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INQUIRIES PERMITTED RE INSURANCE COMPANIES ON VOIR DIRE

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"Are you a stockholder, director, employee, policyholder, or *in any manner interested,* in *any insurance company* issuing policies for protection against liability for damages for injuries to persons or property?" As a defense attorney, would you object to this question if it were propounded in a negligence case by counsel for plaintiff on voir dire examination in Colorado?

Although evidence that the defendant is insured against liability is inadmissible because it is irrelevant and prejudicial, most jurisdictions permit a question in one form or another to be put to jurymen on their voir dire examination.[1] The exact form of the question varies jurisdiction by jurisdiction, trial by trial. Nevertheless, the commonly used interrogation can be classified into two groups: One group includes the questions which name the insurance company, frequently called the specific or narrow question; the other is illustrated by the question stated above. This is known as the broad or general interrogation. On numerous occasions the Supreme Court of Colorado has approved the use of the specific question.[2] Little, if anything, has been said about the propriety of the general query. Because of this and the divergent views expressed in other jurisdictions, we are confronted with these issues: Should counsel on voir dire examination be permitted to ask the jury if any of them have any interest in *any* insurance company? If so, do the Colorado cases prohibit the use of the broad question?

The answer to the first should be in the affirmative. It is fundamental that every litigant is entitled to a trial before a fair and impartial jury. To attain this end counsel is entitled as a matter of right to challenge for cause where the relationship or pecuniary interest is not substantially remote. Even if such interest will not operate to disqualify for cause, counsel may desire to make it a basis for peremptory challenge. In order to exercise intelligently these rights he must be given considerable latitude in the selection of a jury. And only by permitting the broad question can the plaintiff be assured that the jury is disinterested.

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* Written while a student at the University of Denver College of Law.

[1] See cases collected in 56 A.L.R. 1456 and 104 A.L.R. 1067.

[2] The Vindicator Consolidated Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Cripple Creek Mining Co. v. Brabant, 37 Colo. 431, 87 P. 796 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916); Tatarsky v. Smith, 78 Colo. 491, 242 P. 971 (1926); Bolles v. Kinton, 83 Colo. 147, 226 P. 26 (1928); Rains v. Rains, 97 Colo. 19, 42 P. 2d 740 (1935); Johns v. Shinall, 103 Colo. 381, 86 P. 2d 605 (1939).

Where the interrogation is limited to a named insurance company, the possible bias, interest, or prejudice of a juryman is not disclosed. The very nature of his employment, past or present, may create in his mind a prejudice in favor of the defendant. This can best be shown by a hypothetical illustration.

One of the prospective jurors might be an officer, agent or employee of an insurance company other than the one involved in the case, which we assume to be a negligence action based upon an automobile collision. Such a juror would be the first to suspect that an insurance company was involved, and it is not unrealistic to presume that he would lean toward the field of business that gives him his livelihood. Even if he believed that no indemnity company was interested in the outcome, his profession would make him defensive minded. A major stockholder in "another" insurance company, or people more or less indirectly associated with the insurance field might be anything but impartial jurymen. Yet, the specific question would not disclose their state of mind nor develop their possible interests and prejudices.

This conclusion is sustained by an Arkansas case[3] in which counsel asked both the narrow and broad question. Defendant then offered to show that "none of this jury is connected with the general agency or any local agency," and that none of the jurors had any interest in the company as stockholders. The questions were propounded over defendant's objections and exceptions. The court in allowing the questions said:

> The jurors or some of them might have had some relationship or connection with the particular company mentioned or some other surety company so as to make them undesirable jurors, and still not have been connected with any agency or held any stock in the particular company.

Such factors as employment or relationship probably would not warrant a challenge for cause, but they would aid counsel in the wise and intelligent exercise of his peremptory challenge.

Use of the General Question

In many jurisdictions counsel is permitted to use the general question in examining the jurors on their voir dire.[4] One court has stated that:[5]

> The great weight of authority and the better reasoning alike sanction the view that counsel for plaintiff is entitled in good faith to inquire whether any juror is interested in or connected with any insurance or casualty company that may be interested in the case as an insurer of the defendant's liability.

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[3] Halbrook v. Williams, 185 Ark. 885, 50 S. W. 2d 243 (1932).
[4] Arkansas, California, Idaho, Indiana, Iowa, Michigan, New York (by statute), Ohio, and Wyoming.
[5] Eagan v. O'Malley, 45 Wyo. 505, 21 P. 2d 821 (1933).

An Iowa court, in holding that it was permissible to ask the broad question, pointed out that 27 states have sustained plaintiff's right to propound an inquiry "such as was propounded in the instant case."[6] This figure may be an overstatement of approval, for many courts in analyzing the propriety of insurance questions on voir dire examination have failed to consider accurately the scope of permissive questions. All too frequently the support for one form of question is found in cases that deal with the other type of inquiry. Nevertheless, the general question has been approved on numerous occasions.[7] In at least one instance where counsel objected to the general insurance interrogation for the reason that it did not relate to any specific insurance company, it has been held that the trial court was correct in overruling the objection.[8] In Colorado the door has been left open and, as we shall see, the cases do not prohibit the use of the general question.

THE SPECIFIC QUESTION PERMITTED IN COLORADO

One of the earliest Colorado cases to consider the propriety of insurance questions on voir dire examination was *The Vindicator Consolidated Gold Mining Company v. Firstbrook.*[9] Here plaintiff's interrogation named the insurance company. The trial court permitted the question over the defendant's objection. In sustaining this action, the Supreme Court said:

> . . . but where in this instance, the inquiry of the jurors was limited to their interest in the insurance company named, and nothing more, it was not error to allow such inquiry. *Union Pacific Railroad Co. v. Jones,* 21 Colo. 341; *Swift & Co. v. Platte,* 72 P. (Kan.) 271.

On the surface it might appear that the court was limiting the scope of the question to a named insurance company, but the Kansas case cited as authority indicates that the court's intention was merely to prevent the use of questions which would disclose to the jury that an insurance company was involved.

In the next two cases to consider the insurance question,[10] counsel objected to the interrogations, which named the insurance companies, on the ground that they constituted prejudicial error. The right to ask the questions was sustained, the court saying in the *Independence* case:[11]

> It must be remembered that these questions were submitted on the jurors' voir dire during which considerable latitude must, of

[6] Rains v. Wilson, 213 Iowa 1251, 239 N. W. 36 (1931).

[7] Halbrook v. Williams, *supra,* note 3; Shaddy v. Daley, 50 Idaho 536, 76 P. 2d 279 (1938); Ft. Wayne Checker Cab Co. v. Davis. 90 Ind. App. 30, 165 N. E. 764 (1929); Rains v. Wilson, supra, note 6; Tissue v. Durin, 216 Iowa 709, 246 N. W. 806 (1933); Dowd-Feder, Inc. v. Truesdell, 130 Ohio St. 530, 200 N. E. 762 (1936); Eagan v. O'Malley, *supra,* note 5.

[8] Swanson v. Slagal, 212 Ind. 394, 8 N. E. 2d 993 (1937).

[9] 36 Colo. 498, 86 P. 313 (1906).

[10] Cripple Creek Mining Co. v. Brabant, *supra,* note 2; Independence Coffee & Spice Co. v. Kalkman, *supra,* note 2.

[11] *Ibid.*

> necessity, be allowed for the purpose of exercising peremptory challenges.

Both cases cited the *Vindicator*[12] opinion as authority for the stated ruling. It should be noted that in none of these cases was the court called to rule squarely upon the permissive scope of insurance inquiries; in each instance it merely approved the question asked.

Tatarsky v. Smith[13] adds little to our quest. It sustained the right to ask the specific question, holding that such an inquiry did not necessarily convey to the jury the fact that an insurance company was involved in the litigation. As a matter of dictum, the court stated that counsel could ask such questions as he propounded even though he had been supplied with names, addresses, ages, occupations, and residences of each man in the box.

In 1928 the court again considered the insurance question.[14] The case does not clearly indicate whether this issue was assigned as error, but the court said:

> The plaintiff's counsel was permitted to ask the jury on voir dire whether any of them were interested in a certain insurance company. This was proper. The plaintiff had a right to ascertain the fact as to their interest. True, counsel may have had a desire to let the jury know that the defendants carried liability insurance, but we do not see how he or the Court could have treated the matter more fairly. All argument was in chambers and the court restricted the examination on this point to the one simple question. (citing the four Colorado cases that we have just considered).

Note that court does not say that the inquiry should be limited to this one question, nor does it indicate to what extent one may go beyond this question.

Authority For Use of General Query?

Rains v. Rains[15] is frequently cited as authority for the proposition that the insurance query may be put to the jury on their voir dire examination. Here counsel not only asked the specific question, but also whether the jury knew of companies that indemnify against accidents, and stated that the Globe Indemnity Company engaged in that kind of business. It was argued that the jury was advised by these questions that an insurance company was involved in the defense and that the court's refusal to grant a mistrial was error. After pointing out that the objections to the interrogations were not made in time and that the defendant had waived the right to have a mistrial declared, the court said that even if the questions were improper, "the permissible question conveyed, by necessary inference, to every intelligent juror the in-

[12] Vindicator Consolidatel Gold Mining Co. v. Firstbrook, *supra*, note 2.
[13] *Supra*, note 2.
[14] Bolles v. Kinton, *supra*, note 2.
[15] *Supra*, note 2.

formation conveyed by the questions objected to." Once again, then, the problem of scope was not answered.

In the first of the two most recent cases to discuss the propriety of insurance questions on the voir dire examination,[16] the alleged error was an unsolicited statement by a witness that an insurance agent had paid him a visit. Because the insurance element had not been injected intentionally, the court ruled that it was to be treated as evidence ordinarily inadmissible. Thus, there was no reversible error. The *dicta* in the case, however, is worth noting:

> It is permissable to interrogate prospective jurors, some of whom may be selected to serve in the case, as to their connection with or interest in insurance companies, and we have held that questions touching this matter may be asked of every prospective juror.
>
> It is permissible, and rightly so, that each of twelve prospective jurors in a case be asked on voir dire examination whether he is a stockholder, agent, or employee of an insurance company.

Read alone, these statements do not appear to be as narrow as some of those found in the earlier cases. The terms "certain" and "named" insurance companies are notably absent, and in the first paragraph reference to insurance companies is in the plural. While little weight can or should be given to these remarks, they may be significant in view of the latest case to come before the court.

GENERAL QUERY PERMITTED IN MALPRACTICE SUIT

Edwards v. Quakenbush[17] was decided in 1944. It was an action against a physician and surgeon for damages allegedly resulting from his negligence in performing a surgical operation. In the course of the voir dire examination counsel for plaintiff asked: "Have any of you gentlemen ever been an officer or employee of a company that insures against malpractice?" A motion for mistrial was interposed, and overruled. Error was specified to this ruling. Counsel conceded that it was not error to ask the insurance question where it named the company, but it is argued that the right to so inquire does not permit asking a blanket question concerning all insurance companies. The court held:

> Whatever may be the proper procedure hypothetically, we are satisfied that in the instant case the court committed no error in the ruling made because of the circumstances developed in the hearing in chambers.

Counsel for plaintiff had asked defendant in chambers for the name of the company involved. He was denied any information, and the court allowed the general question to stand upon the express basis that "Certainly if he (plaintiff's counsel) does not know the name of the company and cannot find it out, he is entitled to ask the general question." Although this case does not expressly hold

[16] Johns v. Shinall, *supra*, note 2.
[17] 112 Colo. 337, 149 P. 2d 809 (1944).

that the general question may be asked, it certainly opens the door in that direction. The court seemed to be careful not to limit the inquiry to a named insurance company.

It was deemed important to consider in some detail all of the Colorado cases[18] for two reasons: One, so that the reader might see the trend of the language used by the court, i.e., the fact that it is less rigid in the recent cases; two, so that it could be shown that at no time has the court ruled squarely on the permissive scope of insurance questions—at no time has it declared that the interrogation must be limited to one which names the insurance company.

Concluding that the use of the general question is necessary in order to obtain for the plaintiff a disinterested jury and that such an inquiry is not prohibited in Colorado, we then raise one more question: Should the general interrogation be used exclusively?

THE GENERAL QUESTION FAIRER FOR BOTH PARTIES

The defendant, like the plaintiff, is also entitled to an impartial jury. It is generally conceded that whenever jurors know that an insurance company will have to pay, such knowledge will usually be reflected in a larger recovery and sometimes in a verdict not consistent with the evidence. Thus, the defendant has a right to insist that matters of insurance be kept from the jury. Even though this may be difficult to do, it does not justify the court in permitting questions which admittedly inform the jury that an insurance company is interested in the outcome. In the *Rains* case[19] the court stated:

> A question put to a prospective juror as to whether he has any interest in or connection with a certain indemnity company would convey to the mind of every intelligent juror the knowledge that an indemnity company was interested financially in the outcome of the litigation. . . .

Where a specific insurance company is named in the inquiry, a jury will more readily get the impression that an insurance organization is behind the defendant than when counsel used the general interrogation. As one Justice so aptly said in referring to a juryman, "He doesn't require a brick house to fall on him to give him an idea."[20] Because of its very nature. the general question makes the insurance issue less noticeable to the jury. At least one court has stated that it would be better not to name the company.[21]

Another jurisdiction has adopted the rule that the specific

[18] Potts v. Bird, 93 Colo. 547, 27 P. 2d 745 (1933), and Phelps v. Loustalet, 91 Colo. 350, 14 P. 2d 1011 (1932) also discuss some incidental aspects of the insurance question.

[19] Rains v. Rains, *supra*, note 2.

[20] Connelly v. Nolte, 237 Iowa 114, 21 N. W. 2d 311 (1946).

[21] Harker v. Bushouse, 254 Mich. 187, 236 N. W. 222 (1931).

question may be asked only if there has been an affirmative answer to the general interrogation.[22] This may be the answer to the problem of the permissive scope of insurance questions. Certainly, the narrow question is not justified where the jurymen answer a general inquiry in the negative.

Almost from the beginning the court has said that the matter of examination on voir dire is largely in the discretion of the trial court.[23] This is the rule in most jurisdictions. But the time has come in Colorado for the Supreme Court to consider thoroughly the advisability of the practices permitted by the trial courts in regard to the insurance inquiries. A ruling prohibiting the specific question or limiting it as in the answer suggested above, would go far to assure for both the plaintiff and the defendant a fair and impartial trial.

OIL AND GAS LAW SUBJECT OF ANNUAL LAW DAY EXERCISES

The annual Law Day exercises at the University of Colorado this year will be devoted to a two-day conference on oil and gas law on Friday and Saturday, May 4 and 5, at Boulder.

Dean Edward C. King and his able assistants have assembled their usual fine array of talent to discuss a field of law which is still new to Colorado. The following is a summary of the program:

Friday, May 4

9:00 a.m.—Registration at the law school.

10:00 a.m.—Convocation on "The Oil and Gas Industry" by Ernest O. Thompson, Chairman of the Texas Railway Commission.

11:00 a.m.—A panel discussion on "Taxation of Oil and Gas Interests," with John H. Tippit giving a paper on "Ad Valorem Taxes," and Floyd K. Haskell delivering a paper on "Income Taxes." President Robert L. Stearns will preside at the morning session.

After a luncheon recess, a panel discussion will be held on "Unitization and Conservation Techniques."

The participants will be James D. Voorhees, attorney with the Continental Oil, speaking on "The Mechanics of Unitization," Robert Hardwicke, attorney of Fort Worth, Texas, speaking on "Voluntary and Compulsory State Unitization Statutes," and Warwick M. Downing, Denver attorney and Colorado representative to the Interstate Oil Compact Commission on "The Interstate Oil Compact as an Impetus to a Sound Conservation Policy."

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[22] Dowd-Feder v. Truesdell, *supra*, note 7.
[23] Union Pacific R. R. Co. v. Jones, 21 Colo. 341 (1895).