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

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even in the form of the judge's own notes, the open court exception has been applied, and the stipulation enforced.[44]

In *In re Estate of Meister*,[45] a committee for an incompetent sued on her behalf as a third-party beneficiary under a separation agreement executed by her deceased parents. An executor of the estate sought to compel the committee to comply with the terms of an oral settlement made in chambers and recorded by the official court reporter. In holding the agreement "operative and effectual," the Surrogate's Court, New York County, stated that "[t]he business of this court is transacted with equal force in chambers. Moving the parties into the courtroom which adjoins my chambers for the purpose of dictating the stipulation would give the stipulation no greater weight."[46]

The court distinguished *In re Dolgin Eldert Corp.*,[47] where the Court of Appeals held that an oral settlement made in chambers was not within the open court exception. In *Dolgin*, there was no written evidence of the disputed terms of the alleged agreement, and the Court suggested that the result might be different if the facts of the agreement are undisputed and all the elements for an estoppel are present.[48]

In *Meister*, the committee conceded the existence of the stipulation and agreement as to its terms, but sought to avoid it on the ground that subsequent investigation revealed that the amount agreed to would be inadequate to support the incompetent. The court refused to grant such relief, emphasizing the interest of disposing of litigation through settlement and compromise.[49] The decision indicates that CPLR 2104 will not be strictly construed to the detriment of that interest, particularly when the terms of the settlement are clear, uncontested, and supported by a written record.

ARTICLE 31 — DISCLOSURE

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

CPLR 3101(a) requires "full disclosure of all evidence material

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44 *See* Golden Arrow Films, Inc. v. Standard Club of Cal., Inc., 38 App. Div. 2d 813, 328 N.Y.S.2d 901 (1st Dep't) (mem.), *motion for leave to appeal granted*, 30 N.Y.2d 486, 286 N.E.2d 926, 335 N.Y.S.2d 1025 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 164 (1972); Gass v. Arons, 131 Misc. 502, 227 N.Y.S. 282 (N.Y. City Ct. Bronx County 1928).

45 72 Misc. 2d 459, 339 N.Y.S.2d 575 (Sup. Ct. N.Y. County 1972).

46 *Id.* at 462, 339 N.Y.S.2d at 578.

47 31 N.Y.2d 1, 286 N.E.2d 228, 334 N.Y.S.2d 833 (1972).

48 *Id.* at 11, 286 N.E.2d at 234, 334 N.Y.S.2d at 841.

49 72 Misc. 2d at 464, 339 N.Y.S.2d at 580.

and necessary in the prosecution or defense of an action. . . ." In *Gold v. Jacobi*,[50] the Supreme Court, New York County, construed this language narrowly, holding that the limits of a defendant's automobile liability insurance policy were not matter material and necessary in the prosecution or defense of an action and thus not discoverable.[51] Thereafter, in *Allen v. Crowell-Collier Publishing Co.*,[52] the Court of Appeals concluded that the court possesses wide discretionary power to determine whether information satisfies CPLR 3101(a)'s "material and necessary" test. Disclosure, the Court stated, may be had of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason."[53] Despite this liberal disclosure mandate, without an authoritative ruling by the Court of Appeals on whether a defendant's insurance policy limits are discoverable, the several supreme court decisions in point have reached opposite conclusions.

Discovery of the policy limits was permitted in *State National Bank v. Gregorio*,[54] where the Supreme Court, Albany County, reasoned that since such information can be obtained by the trial judge at a pretrial hearing and kept from the jury, there is little reason to tolerate calendars clogged with cases which might be settled were such disclosure allowed. The Supreme Court, Westchester County, also adopted this rationale in *Nolan v. Webber*,[55] wherein it rejected the defendant's motion for a protective order denying such disclosure.

On the other hand, disclosure was denied on several rationales, including the grounds that the policy limits were not within the dis-

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[50] 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 139 (1967).

[51] *Id.* at 492, 276 N.Y.S.2d at 311. The *Gold* court followed the allegedly restrictive legislative intent of CPLR 3101(a) and felt that any change in policy was within the province of the Legislature. The court also theorized that discovery might constitute an "unconstitutional invasion of the defendant's right to the privacy of his papers." *Id.* at 493, 276 N.Y.S.2d at 311.

Discovery of the defendant's insurance policy is permitted when the action is in rem and the policy serves as the res. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Rule 26(b)(2) of the Federal Rules of Civil Procedure expressly permits pretrial discovery of insurance policy limits.

[52] 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).

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

[54] 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 (1972). The *Gregorio* court expressly rejected *Gold* and cited *Allen* as dispositive of the issue of materiality and necessity.

[55] 167 N.Y.L.J. 115, June 14, 1972, at 21, col. 2 (Sup. Ct. Westchester County).

closure mandate of CPLR 3101(a) because they were not (1) evidence[56] or (2) "material and necessary."[57]

In *Cummings v. Dominici*,[58] the Appellate Division, Second Department, seemingly adopted the restrictive position by affirming without opinion the denial of a motion for discovery of the defendants' insurance coverage. When again presented with this issue in *Fierman v. Cirillo*,[59] the Second Department, in a memorandum opinion, reversed the trial court's granting of the plaintiffs' motion for discovery as an "improvident exercise of discretion."[60]

In *Mosca v. Pensky*,[61] the Supreme Court, Westchester County, adopting *Fierman*'s language, recently held that the granting of a motion for discovery of a defendant's liability insurance policy is essentially within the sound discretion of the trial court.[62] Examining *Fierman* and *Cummings* in light of the facts contained in their records on appeal, the court interpreted them as prohibiting disclosure of the limits of coverage prior to the completion of all pretrial proceedings,[63] stating that "[i]mplicit in the *Fierman* memorandum is that discovery shall not be denied as a matter of law."[64] In *Mosca*, the motion for discovery was made after the filing of a statement of readiness, and thus the court felt free to choose the better view after an independent examination of the issue.[65] Focusing on the "material and necessary" requirement

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[56] Sashin v. Santelli Constr. Co., 69 Misc. 2d 695, 330 N.Y.S.2d 522 (Sup. Ct. Ulster County 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 170 (1972). The *Sashin* court recommended legislative action as the proper remedy for dissatisfaction with the rule of *Gold v. Jacobi*.

[57] Kevelson v. Maxwell, 71 Misc. 2d 498, 336 N.Y.S.2d 360 (Sup. Ct. N.Y. County 1972). The *Kevelson* court also felt that such discovery in negligence cases might lead to "litigious activities not previously contemplated." *Id.* at 499, 336 N.Y.S.2d at 361.

[58] 40 App. Div. 2d 765, 336 N.Y.S.2d 234 (2d Dep't 1972) (mem.).

[59] 40 App. Div. 2d 976, 338 N.Y.S.2d 285 (2d Dep't 1972) (mem.). Justice Hopkins concurred specially based on *Cummings*. Justice Benjamin dissented without opinion.

[60] *Id.*

[61] 73 Misc. 2d 144, 341 N.Y.S.2d 219 (Sup. Ct. Westchester County 1973).

[62] *Id.* at 160, 341 N.Y.S.2d at 234.

[63] *Id.* at 154, 341 N.Y.S.2d at 229. This distinction, however, is somewhat strained since the precedents relied on by the appellate division in *Fierman* distinguish only between pre- and post-trial discovery. *See* Sashin v. Santelli Constr. Co., 69 Misc. 2d 695, 330 N.Y.S.2d 522 (Sup. Ct. Ulster County 1972); Gold v. Jacobi, 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

[64] 73 Misc. 2d at 154, 341 N.Y.S.2d at 229.

[65] The court characterized the granting of a motion for discovery of the defendant's insurance policy as presenting only "a timing problem" in light of *Fierman*. *Id.* at 160, 341 N.Y.S.2d at 234. It first reached the question as to whether consideration of the plaintiffs' motion was precluded by the Second Department rule which provides that once an action is placed on the trial calendar by the filing of a statement of readiness and note of issue

> no pre-trial examination or other preliminary proceedings may be had unless . . . unusual and unanticipated conditions subsequently develop which make it necessary that further pre-trial examinations or further preliminary proceedings be had. . . .

22 NYCRR 675.7. Justice McCullough declared this rule inapplicable to pretrial discovery

of CPLR 3101(a) in light of its liberal construction in *Allen*, the court concluded that the policy limits were relevant to the "subject matter" of the case and that *Allen* mandates their discovery.[66] It also reasoned that since the insurer is the real party in interest in a negligence action, disclosure of the limits of coverage would permit the plaintiff's attorney to better assess the depth of his adversary's commitment. Additionally, the court found that such pretrial discovery in the sound discretion of the judge would not serve to invade the defendant's privacy,[67] and it rejected the argument that the plaintiff's counsel might be tempted to demand excessive damages if high policy limits were discovered.[68]

The settlement rationale for permitting disclosure of the defendant's insurance policy limits is compelling, especially in light of CPLR 104, which mandates liberal construction of the CPLR "to secure the just, speedy and inexpensive determination of every civil judicial proceeding." Moreover, should this controversy reach the Court of Appeals, defendants will find it difficult to overcome the force of the liberal construction of CPLR 3101(a) mandated by *Allen*.[69] Insurer opposition to disclosure may well be reevaluated as carriers for co-defendants and third parties increasingly find themselves in the position of adversaries under the apportionment rule of *Dole v. Dow Chemical Co.*[70] While the inception of no-fault insurance in New York may reduce the urgency for change, the Legislature should not thereby be deterred from amending CPLR 3101(a) to effect this needed reform.

CPLR 3101(a)(1): Perpetuation of a party's own testimony by deposition permitted on basis of advanced age.

Pursuant to the full disclosure mandate of CPLR 3101(a)(1), a

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of the defendant's policy since its purpose is to eliminate unnecessary delay, and such discovery, he averred, would not cause any delay. 73 Misc. 2d at 147, 341 N.Y.S.2d at 223. The court was also influenced by the proposed Westchester County Supreme Court rule which would require pretrial disclosure of insurance policy limits in all personal injury and wrongful death cases after the filing of a statement of readiness.

[66] 73 Misc. 2d at 159, 341 N.Y.S.2d at 234.

[67] The court declined to endorse the theory advanced by some authorities that the plaintiff is a third-party beneficiary of the insurance contract and therefore possesses a discoverable interest, characterizing it as "appealing but somewhat tenuous." *Id.* at 155 n.4, 341 N.Y.S.2d at 230 n.4. *See generally* Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59, 71-73 (1965). The court failed, however, to offer a superior argument.

[68] 73 Misc. 2d at 156, 341 N.Y.S.2d at 231. The court refused to impugn counsel's professional responsibility. It noted that, realistically, since New York does not permit indefinite demands for damages or verdicts in excess of the damages sought, plaintiffs will inevitably set the highest monetary amount consistent with the injuries received.

[69] *See* 7B MCKINNEY'S CPLR 3101, supp. commentary at 7 (1972); *Id.*, commentary at 11 (1970); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 237-38 (3d ed. 1970).

[70] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *noted in* 47 ST. JOHN'S L. REV. 185 (1972).