



# The Phantom of the Courtroom

*Insurance companies nearly always play a huge role in how, when, and why lawsuits are brought, and whether the case is settled or decided by a jury. But you will seldom see them acknowledged or even mentioned in a courtroom. Like the wizard behind the curtain, they control many levers, but are never seen.*

South Dakota is not a “direct action” state, so when someone in this state is hurt by another’s negligence and the liability insurance company refuses to pay, the resulting lawsuit names the individual insured as the defendant. The insurance company is never mentioned and the case appears as if there were no insurance involved. Behind the scenes, the lawyers know what insurance is available, and injured plaintiffs and their attorneys virtually never bring a lawsuit unless there is substantial insurance coverage protecting the named defendant. But jurors are not supposed to care whether or not there is insurance, so no one is allowed to let jurors in on the secret.

**The rule says, “Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.”**

That makes sense, since having insurance doesn’t prove you did anything wrong. Over the years, however, judges and lawyers have allowed the rule to grow well beyond what it actually says. Now, insurers insist on extraordinary measures to try to keep anyone from uttering “insurance” in the courtroom – no matter what the context.

## Why does it matter?

Those untold parts of the story might allow jurors to make better sense of the entire picture and focus on the central issues they need to decide.

Defense lawyers hired by the insurance company sometimes exploit the situation by falsely implying there is no liability insurance, hoping that resulting sympathy for the defendant causes jurors to keep the verdict low.

In an effort to keep jurors from using insurance for the wrong reason – to decide if the defendant was at fault in the first place – the system goes overboard in the other direction and leaves jurors puzzled and frustrated with what they sense is only a partially true story.

Injured plaintiffs deserve to be free from prejudice, too – the prejudice that occurs when juries get the false impression that a defendant is standing all alone, uninsured and financially vulnerable.

Jurors deserve to be free of the confusion and mistaken impressions they experience when no one is allowed to mention the phantom of the courtroom.

**If you’ve ever been on a civil jury, you probably wondered whether the defendant can afford to pay for the damage he caused. No one was allowed to tell you that the verdict would not be paid by the defendant himself, but by the insurance company who sold him a policy to cover just such a claim.**

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