

CIVIL PROCEDURE — DISCOVERY — FEDERAL RULE 26(b)(2) — PERMITTING DISCOVERY OF INSURANCE AGREEMENTS IS ADOPTED IN NEBRASKA — *Walls v. Horbach*, 189 Neb. 479, 203 N.W.2d 490 (1973).

### INTRODUCTION

In 1970, the Federal Rules of Civil Procedure were amended so as to allow pre-trial discovery of the existence and content of insurance policies.<sup>1</sup> Prior to that, the controversy over whether an insurance policy was "relevant" to the pending action and therefore discoverable had long divided both the federal and state courts. A majority of the federal courts favored disclosure in accordance with the liberal view generally taken with respect to the rules of discovery. On the other hand, a majority of the state courts (and especially those whose discovery rules were not patterned after the Federal Rules) were opposed to allowing discovery of insurance policies prior to a determination of liability.<sup>2</sup>

The controversy in the federal courts was settled with the enactment of Rule 26 (b)(2), but it is still very much alive in the state courts. In the recent case of *Walls v. Horbach*,<sup>3</sup> the Supreme Court of Nebraska in a 5-1 decision ruled that information regarding insurance coverage is relevant to the subject matter of the action, and Nebraska thereby joined those states which allow pre-trial disclosure. The *Walls* decision reversed *Mecke v. Bahr*,<sup>4</sup> a 1964 decision which prohibited discovery of insurance policies.

The *Mecke* case involved a negligence action arising out of an automobile accident wherein the plaintiff had sought discovery of the existence and extent of the defendant's auto liability insurance. The court made a thorough review of the arguments on both sides of the question and then opted for the non-disclosure position. The court held that a liability insurance policy was not relevant to the issue of negligence nor would it lead to the discovery of admissible evidence pertaining to the issue of negligence; hence it was not discoverable. A strong dissent in *Mecke* urged a more liberal con-

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1. FED. R. CIV. P. 26 (b)(2) provides in pertinent part:

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment . . . .

2. See Davis, *Pretrial Discovery of Insurance Coverage*, 16 WAYNE L. REV. 1047-49, nn. 4 & 12, for a list of positions taken by the various state and federal courts prior to the 1970 amendment.

3. 189 Neb. 479, 203 N.W.2d 490 (1973).

4. 177 Neb. 584, 129 N.W.2d 573 (1964).

struction of the procedural rules, which would not limit discovery solely to information pertaining directly to the issues in a particular action.

### WALLS v. HORBACH

The *Walls* case arose on appeal from the District Court of Douglas County by defendants who were adjudged in contempt of court for refusing to answer pre-trial interrogatories requesting information regarding the terms of any liability insurance policies they owned. On appeal, the appellants relied on *Mecke* and presented two difficult issues to the supreme court: first, whether or not liability insurance coverage is discoverable at the pre-trial stage; second, whether a judicial decision permitting such discovery would usurp the legislative function.

The court began by noting that the relevant Nebraska procedural rules regarding discovery<sup>5</sup> are patterned after the pre-1970 Federal Rules, and that they have not since been amended. The court went on to indicate the general controversy over the discoverability of insurance coverage and recognized it had already decided the question in *Mecke*. Finally, the court announced the overruling of *Mecke*, quoting a treatise for its reasons:

(T)he question resolves itself to whether such information is relevant to the subject matter of the action . . . . (T)he requirement of relevancy . . . should be construed liberally and with common sense, rather than in terms of narrow legalism . . . . The insurance policy is unique in that it is virtually the only fact bearing on the collectability of the judgment which plaintiff must ascertain from defendant or not at all . . . . Knowledge as to defendant's insurance permits a more realistic appraisal of a case and . . . leads to settlement of cases which otherwise would go to trial. 2A Barron and Holtzoff . . . §647.1 pp. 80 to 82.<sup>6</sup>

The *Walls* holding, however, went a step farther than merely overruling *Mecke*. The court said, "(w)e interpret the statutory provisions by adopting the language of Rule 26 (b)(2), Federal Rules of Civil Procedure . . ." Hence, not only did the court overrule *Mecke*, but it also adopted Rule 26 (b)(2) of the Federal Rules, by judicial interpretation of Neb. Rev. Stat. §25-1267.02.

The dissent in *Walls* was based entirely upon the legislative usurpation issue and argued that the intervening silence on the part

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5. NEB. REV. STAT. §§ 25-1267.02 & 25-1267.38 (Reissue of 1964).

6. 189 Neb. at 480, 203 N.W.2d at 491.

7. 189 Neb. at 481, 203 N.W.2d at 491.

of the legislature indicated its assent to *Mecke*.<sup>8</sup> The majority, with some hesitancy, rejected this argument and based its justification on the constructive nature of stare decisis and the general authority of courts to overrule prior cases.

### DISCOVERY OF INSURANCE AGREEMENTS

In the overwhelming majority of cases, the issue regarding pre-trial insurance policy disclosure arises in personal injury actions (usually automobile collisions) wherein the plaintiff seeks to discover the defendant's liability coverage. The discovery is usually sought via depositions or interrogatories which inquire: whether the defendant has liability insurance applicable to the plaintiff's injuries, whether the insurance company is defending, the name of the insurance company, the policy limits, whether the insurance company is raising any policy defenses and the names of other insurance companies interested in the suit.<sup>9</sup> Occasionally, the insurance policy itself is sought via a motion for the production of documents.<sup>10</sup>

It should be noted that it is universally held that a liability insurance policy is discoverable when it is relevant to the *merits* or *issues* of an action. Thus, where it is disputed whether the defendant owned or controlled the vehicle or property involved in the suit,<sup>11</sup> or whether the defendant was an employee or was acting within the course of employment,<sup>12</sup> or whether a government or charitable institution waived its immunity from tort liability,<sup>13</sup> the insurance policy may aid in determining the issue and is discoverable. Also, it is undisputed that a liability insurance policy is discoverable after a defendant has been adjudged liable, as an aid in collection of damages.<sup>14</sup>

The controversy in the state courts is exemplified by the problem faced in *Walls*, *i.e.*, whether disclosure of insurance was relevant within the meaning of the Nebraska statute, which allows discovery of "any matter, not privileged, which is *relevant to the subject*

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8. 189 Neb. at 482, 203 N.W.2d at 492.

9. See, *e.g.*, *Tighe v. Shandel*, 46 F.R.D. 622 (W.D. Pa. 1968); *Cuellar v. Hamer* 45 F.R.D. 245 (W.D. Mich. 1968); *Slomberg v. Pennabaker*, 42 F.R.D. 8 (M.D. Pa. 1967) for general examples of insurance policy interrogatories.

10. Fed. R. Civ. P. 34.

11. *Hooker v. Rayteon Co.*, 31 F.R.D. 120 (S.D. Cal. 1962); *Novak v. Good Will Grange No. 127, Patrons of Husbandry*, 28 F.R.D. 394 (D. Conn. 1961); *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D. N.Y. 1948); *Martyn v. Braun*, 59 N.Y.S.2d 588 (1946).

12. *Plyler v. Gorden*, 25 F.R.D. 170 (D. N.J. 1960); *Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963).

13. *Christie v. Board of Regents of Univ. of Mich.*, 364 Mich. 202, 111 N.W.2d 30 (1961).

14. *Gallimore v. Dye*, 21 F.R.D. 283 (E.D. Ill. 1958).

matter involved in the pending action . . . (emphasis supplied)."<sup>15</sup> Disclosure jurisdictions interpret the phrase broadly to allow discovery of any information which is relevant to the total lawsuit:

The test is not whether the information sought would be admissible in evidence or relevant to the precise issues in the case, but whether it is "relevant to the subject matter" involved in the action.<sup>16</sup>

The major argument advanced by the proponents of the liberal view is that any information which aids in an early and quick determination of a suit is "relevant to the subject matter," i.e., discovery rules are designed to promote the prompt and just determination of lawsuits, and pre-trial disclosure of insurance policies will serve that purpose by enhancing trial preparation and increasing the frequency of out-of-court settlements. In addition, collectability of a judgment is a highly relevant matter to the plaintiff in deciding whether to settle or go to court.<sup>17</sup> In applying the liberal purpose of discovery to insurance policies, the reasoning can be summarized as follows:

(Discovery of insurance) will have a tendency to eliminate secrets, mysteries and surprises and should promote disposition of cases without trial and substantially just results in those cases which are tried.<sup>18</sup>

There have been no empirical studies to support these statements, however.

The other important argument in favor of the liberal construction of "relevancy" is based on financial responsibility laws or similar statutes making liability insurance compulsory, existing in almost all states today. The idea is that insurance does not exist for the protection of the insured but rather for the protection of the injured plaintiff. Hence, it is often said that the liability insurance policy "inures" to the benefit of the plaintiff, who thereby has a discoverable interest in the policy.<sup>19</sup> Although this line of reasoning is strictly

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15. NEB. REV. STAT. § 25-1267.02 (Reissue of 1964).

16. *Johanek v. Aberle*, 27 F.R.D., 272, 280 (D. Mont. 1961).

17. *Deveau v. Millis Transp. Co.*, 43 F.R.D. 505 (D. Conn. 1967); *Ellis v. Gilbert*, 19 Utah2d 189, 429 P.2d 39 (1967).

18. *Lucas v. District Ct. of Pueblo*, 140 Colo. 510, \_\_\_\_\_, 345 P.2d 1064, 1070-71 (1959). See *Clauss v. Danker*, 264 F. Supp. 246 (S.D. N.Y. 1967); *Cook v. Welty*, 253 F. Supp. 875 (D.C. 1966).

19. *Ash v. Farwell*, 37 F.R.D. 553 (D. Kan. 1965); *Brackett v. Woodall Food Prods.* 12 F.R.D. 4 (E.D. Tenn. 1951); *Lucas v. District Ct. of Pueblo*, 140 Colo. 510, 345 P.2d 1064; *Maddox v. Grauman*, 265 S.W.2d 939 (Ky. 1954); see also *Superior Ins. Co. v. Superior Ct.*, 37 Cal.2d 749, 235 P.2d 833 (1951), where the California supreme court held that an automobile liability insurance policy is a contract between the insurer and the injured plaintiff.

applicable only to automobile liability insurance, a similar argument could be made in regard to products liability insurance.<sup>20</sup>

Non-disclosure jurisdictions construe the phrase "relevant to the subject matter" more strictly and limit discovery to information pertaining to the issues in the suit: "There must be some connection between the information sought and the action itself before it (the insurance policy) becomes discoverable."<sup>21</sup> The principal argument in favor of this view is that the discovery rules are designed to permit disclosure of admissible evidence or information leading to admissible evidence, and that a liability insurance policy is neither.

It is quite often argued further that liability insurance is not relevant to the subject matter because (1) it will not aid in determining liability or damages, the two basic issues in every case, and (2) discovery rules were not intended to aid in out-of-court settlements by disclosing a defendant's ability to pay.<sup>22</sup> Some courts have even suggested that pre-trial disclosure of policy limits would hamper effective settlements.<sup>23</sup> It is argued that if the defendant carries an unusually high amount of insurance, the plaintiff will be less willing to accept a reasonable offer.

The Nebraska supreme court solved the problem by opting for the liberal view of relevancy, and gave two reasons — first, the policy is the only fact bearing on collectability of the judgment which the plaintiff must acquire from the defendant or not at all; second, it aids in promoting settlements.<sup>24</sup>

### LEGISLATIVE USURPATION

The second problem posed in the *Walls* case was the position taken by the dissent that legislative silence indicated approval of *Mecke* and that therefore it was not within the province of the court to make rules inconsistent with the legislative intent. The majority opinion indicated that this argument was "troublesome," but that "(w)e are nevertheless not persuaded."<sup>25</sup>

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20. It could be argued that the doctrine of strict liability in tort, which is now almost universally applied in products liability cases, evidences what might be called a "judicially-created financial responsibility law" which in effect makes liability insurance compulsory upon manufacturers for the protection of the consumer.

21. *Jeppesen v. Swanson*, 243 Minn. 547, \_\_\_\_\_, 68 N.W.2d 649, 658 (1955).

22. *Cooper v. Stender*, 30 F.R.D. 389 (E.D. Tenn. 1962); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955).

23. *Berry v. Haynes*, 41 F.R.D. 243 (S.D. Fla. 1966); *Rosenberger v. Vallejo*, 30 F.R.D. 352 (W.D. Pa. 1962); *Carman v. Fishel*, 418 P.2d 963 (Okla. 1966).

24. 189 Neb. at 480-81, 203 N.W.2d at 491.

25. 189 Neb. at 481, 203 N.W.2d at 492.

The theory of legislative silence in terms of the discoverability of insurance policies is not without merit. The usual "if-the-legislature-was-dissatisfied-it-would-have-acted" argument is bolstered by the fact that Nebraska's discovery rules (as opposed to its other procedural rules) are patterned after the federal discovery rules. The conclusion might well be that when Rule 26 (b) was amended in 1970 so as to allow disclosure, it would only be natural for the Nebraska legislature to follow with a similar enactment, unless the *Mecke* ruling met with its approval.<sup>26</sup>

But the legislative silence theory works both ways. As was noted by the United States Supreme Court:

(t)he silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.<sup>27</sup>

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(t)o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.<sup>28</sup>

With respect to the doctrine of stare decisis, the *Walls* court cited the last above-mentioned case, which stated that it is "a principle of policy and not a mechanical formula,"<sup>29</sup> which the Nebraska court apparently felt should not preclude it from departing from *Mecke* once that decision proved unsound. So in response to the legislative usurpation argument, the inference was that the court was not interfering with the legislative function, but rather it was doing no more than exercising its judicial duty by overruling a previously-decided case.

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26. It must be noted at this point that there has not been total non-action on the part of the Nebraska Legislature on the question of insurance policy discovery. In 1969 a bill was introduced in the Unicameral which proposed an amendment to § 25-1267.39 in order "to provide for the production of insurance policies and the copying thereof." L.B. 807, 1 NEB. LEGIS. J., 80th Sess. 353 (1969) Section 25-1267.39, which is similar to Rule 34 of the Federal Rules, provides for pre-trial discovery and production of documents upon a showing of good cause. The bill was referred to committee and later indefinitely postponed. 1. NEB. LEGIS. J., 80th Sess. 1321 (1969). It might be argued that this bill having died in committee is evidence of legislative action in favor of the *Mecke* rule. This argument, however, is greatly diluted by the fact that § 25-1267.39 is quite different from § 25-1267.02, just as Rule 34 is different from Rule 26. Moreover, a similar and much more persuasive argument was nonetheless rejected by the Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

27. *Girouard v. United States*, 328 U.S. 61, 70 (1946).

28. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

29. *Id.*

## RAMIFICATIONS OF WALLS

## THE SCOPE OF INSURANCE DISCOVERY

As was noted earlier, the *Walls* decision went a bit further than overruling *Mecke*. The court construed "relevant to the subject matter" as required in section 25-1267.02 so as to include verbatim the language of Rule 26 (b)(2) of the Federal Rules.<sup>30</sup>

The action of the Nebraska supreme court in adopting Rule 26 (b)(2) in toto is emphasized here for the purpose of distinguishing the state of the law in Nebraska from that of other states which have by judicial decision permitted pre-trial insurance discovery. Many of these states have discovery rules similar to Rule 26, but because the cases involving insurance discovery arose before promulgation of Federal Rule 26 (b)(2), the decisions have not adopted anything similar to Rule 26 (b)(2).

Therefore, while Nebraska has now joined the ranks of the states permitting insurance discovery, it has done so in a way which sets it apart from these other states, and requires examination of the Federal Rule to determine the current Nebraska law.

First, the "existence and contents" of the policy may be discovered. This means that disclosure may be had of the entire policy, not just the limits or extent of coverage. While this rarely poses any problems, it should be remembered that there are occasions where the *terms* of the policy might be important to a plaintiff's attorney regarding any policy defenses. Had *Walls* merely overruled *Mecke*, the provisions of the policy other than the limits would not necessarily be discoverable.

Second, the Rule applies only to persons "carrying on an insurance business." There is no question that the two general types of insurance organizations (stock and mutual companies) are subject to the Rule. The language was intended to exclude the ordinary business concern that enters into a contract of indemnification with another concern.<sup>31</sup>

Third, the Rule refers to insurance agreements under which the insurer "may be liable" to pay or reimburse for payment of a judgment, thus allowing discovery of insurance coverage regardless of whether the insurer is contesting liability.

Fourth, the language of Rule 26 (b)(2) allows disclosure of "any insurance agreement" under which an insurance company may be liable "to satisfy part or all of a judgment," including obligations

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30. It would have sufficed to hold that a liability insurance policy is relevant to the subject matter of the action and is therefore subject to pre-trial discovery.

31. Advisory Committee Note to Rule 26 (b)(2), 43 F.R.D. 228, 230 (1968).

"to indemnify or reimburse for payments made to satisfy the judgment." This is especially important because it encompasses not only liability insurance but also indemnity insurance. Under a liability policy, the insurer is required to pay the injured party even though the insured has not yet suffered any loss, so as to shield the insured from being required to pay the claim for which he is liable; under an indemnity policy, the insurer is required to make payment only after the insured has suffered an actual loss.<sup>32</sup> So Rule 26 (b)(2) allows discovery of an indemnity insurance policy, even though under such a policy (absent special provisions to the contrary), the injured plaintiff would never have an action against the insurer and the insurer would never be liable to the plaintiff.<sup>33</sup> Overruling *Mecke* to allow discovery of liability insurance would not necessarily have included indemnity insurance. This is especially true in view of one justification often made for permitting discovery of liability insurance — that it is peculiar among the defendant's assets because it exists solely for the benefit of the injured plaintiff.

Finally, the language of Rule 26 (b)(2) allows discovery of any insurance policies under which an insurance company may be liable to satisfy or reimburse for "part or all" of a judgment entered in the action. The Rule therefore encompasses instances where a defendant has multiple insurance coverage, which might be in the form of concurrent insurance, double insurance,<sup>34</sup> coinsurance<sup>35</sup> or excess insurance.

#### DISCLOSURE OF OTHER ASSETS

One of the most persistent arguments advanced in opposition to pre-trial disclosure of insurance coverage is that it would logically lead to disclosure of a defendant's other financial assets, which has traditionally been prohibited on the theory that allowing discovery of these assets would be an undue invasion of the defendant's privacy.<sup>36</sup>

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32. 11 G. COUCH, CYCLOPEDIA OF INSURANCE LAW, § 44:4 at 522 (2d ed. 1963).

33. The existence and extent of indemnity insurance would often be just as important to a plaintiff as would liability insurance, because a defendant will be much more willing to pay a reasonable out-of-court settlement if he knows that he will later be reimbursed by the insurance company. However, in the case of a judgment-proof defendant, the existence of indemnity insurance would be of no avail to the plaintiff whereas the existence of liability insurance would still be important.

34. 9 G. COUCH, CYCLOPEDIA OF INSURANCE LAW, § 37:1292 at 14 (2d ed. 1963).

35. *Id.*, § 37:1374 at 77.

36. *State ex rel. Hersman v. District Ct.* 142 Mont. 139, 381 P.2d 709 (1963); *Jeppesen v. Swanson*, 243 Minn. 547, 68 N.W.2d 649 (1955); *see also Brooks v. Owens*, 97 So.2d 693 (Fla. 1957); *Gold v. Jacobi*, 52 Misc.2d 491, 276 N.Y.S.2d 309 (1966).

On the other hand, the proponents of insurance discovery draw a distinction based on the unique nature of liability insurance — *i.e.*, its only value to the defendant is to satisfy the plaintiff's claim; and it is not a confidential agreement between the defendant and the insurer, but rather it embraces the interests of the plaintiff as well.<sup>37</sup>

The peculiarities of an insurance agreement are well taken. However, much of the reasoning which leads to discovery of insurance also leads to discovery of the defendant's other assets. If an insurance policy is "relevant to the subject matter" of the action due to a liberal interpretation which encompasses any information germane to settlement or trial preparation, then other financial assets which are equally germane to settlement or trial preparation are equally relevant. If the collectability of a judgment is relevant for the plaintiff at the pre-trial level, then a defendant's bank statement is no less relevant than his insurance policy.

One argument which is frequently made is that discovery of an insurance policy does not involve a significant invasion of privacy, whereas discovery of other assets does. But is it really an "invasion" of a defendant's "privacy" to allow pre-trial discovery of his financial assets? In jurisdictions which allow punitive damages, the courts are uniformly willing to compel disclosure of a defendant's financial assets.<sup>38</sup> The financial status of a plaintiff also has been the subject of discovery in cases where the plaintiff alleged damages in the loss of earnings, and the defendant sought disclosure of his income tax returns.<sup>39</sup> Is the "privacy" of a defendant less sacred when he is sued for punitive damages than it is when he is sued for compensatory damages? Is a plaintiff's "privacy" less valuable when he alleges damages in loss of earnings? The answer seems to be yes. Indeed, the cases wherein discovery of assets is allowed are based on the fact that the financial status of the particular plaintiff or defendant is relevant to the issues in the action.<sup>40</sup>

Of course, any intrusion into *anybody's* confidential affairs is in some sense an "invasion" of his "privacy." In certain circumstances, however, such intrusions are deemed to be justified. So the real

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37. *Johanek v. Aberle*, 27 F.R.D. 272 (D. Mont. 1961); *Maddox v. Grauman*, 265 S.W.2d 939 (Ky. 1954).

38. *Lewis v. Moody*, 195 So.2d 260 (Fla. 1967); *Coy v. Supreme Ct.*, 23 Cal. Rptr. 393, 373 P.2d 457 (1962); *Gierman v. Toman*, 77 N.J. Super. 18, 185 A.2d 241 (1962).

39. *Eaddy v. Little*, 235 F. Supp. 1021 (E.D. S.C. 1964); *Bush v. Chicago, Burlington & Quincy R.R.*, 22 F.R.D. 188 (D. Neb. 1958).

40. In punitive damages cases, the defendant's financial status is relevant in determining how much of an award will truly be punitive. In loss-of-earnings cases, the plaintiff's income tax return is relevant in determining what his actual losses amounted to.

question is: under what circumstances is an "invasion of privacy" warranted? In punitive-damages and loss-of-earnings cases, discovery of the litigant's financial assets is justified by virtue of the fact that they are pertinent to a specific issue in the action.

But the liberal view in regard to discovery rules is that discovery is not limited to information pertaining to the issues in an action, but encompasses anything relevant to the total lawsuit. A defendant's financial assets are no less "relevant to the subject matter" than is his insurance policy. If financial assets are *not* sufficiently "private" when they are relevant to specific issues in a lawsuit, why should they be considered sufficiently "private" when they are relevant to the subject matter of the lawsuit? In *Walls v. Horbach*, the Nebraska supreme court affirmed the liberal view with respect to discovery of insurance policies. In light of that view, there seems to be no rational basis for limiting disclosure only to insurance policies. Since financial assets are a significant factor in determining the collectability of a judgment and are therefore relevant to the subject matter of the action, they should be subject to pre-trial discovery in all cases.<sup>41</sup>

Whether Nebraska will take the next step beyond *Walls* to allow discovery of financial status is uncertain. It is clear that nearly all of the decisions regarding insurance discovery to date — both pro and con — have indicated in one way or another that pre-trial disclosure of other financial assets would or should not be allowed. The only case to deal with the issue directly is *Doak v. Superior Court*,<sup>42</sup> wherein the California supreme court flatly rejected a plaintiff's attempt to obtain pre-trial discovery of the defendant's financial assets in a wrongful death action, and stated that to allow discovery could be an invasion of privacy. However, although California does allow discovery of liability insurance, it takes a stricter view toward insurance discovery than does Nebraska.<sup>43</sup>

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41. It has been suggested that to allow discovery of assets other than an insurance policy might lead to fraudulent suits instituted solely for the purpose of finding out about a party's financial status. Such an attempt would rarely prove successful, however, because the defending party could always avail himself of a protective order.

42. 257 Cal. App.2d 825, 65 Cal. Rptr. 193 (1968).

43. California is one of those states that allows insurance discovery via judicial construction. The leading case is *Superior Ins. Co. v. Superior Ct.* 37 Cal.2d 749, 235 P.2d 833 (1951); see also *Laddon v. Superior Ct.* 167 Cal. App.2d 391, 334 P.2d 638 (1959), where it is held that a liability insurance policy is in effect a contract between the insurer and the injured plaintiff. By virtue of this "contract" relation, it is held that liability insurance is relevant to the subject matter of the action. This rationale is based on CAL. INS. CODE § 11580 (West 1972), which requires all liability insurance policies to contain provisions allowing the plaintiff to bring an action directly against the insurer after having won a judgment against the insured. Query whether any type of insurance other than liability could even be "relevant to the subject matter" under this thinking. Probably not. The viewpoint taken by Nebraska in *Walls* is certainly the more liberal view. The *Doak* case, it might be

The *Walls* decision itself gives limited assistance. For example, of the two reasons given by the *Walls* court for permitting insurance discovery, the unique nature of the policy and the need for promotion of settlements, the former would be incompatible with extension of the rule to other assets, while the latter would support extension.

However, it must be noted that both the majority<sup>44</sup> and the dissent<sup>45</sup> in *Mecke* indicate that discovery of other assets should not be permitted. But the *Walls* opinion was curiously silent on the matter. So the issue does indeed seem to be left open for further consideration.

### CONCLUSION

As a result of the decision in *Walls v. Horbach*, insurance policies are now subject to pre-trial discovery in the state courts of Nebraska. The effect of such a rule is that it removes one of the obstacles to settlement negotiation and therefore enhances the possibility of a settlement prior to trial.

But the real importance of *Walls* lies in the technique employed by the court to overrule *Mecke v. Bahr*. The court interpreted section 25-1267.02 by adopting Rule 26 (b)(2) of the Federal Rules of Civil Procedure. So not only is liability insurance discoverable in Nebraska, but the other types of insurance encompassed by the Rule are also discoverable. The *Walls* decision goes a step beyond those decisions in other states whose holdings are limited to liability insurance discovery. The judicial technique in *Walls* also opens the door to the possibility that other amendments to the Federal Rules will be adopted in toto by the court, at least with respect to the rules of discovery (since Nebraska's discovery procedure is patterned after the Federal Rules). And finally, by adopting Rule 26 (b)(2) the court announced its adherence to the liberal view toward construing what is "relevant to the subject matter" of an action. To be consistent with that view, financial assets other than an insurance policy should be subject to pre-trial discovery — financial resources are just as relevant to the subject matter as is an insurance policy, and they do not gain a greater aura of "privacy" simply because a plaintiff happens to allege something other than punitive or loss-of-earnings damages. Whether or not the Nebraska supreme court will take that position is speculative. But it is significant that: (1) while nine years ago the court firmly refused to allow dis-

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argued, represents a stricter view regarding discovery of assets than is necessary in Nebraska.

44. 177 Neb. at 590, 129 N.W.2d at 576-77.

45. *Id.* at 595, 129 N.W.2d at 579.

covery of liability insurance, the *Walls* decision not only allows such discovery but also adopts Rule 26 (b)(2); and (2) although the *Mecke* decision reflected the unanimous opinion that other assets should not be discoverable, the court in *Walls* chose not to discuss the question. So without a doubt it can be said that the decision in *Walls v. Horbach* has not foreclosed the opportunity to hold that other financial assets are discoverable at the pre-trial level. And in light of the court's new attitude toward discovery rules as announced in *Walls*, the possibility of such a holding is not remote.

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