

# Louisiana Law Review

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Volume 45 | Number 6  
*Symposium: Law of the Sea*  
July 1985

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## Admissibility of Insurance Policy Limits

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### Repository Citation

Susan A. Row, *Admissibility of Insurance Policy Limits*, 45 La. L. Rev. (1985)  
Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol45/iss6/9>

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## ADMISSIBILITY OF INSURANCE POLICY LIMITS

The question of whether a jury should be informed of insurance policy limits is a controversial issue in Louisiana. Many perceive the problem as an evidentiary question of whether or not the limits should be admitted into evidence. However, the insurance policy must be introduced to establish jurisdiction under the Direct Action Statute, and many insurers plead generally in their answers that the policy limits not be exceeded in the event of judgment against them. Therefore, the problem is more correctly viewed as a narrower question of whether, in direct actions, the trier of fact should be informed of the amount of the policy limits.

Those who oppose the policy of allowing the jury to consider the amount of coverage generally oppose it on the basis that such information is prejudicial and will cause the jury to award higher verdicts. This comment will begin with a review of the policy behind Federal Rule of Evidence 411, which prohibits evidence of the existence of insurance to be revealed to the jury. This policy validates the fear of jury prejudice when insurance is involved in a jury trial. Of course, since Louisiana is a direct action state, the federal rule is not directly applicable, but the approach taken in the Federal Rules of Evidence offers some guidance for solving the unique Louisiana problem of whether to allow a jury to be informed of insurance policy limits.

Although the Louisiana Supreme Court has hinted at its position on this issue, it has not yet clearly articulated that position. As a consequence, confusion has developed in our jurisprudence by the courts' attempts to predict what that position might be. This comment will discuss and analyze this jurisprudence and will recommend a solution to the problem of whether to allow the insurance policy limits to go to the jury.

### *Federal Rule 411*

Federal Rule of Evidence 411 sets out a broad general rule, subject to certain qualifications, that evidence of liability insurance is not admissible to show fault.<sup>1</sup> Two rationales are usually cited for the rule.

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1. Federal Rule of Evidence 411 provides:

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of witness.

First, since insurance is not logically related to the issue of liability, this fact is irrelevant.<sup>2</sup> The Advisory Committee's Note emphasizes that "[a]t best the inference of fault from the fact of insurance coverage is a tenuous one . . . ."<sup>3</sup> The second reason is that knowledge of the presence or absence of insurance might prejudice the jury and cause them to decide the issue of liability or damages on improper grounds.<sup>4</sup> Such evidence may influence jurors to bring verdicts against defendants in close cases.<sup>5</sup> More important is the concern that the mention of insurance will invite higher verdicts than justified. Jurors may believe that the defendants themselves are not required to pay, but that the award will be paid by a "well-pursed and heartless insurance company" which has been paid to take the risk.<sup>6</sup>

The validity of this fear of verdicts influenced by the knowledge of insurance has been questioned. Some feel that the passage of time and the pervasiveness of insurance has eroded much of the danger of prejudice which resulted from bringing the fact of insurance into a case.<sup>7</sup> When the rule originated, insurance coverage was not common, but today liability insurance has become prevalent, and most juries probably assume that defendants are insured.<sup>8</sup> Also, since many states make liability insurance compulsory in some circumstances, the fact of insurance becomes notorious under the law.<sup>9</sup> Thus, it is probable that the existence of insurance is not as prejudicial today as in the past. The results of some experiments, however, support the view that jurors are influenced when insurance is admitted into evidence.

In one study conducted at the University of Chicago,<sup>10</sup> tape recordings of mock trials based on actual trials were prepared and played to persons actually on jury duty. The versions varied in their treatment

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2. The first sentence of Federal Rule of Evidence 411 negates the notion that negligence can be inferred from the existence of insurance. The notion is that insurance may lead a driver to a "devil-may-care" attitude and cause one to act with abandon. This, however, has no bearing on whether one's behavior was substandard on an occasion in question. To the contrary, that a person obeys the law by purchasing insurance when it is compulsory, or has the foresight to purchase insurance even when not required to do so by law, suggests that he exercises a degree of responsibility which connotes carefulness, not carelessness. See 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5362, at 431 (1980).

3. Fed. R. Evid. 411 advisory committee note.

4. *Id.*; McCormick on Evidence § 201, at 593 (E. Cleary 3d ed. 1983) [hereinafter cited to this edition without reference to editor].

5. Phillips, *Mention of Insurance During Trial*, *Trial Law. Guide* 247 (1961); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 216 (1982).

6. McCormick on Evidence § 201, at 593; 2 J. Wigmore, *Evidence in Trials at Common Law* § 282a, at 148 (J. Chadbourn rev. ed. 1979).

7. 10 J. Moore, *Moore's Federal Practice* § 411.03, at 198 (1982).

8. McCormick on Evidence § 201, at 596.

9. 2 J. Wigmore, *supra* note 6, § 282a, at 169.

10. Broeder, *The University of Chicago Jury Project*, 38 *Neb. L. Rev.* 744, 753 (1959).

of the defendant's liability insurance. The experiments indicated that juries tended to award less when they knew an individual was not insured than when they were aware that the individual had insurance. Where jurors knew that a defendant was insured, an objection by defense counsel and an instruction by the court to disregard the evidence alerted the jurors to the defendant's insurance coverage, and consequently, the awards increased significantly.

Another study that was conducted after several insurance companies began an advertising campaign to protest inflated jury awards showed that even a single exposure to one of the advertisements could dramatically lower the amount a juror was willing to award.<sup>11</sup>

Almost without exception, writers have been critical of the policy of Rule 411. Wigmore found the rule "impracticable"<sup>12</sup> and believed it doubtful that in the long run enforcement of the rule would lead to any advance toward justice.<sup>13</sup> Others believe that it is an improper fiction to pretend the insurance company is not a party, since the company controls the litigation and will ultimately pay the judgment.<sup>14</sup> Morgan attacked the policy by stating that its enforcement causes courts to "indulge in a lot of nonsense."<sup>15</sup> Others have protested that the exceptions have inundated the rule. For example, McCormick commented that because of the many exceptions which have developed, "the rule has become a hollow shell, expensive to maintain and of doubtful utility."<sup>16</sup>

Although Rule 411 expressly excludes the proof of liability insurance to establish negligence or other wrongful acts, it does not require exclusion of evidence of insurance when offered for "another purpose."<sup>17</sup> The three most common situations in which evidence of insurance has been deemed admissible are set forth in the rule itself. The first permissible purpose is proof of agency, when that issue is contested. For example, it is usually proper to show the existence of the employer-employee or the principal-agent relationship by showing that an employer or principal carries liability insurance on one alleged to be his employee or agent. The second is to show ownership or control. If the question is whether a defendant owns or has control over certain property, evidence that the defendant carries insurance on the property is admissible.<sup>18</sup> The third permissible purpose is to show the bias or prejudice of a witness. An attorney may cross-examine a witness to show any

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11. Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68 (1979).

12. 2 J. Wigmore, *supra* note 6, § 282a, at 148.

13. *Id.* at 169.

14. 22 C. Wright & K. Graham, *supra* note 2, § 5362, at 434.

15. 1 E. Morgan, *Basic Problems of Evidence* 212 (1961).

16. McCormick on Evidence § 201, at 597.

17. 10 J. Moore, *supra* note 7, §411,03, at 198.

18. Annot., 4 A.L.R. 2d 761, 777 (1949).

interest in insurance or bias against insurance companies which would bear on his credibility.<sup>19</sup> It is necessary for the judge to weigh the possible harmful effect of jury prejudice against the plaintiff's procedural right to question a witness as to his adverse interest or bias.<sup>20</sup> In all three situations, the court should be guided by the principles stated in Federal Rule 403,<sup>21</sup> and the probative value must not be substantially outweighed by its prejudicial effect.<sup>22</sup>

The language "such as" used in Rule 411 indicates that the enumerated exceptions are only illustrative,<sup>23</sup> and cases have established additional exceptions. One such exception is the "intertwined admission."<sup>24</sup> If a party's statement or admission bearing on the issue of negligence or damages contains both an objectionable reference to insurance and admissible evidence, the judge should determine whether the mention of insurance is separable. If the admission cannot be separated without substantially lessening its evidentiary value, the evidence may be admitted regardless of the fact that the reference to insurance is included.<sup>25</sup> An admission relating to the issue of negligence or damages is normally highly probative, and even when it contains a nonseverable reference to insurance, the probative value would likely outweigh any potential jury prejudice.<sup>26</sup>

One problem in applying Rule 411 is that witnesses sometimes make voluntary, unexpected, and unresponsive references to insurance during their testimony. Following such a remark, the judge may declare a mistrial;<sup>27</sup> however, it is more common for the opposing party to move to strike the evidence and have the jury admonished to disregard the remark.<sup>28</sup> Another problem occurs when the fact of insurance is improperly introduced by remarks and arguments of counsel, who willfully make comments regarding insurance to influence a verdict or prejudice the jury. Here too, the court may order a mistrial if the remarks are made in bad faith.<sup>29</sup> However, because knowledge of insurance on the part of present day jurors is presumed and because of judicial skepticism toward the insurance rule, the modern trend is toward a relaxation of

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19. 21B J. Appleman, *Insurance Law & Practice* § 12835, at 501 (1980).

20. Phillips, *supra* note 5, at 250.

21. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

22. McCormick on Evidence § 201, at 594.

23. See also the language "well established illustrations," Fed. R. Evid. 411 advisory committee note.

24. 22 C. Wright & K. Graham, *supra* note 2, § 5368, at 466.

25. McCormick on Evidence § 201, at 595.

26. 2 J. Weinstein & M. Berger, *Weinstein's Evidence* § 41105, at 411-12 (1982).

27. McCormick on Evidence § 201, at 595-96.

28. 22 C. Wright & K. Graham, *supra* note 2, § 5369, at 474.

29. Phillips, *supra* note 5, at 252.

the rule of automatic mistrial,<sup>30</sup> and it is unlikely that the courts will terminate the trial unless the opponent is in bad faith.<sup>31</sup> Another problem arises because jurors are often made aware of insurance through voir dire. The general practice is that the jury may be questioned about interest in or connection with an insurance company which has an interest in the litigation, even though the company is not a party.<sup>32</sup> But courts require the parties to exhibit good faith in making such an inquiry.<sup>33</sup>

In summary, evidence excluded under Rule 411 is inadmissible because it is not relevant to an issue in the case. Because the evidence is not logically relevant, it is not admissible. Even when the fact of insurance *does* have some probative force on an issue which makes it logically relevant, the probative force is usually so slight that it is substantially outweighed by the danger of unfair prejudice.<sup>34</sup> Taking into account the low probative value and the possibility of jury prejudice, evidence excluded under Rule 411 would probably not meet the relevancy requirement of Rules 401 through 403 of the Federal Rules of Evidence in any event. In this sense, Rule 411 is probably redundant, since the same results should be reached in each situation in the absence of that rule.<sup>35</sup>

### *Direct Action Statute*

The most direct method of disclosing the existence of insurance is to join the insurer as a defendant. At least two states allow joinder of the insurance company as a defendant.<sup>36</sup> In those states, admissibility of the fact of insurance does not present the evidentiary problems present in those states which prohibit joinder. An amendment to Rule 411 to add "[e]xcept in jurisdictions or cases where an insurance carrier may be made a party [or] sued directly upon a cause of action" was suggested, but was not adopted because "the result is the same without it."<sup>37</sup>

Louisiana's Direct Action Statute<sup>38</sup> permits joinder of an insurance company in all liability actions. Louisiana occupies a unique position in that the Direct Action Statute allows a suit directly against the insurer

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30. *Snowwhite v. State*, 243 Md. 291, 221 A.2d. 342, 347 (Md. 1966).

31. 22 C. Wright & K. Graham, *supra* note 2, § 5369, at 474.

32. 2 J. Weinstein & M. Berger, *supra* note 26, § 41109, at 411-14.

33. *Id.*

34. 10 J. Moore, *supra* note 7, § 411.03, at 198.

35. 2 J. Weinstein & M. Berger, *supra* note 26, § 41102, at 411-15.

36. La. R.S. 22:655 (1978); Wis. Stat. Ann. § 803.04 (West 1977). Wisconsin's statute permits separate trials on the issue of liability and on the issue of whether the insurance policy in question affords coverage.

37. Comment, Determining Relevancy: Article IV of the Federal Rules of Evidence, reprinted in G. Pugh, *Louisiana Evidence Law* 61 (Supp. 1978).

38. La. R.S. 22:655 (1978); See also discussion in Johnson, *The Louisiana Direct Action Statute*, 43 La. L. Rev. 1455 (1983).

without first establishing the liability of the insured.<sup>39</sup> In Louisiana, it is often not possible to keep the jury unaware of the fact of insurance since the insurer may be a party litigant. When the insurance company is named as a defendant and appears in court to defend the case, it is clear that Louisiana courts are not faced with many of the problems arising under Federal Rule 411. For example, remarks to a jury which might be objectionable in other states because of counsel's reference to insurance, are not necessarily improper in a suit based on the Louisiana Direct Action Statute.<sup>40</sup> Because the statute allows an insurer to be sued directly, a Louisiana judge is not required to weigh the probative value against the prejudice of the evidence in deciding whether to allow evidence of the fact of insurance to be introduced on the issues of agency, ownership or control, or to allow such evidence to be used to impeach a witness. The court does not encounter the dilemma of what to do with the "intertwined admission." But naming the insurance company directly does not necessarily eliminate the danger of prejudice sought to be avoided by Federal Rule 411.<sup>41</sup> If a Louisiana court fears the possibility of jury prejudice, it may attempt to minimize the possibility by appropriate jury instruction.<sup>42</sup>

Although Louisiana has solved the evidentiary problems of admitting the fact of insurance through its Direct Action Statute, it must deal with the complex issue of whether to allow the jury to consider not only the *fact* of insurance, but also the *amount* of insurance by revealing the insurance policy limits to the jury. In some instances Louisiana courts have so allowed. Some find this step a "shock to the normal concepts of the trial lawyer."<sup>43</sup> And one Louisiana court, acknowledging that the danger of prejudice is present by the mere fact that the insurer is sued directly, recommended that "[i]n the absence of true necessity, that risk [of prejudice] should not be increased by allowing the jury to view the policy itself."<sup>44</sup> But others disagree. As Professor Alston Johnson has suggested, "To be consistent with the philosophy of the Direct Action Statute, Louisiana hardly can take the position that the existence of insurance or knowledge of the limits of that insurance is information that the jury cannot be told."<sup>45</sup>

### *Summary of Louisiana Jurisprudence*

The problems presented by allowing a jury to consider policy limits have been a matter of consideration and debate in many Louisiana

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39. *New Amsterdam Cas. Co. v. Harrington*, 274 F.2d 323, 326 (5th Cir. 1960).

40. *Id.* at 326.

41. See *Briscoe v. Stewart*, 423 So. 2d 1198, 1201 (La. App. 4th Cir. 1982) ("In Louisiana, the danger of prejudice is often present by the mere fact that an insurer may be sued directly as a party defendant."), cert. denied, 432 So. 2d 266 (La. 1983)..

42. See generally Comment, *supra* note 37.

43. 21B J.Appleman, *supra* note 19, § 12834, at 440.

44. *Briscoe v. Stewart*, 423 So. 2d at 1201.

45. Johnson, *supra* note 38, at 1537-38.

decisions. The clearest situation in which the court has to decide on the admissibility of the policy limits is when a defendant offers evidence of his impecunious condition at the time of trial.

It is established in Louisiana that a defendant may present evidence which tends to show his financial inability to respond in judgment.<sup>46</sup> This "inability to pay doctrine" dates back to 1898<sup>47</sup> and has been applied consistently by the courts ever since.<sup>48</sup> The purpose of the rule is to protect a defendant who is unable to pay from being deprived of everything he owns.<sup>49</sup> The rule is based on the equitable principle that courts will not grant vain and useless relief or render a judgment incapable of execution.<sup>50</sup> It may be used only for the protection of the "poor" defendant, and may not be used to increase the award merely because the defendant is affluent. The "inability-to-pay" principle applies in mitigation, not in aggravation of damages.<sup>51</sup>

When the defendant pleads inability to pay, the amount of his insurance coverage becomes relevant to the issue of damages. This principle was exemplified in *Suhor v. Gusse*,<sup>52</sup> in which the trial court allowed evidence of the defendant's inability to pay and charged the jury that it could consider the defendant's inability to pay damages over the insurance policy limits, but failed to inform the jury of the *amount* of insurance available. The supreme court found that the failure to inform the jury of the policy limits in this situation was reversible error. The court emphasized that the policy limits were relevant in this situation: "Clearly, where the evidence of defendant's inability to respond in damages is allowed for consideration in assessing damages, plaintiff is entitled to introduce evidence of defendant's insurance coverage . . . ."<sup>53</sup>

Conversely, it seems that where the defendant does not raise the issue of his inability to pay, evidence of his insurance coverage should be excluded, and some cases have so held. The fourth circuit in *Moffett v. Lumpkin*<sup>54</sup> found no error in the trial judge's refusal to let the jury know the policy limits and held that the defendant's financial status was irrelevant since he did not raise the issue of this inability to pay.<sup>55</sup>

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46. *Suhor v. Gusse*, 388 So. 2d 755 (La. 1980); *Daly v. Kiel*, 106 La. 170, 30 So. 254 (1901); *Tabb v. Norred*, 277 So. 2d 223 (La. App. 3d Cir. 1973); *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972).

47. *Loycano v. Jurgens*, 50 La. Ann. 441, 23 So. 717 (1898).

48. *Guy v. Tonglet*, 379 So. 2d 744, 746 (La. 1980), and cases cited therein.

49. *Hartman v. Aschaffenburg*, 12 So. 2d 282, 287 (La. App. Or. 1943).

50. *Williams v. Garner*, 268 So. 2d 56, 61 (La. App. 1st Cir. 1972).

51. *Hartman*, 12 So. 2d at 287.

52. *Suhor v. Gusse*, 388 So. 2d 755 (La. 1980).

53. *Id.* at 757.

54. *Moffett v. Lumpkin*, 382 So. 2d 278 (La. App. 4th Cir. 1980).

55. The inability to pay doctrine presents unique problems when multiple defendants are involved and only one pleads impecuniosity. See *Daniels v. Conn*, 382 So. 2d 945 (La. 1980), where the supreme court held that where there are solvent and insolvent joint tortfeasors liable *in solido*, evidence of the insolvent defendant's inability to pay may not be considered by the trial court in determining damages to be awarded to the plaintiff. See also *Barnett v. Vanney*, 360 So. 2d 617 (La. App. 4th Cir. 1978) (The court held



Similarly, in *Ashley v. Nissan*,<sup>56</sup> the trial judge refused to inform the jury of the limits of the insurance policies applicable in the lawsuit, where no defendant had pleaded the inability to pay. The first circuit found that the trial court properly withheld from the jury the limits of the insurance policies. The rationale of the majority was that to inform the jury of the limits "would violate the established jurisprudence that a defendant's ability to pay damages is not a proper subject of inquiry where the purpose is to show his affluence or wealth."<sup>57</sup> The court added that "there is no logical basis for admitting the amount of insurance coverage and refusing to disclose an individual defendant's financial status."<sup>58</sup>

Judge Yelverton concurred in part, but dissented with this portion of the opinion and asserted that the jury should be informed of the limits of liability of every insurance defendant where any party requests it. The supreme court denied the petition for *certiorari* but stated that "although we do not approve that portion of the opinion which permitted the policy limits to be withheld from the trial jury, we cannot say that under the facts the result is incorrect."<sup>59</sup>

Other courts have allowed evidence of policy limits to go to the jury even where no defendant has raised the issue of his inability to pay. In *Dominique v. Continental Insurance Company*,<sup>60</sup> the jury awarded a verdict for the plaintiff against a driver and his insurer. The defendants appealed the award, contending that the trial court erred in allowing the jury to view the limits of the insurance policy. Here, the defendant-driver did not plead inability to pay, but the jury was charged that an insurance company is entitled to be treated fairly and impartially in the same manner as an individual. The third circuit, in affirming the judgment, found no error in allowing the jury to consider the limits.<sup>61</sup> The court's reasoning was twofold. First, it relied on the language of the supreme court in the writ denial of *Ashley v. Nissan*. Secondly, "the ability of a defendant to respond in damages is well established as a

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that allowing one defendant to give evidence of inability to pay and admitting limits was prejudicial to the co-defendants). But see *Cobb v. Insured Lloyds*, 387 So. 2d 13 (La. App. 3d 1980) (holding that it was proper to allow one of the multiple defendants to plead inability to pay and admit his insurance limits).

56. *Ashley v. Nissan*, 321 So. 2d 868 (La. App. 1st Cir.), cert. denied, 323 So. 2d 478 (La. 1975).

57. 321 So. 2d at 874.

58. *Id.*

59. *Ashley*, 323 So. 2d at 478.

60. *Dominique v. Continental Ins. Co.*, 348 So. 2d 209 (La. App. 3d Cir. 1977).

61. See also *Courville v. State Farm Mut. Auto Ins. Co.*, 386 So. 2d 176 (La. App. 3d Cir. 1980), rev'd in part, 393 So. 2d 703 (La. 1981) (The court allowed the insurance policies to be exhibited to the jury because both were introduced as evidence.); but see *Briscoe v. Stewart*, 423 So. 2d 1198 (La. App. 4th Cir. 1982) (The court found error for the trial court to allow the jury to inspect the uninsured motorist policy, but the error was harmless.), cert. denied, 432 So. 2d 266 (La. 1983).

proper subject for jury consideration,"<sup>62</sup> even though the defendant here did not plead the inability to pay.

Judge Culpepper dissented, stating that because the supreme court was not bound by its previous refusal to grant writs, the court should follow *Ashley* until the supreme court specifically changed the rule. He added that the limits should have been withheld because such evidence was irrelevant to the amount of damages and clearly prejudicial. Judge Culpepper pointed out that if either defendant had raised the issue of the insured's inability to pay, the limits would have been relevant to this issue, and therefore admissible into evidence.

Judge Stoker concurred, but expressed his apprehension in relying on the *Ashley* writ refusal. He did not construe the supreme court's language in the denial as necessarily laying down an unqualified rule that policy limits constitute relevant information to be given juries in liability suits absent facts that make them relevant.<sup>63</sup> He explained that in *Ashley* the defendant-driver who had been held liable had actually given testimony concerning his occupation, means and ability to respond in judgment, although he had not pleaded impecuniosity. In his opinion, the fact that the defendant had raised the defense of inability to pay explained the supreme court's disapproval of the case. Judge Stoker further discussed the unique facts presented by *Dominigue* which justified admitting the policy into evidence even though the defendant had not pleaded inability to pay. Continental Insurance Company in its answer had admitted insurance coverage, but added that its policy was the best evidence of its contents and limitations. It also had failed to disclose its policy limits in its answer to plaintiff's interrogatories. Therefore, by its pleadings and answers to interrogatories, Continental Insurance Company made a trial issue of its policy contents and liability limits. Judge Stoker stated that if a categorical rule regarding the admissibility of policy limits must be adopted, the rule should be that the jury be allowed to know the limits; however, he added that the preferable rule would be to leave the question to the discretion of the trial judge by allowing the judge to determine what are jury issues and what issues are to be tried by the court alone.

A different panel of the third circuit was faced with a problem almost identical to that in *Dominigue* in *Ardoin v. Hartford Accident and Indemnity Co.*<sup>64</sup> Again, defendant's inability to pay was not at issue, but the trial judge allowed the jury to view various insurance policies, in effect informing them of the policy limits. The court expressed neither approval nor disapproval of the *Dominigue* holding, and held that regardless of the correctness of the lower court's ruling, the defendants were not prejudiced by the evidence, and there was no reversible error.

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62. 348 So. 2d at 211.

63. Id. at 215.

64. *Ardoin v. Hartford Acc. & Indem. Co.*, 350 So. 2d 205 (La. App. 3d Cir. 1977).

The first circuit again addressed the problem in *Case v. Arrow*.<sup>65</sup> The trial court entered a judgment pursuant to a jury verdict in favor of plaintiff in an action brought as a result of an automobile accident. The court of appeal found no error in allowing disclosure of the insurer's policy limits to the jury even though the inability to pay was not pleaded. The first circuit relied on the third circuit's interpretation in *Dominique* of the *Ashley* writ denial as being a clear pronouncement by the supreme court that the ability of a defendant to pay, as evidenced by insurance coverage, is a proper consideration for the jury.<sup>66</sup> The first circuit, in deciding *Case*, considered *Ashley* overruled.

In the recent third circuit case of *Ponder v. Groendyke*<sup>67</sup> one of the assignments of error was the trial court's decision permitting the policy limits of all of the insurance carriers to be disclosed to the jury. The trial court denied defendant's pretrial motion to prevent such disclosure. Even though a majority of the court found that the trial court erred in permitting disclosure of policy limits to the jury, they held the error did not warrant reversal since the jury's award fell below the policy limits. The court reasoned that the financial status of a defendant is irrelevant unless he places it at issue by claiming inability to pay.

A different panel of the Third Circuit Court of Appeal expressed the opposite opinion regarding disclosure of policy limits to the jury in *Bishop v. Shelter Insurance Co.*<sup>68</sup> At trial, defendants introduced two insurance policies into evidence and requested that the jury be allowed to examine the limits of coverage. The third circuit found that the trial judge erred in refusing to allow the jury to see the policy limits, but did not find the error to be prejudicial.

In addition to the inability to pay doctrine, the issue of presenting policy limits to the jury has arisen in other situations. One such situation is where the parties have stipulated to the amount of coverage and the judge must decide whether the stipulation should go to the jury. In *Arceneaux v. Dominique*,<sup>69</sup> the trial court refused to inform the jury of a stipulation concerning the liability policy and its limits. The Third Circuit Court of Appeal affirmed the ruling, but the supreme court reversed, reasoning that "[i]n a jury trial, the jury is entitled to know all the evidence."<sup>70</sup> The court added that "[w]e know of no statute or jurisprudence which, in the absence of agreement of the litigants, would permit admissible evidence to be withheld from the jury."<sup>71</sup>

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65. *Case v. Arrow*, 372 So. 2d 670 (La. App. 1st Cir. 1979).

66. *Id.* at 677.

67. *Ponder v. Groendyke*, 454 So. 2d 823 (La. App. 3d Cir.), cert. denied, 457 So. 2d 1195 (La. 1984).

68. *Bishop v. Shelter Ins. Co.*, 461 So. 2d 1170 (La. App. 3d Cir. 1984).

69. *Arceneaux v. Dominique*, 365 So. 2d 1330 (La. 1979).

70. *Id.* at 1336.

71. *Id.*

Another situation arises when an insurance company introduces its policy to protect itself from excess liability. In *Williams v. Bernard*,<sup>72</sup> an insured sued his automobile insurer, seeking uninsured motorist benefits. The jury returned a verdict in excess of the policy limits. Neither party had offered evidence of policy limits. The trial court denied the insurer a new trial for the purpose of proving its policy limits. The insurer appealed, contending that it was prevented by law from introducing evidence of its limits. The supreme court affirmed the denial, stating that it was aware of no law which would prevent an insurer from introducing evidence of its policy limits. The court added that this was a trial tactic which the defendant had deliberately chosen to avoid the possibility that the jury's decision would be influenced by its knowledge of the amount of coverage.

### *Analysis of Jurisprudence*

*Ashley v. Nissan* was the initial case which sparked the debate over whether or not the jury should be informed of policy limits. The first circuit, in finding that the trial court properly withheld the limits of insurance from the jury, clearly understood the inability-to-pay rule. The majority decision was correct. Since no defendant had pleaded inability to pay, the policy limits had no tendency in reason to prove the amount of damage. Because the probative value was so low, it was outweighed by the possibility of jury prejudice; therefore, the evidence was properly withheld.

Judge Yelverton, in his dissent in *Ashley*, argued that the insurance contract itself is admissible as the basis of jurisdiction. However, if an insurer admits coverage in its answer or by stipulation, the insurance contract is no longer at issue. He also reasoned that there is no foundation for the fear of "insurance verdicts." However, that this fear does in fact have a basis is evident in the case of *Adams v. Ross*.<sup>73</sup> In that case, the defendant pleaded inability to pay and the policy limits were revealed to the jury. The jury award of \$60,000 exactly equaled the total amount of coverage. The court reduced the award to \$25,000 and noted that in reaching its decision the jury was probably influenced by the policy limits. In *Williams v. Bernard*<sup>74</sup> the insurer deliberately chose not to offer its policy limits into evidence to avoid possible jury prejudice. Implicit in this trial tactic is an acknowledgement by the defense counsel that the revelation of the limits might invite prejudice. That there is merit in the fear of insurance verdicts is also shown by the adoption of the Federal Rules of Evidence in 1975. The inclusion of Rule 411, which specifically addresses this fear of prejudice, implies that the drafters believed that potential jury prejudice is a reality. It

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72. *Williams v. Bernard*, 425 So. 2d 719 (La. 1983).

73. *Adams v. Ross*, 300 So. 2d 192 (La. App. 1st Cir. 1974).

74. *Williams v. Bernard*, 425 So. 2d 719 (La. 1983).

follows then, that if even the *fact* of insurance has a prejudicial effect on juries, the *amount* of insurance would have an even greater influence on the jury's decision.

The supreme court's writ denial in *Ashley v. Nissan* has left many unanswered questions. Judge Stoker, in his concurrence in *Dominique v. Continental Insurance Co.* explained the probable reasoning behind the language of the supreme court. Because the defendant had given testimony of his inability to respond in damages, the case probably fit under the inability-to-pay rule which would have made the policy limits relevant. However, the third circuit, relying on the *Ashley* writ denial, reached a different result in *Dominique*. The fact that the writ denial can be explained by the unique facts of *Ashley* makes the reasoning of *Dominique* less sound. In addition, the court stated that the ability of a defendant to respond in damages is a proper subject for jury consideration. This statement is correct; however, its application here is incorrect since the defendant did not plead inability to pay. The purpose of the inability-to-pay doctrine clearly indicates that it cannot be used to increase the award merely because the defendant is affluent.<sup>75</sup> Even though the reasoning of the court is not sound, the result of *Dominique* was probably correct since the defendant insurer had made a trial issue of its policy limits in its pleading and through discovery.

Following the writ denial in *Ashley* and the interpretation of it in *Dominique*, the first circuit, in *Case v. Arrow*, considered *Ashley* overruled. As stated above, the decision in *Dominique* is not properly reasoned, although the result is correct, and the writ denial can be explained by the unique facts of *Ashley*. Therefore, the decision in *Case* is not properly grounded, and *Ashley* should still be controlling.

In the recent case of *Ponder v. Groendyke*, the third circuit again reached the correct result in finding the limits irrelevant because the defendant had not put his financial status at issue. Judge Domengeaux concurred, but stated that the clear trend in Louisiana is admissibility of limits before the jury even when the inability to pay is not at issue. In supporting his opinion, he cited *Dominique v. Continental Insurance Co.* and *Arceneaux v. Dominique*. As discussed above, his reliance on *Dominique* is questionable. The court reasoned in *Arceneaux* that the jury is entitled to know all the evidence. The court's statement that there is no statute or jurisprudence which would permit admissible evidence to be withheld from the jury is a correct one; however, in this case, the defendant did not plead the inability to pay, and therefore, the limits did not become relevant. Because this evidence was not relevant, it could not be considered admissible on the issue of quantum.

The supreme court has not taken a clear stance on the issue of when the jury is to be informed of policy limits. Clearly the writ denial

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75. See *supra* notes 49-50.

in *Ashley* has not clarified the supreme court's position and the *Arceneaux* decision offers even less guidance. The statement in *Williams v. Bernard* that no law prevents an insurer from introducing evidence of limits offers no rule governing whether policy limits are admissible before the jury. The supreme court did, however, in *Suhor v. Gusse* take the clear position that limits become relevant when a defendant puts his ability to pay at issue. In considering the issue of whether the jury should view the policy limits when the ability to pay is not at issue, the court of appeal in *Bishop* acknowledged that "[i]n the absence of an opinion with a full discussion of the issue by our Supreme Court, there is certainly room for argument on both sides."<sup>76</sup> However, by relying again on the writ denial in *Ashley* and on *Arceneaux*, the court of appeal concluded that the supreme court preferred to allow the jury to be informed of insurance policy limits.

From a careful review of the jurisprudence, it is not difficult to justify both the statement in *Bishop* that the supreme court "prefers to let the jury see the policy limits"<sup>77</sup> and Judge Domengeaux's statement in *Ponder* that the trend in Louisiana is toward admissibility of policy limits before the jury even when the inability to pay is not an issue. But until the supreme court takes a clear position regarding this issue, no categorical rule can be presumed.

#### CONCLUSION

The results reached through the application of Rule 411 of the Federal Rules of Evidence, in determining whether the fact of insurance is admissible, are reached through a basic relevancy analysis as set out in Rules 401 through 403. Evidence is admissible if the probative value outweighs the risk of harm or prejudice. Although the evidentiary problems addressed by Rule 411 regarding the admissibility of the fact of insurance are avoided by the Louisiana Direct Action Statute, Rule 411 offers guidelines which can be used by Louisiana courts in solving the problem of whether to allow policy limits to go before the jury. A similar relevancy analysis should be applied by Louisiana courts in deciding whether to allow insurance policy limits to be admitted for consideration by the jury. The probative value of the evidence should be weighed against the risk of harm.

Where a plaintiff offers the policy limits on the issue of quantum, clearly the potential prejudice outweighs any probative value; therefore, the amount of insurance should not be admissible on the issue of damages. But where a defendant pleads the inability to pay, the probative value of the amount of insurance increases so as to outweigh any possible prejudice, and the policy limits become relevant.

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76. *Bishop*, 461 So. 2d at 1180.

77. *Id.*

Cases in which a defendant does not plead the inability to pay present more difficult considerations. As seen in *Williams v. Bernard*, if an insurance company fails to admit its policy limits into evidence, it may be required to pay any judgment in excess of those limits. To limit its liability to the amount of the policy, an insurer must plead its limits. Because the insurance company must introduce its policy into evidence to limit its liability, the judge is faced with the dilemma of whether to allow the policy to be considered by the jury. The problem becomes a question of who should decide the issue of the amount of coverage—the judge or the jury.

But if the insurance company admits its policy limits in the pleading, through discovery or by stipulation, the amount of coverage is no longer an issue of fact to be decided by the jury, and therefore, there is no justification for allowing the policy limits to go to the jury.

In his concurring opinion in *Dominigue v. Continental Insurance Co.*, Judge Stoker suggested that perhaps the answer to the dilemma is “a matter for legislative consideration rather than judicial resolution.”<sup>78</sup> The legislature could solve this problem by enacting a procedural article which would provide that when an insurance company in a direct action seeks to introduce its policy limits, that issue goes to the judge. The jury would not be required to consider the evidence unless a defendant has pleaded the inability to pay. Such an enactment would clarify the confusion in our jurisprudence, which has developed as a result of Louisiana’s Direct Action Statute, over whether to allow a jury to have knowledge of the policy limits. The article would also avoid any possibility that the jury would decide the issue of damages based on the amount of coverage, and would eliminate the fear of further jury prejudice which might result.

In the absence of action by the legislature, Judge Stoker offered a solution to the problem by pointing out that a trial judge may exercise much control through the use of written interrogatories and forms of verdicts to be submitted to the jury under Louisiana Code of Civil Procedure articles 1811 and 1812 (now articles 1812 and 1813). “By such a course of action, the question of coverage and amount of coverage become in effect, non-jury questions.”<sup>79</sup> In this situation, the judge would decide the question of the amount of coverage. The judge, aided by the guidelines offered in Federal Rule of Evidence 411, could withhold evidence of policy limits from the jury if in his discretion he determined that the potential prejudice of allowing the information to be considered by the jury outweighed the probative value of the evidence.

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78. *Dominigue*, 348 So. 2d at 218.

79. *Id.*