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CPLR 3213: Judgment Obtained Against Insured Cannot Serve as the Basis for a 3213 Motion Against the Insurer

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mon-carrier liability in situations such as these. It recognizes the state's interest in protecting its domiciliaries[141] from an archaic application of the doctrine of mutuality of estoppel in other forums.[142] Furthermore, it accentuates judicial aversion to inconsistent results.[143] Finally, it safeguards against "forum shopping." However, there is a paucity of case law in New York concerning the offensive use of a judgment by one not a party to the prior action,[144] and it is conceivable that under slightly altered circumstances an opposite conclusion will be reached.[145] Nevertheless, *Hart* should provide guidance to the courts in their continuing venture away from the doctrinaire of *Glaser v. Huette.*[146]

CPLR 3213: Judgment obtained against insured cannot serve as the basis for a 3213 motion against the insurer.

CPLR 3213, as recently amended, permits the service of a summons and motion for summary judgment in lieu of a complaint in actions based upon "an instrument for the payment of money only or upon any judgment." The addition of the word "any" was intended to avoid a construction which would limit the section's operation to money judgments only.[147] However, as illustrated in *Holmes v. Allstate Insurance Co.*,[148] this clarification may, in turn, present new problems of interpretation.[149]

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141 *Cf.* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

142 The court noted that most jurisdictions continue to observe the mutuality doctrine despite the fact that it is a "dead letter" in New York by virtue of B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

143 *See, e.g.*, Schwartz v. Public Administrator, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

144 Nevertheless, the offensive use of a judgment was undoubtedly sanctioned in B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

Valid precedent for *Hart* can be found in United States v. United Air Lines, 216 F. Supp. 709, 725-29 (E.D. Wash. 1962), *aff'd sub nom.* United Air Lines v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

145 In Schwartz v. Public Administrator, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969), the following factors were listed as determinant of whether a party had had his day in court: the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and forseeability of future litigation. *See also* Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 728-29 (1967).

146 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

147 "It is the purpose of the proposed amendment to enable a judgment creditor who holds a foreign judgment . . . to utilize a motion under 3213 regardless of whether it awards a sum of money or any other relief." BENDER'S CPLR 3213, at 32-11 (pamphlet ed. 1969).

148 33 App. Div. 2d 96, 305 N.Y.S.2d 563 (1st Dep't 1969).

149 *Cf.* Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); Orenstein v. Orenstein, 59 Misc. 2d 565, 299 N.Y.S.2d 648

In *Holmes*, the plaintiff commenced his "motion-action"[150] against the Allstate Insurance Company[151] after obtaining a judgment against one allegedly insured by that company.[152] The lower court granted plaintiff's motion for summary judgment. However, focusing on the propriety of utilizing the section in these circumstances, the appellate division reversed on the ground that the action was "not the simple action 'based' upon a judgment as contemplated by CPLR 3213."[153] In reaching this conclusion, the court first considered the purpose of a 3213 motion: to provide an effective means of promptly obtaining a judgment where the defendant's liability would be established prima facie from the terms of the judgment; in these circumstances, a formal complaint is superfluous.[154]

In contrast, an action based upon section 167 of the Insurance Law[155] could not be viewed by the court as an action in which a complaint could be dispensed with: the prior judgment was not rendered against the insurer and the action was not therefore a simple enforcement action.[156] Although the insurer is bound by facts necessarily determined in the prior action against its insured, the basis of the insurer's liability, as an indemnitor, "depends upon facts dehors the terms of the judgment."[157] Consequently, the appellate division labelled the prior judgment as merely *one* of the transactions or occurrences to be established by the plaintiff, and concluded that "orderly procedure requires pleading statements setting forth plainly and concisely the transactions and all occurrences intended to be proved."[158]

(App. T. 2d Dep't 1969), *rev'g* 58 Misc. 2d 377, 295 N.Y.S.2d 116 (N.Y.C. Civ. Ct. Queens County 1968); All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 335-38 (1969).

150 Because an action under CPLR 3213 can be prosecuted with the facility of a motion, it has been styled a "motion-action." 7B MCKINNEY'S CPLR 3213, commentary 829 (1970).

151 The action was brought pursuant to Insurance Law section 167(1)(b) which prescribes that if a judgment against the insured remains unsatisfied for thirty days after service of notice of entry of the judgment, "an action . . . may be maintained against the insurer. . . ." N.Y. INS. LAW § 167(1)(b) (McKinney 1966).

152 There was some controversy as to whether or not Allstate had improperly discontinued coverage of the policy prior to the accident. However, since the case was decided upon a procedural ground, the references in both the majority and dissenting opinions regarding the merits of the case and whether a triable issue of fact indeed existed, should be recognized as dictum.

153 33 App. Div. 2d at 98, 305 N.Y.S.2d at 566.

154 FIRST REP. 91.

155 N.Y. INS. LAW § 167 (McKinney 1966).

156 The action is upon a cause of action unknown at common law, whereas "the action on a judgment was maintainable at and well known to the common law." 33 App. Div. 2d at 97, 305 N.Y.S.2d at 565.

157 *Id.* at 98, 305 N.Y.S.2d 565.

158 *Id.* at 99, 305 N.Y.S.2d at 567.