of insurance into jury trials tends to diminish the size of verdicts,[81] while another writer suggests that Wisconsin's direct action statute has been responsible for that state's comparatively higher insurance rates.[82] This conflict would seem to illustrate dramatically the division of opinion. Perhaps the most realistic view is that proffered by the New York

78. *See* Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 695 (1959-60).

79. *See* Wheeler v. Rudek, 397 Ill. 438, 74 N.E.2d 601 (1947); 8 J. APPLEMAN, *supra* note 3, § 4861; Peck *supra* note 78, at 695 n.19; Annot., 4 A.L.R.2d 761 (1949).

80. 8 J. APPLEMAN, *supra* note 3, § 4862, at 303; 2 J. WIGMORE, *supra* note 57.

81. 8 J. APPLEMAN, *supra* note 3, § 4861 n.18; *see* 22 U. FLA. L. REV. 145, 149 nn.45-48 (1969) and accompanying text. *Contra*, Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

82. Peck, *supra* note 78.

Court of Appeals: ". . . [I]t 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.' "[83] Part of the basis of this court's conclusion was the well-known fact that insurance matters are regularly communicated to juries by able counsel.[84] Another court's suggested middle-group approach is to hold that jury knowledge of insurance is not prejudicial unless the defendant has thereby been deprived of a fair trial on the issues.[85]

With the authorities thus divided, several alternatives are open to a court facing the question of whether to permit direct action in a certain case or class of cases. It is submitted that several considerations should govern: first, the court ought to recognize both the pervasiveness of insurance coverage and the greater sophistication of today's juries and then decide whether the risk of blind speculation by the jury outweighs the risk of prejudice from forthright disclosure; second, the court should determine whether the case before it is one of a class affected with a strong public interest like that subsisting in automobile liability insurance; and third, the court should decide whether the likelihood of the insurer's being prejudiced on the trial of the issues outweighs the policies served by permitting the direct action. If the *Shingleton* rationale is sound, there will be few cases justifying exclusion of the insurer.

2. *Parties.*—A frequent question posed by direct action statutes is whether the insurer may be sued alone or whether both insurer *and* insured must be joined. Guam, Louisiana, Puerto Rico, and Wisconsin have answered that the insurer may be sued alone,[86] while Oklahoma has said that suit against the insurer must be dismissed unless the insured is also a party.[87] The court in *Shingleton* was not faced with the question, but for the future the alternatives are obvious. It has been suggested that rather than adopt the permissive joinder allowed by Louisiana and Wisconsin or the mandatory joinder required by Oklahoma, the insured should be considered a necessary but not indispensable party.[88] The virtue of this approach is that suit would

83. Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 118, 204 N.E.2d 622, 626, 256 N.Y.S.2d 577, 583 (1965).

84. See note 57 *supra*.

85. Oklahoma Transp. Co. v. Claiborn, 434 P.2d 299 (Okla. 1967).

86. GUAM GOV'T CODE §§ 23525, 43354 (1961); P.R. LAWS ANN. tit. 26, §§ 2001 (1958), 2003 (Supp. 1968); Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (La. Ct. App. 1963); Elliott v. Indemnity Ins. Co. of N. Am., 201 Wis. 445, 230 N.W. 87 (1930).

87. Robertson v. Nye, 275 F. Supp. 497 (W.D. Okla. 1967).

88. 22 U. FLA. L. REV. 145, 146-48 (1969). *See generally* James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68 (1963).

still be possible in the absence of the insured, thus assuring the injured party an opportunity for recovery. However, as the next subsection illustrates, permissive rather than mandatory or necessary joinder gives plaintiffs distinct advantages in avoiding certain defenses of the insured.

3. *Defenses and Immunitites.*—The supreme court in *Shingleton* asserted as one reason for permitting joinder that such procedure may prevent the insured's failure to notify or cooperate with the insurer from presenting a bar to the plaintiff's recovery.[89] This was at least a preliminary indication that the defenses of the insurer against its insured may be assertable against the injured third party. These defenses are based upon the insured's failure to comply with the terms of the insurance policy after the accident giving rise to the suit; of course the insured will not thereby be relieved from liability, but the injured party may well lose the only financially able source of payment through misconduct over which he had no control. To prevent this possibility Louisiana cuts off the insurer's policy defenses at the time of the occurrence of the accident, holding that to rule otherwise would be inconsistent with the Louisiana statute's intent to fix the liability of insurers and to benefit injured persons.[90] Wisconsin apparently takes the position that the insurer does not automatically lose its policy defenses upon the occurrence of an accident; however, the defenses are definitely assertable if the insured's failures resulted in prejudice to the insurer's cause. In such cases the injured party has the burden of showing lack of prejudice to the insurer.[91] Puerto Rico similarly requires prejudice to the insurer before the defenses may be urged, but it appears that the burden of proof is on the insurer rather than the party seeking recovery.[92] The Supreme Court of Puerto Rico, moreover, has ruled that the injured party may be completely protected from such defenses by notifying the insurer of the accident and serving upon it a copy of his complaint.[93] Considering these several views, it is submitted that the most reasonable position is to hold that while the accident does not immediately cut off the

89. See cases cited note 69 *supra.*

90. King v. King, 253 La. 270, 217 So. 2d 395 (1968); Futch v. Fidelity & Cas. Co. of N.Y., 246 La. 688, 166 So. 2d 274 (1964) (undertaking to reconcile seemingly conflicting provisions of the Louisiana direct action statute relating to defenses).

91. WIS. STAT. ANN. § 204.34(3) (1957); Calhoun v. Western Cas. & Sur. Co., 260 Wis. 34, 49 N.W.2d 911 (1951).

92. Cuebas v. Porto Rican & Am. Ins. Co., 85 P.R.R. 601 (Sup. Ct. 1962).

93. Cuebas v. Porto Rican & Am. Ins. Co., 85 P.R.R. 601 (Sup. Ct. 1962); Colon v. Government of the Capital of Puerto Rico, 62 P.R.R. 24 (Sup. Ct. 1943).

insurer's policy defenses, the insurer must plead and prove prejudice to its cause and that the injured party can obtain complete protection by reasonable notice to the insurer followed by service of a copy of the complaint.

Another important category of defenses is that denominated as "personal." Among these are coverture, family immunity, charitable immunity,[94] and sovereign immunity.[95] Louisiana has held that these immunities cannot be pleaded in defense by the insurer when sued alone because they in no way grow out of the insurance contract or the accident.[96] Under this reasoning, a complete defense available to the insured is wholly unavailable to the insurer if both are not joined. Of course this problem will be lessened where recognized immunities are fewer[97] although obvious tactical advantages are presented if plaintiffs are permitted to sue the insurer without joining the insured. While these conflicts are difficult to resolve, a partial answer discussed in the preceding subsection is to hold that the insured is a necessary but not indispensable party thus making all defenses available where he can be joined. When the insured cannot be joined, perhaps it would be appropriate to allow the insurer to assert any defenses which would have been available to the insured. However, this practice might produce inequitable results in situations involving charitable or sovereign immunity since coverage expressly designed to protect injured third parties could not be applied to their claims. Another alternative, therefore, is to permit the insurer to assert all personal defenses except charitable and sovereign immunity. Either approach would prevent serious disadvantage to the defendant insurer in a direct action.

A third problem area is presented by statutes of limitation. Primarily at issue is the question of which statute applies to an injured

94. For a general cataloguing of the current status of charitable immunities, see Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 17-19, 152 S.E.2d 485, 496-98 (1967).

95. Sovereign immunity is quickly withering away. *E.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); 22 U. FLA. L. REV. 145, 151 n.69 (1969). *See generally* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 8 DUKE L.J. 588 (1959).

96. LeBlanc v. New Amsterdam Cas. Co., 202 La. 857, 13 So. 2d 245 (1943); Edwards v. Royal Indem. Co., 182 La. 171, 161 So. 191 (1935); Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (La. Ct. App. 1964); Dowden v. Southern Farm Bureau Cas. Ins. Co., 158 So. 2d 399 (La. Ct. App. 1963); Musmeci v. American Auto. Ins. Co., 146 So. 2d 496 (La. Ct. App. 1962); *see* 22 LA. L. REV. 243, 246-49 (1961). *Contra*, Fehr v. General Acc. Fire & Life Assur. Corp., 246 Wis. 228, 16 N.W.2d 787 (1944).

97. For example, Florida retains interspousal and family immunity while not allowing charitable or sovereign immunity as a defense. 22 U. FLA. L. REV. 145, 151 & nn. 68-71 (1969). *See also* Gaston v. Pittman, 285 F. Supp. 645 (N.D. Fla. 1968); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969).

party's direct action against the insurer. A convenient method of deciding would be simply to characterize the action as sounding either in tort or in contract. Louisiana, for instance, holds that its statute creates a cause of action in tort to which the tort statute of limitations is applicable.[98] Puerto Rico, while also applying its tort statute of limitations, concedes that the action probably sounds in contract.[99] However, since *Shingleton* was decided in part on the third party beneficiary doctrine, it would appear that the Florida courts may be inclined to rule that the action against the insurer is one in contract. In Florida, for example, the plaintiff would have an additional year to commence a direct action because of the longer statute of limitations as to contracts.[100] Although additional complications may be presented when wrongful death statutes of limitation are involved,[101] perhaps the best solution is that suggested by Puerto Rico: acknowledge that the cause of action is in contract but apply the tort or wrongful death statutes of limitation since the damage arises from the commission of a tort.[102] This approach would place insurer and insured on equal footing by barring the direct action whenever the statute has run as to the insured. Nevertheless, a corollary problem not solved by the above suggested procedure is whether suit against either the insurer or the insured tolls the running of the applicable statute of limitations as to the party not joined. Louisiana holds that its statute of limitations is tolled by suit against either party.[103] To hold otherwise could result in a plaintiff's being unable to join the insurer as a defendant after bringing suit against the insured within the statute of limitations, which would disserve the many policies promoted by allowing direct action.

A final area of difficulty concerns the assertion by the insurer of defenses inconsistent with the interests of its insured such as fraud in the procurement of the insurance policy and intentional misconduct in causing the accident. Earlier Florida decisions, for example, seem to indicate that to permit such defenses would be inconsistent with the good faith required of insurers in the defense of claims against their insureds.[104] It is submitted, however, that in a direct action the insurer

98. Soirez v. Great Am. Ins. Co., 168 So. 2d 418 (La. Ct. App. 1964).

99. Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967).

100. FLA. STAT. ANN. § 95.11(3) (1960) (5-year period on contracts); FLA. STAT. ANN. § 95.11(4) (1960) (4-year period on torts).

101. *E.g.*, FLA. STAT. ANN. § 95.11(6) (1960) (2-year period on wrongful death); FLA. STAT. ANN. § 768.04 (1964) (2-year period on wrongful death of minor child).

102. Fraticelli v. St. Paul Fire & Marine Ins. Co., 375 F.2d 186 (1st Cir. 1967).

103. Finn v. Employers' Liab. Assur. Corp., 141 So. 2d 852 (La. Ct. App. 1962).

104. *E.g.* Springer v. Citizens Cas. Co., 246 F.2d 123 (5th Cir. 1957); Automobile Mut. Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938).

has another interst to serve, namely that of preventing the return of a judgment against itself as well as against its insured. Permitting inconsistent defenses would serve the policy of eliminating multiple suits by having all claims presented at once, but it might unduly confuse and complicate particular lawsuits. Nevertheless, it is submitted that in view of the new interests involved, such inconsistent defenses should ordinarily be permissible and that the court should, on proper motion, sever for separate trial issues which would excessively hinder or prolong the action brought to determine liability and damages.

4. *Conflict of Laws.*—Many potential problems are posed when a direct action suit involves more than one jurisdiction. Some courts have been reluctant to enforce rights created under another state's direct action statute;[105] Louisiana will not even enforce its own statute where the accident occurred outside the state.[106] Mississippi, Missouri, and Texas have refused to allow direct actions based upon the Louisiana statute on the ground that it is merely procedural,[107] and even the Louisiana courts have expressed differing opinions as to the nature of the rights created.[108] Contrariwise, federal courts sitting in Georgia and New York have permitted suit based upon Louisiana's statute and have held that it grants substantive rights to injured parties.[109] Wisconsin's direct action statute has received similar treatment, and in one interesting disagreement, federal district courts in Illinois have held that the statute creates substantive rights upon which suit may be entertained in such courts[110] while the Illinois state courts have refused to allow the direct action.[111] Although theses state courts have held the statute to be both substantive and procedural,[112]

105. See cases cited notes 107 & 111 *infra.*

106. Weingartner v. Fidelity Mut. Ins. Co., 205 F.2d 833 (5th Cir. 1953) (Illinois accident); Hidalgo v. Fidelity & Cas. Co., 104 F. Supp. 230 (W.D. La. 1952), *aff'd*, 205 F.2d 834 (5th Cir. 1953) (Alamba accident); Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So. 2d 875 (1946) (Mississippi accident).

107. Cook v. State Farm Mut. Ins. Co., 241 Miss. 371, 128 So. 2d 363 (1961); Noe v. United States Fidelity & Guar. Co., 406 S.W.2d 666 (Mo. 1966); Penny v. Powell, 162 Tex. 497, 347 S.W.2d 601 (1961); *accord*, Pearson v. Globe Indem. Co., 311 F.2d 517 (5th Cir. 1962).

108. *Compare* West v. Monroe Bakery, 217 La. 189, 46 So. 2d 122 (1950) (substantive) *with* Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So. 2d 875 (1946) (procedural).

109. Collins v. American Auto. Ins. Co., 230 F.2d 416 (2d Cir. 1956); Shapiro v. Aetna Cas. & Sur. Co., 234 F. Supp. 41 (N.D. Ga. 1963), *aff'd*, 337 F.2d 237 (5th Cir. 1964).

110. Swanson v. Badger Mut. Ins. Co., 275 F. Supp. 544 (N.D. Ill. 1967); Posner v. Travelers Ins. Co., 244 F. Supp. 865 (N.D. Ill. 1965).

111. Marchlik v. Coronet Ins. Co., 40 Ill. 2d 327, 239 N.E.2d 799 (1968); Mutual Serv. Cas. Ins. Co. v. Prudence Mut. Cas. Co., 25 Ill. App. 2d 429, 166 N.E.2d 316 (1960).

112. Marchlik v. Coronet Ins. Co. 40 Ill. 2d 327, 239 N.E.2d 799 (1968) (substantive); Mutual Serv. Cas. Ins. Co. v. Prudence Mut. Cas. Co., 25 Ill. App. 2d 429, 166 N.E.2d 316 (1960) (procedural).

the ground for refusing its application has consistently been that direct actions offend the public policy of Illinois.[113] Michigan, while holding that the right created by the Wisconsin statute is subtantive, has declined to enforce it for public policy reasons.[114] In Minnesota the situation is unclear because of a split of authority in the decisions of the state supreme court.[115] An important factor considered by some of the courts is that by their own terms the Louisiana and Wisconsin statutes limit direct actions to the courts of their respective states.[116] Even so, those courts desiring to permit direct actions have characterized the limiting statutory provisions as relating to venue only and not as intending to bar actions based upon the statutes in those courts choosing to consider the rights granted as substantive.[117]

Whether *Shingleton* will form the basis for actions in courts outside of Florida has already received a partial answer. In *Barrios v. Dade County*,[118] the United States District Court for the Southern District of New York held that *Shingleton* grants a substantive cause of action against an insurer which may be sued upon in that court. In so holding, the district court expanded the Florida decision to cover a general indemnity insurer. Equally significant is the fact that although the injuries were sustained in Florida, they apparently were not caused by an automobile collision. Thus in a single case the *Barrios* court both adopted and expanded the basic rationale of *Shingleton*.

On balance it would seem that *Shingleton* might receive easier acceptance in foreign courts than the direct action stautes since, unlike the statutes, it contains no built-in venue restrictions and is supportable on several alternative bases. Nevertheless, to hostile courts it should be equally susceptible to avoidance as either procedural or violative of public policy. As this subsection indicates, a number of courts have permitted the direct action because of their feeling that direct action rights are substantive.[119] This would seem to indicate that enforcement

113. Cases cited note 112 *supra*.

114. Lieberthal v. Glens Falls Indem. Co., 316 Mich. 37, 24 N.W.2d 547 (1946) *construing* MICH. STAT. ANN. § 24.13030 (Rev. Vol. 1957).

115. Anderson v. State Farm Mut. Auto. Ins. Co., 222 Minn. 478, 24 N.W.2d 836 (1946) (not permitting the action); Kertson v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932) (permitting the action).

116. LA. REV. STAT. § 22:655 (Supp. 1970); WIS. STAT. ANN. § 260.11 (Supp. 1969).

117. *See* Collins v. American Auto. Ins. Co., 230 F.2d 416 (2d Cir. 1956); Posner v. Travelers Ins. Co., 244 F. Supp. 865 (N.D. Ill. 1965), *relying upon* Tennessee Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914); Swanson v. Badger Mut. Ins. Co., 275 F. Supp. 544 (N.D. Ill. (1967). *See also* Lauritzen v. Larsen, 345 U.S. 571 (1953).

118. 38 U.S.L.W. 1111, 2393 (S.D.N.Y. Jan. 7, 1970).

119. See cases cited notes 109-10 *supra*.

was allowed either on the *lex locus delicti* theory or in furtherance of the vested rights policy. Either approach would provide an adequate basis for the application of *Shingleton*. To date only the New York Court of Appeals has allowed suit based upon another jurisdiction's direct action statute on the basis of the significant contacts theory.[120] Perhaps that theory presents the most equitable, if not the most workable, formula for solving the conflicts problems sure to arise. The Supreme Court of Wisconsin has taken this approach with its statute,[121] and it is submitted herein that a careful weighing of the competing interests by courts faced with applying *Shingleton* in the conflicts context will provide a basis for achieving just results while avoiding either due process or full faith and credit violations.[122]

5. *Third Party Practice.*—Because the number of persons who may be joined in an action under liberal rules of procedure is virtually unlimited, special problems are posed for direct action suits.[123] Where, for instance, plaintiff does not join the defendant's insurer, it may be appropriate for the defendant himself to implead his insurer, particularly in a case where the insurer refuses to defend its insured.[124] Three states have held this procedure to be proper despite insurance policy provisions to the contrary.[125] Of course the insurer may likewise seek to implead its insured in order to gain the benefit of his personal defenses. Where counter or cross claims are involved, it may be appropriate for a defendant to join the plaintiff's insurer or the insurer of another defendant.[126] The Wisconsin direct action statute grants specific authority for such joinder of additional claims and parties.[127]

120. Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965). This case involved Puerto Rico's direct action statute which was thereafter amended to include a venue provision like those of Louisiana and Wisconsin. P.R. LAWS ANN. tit. 26, § 2003 (Supp. 1968), *amending* P.R. LAWS ANN. tit. 26, § 2003 (1958).

121. Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

122. *See* Hughes v. Fetter, 341 U.S. 609 (1951); Home Ins. Co. v. Dick, 281 U.S. 397 (1931); Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357 (1960).

123. *See* 22 LA. L. REV. 243, 254-55 (1961).

124. Jenkins v. General Acc. Fire & Life Assur. Corp., 349 Mass. 699, 212 N.E.2d 464 (1965); Adelman Mfg. Corp. v. New York Wood Finisher's Supply Co., 277 App. Div. 1117, 100 N.Y.S.2d 867 (1950); *accord* as to diversity suit, Jordan v. Stephens, 7 F.R.D. 140 (W.D. Mo. 1945).

125. Cases cited note 124 *supra*.

126. *See* Pucheu v. National Sur. Corp., 87 F. Supp. 558 (W.D. La. 1949); Brown v. Quinn, 220 S.C. 426, 68 S.E.2d 326 (1951). For special problems arising in the uninsured motorist coverage context see Hartzog v. Eubanks, 200 So. 2d 303 (La. Ct. App.), *cert. denied*, 251 La. 45, 50, 202 So. 2d 656, 658 (1967), and Allstate Ins. Co. v. Hunt, 450 S.W.2d 668 (Tex. Civ. App. 1970).

127. WIS. STAT. ANN. § 260.11(2) (Supp. 1969).

However, joinder of insurers may be arguably improper when punitive damages are sought against an insured since the inflammatory nature of punitive claims might realistically tend to prejudice an insurer's cause.[128] With the increasing number of accidents involving multiple parties, the problems posed are significant. Nevertheless, it is submitted that the liberal rules of procedure applicable to actions generally should provide adequate means for joining and severing appropriate claims and parties.[129] Judicious use of third party practice should serve to further the interests of eliminating multiple suits and circuity of action while preserving the right to direct action.

6. *Diversity Actions in Federal Courts.*—Superimposed upon the problem areas discussed throughout this section are some special problems faced by the federal courts in entertaining direct actions. First, Congress has limited the courts' jurisdiction to hear direct action suits by providing that

> . . . in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the *insured is not joined as a party-defendant*, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.[130]

Thus if the insured's citizenship coincides with any of those of the insurer, the federal courts will be closed to any direct action against the insurer *alone*. By its own terms the above provision does not apply when the action is brought against both insurer and insured, but whether the court would retain jurisdiction if the insurer were later dismissed as a party defendant has apparently not been decided. However, one court has held that an action for declaratory judgment brought by an insurer is not a direct action within the meaning of the provisions quoted above.[131]

Pleading and proving the jurisdictional amount presents a second problem for plaintiffs in federal courts. The Court of Appeals for the Fifth Circuit has held that the limits of liability on the insurance policy rather than the amount of the plaintiff's claim determine the

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128. *See* Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931).

129. The following states, like Florida, have rules of civil procedure patterned after the federal rules: Alaska, Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia and Wyoming. The federal rules themselves are in effect in the District of Columbia, Puerto Rico and the Virgin Islands.

130. 28 U.S.C. § 1332(c) (1964) (emphasis added), *criticized in* Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268.

131. Goverument Employees Ins. Co. v. LeBleu, 272 F. Supp. 421 (E.D. La. 1967).

jurisdiction over the case.[132] As a result, in any instance where the policy sued on is for 10,000 dollars or less, no diversity suit will be possible.[133] In addition, any insurer involved in a direct action against multiple insurers is entitled to dismissal if its policy limit is 10,000 dollars or less.[134]

A third area of difficulty is that of removal of direct actions from state to federal courts. An early decision held that joining insurer and insured in one action does not affect the removal process,[135] but a later court would not permit the insurer to remove only the question of its liability under the insurance policy.[136] Perhaps removal, when appropriate, should encompass the entire claim rather than just a portion of it.

Finally, several miscellaneous problems should be noted. Third party practice, discussed at length in the preceding subsection, should present less difficulty in view of the liberality of the Federal Rules of Civil Procedure, and the decided cases so indicate.[137] Conflict of laws questions, too, should present fewer problems inasmuch as the cases cited in the preceding subsection seem to indicate a greater willingness on the part of federal judges to apply other states' direct action rights.[138] While the federal courts are bound by the state conflict of laws rules, the Illinois experience demonstrates that this is not too great a barrier.[139] It should be noted also that the first court to adopt *Shingleton* was the United States District Court for the Southern District of New York.[140]

7. *Pretrial Discovery.*—Discovery of insurance matters has long been a troublesome subject in the non-direct action context. As Professor Moore observes, the decided cases are sharply and irreconcilably in conflict.[141] Most of the objections raised to the discovery of insurance have been based upon the prejudice theory or the belief that insurance is irrelevant to the merits of the case.[142]

132. Payne v. State Farm Mut. Auto. Ins. Co., 266 F.2d 63 (5th Cir. 1959).
133. *Id.*
134. Dendinger v. Maryland Cas. Co., 302 F.2d 850 (5th Cir. 1962).
135. Daniel v. Burdette, 24 F. Supp. 218 (W.D.S.C. 1938).
136. Highway Ins. Underwriters v. Nichols, 85 F. Supp. 527 (E.D. Okla. 1949).
137. Taylor v. Fishing Tools, Inc., 274 F. Supp. 666 (E.D. La. 1967); Pucheu v. National Sur. Corp., 87 F. Supp. 558 (W.D. La. 1949); Jordan v. Stephens, 7 F.R.D. 140 (W.D. Mo. 1945); Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939).
138. See cases cited notes 109-10, 118 *supra.*
139. See cases cited notes 110-12 *supra.*
140. Barrios v. Dade County, 38 U.S.L.W. 1111, 2393 (S.D.N.Y. Jan. 7, 1970).
141. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.16[3] (2d ed. 1969).
142. *Id.*

However, with insurers joined as defendants, there is good reason to argue that these objections are no longer tenable. It is submitted, therefore, that full discovery of insurance matters should now be permitted in cases applying *Shingleton* although precedent to the contrary may remain influential.[143]

8. *The Insured as Nominal Defendant.*—The possible effects of direct actions on recognized immunities have already been discussed in the subsection on defenses. As noted, the trend is markedly toward the abolition of both charitable[144] and sovereign[145] immunities. However, their continued vitality,[146] either in whole or in part, still presents potential difficulties in the application of *Shingleton*. Where immunities are recognized, one effective solution to the problems posed is to allow suit against the insured alone as a nominal defendant when the immune entity carries liability insurance. Thus the insurer remains ultimately liable to the extent of its policy limits although not required or permitted to be joined as a defendant. The immune entity continues in the suit as the apparent real party in interest although actually its interest is "nominal." Idaho[147] and Tennessee[148] follow this procedure where sovereign immunity is a factor. As to certain charities, Georgia,[149] Maryland,[150] Maine,[151] Nebraska,[152] and Tennessee[153] permit suit against the nominal defendant only. Illinois follows similar procedure but does not limit the charities' liability to the amount of insurance carried.[154]

Besides this nominal defendant method, two other approaches are followed. One is to hold that carriage of liability insurance does not

143. *E.g.*, Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

144. Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

145. Brinkman v. City of Indianapolis, 231 N.E.2d 169 (Ind. Ct. App. 1967).

146. *See, e.g.*, Rabon v. Rowan Memorial Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967).

147. IDAHO CODE ANN. § 41-3505 (1961); Pigg v. Brockman, 79 Idaho 233, 314 P.2d 609 (1957).

148. McMahon v. Baroness Erlanger Hosp., 43 Tenn. App. 128, 306 S.W.2d 41, *cert. denied*, 306 S.W.2d 41 (1957); Wilson v. Maury County Bd. of Educ., 42 Tenn. App. 315, 302 S.W. 2d 502, *cert. denied*, 302 S.W.2d 502 (1957).

149. Morehouse College v. Russell, 219 Ga. 717, 135 S.E.2d 432 (1964).

150. MD. ANN. CODE art. 43, § 556A (Supp. 1969); Howard v. Bishop Byrne Council Home, Inc., 249 Md. 233, 238 A.2d 863 (1968); McCormick v. St. Francis de Sales Church, 219 Md. 422, 149 A.2d 768 (1959); *accord* as to diversity actions, Sanner v. Trustees of Sheppard & Enoch Pratt Hosp., 278 F. Supp. 138 (D. Md.), *aff'd*, 398 F.2d 226 (4th Cir. 1968).

151. ME. REV. STAT. ANN. tit. 14, § 158 (Supp. 1970).

152. Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966).

153. McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S.W.2d 917 (1936).

154. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

permit suit against either the immune defendant or its insurer,[155] while the second, followed by Arkansas and Louisiana, is to allow direct action against the insurer notwithstanding its insured's immunity.[156] As a result, a court faced with applying *Shingleton* to an immunity case has these three alternatives. A resolution of the inherent problems in such a situation is difficult, particularly since this may be one instance where the prejudice theory is indeed viable. Of course its validity may be dependent upon the extent of jury awareness that except for the insurance there could be no recovery. Assuming such knowledge, if the insurer is joined the jury will know that it will bear the entire loss; if the insurer is not joined, the jury necessarily will speculate that an insurance company remains ultimately liable. In either case the fact of insurance coverage would be unavoidably apparent. If, however, a general lack of public awareness of immunities is assumed, the situation would be no different from any other case involving insurance. It is submitted, therefore, that the best solution would be to permit joinder of the immune entity's insurer so that all parties, claims, liabilities, and issues would be frankly and openly before the court. This may better serve the interests of all parties and, in this instance, particularly those of the insurer.

9. *Multiple Coverage, Pro Rata Payment and Subrogation.*—Issues involving these troublesome topics probably will not be greatly affected by direct actions via *Shingleton*, but the aboveboard nature of the direct action itself will likely make them more apparent. While direct action may serve to bring together all claims at once and thus eliminate additional litigation, the complicated nature of issues of this type may increase the complexity of particular suits beyond acceptable limits.[157] Nevertheless, it is submitted that no reason is apparent why the law relating to these subjects should be changed by permitting the direct action.

10. *Severance of Complex Claims.*—It is to be expected that,

155. Schulte v. Missionaries of La Salette Corp. of Mo., 352 S.W.2d 636 (Mo. 1961); Decker v. Bishop of Charleston, 247 S.C. 317, 147 S.E.2d 264 (1966).

156. ARK. STAT. ANN. § 66-3240 (Repl. Vol. 1966); LA. REV. STAT. § 22:655 (Supp. 1970).

157. Reference to the following cases and materials should be of help in meeting those problems which arise: Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689 (Fla. 1966); Futch v. Fidelity & Cas. Ins. Co., 246 La. 688, 166 So. 2d 274 (1964); Graves v. Traders & Gen. Ins. Co., 200 So. 2d 67 (La. Ct. App. 1967), *aff'd and amended*, 252 La. 709, 214 So. 2d 116 (1968); Cotton v. Associated Indem. Corp., 200 So. 2d 78 (La. Ct. App.), *cert. denied*, 251 La. 71, 203 So. 2d 88 (1967); 16 COUCH ON INSURANCE 2d §§ 62:1-62:140 (R. Anderson ed. 1966); Appleman, *Overlapping Coverages in Liability Contracts; Subrogation*, 13 VAND. L. REV. 897 (1960); 22 LA. L. REV. 243, 255-56 (1961).

particularly in view of what was said in the immediately preceding subsection, cases will arise wherein the issues, parties, or claims will be of such complicated nature as to unduly delay or hinder the trial as to liability and damages. Severance for separate trial as suggested by *Shingleton*[158] presents a manageable solution to this problem, but courts should take care to disallow the manufacture of subsidiary issues intended to secure the insurer's dismissal from the main case.[159] Considering the flexibility afforded by modern rules of civil procedure,[160] the courts should have little difficulty in dealing with the problems thus posed.

V. CONCLUSION

With the *Shingleton* decision the Supreme Court of Florida took an unprecedented step forward. Wholly made of judicial cloth, the direct action created by the court rests upon a broad public policy basis. The court recognized both the importance and pervasiveness of automobile liability insurance in today's world and faced the issues presented with commendable forthrightness. After considering all the interests involved, it was determined that present realities require holding that persons injured in automobile collisions are third party beneficiaries of automobile insurance policies. In view of the inconclusive evidence available, it is submitted that the court correctly rejected the prejudice theory in favor of the countervailing interest of openly joining and trying all related claims among interested parties.

The basic soundness of the decision should permit its extension into other fields of liability insurance that are deeply affected with a public interest.[161] Indeed, as shown in the section on the conflict of laws, one court has already applied *Shingleton* to a suit in New York against a general indemnity insurer.[162] Of critical importance in this regard is the fact that the Supreme Court of Florida reached its decision by means of the well-recognized legal vehicles of public policy, third party beneficiary rights, and the real party in interest concept. Though unique, the decision does not proceed upon any novel or undeveloped ground. The court's own reasoning thus presents

158. 223 So. 2d at 720.

159. The court in *Shingleton* strongly intimated that even after severance the identities of all parties and interests would still be disclosed at trial. *Id.*

160. See note 129 *supra.*

161. See note 71 *supra* for a discussion of two subsequent Florida appellate cases extending *Shingleton* to property and homeowner's insurance.

162. Barrios v. Dade County, 38 U.S.L.W. 1111, 2393 (S.D.N.Y. Jan. 7, 1970).

acceptable alternative bases for its adoption or extension by other jurisdictions. All that remains is for other courts to become convinced of the need for direct action. Considering the increasingly crowded court dockets and the interminable time necessary to prosecute personal injury claims to conclusion, it can hardly be doubted that a substantial need for relief exists. Although *Shingleton* will not provide a complete solution for all problems, it is submitted that in view of the policy values it is designed to promote, it certainly deserves significant consideration in the development of a sound perspective toward the resolution of the mounting crisis in personal injury litigation.

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