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Article 27

CPLR 3101(a): Discovery of the Amount of Insurance Not Allowed

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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.[38]

ARTICLE 31 — DISCLOSURE

CPLR Art. 31: Disclosure under court rule.

Kovalenko v. Dilberian[39] is an example of disclosure being sought under court rule rather than under the CPLR.[40] 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*,[41] 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.[42] 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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[38] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3018.18 (1966).

[39] 51 Misc. 2d 625, 273 N.Y.S.2d 642 (Sup. Ct. Suffolk County 1966).

[40] CPLR 3121(b).

[41] 49 Misc. 2d 206, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

[42] Milk Tank Serv., Inc. v. Wood, 200 Misc. 333, 107 N.Y.S.2d 166 (Sup. Ct. Sullivan County 1951).

Other courts, however, have allowed discovery of information relating to insurance where it was relevant to the issues in the case.[43]

In *Gold,* plaintiff wanted this information in order to induce settlement discussions. In support of this contention the plaintiff cited several federal decisions [44] which required disclosure of insurance amounts under the federal rules.[45] The federal position is based on the theory that if the policy limits are low, a party would tend to accept a settlement more readily, thus reducing the heavy automobile negligence dockets. However, the *Gold* court claimed that the CPLR is more restrictive in its approach to pretrial disclosure. Nevertheless, the court could have followed the federal decisions by applying CPLR 104.[46] By liberally construing CPLR 3101, the spirit of a "just, speedy and inexpensive determination" would be promoted.

CPLR 3101(a), (d): Disclosure of names and addresses of witnesses.

While under the CPA a party was not generally required to disclose the names and addresses of witnesses,[47] the present trend under the CPLR has been toward such disclosure.[48]

CPLR 3101(a) allows disclosure where the identity of witnesses is "material and necessary." This provision would appear to be limited by subdivision (d)'s proviso that where the names are considered material prepared for litigation, they are conditionally immune from disclosure.[49] However, disclosure has been allowed, both under the CPLR and the CPA, where the witness was present at the time of the occurrence [50] or was an active

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[43] Merchants Indem. Corp. v. Wallack, 14 App. Div. 2d 777, 219 N.Y.S.2d 1014 (2d Dep't 1961); Guilianelle v. Brownell, 7 App. Div. 2d 691, 179 N.Y.S.2d 344 (3d Dep't 1958).

[44] Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Hurley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965); Hill v. Greer, 30 F.R.D. 64 (D. N.J. 1961).

[45] FED. R. CIV. P. §§ 26(b), 33.

[46] In Hill v. Greer, *supra* note 44, the federal court applied FED. R. CIV. P. § 1 which is similar to CPLR 104 in order to justify disclosure of insurance limits under the federal rules.

[47] CPA § 288; Martyn v. Braun, 270 App. Div. 768, 59 N.Y.S.2d 588 (2d Dep't 1946).

[48] Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); Matter of Pennino's Estate, 41 Misc. 2d 791, 246 N.Y.S.2d 348 (Surr. Ct. Westchester County 1963).

[49] *But see* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3101.11, 3101.48 (1966).

[50] Votey v. New York City Transit Authority, 46 Misc. 2d 554, 260 N.Y.S.2d 124 (Sup. Ct. N.Y. County 1965).