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CPLR 3101(f): Court Allows Discovery of Prior Claims Satisfied Out of Defendant Doctor's Malpractice Insurance Policy

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ARTICLE 31 — DISCLOSURE

CPLR 3101(f): Court allows discovery of prior claims satisfied out of defendant doctor's malpractice insurance policy.

CPLR 3101(f), a verbatim adoption of rule 26(b)(2) of the Federal Rules of Civil Procedure,[24] significantly broadens the scope of discovery allowed in New York by permitting a party to obtain disclosure of the existence and contents of any insurance agreement whose proceeds may be used either in satisfaction of a judgment that may be entered in the action or for indemnification or reimbursement of payments made to satisfy such a judgment.[25] It further provides that information so obtained is not, by the mere reason of its disclosure, admissible at trial.[26] The apparent purpose of CPLR 3101(f) is to facilitate and encourage negotiations between counsel, thereby augmenting the chances for settlement.[27]

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penalties for attorney neglect make no reference to expenses incurred. *See* cases cited note 5 *supra*.

[24] 7B MCKINNEY'S CPLR 3101, commentary at 8 (Supp. 1975).

[25] CPLR 3101(f) states:

> 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. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purpose of this subdivision, an application for insurance shall not be treated as part of an insurance agreement.

Prior to the recent enactment of CPLR 3101(f), ch. 668, § 1, [1975] N.Y. Laws 1072, the discoverability of insurance policies was wholly dependent upon a finding pursuant to CPLR 3101(a), formerly CPA 288, that such disclosure was "material and necessary in the prosecution or defense of [the] action." Consequently, disclosure was limited to two situations. *See* 3A WK&M ¶ 3101.58, at 31-156.1. Discovery was permitted if relevant to an essential issue in the case. *See, e.g.*, Guilianelle v. Brownell, 7 App. Div. 2d 691, 179 N.Y.S.2d 344 (3d Dep't 1958) (mem.) (insurance policy of alleged employer disclosed to prove agency relationship); Martyn v. Braun, 270 App. Div. 768, 59 N.Y.S.2d 588 (2d Dep't 1946) (mem.) (policy discoverable to prove defendant's ownership of property causing injury). Discovery was also allowed where jurisdiction was predicated upon the attachment of an insurance policy. *See, e.g.*, Tickel v. Oddo, 66 Misc. 2d 386, 320 N.Y.S.2d 268 (Sup. Ct. Nassau County 1971); Day v. State Farm Mut. Ins. Co., 63 Misc. 2d 497, 311 N.Y.S.2d 647 (Sup. Ct. Monroe County 1969); Mirabile v. Fitzmaurice, 59 Misc. 2d 239, 298 N.Y.S.2d 568 (Sup. Ct. Kings County 1969). With the exception of these rare situations, disclosure of insurance policies was usually disallowed. *See, e.g.*, Mosca v. Pensky, 42 App. Div. 2d 708, 345 N.Y.S.2d 606 (2d Dep't 1973) (mem.), *aff'd mem.*, 35 N.Y.2d 764, 320 N.E.2d 864, 362 N.Y.S.2d 148 (1974).

[26] CPLR 3101(f) effects no change in the rules of evidence regarding the admissibility at trial of insurance coverage. For a synopsis of the New York law on the admissibility of such coverage, see W. RICHARDSON, EVIDENCE § 169 (10th ed. J. Prince 1973).

[27] 7B MCKINNEY'S CPLR 3101, commentary at 8 (Supp. 1975); 3A WK&M ¶ 3101.58. Three years before the adoption of FED. R. CIV. P. 26(b)(2), in a case where he reluctantly disallowed pretrial disclosure of insurance coverage, the then United States District Judge Mansfield explained why permitting such disclosure might facilitate and encourage settlements:

> This Court has witnessed the dismal waste of time and effort, both on the part of the parties and the court, in cases where an early disclosure of limited policy limits would have led to prompt settlements that were not reached until the eve of trial, when such information was first revealed after needless pretrial discovery and

Pursuant to this provision, the plaintiff in *Folgate v. Brookhaven Memorial Hospital*[28] served a notice of discovery and inspection on the defendant doctor in order to obtain information regarding his medical malpractice insurance policy. He sought, *inter alia*, disclosure of the number of claims brought against the defendant during the term of the policy, the amount sought in each of those claims, and the amount already paid in satisfaction of each claim. The defendant, believing that the information regarding previous claims was not within the scope of discovery permitted by 3101(f), responded to the plaintiff's notice by disclosing only the policy period and limits. The plaintiff therefore moved for an order compelling the defendant to comply fully with the notice of discovery and inspection. According to the plaintiff, since there was an absolute limit to the insurer's liability for malpractice claims against the defendant during the applicable policy period, the information sought was indispensable in formulating a prejudgment determination as to what funds would be available from the policy in the event of a recovery.[29]

The Supreme Court, Suffolk County, granted the plaintiff's motion, holding that the discovery of information revealing the actual amount available from the insurance policy is consistent with both the language and intent of CPLR 3101(f).[30] In analyzing the

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preparation for trial. Aside from such unnecessary consumption of time and effort . . . , the effect frequently is to disrupt the court's schedule and cause loss of trial time for many needy prospective litigants.

. . . [I]n cases where liability is doubtful but potential recovery large, the insurer on a small policy might refrain from settlement and refuse disclosure of the policy limits for the reason that it would not lose a great deal by going to trial and it might win the case outright. Disclosure might pressure the insurance company into a settlement within the policy limits . . . .

Clauss v. Danker, 264 F. Supp. 246, 248 (S.D.N.Y. 1967). The viewpoint that pretrial disclosure of policy limits below the amount of the damages sought would encourage early settlements was also espoused by proponents of CPLR 3101(f). *See, e.g.*, Letter from the New York Trial Lawyers Ass'n to the New York Legislature, June 2, 1975, on file in the St. John's Law Review Office. The counterargument is of course that any benefit to be gained from pretrial discovery of insurance agreements is negated by the existence of instances where the defendant's insurance coverage is greater than the offered settlement price and the plaintiff proceeds to trial in the hope of obtaining a larger sum. *See Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 1018-19 (1961). One commentator, however, has stated that "there is little empirical evidence to support this argument." Schwartz, *The New Federal Rules on Discovery*, 55 MASS. L.Q. 345, 348 (1970). Having considered the arguments pro and con, the Advisory Committee on Rules of Civil Procedure, in its comments regarding FED. R. CIV. P. 26(b)(2), appears to have concluded that pretrial discovery of insurance coverage will bring about more settlements than it will prevent. *See* ADVISORY COMMITTEE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, in 48 F.R.D. 487, 498-99 (1969) (Advisory Committee Notes) [hereinafter cited as Advisory Notes].

[28] — Misc. 2d —, 381 N.Y.S.2d 384 (Sup. Ct. Suffolk County 1976).

[29] *Id.* at —, 381 N.Y.S.2d at 385. The policy limits were $500,000/$1,500,000, the latter figure representing the total amount available to satisfy all claims against the defendant. *Id.*

[30] *Id.*

language of the statute, Justice Lazer observed that the statutory phrase "to satisfy part or all of a judgment" implies a legislative intent "to make possible a realistic assessment of the available insurance coverage."[31] The justice noted that this position is supported by the commentaries addressed to federal rule 26(b)(2), which assert in part that disclosure of insurance coverage should lead to a " 'realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.' "[32] Justice Lazer rejected the defendant's argument that the liberal construction urged by the plaintiff would turn CPLR 3101(f) into a device for discovery of information, such as evidence of other acts of negligence, which, unlike the information actually regarding the insurance agreement,[33] might be used at the trial to the detriment of the defendant.[34] According to the justice, other rules of evidence would apparently prevent this type of prejudicial effect.[35]

Since *Folgate* seems to have been a case of first impression, Justice Lazer could cite no New York decisional law to support his conclusions.[36] He was able to find one federal case construing rule

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[31] *Id.*

[32] *Id., quoting* Advisory Notes, *supra* note 27, at 499. While the legislative history of CPLR 3101(f) is scant, it is generally presumed by courts and commentators that the statute's purposes are the same as those underlying the federal rule. *See* Monell v. International Business Machs. Corp., 85 Misc. 2d 323, 324, 378 N.Y.S.2d 615, 617 (Sup. Ct. Orange County 1976); Hernandez v. Jones, 84 Misc. 2d 805, 806, 376 N.Y.S.2d 402, 403 (Sup. Ct. Queens County 1975); Rautine v. Preston, 84 Misc. 2d 156, 158, 374 N.Y.S.2d 280, 282-83 (Sup. Ct. Chemung County 1975); Letter from Adolf Homburger, Professor of Law at the State University of New York at Buffalo, to Judah Gribetz, Counsel to Governor Carey, July 17, 1975, on file in the St. John's Law Review Office; Letter from Carol H. Katz, Assistant Regional Director to the FTC, to Judah Gribetz, Counsel to Governor Carey, July 17, 1975, on file in the St. John's Law Review Office; Letter from the New York State Bar Ass'n Comm. on the CPLR to Judah Gribetz, Counsel to Governor Carey, July 15, 1975, on file in the St. John's Law Review Office.

[33] *See* text accompanying note 26 *supra.*

[34] — Misc. 2d at —, 381 N.Y.S.2d at 386.

[35] Since prior acts of negligence are not admissible to create an inference of negligence, *see* Wooster v. Broadway & Seventh Ave. R.R., 25 N.Y.S. 378, 379 (Sup. Ct. 1st Dep't 1893), Justice Lazer noted that the evidence could not be used to create such an inference in the present action. — Misc. 2d at —, 381 N.Y.S.2d at 386. Nor could such information be introduced as character evidence. *Id.* "[T]he character of a party may not be shown in a civil case to raise an inference that he acted in conformity therewith on the occasion in question." W. RICHARDSON, EVIDENCE § 158 (10th ed. J. Prince 1973). Insofar as employing the evidence of prior malpractice to impeach credibility, Justice Lazer noted that it would be of little use, since extrinsic evidence could not be admitted to show a prior criminal, immoral, or vicious act, *see* People v. Sorge, 301 N.Y. 198, 200-01, 93 N.E.2d 637, 638-39 (1950); — Misc. 2d at —, 381 N.Y.S.2d at 386. Moreover, it is doubtful that a doctor could even be questioned as to previous acts of malpractice, for previous acts can be used to impeach credibility only if they tend to show moral turpitude. *See* People v. Montlake, 184 App. Div. 578, 172 N.Y.S. 102 (2d Dep't 1918). Since "moral turpitude" has been interpreted to mean conduct that is dishonest, unprincipled, immoral, or contrary to justice, *see, e.g.,* United States *ex rel.* Berlandi v. Reimer, 30 F. Supp. 767, 768 (S.D.N.Y. 1939), prior acts of medical negligence do not appear to qualify for such use.

[36] In view of its relatively recent enactment, CPLR 3101(f) received little judicial scrutiny

26(b)(2), however, which he regarded as being "directly on point" and supportive of his interpretation of the rule's counterpart in New York. *Union Carbide Corp. v. Travelers Indemnity Co.*[37] involved a dispute between two defendant insurers concerning their respective liability for the satisfaction of a judgment previously rendered against the plaintiff insured. Defendant Travelers served interrogatories on codefendant Aetna Casualty and Surety Company in an attempt to secure, among other things, information concerning charges made against the plaintiff's policy for the settlement of other claims. The district court allowed discovery of this information, stating that the "possible exhaustion of policy limits by other claims are matters [*sic*] subject to discovery."[38]

Justice Lazer's citation of *Union Carbide* as "on point" is subject to criticism. While it is true that the district court expressly cited rule 26(b)(2) as "specifically" opening up to discovery the information sought by Travelers,[39] the reason given by the court for permitting the interrogatories was that since the issue in question was insurance coverage, the requested information was relevant to the subject matter of the case.[40] Furthermore, the court noted, the interrogatories were "reasonably calculated to lead to the discovery of admissible evidence."[41] This analysis is not relevant to a finding that information is discoverable under rule 26(b)(2), but relates to the provision in the federal rules that permits "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[42] On the other hand, in *Folgate,* disclosure was clearly not obtainable under the general discovery provision in the CPLR, which similarly permits the discovery of evidence relevant to an essential issue in the case.[43]

prior to the *Folgate* decision. *See* Tague v. Supe, 175 N.Y.L.J. 12, Jan. 19, 1976, at 11, col. 5 (Sup. Ct. Suffolk County) (McCarthy, J.) (information regarding insurance policies affording excess coverage held discoverable); Monell v. International Business Machs. Corp., 85 Misc. 2d 323, 378 N.Y.S.2d 615 (Sup. Ct. Orange County 1976) (discovery of policy permitted while appeal to Court of Appeals was pending); Rubenstein v. DeVoe, 84 Misc. 2d 477, 376 N.Y.S.2d 843 (Sup. Ct. Nassau County 1975) (CPLR 3101(f) applicable where plaintiff ready for trial before its enactment); Hernandez v. Jones, 84 Misc. 2d 805, 376 N.Y.S.2d 402 (Sup. Ct. Queens County 1975) (discovery of policy mandatory unless plaintiff agrees to accept true copy or sworn statement); Rautine v. Preston, 84 Misc. 2d 156, 374 N.Y.S.2d 280 (Sup. Ct. Chemung County 1975) (that pretrial proceedings were incomplete is no bar to 3101(f) discovery).

[37] 61 F.R.D. 411 (W.D. Pa. 1973) (mem.). Reported applications of the federal rule are few in number. *See* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.62[2] (2d ed. 1975).

[38] 61 F.R.D. at 413.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] FED. R. CIV. P. 26(b)(1).

[43] The discovery permitted in *Union Carbide* would clearly have been allowed under the general discovery provisions of CPLR 3101(a) since the information sought was relevant to

Accordingly, the state court had to confront the issue of whether discovery of other claims comes within the scope of 3101(f).

Nevertheless, in view of the statute's purpose to promote realistic negotiations, the *Folgate* court appears to have reached the proper decision. Narrowly reading CPLR 3101(f) to restrict discovery to information on the face of the insurance policy[44] would clearly emasculate the statute in situations where information not disclosed by the policy itself affects the amount of money actually available to the plaintiff should he be awarded judgment. On the other hand, the liberal construction given in *Folgate* ensures CPLR 3101(f)'s viability as a settlement-inducing statute.[45]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3215(e): Predemand complaint viewed as sufficient to satisfy requirements for entry of default judgment.

Service of a summons alone, unaccompanied by either notice or a complaint, commences a civil action[46] and necessitates a defendant's appearance[47] on pain of default.[48] Before a judgment of default can be entered, however, a plaintiff is required under CPLR 3215(e) to file proof that either a summons and complaint or a summons and notice[49] have been duly served upon the defendant. Consequently, when failure to appear follows service of a bare summons, entry of a default judgment is precluded[50] unless

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an essential issue in the case, *viz* insurance coverage. *See* note 25 *supra*. What funds are available under a malpractice insurance policy is obviously irrelevant, however, to the issue of whether a doctor has committed malpractice.

[44] The defendant in *Folgate* argued that since CPLR 3101(f) is in derogation of the common law, it must be strictly construed. — Misc. 2d at —, 381 N.Y.S.2d at 385. Justice Lazer properly ignored this point, however, since CPLR 104 impliedly makes inapplicable the rule calling for strict construction of statutes changing the common law. *See* FOURTH REP. 46.

[45] *Cf.* Monell v. International Business Machs. Corp., 85 Misc. 2d 323, 324, 378 N.Y.S.2d 615, 617 (Sup. Ct. Orange County 1976).

[46] CPLR 304.

[47] A defendant who has been served with a summons by personal delivery within the State must appear within 20 days of such service. Service of the summons by any other method as well as service without the State require the defendant's appearance within 30 days after service is complete. CPLR 320(a); 1 WK&M ¶ 320.02.

[48] A default occurs when a party fails to appear, plead, or timely carry out other procedural steps in the litigation. CPLR 3215(a); 8 CARMODY-WAIT 2d § 63:64, at 717 (1966); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 321 (4th ed. 1973).

[49] Before a default judgment can be entered against a party, he must be apprised of the subject matter of the action and the relief sought. Accordingly, if a plaintiff wishes to preserve his right to judgment in the event of default, the summons must be accompanied by a copy of the complaint or a notice stating the object of the action and the monetary amount for which judgment will be taken in the event of default. *See* CPLR 305(b), 3215(e).

[50] Several commentators have expressed the view that the legislature did not intend the service of a bare summons to preclude entry of a default judgment since such a harsh result