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CPLR 3101(a): Courts Differ on Whether a Plaintiff Is Entitled to Discovery and Inspection of Defendant's Automobile Liability Insurance Policy

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defendant was entitled to a bill of particulars and an examination before trial on the question of damages where the plaintiff had been awarded summary judgment on the question of liability and a hearing had been scheduled for the assessment of damages. The Civil Court, New York County, held that the motion for summary judgment foreclosed the opportunities for disclosure which the defendant would have had if the case had proceeded routinely to trial, and that the defendant, in effect, would still have to face a "trial" for damages.[114] The court found that the bill of particulars[115] and examination as to damages[116] were "material and necessary" and so ruled in favor of the defendant.

Doxtator v. Swarthout and *Appeal Printing Co. v. Levine* clearly satisfy the *Allen* test of "usefulness and reason." These decisions are excellent examples of a liberal and enlightened approach to discovery procedure.

CPLR 3101 (a): Courts differ on whether a plaintiff is entitled to discovery and inspection of defendant's automobile liability insurance policy.

The Court of Appeals, in *Allen v. Crowell-Collier Publishing Co.*,[117] broadened the criteria of "material and necessary" under CPLR 3101 to require "disclosure upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[118] Prior to *Allen*, the Supreme Court, New York County, in *Gold v. Jacobi*,[119] held that insurance policy limits in negligence suits were not "material and necessary" and refused to allow such discovery. Although alluding to the Federal Rules of Civil Procedure and their emphasis on "relevancy,"[120] the court stated that the Legislature, in adopting the CPLR, had opted for a more restrictive approach to pretrial disclosure and that any change should

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114 *Id.* at 78, 329 N.Y.S.2d at 113.

115 In Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 604-05, 4 N.Y.S.2d 397, 400 (Sup. Ct. Madison County 1938), the court observed:

> The purpose of a bill of particulars is, generally, to advise the defendant of plaintiff's claims, to enable the defendant to prepare to meet those claims, and to assist the court. It is as necessary and useful upon an assessment of damages as upon a trial.

See also McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605 (1930).

116 *See* Shemitz v. Junior Center, 74 N.Y.S.2d 34 (N.Y. City Ct. N.Y. County 1947).

117 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 324 (1968).

118 *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

119 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

120 FED. R. CIV. PROC. 26(b). For discussion of the test of "relevancy," see 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2010 (1970); Annot., 13 A.L.R.3d 822 (1967). For a comparison of different state standards, see Davis, *Pretrial Discovery of Insurance Coverage*, 16 WAYNE L. REV. 1047 (1970); Annot., 13 A.L.R.3d 822 (1967).

be made by that body rather than by the courts.[121] The question of whether *Allen* supersedes *Gold v. Jacobi* on the issue of discoverability of liability insurance policy limits remains unresolved. Two recent decisions illustrate differing approaches taken by the courts.

In *Sashin v. Santelli Construction Co.*,[122] the plaintiff sought discovery of all insurance policies covering the defendant, for the sole purpose of being able to adjust his settlement strategy accordingly. The Supreme Court, Ulster County, in offering a restrictive interpretation of *Allen*, held that a liberal disclosure policy should apply only to evidentiary, as opposed to nonevidentiary, matters and that insurance policy limits, which are not admissible as evidence, were beyond the *Allen* purview.[123] In finding *Gold v. Jacobi* still controlling, the court called for a legislative amendment to the CPLR rather than a judicial revision.

The Supreme Court, Albany County, in *State National Bank v. Gregorio*,[124] reached an opposite conclusion in permitting discovery and inspection of the defendant's liability insurance policy. Finding no prejudice to the defendant when such discovery is confined to the pretrial stage and not mentioned to the jury, the court noted that a liberal disclosure policy on this issue would facilitate early settlement and pretrial disposition of automobile collision claims, which are currently congesting court calendars.[125] In rejecting *Gold v. Jacobi*, the court argued that under *Seider v. Roth*,[126] discovery of insurance policies has been allowed on an in rem basis, and that the liberal *Allen* guidelines should be construed as permitting discovery when in personam jurisdiction has been obtained.[127]

The more liberal view adopted in *State National Bank v. Gregorio* seems more consistent with the *Allen* test of "usefulness and reason,"[128] and should promote efficient settlement of negligence actions without prejudice to either party.[129] The legal fiction that the insured is the real

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121 For an analysis of the "material and necessary" test, see H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 231 (1st ed. 1963); 3 WK&M ¶ 3101.07. For an analysis of how *Allen* apparently brings CPLR 3101 into conformity with the federal standard, see 7B MCKINNEY'S CPLR 3101, commentary at 11 (1970).

122 69 Misc. 2d 695, 330 N.Y.S.2d 522 (Sup. Ct. Ulster County 1972).

123 *Id.* at 696, 330 N.Y.S.2d at 523.

124 68 Misc. 2d 926, 328 N.Y.S.2d 799 (Sup. Ct. Albany County 1971).

125 *Id.* at 927, 328 N.Y.S.2d at 801.

126 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

127 68 Misc. 2d at 928, 328 N.Y.S.2d at 801.

128 Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968).

129 Counsel for both plaintiff and defendant have acquired by experience a pretty good idea of a case's value. Irrespective of coverage, a case should be settled for what it is worth. If the parties cannot get together, the jury, without knowledge

party in interest, although useful at trial, is inappropriate at the pretrial level, particularly when, as with automobile coverage, the requirements of compulsory insurance are generally known. The CPLR should be amended to expressly authorize discovery of insurance policies.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: A misapplication.

Donato v. Cataffo[130] was an automobile accident case involving the owner and the driver of one car and the owner and the driver of another car. Both defendants moved for summary judgment, and the plaintiff-owner cross-moved for summary judgment. Prior to this action, a passenger in the plaintiff-owner's vehicle had obtained judgment against all the parties hereto. The absentee plaintiff-owner had not acquiesced in the use of his vehicle for any business reason. The plaintiff-owner contended that the decisive case was *Mills v. Gabriel*,[131] which held that a driver's negligence is not imputable to an absentee owner when he attempts to recover his own damages. The defendants argued that the plaintiff-owner was collaterally estopped under the previous action.[132] They relied on *Schwartz v. Public Administrator of Bronx County*,[133] which established two prerequisites to invocation of collateral estoppel: (1) an identity of issue necessarily decided previously, and (2) a full and fair opportunity to contest the prior decision.[134]

The *Donato* court chose to apply the collateral estoppel theory.[135] In so doing, the court erred. The *Schwartz* case, which involved a suit between two operators, was not in point, for *Donato* was an action by an owner whose liability was wholly different from that of the driver

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> of policy limits, will resolve the issue for them. If a case is evaluated below the policy limits, no problem arises. If it is serious enough to call for an evaluation above the limits, in practice it would generally be settled within such limits, *if* the plaintiff knows what they are. Only in rare instances will a plaintiff persist in a demand above policy limits, even if his injuries call for a possible recovery in excess thereof. What's the use of incurring the expenses of a trial, and losing valuable time, if a judgment in excess of the limits is uncollectible?

Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59, 78-79 (1965).

130 69 Misc. 2d 705, 330 N.Y.S.2d 536 (Sup. Ct. Kings County 1972).

131 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), *aff'd*, 284 N.Y. 755, 31 N.E.2d 512 (1940).

132 For a thorough discussion of collateral estoppel, see Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

133 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 136, 153 (1969).

134 *Id.* at 71, 246 N.E.2d at 728, 298 N.Y.S.2d at 959. As to which parties are bound by prior judgments and affected by collateral estoppel, see 5 WK&M ¶ 5011.32-.37. *See also* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 350-52 (3d ed. 1970).

135 69 Misc. 2d at 707-08, 330 N.Y.S.2d at 539-40.