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Federal Procedure - Jurisdiction - Suit Under Direct Action Statute Where There is Diversity of Citizenship Between Claimant and Insurer but Not Between Claimant and Wrongdoer

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FEDERAL PROCEDURE—JURISDICTION—SUIT UNDER DIRECT ACTION STATUTE WHERE THERE IS DIVERSITY OF CITIZENSHIP BETWEEN CLAIMANT AND INSURER BUT NOT BETWEEN CLAIMANT AND WRONGDOER—Plaintiff, a citizen of Louisiana, was injured in an automobile accident allegedly caused by the negligence of another citizen of Louisiana. Defendant insurance company, an Illinois corporation, had issued a public liability policy insuring the latter against claims arising from the negligent operation of his car. Pursuant to a Louisiana statutory provision that "the injured person or his or her heirs, at their option, shall have a right of direct action . . . against the insurer alone or against both the insured and the insurer, jointly and in solido,"[1] respondent brought an action against the petitioner alone in the United States District Court in Louisiana alleging diversity of citizenship and damages in excess of $3,000. Petitioner's motion to dismiss the complaint for lack of federal jurisdiction was granted. The Court of Appeals for the Fifth Circuit reversed and remanded the case for trial. On certiorari to the Supreme Court of the United States, *held,* affirmed. Federal jurisdiction exists in a suit for damages brought by the injured party under the Louisiana direct action statute against the wrongdoer's insurer alone, where diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the wrongdoer. *Lumbermen's Mutual Casualty Co. v. Elbert,* 348 U.S. 48, 75 S.Ct. 151 (1954).

The case is one in which there is no question that diversity of citizenship exists between the parties to the action, but in which there is a very real question as to whether there is an "action where the matter in controversy"[2] is between these parties. The Court in addressing itself to this problem denies that the real matter in controversy is the underlying tort liability of the alleged wrongdoer. It is stated that the insurer is the real party in interest in the case. This approach is weak in two respects. First, the phrase "real party in interest," if it is to have legal significance, must be applied to the defendant within the scope of the real party in interest provision of rule 17(a),[3] yet that provision by its terms applies only to parties plaintiff.[4] Second, the misapplication of the phrase leads the Court to cite cases recognizing separate actions available to fiduciaries on behalf of their beneficiaries. These cases are not in point. The injured plaintiff is suing neither as the representative nor as the beneficiary of the insured tortfeasor. He is suing on his own cause of action against the insurer, and the Court's reasoning fails to meet squarely the issue of whether such a cause of action exists. The problem is solved only by examining the legislative history and court interpretation of the underlying statute.

The first statute in Louisiana treating the insurer's liability to the injured party[5] is similar to those now existing in over half the states. It gave the in-

[1] La Rev. Stat. (1950) tit. 22, §655.
[2] 62 Stat. L. 930 (1948), 28 U.S.C. (1952) §1332(a).
[3] Rule 17(a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).
[4] See 3 MOORE, FEDERAL PRACTICE, 2d ed., ¶17.07 (1948).
[5] La. Acts (1918) No. 253.

jured party a direct action against the insurer where no recovery could be obtained from the insured tortfeasor because of the latter's insolvency. In 1930, the legislature extended the injured party's right of action to its present scope. The statute "gives the injured party an immediate right of direct action against the insurer of the party responsible for the injuries . . . and expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but of the public."[6] The Louisiana courts, recognizing the separate nature of the direct action against the insurer, require pleading and proof distinct from that of an action against the tortfeasor either alone or when joined with his insurer. The injured party must establish not only the tortfeasor's fault, but also the insurer's liability within the terms of the policy. These terms are more liberally construed in application to the injured party,[7] and defenses personal to the insured are not available to the insurer.[8] Some Louisiana courts have interpreted the statute as giving only a procedural right,[9] but a recent decision of the supreme court of that state confirms the view that the right conferred is a substantive one.[10] Clearly the statutory provision as historically interpreted and as judicially applied gives the injured party a separate, direct cause of action against the insurer alone. Such a cause of action is enforceable in the federal courts[11] when jurisdiction is based upon the diversity of citizenship of *its* parties.

At the present time the ramification of the decision with respect to an increase of litigation in the federal courts is slight. Louisiana is the only state now providing for an immediate direct action against the insurer alone, but the adoption of similar legislation in other states appears likely. An ever-increasing burden on the district courts can be expected as direct actions are recognized against liability insurance companies which now insure three-fourths of the fifty million automobiles which yearly inflict over one and one quarter million injuries.[12] The burden is not one which the district judge can lighten. The insured tortfeasor is not an "indispensable party" whose non-joinder requires dismissal of the action.[13] The express provisions of the Louisiana statute exclude such an interpretation under state law and the wrongdoer does not meet the requirements for "indispensability" outlined by the federal courts.[14] Nor does the treatment of the tortfeasor as a "necessary party" authorize the court to dismiss the action under rule 19(b).[15] Discretionary refusal to entertain a

[6] Davies v. Consolidated Underwriters, 199 La. 459 at 476, 6 S. (2d) 351 (1942).
[7] West v. Monroe Bakery, 217 La. 189, 46 S. (2d) 122 (1950).
[8] Rome v. London and Lancashire Indemnity Co., (La. App. 1936) 169 S. 132.
[9] Graham v. American Employers Ins. Co., (La. App. 1937) 171 S. 471.
[10] West v. Monroe Bakery, note 7 supra.
[11] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949).
[12] Lemmon, "Insurance and the Automobile—Where Are We Headed?" 1954 INS. L.J. 369 (1954).
[13] Rule 19(a), Fed. Rules Civ. Proc., 28 U.S.C. (1952).
[14] Washington v. United States, (9th Cir. 1936) 87 F. (2d) 421.
[15] Dunham v. Robertson, (10th Cir. 1952) 198 F. (2d) 316. See 66 HARV. L. REV. 1529 (1953) for a suggestion to the contrary.

cause of action within the federal court's jurisdiction is exercised only in exceptional cases.[16] Hence the only relief from this growing burden lies in congressional action based upon a realization that the "stuff of diversity jurisdiction is state litigation."[17]

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[16] Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7 (1943).
[17] Justice Frankfurter concurring in the principal case, at 54.