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## Jury Tampering - 1978 Style Lawyer's Forum.

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## JURY TAMPERING—1978 STYLE

W. JAMES KRONZER\*

Today we again witness an attack upon our tort reparations system by the casualty insurance industry. The present attack closely resembles the affront that occurred in the 1950's and the 1960's which was mounted by the same group. Intrinsic to both of these attacks is the insurance industry's attempt to reach and affect potential jurors although, no doubt, the current attack is more insidious and effective.

The recent attempt to influence jurors has taken several forms. One form has been direct assaults through premium/verdict advertisements by companies like Crum & Forster and Aetna.<sup>1</sup> Crum & Forster's ads suggest, "The jury smiled when they made the award. They didn't know it was coming out of their own pockets."<sup>2</sup> The consequence, according to these advertisements, is that the jury gave an unconscionable amount because "it wouldn't hurt to be generous."<sup>3</sup> This same group has misrepresented the number of "product liability" claims filed, as well as referred to fictitious cases in their ads. The company has even suggested, "There isn't a product made that cannot be misused,"<sup>4</sup> implying that one who misuses a product can recover for injuries resulting from that misuse.

One of Aetna's ads states, "Too bad judges can't read this to a jury" and suggests that jurors be instructed: "The jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves."<sup>5</sup> Like Crum & Forster's ads, Aetna's advertisements misrepresent the number of claims filed, report on fictitious cases, and give incomplete facts. Another of these specious ads commences, "And Now, The Big Winners In Today's Lawsuits," suggesting that damage awards for personal injury litigation often greatly exceed the actual extent of the injury.<sup>6</sup> Aetna has also at-

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1. See appendices A and B.
2. See appendix B.
3. See appendix B.
4. See *Young v. Crum & Forster Ins. Co.*, No. B-78-62 (D. Conn., Jan. 11, 1979) (exhibit A) (order remanding to state court as directed in consolidation with *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978)).
5. See appendix A.
6. See *Young v. Crum & Forster Ins. Co.*, No. B-78-62 (D. Conn., Jan. 11, 1979) (exhibit G).

tempted to reach jurors more indirectly through incredible ads which attempt to spawn a "no-fault" system.<sup>7</sup>

These advertisements appearing in national publications question the economic and moral underpinnings of personal injury litigation judgments. Such attacks by large, well-financed insurance companies on the present tort compensation system, attempting to influence jurors to disregard their oaths to decide cases only on the evidence presented in court, cannot be counteracted by advertisements by individual plaintiffs.<sup>8</sup> While this recent insurance company offensive is being curtailed to some extent by courts and insurance commissions,<sup>9</sup> the process is exceedingly slow. Furthermore, long range control of these improprieties is more than can be expected within the limitations of the judicial process. Therefore, the more immediate question, and the one that relates directly to the preservation of the right of trial by jury, concerns the power of the judicial system to eradicate or enervate the damage done. It is in this area that the St. Mary's Law Journal has proposed a dialogue between counsel on "both sides of the docket." Mr. Mike Hatchell, representing the "defense" viewpoint, has written an excellent article in which he delineates the current status of the Texas law on the question of eradicating such influences, either by *voir dire* examination or by instructions from the court, and concludes, for a number of reasons, that the current hardline rule in Texas should be followed. There is little that can be added to his discussion and presentation of the Texas authorities, and his research of authority from other jurisdictions is excellent; our difference lies in the interpretation of these authorities and in his conclusions and opinions that there is no need for further judicial "treatment" of the wounds.

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7. Aetna has used "dramatizations" in its "no-fault" ads that are patently deceitful and calculated to impress jurors that the present tort reparation system does not work. The most offensive of these ads is the "man in the middle" ad which implies that over fifty percent of the money awarded an injured plaintiff is consumed by the costs of the present system.

8. Nor can the sting of these ads be removed by humorous articles such as Art Buchwald's in which the reluctant juror goes along with the others, rendering a verdict for the plaintiff but with reservations that their verdict might result in the insurance carrier having to sell its golf course. See 124 CONG. REC. E3854 (daily ed. July 18, 1978).

9. Presently, both Crum & Forster and Aetna have signed consent orders with state insurance commissions agreeing not to publish the contested ads. See Consent order signed by the Crum & Forster Companies with the Connecticut Insurance Department (August 16, 1978); Consent order signed by the Crum & Forster Companies with the Kansas Insurance Commissioner (June 27, 1978); Consent order signed by Aetna with the Kansas Insurance Commissioner (June 24, 1978). Additionally, suits have been filed by plaintiffs in personal injury litigation seeking to enjoin the ads. See *Young v. Crum & Forster Ins. Co.*, No. B-78-62 (D. Conn., Jan. 11, 1979); *Parris v. Garner Commercial Disposal, Inc.*, No. 77-VCS 879 (N.C. Super. Ct., filed Nov. 18, 1977).

## THE EXISTING TEXAS ATTITUDE ABOUT JURIES AND INSURANCE

Texas does indeed have an extremely strict prohibition against injecting or introducing the fact that any party is or is not protected by some form of insurance.<sup>10</sup> The zenith of this preemptive rule is *Kirby Petroleum Co. v. Jones*<sup>11</sup> in which the Tyler Court of Civil Appeals reversed and remanded a case in which a compensation insurance carrier was joined in a suit against Kirby.<sup>12</sup> There was no showing of "harm" within the context of rule 434, but the reversal bottomed upon the outdated "presumed harm" rule. The Tyler court held:

Although we are keenly aware of the holding of the Supreme Court in *Dennis v. Hulse* . . . holding that even though the record discloses that the question of insurance was improperly injected into the case, and even though such error was reasonably calculated to cause a miscarriage of justice, the party appealing must also show that it probably did cause the rendition of an improper judgment under rules 434 and 503, T.R.C.P., yet as we read the cases, the Supreme Court remains committed to the view that the Court will take judicial knowledge of the fact that a jury is more apt to render a judgment against a Defendant, and for a larger amount, if it knows that the Defendant is protected by insurance.<sup>13</sup>

While the *Jones* case did not involve *voir dire* examination, it does clearly reflect the traditional Texas attitude about any suggestion that either party to the suit may be protected by some form of insurance.

Recently, however, some Texas courts have not treated this prohibition as an ironclad rule requiring automatic reversal.<sup>14</sup> Some courts of civil appeals have allowed the plaintiff to ask prospective jurors whether they had any connection or relationship with the insurance industry.<sup>15</sup> In *South Austin Drive-In Theatre v. Thomison* the court held that "in the absence of a clear inference of the

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10. Courts, however, do not treat injection of lack of insurance as strictly as they have the injection of insurance. See *Villanueva v. Rodriguez*, 300 S.W.2d 668, 670 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.). In *Villanueva* the court said statements by a juror indicating she would not decide the case against the defendant because the defendant "would have to pay the money out of his pocket" (an inference that there was no insurance), was not jury misconduct. *Id.* at 670.

11. 383 S.W.2d 610 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).

12. *Id.* at 615-16.

13. *Id.* at 616.

14. See, e.g., *St. Louis Sw. Ry. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965); *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962); *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933, 941 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

15. See *McDonough Bros., Inc. v. Lewis*, 464 S.W.2d 457, 464 (Tex. Civ. App.—San

existence of insurance in the case" it would not be error to make a good faith inquiry about connection with the insurance industry.<sup>16</sup> Additionally, the Texas Supreme Court has held that mention of insurance does not always require reversal and that the appellant must show that the mention probably did cause an improper judgment.<sup>17</sup>

Although these cases may represent a trend toward liberalizing the prohibition, there has been no landslide in this direction on the trial court level. In practice, trial courts uniformly refuse to allow counsel to make reference, either in *voir dire* examination or in jury argument, to rule 226A of the Texas Rules of Civil Procedure which provides for an instruction not to consider whether any party is protected by insurance.<sup>18</sup> Additionally, it has been held that giving the instruction does not cure the improper mention of insurance in *voir dire* examination, at least when the overtone of existence of coverage is projected.<sup>19</sup> At the trial court level, therefore, the prohibition remains strong although there has been some appellate enervation of the relic.

In fact, contrary to Mr. Hatchell's contention, rule 226A was a direct judicial response to the earlier attack upon the tort system in the 1950's and early 1960's. Although the rule was not immediately forthcoming, by order of the Texas Supreme Court on July 21, 1970, jurors were to thereafter be instructed in writing "not [to] consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind."<sup>20</sup> It is perhaps true that this change in the rules was intended primarily

Antonio 1971), writ ref'd n.r.e.); *Kollmorgan v. Scott*, 447 S.W.2d 236, 238 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933, 941-42 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.). Another civil appeals court has held that such questions did not necessarily constitute reversible error. See *Shoppers World v. Villarreal*, 518 S.W.2d 913, 920-21 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

16. *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933, 941 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

17. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962); see *St. Louis Sw. Ry. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965); *Meyers v. Searcy*, 488 S.W.2d 509, 514-15 (Tex. Civ. App.—San Antonio 1972, no writ); *El Rancho Restaurants, Inc. v. Garfield*, 440 S.W.2d 873, 880 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.); *Tex. R. Civ. P. 226a*. "Not every mention of insurance requires the setting aside of a jury's verdict." *St. Louis Sw. Ry. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965).

18. *Tex. R. Civ. P. 226a*.

19. *A. J. Miller Trucking Co. v. Wood*, 474 S.W. 2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). If the "rule" of this case is followed it will be virtually impossible to expand *voir dire* to encompass questions concerning deceptive advertisements.

20. *Tex. R. Civ. P. 226a*.

to inform jurors that they are not to consider such matters in their deliberations, rather than to qualify jurors for purposes of selection prior to being impaneled as jurors for the case. Nonetheless, the rule was a response to the increasing presence of insurance in personal injury litigation and the greater number of instances in which jurors had either considered the presence or absence of insurance protection.

Yet, rule 226A has done little to reduce a plaintiff's problems. Although the instruction directs jurors not to consider insurance when deciding the case, the recent advertisements by insurance companies may still have an effect on their verdict.<sup>21</sup> Currently, most Texas courts will probably prohibit questions during *voir dire* concerning exposure to these ads, and thus, a plaintiff is denied an opportunity to uncover grounds for challenge for cause, to intelligently exercise peremptory challenges, or to "rehabilitate" potential jurors.<sup>22</sup> This failure of Texas courts to permit a broader *voir dire* examination of the jury concerning extraneous influences such as these insurance company advertisements does not indicate that the jury system has accommodated itself to influences of this type. Rather, it is suggested that the Texas judiciary has been willing to

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21. See Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69 (Jan. 1979) (exposure to insurance advertisements will reduce verdicts).

22. On November 15, 1978, the Arkansas Supreme Court "attacked the citadel" in *King v. Westlake*, holding that *voir dire* questions by plaintiff's counsel concerning liability insurance company ads were permissible. All but two of the potential jurors stated they had seen the ads in *Time*, *Wall Street Journal*, and *Smithsonian Institute*. Plaintiff's counsel continued:

It is improper for either side to imply or suggest that the defendant does or does not have insurance, and the questions I will now direct to you have nothing to do with whether or not the defendant has insurance. The questions I will ask concern your insurance premiums, not insurance in this case. How many of you believe that jury verdicts affect insurance premiums?

The question I have been building up to is this: Assuming that the verdict you render could cost you a little more or a little less money on your insurance premiums, can you listen to the testimony, the statements of counsel, and the instructions and then put aside the financial interest you have in the case because of your insurance premiums and render a verdict? (All jurors raised their hands.)

*King v. Westlake*, 572 S.W.2d 841, 844 (Ark. 1978). As could be expected, defense counsel complained that the effect of this *voir dire* was to implant in the minds of the jurors the fact that the defendant had liability insurance. After noting that the questioning was obviously in "good faith," the court observed:

[T]he purpose of *voir dire* examination is to enable counsel to ascertain whether there is ground for a challenge of a juror for cause, or for a peremptory challenge and . . . so long as counsel acts in good faith, he may, in one form or another question prospective jurors respecting their interest or connection with liability insurance companies.

*Id.* at 844 (emphasis added).

let juries flounder in speculation regarding coverage, or lack of it, and further, to not permit a fair exposure of the jurors who may have been contaminated.

### THE STRICT RULE IS NO LONGER JUSTIFIED

Not all jurisdictions have such a strict prohibition against any reference to insurance. Most states will allow the plaintiff to question prospective jurors about a connection with a liability insurance company,<sup>23</sup> and two states will allow the insurance company to be joined as a party defendant.<sup>24</sup> In fact, the tendency has been toward relaxing the traditional rule as courts reexamine the justifications for the rule.<sup>25</sup>

This tendency toward lessening the fervor with which the traditional prohibition was enforced comports more readily with modern reality than does Texas' overly strict rule. The existence of insurance in many personal injury cases is no secret to most jurors.<sup>26</sup> In fact, with knowledge of financial responsibility laws requiring liability insurance for motorists<sup>27</sup> and of the realities of modern society, jurors usually assume that the defendant is insured.<sup>28</sup> Thus, any

23. See, e.g., *Hart v. Wielt*, 84 Cal. Rptr. 220, 224 (Ct. App. 1970) (may ask whether prospective jurors are interested in a particular insurance company); *Cain v. Wilson*, 506 P.2d 1240, 1243 (Colo. Ct. App. 1972) (citing other cases permitting question concerning specific insurance company, including *Mayer v. Sampson*, 402 P.2d 185, 188 (Colo. 1965)); *Johnson v. Watson*, 265 N.E.2d 891, 893 (Ill. App. Ct. 1971) (question about interest in insurance company not improper). These questions have also been allowed by federal courts. See *Kiernan v. Van Schaik*, 347 F.2d 775, 782 (3d Cir. 1965). See generally C. McCORMICK, *LAW OF EVIDENCE* § 201, at 481 (1972); Comment, *Voir Dire Examination of Jurors Concerning Insurance Company Interests*, 15 DE PAUL L. REV. 148, 149 (1965).

24. See LA. REV. STAT. ANN. § 22.655 (West 1978); WIS. STAT. ANN. § 632.24 (West Spec. Pamphlet 1978).

25. *Takoma Park Bank, Inc. v. Abbott*, 19 A.2d 169, 176 (Md. 1941); see *Causey v. Cornelius*, 330 P.2d 468, 472-73 (Cal. Dist. Ct. App. 1958); *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 364-65 (Fla. 1974); *Runnacles v. Doddrell*, 157 A.2d 836, 839 (N.J. Super. Ct. App. Div. 1960). See generally C. McCORMICK, *LAW OF EVIDENCE* § 201, at 482 (1972); 2 WIGMORE, *EVIDENCE* § 282a, at 138-47 (1940); Annot., 4 A.L.R.2d 761, 764 (1949).

26. See *Pinkerton v. Oak Park Nat'l Bank*, 147 N.E.2d 390, 394 (Ill. App. Ct. 1958); *Connelly v. Nolte*, 21 N.W.2d 311, 320 (Iowa 1946); *Johnson v. Hansen*, 389 P.2d 330, 332 (Or. 1964) (en banc). "Any juror who doesn't know that there is liability insurance in the case by this time should probably be excused by virtue of the fact he or she is an idiot." *Young v. Carter*, 173 S.E.2d 259, 261 (Ga. Ct. App. 1970) (concurring opinion).

27. See *Causey v. Cornelius*, 330 P.2d 468, 473 (Cal. Dist. Ct. App. 1958); *Runnacles v. Doddrell*, 157 A.2d 836, 838 (N.J. Super. Ct. App. Div. 1960). See generally C. McCORMICK, *LAW OF EVIDENCE* § 201, at 481 (1972); Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 166 (1954). In a survey in 1959, 83.3% of the citizens in the twenty-eight states from which statistics were taken were covered by automobile liability insurance. Ames, *The Automobile Accident Commission Proposal: An Irrational Concept*, 14 U. FLA. L. REV. 398, 400 (1961-62).

28. See, e.g., *Causey v. Cornelius*, 330 P.2d 468, 474 (Cal. Dist. Ct. App. 1958); *Pinkerton*

attempt to conceal the existence of insurance is unlikely to be successful and is therefore pointless.<sup>29</sup>

The principal ground of support for the prohibition is that knowledge that the defendant is protected by insurance will increase the likelihood and the size of a verdict for the plaintiff. This fear has never been substantiated, however, and may be based upon mere conjecture.<sup>30</sup> Indeed, cases can be cited in which the result was exactly converse to that feared.<sup>31</sup> Plaintiffs should not be denied valuable information, necessary for intelligent exercise of their challenges, by a prohibition based on conjecture. Such a significant encroachment on a plaintiff's right to a trial by an impartial jury should be supported by factual data rather than an unverified supposition.<sup>32</sup>

Since the traditional rule is no longer successful in its objective and cannot be justified on a factual basis, it is time to reexamine it.<sup>33</sup> In the proper instance, the modern jury can safely be made aware of the real parties in interest.<sup>34</sup> Indeed, it may be "time to deal

v. Oak Park Nat'l Bank, 147 N.E.2d 390, 394 (Ill. App. Ct. 1958); *Runnacles v. Doddrell*, 157 A.2d 836, 838 (N.J. Super. Ct. App. Div. 1960). This assumption on the part of jurors has been noted by most authorities. See C. McCORMICK, *LAW OF EVIDENCE* § 201, at 481 (1972); C. McCORMICK & R. RAY, *TEXAS LAW OF EVIDENCE* § 1539, at 396 (2d ed. 1956); 2 WIGMORE, *EVIDENCE* § 282a, at 146 (1940); Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 166 (1954).

29. See *Pinkerton v. Oak Park Nat'l Bank*, 147 N.E.2d 390, 394 (Ill. App. Ct. 1958); *Johnson v. Hansen*, 389 P.2d 330, 334 (Or. 1964)(en banc)(concurring opinion); Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 160 (1954).

30. See *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 378 P.2d 741, 742 (Ariz. 1963)(en banc) (fear of higher verdict not as likely as once thought); *Moniz v. Bettencourt*, 76 P.2d 535, 539 (Cal. Dist. Ct. App. 1938); *Johnson v. Hansen*, 389 P.2d 330, 336 (Or. 1964)(en banc)(concurring opinion); *Texas Co. v. Betterton*, 126 Tex. 359, 362, 88 S.W.2d 1039, 1040 (1936). See generally C. McCORMICK & R. RAY, *TEXAS LAW OF EVIDENCE* § 1539, at 396 (2d ed. 1956); Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 160-61 (1954).

31. In *Southwestern Freight Lines v. McConnell* the first trial, in which there was no mention of the defendant's insurance, resulted in a verdict of \$4,310.50; in the second trial, in which insurance was mentioned, the verdict was only for \$3,750. *Southwestern Freight Lines v. McConnell*, 269 S.W.2d 427, 430-31 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.). Leon Green in his article criticizing the prohibition against informing the jury about the existence of insurance cites to a similar case, *Gladewater Laundry & Dry Cleaners, Inc. v. Newman*, 141 S.W.2d 951 (Tex. Civ. App.—Texarkana 1940, writ dismissed judgment cor.). Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 160 n.17 (1954).

32. See Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 161 (1954).

33. See, e.g., *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 378 P.2d 741, 742 (Ariz. 1963)(en banc); *Causey v. Cornelius*, 330 P.2d 468, 472 (Cal. Dist. Ct. App. 1958); *Young v. Carter*, 173 S.E.2d 259, 260 (Ga. Ct. App. 1970)(concurring opinion). See generally C. McCORMICK, *LAW OF EVIDENCE* § 201, at 482 (1972); C. McCORMICK & R. RAY, *TEXAS LAW OF EVIDENCE* § 1539, at 396 (2d ed. 1956). The only real purpose of the strict rule is to provide a "fertile source of errors" for the insurance company. Green, *Blindfolding the Jury*, 33 *TEXAS L. REV.* 157, 167 (1954); accord, *Causey v. Cornelius*, 330 P.2d 468, 473 (Cal. Dist. Ct. App. 1958).

34. See *Causey v. Cornelius*, 330 P.2d 408, 472-73 (Cal. Dist. Ct. App. 1958); C. McCOR-



with jurors as intelligent persons who can be trusted to treat parties justly and to uphold the dignity . . . of their functions"<sup>35</sup> and relax the prohibition against reference to insurance when there are sound countervailing interests justifying such relaxation.<sup>36</sup>

INSURANCE COMPANIES HAVE OPENED THE DOOR TO *Voir Dire*  
EXAMINATION ABOUT THE ADVERTISEMENTS

Even under the traditional rule, plaintiffs should be allowed to question prospective jurors about the ads in question. While ordinarily under this rule all inferences to insurance are forbidden, the premium/verdict advertisements disseminated by the insurance companies create a totally new situation. By printing advertisements aimed at potential jurors proclaiming an alleged correlation between jury verdict and insurance premiums the insurance companies have opened the door to discussion of these ads. It is the insurance company advertising that is making jurors aware of the existence of insurance, not plaintiff's questions on *voir dire*. The companies should not be allowed to publish these ads in an attempt to influence potential jurors and still receive the protection of the traditional prohibition at trial.

Presently, these companies are attempting to accomplish just such a coup. Despite their protests to the contrary, the insurance companies *have* published these ads in an attempt to influence potential jurors.<sup>37</sup> These companies have spent large sums of money in an attempt to influence verdicts in personal injury cases.<sup>38</sup> They seek to implant a prejudicial attitude against plaintiffs in the minds of potential jurors, thereby inducing such jurors to find no liability in personal injury cases or award damages in an amount less than that proved by the evidence.

In seeking to influence jurors to violate their oaths as jurors, the

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MICK & R. R.Y, TEXAS LAW OF EVIDENCE § 1539, at 396 (2d ed. 1956); Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 163 (1954).

35. Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 164 n.22 (1954); accord, C. McCORMICK, LAW OF EVIDENCE § 201, at 482 (1972).

36. See *Runnacles v. Doddrell*, 157 A.2d 836, 839 (N.J. Super. Ct. App. Div. 1960).

37. See *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 378 P.2d 741, 744 (Ariz. 1963)(en banc); *Causey v. Cornelius*, 330 P.2d 468, 473 (Cal. Dist. Ct. App. 1958); *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 480 (Sup. Ct. 1978).

38. See *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 378 P.2d 741, 744 (Ariz. 1963)(en banc). These expenditures are estimated to be over ten million dollars. Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69, 70 (Jan. 1979); see *Aetna and the First Amendment*, 8 JURIS DOCTOR 30, 30 (Dec. 1978/Jan. 1979)(Aetna reported a \$5.5 million media budget).

ads deny plaintiffs their rights to a fair and impartial trial,<sup>39</sup> and may even constitute jury tampering.<sup>40</sup> Under Texas law a person is guilty of a Class A misdemeanor if he attempts "to influence the outcome of the preceding on the basis of considerations other than those authorized by law."<sup>41</sup> The insurance company advertising comes precariously close to violating this standard.<sup>42</sup>

#### THE INSURANCE COMPANIES ARE TRYING TO MAKE JURIES AWARE THAT CORPORATIONS ARE INSURED

These ads represent a deliberate attempt by the insurance companies to influence jury verdicts in suits involving corporate defendants. Having effectively created insurance cost consciousness in vehicular accident cases, the companies, or at least some of them, obviously desire to penetrate the area of "big verdicts." It is obvious that the thrust of the propaganda mills is to make the jurors conscious that *any award* may affect their pocketbooks, thereby injecting an entirely improper element into jury consideration.<sup>43</sup> The ads are intended to cause juries to realize that the super-corporations also procure casualty insurance protection and that a large award will also "come out of their pockets." The "tampering" aspect is most clearly reflected at this level of the advertisements. Jurors do not now recognize that General Motors or General Electric or General Foods also have insurance protection, and thus in rendering their "fair and reasonable" awards jurors consider solely the defendant's liability without the extraneous injection of insurance protection. The recent media blitz was intended to cause the jurors to render lower verdicts because of insurance protection. Some courts and insurance commissions are not accepting the blitz, and it is suggested that the trial judges of Texas should do the same.

39. See *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 478, 480 (Sup. Ct. 1978).

40. See *id.* at 480.

41. TEX. PEN. CODE ANN. § 36.04(a) (Vernon 1974).

42. See *id.*; cf. *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 480 (Sup. Ct. 1978) (advertisements violate New York's jury tampering law and state public policy).

43. The argument that a verdict should be reduced because insurance rates will be increased is not any more justifiable than an argument that a verdict should be increased because the defendant is insured. The *only* true basis for the award is the facts of the particular case which establish "fair and reasonable compensation," subject to judicial control for gross excessiveness or inadequacy. At least one Texas court has held that in the case of "super-corporations" there is no error in advising the panel that they are not to consider who will pay the judgment, what type of judgment will be entered, or whether it will ever be paid. See *Phillips Petroleum Co. v. Capps*, 170 S.W.2d 522, 524 (Tex. Civ. App.—Eastland, 1943, writ ref'd w.o.m.).

## ATTEMPTS TO ENJOIN THE ADVERTISEMENTS

The insurance company ads have had their desired effect. A recent study has shown that just one exposure to an ad will significantly affect the verdict a juror would award.<sup>44</sup> This data becomes more alarming when it is realized that most jurors have probably been exposed to these ads several times.<sup>45</sup> Since individual plaintiffs cannot hope to match the resources of the insurance companies in order to defend themselves with rebuttal advertisements,<sup>46</sup> attempts have been made to prohibit the ads through the judicial system.

These attempts to enjoin insurance company advertising are destined for only limited success, however, because the advertising is entitled to some first amendment protection. While it is rather anomalous to find insurance companies seeking protection from the Constitution in view of their recent attempts, through "no-fault" laws, to hinder the constitutional rights of injured plaintiffs,<sup>47</sup> the first amendment does provide some protection for advertising.<sup>48</sup> Earlier attempts to enjoin similar insurance propaganda found courts were very sympathetic to this claim of constitutional protection.<sup>49</sup>

The Constitution, however, does not protect advertising that is misleading or deceptive. Commercial speech that is false or misleading is entitled to no protection whatsoever, and is properly subject to government regulation.<sup>50</sup> The recent insurance company

44. Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 69 (Jan. 1979).

45. *Id.* at 70. Over the last twenty years the cumulative effect of these advertisements could be enormous. The ads published in the late 1950's were aimed at reaching one out of every three potential jurors—over 70 million persons. *Causey v. Cornelius*, 330 P.2d 468, 473 (Cal. Dist. Ct. App. 1958); *People ex rel Barton v. American Auto Ins. Co.*, 282 P.2d 559, 561 (Cal. Dist. Ct. App. 1955). The present ads were published in approximately eighteen national periodicals and were aimed at an estimated audience of 30 million persons. *Aetna and the First Amendment*, 8 JURIS DOCTOR 30, 30 (Dec. 1978/Jan. 1979).

46. See generally Plaintiff's Complaint, *Parris v. Garner Commercial Disposal, Inc.*, No. 77-CVS 879 (N.C. Super. Ct., filed Nov. 18, 1977).

47. "It was a colossal spectacle to see the merchandisers of constitutional restrictions on the rights of the injured scrambling to hide behind the Constitution." Colley, *President's Page*, 14 TRIAL 4, 4 (Sept. 1978).

48. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 477 (Sup. Ct. 1978).

49. See *Hoffman v. Perrucci*, 117 F. Supp. 38, 40 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955); *United States ex rel May v. American Mach. Co.*, 116 F. Supp. 160, 163 (E.D. Wash. 1953); *Hendrix v. Consolidated Van Lines, Inc.*, 269 P.2d 435, 442 (Kan. 1954).

50. See, e.g., *Ohralik v. Ohio State Bar Ass'n.*, \_\_\_ U.S. \_\_\_, \_\_\_, 98 S. Ct. 1912, 1922, 56 L. Ed. 2d 444, 457 (1978); *Bates v. State Bar of Arizona*, \_\_\_ U.S. \_\_\_, \_\_\_, 97 S. Ct. 2691, 2708-09, 53 L. Ed. 2d 810, 835 (1977); *Virginia State Bd. of Pharmacy v. Virginia*

premium/verdict advertising easily fits into this unprotected category.<sup>51</sup>

### *The Ads Are Deceptive and Inaccurate*

The advertisements are designed to deceive the reader into believing that the present tort compensation system is in a state of crisis. This insurance company propaganda relies heavily on fictitious incidents and inaccurate figures. Even the insurance industry has admitted that the infamous "lawnmower as a hedgeclipper" case cannot be substantiated.<sup>52</sup> In all likelihood the story is a complete fabrication similar to other insurance advertising claims.

Crum & Forster's "safety pin" ad, implying a manufacturer was found liable because a pin was swallowed, cannot be substantiated by citation to an actual case either.<sup>53</sup> This advertisement is patently misleading in two respects. First, it causes the reader to believe an actual case exists, and second, it implies that one who misuses a product can recover for injuries caused by that misuse.<sup>54</sup> Aetna's

Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Additionally, in this instance the insurance companies' right to advertise must be balanced against plaintiffs' right to a fair and impartial trial. See *Wood v. Georgia*, 370 U.S. 375, 396 (1962). In view of the companies' direct attack on prospective jurors, the balance should be weighted more heavily in favor of plaintiffs' fair trial. *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S. 2d 743, 480 (Sup. Ct. 1978). See generally Note, *Newspaper Advertising—An Interference With A Fair Trial By Jury?*, 22 U. PITT. L. REV. 601, 601 (1961).

51. The advertising has frequently been referred to in such terms as "misleading," "deceptive," and "false." See *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978) (misleading); SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 38 (1978) (false and misleading); 124 CONG. REC. H3706 (daily ed. May 9, 1978) (trying to "sell" higher insurance rates through false advertising); *Adding Insult to Injury—The Drive to Change the Product-Liability Laws*, 43 CONSUMER REP. 412, 414 (July 1978) (insulting and misleading). Several companies have agreed to stop publication of the ads in consent decrees with state insurance commissions in which the commissioner has alleged that the advertisements were false and misleading. See note 9 *supra*.

52. In a recent article Jerry Geisel tracks down the source of this legend only to find it has no basis in fact. Geisel, *Horror Story Ads Untrue?—Can't Prove Mower, Claims Assertions*, 11 BUS. INS. 1,66 (October 31, 1977); see SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 38, 50 (1978); Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978); *Adding Insult to Injury—The Drive to Change the Product-Liability Laws*, 43 CONSUMER REP. 412, 413-14 (July 1978).

53. See Consent order signed by the Crum & Forster companies with the Connecticut Insurance Department (Aug. 16, 1978) (commissioner's allegations); Consent order signed by the Crum & Forster companies with the Kansas Insurance Commissioner (June 27, 1978) (commissioner's allegations).

54. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 50 (1978). Misuse is a defense

advertisements cite to case histories but fail to disclose key facts or mitigating factors.<sup>55</sup> These careful omissions mislead the reader into believing that the tort system is unjust and provides windfall verdicts to undeserving parties.<sup>56</sup>

Perhaps the best example of the deceptions and inaccuracies in these advertisements is the repeated assertion that one million product liability suits are being filed each year. This claim is simply untrue. The Insurance Services Offices (ISO) estimates that *at most* only 140,000 product liability claims were filed in 1977.<sup>57</sup> Thus, the figure cited in the advertising was at least 700 percent higher than the highest estimate of actual claims.<sup>58</sup> This gross exaggeration of the number of claims is just another way in which insurance companies are trying to convince readers that a "crisis" exists that must be cured by awarding lower verdicts and by "reform" of the tort system.

### *There Is No Crisis*

The truth of the matter, however, is that there is no crisis. Whatever else may be true since the first attack in the 1950's and 1960's, primarily addressed to the "whiplash" injury and the "low back syndrome," cases against individual defendants for vehicular accidents are simply no longer economically productive in the courts. One need look no further than recent advance sheets and compare the number of cases noted under "Automobiles" in 1968. Perhaps this decrease has prevented the imposition of a "no-fault" system,

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to a product liability claim. See, e.g., *Latimer v. General Motors Corp.*, 535 F.2d 1020, 1023 (7th Cir. 1976); *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1973); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977). See generally RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965).

55. For example, Aetna's "Too bad judges can't read this" ad fails to disclose all the facts about the injuries to the driver of the "truck without brake lights," nor does it reveal that the case was settled for an amount smaller than that indicated.

56. See *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978).

57. The House subcommittee report on product liability insurance notes the ISO estimate of 125,000 to 140,000 claims. SUBCOMMITTEE ON CAPITAL, INVESTMENT AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 38 (1978). The actual number of claims is probably even lower. See *Fisk, An Interview with John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978) (ISO estimates 60,000 to 140,000 claims); *Geisel, Horror Story Ads Untrue?—Can't Prove Mower, Claims Assertions*, 11 BUS. INS. 1, 66 (October 31, 1977) (ISO estimates 60,000 to 70,000 claims); *Aetna and the First Amendment*, 8 JURIS DOCTOR 30, 30 (Dec. 1978/Jan. 1979) (actual figure closer to 70,000).

58. See, e.g., SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 38 (1978); *Fisk, An Interview With John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978); *Geisel, Horror Story Ads Untrue?—Can't Prove Mower, Claims Assertions*, 11 BUS. INS. 1, 66 (October 31, 1977).

but it would be most difficult to persuade the author that both the previous and present attacks have not wrought a debilitating toll. While it may be true that the average number of jury verdicts in personal injury and wrongful death cases has increased in the past twenty years in the very teeth of the attack by the insurance industry upon the tort system, it is simply not true that the average size of the verdict in "four-wheeler accidents" has increased.

### *Product Liability*

In the area of product liability, which has been the focal point of the recent ads, the insurance industry's cries of "wolf" are equally unsubstantiated. While the average number of claims may be increasing, they do not even come near the now discredited claim of one million annually.<sup>59</sup> A more accurate gauge of the extent to which product liability claims have reached "crisis" proportions is the number of times a plaintiff wins and the size of the verdict in those instances. Less than four percent of all product liability claims go to verdict,<sup>60</sup> and the insurer wins seventy-five percent of those suits.<sup>61</sup> Accordingly, the plaintiff wins the lawsuit less than one percent of the time. This figure hardly indicates, as the advertisements suggest, that juries have adopted a philosophy of *caveat fabricator* and a bias in favor of the plaintiff, holding the manufacturer liable anytime a person is injured.<sup>62</sup>

Nor do the amounts paid for bodily injuries as a result of product liability suits justify insurance company hysteria. The Insurance Services Office indicates that during the period of their closed claim survey, 1976-1977, the average payment per bodily injury claim was only \$13,911.<sup>63</sup> This figure itself is inaccurate due to "trending" whereby the amounts actually paid are adjusted by an inflationary factor. The *actual average amount paid* per bodily injury claim was

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59. See notes 57-58 *supra* and accompanying text.

60. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 6, 56, 73 (1978). This figure was reported in the Insurance Services Office Product Liability Closed Claims Survey. See *id.* at 6, 56; *Adding Insult to Injury—The Drive to Change the Product-Liability Laws*, 43 CONSUMER REP. 412, 414 (July 1978).

61. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 6, 73 (1978); Fisk, *An Interview with John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978).

62. See 124 CONG. REC. H3705 (daily ed. May 9, 1978).

63. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 34 (1978).

only \$3,592.<sup>64</sup> The \$13,911 figure was reached by applying an extremely high factor of twenty-five percent per year to the actual amounts paid.<sup>65</sup>

### *Excessive Verdicts*

It is true that verdict size in product liability claims has increased from 1971 to 1977, but the Jury Verdict Research Project indicates that there has been a decrease in average verdicts from 1975-1976, which is the last year for which they had reliable data.<sup>66</sup> In fact, the average yearly increase in verdict size for all personal injury suits since 1973 has been only 7.47%, just under the average yearly increase in the Consumer Price Index for the same period.<sup>67</sup> These figures hardly substantiate advertising claims of "runaway" juries.

Nor is there any validity to the impression created by the advertisements that most verdicts are in the neighborhood of a million dollars with most of that amount allocated to punitive damages.<sup>68</sup> A House subcommittee report on product liability insurance concluded that "instances in which punitive damages have been awarded have been negligible."<sup>69</sup> Moreover, awards for pain and

64. See *id.* at 33-34; Fisk, *An Interview with John LaFalce*, 14 TRIAL 56, 61 (Nov. 1978). For each \$3,592 almost one-fourth was attributable to claim administration expenses. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 6 (1978). It would be of interest to compare the amounts paid in premiums for product liability policies with the amounts actually paid out. See Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 61 (Nov. 1978). It might also be interesting to discover exactly how much the advertising in question has cost and whether its cost is added to the expenses considered in determining premiums. See generally Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 166 (1954) (efforts to influence verdicts with threat of increased rates thereby preventing a verdict to which the accident victim is entitled).

65. Even the \$3,592 figure is misleading because it is computed only as the average of claims paid and "excludes those instances where no payment is made." SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 34 (1978). Therefore, the figure does not represent the true average of claim costs. *Id.*

66. Jury Verdict Research, Inc., *Current Award Trends*, 1 PERSONAL INJURY VALUATION HANDBOOKS 1, 10-11 (1978). In other areas many personal injury suits have become no longer economically feasible. See text at pages 410-11 *supra*.

67. Jury Verdict Research, Inc., *Current Award Trends*, 1 PERSONAL INJURY VALUATION HANDBOOKS 1, 10 (1978). In fact, an article in *Business Week* indicates that the number of claims against insurance companies steadily fell in 1977. See *Sudden Riches for the Casualty Insurers*, BUS. WEEK, May 1, 1978, at 68 (auto claims dropped six percent).

68. See notes 63-67 *supra* and accompanying text.

69. SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 73 (1978); see Fisk, *An Interview with John LaFalce*, 14 TRIAL 58, 61 (Nov. 1978). See generally Igoe, *Punitive Damages — An Analytical Perspective*, 14 TRIAL 48 (Nov. 1978).

suffering are not the bugaboo that insurance companies would have readers believe. Of those injury victims who received awards in excess of \$100,000, only twenty-six percent of their recovery was for pain and suffering; the balance was for economic losses.<sup>70</sup>

Even in instances in which the plaintiff was awarded in excess of one million dollars, there is no indication that the award resulted from an "out-of-control" tort system. Large judgments are not necessarily excessive. Many times such judgments are merely fair and just compensation for grievous injuries suffered by the plaintiff.<sup>71</sup> Whether a judgment is "excessive" is a question of law, and the judicial system has adequate safeguards to prevent a plaintiff from receiving more than is fair and just. The courts may order a remittitur or a new trial if they believe the verdict was based on sympathy or prejudice rather than the plaintiff's actual injuries.<sup>72</sup> Thus, insurance advertising is misleading to the extent it implies that these safeguards do not exist.<sup>73</sup>

#### *No Proof That Rates Need To Be Raised*

The ads are also misleading in their implication that increases in jury verdicts have necessitated higher premiums. This implication cannot be verified by available data. It is next to impossible to get the necessary information from the insurance companies. In fact, no pursuit has been more difficult than the efforts of the public, insurance commissioners, and consumer protection agencies to ascertain the reason for the rising cost of insurance. Information that has become available, however, produces some shocking revelations.

Only ten percent of all product liability premium dollars are computed actuarially; the other ninety percent are derived from the subjective estimates of underwriters.<sup>74</sup> Thus, only a very small part

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70. SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 53 (1978).

71. Of the 188 verdicts of one million dollars or more reported by the Jury Verdict Research Project, forty-eight were concerned with quadriplegia or paraplegia, fifty-five concerned brain damage often requiring twenty-four hour care, thirty-two were for wrongful death, and fourteen pertained to amputation, usually multiple. Jury Verdict Research, Inc., *Current Award Trends*, 1 PERSONAL INJURY VALUATION HANDBOOKS 1, 6-7 (1978). See also SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 53 (1978) (pain and suffering awards not necessarily excessive).

72. See *Lahti v. McMnamin*, 268 P. 644, 646-47 (Cal. 1928); *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978). See generally Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 166 (1954).

73. See *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 478 (Sup. Ct. 1978).

74. Fisk, *An Interview with John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978); see SUBCOMMITTEE



of product liability premiums is based on statistical data and the accuracy of that data is impossible to verify.<sup>75</sup> Since subjective judgments are based more on a particular perception of reality than on the actual facts, there is great room for error. In view of the gross differences between the reality that the insurance companies see and represent and the true facts,<sup>76</sup> there is substantial support for the view that these companies are overreacting, responding to their fears rather than the true facts.<sup>77</sup> To expound as a blanket proposition that insurance premiums are increasing because of an increase in and the size of verdicts for the plaintiff is inaccurate.

It is also inaccurate, if not intentionally misleading, for these companies to imply through their advertisements that they are losing money because of liability insurance losses. A major portion of the "losses" used in computing these underwriting losses is money set aside in reserve for claims a company imagines might have arisen but which have not been reported—"incurred but not reported" (IBNR).<sup>78</sup> These reserves bear no relation to any statistical probability of unknown claims and serve mainly as a means of creative accounting by the insurance companies.<sup>79</sup> By maintaining large

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ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 14-15 (1978). A brief explanation of the methods by which premiums are determined can be found at pages 14-15 of the subcommittee report.

75. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 15, 71 (1978); *Adding Insult to Injury—The Drive to Change the Product-Liability Laws*, 43 CONSUMER REP. 412, 414 (July 1978).

76. See notes 52-73 *supra* and accompanying text.

77. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 50-51 (1978); Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 60 (Nov. 1978); *Adding Insult to Injury—The Drive to Change the Product-Liability Laws*, 43 CONSUMER REP. 412, 415 (July 1978). A similar overreaction resulted in the manufacturing of the medical malpractice "crisis." Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 61 (Nov. 1978); see SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 31 (1978); *Sudden Riches for the Casualty Insurers*, BUS. WEEK, May 1, 1978, at 67.

78. See SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 28-31 (1978). These reserves are substantial — up to 71.4% of Crum & Forster's losses. Fisk, *An Interview with John LaFalce*, 14 TRIAL 58, 58 (Nov. 1978); see SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 28-29 (1978) (tables containing IBNR figures for several companies). Some companies even set aside reserves to protect against not only projected claims for the next year, but for claims that might arise in the future because a certain number of products were manufactured. See Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 58-59 (Nov. 1978).

79. See Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 58-59 (Nov. 1978). Some states are becoming aware of the insurance industry's use of IBNR reserving. States like

INBR amounts, the companies can show large underwriting "losses" and enjoy an increased fund for investment.<sup>80</sup> Investments have become an ever-increasing source of income for the insurance industry. Underwriting losses, if they actually occur,<sup>81</sup> are only a part of the total economic picture.<sup>82</sup> While wailing over underwriting "losses," the companies have watched their net worth increase dramatically.<sup>83</sup> "If such substantial increases in net worth and asset size can occur during a period in which underwriting deficits are sustained, serious questions as to the meaning of these underwriting deficits must be raised."<sup>84</sup>

The preceding discussion clearly shows that there is no justification for the insurance companies' pleas of poverty and continued increase of premiums. The insurance industry claims are simply unsupportable. There is ample evidence that these advertisements are deceptive and misleading and not merely expressions of insurance industry opinions about the tort compensation system. When the insurance companies' "right" to publish this deceptive advertising is balanced against a plaintiff's right to a fair trial in which jurors consider only the evidence presented in court and not insurance company propaganda, it is evident that these deceptive advertisements may be constitutionally enjoined.

#### PLAINTIFFS MUST BE GIVEN THE OPPORTUNITY TO EXPLORE THIS SUBJECT ON *Voir Dire*

Although injunctive relief is possible when the advertising is deceptive, it is not necessarily the most productive means by which

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Michigan, Florida, and Kansas have included in their "reform" legislation of product liability laws provisions requiring disclosure, and even limitations, of IBNR amounts by insurance companies. See *Insurance Regulation: The Silent Revolution?*, 2 PRODUCT LIABILITY TRENDS 193, 193-97 (1978).

80. Fisk, *An Interview with John LaFalce*, 14 TRIAL 58, 59 (Nov. 1978). Another benefit is the great tax benefits allowed on these reserves. *Id.* at 59; see SUBCOMMITTEE ON CAPITAL, INVESTMENT, AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 30-31 (1978).

81. See notes 78-79 *supra* and accompanying text.

82. Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 58-59 (Nov. 1978); see 124 CONG. REC. E3333 (daily ed. June 19, 1978).

83. Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 59 (Nov. 1978)(increase in net worth of twenty-two percent in 1976); *Sudden Riches for the Casualty Insurers*, BUS. WEEK, May 1, 1978, at 66 (twenty-one percent return on net worth in 1977). Investment income generated from reserves more than makes up for any underwriting losses. See 124 CONG. REC. E3333 (daily ed. June 19, 1978).

84. 124 CONG. REC. H3706 (daily ed. May 9, 1978); see 124 CONG. REC. E3334 (daily ed. June 19, 1978).

plaintiffs may protect themselves. Even when the constitutional validity of an injunction is recognized, courts are reluctant to grant such relief. Plaintiffs must have some way to protect themselves from the influence of improper factors on verdicts. Texas courts should allow plaintiffs to question prospective jurors about their exposure to the insurance ads and even attempt to rehabilitate jurors who have been exposed. In addition, an instruction by the court, telling the jurors that they must disregard these attempts to influence their verdict, is necessary.

#### *Authorities From Other Jurisdictions*

The paucity of authority that Mr. Hatchell refers to is no doubt due to the fact that most jurisdictions have virtually abolished *voir dire* examination at the hands of counsel for the parties. This valuable right has been vitiated through interrogation by judges themselves.<sup>85</sup> The majority of jurisdictions that have considered the question, however, have recognized the plaintiff's right to examine prospective jurors about their exposure to the ads.<sup>86</sup> These decisions clearly suggest that such corrective inquiries may be necessary.

In a recent case, *King v. Westlake*,<sup>87</sup> the Arkansas Supreme Court stated that a good faith inquiry about exposure to and impressions from these ads was proper and necessary for intelligent exercise of

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85. Denying the right of *voir dire* examination to counsel, however, is not tantamount to suggesting that interrogation on this subject is improper. It may be that the area which we are exploring is one that might lend itself more readily to judicial interrogation. Certainly the concern of Texas courts that any mention of the rule that jurors are not to consider insurance is an indirect suggestion that insurance is involved with the case would be alleviated by judicial questioning. In making this observation, however, this writer does not wish to be understood as suggesting that Texas should deny the valuable right of *voir dire* examination to counsel. The eye-to-eye contact with prospective jurors is an important factor in intelligent selection of the panel. It is hoped and trusted that this important right will never be denied or diminished in this jurisdiction.

86. See, e.g., *Hoffman v. Perrucci*, 117 F. Supp. 38, 40 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955); *King v. Westlake*, 572 S.W.2d 841, 844 (Ark. 1978); *Graham v. Waite*, 257 N.Y.S.2d 629, 630 (App. Div. 1965) (memorandum opinion). *But see* *Kujawa v. Baltimore Transit Co.*, 167 A.2d 96, 98 (Md. 1961); *Maness v. Bullins*, 198 S.E.2d 752, 752-53 (N.C. Ct. App. 1973). In one of the recent attempts to enjoin insurance company advertising, the court apparently saw no problem in allowing such questions on *voir dire*; it merely stated that such questions would be insufficient to balance the great harm inflicted by the ads on plaintiff's right to a fair trial. See *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 481, 482 (Sup. Ct. 1978). Elizabeth Loftus, after discussing the results of her tests of the effect these advertisements have on jurors, suggests that such questions are necessary to protect plaintiffs from the clout of these ads. See Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A.J. 68, 70 (Jan. 1979).

87. 572 S.W.2d 841 (Ark. 1978).

plaintiff's challenges.<sup>88</sup> At trial the plaintiff, after first establishing that all but two of the jurors had been exposed to the ads, was allowed to ask whether their verdict would be affected by the ads.<sup>89</sup> The Arkansas court did not believe the questions implied that the defendant carried liability insurance,<sup>90</sup> and indeed, the questions did not in any way imply that the defendant was insured. Such questions should not be viewed as a violation of the prohibition against mention of insurance or as an indirect inference that the defendant is insured.<sup>91</sup>

Other courts have ruled similarly. In *Graham v. Waite*<sup>92</sup> a New York court held that the plaintiff had a right to ascertain the impact of advertising correlating high jury verdicts to high insurance premiums.<sup>93</sup> In *Hoffman v. Perrucci*,<sup>94</sup> a suit seeking to enjoin similar advertising in the 1950's, the court stated that an injunction was improper, but that plaintiffs definitely had a right to ascertain the effect such ads would have on prospective jurors and their verdict.<sup>95</sup> The right of a plaintiff to uncover the taint of insurance company propaganda was also recognized by Connecticut's highest court.<sup>96</sup> In *Lowell v. Daly*<sup>97</sup> the court held that the question asked by the plaintiff was too general and made no attempt to ask jurors whether they had actually seen the articles in question.<sup>98</sup> The court then stated, however, that the plaintiff could have asked if jurors had in fact seen the articles, saying "[i]f plaintiffs wished to ascertain or prove which, if any, veniremen had read the articles in question . . . a proper course to pursue would have been to inquire on the voir dire."<sup>99</sup>

Other holdings lend support to the proposition that plaintiffs have a right to examine prospective jurors concerning the ads. Plaintiffs have been allowed to ask jurors if they are insured by a mutual benefit company in which premiums are influenced by the

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88. *Id.* at 844. For the text of the question asked in *Westlake*, see note 22 *supra*.

89. *Id.* at 844.

90. *Id.* at 844.

91. Even with Texas' strict rule against mention of insurance, the plaintiff should be allowed at least this much leeway in his *voir dire* examination.

92. 257 N.Y.S.2d 629 (App. Div. 1965)(memorandum opinion).

93. *Id.* at 630.

94. 117 F. Supp. 38 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955).

95. *Id.* at 40.

96. See *Lowell v. Daly*, 169 A.2d 888, 889 (Conn. 1961).

97. 169 A.2d 888 (Conn. 1961).

98. *Id.* at 889.

99. *Id.* at 889.

size of verdicts paid.<sup>100</sup> Additionally, the Oregon Supreme Court has held that questioning jurors about whether they believed they had a financial interest in the case or thought that a large verdict would increase their cost of living was not reversible error.<sup>101</sup> Other courts have gone further, stating that because of the widespread use of the advertisements the mention of insurance is no longer prejudicial.<sup>102</sup>

The courts that have refused to allow questions aimed at unearthing prejudice created by insurance company propaganda have not necessarily laid down an absolute prohibition against such questions. In *Kiernan v. Van Schaik*<sup>103</sup> the court merely held it was not an abuse of the trial court's discretion to refuse to allow such questions.<sup>104</sup> The Kentucky Court of Appeals has ruled similarly when jurors had already been asked if they could reach a fair and impartial verdict.<sup>105</sup> In two other decisions the courts indicated that in those cases questions similar to those discussed here were improper, but implied that other questions directed at the same purpose might not be.<sup>106</sup> In only one case, *Maness v. Bullins*,<sup>107</sup> has there been an outright refusal to allow such questions.<sup>108</sup> If the rule

100. See *Dedmon v. Thalheimer*, 290 S.W.2d 16, 16-17 (Ark. 1956). In a later case in addition to the general question, the plaintiff asked if any jurors were employed by a specific company. The court held the second question was improper, saying that "naming of the Travelers Insurance Company in the *voir dire* examination was more than [the plaintiff's] attorneys were entitled to." *Malone v. Riley*, 321 S.W.2d 743, 744 (Ark. 1959).

101. *Johnson v. Hansen*, 389 P.2d 330, 331-32 (Or. 1964) (en banc). The court noted that "the increment of prejudice in this case was very slight. The improper questions did not obviously carry an insurance label." *Id.* at 332. In a concurring opinion Justice Denecke suggested that while such a question might suggest to judges and attorneys that the defendant had insurance, the innuendo was not so obvious to jurors. *Id.* at 333 (Denecke, J., specially concurring). In an additional concurrence, Justice O'Connell felt that the prejudicial effect of such questions was slight in view of insurance company advertising. *Id.* at 335-36, 338 (O'Connell, J., specially concurring).

102. See *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 378 P.2d 741, 744 (Ariz. 1963)(en banc); *Causey v. Cornelius*, 330 P.2d 468, 474 (Cal. Dist. Ct. App. 1958), quoting, *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 304 P.2d 13, 18 (Cal. 1956)(Carter, J., dissenting).

103. 347 F.2d 775 (3d Cir. 1965).

104. *Id.* at 777, 783.

105. See *Murrell v. Spillman*, 442 S.W.2d 590, 592 (Ky. 1969); *Farmer v. Pearl*, 415 S.W.2d 358, 361 (Ky. 1967).

106. See *Barton v. Owen*, 139 Cal. Rptr. 494, 508 (Ct. App. 1977)(plaintiff could have asked if panel was prejudiced against plaintiffs in malpractice cases); *Kujawa v. Baltimore Transit Co.*, 167 A.2d 96, 98 (Md. 1961)(no showing plaintiff was prejudiced by trial court's refusal to permit question; not an abuse of discretion to prohibit question). In point of fact, however, it is hard to imagine how the plaintiffs in either case could have asked questions less suggestive of insurance and still acquire the information they were seeking.

107. 198 S.E.2d 752 (N.C. Ct. App. 1973).

108. *Id.* at 752-53.

in *Maness* is followed, plaintiffs will be defenseless against the prejudices created by these deceptive and misleading insurance company ads.

*There Is a Need To Interrogate the Panel on This Subject*

The authorities cited indicate that most courts are willing to allow the plaintiff to protect himself by questioning jurors about exposure to and impressions from the ads, and it is submitted that there is really no reason why the plaintiff should not be allowed to ask such questions. Mr. Hatchell presents a formidable argument against broadening the *voir dire* inquiry, either by the court or counsel, to include matters relating to publications concerning insurance costs, runaway juries, liberal courts, and unscrupulous lawyers and doctors. Similar propaganda has been circulated by mail to the insurance-buying public by agents and representatives, mostly in the nature of explaining, "What makes your rates so high." He does not even deny the purpose of these blitzkriegs or that they are intended to reach potential jurors, but instead suggests that there are a great number of similar social influences that are brought to bear in the mainstream of a potential juror's consciousness that might be appropriate subjects for the defendant's *voir dire* if the advertising questions are allowed.

There are two responses to this argument. First, depending upon the discretion of the trial judge, many of these matters are presently inquired into by defense counsel. Second, many matters mentioned by Mr. Hatchell that should be inquired into if we abandon the stricture against mention of insurance are matters that arise in the context of the environment and are nothing more than societal patterns. *What we are talking about here are intentional efforts to reach and contaminate jurors!*

The insurance companies have taken an ambivalent attitude about jurors' knowledge and consideration of insurance. They have always been leaders in the fight against advising jurors of the real party in interest in most personal injury cases, but now these same companies are publishing ads urging jurors to remember that the defendant does have insurance and their verdicts will affect their own insurance rates. One can be certain, however, that even though an enormous campaign has been waged<sup>109</sup> seeking to insure that

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109. See notes 44-45 *supra* and accompanying text.

jurors are aware of the existence of insurance and even to influence jurors to put their own alleged financial interest over the plaintiff's right to a fair trial, the insurance company's defense attorneys will knock each other over leaping up to object the first time the slightest inference of insurance is made at trial.<sup>110</sup> The insurance companies should not be allowed to have it both ways. If they have changed their position about the prohibition against informing jurors about the existence of insurance, no doubt plaintiffs' attorneys would be more than willing to help draft a fair instruction regarding the existence of insurance, the means by which premiums are determined, and the effect of a verdict for the plaintiff on premium cost. This writer has serious doubts, however, that there will be a mad dash on the part of the insurance companies to accept this invitation.

It is unlikely that the insurance industry is interested in having both sides of the story told. In fact, one can imagine the hue and cry of the defense community if consumers could surmount the economic burdens and reveal all the reasons for increased insurance rates and disclose the profits the casualty industry has received from the *premium payers* throughout these periods of attack. Something must be done, however, to protect the rights of individual plaintiffs. Because of the vast expense involved, such an advertising counterattack is not possible. Thus, under the present strict rule in Texas, the plaintiff finds himself in a very difficult position. Potential jurors are being bombarded by insurance company propaganda, but the present rule prevents the plaintiff from determining if the panel seated to hear his case has been prejudiced against him by these ads.<sup>111</sup>

There is no reason for the prohibition against mentioning insurance to prevent plaintiffs from seeking to discover, and perhaps counteract, any prejudice created by the ads. The plaintiff is not interested in injecting insurance into the trial; he is only interested in securing sufficient information to determine if any juror should be challenged for cause or to intelligently exercise his peremptory challenges.<sup>112</sup> The plaintiff is only interested in ensuring that the

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110. See *Causey v. Cornelius*, 330 P.2d 468, 473 (Cal. Dist. Ct. App. 1958). See generally *Quinn v. Aetna Life & Cas. Co.*, 409 N.Y.S.2d 473, 480-81 (Sup. Ct. 1978). For a further discussion of these companies' amazing ability to present "different facts to different groups, depending upon their advocacy purpose," see Fisk, *An Interview With John LaFalce*, 14 TRIAL 58, 59 (Nov. 1978).

111. Martin Baron, counsel for plaintiff in *Quinn v. Aetna Life & Cas. Co.*, notes that "the insurance companies are making a case in the media that I can't challenge in the courtroom." *Aetna and the First Amendment*, 8 JURIS DOCTOR 30, 30 (Dec. 1978/Jan. 1979).

112. See *King v. Westlake*, 572 S.W.2d 841, 844 (Ark. 1978); *Dedmon v. Thalheimer*,

jurors disregard extraneous influences in their consideration of his case. Questions and instructions could be phrased to minimize any inference of insurance or prejudice to the insurance company.<sup>113</sup>

It would appear that the more difficult problem has to do with the ability of affected jurors to admit, or even discern, the effect of the ads. It is with greatest reluctance that any juror will admit to any type of "bias or prejudice" upon interrogation.<sup>114</sup> Two factors operate to create this incongruity. First, the words "bias" and "prejudice" suggest evil or impropriety to the average person. This connotation is, of course, not accurate any more than it is evil or wrong to prefer one football team over another. Nonetheless, in many instances potential jurors simply will not admit that they have any bias or prejudice that would cause them to be unable to follow their oaths as jurors, except for the cases in which the juror simply does not want to serve or perform a public duty.

Second, more often than not these attacks are invidious in that they are calculated to subliminally affect the mind of the targeted person and only rarely may be recalled even under direct interrogation on the subject. Thus, under this premise, what value is there in seeking to eradicate an advertisement or circular that *might* have been read or heard? The answer to this query is that a negative response by a juror who has been asked if he has been prejudiced by the advertisements is not unlike negative answers by jurors who have read in detail about a given homicide case, or a notorious piece of civil litigation, which they deny will have any effect on their deliberations. Every lawyer and judge is fully aware that these claims of eradication are nothing more than the feeling or apprehension the potential juror has against being accused or challenged for

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290 S.W.2d 16, 17 (Ark. 1956); *Johnson v. Hansen*, 389 P.2d 330, 335-36 (Or. 1964) (en banc)(concurring opinion). Other courts have recognized the plaintiff's need in situations concerning questions about jurors' interest or connection with insurance companies. See *Kiernan v. Van Schaik*, 347 F.2d 775, 782 (3d Cir. 1965); *Harvey v. Castleberry*, 529 S.W.2d 324, 328-29 (Ark. 1975)(dissenting opinion); *Mathena v. Burchett*, 369 P.2d 487, 490 (Kan. 1962). A similar argument has been accepted by the Austin Court of Civil Appeals in *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

113. See *Johnson v. Hansen*, 389 P.2d 330, 333 (1964) (en banc)(concurring opinion)(innuendo of insurance not so obvious to jurors). In a study in 1965, of the eighty-six jurors who were asked the insurance company connection question, only forty-five understood the significance of the question. Even with those forty-five, the question was only a minor factor in their assumption that the defendant had insurance. When questioned about the reasons for their assumption, no juror mentioned the *voir dire* question. See Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 525 (1965).

114. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977).



cause for having formulated a view of the case. In such instances it is important, at the very least, for the litigants to know of such knowledge or circumstances to aid in the exercise of the peremptory challenge.

### A PROPOSAL

Not only do plaintiffs need sufficient information to exercise their peremptory challenges, but they need at least a limited opportunity to counteract the insurance companies' misleading propaganda or to establish grounds for challenge for cause. So long as the trial judge or counsel do not suggest the existence or non-existence of insurance, no harm is done by asking the panel broad questions concerning their recollection of reading such articles or receiving communications relating to the jury system and then individually interrogating those that indicate they have received such information. As to those that do not acknowledge the receipt or examination of such materials, certainly general questions relating to their experiences or apprehensions regarding personal injury litigation and possible insurance coverage should be permitted.

#### *Plaintiff's Voir Dire*

Plaintiff should be allowed to ask, "Have any of you seen the recent magazine advertisements relating to jury verdicts?" Those that answer this question affirmatively could be questioned individually, perhaps at the bench to avoid tainting the rest of the panel.<sup>115</sup> Some other questions that the plaintiff might want to ask each juror are:

- (1) Did you infer from these ads that your verdict in this suit might have an effect on your insurance premiums?
- (2) Do you agree with me that the plaintiff has a right to a fair and impartial trial determined on the evidence and instructions presented in court and that it is improper for anyone to introduce or consider other, extraneous matters that would prevent the plaintiff from receiving a fair trial?
- (3) Do you realize that there is no basis for the claim that insurance premiums are directly affected by jury verdicts and that your

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115. Before continuing the individual interrogation, it might be best for counsel, or the court, to instruct the jury that the questions have nothing to do with insurance, but only with their exposure to the ads and inferences they may have drawn from such advertising. See *King v. Westlake*, 572 S.W.2d 841, 844 (Ark. 1978). Counsel might also want to precede the questioning about advertising with a question about whether the jurors agree with him that any attempt to influence their judgment about the validity of the plaintiff's case before any evidence is heard is improper.

verdict here will have little, if any, effect on your insurance costs?

(4) Will you be able to disregard any possible effect, real or imagined, large or small, your verdict might have on your insurance rates and give the plaintiff an award that is fair and just compensation for the injuries he has received?

(5) Can you promise me that your verdict will be based on the evidence presented in court and the instructions given you by the judge and that you will disregard these attempts to have you consider extraneous matters or your own supposed financial interests in violation of your oath as a juror?

### *The Court's Instruction*

An instruction by the court also should be given to insure that the plaintiff is not prejudiced by insurance company attempts to introduce extraneous factors into the case by way of suggestion and to eliminate any implication that counsel for one of the parties would inject the existence or non-existence of insurance. It is thought the following instruction, or one similar thereto, should be given in writing and verbally to the panel:

Ladies and Gentlemen:

Both parties and the court want jurors who are as free as possible of any prejudice or feelings against their claim or defense, and who have no reasons, whether real or imaginary, that might affect their ability to fairly consider the fact questions that I will submit to you at the end of the case. I want to assure you that it is not important to me that you do have such feelings or reasons, but it is vitally important that you tell me now if you do.

You are not here to decide who should win or lose; you are here solely and only for the purpose of deciding the questions I will submit to you, without regard to whether I will enter a judgment on your answers, or whether any judgment I enter will be paid, or who will pay it, or whether it ever will be paid. That is plainly and simply not your purpose, and if you make it so, you have not performed your duty or lived up to your oath to render a true verdict.

It is equally important for the parties to know if you have any such feelings or reasons that might affect your verdict. Not only do they have the right to know, so that they can question me about whether you should serve in this case, but they have a right on their own to strike or remove several of you from the panel. These rights are sacred to the jury system. In exercising these rights, the parties are in no way questioning your ability to serve as a juror. Rather, they realize that some of you may have some strong feelings or opinions that might make service on this jury difficult for you.

For example, some of the situations we often see are people who

have had bad experiences arising from accidents; or are opposed to this type of accident litigation; or who have had unfortunate experiences with lawyers, courts, or big companies; or who believe damages should not be awarded for pain and suffering; or that there should be a limit on what should be awarded for pain and suffering, loss of life, or physical impairment; or who have read advertisements or received circulars related to jury verdicts that have so influenced them that they have formed definite opinions in regard to them; or who fear their insurance rates will increase as a result of their verdict.

If any of you have or entertain such feelings, or have heard or read such matters, please understand I will not try to change your mind, or give you a lecture. I will want you to disclose it to me so that the parties and I can know how it might affect your possible service in this case.

In giving you these instructions and requesting this information, I do not intend to suggest in any way that any party is or is not protected by any form of insurance. In fact, my sole purpose is to have you realize and appreciate that if you are selected, these considerations have absolutely nothing to do with your service and deliberations. The only duty you have is to truthfully answer the questions I ask you based solely on the evidence and my instructions to you. Each party is entitled to a verdict based only on the evidence and instructions presented by the court and to a jury who have no feelings either for or against their claim or defense.

Now, if any of you have any such reasons or feelings, will you indicate by your raised hands so that I may have you come forward and ask you a few more questions privately?

Such an instruction would go a long way toward alleviating the problem caused by the recent insurance company premium/verdict advertising.

#### CONCLUSION

By allowing plaintiffs an opportunity to examine jurors on *voir dire* about these advertisements and giving the foregoing instruction, Texas courts can counteract some of the deleterious effects of this recent attack on our judicial system. The deceptive and misleading aspects of this advertising may be controlled by injunction or order of the Texas Insurance Board, but the deliberate attempt to have jurors consider their own insurance costs rather than the merits of the plaintiff's claim can only be cured by expanded rights on *voir dire* and appropriate instructions. The tort system preceded the insurance casualty business and with a little care the system will survive the powerful economic pressure exerted by the insur-

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ance industry. To destroy and lay to rest the "fault" system without further attempting to save it from these ravaging attacks is an abdication of judicial responsibility.