

CPLR 3101(a): Appellate Departments Adopt a Strict Approach to Discovery and Inspection of Insurance Policy Limits

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Thus, under the authority of *Deason v. Deason*,⁷⁸ Justice Heller directed the City of New York to provide counsel or, in lieu of that, to pay the fees of counsel selected by the defendant. He further recommended the amendment of the County Law,⁷⁹ which now provides for the assignment and compensation of counsel in criminal cases, to encompass indigent matrimonial defendants.

Much of the language of *Vanderpool* could be applied with equal force to an indigent plaintiff in a matrimonial action. It remains to be seen to what extent the courts will apply *Boddie* in this area as well as in non-matrimonial civil litigation.⁸⁰

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Appellate departments adopt a strict approach to discovery and inspection of insurance policy limits.

In the absence of a definitive ruling by the Court of Appeals, New York case law remains uncertain on the issue of whether a plaintiff in an automobile accident case can compel disclosure of a defendant's automobile liability insurance policy limits.⁸¹ Lower court cases arriving at conflicting results have differed in their interpretation of *Allen v. Crowell-Collier Publishing Co.*,⁸² wherein the Court of Appeals adopted a liberal construction of CPLR 3101(a) so as to mandate "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."⁸³ Despite the broad scope of this test, the Second and Third Departments have recently refused to require disclosure of insurance coverage.

⁷⁸ 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 725, 731 (1973).

⁷⁹ N.Y. COUNTY LAW art. 18-B (McKinney 1973).

⁸⁰ The First Department, relying on *Boddie*, has held that an indigent tenant is entitled to assigned counsel and witness fees in an eviction proceeding. *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1st Dep't 1971).

⁸¹ Compare *Shutt v. Pooley*, 43 App. Div. 2d 59, 349 N.Y.S.2d 839 (3d Dep't 1973) (discovery disallowed); *Mosca v. Pinsky*, 42 App. Div. 2d 708, 345 N.Y.S.2d 606 (2d Dep't 1973) (mem.) (discovery disallowed); *Fierman v. Cirillo*, 40 App. Div. 2d 976, 338 N.Y.S.2d 285 (2d Dep't 1972) (mem.) (discovery disallowed); *Sashin v. Santelli Constr. Co.*, 69 Misc. 2d 695, 330 N.Y.S.2d 522 (Sup. Ct. Ulster County 1972) (discovery disallowed); *Gold v. Jacobi*, 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966) (discovery disallowed), with *Allen v. Crowell-Collier Publishing Co.*, 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) (very liberal disclosure policy enunciated); *State Nat'l Bank v. Gregorio*, 68 Misc. 2d 926, 328 N.Y.S.2d 799 (Sup. Ct. Albany County 1971), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 170 (1973) (discovery allowed).

⁸² 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

⁸³ *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

In *Fierman v. Cirillo*,⁸⁴ the Appellate Division, Second Department, reversed as an "improvident exercise of discretion"⁸⁵ a lower court order compelling discovery and inspection of a defendant's insurance policy. The reference to "discretion" in the *Fierman* memorandum led the Supreme Court, Westchester County, in *Mosca v. Pensky*,⁸⁶ to infer that discovery of policy limits would not be denied "as a matter of law."⁸⁷ In *Mosca*, discovery proceedings had been completed and a statement of readiness had been filed when the motion for disclosure was made,⁸⁸ whereas disclosure had been sought at an earlier stage in *Fierman*. Relying upon this distinction and upon the liberal language of the *Allen* case, the *Mosca* court, after undertaking a comprehensive review of the relevant authorities, granted a motion for discovery and inspection of the defendant's policy.

On appeal, the Appellate Division, Second Department, by a divided court, reversed the lower court's order.⁸⁹ It refused to distinguish its earlier decision in *Fierman* and added that "such disclosure in this case should be denied as a matter of law."⁹⁰ The Second Department thus summarily set aside an opinion which had been praised as "the most thorough analysis yet"⁹¹ of the issue. Subsequently, in *Kenney v. Angerer*,⁹² the Second Department adhered to its position, again holding, over one dissent, that it was error as a matter of law to direct disclosure of policy limits.

In *Shutt v. Pooley*,⁹³ the Third Department aligned itself with the Second, adopting the view that a defendant's policy limits are not "evidence material and necessary"⁹⁴ where ownership and control of a

⁸⁴ 40 App. Div. 2d 976, 338 N.Y.S.2d 285 (2d Dep't 1972) (mem.).

⁸⁵ *Id.*, 338 N.Y.S.2d at 286.

⁸⁶ 73 Misc. 2d 144, 341 N.Y.S.2d 219 (Sup. Ct. Westchester County 1973), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 725, 735 (1973).

⁸⁷ *Id.* at 154, 341 N.Y.S.2d at 229.

⁸⁸ A rule promulgated by the Appellate Division, Second Department, prohibits disclosure proceedings after the filing of a note of issue and statement of readiness. 22 NYCRR 675.7. Its purpose is to discourage the placing of cases on the calendar which are not yet ready for trial. The trial court in *Mosca* held that this rule did not bar discovery of policy limits after a case is placed on the calendar, reasoning that neither delay nor prejudice results to any party from such disclosure.

⁸⁹ 42 App. Div. 2d 708, 345 N.Y.S.2d 606 (2d Dep't 1973).

⁹⁰ *Id.*, 345 N.Y.S.2d at 607.

⁹¹ 7B MCKINNEY'S CPLR 3101, supp. commentary at 7 (1973).

⁹² 42 App. Div. 2d 963, 347 N.Y.S.2d 743 (2d Dep't 1973).

⁹³ 43 App. Div. 2d 59, 349 N.Y.S.2d 839 (3d Dep't 1973).

⁹⁴ *Id.* at 62, 349 N.Y.S.2d at 843. The court relied primarily upon the reports of the Advisory Committee on Practice and Procedure. The Committee originally proposed a more liberal discovery statute than the present CPLR 3101. Commenting on the proposed provision, the Committee stated that it would not "permit discovery of the amount of insurance in the average negligence case." FIRST REP. 118-19. The proposal was abandoned and the less liberal language of CPA 288 was adopted. The court in *Shutt* con-

vehicle are not in issue and jurisdiction is not predicated upon attachment of the policy.⁹⁵ While acknowledging the liberal approach adopted by the Court of Appeals in *Allen*, the court feared that "[t]he construction of subdivision (a) of CPLR 3101 so as to permit disclosure of the insurance coverage would be more a rewriting than a liberal interpretation of the statute."⁹⁶

In light of the obvious reluctance of the appellate departments to allow discovery of insurance policy limits, the Legislature should enact a practice statute similar to rule 26(b)(2) of the Federal Rules of Civil Procedure⁹⁷ which allows such discovery. Disclosure in this critical area has advantages which clearly outweigh opposing considerations.⁹⁸ As one commentator has noted

cluded, by a fortiori reasoning, that the present provision does not contemplate discovery of insurance coverage.

⁹⁵ *Id.* The court was here referring to two instances where discovery of insurance policy limits has been allowed. The first is in quasi in rem actions where jurisdiction is obtained by attachment of the policy under the doctrine of *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In such cases, discovery is permissible because the insurance policy is the subject matter of the action, *Simpson v. Loehmann*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). Discovery has also been allowed where the fact of insurance is relevant to one of the material issues raised directly by the pleadings, i.e., ownership and control of a vehicle. *See, e.g., Leotta v. Plessinger*, 8 N.Y.2d 449, 171 N.E.2d 454, 209 N.Y.S.2d 304 (1960).

⁹⁶ 43 App. Div. 2d at 61, 349 N.Y.S.2d at 842.

⁹⁷ FED. R. CIV. P. 26(b)(2) reads in pertinent part: "A party may obtain discovery of the existence of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment. . . ."

⁹⁸ One argument advanced against allowing discovery of policy limits is that this procedure will invade the defendant's right to privacy and ultimately pave the way to discovery of his other assets. *See Gold v. Jacobi*, 52 Misc. 2d 491, 493, 276 N.Y.S.2d 309, 311 (Sup. Ct. N.Y. County 1966). The Advisory Committee to the United States Judicial Conference saw little danger in this area, noting that insurance policies differ from other personal assets of the defendant

(1) because insurance is an asset created specially to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from the defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Advisory Committee Notes, 48 F.R.D. 487, 499 (1970).

It has also been argued that an injured party has a discoverable interest in a defendant's policy. *See Superior Ins. Co. v. Superior Ct.*, 37 Cal. 2d 749, 235 P.2d 833 (1951), discussed in *Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 ALA. L. REV. 355, 360-61 (1958).

Another fear has been that disclosure of policy limits will encourage a plaintiff to demand unreasonably high payments as a condition of settlement. *See Note, Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1018-20 (1961). In this connection the Advisory Committee to the United States Judicial Conference found that

[d]isclosure of insurance coverage will enable 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. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.

Advisory Committee Notes, *supra*, at 499 (1970). With reference to New York practice, Professor David D. Siegel has argued that

[T]he stronger case today is the one which permits disclosure of the policy limits

[e]ach side is concerned with money, and damages cannot be separated from liability, even in the pretrial stages. . . . 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 judgment will be collectable.⁹⁹

The adoption of a rule similar to the one presently in force in the federal courts will help relieve calendar congestion by facilitating settlements of cases which cannot ultimately yield a monetary recovery demanded by the plaintiff ignorant of the defendant's policy limits.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Criminal conviction conclusively establishes underlying facts in subsequent civil action.

Traditionally, a criminal conviction has been considered merely prima facie evidence of its underlying facts in subsequent civil litigation. However, the foundation case for this rule, *Schindler v. Royal Insurance Co.*,¹⁰⁰ has been discredited by the abandonment of the doctrine upon which it was based, i.e., the requirement of mutuality of estoppel,¹⁰¹ in favor of the two-fold test of *Schwartz v. Public Administrator*.¹⁰²

Adopting the rationale of a 1972 First Department case,¹⁰³ the Court of Appeals, in a unanimous opinion, recently put *Schindler* to rest by holding that a contractor's conviction in federal court of using interstate facilities to violate state bribery laws conclusively established the illegality of the contract in a subsequent civil action between the contractor and New York City. In *S. T. Grand, Inc. v. City of New*

even in in personam cases. There is little dispute that the purpose of the rule originally precluding the disclosure is that it would unduly prejudice the defendant's case in the eyes of the jury. As long as the policy and coverage is kept away from the jury, the reason for the preclusive rule falls. Judges are generally in agreement that knowledge of the policy limits often aids settlement talks. If that is so, there is every reason for permitting the disclosure.

7B MCKINNEY'S CPLR 3101, *supp. commentary* at 8 (1973).

⁹⁹ Davis, *Pre-trial Discovery of Insurance Coverage*, 16 WAYNE L. REV. 1047, 1056-57 (1970).

¹⁰⁰ 258 N.Y. 310, 179 N.E. 711 (1932).

¹⁰¹ See *Albero v. State*, 26 N.Y.2d 630, 255 N.E.2d 724, 307 N.Y.S.2d 469 (1970) (mem.); *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *B.R. De Witt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

¹⁰² 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. 135, 144 (1969). The two prerequisites for the application of the doctrine of collateral estoppel are: first, the decisive issue in the present action and the previously decided issue must be identical; and second, there must have been a full opportunity to contest the issue now in dispute in the prior action.

¹⁰³ See *Vavolizza v. Krieger*, 39 App. Div. 2d 446, 336 N.Y.S.2d 748 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 351, 308 N.E.2d 439, 352 N.Y.S.2d 919 (1974). The appellate division opinion is discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 594 (1973).