# THE CURIOUS CASE OF RASKOB VS. SANCHEZ
# DIRECT ACTIONS AGAINST AUTO INSURERS IN NEW MEXICO

Gary Kilpatric, Esq.[1]
(505) 982-3873

> ***CURIOUSER and CURIOUSER! Cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English)***[2]

On November 23, 1998 the New Mexico Supreme Court issued a slender two page opinion in a simple automobile negligence case which may wreak about as much havoc among auto insurers in New Mexico as the Queen of Hearts did in *Alice's Adventures in Wonderland* or its effects may disappear like the Cheshire cat as described by Lewis Carroll in that same classic tale, leaving only a trace of a smile.

Elizabeth Raskob was involved in two automobile collisions in New Mexico in the space of eleven months in 1992 and 1993. As it happened, the other driver in each accident was insured by Allstate Insurance Company. What Ms. Raskob did next was to bring separate suits against each driver. How she did this and who she named as parties in these suits may have changed forever the way automobile negligence cases will be tried in New Mexico. In addition to suing the other driver, Raskob's attorney also named Allstate as a party defendant.

In her suit against the tortfeasor in her first accident, Gabriel Sanchez, she filed a two page complaint[3] which simply alleged that Allstate was a proper defendant because it was an insurance company authorized to do business in New Mexico and the vehicle Sanchez was driving at the time of the accident was insured by Allstate under a motor vehicle liability policy procured by force of New Mexico's Mandatory Financial Responsibility Act ("MFRA").[4] Allstate moved for dismissal arguing that it is well established in New Mexico that in the absence of a contractual or statutory provision authorizing a direct action against or the joinder of a liability insurer, an injured person had no cause of action against an alleged tortfeasor, citing three new Mexico Court of Appeals cases, *Chapman v. Farmers Ins. Group*, *Roberts v. Sparks*, and *Caster v. Board of Education of Albuquerque*.[5]

Raskob, resisting Allstate's motion, claimed that under the three part test developed by the New Mexico Supreme Court in *England v. New Mexico State Highway Commission*,[6] a third party could bring a direct action against a tortfeasor's automobile insurer if (1) the insurance was procured by force of legislative enactment; (2) the benefit from the purchase of the insurance inured to the benefit of the public; and (3) the language of the statute did not negate the idea of joinder of an insurance company. Raskob never did state what would be gained by joining Allstate in her lawsuit against Sanchez, nor how the public policy behind the MFRA of requiring automobile liability insurance for the benefit of the public would be served by allowing a direct action against an auto insurer before liability had been established against its insured.

The District Court granted Allstate's motion to dismiss and Raskob appealed to the New Mexico Court of Appeals claiming that the trial court had erred in dismissing Allstate because under New Mexico law she had a direct cause of action against Allstate. The parties completed briefing to that court which filed an Order of Certification to the State Supreme Court on its own motion. The State Supreme Court accepted certification and the case was set for oral argument without further briefing by the parties. In her brief-in-chief Raskob described why she wanted to bring a direct action against Allstate:

> Allstate can be joined as a party Defendant and its joinder as a real party in interest disclosed to the fact-finder, just like any other real party in interest. Allstate controls the defense of this case. Allstate has a direct financial interest in the outcome of the litigation. Allstate is contractually liable for Gabriel Sanchez' negligence. Allstate's liability under Gabriel Sanchez' policy became absolute on June 4, 1992, when Gabriel Sanchez negligently injured Elizabeth Raskob in an automobile accident.[7]

The statement in Allstate's appellate brief which best captured the reason why it so adamantly resisted the plaintiff's

attempt to name it as a party defendant was as follows:

> There is absolutely no reason for Allstate to be a co-defendant in this case except to try to prejudice the jury. The potential prejudicial effect of an insurer's presence at trial is the possibility of the jury awarding a larger verdict (if negligence is established) under a deep pockets theory. An insurer's presence as a party defendant has no bearing on the issue of fault or damages. There is absolutely no probative value justifying the insurer's presence. The issues of liability are directed at the tortfeasor, not the insurer and the insurer should not be a defendant. There is certainly no "public policy" in favor of engendering such prejudice.[8]

Justice Dan A. McKinnon, writing for a unanimous court, made short work of Allstate's arguments against joinder.[9] The Court held that Allstate was a proper defendant under the circumstances of this case. It found that the legislative purpose contained in the MFRA indicated that the insurance required by that Act was for the benefit of the public generally as well as the insured. Because the MFRA mandates insurance for the benefit of the public, the general rule that an injured third party has no claim against the insurer of a negligent defendant absent a contractual provision, statute or ordinance to the contrary does not apply unless the statute or ordinance by its terms negates the idea of joinder.[10]

The Court noted that Allstate had conceded that the first two elements of the test for joinder contained in *England* had been satisfied. The Court then turned its attention to the third element of the test to determine whether the language of the Act, either expressly or by implication, prohibited joinder and found that, in contrast to the New Mexico Tort Claims Act, there was no language in the MFRA expressing such an intent.[11] Since there was no express prohibition against joinder contained in the MFRA, under the test applied in *England*, joinder had to be permitted unless the Court was persuaded to modify the test.

Finally, the Court addressed and rejected Allstate's argument that the Act implied that the Legislature intended to disallow direct actions against insurers because the language in the Act required indemnification only *after* the liability issues have been decided and the judgment remains unsatisfied. The Court concluded that the language of the Act in effect at the time the claim arose, but which was later repealed effective July 1, 1998, manifested an intent that the insurer be joined as a defendant because the insurer's liability became absolute at the time of the injury. It read as follows:

> **3.E Every certified motor vehicle liability policy shall be subject to the following provisions which need not be contained in the policy:
>
> (1) the liability of the insurance carrier with respect to the insurance required by the Mandatory Financial Responsibility Act becomes absolute whenever injury or damage covered by the certified motor vehicle liability policy occurs . . .[12]

The Court's concluding paragraph in *Raskob* is worth quoting because it is being examined many times over by attorneys for plaintiffs and automobile liability insurers throughout New Mexico, and, perhaps, beyond:

> There is no language in the Mandatory Financial Responsibility Act that negates the joinder of Allstate as a party defendant. We find no reason to modify the *England* elements, *nor* to read the Act as implying that direct actions are improper. To the contrary, the Act effective at the time this suit arose manifests an intent that Allstate is a proper party to this lawsuit.[13]

By its decision in *Raskob* the Court placed New Mexico with Wisconsin and Louisiana as the only states which currently allow the joinder of a tortfeasor's liability insurer in an automobile negligence case prior to obtaining a judgment as to the liability of the insured tortfeasor.[14]

### *The Bothersome Footnote and Its Curious Demise*

In its original opinion the Court included only one footnote to the text of its decision which read:

> We note that the joinder of the liability carrier involves the exercise of a tactical judgement by counsel as well as the application of legal principles. However, under our present rule of evidence, the fact of joinder may be withheld from the jury. *See generally* Rule 11-411 NMRA 1998 (fact that a party was or was not insured against liability not admissible for the purpose of showing negligence); *Safeco Ins. Co. v. U.S. Fidelity & Guar. Co.,* 101 N.M. 148, 150, 679 P.2d 816, 618 (1984) (when Rule 1-017 NMRA 1998 requires an insurer (or an insured) to be joined as a party, the fact of joinder is not to be disclosed to the jury). We give no opinion as to the advisability of joining liability carriers as party defendants. *See*, e.g., *Safeco*, 101 N.M. at 152, 679 P.2d at 820 (fact that a defendant is covered by insurance cuts both ways).[15]

This footnote made it clear that the Court's decision was not meant to allow for the disclosure of insurance coverage to the jury. Raskob immediately filed a petition for Rehearing and Modification or Clarification of the Court's Opinion, requesting that the footnote be deleted.[16] It was obvious from Raskob's brief in support of her motion that the ability to disclose to the jury the fact that the defendant tortfeasor had insurance was the primary reason why she had fought for the right to join Allstate. As she argued in her brief, she saw "no reason to allow trial courts to withhold the identity of proper party from the jury by giving insurance companies a special, secret status."[17]

There has been much comment and criticism in the history of New Mexico appellate jurisprudence regarding the issue of the disclosure of insurance coverage to the jury.[18] However, Justice Walters provided the best perspective on the issue in her opinion in *Safeco Ins. Co. v. U.S. Fidelity & Guar. Co.*[19] which she authored on the eve of the implementation of the MFRA. Although she speculated that the MFRA could contribute to an understanding by jurors that insured parties are not uncommon, Justice Walters still had concerns that the disclosure of insurance could confuse the jury's deliberations:

> Nevertheless, there may be legitimate questions of coverage not at all relevant to the issue of liability which may be overlooked by jurors in their awareness of the statutory requirements for insurance. Thus, evidentiary prejudice must also be assessed in the context of these present-day realities and a juror's possible misconceptions arising from his knowledge of mandatory insurance requirements.[20]

In any event, the Court granted Raskob's motion and the footnote was removed without allowing Allstate or any other interested party to comment on or oppose the motion.[21]

### *Be Careful What You Ask For*

A recent article in the New Mexico Trial Lawyer's Foundation trade journal hailed the *Raskob* decision as a landmark case after which the practice of tort law may be forever different in the state of New Mexico.[22] Another article in the New Mexico Defense Trial Lawyers publication worried that " . . . the fundamental rules of engagement [in automobile negligence cases] have been altered as never before" as a result of *Raskob*.[23] Yet, the battle is not over nor have all of the consequences of the decision been foreseen. Consider, for example, *Raskob's* companion case, *Raskob v. Gonzales*,[24] which, as it happens, was the first case tried where joinder of the insurer was allowed. The trial judge in *Gonzales* allowed Raskob to join Allstate as a party defendant and to disclose the fact of insurance coverage to the jury. However, the trial judge allowed Allstate's counsel to participate in almost every phase of the trial.[25] The jury determined that although Gonzales had been negligent, that negligence was not the proximate cause of any injury to Raskob, and so she recovered nothing. Raskob moved for a new trial contending, among other things, that she had been prejudiced because the court allowed separate counsel for each defendant to participate in the trial. In effect, she had been ganged up on. Her motion was denied.

### *Not So Fast . . . Other Fights in Other Forums*

Efforts to both reinforce and reverse the effects of the *Raskob* holding have been, and will continue to be, made in the state legislature and in New Mexico's trial courts. It is likely to be argued by insurers that *Raskob* is based upon language in the MFRA which has since been repealed and therefore may not be applicable to any cause of action for damages arising out of an automobile accident occurring after July 1, 1998. Also, the language of the MFRA relied upon by the *Raskob* court dealt with *certified* insurance policies, and the New Mexico Court of Appeals, in at least one case, has indicated that the provisions of the MFRA relating to certified insurance policies were not intended to be

applicable to the ordinary policy purchased in compliance with that Act.[26] In fact, all references to "certified insurance policies" contained in the MFRA were removed by the legislature in 1998.[27]

At the trial court level insurers have met with some success resisting their joinder by arguing issues conceded or not presented by Allstate in the *Raskob* decision.[28] Insurers have also convinced some trial courts that even if the insurer is required to be joined as a party in a lawsuit, the fact of the insurer's joinder should not be disclosed to a jury. Those courts have bifurcated these cases and dealt with the issues relating to the individual tortfeasor first without advising the jury of the joinder of the tortfeasor's insurer.[29] The New Mexico Supreme Court has rejected the opportunity to review this practice.[30] Meanwhile, the plaintiff's bar is attempting to have New Mexico's Uniform Jury Instructions amended to allow disclosure to the jury of the status of an insurance company as a party defendant in a direct action against an insurer brought pursuant to the MFRA. During the 1999 legislative session the insurance industry sought to amend the MFRA to include an express prohibition against joinder of the insurer of the individual defendant similar to that contained in the state's Tort Claims Act while the plaintiff's bar attempted to reinstate the repealed language of the MFRA relied on by the *Raskob* court. Neither attempt was successful.[31]

***"Tut, tut, child!" said the Duchess (to Alice). "Everything's got a moral, if only you can find it"***[32]

The *Raskob* case history is only slightly less curious than that of the trial of the Knave of Hearts for the great tart caper in *Alice*[33], and it promises to become stranger no matter how it finally turns out. While the plaintiff's bar is hoping the *Raskob* decision turns the world of automobile negligence litigation in New Mexico into a "wonderland" of substantial plaintiff's verdicts, the insurance defense bar is hoping that it is only a plaintiff lawyer's dream, the effects of which will be short lived.

***Endnotes***

1. The author gratefully acknowledges the invaluable assistance of David Urias, 2nd year law student at the University of New Mexico School of Law, in preparing this article.

2. Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass, Bantam Doubleday Dell Books for Young Readers, 1992, (1896).

3. *Elizabeth Raskob vs. Gabriel Sanchez and Allstate Insurance Company*, Second Judicial District, County of Bernalillo, No. CV -95-004459.

4. *See* N.M. STAT. ANN. § 66-5-201 through § 66-5-239 (Michie 1983).

5. 90 N.M. 18, 558 P.2d 1157 (Ct.App. 1976); 99 N.M. 152, 655 P.2d 539 (Ct.App. 1982); 86 N.M. 779, 527 P.2d 1217 (Ct.App. 1974).

6. 91 N.M. 406, 575 P.2d 96 (1978).

7. Plaintiff-Appellant's Brief in Chief at 19, *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998) (No. 24,476).

8. Appellees Answer Brief at 22, *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998) (No. 24,476).

9. *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998).

10. *Id*. at 394.

11. *See* N.M. STAT. ANN. § 41-4-17(C) (Michie 1982) ("No action brought pursuant to the provisions of the Tort Claims Act shall name as a party any insurance company insuring any risk for which immunity has been waived by that [A]ct.").

12. *Raskob* at 394; N.M. STAT. ANN. § 66-5-221(E)(1) (Michie 1983) (repealed effective July 1, 1998).

13. *Raskob* at 394.

14. The modern and majority rule in jurisdictions outside of New Mexico is that in the absence of a contractual or statutory provision allowing a direct action, an injured claimant or plaintiff has no right to such an action against the insurer for the tortfeasor. A number of states have, however, enacted direct action statutes, but most have limited their application by requiring that liability be found on the part of the insured before an action can be brought against an insurance carrier.[1] For an excellent discussion of direct actions *see* Thomas F. Segalla & Richard J. Cohen, Direct Actions-Current Developments, 20 NO. 9 Ins. Litig. Rep. 411, 1998.

15. *Raskob v. Sanchez*, Original File Opinion, No. 24,476, p.3 n.1 (1998).

16. Under Rule 12-404 NMRA 1998, Allstate was not permitted to file a brief in opposition to the Motion unless specifically requested to do so by the Court, which did not happen.

17. Plaintiff-Appellant's Brief in Support of her Motion for Rehearing and Modification or Clarification of the Court's Opinion at 2, *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998) (No. 24,476).

18. *See*, e.g., *Cardoza v. Town of Silver City*, 96 N.M. 130 628 P.2d 1126 (Ct. App.), *cert. denied*, 96 N.M. 116, 628 P.2d 686 (1981); *Grammar v. Kohlhaas Tank*, 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980); *Safeco Ins. Co. v. U.S. Fidelity & Guar. Co.*, 101 N.M. 148, 679 P.2d 816 (1984).

19. 101 N.M. 148, 150, 679 P.2d 816, 618 (1984).

20. *Safeco* at 152.

21. Allstate did attempt to convince the Court to reconsider the decision to remove the footnote after the fact. *See* Defendant-Appellee Allstate Insurance Company's Motion for Rehearing and Modification or Clarification of the Court's Opinion, *Raskob v. Sanchez*, 126 N.M. 394, 970 P.2d 580 (1998) (No. 24,476).

22. David Berardinelli, "Direct Actions After Raskob: Brave New World or Business as Usual"?, The New Mexico Trial Lawyer, January 1999.

23. P. Scott Eaton, "Raskob Editorial: A DLA Perspective," NMDLA Defense News, Spring 1999.

24. *Elizabeth Raskob vs. Allstate Insurance Company, Denise C. Gonzales, A. L. Gonzales, and Darlene S. Gonzales,* Second Judicial District, County of Bernalillo, No. CV-96-004171.

25. Allstate's counsel was not allowed additional peremptory challenges to jury selection.

26. *Allstate Ins. Co. v. Jensen*, 109 N.M. 584, 586, 788 P.2d 340, 342 n.2 (1990).

27. Laws 1998, Ch. 34.

28. *See Mary McCabe v. Debra Baca and State Farm Mutual Automobile Insurance Company*, Second Judicial District Court, Bernalillo County, No. DV 99-6323.

29. *See* for example *Albino Trujillo and Rose Trujillo v. Dora Rivera and Farmers Insurance Company,* First Judicial District Court, Santa Fe County, No. D-0101-CV-9801353, Decision Pertaining to Plaintiffs' Motion in Limine and Memorandum in Support of Allowing Jury Disclosure of Identity of Parties During Voir Dire.

---

[1] States with some form of limited direct action statutes include California, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia, and Vermont. *See* supra note 40.

30. *See* Order denying a petition for writ of superintending control and pleadings in *Marsha Alvarez et al. vs Hon. Stephen Pfeffer*, District Judge for the First Judicial District, and Allstate Insurance Company and Susan Rupp, Supreme Court for State of New Mexico, Docket No. 25610, April 21, 1999.

31. S. 523, 44th Leg., 1st Sess. (NM 1999); H.R. 848, 44th Leg., 1st Sess. (NM 1999).

32. Carroll, *supra*, at 131.

33. Carroll, *supra*, at 162.