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THE JOINDER—SEVERABILITY QUESTION SURROUNDING LIABILITY INSURER DEFENDANTS

A minor sued Beta Eta House and its liability insurance carrier to recover damages for personal injuries allegedly caused by the negligence of the fraternity house in maintaining its premises. The insurance carrier, which had been joined as a party defendant, moved for dismissal. Although the motion to dismiss was denied, as was the carrier's petition for common law writ of certiorari in the district court of appeal, two questions were certified for review by the Florida Supreme Court¹ which held: The principles announced in *Shingleton v. Bussey*² are applicable to all forms of liability insurance, but the trial court may on a motion of either party order separate trials³ in those cases where a liability insurer is joined as a defendant. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970).

Apparently, there are three prevalent theories regarding the disclosure of insurance coverage in the jury trial.⁴ The so-called "older line of authority" follows the position that any evidence of the defendant's insurance should be kept from the jury.⁵ Until recently, this has been the Florida position.⁶ A second viewpoint is that the mere mention of insurance, in the absence of anything more (e.g., dwelling on it, featuring it, or making an issue of it) is not prejudicial.⁷ The third and apparently more modern view, is that there should be full disclosure of insurance coverage and that such disclosure is harmless in terms of prejudicing a jury.⁸

As a corollary to the theories regarding the role of insurance, there are basically three schools of thought regarding the joinder of insurance carriers.⁹ The first, and probably oldest school of thought, simply holds

1. *Beta Eta House Corp. v. Gregory*, 230 So.2d 495 (Fla. 1st Dist. 1970).

2. 223 So.2d 713 (Fla. 1969). The Court in this case announced that an insurer could be joined as a defendant, and the issue of insurance coverage could be brought to the jury's attention.

3. See FLA. R. CIV. P. 1.270(b).

4. For a more detailed discussion of the earlier history regarding these theories, see Annot., 4 A.L.R.2d 761 (1949).

5. See *Hoffman v. Brandt*, 65 Cal. 2d 549, 421 P.2d 425, 55 Cal. Rptr. 417 (1966); *Brandemarte v. Green*, 37 N.J. 557, 182 A.2d 562 (1962).

6. See *Rose v. Peters*, 82 So.2d 585 (Fla. 1955); *Carls Markets v. Meyer*, 69 So.2d 789 (Fla. 1953); *Carlton v. Johns*, 194 So.2d 670 (Fla. 4th Dist. 1967); *Crowell v. Fink*, 135 So.2d 766 (Fla. 1st Dist. 1961); *Barnett v. Butler*, 112 So.2d 907 (Fla. 2d Dist. 1959).

7. See *Schevling v. Johnson*, 122 F. Supp. 87 (D. Conn. 1953); *Clark v. Atlantic Stevedoring Co.*, 3 F.R.D. 35 (E.D.N.Y. 1943); *Tullgren v. Jasper*, 27 F. Supp. 413 (D. Md. 1939); *Odegard v. Connolly*, 211 Minn. 342, 1 N.W.2d 137 (1941).

8. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969). See also Note, *The Liability Insurer As A Real Party In Interest*, 41 MINN. L. REV. 784 (1957); Note, *Permissive Joinder As A Substitute For Excluding Evidence That Defendant Is Insured*, 59 YALE L.J. 1160 (1950).

9. For a detailed description of the earlier law regarding direct action and joinder, see 8 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4861-66 (Supp. 1970) [hereinafter referred to as APPLEMAN]. See also Note, *Procedure—Insurance Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969), 48 TEXAS L. REV. 242 (1969).

that insurers should not be joined as defendants in suits by injured parties against insureds.¹⁰ This doctrine has been followed until recently in Florida,¹¹ based on the rationale that the suit between the insured and the injured party was one in tort, whereas the relationship between the insured and insurer was a contractual one.¹² The second school embraces the theory that only under certain circumstances may there be joinder of the insurer. Under this theory, there are two tests employed by the various states to determine whether joinder will be allowed. According to the first test, if the insurance policy is construed to be liability insurance, as opposed to indemnity insurance,¹³ the insurer may be joined, but not otherwise.¹⁴ The other test employed is that the insurer may be joined where the insurance involved is required by statute, or pursuant to a license that is required by statute.¹⁵ The third school allows joinder of insurers either because of a statute,¹⁶ or through case law,¹⁷ without some of the reservations of the other theories, but it does restrict joinder in other ways. For instance, Wisconsin, whose statute is generally considered the forerunner of the "direct action" statutes, has numerous cases holding the statute to be very narrowly construed and that it only applies to motor vehicles on streets and highways.¹⁸

Returning now to a discussion of the instant case, *Beta Eta House Corp. v. Gregory*,¹⁹ the Supreme Court of Florida appears to have given the "right"²⁰ of direct action a much broader scope than most jurisdic-

10. See *Shermoen v. Lindsay*, 163 N.W.2d 738 (N.D. 1968); *Young v. Barney*, 20 Utah 2d 108, 433 P.2d 846 (1967).

11. See *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969).

12. See *Jones v. United States Fid. & Guar. Co.*, 19 F. Supp. 799 (N.D. Fla. 1937); *Artile v. Davidson*, 126 Fla. 219, 170 So. 707 (1936); *Thompson v. Safeco Ins. Co. of America*, 199 So.2d 113 (Fla. 4th Dist. 1967); *Fincher Motor Sales Inc. v. Lakin*, 156 So.2d 672 (Fla. 3d Dist. 1963).

13. Theoretically, liability insurance makes the insurer primarily liable, whereas indemnity insurance makes the insurer only secondarily liable.

14. See *Wells v. American Employers Ins. Co.*, 132 F.2d 316 (5th Cir. 1942); *Jones v. Thunderbird Transp. Co.*, 178 F. Supp. 9 (D.C. Kan. 1959); *Kuntz v. Spence*, 67 S.W.2d 254 (Tex. Ct. App. 1934).

15. See *John Long Trucking Inc. v. Greear*, 421 F.2d 125 (10th Cir. 1970); *Har-Pen Truck Lines Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967); *Spicer v. American Home Assurance Co.*, 292 F. Supp. 27 (N.D. Ga. 1967); *James v. Young*, 77 N.D. 451, 43 N.W.2d 692 (1950); *Meyer v. Guernsey*, 111 Neb. 577, 197 N.W. 432 (1924). See also APPLEMAN, *supra* note 9, at § 4862 (1962).

16. There are four jurisdictions that have "direct action" statutes, which permit the injured party to join the insurer. They are as follows: Guam—GUAM GOV'T CODE § 43,354 (1961); Puerto Rico—26 P.R. LAWS ANN. § 2001 (1958) & § 2003 (1968); Louisiana—LA. REV. STAT. ANN. § 22:655 (1969); Wisconsin—Wis. STAT. ANN. §§ 204.30(4), 260.11(1) (1969).

17. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969). Florida is the only state at the present time that has adopted direct action by judicial rather than legislative process. See Note, *Procedure-Insurance, Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969), 48 TEXAS L. REV. 242 (1969).

18. See APPLEMAN, *supra* note 9, at § 4866.

19. 237 So.2d 163 (Fla. 1970).

20. This "right" was considered by the first district court of appeal to be procedural. However, many courts have considered the right to sue the insurer a substantive matter. See,

tions which permit such a suit.²¹ The district court pointed out that although the decision by the district court in *Shingleton* was narrow,²² the Supreme Court in *Shingleton* made it clear that the holding applied not only to automobile liability insurance but to other types of insurance as well.²³ This view was evidently adopted by the Florida Supreme Court when it answered the certified questions in *Beta Eta*, for the court chose to utilize those arguments put forth in their earlier *Shingleton* opinion which could easily be applied to other types of insurance as well.²⁴ One such argument is that today, "it is very likely that the jury will assume, rightly or wrongly, that the defendant is insured."²⁵

In expanding the holding of *Shingleton*, the court in *Beta Eta* may have been aware that other courts in Florida were reading *Shingleton* as applying to more than just automobiles.²⁶ Although in the instant case two members of the court dissented from the majority,²⁷ both the majority and the dissent appear to have agreed that the peculiarities relating to automobiles in Florida²⁸ were not sufficient to prevent *Shingleton* from applying to all types of liability insurance.

Although the clarification of *Shingleton's* applicability to nonautomobile policies was helpful, the real significance of *Beta Eta* was its affirmation of the district court's opinion on separate trials. The court noted, with emphasis, that the word "should," in the lower court's opinion,²⁹ was changed to "may."³⁰ However, at least to one dissenting justice,

e.g., *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544 (N.D. Ill. 1967); *Greear v. John Long Trucking Inc.*, 272 F. Supp. 224 (W.D. Okla. 1967); *Alcoa S.S. Co. v. Charles Ferran & Co.*, 251 F. Supp. 823 (E.D. La. 1966); *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965). *But see* *Noe v. United States Fid. & Guar. Co.*, 406 S.W.2d 666 (Mo. 1966) and *Penny v. Powell*, 162 Tex. 497, 347 S.W.2d 601 (1961) which held the right of direct action to be one of procedure. *See also* Comment, *The Louisiana Direct Action Statute*, 22 LA. L. REV. 243, 252 (1961).

21. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970).

22. *Bussey v. Shingleton*, 211 So.2d 593 (Fla. 1st Dist. 1968).

23. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969). For a detailed analysis of the *Shingleton* decision, see Note, *Joinder of the Liability Insurer As A Party Defendant*, 23 U. MIAMI L. REV. 652 (1969). *See also* Note, *Procedure-Insurance Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969), 48 TEXAS L. REV. 242 (1969).

24. In *Shingleton v. Bussey*, 223 So.2d 713, 718, the court pointed out that joinder of the insurer would decrease the number of suits and the "[a]boveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers. . . ." *Id.*

25. Note, *The Liability Insurer As A Real Party In Interest*, 41 MINN. L. REV. 784, 789 (1957). *See also* Kalven, *The Jury, The Law, and The Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958) [hereinafter cited as Kalven].

26. *See* *Duran v. McPherson*, 233 So.2d 639 (Fla. 4th Dist. 1970) (applying *Shingleton* to professional liability insurance); *Shipman v. Kinderman*, 232 So.2d 21 (Fla. 1st Dist. 1970) (applying *Shingleton* to medical malpractice insurance); *Liberty Mut. Ins. Co. v. Roberts*, 231 So.2d 235 (Fla. 3d. Dist. 1970) (applying *Shingleton* to homeowners liability insurance).

27. *Beta Eta House Corp. v. Gregory*, 237 So.2d at 166.

28. *See* Financial Responsibility Law, FLA. STAT. ch. 324 (1969).

29. *Beta Eta House Corp. v. Gregory*, 230 So.2d 495, 500 (Fla. 1st Dist. 1970).

30. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163 (Fla. 1970).

this appears to be a distinction without a difference for even the majority admits that separation will be the rule as opposed to the exception.³¹

It appears that the majority, in reaching their decision, reasoned that the purpose of joining the insurer was for judgment only, thus the substantive law prohibiting the issue of insurance from reaching the jury could be maintained, while at the same time having the insurer in the litigation as a defendant though not a party to the initial trial.³² Although the court in *Beta Eta*, apparently tried to complement the *Shingleton* decision, there are many who believe that the effect of the decision is for all practical purposes to reverse *Shingleton*.³³

Since the supreme court affirmed the lower court's interpretation that the action in *Shingleton* involved only a procedural matter, the benefits of *Shingleton* may now be realized, *i.e.*, having the insurer joined to avoid garnishment proceedings, etc., without disturbing the substantive long-standing rule against disclosure of insurance to the jury.³⁴ However, several members of the supreme court indicated in the *Beta Eta* opinion that *Shingleton* did in fact involve a decision on the substantive question of insurance.³⁵ In fact, much of the language in *Shingleton* appears to give this impression.³⁶

A valid argument has been made for keeping knowledge of insurance from the jury. For one thing, studies show that knowledge of insurance may affect the jury, both on the question of liability as well as damages.³⁷ In addition, if the jury can know of the defendant's insurance resources, then why shouldn't they be apprised of the defendant's personal financial resources?³⁸

Good arguments though they may be, this author is hard-pressed to find any reliance on these statements by the court in *Shingleton*. In fact, the following language from the *Shingleton* case seems to relate to the substantive issue of disclosure rather than to the procedural question of joinder: "the injection of insurance does not operate to increase the

31. *Id.* at 166 (Boyd, dissenting opinion).

32. This reasoning was expressed in a companion case decided at the same time, wherein *Shingleton* was extended to cover medical malpractice insurance. See Brief for Petitioner at 8, 9, North Miami Gen. Hosp., Inc. v. Roach, 237 So.2d 173 (Fla. 1970).

33. See Brief for Respondent at 20, 230 So.2d 495 (Fla. 1st. Dist. 1970); Brief for Respondent at 5, North Miami Gen. Hosp., Inc. v. Roach, 237 So.2d 173 (Fla. 1970); Beta Eta House Corp. v. Gregory, 237 So.2d 163 (Fla. 1970) at 5 (Boyd, dissenting opinion), at 8 (Ervin, dissenting opinion).

34. *But see* Beta Eta House Corp. v. Gregory, 237 So.2d at 166 (Boyd, dissenting opinion).

35. Beta Eta House Corp. v. Gregory, 237 So.2d at 165.

36. *Shingleton v. Bussey*, 223 So.2d at 718.

37. See Kalven, *supra* note 25; Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368 (1957).

38. For a discussion on this argument and the law pertaining thereto, see Brief for Petitioner at 10, North Miami Gen. Hosp., Inc. v. Roach, 237 So.2d 173 (Fla. 1970); Brief for Petitioner at 6, Beta Eta House Corp. v. Gregory, 230 So.2d 495 (Fla. 1st Dist. 1970). See also 22 AM. JUR. 2d, *Damages* § 320 (1965).

size of jury verdicts";³⁹ "we do think the stage has now been reached where juries are more mature."⁴⁰ This author is forced to conclude that when the court in *Shingleton* spoke of a "candid admission at trial of the existence of insurance coverage,"⁴¹ as opposed to "the questionable 'ostrich in the sand' approach,"⁴² it was dealing with the substantive question of whether or not insurance coverage is a subject for the jury's knowledge. Accordingly, the court has been inconsistent in its rulings in *Shingleton* and *Beta Eta*.

It is this author's opinion, that regardless of the intent of the court in *Beta Eta*, the effect of its decision will be, for all practical purposes, to override *Shingleton*. It is unfortunate that the State of Florida apparently will return "to the present rule of non-disclosure—a rule which is not only a fruitful source of controversy, but fails completely to accomplish its purpose."⁴³

STEPHEN T. BROWN

STOCKHOLDERS' DERIVATIVE SUIT: PLAINTIFFS' RIGHT TO TRIAL BY JURY

Plaintiffs, stockholders of a closed-end mutual fund, brought a derivative action in the Federal District Court for the Southern District of New York, naming as defendants the corporation's board of directors and an investment banking firm which acted as the corporation's stock broker.¹ Both the directors and the broker were accused of breaching the fiduciary duty owed by each to the corporate fund. The broker, some of whose partners comprised a portion of the corporation's board of directors, was also alleged to have thereby violated the Investment Company Act of 1940.² This control by the broker was alleged to have been used for the purpose of extracting from the corporation unusually high brokerage fees. Allegations against the directors individually, asserted that they had converted corporate assets and were guilty of "gross abuse of trust, gross misconduct, willful misfeasance, bad faith," and "gross negligence." The plaintiffs' complaint requested an accounting of the alleged excess profits received by the broker and of the resulting losses to the corporation and also demanded a jury trial. The defendant's motion to strike

39. *Shingleton v. Bussey*, 223 So.2d 713, 718 (Fla. 1969).

40. *Id.*

41. *Id.*

42. *Id.*

43. Note, *Permissive Joinder As A Substitute for Excluding Evidence that Defendant is Insured*, 59 YALE L.J. 1160, 1167 (1950).

1. *Ross v. Bernhard*, 275 F. Supp. 569 (S.D.N.Y. 1967).

2. Investment Company Act, 15 U.S.C. § 80(a) 1 *et seq.* (1964).