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CPLR 3101(d): Evidence Gathered by Insurer for Defense of Insured Is Not "Material Prepared for Litigation" in Separate Action Against the Insurer

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Leave to amend is generally denied where the opposing party would be prejudiced.[95] In the instant case the plaintiff, who was elderly and in ill-health, had prepared her case on the basis of the general denial. Therefore, the court recognized that to permit the amendment would clearly be prejudicial. The decision is in accord with prior case law[96] and serves as a good example of the type of prejudice that would be a basis for a denial of a motion to amend pleadings.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Evidence gathered by insurer in preparation for defense of insured is not "material prepared for litigation" in separate action against the insurer.

The scope of CPLR 3101(d), which grants a conditional privilege for material created in preparation for litigation, has recently been narrowed. *Collins v. Jamestown Mutual Insurance Co.*[97] involved an action by an injured plaintiff against an insurer. The "insured" had defaulted in an earlier action brought against him by the plaintiff after the insurer had disclaimed coverage and refused to defend. The "insured" then assigned to the plaintiff all rights he might have against the defendant-insurer. The court compelled the defendant to disclose any evidence relating to its investigation of the accident.[98] The court did not have to respond to the insurer's contention that the material sought was absolutely privileged from disclosure by virtue of an "insurer-insured" relationship since there was no showing that any statements from the insured to the insurer were involved. Moreover, since this privilege would presumably belong solely to the insured,[99] the plaintiff might have successfully argued that even if such statements were involved, any privilege attaching to them was impliedly waived

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95 *See, e.g.*, Ciccone v. Glenwood Holding Corp., 44 Misc. 2d 273, 253 N.Y.S.2d 576 (N.Y.C. Civ. Ct. Kings County 1964) (defendant's motion to amend answer to allege plaintiff was an employee denied because plaintiff's right to workmen's compensation, his sole remedy as an "employee," was barred by statute of limitations).

96 *See* Winslow v. Bellaire, Inc., 232 N.Y.S.2d 295 (Sup. Ct. Kings County 1962); Kamen v. State, 34 Misc. 2d 380, 228 N.Y.S.2d 749 (Ct. Cl. 1962). *Cf.* De Fabio v. Nadler Rental Service, Inc., 27 App. Div. 2d 931, 278 N.Y.S.2d 723 (2d Dep't 1967) holding that where a party who wishes to amend has or should have knowledge of facts at the time of original pleading, and does not amend for a long period of time, his motion will be denied because of gross laches.

97 32 App. Div. 2d 725, 300 N.Y.S.2d 391 (3d Dep't 1969).

98 It can be assumed that these materials, under normal circumstances, would be considered "materials prepared for litigation." *See* Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

99 *Cf.* W. RICHARDSON, EVIDENCE, § 434 (J. Prince 9th ed. 1964).

when the insured assigned his rights under the policy. Thus, it is still unsettled in New York whether any such absolute "insurer-insured" privilege does in fact exist.[100]

The court then considered the availability of a conditional privilege under CPLR 3101(d). The court found none, stating that "an investigation conducted to defend an insured against a possible legal action is not material prepared for legal action *as against the insurer*."[101]

The third department's interpretation is not without basis. In *Bennett v. Troy Record Co.*,[102] the court required an insurer to disclose materials prepared for prior litigations which involved accidents similar in nature to that in which the plaintiff was injured.[103] And in *Colbert v. Home Indemnity Co.*,[104] the supreme court held that a defendant-insurer could not prevent disclosure of materials which it had gathered for a separate action against its plaintiff-insured.

The holding in the instant case is particularly sound because the insurer disclaimed coverage in the action against its insured. How could the insurer thereafter logically assert that the materials it possessed were prepared for the defense of that litigation?

CPLR 3117(a)(3): Use of party's own deposition denied.

A party may not put his own deposition in evidence unless the conditions of CPLR 3117(a)(3) are fulfilled.[105] In *Jobse v. Connolly*,[106] the court did not allow the plaintiff's deposition to be put in evidence where he had been missing for six years and his attorney had not been able to locate him. Judge Younger remarked that there is an implied condition in CPLR 3117(a)(3) that the deponent's absence must not be due to the act or neglect of the party offering the deposition. Since the plaintiff's unavailability was a consequence of his own actions, a

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100 The question of whether an absolute privilege should attach to an insured-insurer relationship was raised in Kandel v. Tocher, 22 App. Div. 2d 513, 515, 256 N.Y.S.2d 898, 901-02 (1st Dep't 1965). 3 WK&M ¶ 3101.50b (1969) suggests that an absolute privilege should not be extended to an insurer-insured relationship and that adequate protection is afforded to the insurer by the conditional privilege.

101 32 App. Div. 2d 725-26, 300 N.Y.S.2d 392 (3d Dep't 1969) (emphasis added).

102 25 App. Div. 2d 799, 269 N.Y.S.2d 213 (3d Dep't 1966); *see also* 3 WK&M ¶ 3101.51 (1969):

> [I]n a suit by the insured against his insurer for failure to settle a case, material prepared for related litigation is treated as if not prepared for the case at bar. [Footnotes omitted.]

103 *Cf.* Linton v. Lehigh Valley R.R., 25 App. Div. 2d 334, 269 N.Y.S.2d 490 (3d Dep't 1966) (construing N.Y. Pub. Serv. Law § 47 (McKinney 1965)).

104 45 Misc. 2d 1093, 259 N.Y.S.2d 36 (Sup. Ct. Monroe County 1965), *aff'd mem.*, 25 App. Div. 2d 1080, 265 N.Y.S.2d 893 (4th Dep't 1965).

105 3 WK&M ¶ 3117.04 (1969). *See also* 7B McKINNEY'S CPLR 3117, supp. commentary 119, 120 (1965).

106 60 Misc. 2d 69, 302 N.Y.S.2d 35 (N.Y.C. Civ. Ct. Bronx County 1969).