

## CPLR Art. 31: Disclosure Under Court Rule

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ment since "plaintiff . . . could not convincingly claim surprise or prejudice." Thus,

the waiver rule may be operable only when the failure to plead affirmatively has prejudiced the plaintiff in a manner that cannot be remedied by the court by the award of costs, or a continuance, or some other sanction.<sup>38</sup>

#### ARTICLE 31 — DISCLOSURE

##### *CPLR Art. 31: Disclosure under court rule.*

*Kovalenko v. Dilberian*<sup>39</sup> is an example of disclosure being sought under court rule rather than under the CPLR.<sup>40</sup> In that action for personal injuries, plaintiff moved, pursuant to Rule III, Part Four, Rules of the Appellate Division, Second Department, for an order directing the defendant to serve a copy of an examination of the plaintiff conducted by the defendant's insurance carrier. The defendant, however, explained that this examination was made in relation to plaintiff's claim under her own medical coverage insurance written by that same company.

The court, in denying the plaintiff's motion, noted that since the carrier did not examine the plaintiff as defendant's representative, there was no report available subject to plaintiff's motion. The court also held that the findings of the examination made by the insurer were unavailable to the defendant.

##### *CPLR 3101(a): Discovery of the amount of insurance not allowed.*

In *Gold v. Jacobi*,<sup>41</sup> an automobile negligence action, the plaintiff sought discovery of the amount of defendant's automobile liability insurance. The court, however, held that this information was not subject to discovery since it was not "material and necessary" in the prosecution of the case.

Although the court noted that this was a case of first impression, a case decided under the CPA lends support to this decision.<sup>42</sup> There it was held that information such as the amount of insurance coverage could not be elicited at an examination before trial since it was not related to the issues in the case.

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<sup>38</sup> 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3018.18 (1966).

<sup>39</sup> 51 Misc. 2d 625, 273 N.Y.S.2d 642 (Sup. Ct. Suffolk County 1966).

<sup>40</sup> CPLR 3121(b).

<sup>41</sup> 49 Misc. 2d 206, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

<sup>42</sup> *Milk Tank Serv., Inc. v. Wood*, 200 Misc. 333, 107 N.Y.S.2d 166 (Sup. Ct. Sullivan County 1951).