



9-1-1979

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Michael A. Hatchell

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Recommended Citation

Michael A. Hatchell, *Insurance Advertising - Much Ado about Nothing Lawyer's Forum.*, 10 ST. MARY'S L.J. (1979).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol10/iss3/3>

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INSURANCE ADVERTISING—MUCH ADO ABOUT NOTHING

MICHAEL A. HATCHELL*

The question posed as the premise for this article may convey a false sense of immediacy or uniqueness; the truth is that the problem, if indeed it is a problem, is not new at all but is one that rears its head on a seemingly cyclical basis in response to the varying modes of insurance advertising. A previous wave of premium/verdict advertising occurred in the 1950's. This campaign, which created more controversy in the Eastern states, saw advertisements similar to those currently in vogue.¹ In 1953 the plaintiffs' bar was so outraged by the companies' exercise of free speech and dissemination of information through such advertising that it sought, in *United States ex. rel. May v. American Machinery Co.*,² to enjoin the objectionable advertisements as contempt of court, obstruction of justice, and jury tampering. The cause was rather unceremoniously dumped out of court on the technical ground that no contempt was present, with the comment that the insurance companies' claim of constitutional privilege in the uninhibited dis-

* B.B.A., LL.B., University of Texas; Member, Ramey, Flock, Hutchins, Grainger & Jeffus, Tyler, Texas.

1. See *Hoffman v. Perrucci*, 117 F. Supp. 38, 39-40 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955). In one advertisement a printed message underneath a guarded jury room door states:

Casualty insurance companies have been losing an average of \$11 on every \$100 of earned automobile liability premiums. More accidents are partly responsible. So are excessive jury awards, rendered by jurors who feel they can afford to be generous with the "rich" insurance company's money. Actually, jurors who are responsible for awards in excess of what is just and reasonable are soaking you by raising insurance rates.

Id. at 39.

A second advertisement states: "Next time you serve on a jury, remember this: When you are overly generous with an insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy." *Id.* at 39.

A notation at the bottom right hand corner of each advertisement informs the reader that:

Most claims for damages are legitimate and reasonable, and are amicably settled out of court.

However, as jurors tend more and more to give excessive awards in cases that do go to court, such valuations are regarded as establishing the "going" rate for the day-to-day out-of-court claims—all of which means increased insurance premium cost to the public.

Id. at 39-40. Additional samples of the advertisements are noted in *Hoffman*. See *id.* at 39-40.

2. 116 F. Supp. 160 (E.D. Wash. 1953).

semination of information under the first amendment "appears to have substantial merit."³ Interestingly enough, the current wave of industry advertising relative to jury verdicts and premium rates has spawned virtually identical litigation.⁴

Reference to prior judicial history on this subject is made not to denigrate or minimize the seriousness of the issue under consideration but to suggest that the relationship of insurance advertisements vis-à-vis jury verdicts in damage cases is one that has been around for quite some time and one that the separate jurisprudence of each state has comfortably accommodated into its existing rules. For that reason it is submitted that no change in the present Texas trial practice is indicated as a result of the latest, and probably not the last, round of premium/verdict advertising.

THE EXISTING TEXAS ATTITUDE ABOUT JURIES AND INSURANCE

When insurance, or an insurance company, is not involved in a suit, Texas courts have consistently eschewed the slightest intrusion of insurance at any and all stages of litigation, from *voir dire* examination through jury deliberation. Thus, it is error, although not necessarily reversible error, whenever:

(a) counsel has inquired of the jury panel about any personal connection with the "insurance industry,"⁵ whether jurors carry insurance with a given company,⁶ whether a panel member would be influenced by the fact that the defendant is insured,⁷ or whether any

3. *Id.* at 163. Additional cases were resolved similarly. See *Hoffman v. Perrucci*, 117 F. Supp. 38, 40 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955); *Hendrix v. Consolidated Van Lines*, 269 P.2d 435, 442 (Kan. 1954). See generally Note, *Newspaper Advertising—An Interference With A Fair Trial By Jury?*, 22 U. Prrt. L. Rev. 601, 603-05 (1961).

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

5. *A.J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763, 765-66 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (not only error, but reversible error); *Brockett v. Tice*, 445 S.W.2d 20, 22-23 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (question conveyed impression defendant had insurance—reversible error); see *Johnson v. Reed*, 464 S.W.2d 689, 692 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (no error in trial court's decision to prohibit questions by plaintiff about connections with the insurance industry), *cert. denied*, 405 U.S. 981 (1972); *Tarbutton v. Ambriz*, 259 S.W. 259, 260-61 (Tex. Civ. App.—San Antonio 1924, writ dism'd) (connection with insurance industry could have no legitimate bearing on the case).

6. *Green v. Ligon*, 190 S.W.2d 742, 746-47 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.).

7. *Houston Car Wheel & Mach. Co. v. Smith*, 160 S.W. 435, 437 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

panel members have adjusted claims;⁸

(b) counsel informs the jury that "no insurance" is involved in the case;⁹

(c) witnesses are questioned in a manner calculated to elicit information about insurance,¹⁰ or a witness, inadvertently or otherwise, responds in a manner that discloses insurance coverage;¹¹

(d) the existence of insurance coverage is implied during jury argument, such as by emphasizing that the jury should not worry about who is going to pay, stating that the defendant is not being asked to pay money by the suit, or by making references to insurance adjusters in reference to the facts of the case;¹²

(e) the jury considers the possibility of insurance coverage and speculates about defendant's ability to recoup the judgment from an insurance carrier.¹³

Injection of insurance into a case does not always call for automatic reversal. As with any alleged error the requirement of rule 434, that the error complained of was calculated to and probably did cause the rendition of an improper judgment, must be met before a verdict is set aside because of the infection of the influence of insurance.¹⁴ The point is, however, that the insurance taboo practiced in

8. *Shoppers World v. Villarreal*, 518 S.W.2d 913, 920-21 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

9. *St. Louis Sw. Ry. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965). It also would be error for the judge to inform the jury there was no insurance in the case. See *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962) (not reversible because no showing of harm).

10. *Ford v. Carpenter*, 147 Tex. 447, 450-51, 216 S.W.2d 558, 559 (1949) (error and calculated to cause harm to refer to plaintiff's insurance protection, but not reversible if plaintiff does not ask for mistrial); *Southern Pac. Trans. Co. v. Peralez*, 546 S.W.2d 88, 96 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (would have been reversible error if trial court had not refused to allow question referring to plaintiff's insurance protection); see *Rojas v. Vuocolo*, 142 Tex. 152, 155, 177 S.W.2d 962, 963-64 (1944) (reversible error to allow witness to answer question by juror concerning insurance protection).

11. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962) (mention of insurance by witness was improper but not necessarily reversible error); see *Page v. Thomas*, 123 Tex. 368, 370-72, 71 S.W.2d 234, 235-36 (1934) (reversible error).

12. *Springer v. Baggs*, 500 S.W.2d 541, 542-43 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); *Atchison, T. & S.F. Ry. v. Acosta*, 435 S.W.2d 539, 549 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); *Griffith v. Casteel*, 313 S.W.2d 149, 155 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); *Martinez v. Williams*, 312 S.W.2d 742, 750-751 (Tex. Civ. App.—Houston 1958, no writ).

13. *Barrington v. Duncan*, 140 Tex. 510, 516, 169 S.W.2d 462, 464-65 (1943); *Southwestern Sheet Metal Works v. Leavell*, 414 S.W.2d 723, 725-30 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); *Eichelberger v. Rankin*, 278 S.W.2d 278, 279-80 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.); *Plains Creamery v. Denny*, 277 S.W.2d 755, 768 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.).

14. *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); see *Tex. R. Civ. P. 434*.

Texas covers the full panoply of trial activity and is deeply rooted in the common law of the state, being virtually as old as litigation itself.

For purposes of the present problem, it is useful to consider *why* the ban against insurance is so pervasive. For well over forty years, the highest courts have acknowledged that the tenet 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," is so basic to human nature that courts can judicially know it.¹⁵ The philosophical basis for this recognition was deeply engrained in Texas practice even before the general charge went out of vogue. In 1913 the San Antonio Court of Civil Appeals explained in *Houston Car Wheel & Machine Co. v. Smith*¹⁶ that the question of insurance in a case is immaterial and noted that the injection of these facts has a tendency to influence the size of a jury's verdict and possibly even the course of their deliberations.¹⁷ In *Houston* the court said:

What could have been the purpose of such inquiry if not to impress upon the mind of the jury that the defendant did carry such insurance? And what effect could have been expected, except that it would have some bearing upon their minds in passing upon the facts in the case? . . . Appellee's counsel knew that he would not be permitted to make such a fact an issue in the case, nor in any manner directly bring it to the attention of the jury. He will not be permitted to do by indirection what he cannot do by direction.¹⁸

With the adoption of article 2189 of the Revised Civil Statutes in 1925¹⁹ (since repealed) and later, rules 277-279 of the Rules of Civil Procedure,²⁰ Texas was committed to a special issue practice for

15. *Kuntz v. Spence*, 67 S.W.2d 254, 256 (Tex. Comm'n App. 1934, holding approved); accord, *Barrington v. Duncan*, 140 Tex. 510, 516, 169 S.W.2d 462, 465 (1943). See generally Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959); Gay, "Blindfolding" the Jury: Another View, 34 TEXAS L. REV. 368, 372 (1956); Vetter, *Voir Dire II—Liability Insurance*, 29 Mo. L. REV. 305, 306 (1964).

16. 160 S.W. 435 (Tex. Civ. App.—San Antonio 1913, writ ref'd).

17. *Id.* at 437; accord, *Tarbutton v. Ambriz*, 259 S.W. 259, 260-61 (Tex. Civ. App.—San Antonio 1924, writ dism'd); *Lange v. Lawrence*, 259 S.W. 261, 261-62 (Tex. Civ. App.—San Antonio 1924, writ dism'd).

18. *Houston Car Wheel & Mach. Co. v. Smith*, 160 S.W. 435, 437 (Tex. Civ. App.—San Antonio 1913, writ ref'd). The plaintiff's attorney asked a juror, who was employed as an insurance agent, "would the fact that the defendant might have or carry an accident policy in some other company indemnifying him against loss tend to influence your action, if you were selected to serve as juror in this case?" *Id.* at 437.

19. Tex. Rev. Civ. Stat. art. 2189 (1925), now codified in TEX. R. CIV. P. 277-279.

20. TEX. R. CIV. P. 277-279.

obtaining jury verdicts on the underlying theory that better justice is meted out if the jury is confined to finding facts via special issues rather than being given rein to weigh not only facts but the competing sympathies, equities, social ramifications, and philosophical considerations that naturally tend to invade and compromise verdicts based upon a general charge.²¹ Thus, even though contemporary jurors may be said to be more sophisticated regarding the existence of insurance in damage cases, the fact-finding role of jurors mandated by the rules of procedure increases the necessity that this function be isolated from extraneous and potentially influential factors of which insurance coverage is one of the most prominent.²² To be effective in preserving the role of the jury, the barrier against the intrusion of insurance must be erected at the initial juncture on the road to verdict—*voir dire* examination. The oft-cited case of *Green v. Ligon*²³ dwells at length on this point, underscoring the disruptive nature of insurance on the jury process and the utter necessity to eliminate its taint at *voir dire*.²⁴ The court noted that generally attorneys are allowed a broad range of questions on *voir dire*, but then observed that in the case before it the question was whether this broad range of inquiry entitled counsel to ask questions that were calculated to give the jury the impression that an insurance company had an interest in the suit.²⁵ In deciding that such questions were not permissible the court said:

It is the settled doctrine in this state . . . that in cases . . . between two individuals where there is nothing to indicate that either carries indemnity insurance, that litigants may not by word, act, or deed convey to the jury the idea that some insurance company will be called upon to pay the judgment entered; if this rule is infringed a reversal of the judgment must follow. [Citing authority]. Likewise it may not be approached by questioning jurors on *voir dire*. [Citing authority]. . . . [F]ar more harm would come from a relaxing of the fixed rule than if strictly adhered to. We believe that if by questions on *voir dire* suggestions of insurance should be allowed the flood gates would be opened that would in effect abrogate the rule prohibiting the injection into a case of immaterial matters.²⁶

21. See generally Gay, "Blindfolding" the Jury: Another View, 34 TEXAS L. REV. 368, 377-81 (1956).

22. See *id.* at 373.

23. 190 S.W.2d 742 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.).

24. *Id.* at 747-48.

25. *Id.* at 747.

26. *Id.* at 748.

On the strength of that holding, one could conclude beyond cavil that, to use a tired but appropriate cliché, it is "settled" that insurance is not a proper subject for *voir dire* examination in Texas and that the ban is in strict conformity with Texas' jurisprudential system, rooted in a discernible attempt at achieving justice through equal treatment of all litigants before the bar.²⁷

Admittedly, Texas has been among the strictest jurisdictions as far as *voir dire* and the insurance ban are concerned.²⁸ The problem encountered most frequently has been with general questioning of jurors concerning their interest in or association with the insurance industry or claims adjustment. Appellate resolution of that issue has been ambivalent, ranging from outright condemnation and reversal,²⁹ to mild condemnation coupled with a finding of harmlessness,³⁰ to tacit approval.³¹ But tacit approval is essentially as far as Texas courts have gone; keenly personal inquiries that focus upon a particular insurance company or a particular attitude about insurance coverage have been forbidden.³²

As a result of this stricture in *voir dire* examination, Texas courts, save on one occasion, have not been called upon to condemn or condone questioning relating to jurors' perception of a potential verdict's effect upon insurance premiums. In that one case, *Brockett v. Tice*,³³ plaintiff's counsel "asked whether any juror had any connection with any insurance company," and though admonished to cease this pursuit, was bold enough to further inquire if any jurors "thought the verdict in the case would affect their insurance

27. The ban on mention of insurance in *voir dire* is in accord with the general prohibition against mention of insurance at all stages of the trial process. 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); *Barrington v. Duncan*, 140 Tex. 510, 516, 169 S.W.2d 462, 464 (1943).

28. Compare *Hart v. Wielt*, 84 Cal. Rptr. 220, 224 (Ct. App. 1970) and *Mathena v. Burchett*, 369 P.2d 487, 490-91 (Kan. 1962) with *A.J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) and *Green v. Ligon*, 190 S.W.2d 742, 747-49 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.). See generally Annot., 89 A.L.R.2d 1177 (1963); Annot., 4 A.L.R.2d 761, 792-816 (1949).

29. *A.J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763, 766 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.) (question infers insurance—reversible error).

30. *Shoppers World v. Villarreal*, 518 S.W.2d 913, 920-21 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (error, but no showing of harm).

31. See *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.) (no showing of prejudice).

32. See *Brockett v. Tice*, 445 S.W.2d 20, 21 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); *Green v. Ligon*, 190 S.W.2d 742, 747-49 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.).

33. 445 S.W.2d 20 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

rates.'"³⁴ The judgment for plaintiff was reversed because the reference, combined with other references to insurance, was prejudicial and affected the verdict.³⁵ It is difficult to say whether the premium/verdict inquiry would have been sufficient alone to reverse the case, but a good argument can be made to that effect since the court's decision was premised heavily upon the intent of counsel to inject insurance into the case and the question relative to premiums was doubtless intentional—indeed, the court so noted.³⁶

In view of the standard ban against mention of insurance in *voir dire* as amplified and extended by the *Brockett* decision, one should assume that Texas law now precludes, on the penalty of potential reversal, exploration of jurors' attitudes about correlation between verdicts and insurance premiums. The ban on mention of insurance held fast through the industry media blitz of 1950's without a great hue and cry for reform premised upon a real or imagined deleterious effect upon jury verdicts. This fact strongly suggests that our jury system has already accommodated itself adequately to extraneous influences like advertising.

The experience of other jurisdictions is not particularly helpful or persuasive one way or the other. There are, of course, decisions in some states adopting a more liberal stance regarding the type of *voir dire* in question, but actual opinions that have broached the subject are cursory at best and state no philosophical justification for such questioning persuasive enough to condemn the Texas approach.³⁷ In *Hoffman v. Perrucci*,³⁸ one of the suits that sought to enjoin the 1950's advertising campaign, the court commented purely as an aside in denying the injunction that "plaintiff will have an opportunity to question the prospective jurors concerning the possible effect such advertisements and pamphlets may have on any award of damages which they may render."³⁹ Later, a New York intermediate appellate court⁴⁰ set aside an order prohibiting *voir dire* inquiry on this particular subject, reasoning that the dissemi-

34. *Id.* at 21.

35. *Id.* at 25.

36. "The necessary effect of this was to infer that appellant had insurance because a verdict could not possibly affect their rates unless he had insurance." *Id.* at 22.

37. See *Hoffman v. Perrucci*, 117 F. Supp. 38, 40 (E.D. Pa. 1953), *appeal dismissed*, 222 F.2d 709 (3d Cir. 1955) (no explanation of the need for question); *Graham v. Waite*, 257 N.Y.S.2d 629, 630 (App. Div. 1965) (memorandum opinion) (no explanation or justification for holding).

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

39. *Id.* at 40.

40. *Graham v. Waite*, 257 N.Y.S.2d 629, 630 (App. Div. 1965) (memorandum opinion).

nation by insurance companies of information concerning the impact of jury awards upon insurance rates "may be a proper subject for exploration upon voir dire examination of the jury panel."⁴¹ The single, inconclusive sentence quoted, however, was the extent of the court's holding. The Arkansas Supreme Court approved a *voir dire* question that asked jurors if they were insured "with any mutual benefit liability company where your premiums are determined upon the size of judgments given in personal injury actions for the previous year?"⁴² In a later action, however, the court found the refusal to permit such a question was also proper.⁴³ Other courts have not been convinced that such examination is appropriate. The Kentucky Court of Appeals found "unnecessary" a question asking if jurors had "read articles, periodicals, editorials, any material, pertaining to automobile accidents jury verdicts?"⁴⁴ The Connecticut Supreme Court condemned as "vague and ambiguous" a *voir dire* question that asked: "Would you feel that you have any financial interest in this lawsuit, or might in any way be affected by awarding damages to the Plaintiffs?"⁴⁵ A Maryland court approved trial court action prohibiting plaintiff from inquiring on *voir dire* if jurors had "formed any ideas with reference to amounts of jury verdicts."⁴⁶ And, finally, a North Carolina court held that it was a prejudicial injection of insurance to ask: "Is there any member of the jury who feels that his liability insurance rates will go up if he returns a verdict against the defendants in this case?"⁴⁷

These meager and inconclusive pronouncements on the subject are insignificant. It is important that there is a veritable paucity of authority on the subject from the collective states. This lack of authority raises a clamor of silence supporting the notion that the effect of premium/verdict advertising generally has not been perceived as a factor which vitally affects the qualifications of jurors or the quality of verdicts. Indeed, one court was regaled with advertisements regarding verdicts and jurors' financial interests spanning twenty years, yet remained unmoved toward a blanket approval of

41. *Id.* at 630 (emphasis added).

42. *Dedmon v. Thalheimer*, 290 S.W.2d 16, 16-17 (Ark. 1956).

43. *Malone v. Riley*, 321 S.W.2d 743, 744 (Ark. 1959).

44. *Farmer v. Pearl*, 415 S.W.2d 358, 361 (Ky. 1967). *See also Farrow v. Cundiff*, 383 S.W.2d 119, 120 (Ky. 1964).

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

46. *Kujawa v. Baltimore Transit Co.*, 167 A.2d 96, 98 (Md. 1961).

47. *Maness v. Bullins*, 198 S.E.2d 752, 752-53 (N.C. Ct. App. 1973).

voir dire on the subject.⁴⁸ What then, is so pervasive about the current, and doubtless short lived, insurance company media campaign that requires undoing the settled axioms discussed above and renders it so disruptive that reform of the present *voir dire* rules and regulations is required?

REASONS FOR RESTRICTING PREMIUM/VERDICT INQUIRIES FROM *Voir Dire* EXAMINATION

It is difficult to see how the current industry campaign provides sufficient impetus for expanding *voir dire* examination into the premium/verdict arena when prior campaigns have not convinced courts to do so. Better reasoning still supports the total ban against referring to insurance on *voir dire* when considered in the light of present jury practice philosophy and procedural safeguards attendant thereto, potential harm to both plaintiffs and defendants from permitting such inquiry to invade a given case, and the nature of the advertising employed.

Necessity for Preservation of Jurors' Fact-Finding Status

The most conspicuous reason for continuing the ban against all types of insurance-related *voir dire* examination, including premium/verdict inquiries, is the numerous sacrifices that would have to be made to the "blindfolded," fact-finding jury concept that has always been considered a feather in the cap of Texas jurisprudence.⁴⁹ The first compromise would be to sacrifice Texas' traditional issue-oriented and qualification-related *voir dire* examination in favor of a "rabbit trail" type of examination more appropriate to a psychoanalyst's couch or to the diary of a private investigator than to the decorum of a courtroom. The author has seen no convincing evidence that potential jurors have been so radically politicized by insurance company advertising that the judicially conceded relationship between a juror's knowledge of insurance coverage and the frequency or excess of plaintiffs' verdicts no longer prevails. Indeed, one could hardly deny that the increase in the size of verdicts subsequent to the 1950 industry advertising campaign has been healthy if not astonishing.⁵⁰

48. See *Murell v. Spillman*, 442 S.W.2d 590, 591 (Ky. 1969) (remains in discretion of trial judge).

49. See generally Gay, "Blindfolding" the Jury: Another View, 34 TEXAS L. REV. 368, 368-77 (1956).

50. The size of verdicts has greatly increased. In 1976 the increase in verdict size for four

Regardless of its professed purpose, premium/verdict *voir dire* examination inherently tends to inform the jury that insurance is involved. As the court noted of just such an inquiry in *Brockett v. Tice*,⁵¹ the question necessarily implies that the defendant has insurance because if he does not, a verdict against him could not possibly affect the jurors' rates.⁵² This suggestion of insurance, in addition to its prejudice, is generally confusing because of its implication that insurance is an integral issue in the case. It is misleading in cases when no insurance exists, as was noted of a comparable injection of insurance in *Green v. Ligon*.⁵³

There can be no doubt that the question propounded by counsel to the jury before being impaneled did impart sufficient information to lead at least some of the jurors to believe that the defendant in this case was protected by a policy of insurance. It makes little difference as to the good faith of counsel in asking the question for the purpose of obtaining needed information—the result and effect of the question were the same as if he had made the inquiry for the deliberate purpose of accomplishing the end that it obviously brought. The plaintiff's rights ended where the defendant's began.⁵⁴

The prevalence of insurance company advertising does not make the existence of insurance coverage or a given insurance company any more a part or a party to a lawsuit. If the rules governing *voir dire* examination are relaxed to permit exploration of the premium/verdict issue, the relaxation gives credence to an issue that has no real bearing on the case.⁵⁵

Additionally, allowing examination on this issue raises the problem when to draw the line on other collateral issues. For example, any fair response to premium/verdict interrogation by a plaintiff should allow defense counsel, among other things, to explore jurors' inherent sympathies for injured parties, widows, and children; their general economic philosophy; their attitude toward "target defendants" such as corporations; their assumptions concerning the ex-

selected injuries was 16.6%, a rather significant increase. Jury Verdict Research, Inc., *Current Award Trends*, 1 PERSONAL INJURY VALUATION HANDBOOKS 1, 2-3 (1978). In two areas, product liability and medical malpractice, there has been a consistent increase in plaintiff verdicts from 1971 through 1976. *Id.* at 9.

51. 445 S.W.2d 20 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

52. *Id.* at 22.

53. 190 S.W.2d 742 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.).

54. *Id.* at 748.

55. 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); *Barrington v. Duncan*, 140 Tex. 510, 516, 169 S.W.2d 462, 464 (1943).

istence of insurance *vel non* in the case; and their attitudes about insurance companies, claims, and insurance fraud. Even more pertinent inquiry could explore the jurors' relationship to, or association with, anyone active in the organized plaintiffs' bar or their attendance at speeches or seminars featuring plaintiffs' attorneys who regale insurance companies for their practices or promote the expansion of theories of recovery. Jurors could be asked about their participation in labor union instructional seminars seeking to inform participants how to achieve plaintiffs' verdicts in answering special issues, informing them of the presence of insurance in personal injury cases, and urging healthy economic awards as a beneficial end. In fact, any employment or association by jurors with lobbying efforts of the plaintiffs' bar to expand theories of liability or to alter modes of practice would be subject to inquiry. Such a broad range of inquiry would take the *voir dire* on and on into untold numbers of ethereal issues far removed from the concrete conflict between the litigating parties. Indeed, once the "flood gates" referred to in *Green v. Ligon*⁵⁶ are widened for such collateral matters, one can envision civil *voir dire* assuming the status currently in vogue in criminal practice in which jurors' personal lives, opinions, and attitudes are interminably sifted in individual examination while hired psychologists compile psychological profiles on each juror.

Insurance company advertising is hardly a sufficient reason *per se* to compromise present practice in such a radical fashion. Its use as a premise for expanding *voir dire* examination pales virtually to insignificance when stock is taken of the safeguards already built into the system to protect jury deliberation from extraneous influence. There are, first of all, the specific written instructions given jurors prior to every case admonishing them to "consider only the evidence introduced here under oath."⁵⁷ More specifically, a juror's propensity to be influenced by personal monetary considerations should be controlled by the charge "not [to] let bias, prejudice or sympathy play any part in your deliberations,"⁵⁸ and the particular effect of all matters related to insurance would be negated by the written instruction 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."⁵⁹

56. 190 S.W.2d 742, 748 (Tex. Civ. App.—Fort Worth 1945, writ *ref'd n.r.e.*).

57. TEX. R. CIV. P. 226a (¶ III, Written Instruction 2).

58. *Id.* (¶ III, Written Instruction 1).

59. *Id.* (¶ II, Written Instruction 9).

Second, essentially the same exploration can be indulged by using questions, proper under the present practice, which do not inject insurance into the case. The Kentucky Court of Appeals correctly noted in *Farmer v. Pearl*⁶⁰ that the ultimate thrust of questions probing a juror's acquaintance with literature correlating verdict size and liability premiums is simply to ascertain if a juror can render an impartial verdict.⁶¹ If insurance company advertising is truly perceived to be a negative influence, its influence can be ascertained by asking either of two questions:

(1) Does any member of the panel have any opinion or belief about the facts of this case, or about cases of this nature in general, which would indicate that you could not impartially consider plaintiff's evidence and contentions?; or more pointedly,

(2) Does any member of the panel know of any reason why he or she could not consider the total amount of damages sued for if supported by the evidence?

Should any juror respond to these questions by raising his hand, an *in camera* examination by the court could be conducted, and if the opinion disqualified the juror, he could be challenged for cause. If the juror did not disqualify himself, plaintiff's counsel would still have information needed to exercise an intelligent peremptory challenge.

Of course this suggestion is founded upon the assumption that jurors would be able to discern those influences that might affect their verdict and answer accordingly—such an assumption may or may not be correct. Premium/verdict *voir dire* examination is based upon the same premise, however, and if the premise is false, it would be fruitless to pursue that type of examination anyway. More dangerously, premium/verdict *voir dire* examination would permit the *voir dire* inquiry to act as a subterfuge for injection of insurance into the case. Indeed, Mr. Kronzer's excoriation of present trial practice for permitting the jury to flounder in speculation and his advocacy of revealing that an insurance company is often the real party in interest strips away the veneer of concern for the integrity

60. 415 S.W.2d 358 (Ky. 1967).

61. *Id.* at 361.

Let's suppose for a moment that the court had permitted counsel to pursue this inquiry and one or several of the jurors had replied in the affirmative. The next question would obviously be whether or not the exposure to such reading material would prevent the jurors from reaching a fair and impartial verdict, and this is the very question which both the court and counsel had previously propounded.

Id. at 361.

of the jury system and bares the self-serving desire to infect tort litigation with the taint of insurance, knowing full well the judicially-conceded fact that such considerations invariably prejudice defendants, both regarding liability and damages.⁶²

Potential Harm to Plaintiffs

Despite the urging for the type of attitude-exploring *voir dire* examination under scrutiny here, it is doubtful whether its indulgence would be in the best interest of plaintiffs. First of all, it is questionable whether inquiries about premium/verdict advertising would be productive. Quizzing jurors on this subject is, in a sense, challenging their integrity to render an unbiased and impartial verdict. People are generally reluctant to admit openly, particularly in a crowded courtroom, that their prior experiences or attitudes could cause them to be unfair to one party or the other. Thus, *voir dire* concerning their attitudes about verdicts and insurance premiums runs the risk of being unproductive not only among those jurors who have not been touched by the advertising or who have no opinion about verdicts and premium rates, but also with those too embarrassed to respond to the question. Second, in broaching the subject with the panel, plaintiff's counsel invites the risk by his questions of implanting in jurors' minds the very attitude he seeks to ferret out. Once aroused, this curiosity about the effect of a verdict upon premiums could smolder in the mind of a juror previously naive of the subject, catching fire in jury deliberations. This potentially counter-productive effect underscores the wisdom of insulating *voir dire* examination from all such collateral issues.

The Nature and Effect of Company Advertising

If leaflets or pamphlets urging low verdicts as a hedge against high liability insurance rates were being distributed by insurance industry representatives to potential jurors at the courthouse steps on jury summons day, there would be ample justification for taking action against this type of influence, as it would be a specific influence pointed at the jury service and verdict in a given case. The remedy, however, would probably be a mistrial rather than expanded *voir dire* examination. Nothing of this kind is alleged to be taking place in the current industry advertising campaign. The advertisements that the author has seen, or heard, appear in nation-

62. See authorities cited note 15 *supra*.

wide or regional magazines and newspapers or are broadcast over the radio. Examples, which are included in the appendices,⁶³ are similar to those that were prevalent in the 1950's.⁶⁴ On their face, these advertisements are merely rhetorical dramatizations of problems facing the insurance industry. They are manifestly one-sided in nature, and the general public, having grown accustomed to grandiose exhortation in the media, can be expected to place these dramatizations in context and discount them according to their partisan source. Indeed, the premise of the ads, that there is a relation between higher verdicts and higher premiums, is a simple one which the average juror probably understands anyway.⁶⁵

If encountered by a potential juror in an extrajudicial setting, the advertisements merely count as one of life's experiences which competes with other general experiences that converge to form a juror's attitude and reaction to sociolegal situations and issues. In *Houston Car Wheel & Machine Co. v. Smith*⁶⁶ the San Antonio Court of Civil Appeals correctly noted that "jurors, unfortunately, cannot be stripped of the frailties of human nature when they enter the jury box, and they carry into their deliberations as jurors prejudices and prepossessions of which they themselves are often unaware."⁶⁷ *Voir dire* examination will never be able to pinpoint all the attitude-forming influences jurors bring to the courthouse. The lengths to which one would have to go to explore the most conspicuous of these influences is not compatible with the efficient progress of litigation, is out of character with the decorum of the civil courtroom, and is an affront to the privacy that jurors might legitimately expect in terms of the issues in a civil case. Nothing in industry advertising practices justifies venturing so far afield via *voir dire* examination.

CONCLUSION

If it is truly a social evil, a public fraud or misrepresentation, or a threat to rule by law for insurance companies to publicly proclaim a cause and effect relationship between liability insurance rates and jury verdicts, adequate control and safeguards for that problem can

63. See appendices A and B.

64. See note 1 *supra*.

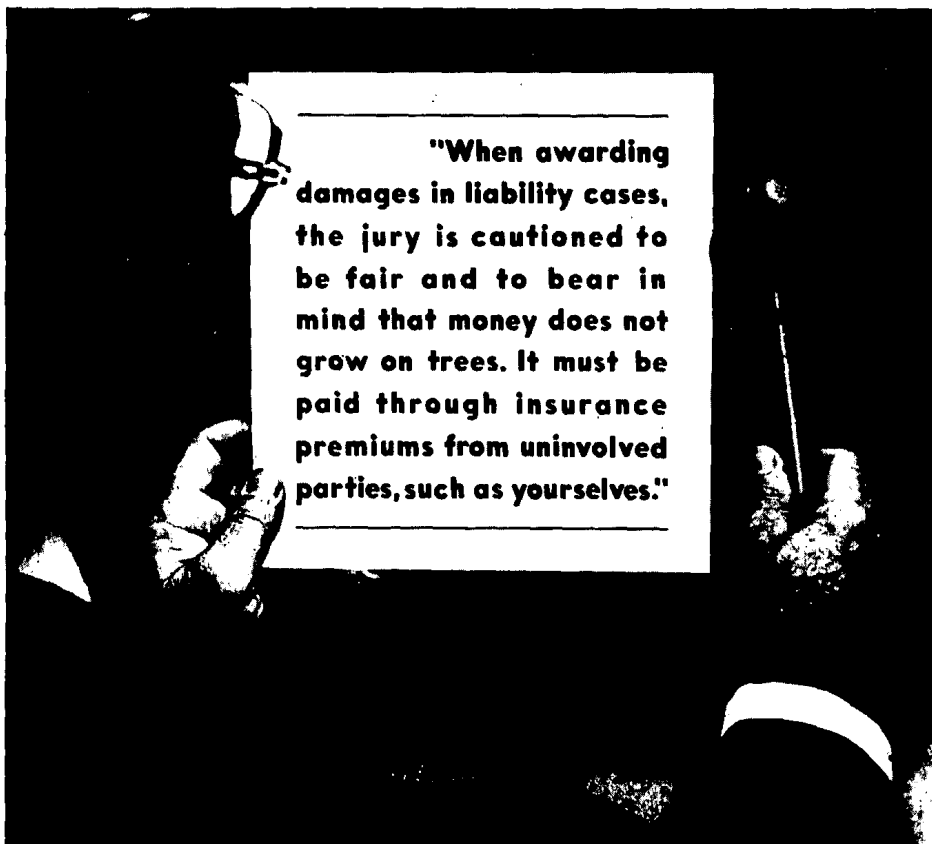
65. As stated in *Bunch v. Crader*, 369 S.W.2d 768, 770-71 (Mo. Ct. App. 1963), "It is also a fact, which is at least subject to argument, that the average insured juror realizes that claims against liability carriers furnish the premium basis, and that the greater the losses the higher the premiums."

66. 160 S.W. 435 (Tex. Civ. App.—San Antonio 1913, writ *ref'd*).

67. *Id.* at 437.

be found in article 21.21 of the Texas Insurance Code.⁶⁸ The appeal to expand *voir dire* examination in response to this advertising, however, is essentially a non-issue. It is a matter that the courts have faced before and for which allowance has been made through the rules of procedure and currently permissible *voir dire* examination. It is always unwise, and would be unwise in this case, to attempt a radical overhaul of existing, adequate trial procedures, risking the injection of far more prejudicial matters than are sought to be eliminated, as a pure overreaction to a temporary social phenomenon.

68. TEX. INS. CODE ANN. art. 21.21 (Vernon 1963 & Supp. 1963-1978). To the extent that premium/verdict advertising could be deemed "untrue, deceptive or misleading" it would be an "unfair or deceptive act or practice" within the meaning of section 4(2) of article 21.21 of the Insurance Code, and subject to both fine and prohibition pursuant to sections 7 and 10 of article 21.21. *See id.* §§ 3, 4(2), 7, 10.



Too bad judges can't read this to a jury.

A truck without brake lights is hit from behind. For "psychic damages" to the driver, because his pride was hurt when his wife had to work, a jury awards \$480,000 above and beyond his medical bills and wage losses.

A 67-year old factory worker loses an arm on the job. His lawyer argues that he should receive wages for all the

APPENDIX A

remaining years of his life expectancy. He had been earning about \$10,000 a year. The jury awards him a sum equal to almost \$89,000 a year.¹

Then there's the one...but *you* can probably provide the next example. Most of us know hair-raising stories of windfall awards won in court.² Justified claims should be compensated, of course. Aetna's point is that it is time to look hard at what windfall awards are costing.³

What can we do? Several things:

We can stop assessing "liability" where there really *was* no fault—and express our sympathy for victims through other means.

We can ask juries to take into account a victim's *own* responsibility for his losses. And we can urge that awards realistically reflect the actual loss suffered—that they be a fair *compensation*, but not a reward.⁴

Insurers, lawyers, judges—each of us shares some blame for this mess. But it is you, the public, who can best begin to clean it up. Don't underestimate your own influence. Use it, as we are trying to use ours.

Aetna wants insurance to be affordable.

¹ The man was awarded \$1,250,000, or about \$89,000 a year, for the remaining 14 years of his life expectancy. The jury awarded an extra \$500,000 to his wife for loss of "consortium"—the company, affection and services of her husband.

² A by-product of such awards

has been a quantum leap in the number of personal injury and property damage suits filed. A 1977 study in California shows such suits increasing at *five times the rate of population growth*.

³ Most awards are paid by insurance, and insurance companies spend millions more defend-

ing policyholders against lawsuits. The direct result is rising premiums for automobile and other liability coverages. The *indirect* result is higher prices for goods and services—prices which are boosted to cover the skyrocketing insurance premiums of manufacturers, doctors, hospi-

tals, and others who are targets for windfall awards.

⁴ For example, it would help if juries were simply required to take into account payments the claimant has already received for medical bills and lost wages. Under the present system, these bills may be paid all over again.

Aetna Life & Casualty,
151 Farmington Avenue,
Hartford, CT 06156



APPENDIX A

The jury smiled when they made the award. They didn't know it was coming out of their own pockets.

They thought they were giving away the insurance company's money.

So it wouldn't hurt to be generous.

Because insurance companies can afford to pay big awards. All they have to do is collect higher insurance premiums.

From you.

And excessive awards eventually cost you money.

We don't object to paying fair awards. That's our business. But paying exaggerated awards inflates costs.

And can affect your insurance in other ways. Insurance companies might be forced to limit the kinds of coverage or the number of policies they write.

Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate the few who have losses.



The price of insurance must reflect the rising cost of compensating those losses and the work that goes into doing that.

And that includes the escalation in jury awards.

That's why your premiums have been going up.

*No one likes higher prices.
But we're telling it straight.*

**CRUM & FORSTER
INSURANCE COMPANIES
THE POLICY MAKERS.**

APPENDIX B