Tuller v. Shallcross: Pretrial Discovery of Automobile Liability Insurance Coverage in Oklahoma

Kevin Wayne McDonald

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol32/iss1/6

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.
**TULLER v. SHALLCROSS: PRETRIAL DISCOVERY OF AUTOMOBILE LIABILITY INSURANCE COVERAGE IN OKLAHOMA**

I. INTRODUCTION

Pretrial discovery of the existence and contents of insurance agreements has been statutorily allowed in federal courts for the past twenty-five years. Many states have adopted the same or a similar rule, either by statute or judicially. Some states, however, do not permit such discovery.

Prior to 1994, Oklahoma was among the states denying pretrial discovery of the existence and limits of automobile insurance coverage. Oklahoma’s discovery code limited discovery to relevant matters that would be either admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence. Recently, however, the Oklahoma Supreme Court in *Tuller v. Shallcross* held that discovery of the existence and limits of automobile liability insurance is now allowable in some instances. In reaching its decision, the court relied on the text of Oklahoma’s mandatory automobile insurance law as well as policy considerations.

The court’s decision was expressly limited to automobile policies mandated by the Compulsory Liability Insurance Law, thus allowing discovery in far fewer situations than the federal rule. Further, the impact of the *Tuller* decision is somewhat unclear until it is determined whether the holding will be interpreted narrowly or broadly; whether discovery is to be extended to all

---

1. See Fed. R. Civ. P. 26(a)(1)(D). Such discovery includes the insurance policy itself and is to be provided “without awaiting a discovery request” from the opposing party. See id.
7. See id. at 485.
8. See id. at 483-84.
10. The federal rule allows for discovery of any insurance agreement that could make any person in the insurance business liable for part or all of a judgment in the action. Fed. R. Civ. P. 26(a)(1)(D).
liability insurance policies, or merely those relating to automobiles. However, *Tuller* represents a step in the right direction for Oklahoma discovery law.

II. *TULLER V. SHALLCROSS*

A. The Facts

Larry Allen Tuller and David Ray Jehlicka were involved in an automobile accident in which Tuller was injured. Tuller sued Jehlicka to recover damages for personal injury. Tuller’s uninsured motorist (UM) carrier intervened on the basis that it would be liable to satisfy any judgment in excess of Jehlicka’s policy coverage. Jehlicka sought discovery of the limits of Jehlicka’s liability insurance coverage; Jehlicka refused to produce the information. Tuller filed a motion with the district court to compel discovery. Oklahoma District Court Judge Deborah Shallcross denied the motion to compel. Tuller then brought an original action in the Supreme Court of Oklahoma seeking a writ of mandamus directing Judge Shallcross to order Jehlicka to produce the information.

B. The Issue

The Oklahoma Supreme Court framed the issue as “whether automobile liability insurance policy information is discoverable under the Oklahoma Discovery Code.” In making its decision, the court examined its prior holdings on the subject in the light of subsequent legislation and policy considerations.

III. LAW PRIOR TO TULLER

A. Federal Courts

Prior to the 1970 amendment to Federal Rule of Civil Procedure 26, federal courts were split on the issue of whether to allow pretrial discovery of insurance coverage. Commentators, however, tended to prefer disclosure, and

---

11. *See Tuller*, 886 P.2d at 482.
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.* This is how the discovery of liability insurance coverage issue most frequently reaches the courts.
18. *See id.*
21. *See id.* at 483-84.
both major federal procedure treatises favored disclosure. The 1970 amendment to Rule 26 resolved the issue in favor of discovery:

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.

Such information was not to be made admissible simply because it was discoverable, however. This rule is now found in Rule 26(a)(1)(D) with the same principles being applied, except that now parties are required to disclose such information without awaiting a discovery request.

The federal rule explicitly provides that courts may disregard the provisions of Rule 26. In Oklahoma, the Eastern District has opted out with respect to some of the provisions, but not with respect to insurance policy disclosure. The Northern District has specifically adopted Federal Rule 26(a)(1)(D) and provides that "full and complete copies of such insurance agreements shall be served on all other parties along with the disclosing party's answer, reply, or motion filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure." The Western District has provided a local rule that is quite similar to Rule 26(a)(1)(D) of the Federal Rules:


23. See Peter A. Davis, Pretrial Discovery of Insurance Coverage, 16 WAYNE L. REV. 1047, 1049 (1970). But see Joseph N. Fournier, Pretrial Discovery of Insurance Coverage and Limits, 28 FORDHAM. L. REV. 215, 231 (1959) (arguing that a defendant's liability insurance coverage should not be subject to discovery when it is not independently admissible and does not have a significant bearing on any other issue in the case).


26. See id. The Federal Rules of Evidence provide that:

evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411.

27. See FED. R. CIV. P. 26(a)(1)(D).

28. See FED. R. CIV. P. 26(a)(1). The rule provides that the disclosures in Rule 26(a)(1) shall be made without awaiting a discovery request "except to the extent otherwise stipulated or directed by . . . local rule." Id.


30. See id.


33. See W.D. OKLA. Local Rule 1.5 (West Supp. 1996). This rule provides that "[l]ocal Rule 17(C) governing voluntary disclosure shall be applied in lieu of FED. R. CIV. P. 26(a)(1)." Id.
Prior to the first status and scheduling conference, each party shall, without awaiting a discovery request, disclose to all other parties:
(c) the existence and content of any insurance agreement under which any person or entity 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.\(^{34}\)

The Advisory Committee for the Federal Rules of Civil Procedure discussed certain policy reasons for allowing disclosure.\(^{35}\) First, "disclosure enables counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."\(^{36}\) Second, in some cases settlement will be aided, thus avoiding unnecessary and lengthy litigation.\(^{37}\)

**B. States Other Than Oklahoma**

Several states allow discovery of liability insurance by statute.\(^{38}\) Many of these statutes duplicate the federal rule exactly.\(^{39}\) These states allow broad discovery of liability insurance, regardless of the object or property insured.\(^{40}\)

In states without specific statutory authorization of discovery, the issue is determined by the courts.\(^{41}\) The issue is most often raised as in *Tuller*.\(^{42}\) Typically, the plaintiff, wishing to avoid a costly lawsuit against a potentially judgment proof defendant, serves interrogatories on the defendant.\(^{43}\) The interrogatories usually require information concerning the existence and limits of any coverage applicable to the injuries alleged.\(^{44}\) The courts normally hear the is-

---

36. See id. at 499.
37. See id. The Advisory Committee also distinguished liability insurance policies from other assets or information concerning the financial status of defendants:
   The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.
   Id.
38. See supra note 2.
41. See Davis, supra note 23, at 1050-55.
42. See id. at 1052-53.
43. See id. at 1052. Interrogatories are necessary when the insurance policy is not "voluntarily exhibited by the defendant" and an informal request to defendant's attorney to produce the information fails, which will usually be the case. Id.
44. See id. Other subjects occasionally inquired into by the interrogatories include "whether the insurance company is defending the action, and, if so, the name and address of the insurance company," whether the insurer is claiming the policy does not cover the incident, whether any other insurers may possibly be involved, and if so, the name and address of any other such insurance carrier. See id. See also Marks v. Thompson, 192 S.E.2d 311, 312 (N.C. 1972); Cuellar v. Hamer, 45 F.R.D. 245, 246 (W.D. Mich. 1968); Tighe v. Shandel, 46 F.R.D. 622, 623-24 (W.D. Pa. 1968); Slomberg v. Pennabaker, 42 F.R.D. 8, 9-10 (M.D. Pa. 1967); Harley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965) (typical questions posed in interrogatories); Maddox v. Grauman, 265 S.W.2d 939, 940 (Ky. 1954) (typical questions posed to a defendant during a deposition).
sue upon plaintiff’s motion to compel discovery or defendant’s objection to the
discovery request.45

State courts are split on the issue of whether to grant or deny discovery in
the absence of explicit statutory authority. To justify its decision, a court nor-
really looks first to the language of the discovery statutes,46 then uses policy
considerations to bolster its opinion.47

C. Oklahoma

Prior to Tuller, discovery of liability insurance information was not al-
lowed in Oklahoma. In Carman v. Fishe!,48 the Oklahoma Supreme Court held
that interrogatories concerning liability insurance were not within the scope of
permissible inquiry.49 The court held that the discovery statutes never intended
such discovery.50 The court specifically rejected the theory that since settle-
ment might be aided, disclosure should be permitted, arguing that under this
view, “almost any information could be forced out of either side to a lawsuit if
it would somehow contribute to the clearing of the court’s calendar.”51

In Hall v. Paul,52 the Oklahoma Supreme Court considered whether cer-
tain provisions of the discovery statutes53 modified Carman’s prohibition
against liability insurance discovery.54 In holding that they did not, the court
reaffirmed that discovery was limited to relevant matters admissible at trial or
reasonably calculated to disclose admissible evidence.55 The court found that
liability insurance did not come within the scope of permissible discovery and
thus could not be required to be disclosed.56

In 1992, the Oklahoma legislature adopted the new Oklahoma Discovery
Code.57 This current version of the Oklahoma Discovery Code provides that
information “regarding any matter, not privileged, which is relevant to the sub-
ject matter involved in the pending action” is discoverable.58 Further “[i]t is
not a ground for objection that the information sought will be inadmissible at
the trial if the information sought appears reasonably calculated to lead to the
discovery of admissible evidence.”59 As originally introduced in the State Sen-
ate, the Oklahoma Discovery Code specifically authorized discovery of liability

45. See Davis, supra note 23, at 1053.
46. For example, the court in Tuller looked first to the language of the Oklahoma Discovery Code, and
only then utilized policy considerations. See Tuller v. Shallcross, 886 P.2d 481, 482-84 (Okla. 1994).
47. See Davis, supra note 23, at 1053-55.
49. See Carman, 418 P.2d at 975.
50. See id. at 974-75.
51. See id. at 974.
54. See Hall, 549 P.2d at 344.
55. See id.
56. See id.
58. Id. § 3226.
59. Id. This language is typical of many discovery statutes.
insurance by a rule identical to the federal rule.\textsuperscript{60} The House of Representatives deleted the provision, however, and enacted the current version which contains no such provision for discovery.\textsuperscript{61} Subsequent legislative efforts to restore the deleted provision to the Discovery Code failed.\textsuperscript{62}

IV. THE TULLER DECISION

A. Holding

The Tuller decision "overrule[d] Carman and Hall to the extent that they may be construed to hold that automobile liability insurance information is not discoverable."\textsuperscript{63} The court in Tuller, however, limited the scope of discoverable insurance policies by interpreting the Oklahoma Discovery Code to allow discovery only when the policy is issued under the Compulsory Liability Insurance Law.\textsuperscript{64} The holding of the court was that discovery is permitted of:

the existence and contents of any liability insurance agreement issued in accordance with the Compulsory Liability Insurance Law, regardless of policy limits, in any action against an insured under such a policy in 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. Information concerning the insurance agreement, however, shall not by reason of disclosure be admissible in evidence at trial.\textsuperscript{65}

The court went on to "direct the trial court to allow discovery of [the defendant's] automobile liability insurance agreement in accordance with this opinion."\textsuperscript{66}

Although construing the state's discovery code, the court's holding closely follows the federal rule, with the exception of its express limitation to the source of the policy. While the federal rule permits discovery of any liability insurance agreement, the court in Tuller specifically limited its holding to automobile insurance policies mandated by the Compulsory Liability Insurance Law.\textsuperscript{67} The court passed on "any decision as to the discoverability of other liability policies."\textsuperscript{68}

\textsuperscript{61} See Adams, supra note 60, at 492.
\textsuperscript{62} See id. at 492-93.
\textsuperscript{63} Tuller v. Shallcross, 886 P.2d 481, 485 (Okla. 1994).
\textsuperscript{64} See id. at 484. This law mandates automobile liability insurance coverage of at least $10,000. See OKLA. STAT. tit. 47, § 7-204(a) (1991). Uninsured motorist (UM) coverage is also statutorily required in Oklahoma. See OKLA. STAT. tit. 36, § 3636 (Supp. 1995).
\textsuperscript{65} Tuller, 886 P.2d at 485 (citation omitted).
\textsuperscript{66} Id.
\textsuperscript{67} See id.
\textsuperscript{68} Id. at 484.
B. Reasoning

The court based its holding in Tuller on the existence of the state Compulsory Liability Insurance Law and policy reasons. First, the court observed that many courts denying discovery of insurance information have done so on the basis that to do so “was tantamount to compelling [the defendant] to furnish the plaintiff with ‘full information as to his financial resources.’” This concern is moot in Oklahoma because of the Compulsory Liability Insurance Law, which mandates automobile liability insurance. Thus, the court held, the insured’s right to privacy can not be said to be violated by disclosure.

The court further stated that since a liability insurance policy exists only to protect other assets, disclosure of the coverage “does not disclose the private financial status of the insured, but merely reveals the extent of the insured’s protection, in the very suit in which discovery is sought.” This argument for disclosure is not based upon the Compulsory Liability Insurance Law; therefore it would be equally applicable to cases involving liability insurance policies unrelated to automobiles. The court further observed that in virtually all cases, the insurance company, not the defendant, is the party objecting to the discovery of the policy information.

The court’s discussion of policy considerations indicates its preference for disclosure. First, the court discussed and dismissed the argument that disclosure would violate the privacy rights of the insured. Second, the court noted that policy information is “information necessary to produce results fair to both sides.” Under this view, denying discovery allows unwarranted tactical maneuvers; it introduces “an undesirable element of hide and seek into the process.”

Minimizing bad faith litigation against uninsured motorist (UM) carriers was another concern of the Tuller court. Citing the case of Buzzard v. Farmers Insurance Co. as an example, the court observed that in nearly every lawsuit arising from a serious automobile accident, the possibility of such bad faith litigation arises. Allowing discovery of automobile liability policies would only help to prevent this problem. Additionally, the court considered whether the legislature had implicitly opposed discovery of liability insurance, finding that it had not. Finally, the court noted that other courts have allowed disclo-

69. See id. at 483-84.
70. Id. at 483 (quoting McClure v. Boeger, 105 F. Supp. 612, 613 (E.D. Pa. 1952)).
71. See OKLA. STAT. tit. 47, §§ 7-600 to 7-609 (Supp. 1995).
72. See Tuller, 886 P.2d at 484.
73. Id.
74. See id. This is because, in most automobile accident cases, the insurance company is the real party in interest. See id. The “real party in interest” is “the one who is actually and substantially interested” in the subject matter of the lawsuit and thus controls the litigation. BLACK’S LAW DICTIONARY 1264 (6th ed. 1990).
75. See Tuller, 886 P.2d at 483-84.
76. Id. at 484.
77. Id.
79. See Tuller, 886 P.2d at 484.
80. See id.
sure of insurance policy information in the absence of an explicit statutory authorization.81

V. ANALYSIS

A. Policy

The policy arguments most frequently relied upon by courts in granting or denying discovery of liability insurance coverage are "relevance, settlement incentive, and the so-called 'asset theory' for denying disclosure."82 Those given for granting discovery include: the just and efficient determination of actions;83 open and frank disclosure,84 the state's requirement of automobile liability insurance;85 and other reasons not as persuasive.86 Other grounds commonly given for denying discovery include the lack of any such requirement under state discovery rules;87 the fact that such information is not admissible at trial, nor will it lead to the discovery of admissible evidence;88 and a variety of other less persuasive reasons.89

Discovery is only permitted when the information at issue is relevant to the subject matter of the lawsuit.90 Some courts have confused the subject matter with the issues in the lawsuit, leading those courts to conclude that policy information should not be discoverable unless the insurance coverage itself is at issue in the lawsuit.91 However, this is not the appropriate inquiry. The subject matter of a case is a much broader concept than the issues to be tried. Courts should liberally construe the relevance requirement to allow discovery in the case of liability insurance. It is unrealistic to claim that a defendant's liability insurance coverage is irrelevant to the subject matter of a lawsuit.92

81. See id.
82. See Davis, supra note 23, at 1055.
86. These include "uniformity of decision will discourage forum shopping; the plaintiff has a third-party beneficiary interest in the policy giving him a 'discoverable interest'; or because the provisions of the insurance policy may themselves be relevant to proof of liability." Davis, supra note 23, at 1054 (citations omitted).
89. See Davis, supra note 23, at 1054-55.
90. See Fleming James, Jr. and Geoffrey C. Hazard, Jr., CIVIL PROCEDURE § 5.8 (3rd ed. 1985). "It is not an objection that the matter [sought to be discovered] is irrelevant to the issues under the pleadings as they stand so long as it is relevant to the 'subject matter involved in the pending action.'" Id.
92. See Davis, supra note 23, at 1056.
[Anything aiding] the early and easy determination of the dispute between the parties with justice to both sides,... whether disclosure of policy limits or the disgorging of evidence, is relevant to the subject matter. A paper judgment is meaningless; each side is concerned with money, and damages.
Our rules of civil procedure are structured to enhance the possibility of settlement. One of the main goals behind the pretrial conference is to facilitate settlement.93 This is quite obvious as declining a settlement offer and receiving a lower award at trial results in monetary penalties.94 In addition, the ABA Code of Professional Responsibility states that the primary purpose of the "civil adjudicative process [is the] settlement of disputes between parties."95

Whether and to what extent a defendant is covered by liability insurance is a relevant factor to both sides in settlement negotiations. If policy limits are low, the plaintiff will be more likely to settle for a lower amount, rather than proceeding to trial to obtain a judgment which can never be collected. It has been argued that the reverse is possible; if limits are high, settlement may actually be deterred.96 However, this seems to be an unlikely possibility in light of provisions such as those discussed above which sanction parties who obtain a judgment less than was offered in settlement negotiations.

Another settlement-based argument for denying discovery is that disclosure gives the plaintiff an unfair advantage.97 "Uncertainty in one's opponent" is advantageous in settlement negotiations, but hardly presents a case for judicial protection by denial of discovery of liability insurance.98 "Just as the defendant knows the amount of plaintiff's claim and can compel the plaintiff to itemize his damages, the plaintiff should know whether, if he proves his case, the defendant will be collectable."99 The true effect of discovery of liability coverage is to level the playing field between the parties during settlement negotiations.100 The desirable result is "that settlements will be based more upon a
fair evaluation of plaintiff’s claim and less upon ignorant conjecture concerning the depth of defendant’s pocket.”

Another related argument is the theory that allowing discovery of policy limits promotes greed among plaintiffs’ attorneys. According to this view, requiring disclosure will assist plaintiffs’ attorneys in “the predatory concept of law practice.” This argument, however, is only valid if one assumes that lawyers will necessarily neglect their duty to the court. Attorneys have a general duty to serve the public, not simply their client. Further, attorneys have a duty to the court not to abuse the justice system. Attorneys also have responsibilities specifically applicable to this case; to limit the amount sought in the complaint to a reasonably supportable amount, and a qualified duty to the defendant on the part of the insurance company’s attorney to settle within the policy limits. Although some attorneys may neglect their responsibilities to the administration of justice and to the public, this neglect cannot be assumed of all or a large number of plaintiffs’ attorneys. Thus, all plaintiffs should not be punished by unreasonably restricting the scope of discovery. The mere fact that some attorneys may abuse the system does not outweigh the compelling arguments for free disclosure of information.

Yet another premise for denying disclosure of liability insurance coverage is the “[a]sset [t]heory.” The underpinning of this theory is that “[t]he assets of a defendant are generally not discoverable during the pretrial stage.” The reason behind this exclusion is an appreciation for the sanctity of an individual’s privacy interests. Since it is reasonable to classify liability insurance policies as assets, courts often rely upon the asset theory and the defendant’s privacy interests to deny discovery.

---

101. Id.
103. Id.
105. See id. The court stated in Ellis that an attorney has “over-arching responsibilities . . . to the court as one of its officers, and to the profession itself, in its duty to serve the public according to the ideal which is the purpose of all procedure: to seek the truth and to do justice.” Id. The court went on to say that it was unreasonable to “treat such an essential aspect of the case as the existence of insurance as though it would corrupt the whole procedure if the lawyers and the court knew about it.” Id.
106. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Cannon 7 (1983). This is due to the inflammatory effect on the jury of a highly excessive prayer for damages. See id.
108. See Davis, supra note 23, at 1061.
109. Id.
110. See id.
111. See Jeppesen v. Swanson, 68 N.W.2d 649, 653 (Minn. 1955); see also Gallimore v. Dyc, 21 F.R.D. 283, 286 (E.D. Ill. 1958).
Liability insurance policies, however, are distinguishable from other assets in that their sole value is to protect existing or future assets. The court in Tuller recognized this fact when it stated:

A liability insurance policy is unlike an insured’s other assets. The policy serves only to protect the insured’s other assets from the claims of those whom the insured might injure. The worth of the coverage is limited by the plaintiff’s recovery. Thus, requiring disclosure of liability insurance policies does not disclose the private financial status of the insured, but merely reveals the extent of the insured’s protection, in the very suit in which discovery is sought.

Other courts have expressed the same or similar opinions. One court held that there are "valid reasons . . . to inquire into insurance coverage" which distinguish liability insurance from defendant’s other assets. The court also noted that concerning defendant’s other assets, “plaintiff may have other means of knowing something about defendant’s financial responsibility.”

Discovery of liability insurance coverage should not be denied based on the asset theory. A liability insurance policy is, after all, only a “contingent asset purchased to satisfy a contingent liability,” and thus disclosure of the policy is quite different than disclosure of all of the defendant’s other assets.

Another reason for disclosure of liability insurance policies is simply that the purpose of discovery is to promote fairness in the administration of lawsuits. Under this view, disclosure of liability policy information is desirable because, first, insurance coverage is often the “most important or even sole asset available to satisfy a judgment.” Aside from declaratory judgments, judgments are worthless if they are uncollectible, and thus knowledge of the insurance coverage of a defendant is “vitaly important in determining the expected value of the judgment.” It is critical for the plaintiff to have an estimate of the expected value of the judgment in order to make crucial decisions re-

112. See Davis, supra note 23, at 1062.
113. Tuller v. Shallcross, 886 P.2d 481, 484 (Okla. 1994). The court further noted that realistically, the insurer is the real party in interest in most automobile accidents, and as such is the one making objections to the discovery of the policy information. See id. Thus, the argument that the defendant’s privacy is being invaded is somewhat less persuasive.
115. Ellis, 429 P.2d at 41.
116. Id.
117. Davis, supra note 23 at 1062.
118. See Tuller, 886 P.2d at 484; Ellis, 429 P.2d at 41. Mr. Justice Henrix’s dissent in Ellis: "If the main opinion stands, there is absolutely no reason why a plaintiff, who might have a phony claim, could not require . . . anyone . . . to open up his safety deposit box and divulge how green it is." Ellis, 429 P.2d at 43 (Henrix, J., dissenting).
119. See, e.g., FED. R. CIV. P. 1. The Federal Rules of Civil Procedure are to be “liberally construed and administered to secure the just, speedy, and inexpensive determination” of actions. Id. This provision supports disclosure of policy information.
121. Id.
regarding whether to pursue the case, how much time, money, and effort to expend, and whether to settle and for what amount. Thus, allowing discovery of liability insurance coverage promotes fairness without unduly intruding on privacy rights.

B. Effect of Compulsory Liability Insurance Law

The Oklahoma Compulsory Liability Insurance Law, which took effect on January 1, 1983, requires automobile owners to prove that they have liability insurance in order to register their vehicles. Coverage of at least $10,000 is required.

Several state courts have allowed discovery on the basis of the state’s requirement to maintain automobile insurance. Most states either require automobile liability insurance or have financial responsibility laws to accomplish the same purpose. Most courts consider mandatory insurance laws and financial responsibility laws to be equivalent since their effect is the same.

The effect of compulsory automobile liability insurance laws is to make the policy information a public record. Since policy information is obtainable from state agencies, disclosure of the information should not be denied based on the asset theory of denying discovery. This, in effect, was one of the bases of the court’s opinion in Tuller. However, the court should not have to rely on compulsory liability insurance laws to allow disclosure of policy information, but should hold that, as a matter of law, the information is discoverable.

---

122. See id. It is fundamental to every lawsuit that expected costs be weighed against expected benefits. If the expected costs outweigh the expected benefits, obviously the case should not be pursued. The cost-benefit relationship drives not only whether to pursue the case, but the settlement negotiations as well, simply because clients are not willing to spend large sums of money in order to obtain less than was spent on the winning case. It follows logically that there is a need to have a reasonably correct estimate of the possible value of the case.


128. See Davis, supra note 23, at 1050.

129. See id.

130. See id.

131. See Tuller v. Shallcross, 886 P.2d 481, 483 (Okla. 1994) (stating that proof of policy limits must be carried in the car with the owner).

132. Id. at 484.
VI. IMPLICATIONS

A. Current Effect on Lawsuits

The effect of the holding in Tuller depends in large measure on subsequent interpretation of the holding. The most narrow reading of the Tuller decision would be that disclosure is limited to (1) whether the defendant has insurance coverage that may be liable to satisfy part or all of any judgment;\(^\text{133}\) and (2) the amount of coverage only to the extent of the statutory minimum.\(^\text{134}\) For example, under this interpretation, whether the defendant had coverage of $10,000 or $100,000 would not matter. All that would be required to be disclosed would be that the coverage was at least equal to the statutory minimum.

The argument for this very narrow interpretation is that the Tuller decision was founded upon the Oklahoma Compulsory Liability Insurance Law, and the idea that the threat of invasion of privacy is therefore reduced.\(^\text{135}\) Since the minimum coverage amount under the Compulsory Liability Insurance Law is $10,000, that is all that should be required to be disclosed.

However, the argument for narrowly interpreting Tuller overlooks the policy considerations behind that court’s decision.\(^\text{136}\) Further, the court did not expressly limit its holding to allow only discovery of policy limits up to the mandatory coverage amount; rather, the court stated that “the existence and contents of any liability insurance agreement issued in accordance with the Compulsory Liability Insurance Law” will now be discoverable.\(^\text{137}\) The court’s use of the word “contents” without limitation seems to indicate that the full contents of the liability insurance policy should be discoverable.

Tuller’s holding could also be interpreted very broadly by finding that all liability insurance policies are discoverable, similar to the federal rule. The policy considerations discussed by the court,\(^\text{138}\) with the exception of the discussion of the Compulsory Liability Insurance Law,\(^\text{139}\) certainly seem to apply equally well to any liability insurance policy.\(^\text{140}\) Further, the federal system and many states apply this approach; hence there is ample authority for its use.

However, although a broad reading of Tuller’s holding could be justified by policy considerations, it can not be intrinsically justified by the holding in Tuller itself. The court explicitly limited its holding in the case to liability in-

---

133. This information is clearly required to be disclosed. See id. at 485.
134. See id.
135. See id. at 483-84.
136. See id.
137. Id. at 485.
138. See id. at 483-84.
139. See id.
140. Facilitating settlement, giving plaintiffs information necessary for achieving fair results, and the other policy considerations discussed above will be aided by discovery of information concerning any liability policy, not just automobile policies.
urance policies issued under the Oklahoma Compulsory Liability Insurance Law.\textsuperscript{141}

The most appropriate reading of the Tuller decision probably lies somewhere in the middle of these two extremes. With regard to any policy under which "any person carrying on an insurance business may be liable to satisfy part or all of a judgment"\textsuperscript{142} in the action, discovery should be allowed of (1) the existence of any such policy;\textsuperscript{143} and (2) the limits of coverage of any such policy.\textsuperscript{144} Discovery of this information is clearly authorized by the opinion in Tuller, and is also supported by numerous policy considerations.

\section*{B. Possible Extension to Other Liability Policies}

Will, or should, the Oklahoma Supreme Court extend discovery of liability insurance policy information to any policy that may be called on to satisfy a judgment?\textsuperscript{145} Courts in other states, such as Nebraska, Illinois, and Pennsylvania,\textsuperscript{146} have allowed discovery without explicit statutory authorization, and without relying on compulsory liability insurance laws.\textsuperscript{147} Examination of these cases is useful in considering whether the Oklahoma Supreme Court is justified in allowing such discovery.

Walls v. Horbach\textsuperscript{148} is a striking example of a case in which discovery was extended to liability insurance policies other than those covering automobiles without explicit statutory authorization. In that case, the Nebraska Supreme Court considered facts quite similar to Tuller, except the liability policy involved was not an automobile policy.\textsuperscript{149} The plaintiffs served interrogatories on defendants Livestock Press Company and Larry Horbach;\textsuperscript{150} the interrogatories requested information concerning any insurance policies "against the respectively alleged liabilities."\textsuperscript{151} The defendants refused to answer the interrogatories relating to insurance coverage,\textsuperscript{152} and defendants were then held in contempt of court.\textsuperscript{153} Defendants contended on appeal that the trial court had "usurped the legislative function by materially changing [the] rules of discovery."\textsuperscript{154}

\bibliography{tulsa}

\footnotesize{\textsuperscript{141} See Tuller, 886 P.2d at 485.\textsuperscript{142} Id.\textsuperscript{143} See Davis, supra note 23, at 1077.\textsuperscript{144} See id.\textsuperscript{145} This is the approach of the federal courts. See Fed. R. Civ. P. 26(a)(1)(D). The Tuller court expressly reserved any opinion on this issue. See Tuller, 886 P.2d at 484.\textsuperscript{146} See Szarmack v. Welch, 318 A.2d 707, 711 (Pa. 1974). Szarmack was an automobile accident case, but the court did not expressly limit its holding to automobile liability insurance policies. See id.\textsuperscript{147} See, e.g., Walls v. Horbach, 203 N.W.2d 490, 491-92 (Neb. 1973); People ex rel. Terry v. Fisher, 145 N.E.2d at 588, 593 (Ill. 1957); Szarmack, 318 A.2d at 711; Ellis v. Gilbert, 429 P.2d 39, 42 (Utah 1967).\textsuperscript{148} 203 N.W.2d 490, 491-92 (Neb. 1973).\textsuperscript{149} See id. at 491.\textsuperscript{150} See id.\textsuperscript{151} Id.\textsuperscript{152} See id.\textsuperscript{153} See id.\textsuperscript{154} Id. The substance of the argument apparently was that since the Nebraska Supreme Court previously held that the discovery statutes, as created by the Nebraska Legislature, did not allow discovery of such policy}
The Nebraska Supreme Court had previously held in *Mecke v. Bahr*\(^{155}\) that its discovery rules did not permit disclosure of liability policy information. The court in *Walls* briefly discussed decisions of other courts concerning disclosure,\(^{156}\) relevance,\(^{157}\) and policy considerations.\(^{158}\) The court then proceeded to overrule its prior holding in *Mecke*, interpreting the Nebraska discovery statutes to allow disclosure of liability insurance policy information.\(^{159}\)

The court in *Walls* expressly dealt with the issue of whether its ruling "usurp[ed] the legislative function,"\(^{160}\) finding the notion "troublesome."\(^{161}\) The court found that although stare decisis is an important consideration, it is a "principle of policy and not a mechanical formula."\(^{162}\) The court balanced the arguments and held that policy considerations favored allowing disclosure strongly enough to warrant the reversal of its earlier decision.\(^{163}\)

The Illinois Supreme Court has also held that discovery of insurance policy information is allowable, even in the absence of statutory authorization.\(^{164}\) The court's reasoning was similar but not completely equivalent to that of the Nebraska Supreme Court in the *Walls* decision.\(^{165}\) The opinion noted that such information was relevant in that it "apprise[s] injured plaintiffs of rights arising out of the accident, otherwise unknown."\(^{166}\)

In the case of *Szarmack v. Welch*,\(^{167}\) the Supreme Court of Pennsylvania held that automobile liability insurance policy information was discoverable information, the trial court was exceeding the bounds of its discretion in allowing disclosure. *See id.* at 491-92.

156. *See Walls*, 203 N.W.2d at 491.
157. *See id.* The court interpreted the relevance requirement broadly to allow disclosure. *See id.*
158. *See id.* at 492.
159. *See id.* at 491-92. The court did so by judicially adopting the language of the federal rule in full. *See id.*
160. *Id.* at 492. The argument by the dissent was that by the legislature's silence after the *Mecke* ruling, the legislature had tacitly approved of that decision, and that its intent must therefore have been to deny discovery in situations such as *Walls*. *See id.* at 492 (Newton, J., dissenting).
161. *Id.* at 492.
162. *Id.* at 492 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).
163. *See id.*
164. *See People ex rel. Terry v. Fisher*, 145 N.E.2d 588, 592-94 (Ill. 1957). The case arose from a personal injury lawsuit in which the plaintiff posed interrogatories concerning the "existence and amount" of defendant's insurance coverage. *See id.* at 589. Plaintiff sought and obtained orders to compel defendant to respond to the interrogatories. *See id.* Defendant appealed, arguing that the orders were not allowable under the scope of the discovery rules. *See id.* at 589-90. The discovery rules were typical:

\[\text{[discovery was allowed of] any matter, not privileged, relating to the merits of the matter in litigation, whether it relates to the claim or defense of the examining party or of any other party, including the existence, description, nature, custody, condition and location of any documents or tangible things and the identity and location of persons having knowledge of relevant facts.}\]

*Id.* at 590 (citing ILL. SUP. CT. R. 101.19-4). The language of this statute seems to be more broad in scope than other statutes, and thus disclosure might be easier to allow under these rules.
165. *See Walls*, 203 N.W.2d at 491-92.
166. *Terry*, 145 N.E.2d at 593. This argument seems to imply that if a defendant is, for practical purposes, uncollectible, there is in reality no cause of action (or "rights") arising out of the accident. Practically speaking, this is in fact the case, since there can be no recovery from an insolvent defendant, regardless of the defendant's fault or the extent of plaintiff's injuries.
under the state’s discovery rules. In so holding, the court considered issues of fairness, efficiency, and, perhaps most importantly, the “general purpose of all procedural rules: [t]he rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable.” The court found that these goals will be furthered by discovery of policy information.

The court in Szarmack considered and rejected the arguments that settlement may be frustrated in cases where policy limits are high, and that the extent of defendant’s insurance coverage is privileged because it is private financial information. Pennsylvania, like Oklahoma, had financial responsibility laws which invalidated the argument for privileged and nondiscoverable insurance information. However, unlike the Oklahoma Supreme Court in Tuller, the Pennsylvania Supreme Court did not expressly base its decision on the state financial responsibility laws. Nor did the court limit its holding to any specific type of liability insurance policy; thus, it would appear that the holding extended to all liability insurance policies, whether an automobile policy or otherwise.

Like the courts in Hall and Szarmack, the Oklahoma Supreme Court could, and should, find that the proper approach is to allow discovery of the existence and contents of any liability insurance policy which may be used to satisfy any judgment entered in the case. This approach would parallel the federal rule concerning discovery of insurance agreements, thus promoting consistency in the dual court system, as well as gain consistency with many other state jurisdictions. Stare decisis should not restrain the Court from reaching the result that is the most just, efficient, and logical.

VII. Conclusion

It is time that Oklahoma joined the ranks of the federal court system and most other states in allowing full discovery of information relating to any liabili-

168. See id.
169. See id. at 710.
170. See id.
171. Id. (citing PA. R. CV. P. 126). This rule parallels Rule 1 of the Federal Rules. See FED. R. CV. P. 1.
172. See Szarmack, 318 A.2d at 710.
173. See id. The court framed the issue as whether “settlement is a game whereby the defendant is entitled to crucial information not possessed by the plaintiff.” Quoting Landhamer v. O’Laughlin, 45 F.R.D. 240, 241 (S.D. Iowa 1968), the court found that such a situation does not foster the procedural goals of obtaining a just, speedy, and inexpensive determination. See Szarmack, 318 A.2d at 710.
174. See Szarmack, 318 A.2d at 710-11. This argument is based on the asset theory.
175. See id. at 711. Financial responsibility laws, while not exactly the same as compulsory liability insurance laws, are substantially similar in their purpose and effects.
176. See id. The court stated that “[f]or all of the reasons noted, we agree with the courts below that the information which plaintiff sought is discoverable.” Id. (emphasis added).
177. See id.
178. Pennsylvania has since adopted Rule of Civil Procedure 4003.2, which parallels the federal rule. PA. R. CV. P. 4003.2. Thus, the Szarmack decision has been effectively codified by the Pennsylvania legislature. Although discovery of liability policy information in Pennsylvania is now accomplished by statute, rather than judicially as in Szarmack, the decision still stands as an example of judicial treatment of the discovery issue.
ity insurance policy, not just those issued under the Compulsory Liability Insurance Law. The arguments for denying disclosure are insubstantial when weighed against the sound considerations favoring disclosure. With the advent of mandatory disclosure, the days of trial by ambush are over; it is appropriate for the court to give more weight to considerations of fairness, justice, and efficiency of the judicial process. Liberal discovery rules promote these important considerations. When other, more crucial rights, such as privilege, are not being violated, the procedural system should allow liberal discovery of information to facilitate the fair and efficient administration of justice. Insurance policy information is no exception.

Although the decision in *Tuller* was a pensive step in the right direction for Oklahoma discovery law, the court should take its next opportunity to properly and assertively extend *Tuller*'s holding to parallel the federal rule. In doing so, the court may be assured that its decision is firmly rooted in sound principles of fairness, efficiency, and justice—the very considerations upon which our system of civil procedure is, and should be, structured.

*Kevin Wayne McDonald*