Marquette Law Review

Volume 22
Issue 2 *February 1938*

Article 2

1938

# Joinder of Policyholder and Insured as Parties Defendant

John A. Appleman

# JOINDER OF POLICYHOLDER AND INSURER AS PARTIES DEFENDANT

JOHN A. APPLEMAN

AUTOMOBILE law now constitutes one of the bulkiest and most involved phases of modern jurisprudence. Last year nearly 40,000 people were killed and nearly a million persons injured in automobile accidents. Everyone of these injuries and fatalities was a potential claim against some individual. Because of the large percentage of automobiles insured against liability arising by reason of the acts of the owner or operator over 250,000 potential claims develop each year as a result of such automobile accidents against the liability companies insuring these risks. Some of these claimants have exaggerated ideas as to the value of their injuries or have firmly resolved that the accident can be converted into a monetary blessing. Many such cases cannot be settled by the insurance companies at a reasonable figure, that is, costs, expenses, and pecuniary loss, plus pain and suffering. Oftentimes, too, the company is at fault, attempting to chisel claims far below their real value. At any rate, litigation frequently results from either situation.

It is a well known fact to every attorney familiar with personal injury cases that if the plaintiff can make the jury realize that the defendant is insured he greatly increases his chances of recovering a large verdict, or for that matter, a verdict of any type. The same body of men which will hesitate to penalize an individual where the elements of negligence do not clearly preponderate in favor of the plaintiff has no such compunctions against returning a substantial verdict against an insurance company. Attorneys, therefore, try every means possible to get the element of insurance before the jury, despite the fact that such practice is often considered somewhat unethical. Adroit questioning of a witness as to conversations with various individuals who might possibly be insurance agents or adjusters, examination of the jurors on their *voir dire*, comments during summation as to who shall bear the actual loss in event of a verdict favorable to plaintiff—these are only a few of the means employed to impress insurance upon the jury. It is, of course, obvious that if the insurer is joined as a party defendant to the personal injury action the element of insurance is constantly confronting the jury. Courts are familiar with this tendency and, in a number of cases, have refused to permit such joinder even where nothing to the contrary was contained either in the statutes of that state or

in the policy of insurance forming the basis of the joinder.[1] The reasons for this result are varied. Several courts felt that the procedure described by statute was at variance with such result[2] while one court arrived at such result from the general policy language.[3] Still others felt it highly improper to join actions *ex contractu* with actions *ex delicto*.[4]

[1] Miami Jockey Club v. Union Assurance Society, 12 F. Supp. 657 (S.D. Fla. 1935), *aff'd* 82 F. (2d) 588 (C.C.A. 5th, 1936); Smith Stage v. Eckert, 21 Ariz. 28, 184 Pa. 1001 (1919); Universal Automobile Ins. Co. v. Denton, 185 Ark. 899, 50 S.W. (2d) 592 (1932); Artille v. Davidson, (Fla. 1936) 170 So. 707; Alpin v. Smith, 197 Iowa 388, 197 N.W. 316 (1924); Ellis v. Bruce, 215 Iowa 308, 245 N.W. 320 (1932); New York Indemnity Co. v. Ewen, 221 Ky. 114, 298 S.W. 182 (1927); Conley v. United States Fidelity & Guaranty Co., (Mont. 1934) 37 P. (2d) 565; Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931); Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935); Keseleff v. Sunset Highway Motor Freight Co., (Wash. 1936) 60 P. (2d) 720; Mitchell v. Cadwell, (Wash. 1936) 62 P. (2d) 41; Shepherd v. Pocahontas Transportation Co., 100 W.Va. 703, 131 S.E. 548 (1926); Conwell v. Hays, 103 W.Va. 69, 136 S.E. 604 (1927).

[2] Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 Pac. 1001 (1919); New York Indemnity Co. v. Ewen, 221 Ky. 114, 298 S.W. 182 (1927); William v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Brown v. Brevard Auto Service Co., 195 N.C. 647, 143 S.E. 258 (1928); Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931).

[3] "It is our duty to give force and effect to the intention of the parties wherein the insurance companies agreed to defend in the name and on behalf of the assured any suit seeking damages and after the establishment thereof to pay, irrespective of the limit of liability, stated in the policies, all costs taxed against the assured in any such defended suit and after a judgment has been obtained no more than the amount specified in the policy. Those are practically the terms which are made as a condition precedent to the right of the injured party to maintain an action against the insurance companies, and where the rights of the parties are fixed by contract the law will uphold such rights." Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935).

[4] "If the first contention of the appellee be valid, then *Aplin* v. *Smith* was wrongly decided. If only one cause of action is set forth in plaintiff's petition herein, then only one cause was set forth by the plaintiff in the *Aplin* case. As a matter of logic the contention of appellee is not without its plausibility. The field of difference between joinder of *parties* and joinder of *causes of action* has its zone of doubt and of fine distinction. We deem it clear, however, that an action of tort against a tort-feasor and an action of contract against a contracting party do present different *causes* of action. True plaintiff seeks but one recovery. But the liability for the recovery against the tort-feasor is predicated upon his wrongdoing; whereas the liability of the insurance company is predicated upon its contractual undertaking. The two purported causes of action are provable by different evidence. The contractual liability of the insurance company has no probative value to establish the liability of the tort-feasor for his tort. The liability of the insurance company upon its contract is subject to defenses which are in no sense available to the tort-feasor. The insurance policy contains several conditions and qualifications. Proof of compliance with the conditions is incumbent upon the plaintiff. Such proof sustains no relation to the commission of the tort. Though it be true that the commission of the tort by the tort-feasor is a factor in the case of plaintiff against the insurance company, yet the existence of the insurance policy is not a factor in the creation of liability of Bruce for the tort. Such is the general idea underlying the discussion in the *Aplin* case, though the duality of the causes of action was not challenged therein. We hold that the petition purports to set forth *two* causes of action, and not one." Ellis v. Bruce, 215 Iowa 308, 245 N.W. 320 (1932).

"If we give to the language of the indorsement its usual and popular construction, then we must hold that it binds the insurer to direct liability to the

This last reason is an extremely cogent one well deserving of attention by the courts. It is not necessary to consider it, however, in discussing the question of joinder under the standard automobile policy. Under this type of policy form and almost all others, as well, there is a special clause contained, known as a "no action" clause whereby it is specifically declared that such joinder cannot be made. This clause is made a condition precedent to recovery under the policy.[5] Since the injured third person may claim only by virtue of the policy and stands in no better position than the policyholder,[6] he must observe this condi-

injured person whether an action for damages is brought against the assured alone or against the assured and the insurer jointly. This construction, however, does not sanction a joinder of the insurer with the insured in these particular cases. Here, the liability of the insured is predicated on a tort. The liability of the insurer is based on a contract. It has long been settled law in this state that an action for a tort cannot be joined in the same declaration with an action on a contract." Conwell v. Hays, 103 W.Va. 69, 136 S.E. 604 (1927). See also: Russell v. Burroughs, (Ga. 1936) 188 S.E. 451; Zeigler v. Ryan, 63 S.D. 607, 262 N.W. 200 (1935).

[5] This clause in the standard policy reads as follows: "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, 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 the company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

"Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

"Bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder."

[6] "If the injured party can dispense with one of the terms, she can dispense with any of them; but our view is that she must comply with its terms and conditions and if she does not do so, she forfeits her rights under the policy, the same as the assured. It is said, however, that this gives an opportunity for collusion and fraud between the assured and the insurance company to defeat the rights of the injured party. There is, however, the same opportunity for collusion and fraud between the assured and the injured party to defraud the insurance company. New Jersey Fidelity & Plate Glass Ins. Co. v. Love, 43 F. (2d) 82 (C.C.A. 4th, 1930).

"The plaintiffs in the attachment proceedings have no right superior to that of the assured. They stand in his place, and the same defenses which the insurance carrier had against the right of action on the part of the assured on the policy of insurance are available to the assurer as the garnishee of the plaintiffs. So, the assured's breach of a condition precedent with which the assured may bar a recovery by the assured is equally a bar to an attachment laid in the hands of the assurer by a creditor of the assured. The law does not permit the garnishee to be put in a worse position by the issue of a writ of attachment." Employers' Liability Assurance Corp. Ltd. v. Perkins, 169 Md. 269, 181 Atl. 436 (1935).

See also: Georgia Casualty Co. v. Boyd, 34 F. (2d) 116 (C.C.A. 9th, 1929); Royal Indemnity Co. v. Morris, 37 F. (2d) 90 (C.C.A. 9th, 1930); Clements v. Preferred Accident Ins. Co. of New York, 41 F. (2d) 470 (C.C.A. 8th, 1930); Ocean Accident & Guaranty Corp. Ltd. v. Schroeder, 48 F. (2d) 727 (C.C.A. 6th, 1931); United States Fidelity & Guaranty Co. v. Wyer, 60 F. (2d) 856

tion. Consequently, it has been repeatedly held that this "no action" clause prevents a joinder of the insurer and insured in the ordinary case.[7]

---

(C.C.A. 10th, 1932); Royal Indemnity Co. v. Watson, 61 F. (2d) 614 (C.C.A. 5th, 1932); General Casualty & Surety Co. v. Kierstead, 67 F. (2d) 623 (C.C.A. 8th, 1933); Phelan v. New Amsterdam Casualty Co., 5 F. Supp. 810 (D. Wyo. 1934); Ocean Accident & Guarantee Corp., Ltd. v. Lucas, 74 F. (2d) 115 (C.C.A. 6th, 1934); Hoff v. St. Paul Mercury Indemnity Co. of St. Paul, 74 F. (2d) 689 (C.C.A. 2d, 1935); Storer v. Ocean Accident & Guarantee Co., 80 F. (2d) 470 (C.C.A. 6th, 1935); State Farm Mutual Ins. Co. v. James, 80 F. (2d) 802 (C.C.A. 4th, 1936); Metropolitan Casualty Ins. Co. v. Blue, 219 Ala. 37, 121 So. 25 (1929); George v. Employers Liability Assurance Corp., Ltd. of London, England, 219 Ala. 307, 122 So. 175 (1929); Blackwood v. Maryland Casualty Co., 25 Ala. App. 308, 150 So. 179 (1932); Hynding v. Home Accident Ins. Co., 214 Cal. 743, 7 P. (2d) 999 (1932); Sears v. Illinois Indemnity Co., 121 Cal. App. 211, 9 P. (2d) 245 (1932); Sly v. American Indemnity Co. of Galveston, Texas, 127 Cal. App. 202, 15 P. (2d) 522 (1932); McDanels v. General Ins. Co. of America, 1 Cal. App. (2d) 454, 36 P. (2d) 829 (1934); Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal. (2d) 81, 53 P. (2d) 155 (1935); Rochon v. Preferred Accident Ins. Co., 114 Conn. 313, 158 Atl. 815 (1932); Whitney v. Employers' Indemnity Corp., 200 Iowa 25, 202 N.W. 236 (1925); Sun Indemnity Co. v. Dulaney, 264 Ky. 112, 89 S.W. (2d) 307 (1926); Duncan v. Pedare, (La. 1935) 161 So. 221; American Automobile Insurance Co. v. Fidelity & Casualty Co. of New York, 159 Md. 631, 152 Atl. 523 (1930); Goldberg v. Preferred Accident Ins. Co. of New York, 279 Mass. 393, 181 N.E. 235 (1932); Souza v. Car & General Assurance Corp., 281 Mass. 11, 183 N.E. 140 (1932); Sheldon v. Bennett, 282 Mass. 240, 184 N.E. 722 (1933); Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511, 186 N.E. 778 (1933); Liddell v. Standard Accident Ins. Co., 283 Mass. 340, 187 N.E. 39 (1933); Wainer v. Weiner, 288 Mass. 250, 192 N.E. 497 (1934); Doolan v. United States Fidelity & Guaranty Co., 85 N.H. 531, 161 Atl. 39 (1932); Suydam v. Public Indemnity Co., 10 N.J. Misc. 868, 161 Atl. 499 (1932); Hutt v. Travelers Ins. Co., 110 N.J.L. 57, 164 Atl. 12 (1933); Neilson v. American Mutual Liability Ins. Co. of Boston, 111 N.J.L. 345, 168 Atl. 436 (1933); New Amsterdam Casualty Co. v. Mandel, 115 N.J. Eq. 198, 170 Atl. 19 (1934); Brodsky v. Motorists Casualty Ins. Co., 112 N.J. L. 211, 170 Atl. 243 (1934), *aff'd* in 114 N.J. L. 154, 176 Atl. 143 (1935); Hermance v. Globe Indemnity Co., 221 App. Div. 394, 223 N.Y. Supp. 93 (1927); Killeen v. General Accident Fire & Life Assur. Corp., 131 Misc. Rep. 691, 227 N.Y. Supp. 220 (1928); Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 131 Misc. Rep. 836, 228 N.Y. Supp. 314 (1928); Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367 (1928); Geitner v. United States Fidelity & Guaranty Co., 251 N.Y. 205, 187 N.E. 222 (1929); Seltzer v. Indemnity Ins. Co. of North America, 252 N.Y. 330, 169 N.E. 403 (1929); Cohen v. Metropolitan Casualty Ins. Co. of New York, 233 App. Div. 340, 252 N.Y. Supp. 841 (1931); Fox v. Employers Liability Assurance Corp., Ltd. of London, England, 243 App. Div. 325, 276 N.Y. Supp. 917 (1935); Drennan v. Sun Indemnity Co., 244 App. Div. 571, 280 N.Y. Supp. 723; Peeler v. United States Casualty Co., 197 N.C. 286, 148 S.E. 261 (1929); Rohlf v. Great American Mutual Indemnity Co., 27 Ohio App. 208, 161 N.E. 232 (1927); Kazdan v. Stein, 26 Ohio App. 455, 160 N.E. 506 (1927); Drucker v. Travelers Ins. Co., 51 Ohio App. 303, 200 N.E. 774 (1936); Allegretto v. Oregon Automobile Ins. Co., 140 Or. 538, 13 P. (2d) 647 (1932); Miller v. Metropolitan Casualty Ins. Co. of New York, 50 R.I. 166, 146 Atl. 412 (1929); Indemnity Ins. Co. of North America v. Davis Adm'r., 150 Va. 778, 143 S.E. 328 (1928); Hunter v. Hollingsworth, 165 Va. 583, 183 S.E. 508 (1936); Koontz v. General Casualty Co. of America, 162 Wash. 77, 297 Pac. 1081 (1931); Chirley v. American Automobile Ins. Co., 163 Wash. 136, 300 Pac. 155 (1931); Baxter v. Central West Casualty Co. of Detroit, Mich., 186 Wash. 459, 58 P. (2d) 835 (1936); Lienhard v. Northwestern Mutual Fire Ass'n., (Wash. 1936) 59 P. (2d) 916; Bro v. Moran, 194 Wis. 293, 215 N.W. 431 (1927); Fanslau v. Rogan, 194 Wis. 8, 215 N.W. 589 (1927); Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930).

[7] Michel v. American Fire & Casualty Co., 82 F. (2d) 583 (C.C.A. 5th, 1936); Federal Automobile Ins. Assoc. v. Abrams, 217 Ala. 539, 117 So. 85 (1928);

While this result attains in nearly every jurisdiction where the ordinary type of liability policy covering a pleasure vehicle is concerned,[8] there is one situation where a somewhat different result has been frequently attained. In a number of states specific regulations have been passed governing and controlling the operation of taxicabs, contract and common carriers, and other specified vehicles which are deemed to be vested with a public interest. Usually commissions are set up to regulate the conduct of these businesses. In such cases, the carriers are required to furnish bonds or policies of insurance to provide for the protection of persons who may be injured by such operation. The courts have, therefore, held that such contracts of insurance are intended primarily for the benefit of the public in general rather than for the protection of the policyholder, as contrasted with the ordinary liability policy intended primarily to protect the insured. Because of this situation, such members of the public in general have been held to be the direct beneficiaries of such policies and, by the majority rule, are permitted to join the insurer and insured as parties defendant in the same action.

The Alabama,[9] Arkansas,[10] California,[11] Georgia,[12] Kansas,[13] New

Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 Pac. 1001 (1919); Roberts v. Central Mutual Ins. Co., 285 Ill. App. 408, 2 N.E. (2d) 132 (1936); Capelle v. United States Fidelity & Guaranty Co., 80 N.H. 481, 120 Atl. 556 (1922); Damiano v. Damiano, 6 N.J. Misc. 849, 143 Atl. 3 (1928); Schroeder v. Columbia Casualty Co., 126 Misc. Rep. 205, 213 N.Y. Supp. 649 (1923); Weiss v. New Jersey Fidelity & Plate Glass Ins. Co., 131 Misc. Rep. 836, 228 N.Y. Supp. 314 (1928); Matelsky v. Globe Indemnity Co., 291 N.Y. Supp. 348 (1936); Gray v. Houck, 167 Tenn. 233, 68 S.W. (2d) 117 (1934); Employers' Liability Assur. Corp. v. Taylor, 164 Vt. 103, 178 S.E. 772 (1935).

[8] See, however, the cases of Casualty Reciprocal Exchange of Kansas City, Mo. v. Bounds, 191 Ark. 934, 88 S.W. (2d) 836 (1936); Parks v. Mathews, (Idaho, 1937) 69 P. (2d) 781. These cases contravene the general line of authority and seem to indicate that the "no action" clause is practically worthless in those states.

[9] See General Acts, Alabama, 1931, p. 312, Section 13. Also Hodges v. Wells, 226 Ala. 558, 147 So. 672 (1932); McWhorter Transfer Co. v. Peck, (Ala. 1936) 167 So. 291.

[10] Arkansas, in the case of University Automobile Ins. Co. v. Denton, 185 Ark. 899, 50 S.W. (2d) 592 (1932), rendered an excellent decision refusing to permit joinder. Subsequently, however, in Casualty Reciprocal Exchange of Kansas City, Mo. v. Bounds, 191 Ark. 934, 88 S.W. (2d) 836 (1936), that jurisdiction declared that joinder would be permitted even under an ordinary type of policy. The decision is poorly reasoned and has been subject to much criticism. The result of allowing joinder under a required policy quite naturally follows.

[11] "There is no provision, however, in the bond in question which expressly excludes a direct right of recourse by the injured party against the bonding company. Moreover, the bond as it read at the date of the accident was a contract made not only for the protection of the operator of the motorbus, but also directly for the benefit of injured passengers in so far as it expressly promised to pay directly to an injured party any amount for which the operator of the bus might be adjudged liable. To read the statutory requirement into the bond, while it accords to the plaintiff the privilege of joining the casualty company in a suit against the operator of the bus, introduces no necessary inconsistency into the contract and leaves the substantial rights of the parties unimpaired. The only ground upon which it is suggested that the

Mexico,[14] Oklahoma,[15] South Carolina,[16] Tennessee,[17] and West Vir-

rights o fthe defendants might be injuriously affected is that a jury might be expected to return a larger verdict for the plaintiff in a suit in which the casualty company appears as a party defendant, because they would necessarily know that the operator of the bus, whose act actually caused the injury, was insured. The jury would presumably know in any event that the operator was insured, since the law requiring the filing of the bond was one of which all persons would be presumed to have knowledge." Milliron v. Dittman, 180 Cal. 443, 181 Pac. 779 (1919). See also Gugliemetti v. Graham, 50 Cal. App. 268, 195 Pac. 64 (1920); Malachowski v. Varro, 76 Cal. App. 207, 244 Pac. 936 (1926).

[12] Georgia has had a most interesting and provoking development along this line. In the decisions of Laster v. Maryland Casualty Co., 46 Ga. App. 620, 168 S.E. 128 (1933) and La Hatte v. Walton, 53 Ga. App. 6 184 S.E. 742 (1936), it was held that the insurer was a proper party for direct suit before judgment was obtained against the insured. The first of these cases reasoned that the nature of the actions against both the insurer and insured was *ex contractu* and joinder was proper. Shortly after, the court allowed an action to lie against the company alone, not joining the policyholder at all. Great American Indemnity Co. v. Vickers, (Ga. 1936) 188 S.E. 24. One month later, however, the court refused to permit an action to be brought against the policyholder and company jointly on the theory that it amounted to joining actions *ex contractu* and *ex delicto*. Russell v. Burroughs, (Ga. 1936) 188 S.E. 451. It is possible for all of these results to be reconciled. The distinction made by the court, however, is absurd. There can be no contractual liability on the part of the company unless a tort liability of the policyholder is established, unless such liability arises by reason of breach of contract. In the latter case, joinder is allowed. In the former case, the insurer is sued separately. Regardless of the joinder or non-joinder of the insured, the fundamental nature of the action is unchanged. The causes of action *ex delicto* and *ex contractu* must still be proved by the plaintiff regardless of the parties defendant.

[13] Dunn v. Jones, 143 Kans. 218, 53 P. (2d) 918 (1936), rehearing denied 143 Kans. 771, 57 P. (2d) 16 (1936); Twichell v. Hetzel, (Kan. 1937) 64 P. (2d) 557.

[14] "The ultimate liability of the insurer to one injured by the negligence of the assured is not questioned. The contention is that, since the insurer was not a party to the negligence, and since its liability is contractual only, and since its agreement is merely to pay a final judgment recovered for the tort, there is no joint cause of action; and that the two causes of action, one in contract and the other in tort, and the insurer and the assured as parties defendant, are improperly joined in this cause. A great many authorities are brought to our attention. These we need not refer to here. There is no contention that the Legislature could not authorize joinder of parties and causes in such a case as this. The question is whether it has done so. It is one of statutory construction, and no controlling decision has been found. One provision of section 5, supra, is to our minds decisive: 'All such * * * policies * * * shall be for the benefit of and subject to immediate suit or action thereon by any person who shall sustain actionable injury or loss protected thereby. * * *' There is no point of time to which 'immediate' can reasonably relate except the time of sustaining the injury. The occurrence of an actionable injury or loss protected by the policy immediately, without intervening time or event, gives the right to sue. * * * The contract, in so far as it covers public liability, is a mere agreement to pay a final judgment obtained against the assured. It creates a secondary liability. As it stands there, both the liability to pay and the liability to be sued are postponed until a final judgment for the tort shall have been obtained. Here the statute comes in. It prevents postponement of the liability to be sued. It does not prevent postponement of the liability to pay. Sued singly, the insured may validly object that its liability to pay is dependent upon adjudication against the tort-feasor. But, objecting, as it does here, to being sued jointly, the right of the injured party to sue immediately is controlling. Varying the contract only so far as the statute requires, giving the injured party all that the statute gives her, and taking from the insurer nothing that the statute does not take, the result is that there may be an

ginia[18] courts seem to hold that under the statutes and decisions in those states a judgment need not be recovered against the policyholder where a required form of policy is involved before action can be maintained against the company, anything in the policy to the contrary notwithstanding. Necessarily, this means that the chances of a recovery by the plaintiff are greatly increased since the jury knows the defendant to be insured. Insurance companies doing business in those states, however, take this risk into account and raise their rates in proportion. Consequently, rates have risen rapidly upon this type of business and the policyholder is penalized by reason of such joinder. It does seem somewhat unfair that this greater burden must be sustained in view of the fact that the real question of negligence and contributory negligence are apparently not as important to a jury as the question of insurance. As long as these jurisdictions continue, however, to permit such joinder rates will tend to even more exorbitant levels and conservative companies will, more and more, refuse to underwrite such business.

Some states have, apparently, observed this tendency toward judicial inequality when joinder has been allowed and have expressed themselves as opposed to such procedure even when a required form of policy was under discussion. Arizona has long been committed to this rule,[19] but North Carolina at first tended in the other direction,[20] recently, however, altering its rule to conform with the minority doctrine.[21] Washington presents by far the most interesting transition of

immediate suit to which both insurer and assured are parties defendant, but not an immediate suit against the insurer alone. This statutory resultant is a status intermediate primary and secondary liability." Lopez v. Townsend, 37 N. Mex. 574, 25 P. (2d) 809 (1933).

[15] Jacobsen v. Howard, 164 Okla. 88, 23 P. (2d) 185 (1933); Graves v. Harrington, (Okla. 1936) 60 P. (2d) 622; Enders v. Longmire, (Okla. 1937) 67 P. (2d) 12.

[16] Piper v. American Fidelity & Casualty Co., 157 S.C. 106, 154 S.E. 106 (1930); Ott v. American Fidelity & Casualty Co., 161 S.C. 314, 159 S.E. 635 (1931); Benn v. Camel City Coach Co., 162 S.C. 44, 160 S.E. 135 (1931); Andrews v. Poole, (S.C., 1936) 188 S.E. 860; Hicks v. Hicklin, (S.C., 1937) 190 S.E. 922. But not if cause of action or damages requested are different. Miles v. Thrower, (S.C. 1936) 187 S.E. 818. The language, however, of the *Piper* case and the *Andrew* case is very broad. Instead of placing the reason for permitting a joinder upon the fact that a required policy was involved the court seems to attempt to make a distinction between a liability and an indemnity policy. If this distinction is logically carried out, it seems apparent that in cases involving ordinary automobiles insured under the standard form policy joinder of the insurer will be permitted since that type of policy is a liability and not an indemnity form. Whether or not this result will be attained will have to be determined from future cases.

[17] Western Auto Casualty Co. v. Burnell, 17 Tenn. App. 687, 71 S.W. (2d) 474 (1933).

[18] Cramblitt v. Standard Accident Ins. Co., 116 W. Va. 359, 180 S.E. 434 (1935).

[19] Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 Pac. 1001 (1919).

[20] Harrison v. Southern Transit Co., 192 N.C. 545, 135 S.E. 460 (1926).

[21] See N.C. Laws 1927, c. 136, §§ 6, 20, 22: In the interpretation of this statute, it was held that no joinder could be affected even where the injury occurred before this right was removed by statute. In answering the argument that this

any of the states involved in this discussion. Originally, Washington had been one of the most rigid adherents to the doctrine of permitting joinder of the insurance company in suits where a required form of policy was in issue.[22] In September, 1936, however, while the court did not discuss its former decisions it proceeded to overrule them in an extremely interesting and well-reasoned opinion.[23] This result has since been reiterated, and we may be confident that the Washington courts will stand by the newer decisions.

Is not this result more logical, in states where no statute dictates that a joinder could be made? The common law rule was to the effect that such a joinder was clearly improper. The action against the insured is in tort; the action against the insurer is in contract. The third party claimant has no claim, under the "no action" clause, until a final judgment has been recovered against the insured. Certainly, it works no great hardship upon the plaintiff to be required to recover such judgment first since a simple garnishment action is sufficient to reach the policy proceeds. If such a joinder is allowed, assume that the insurer has policy defenses available which it desires to use. The jury must not only determine all issues of negligence and contributory negligence, passing upon the merits of the case, but it must at the same time consider highly involved legal matters pertaining to the validity and enforceability of the insurance contract. No jury is capable of adequately undertaking both of these tasks and to submit such combined issues to a jury works an undue hardship upon all parties. Considering also the effect of the mention of insurance to a jury, it must be seen that a gross inequity is present.

---

construction would render the statute unconstitutional it was pointed out that this was purely a matter of remedy. Williams v. Frederickson Motor Express Lines, 195 N.C. 682, 143 S.E. 256 (1928); Brown v. Brevard Auto Service Co., 195 N.C. 647, 143 S.E. 258 (1928).

[22] Devoto v. United States Auto Transportation Co., 128 Wash. 604, 223 Pac. 1050 (1924), *aff'd*, 130 Wash. 707, 226 Pac. 1118 (1924); Hayes v. Staples, 129 Wash. 426, 225 Pac. 417 (1924); Field v. North Coast Transportation Co., 164 Wash. 123, 2 P. (2d) 672 (1931). The *Devoto* case cites the earlier Texas cases which have since been overruled by the Texas Supreme Court. This may have had some effect upon the recent decision in the *Keseleff* case.

[23] "The policy is not attached to the complaint, nor is it contained in the record, but since the complaint alleged its effective date as July 18, 1934, and that it was executed and delivered as required by law and the rules and regulations of the department of public works, it is to be presumed that it bore the endorsement required by rule 35, then in force. By this indorsement, the insurer agrees that it will pay any final judgment for personal injury or damage to property recovered against the insured and that, upon its failure to pay such judgment, the judgment creditor may maintain an action in any court of conpetent jurisdiction to compel payment. This indorsement clearly implies that the liability of the insurance company is dependent upon the recovery of a judgment against the insured by the injured party. When a judgment so recovered remains unpaid, then the right of the injured party, the judgment creditor, to sue the insurer becomes fixed." Keseleff v. Sunset Highway Motor Freight Co., (Wash. 1936) 60 P. (2d) 720. This result is reiterated in Mitchell v. Cadwell, (Wash. 1936) 62 P. (2d) 41 (1936).

Some few states have, by statute, provided that the joinder of the company and its policyholder is perfectly proper. Let us examine these jurisdictions separately in order to ascertain just how far they have gone.

Wisconsin has been one of the pioneers in this field and the development of this doctrine through its statutes and judicial decisions is very interesting. The earlier cases, for various reasons, usually held that a joinder was permissible by reason of the existing statute,[24] but the tendency of that jurisdiction was to enforce "no action" clauses, despite the statute, and to refuse a joinder where such a clause was contained in the policy.[25]

Then, in 1931, Wisconsin approved the statute which is still in effect today. One of the first cases construing it refused to permit it to have a retroactive operation as to accidents occurring before 1931. The insurer, it held, had a right not to be joined in such action—and if the statute were construed to deprive it of such a right, it would be unconstitutional.[26] It was held, as to the ordinary case where the accident

---

[24] In Ehlers v. Gold, 166 Wis. 185, 164 N.W. 845 (1917), joinder was permitted under a required form policy. White v. Kane, 179 Wis. 478, 192 N.W. 57 (1923) and Duncommun v. Strong, 193 Wis. 179, 212 N.W. 289 (1927) rehearing denied, 193 Wis. 179, 214 N.W. 616 (1927). Apparently both involved indemnity contracts but provided in the policy that its terms should be read to conform with all statutes and ordinances. Upon that basis, a joinder was allowed. Bro v. Moran, 194 Wis. 293, 215 N.W. 431 (1927), seemed to imply that no joinder would lie unless specifically allowed by the policy terms but this apparent holding is practically nullified by that in Fanslau v. Rogan, 194 Wis. 8, 215 N.W. 589 (1927), and Stransky v. Kousek, 199 Wis. 59, 225 N.W. 401 (1929).

[25] "'Any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, because of the negligent operation, maintenance, use or defective construction of the vehicle described therein, such liability not to exceed the amount named in said bond or policy.' * * * The provision here in question does not attempt to limit the liability of the carrier or to provide that the injured person cannot enforce liability under the policy. This provision simply fixes the time when such liability may be enforced. It is like the provisions commonly contained in policies that suit shall not be brought upon the policy until the expiration of a fixed period of time. It does not conflict with the provisions of section 85.25 of the Statutes, and is valid and enforceable." Morgan v. Hunt, 196 Wis. 298, 220 N.W. 224 (1928). See also the decisions of Burkhart v. Burkhart, 200 Wis. 628, 229 N.W. 34 (1930); City of Milwaukee v. Boynton Cab Co., 201 Wis. 581, 229 N.W. 28, 231 N.W. 597 (1930); Bergstein v. Popkin, 202 Wis. 625, 233 N.W. 572 (1930); Baker v. Tormey, 209 Wis. 627, 245 N.W. 652 (1932); Kertson v. Johnson, 185 Minn. 591, 242 N.W. 329 (1932). In a slightly different case, where the wording of the "no-action" clause was peculiarly expressed, the court held that it was intended to apply only to actions by the policyholder and not injured third persons. See Heinzen v. Nuprienok, 208 Wis. 512, 243 N.W. 448 (1932).

[26] "That the 'no action' clause of an indemnity policy does secure a valuable right, that it is of value, has inferentially been held by this court.... That the companies insert the clause in their policies indicates that they consider it of value to have the case of the owner of the automobile tried without knowledge on the part of the jury that he carried insurance. * * * And, if it did

happened since the passage of the statute, that the intention of the legislature was to overrule the *Morgan* and *Bergstein* cases, and accordingly, a "no action" clause is usually ineffective to prevent joinder.[27]

Several interesting questions have since then arisen. In one case the Fidelity and Casualty Company has issued a policy in Wisconsin to an insured residing therein. This policy contained a "no action" clause The insured had an accident in Indiana and then moved to Pennsylvania. Suit was brought against the insurer alone in Wisconsin. The court made two important findings: (1) That in such an instance the insurer could be sued without joining the insured. (2) That the form, rather than the *lex loci delicti* would govern the question of joinder.[28]

In the *Sheehan* case, the policies were Massachusetts contracts containing "no action" clauses but also containing clauses making any of their provisions void which conflicted with any statutory law. The court held that the "no action" clause did conflict with the Wisconsin statute, and, by its own terms became void.[29] This is particularly interesting in view of two very recent decisions.

The Hartford Accident and Insurance Company wrote a policy upon an Illinois resident containing a "no action" clause. The court examined the policy construction and determined that it was an Illinois contract. It then refused to permit the insurer to be joined in an action brought against the insured, stating that if such clause is valid and enforceable where written, that to refuse to enforce it in Wisconsin would amount to the deprivation of a constitutional right.[30] This has

---

prejudicially affect the rights of the parties, a provision of the contract securing that right is of value and must be upheld against a statute enacted subsequent to the execution of the contract." Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611 (1932).

[27] Biller v. Meyer, 33 F. (2d) 440 (C.C.A. 7th, 1929); Lang v. Baumann, 213 Wis. 258, 251 N.W. 461 (1933); Georgeson v. Nielsen, 214 Wis. 204, 252 N.W. 576 (1934).

[28] "The second plea in abatement is based upon the contention that Williams is a necessary party to the action, and that this action cannot be maintained against the insurer unless and until Williams has been served or has appeared in this action. * * * As such direct liability on the part of the insurer exists in the case at bar, as it did in the Elliott case, the conclusion in that case that the insured is not a necesstry party is likewise applicable herein, and it was therefore proper to sustain the demurrer to the second plea in abatement." Oertel v. Williams, 214 Wis. 68, 251 N.W. 465 (1931).

[29] Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935).

[30] "That policy had a 'no action' clause, the legal effect of which was substantially the same as that of the no action clauses in similar policies, under which it has become the established rule, * * * that no action could be brought against an insurer under such policies issued before the enactment, in 1931, of section 260.11, Stats. That statute makes such an insurer a proper party defendant in any action brought against an insured under such a policy to recover damages caused by the latter's negligent operation of an automobile. That such 'no action' clauses in such policies secure a valuable right, was definitely determined in Pawlowski v. Eskofski, 209 Wis. 189, 244 N.W. 611.

been definitely sustained even though the accident occurs in Wisconsin and the action is tried in that state.[31]

It is rather interesting to compare the results arrived at in Louisiana to those in Wisconsin. It is clearly the result that the insurer may be joined in a suit against the insured, even though a "no action" clause is present in the policy.[32] It has been established in Louisiana

Likewise, it was then determined that even though section 260.11, Stats., related to procedure and was therefore a remedial statute, it would be unconstitutional to construe or apply it so as to substantially lessen the value of a preexisting contractual provision, and that, therefore, that statute could not be given a retroactive effect so as to apply it to policies written before its enactment. Manifestly, if the procedure authorized by that statute would result in such a substantial impairment of the existing valuable right under a valid 'no action' clause that it would be unconstitutional to apply that statute retroactively, then it would be likewise unconstitutional to apply it so as to impair that contractual right when it exists under a 'no action' clause in a policy written in Illinois, where such a clause is valid and effective in all respects." Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936).

[31] Kilcoyne v. Trausch, 222 Wis. 528, 269 N.W. 276 (1936).

[32] "On the question of plaintiff's right of action against National Casualty Company, defendant's insurance carrier, the case turns upon the interpretation of Act No. 55 of 1930, Sec. 2, amending section 1 of Act No. 253 of 1918, in the following words: 'That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured for which the insurer is liable, which shall have become executor, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly and in solido. Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State. It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the term and conditions of such policy contract are not in violation of the laws of this State.' The contention of the defendant is that the act only gives the injured person a direct action against the insurer when there is no clause in the insurance contract forbidding such action. * * * But there must have been some legislative purpose in amending section 1 of Act No. 253 of 1918 by Act No. 55 of 1930 (section 2), and we believe a comparison of the two acts will reveal it. The act of 1918, with the exception of the repealing clause and a declaration as to the date of its effective application, is in two sections. Section 1 declares that it shall be illegal for any company doing business in this state to issue a policy against liability 'unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.' Section 2 of the act denounces its violation as a misdemeanor punishable by fine of not less than $50 and no more than $500. So that this act declares that the bankruptcy of the assured shall not release the company from liability and permits the injured person, in the event of

that such suit may be maintained against the insurer alone before judgment is obtained or suit instituted against the insured.[33]

We have seen that Wisconsin refused to permit a retroactive operation of its statute. Louisiana, on the contrary, has stated that it does not matter whether the policy is issued before or after the passage of the statute or whether the accident happens before or after the effective date. To permit the statute to operate retrospectively or retroactively does not render it unconstitutional.[34]

Wisconsin, the reader will recall, also gave full force and effect to "no action" clauses contained in policies effective where written. As a matter of fact, the courts of that jurisdiction stated that the statute would be unconstitutional if otherwise construed. The trial court in

---

such insolvency, to maintain a direct action against the insurance company. The amending act, Act No. 55 of 1930, goes very much further. * * * Considering both acts together, the act of 1918 and the act of 1930, it seems to us too plain for argument that it represents a determination upon the part of the Legislature to extend the rights of an injured party as against the insurer. In the beginning, an action could only be maintained in the event of the insolvency of the insured. Later this right of action was facilitated by a definition of insolvency and a conditional right of action conferred unrelated to the insolvency of the insured and capable of being exercised initially as against the insurer alone, or in conjunction with the insured as a solidary obligation." Bougon v. Volunteers of America, (La. App. 1934) 151 So. 797.

See also Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (1931); Rambin v. Southern Sales Co., (La. App. 1932) 145 So. 46; Gomer v. Anding, (La. App. 1933) 146 So. 704 rehearing denied 147 So. 545; Jones v. Shehee Ford Wagon & Harness Co., (La. App. 1934) 157 So. 309, judgment reinstated on rehearing, 160 So. 161; Stephenson v. List Laundry & Dry Cleaners, 182 La. 383, 162 So. 19 (1935); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935), reversing in part earlier case found in (La. App. 1934) 157 So. 737; Robbins v. Chort, (La. App. 1936) 165 So. 512; Duncan v. Ashwander, 16 F. Supp. 829 (W.D. La. 1936).

[33] "The policy is said to be subject to the condition that no recovery against the company shall be had until the amount of the assured's obligation to pay shall have been finally determined, either by judgment against the assured after actual trial, or by written agreement of the assured and the claimant and the company. This stipulation, however, must yield to the provisions of Act No. 55, of 1930, which allows an injured person to bring suit against the liability insurer without making the insured a party to the suit. In fact, one of the conditions stated in the policy is that any specific statutory provision in force in the state in which it is claimed that the insured is liable for any such loss as is covered by the policy shall supersede any provision in the policy inconsistent therewith." Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935). See also Baden v. Globe Indemnity Co., (La. App. 1932) 145 So. 53; Gager v. Teche Transfer Co., (La. App. 1932) 143 So. 62, (La. App. 1934) 153 So. 69; Rambin v. Southern Sales Co., (La. App. 1932) 145 So. 46; Holland v. Owners' Automobile Ins. Co. of New Orleans, (La. App. 1934) 155 So. 780; Reeves v. Globe Indemnity Co., (La. App. 1935) 164 So. 642, set aside on other grounds, 185 La. 42, 168 So. 488 (1936).

[34] "By the act of 1930 insurance companies and holders of policies were notified that thereafter injured persons might bring direct actions against the insurers of the parties alleged to be responsible. No substantive or vested rights were thereby taken from the insurers. Their liability remained contingent and dependent upon some proof of fault as was required before the passage of the act." Rossville Commercial Alcohol Corp v. Dennis Sheen Transfer Co., 18 La. App. 725, 138 So. 183 (1931). See also Gager v. Teche Transfer Co., (La. App. 1932) 143 So. 62.

Louisiana, in a recent case, accepted this view. The upper court held, however, that the right was merely procedural and not substantive, and went on to allow the joinder.[35]

It is generally accepted in Rhode Island that the insurer may be joined in an action against the insured,[36] although one case has stated that such judgment is not conclusive as to its liability.[37] It is upon the question, however, where Wisconsin and Louisiana differ so grossly—that of extraterritorial operation—that the writer wishes to focus attention as to Rhode Island decisions. It was first held that the statute would not apply to a policy issued in Massachusetts if the accident occurred in Massachusetts.[38] In the next case involving a New York contract, the plaintiff desired to make a distinction by showing that the accident occurred in Rhode Island and the statute of Rhode Island should apply. The court held the *lex loci delicti* was not the test, and since the contract was one made in New York, that law would govern and joinder could not be had.[39] This result was affirmed by a federal case involving a different type of liability contract. That result was a little odd. The contract was executed in Chicago and contained a "no action" clause. The property was located in Rhode Island, however, and the only possible liability would have to arise in that state. The court held the Illinois law to apply, and refused a joinder.[40] The legal result is, of course, consistent with the Rhode Island decisions.

---

[35] "Our conclusion is that that part of act No. 55 of 1930 permitting a claimant to join the insurer with the owner of the car under an automobile liability accident policy where a suit for damages is brought only relates to the form and effect of the action and may be applied by the *lex fori*, even though the contract of insurance is governed by a different provision in the policy valid under the laws of the state where entered into." Robbins v. Short, (La. App. 1936) 165 So. 512. See also Stephenson v. List Laundry & Dry Cleaners, 182 La. 383, 162 So. 19 (1935), *aff'd*, 168 So. 317; Duncan v. Ashwander, 16 F. Supp. 829 (W.D. La. 1936).

[36] Bell v. Weiner, 46 R.I. 478, 129 Atl. 339 (1925); Coderre v. Traveler's Ins. Co., 48 R.I. 152, 136 Atl. 305 (1927); Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 Atl. 186 (1927); Miller v. Metropolitan Casualty Ins. Co. of New York, 50 R.I. 166, 146 Atl. 412 (1929).

[37] Miller v. Metropolitan Casualty Ins. Co., 50 R.I. 166, 146 Atl. 412 (1929).

[38] "If, however, the statute was intended to have the broad purpose for which the plaintiffs contend, it would be beyond the constitutional power of a state Legislature to regulate the contracts of a foreign corporation made in another state with a citizen of such other state. If the statute under consideration was enacted with the legislative intent for which the plaintiffs contend, it would amount to an attempt by the General Assembly of this state to regulate the manner of doing business in Massachusetts between residents of that state. Such claim is contrary to the general rule as to the construction of contracts, which is applicable to contracts of insurance. In the absence of special provision in the contract to the contrary, a contract is to be construed in accordance with the law of the state where it is made." Coderre v. Travelers' Ins. Co., 48 R.I. 152, 136 Atl. 305 (1927).

[39] Riding v. Travelers' Ins. Co., 48 R.I. 433, 138 Atl. 186 (1927).

[40] Martin v. Zurich General Accident & Liability Ins. Co., 84 F. (2d) 6 (C.C.A. 1st, 1936), *rev'g* 13 F. Supp. 162 (D.R.I. 1935).

Probably the most interesting of all the transitional changes is that of Texas. The earlier cases are confusing, at best, and will receive but scant attention. It seems that the tendency was to allow the insurer to be joined where the policy was one of liability or one required by a statute for the protection of the general public.[41] If the policy was one of indemnity, the tendency seemed to be to refuse a joinder.[42]

In 1933 while the great bulk of these decisions were being rendered, the Court of Civil Appeals produced a beautifully reasoned decision. The court therein stated its firm belief that many earlier decisions were erroneously decided.[43] By so doing, this court started an avalanche which has seemingly led to the overthrow of the older cases to a large degree. Because of the very newness of these decisions, the writer must make any statements with some equivocation, as it is always possible that the court may modify its language and attitude in the future. There is no question whatsoever that the earlier cases are definitely, however, in disfavor. The present results may be classified as follows: (1) It now seems that a different rule may still apply to liability and indemnity contracts—if a "no action" clause is present in indem-

[41] American Automobile Ins. Co. v. Struwe, 117 Tex. 383, 218 S.W. 534 (1920); Engler v. Hatton, (Tex. Comm. App. 1929) 12 S.W. (2d) 990, *aff'g* 2 S.W. (2d) 519; Texas Landscape Co. v. Longoria, (Tex. Civ. App. 1930) 30 S.W. (2d) 423; Monzingo v. Jones, (Tex. Civ. App. 1931) 34 S.W. (2d) 662; Kuntz v. Spence, (Tex. Civ. App. 1931) 48 S.W. (2d) 413, *rev'd* (Tex. Comm. App. 1934) 67 S.W. (2d) 254; Pickins v. Seaton, (Tex. Civ. App. 1932) 51 S.W. (2d) 1050, *rev'd* in part, (Tex. Comm. App. 1935) 87 S.W. (2d) 709; American Indemnity Co. v. Martin, (Tex. Civ. App. 1932) 54 S.W. (2d) 542; Commercial Standard Ins. Co. v. Caster, (Tex. Civ. App. 1933) 59 S.W. (2d) 931, *rev'd*, 125 Tex. 48, 81 S.W. (2d) 487 (1935); Southland Greyhound Lines v. Dennison, (Tex. Civ. App. 1933) 62 S.W. (2d) 500; Commercial Standard Ins. Co. v. Shudde, (Tex. Civ. App. 1934) 76 S.W. (2d) 561.

[42] Hanson v. Haymann, (Tex. Civ. App. 1926) 280 S.W. 869; American Indemnity Co. v. Martin, (Tex. Civ. App. 1932) 54 S.W. (2d) 542; Cuellar v. Moore, (Tex. Civ. App. 1932) 55 S.W. (2d) 244; Lander v. Jordan, (Tex. Civ. App. 1933) 59 S.W. (2d) 959, second appeal, (Tex. Civ. App. 1935) 87 S.W. (2d) 1109; I. & G. N. Wood & Coal Co. v. Schilling, (Tex. Civ. App. 1932) 59 S.W. (2d) 1110.

[43] "Could Ray, the assured, have originally maintained suit against the insurer under this policy and collected a judgment upon allegations of the facts pleaded by plaintiff and before any judgment was ever rendered against him determinative of liability and the extent of the damages? We think not. This, for one reason, because the policy itself requires the existence of a final judgment against the assured or an agreement, to which the insurer was a party, so as to have determined the intrinsic character of the happening and the amount of damages as a condition precedent to his right to sue. Would a stranger to the contract then be given a right inhibited by it expressly to the very party who made it? The recovery of a judgment is the manner provided in the contract by which the insured proves to the insurer that the occurrences relied upon by the injured party were covered by the policy and the extent of the damages. * * * To have these questions definitely determined in a suit between the original parties is undoubtedly a matter of some concern to the insurer, in consideration of which it could afford to issue a policy for a less consideration. If such an arrangement suits both parties to the contract and same is valid, certainly an appellate court is without authority to judicially nullify what they have plainly agreed upon." Ray v. Moxon, (Tex. Civ. App. 1933) 56 S.W. (2d) 469.

nity contracts, certainly the insurer may not be properly sued until judgment has been recovered against the insured.[44] (2) The insurer may no longer be joined as a party defendant even in suits upon required policies under forms prescribed by the public service commission, taxi-cab, jitney policies or otherwise.[45] (3) The result seemingly

---

[44] "We are aware of the fact that the general rule is that an insurance policy or contract which is merely one of indemnity, that is, which only binds the company to indemnify and save harmless the assured, will not form the basis of a cause of action against the insurance company by a person who has been injured by the negligent act of the insured. On the other hand, it is also the general rule that, where the policy creates a primary liability on the part of the insurance company in favor of any person who may be injured by the negligence of the insured, such injured person may sue the insurance company alone or join it in a suit against the insured. 5 Tex. Jur. pp. 661, 662, and authorities there cited. In spite of either rule where the liability of the insurance company to the person injured rests solely on the insurance policy or contract, he must bring his suit within its terms before he can recover thereon. This is because the insurance company has committed no wrong against the injured party, and its liability is purely contractual. When we come to examine the insurance policy made the basis of this cause of action, we find that it contains what is known in legal parlance as a 'no action clause.' This clause is set out and quoted above under 'Determination of Company's Liability for Accident (3).' Also this no action provision is carefully preserved where necessary throughout the policy. When the policy is read in the light of the 'no action clause,' contained therein, and as fully preserved throughout the contract, it does not bind the casualty company as for primary liability to an injured party so that it can be sued alone prior to a judgment against the insured, or sued with the insured before such judgment against him is obtained. On the other hand, it fully guards against such suit. If there is any reason why such provision in the contract should not be given effect, we are unable to think of it. Such provision violates no statute, and is certainly not against public policy. Ray v. Moxon, (Tex. Civ. App.) 56 S.W. (2d) 469, 470, and authorities there cited. Furthermore, it is certainly very important to the insurance company that it be not sued with the insured. In this respect we judicially know that juries are much more apt to return a verdict for the injured party and for a larger amount, if they know the loss is to ultimately fall on an insurance company." Kuntz v. Spence, (Tex. Comm. App. 1934) 67 S.W. (2d) 254. See also Ray v. Moxon, (Tex. Civ. App. 1933) 56 S.W. (2d) 469, *aff'd*, 125 Tex. 24, 81 S.W. (2d) 488 (1935); Neeson v. Bluth, (Tex. Civ. App. 1933) 63 S.W. (2d) 1046, *aff'd*, (Tex. 1936) 94 S.W. (2d) 407.

[45] "A careful reading of section 13, supra, discloses that the obligation of the insurance contract by such statute required is only to pay 'judgments,' not to pay damages resulting from the negligence of a truck operator. In this connection we call attention to the fact that such statute in unambiguous terms only requires the insurance carrier to '* * * pay * * * *all judgments* which may be recovered against the motor carrier, * * * based on claims for loss or damages from personal injury or loss of, or injury to property, * * * aising out of the actual operation of such motor carrier. * * *' (Italics ours.) In this regard the statute by express words, and all fair implication to be drawn from the express words used, makes the basis of a suit by an injured party against the insurance company a *'judgment'* against the truck operator, and no authority for a suit against such insurance company is authorized or has any basis whatever unless and until there is a judgment. Under the very terms of the statute, a suit filed against the insurance company by an injured third party before there is a judgment against the truck owner is a suit without basis in law, and, as to the insurance company, the plaintiff's petition would not only constitute a misjoinder where the insurance carrier and the truck owner are joined in the same suit, but the suit as against the insurance carrier would be subject to a general demurrer because no cause of action

may be obtained even if there is not a "no action" clause if the policy is one of indemnity.[46] (4) The insurer may raise this question of misjoinder by plea in abatement and by writ of error.[47]

One of the most recent cases leaves some loophole for the court to slip back into its old ways. While its immediate decision conforms to the most recent results it states that the insurer may not be joined unless the plaintiff can show that he was a party to the contract or demonstrate that he was made a beneficiary thereof by statute or ordinance.[48] The other recent cases refused to allow such a construction under almost any type of required policy. In view of this definite stand, any hedging statement would seem to be a vacillation from the court's present position. The above generalizations seem to represent the present Texas law, to the writer's best knowledge.

Where the public policy has been conclusively expressed by the legislature, the court have no option but to follow the statutes thereby set forth. The four states just discussed have applied these principles judiciously, wherever possible, even though some conflict is found to exist between them. In the other jurisdictions, however, where courts have permitted joinder without reference to any statute whatsoever the result must be severely critized. An almost unbearable burden is placed

---

can be alleged against it except on a judgment." Grasso v. Cannon Ball Freight Lines, 125 Tex. 154, 81 S.W. (2d) 482 (1935).

See also Moxon v. Ray, 125 Tex. 24, 81 S.W. (2d) 488 (1935) *aff'g* (Tex. Civ. App. 1933) 56 S.W. (2d) 469; American Fidelity & Casualty Co. v. McClendon, 125 Tex. 41, 81 S.W. (2d) 493 (1935); Aubrey v. Dunnahoo, (Tex. Civ. App. 1936) 90 S.W. (2d) 611; Leap v. Braziel, (Tex. Civ. App. 1936) 93 S.W. (2d) 1213; Bransford v. Pageway Coaches, Inc., (Tex. Comm. App. 1937) 104 S.W. (2d) 471; Lloyds America v. Brooks, (Tex. Comm. App. 1937) 105 S.W. (2d) 660. But see Commercial Standard Ins. Co. v. Shudde, (Tex. Civ. App.. 1934) 76 S.W. (2d) 561.

[46] "The policies construed in Kuntz v. Spence and American Indemnity Company v. Martin, supra, contained clauses providing in substance that no action should lie against the insurer for any loss under the policy until the amount of the damages for which the assured might be liable should be determined, either by final judgment against the assured or by agreement. It was held that the policies could not in the face of such 'no action' clauses be construed as giving a direct right of action to the injured party before judgment against the assured. The policy in the instant case does not provide in terms that no action shall be brought on it until after judgment in favor of the injured person against the assured, but its effect is the same when it specifically states the limit of the company's liability as being the paying of a final judgment that may be rendered against the assured. As said in one of the briefs, 'There can be no difference in legal effect between language which affirmatively bestows the right of action after the recovery of a final judgment against the assured and a policy general in its insuring terms, with further provision that there shall be no liability until after a final judgment shall have been rendered against the assured.'" Seaton v. Pickens, 126 Tex. 271, 87 S.W. (2d) 709 (1935).

[47] Universal Automobile Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W. (2d) 727 (1935), *aff'g*, (Tex. Civ. App. 1932) 54 S.W. (2d) 1061; Aubrey v. Dunnahoo, (Tex. Civ. App. 1936) 90 S.W. (2d) 611; Bluth v. Neeson, (Tex. 1936) 94 S.W. (2d) 407, *aff'g* (Tex. Civ. App. 1933) 63 S.W. (2d) 1046.

[48] Webster v. Isbell, (Tex. Com. App. 1937) 100 S.W. (2d) 350.

upon the jury system. Every lawyer knows that matters of policy are difficult and involved matters of construction even for a skilled attorney. How much more difficult are the determination of such matters for the average jurer. Yet despite the difficulty of this question, the jury is asked to make such a determination at the same time it weighs issues of negligence, contributory negligence, assumption of risk, and all matters pertaining to the merits of the case. Can a juror successfully isolate these matters in his own mind and render a verdict with any prospect of equity and justice? To the average juror, the company as a defendant means only one thing. The plaintiff has been injured and has suffered. Perhaps he was wholly at fault. But the individual defendant, the policyholder, will not be penalized by the return of a large verdict. Sympathy outweighs justice, and a verdict is returned in favor of the plaintiff. The scales of justice are unwieldy indeed when two defendants, on the one hand, must throw enough into the other scoop to make the scales balance.