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CPLR 3216: Departments Divided on Rule's Constitutionality

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grounds, its future effects are not so readily ascertainable. New York apparently has adopted a case-by-case approach that seeks to remove all the inconsistencies and unfairness of collateral estoppel, while retaining its viability. The case-by-case approach has been adopted elsewhere and appears at the present time to be the "ideal standard."[79] The full-and-fair opportunity, applied on a case-by-case basis, appears to be the most practicable way of achieving Judge Keating's aim of eliminating repetitious litigation, while avoiding the prejudicing of the litigant's rights. If the "standard of fairness test" is applied consistently by the courts, without recourse to the rule of thumb approaches of the past,[80] the factors determinative of fairness mentioned by Judge Keating are definitive enough to be viable. However, the question arises whether the lack of certainty inherent in the imposition of the case-by-case approach might cause the opposite result hoped for, namely, that a number of parties would seek to show that they would be prejudiced by the invocation of the doctrine of collateral estoppel. While this might be true initially, this type of litigation would not be as extensive as a trial on the merits. As case law developed explaining what constitutes a fair opportunity the total of litigations would diminish. When viewed in this light, the overruling of *Glaser* becomes secondary to the Court's espousal and hoped for adoption of a "full-and-fair standard." The indecisiveness of the lower courts as to the applicability of *Glaser* as precedent has been settled. However, the discretion left to the courts in determining a "full-and-fair opportunity" can result in even more confusion than existed prior to *Schwartz.*

In any event, the practitioner representing a person in the position of D1 must now ensure that his client initiates the negligence action as soon as possible after the accident so that the client appears to be the primary plaintiff and will therefore be in a better position to control the litigation.

CPLR 3216: Departments divided on rule's constitutionality.

The constitutional validity of CPLR 3216[81] has been denied in *Cohn v. Borchard Affiliations,*[82] where by a 3-2 decision the majority

79 Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957).

80 These past approaches have been: mutuality, defensive use only, and use allowed only when the party it is being invoked against was the plaintiff in the prior suit.

81 CPLR 3216 sets forth the requirements for a motion to dismiss. There are three conditions precedent which must be met before a party may seek such a motion: (1) issue must be joined; (2) one year must elapse from the joinder of issue; and, (3) a forty-five day demand must be served upon the complainant, and a default in compliance with that demand must occur.

82 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). For a detailed discussion of

held 3216 to be unconstitutional in part because it deprived the courts of their inherent power to control their calendars. The holding in *Cohn* has been followed in a later first department case.[83] Aside from the manifest split among the justices who took part in *Cohn*, it is apparent that the entire first department is split on the issue of 3216's constitutionality, and it has been noted that the determination is dependent upon which five justices happen to be sitting for the oral arguments that day.[84]

In *Kull v. City of New York*,[85] the second department preemptorily dismissed any question of unconstitutionality in a memorandum decision: "Insofar as this holding is inconsistent with Cohn . . . , we choose not to follow that case. It is our determination that the provisions of CPLR 3216 are constitutional."[86]

In the fourth department the validity of *Cohn* was first questioned in *Johnson v. Parrow*,[87] wherein the court relied upon article VI, section 30, of the New York State Constitution as support in finding 3216 to be constitutionally valid. Furthermore, in *Foisy v. Penn Aluminum Inc.*,[88] the appellate division did not mention the constitutional issue, thereby impliedly sanctioning the rule's constitutionality.

It should therefore be noted that while both the second and fourth departments have ruled in favor of 3216's constitutional validity, the first department decision, even though by a divided court, creates a degree of uncertainty in regard to action taken pursuant to the rule. Until the Court of Appeals rules on *Cohn* there will be no definite word on the soundness of the rule.[89]

If *Cohn* is upheld by the Court, the validity of the entire CPLR will theoretically be placed in jeopardy, since *Cohn* stands for the proposition that a court has inherent power to control its own calendar — a purely procedural question. However, the entire CPLR is

this holding see 7B MCKINNEY'S CPLR 3216, supp. commentary 304 (1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 330-31 (1968).

83 J. E. Schecter Corp. v. Eastern Steam Specialty Co., N.Y.L.J., July 1, 1968, at 2, col. 1 (Sup. Ct. N.Y. County 1968).

84 For an extended discussion of the positions of the various justices in the first department see 7B MCKINNEY'S CPLR 3216, supp. commentary 304-06 (1968).

85 31 App. Div. 2d 638, 295 N.Y.S.2d 959 (2d Dep't 1968).

86 *Id.*, 295 N.Y.S.2d at 960.

87 56 Misc. 2d 863, 864, 291 N.Y.S.2d 175, 177-78 (Sup. Ct. Ontario County 1968). *See also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 517 (1968).

88 31 App. Div. 2d 783, 296 N.Y.S.2d 1019 (4th Dep't 1969).

89 The unconstitutionality of 3216 was hinted at by the Court of Appeals in Commercial Credit Corp. v. Lafayette, 17 N.Y.2d 367, 218 N.E.2d 272, 271 N.Y.S.2d 212 (1966), where the Court avoided the question but alluded to "strong support" in regard to its unconstitutionality. *See also* 7B MCKINNEY'S CPLR 3216, supp. commentary 248, 251 (1965-66); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 312-16 (1966).

merely a legislative enactment intended to regulate practice and procedure in the courts. It is submitted that the legislative rule-making power is constitutionally valid under article VI, section 30, of the New York State Constitution.

Collateral Estoppel: Third department abandons unity requirement.

In *Albero v. State*,[90] plaintiff brought suit in the Court of Claims for personal injuries allegedly suffered due to the state's negligence in maintaining highways. The state made a motion to dismiss under CPLR 3211(a) on the grounds that there existed a judgment against the plaintiff for his negligence in the same accident upon which his claim was based.

In the prior federal court action, Albero was the defendant and the plaintiffs were the driver and passengers who were hit by Albero's auto when it jumped the divider on a state highway. In that action, it should be noted that Albero was unable to start a third-party action against the state since the Court of Claims has exclusive jurisdiction in determining the liability of the state. It appears from both the Court of Claims and third department opinions that in the federal court action Albero had tried to introduce evidence that it was the state's negligence, and not his, which had been the proximate cause of the accident. However, it was determined by the federal jury that Albero's negligence was the proximate cause of the plaintiffs' injuries.[91]

The third department's opinion is in conformity with New York's continuing trend towards liberal use of collateral estoppel.[92] While *Albero* was decided before *Schwartz v. Public Administrator*,[93] it appears that the *Albero* decision meets the requirements for the use of collateral estoppel as set down by *Schwartz*. Specifically, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, secondly, there must have been a full and fair opportunity to contest the decision now said to be controlling. In applying these standards, it would appear that Albero had the opportunity to show his freedom from liability and

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90 31 App. Div. 2d 694, 295 N.Y.S.2d 965 (3d Dep't 1969). For the Court of Claims' disposition, see 56 Misc. 2d 235, 289 N.Y.S.2d 14 (Ct. Cl. 1968); *see also The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 335-36 (1968).

91 Upon the excerpts of the record of the trial in the federal court, the Court of Claims was unable to determine whether or not the evidence offered by Albero was considered by the jury, but it based its decision upon the instructions by the court and the jury verdict. 56 Misc. 2d at 238-39, 289 N.Y.S.2d at 17-18.

92 *See* Schwartz v. Public Administrator, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); DeWitt Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). *See also* pp. 144-51 *supra*.

93 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).