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In *Broad Properties, Inc. v. McMorran,*[162] the question before the court was whether disclosure may be had from a state agency under the CPLR.

In an Article 78 proceeding, petitioner sought an order permitting the initiation of disclosure proceedings by way of discovery and inspection and an examination before trial of respondent, the New York State Superintendent of Public Works. The court denied the motion and held that because prior law did not allow the state or its agency to be the subject of disclosure in the supreme court, absent an express provision, such disclosure may not be had under the CPLR.

The plan of the CPLR was to make all disclosure procedures applicable to the state unless there was a specific provision to the contrary.[163] The Revisers of the CPLR strongly felt that the treatment given the state should not differ from that given other litigants unless it was essential to do so.[164] Since article 31 of the CPLR, governing disclosure, contains no contrary provisions, it would appear that the state (or an agency of the state) should be subject to disclosure to the same extent as other litigants. It is significant that a special exception for the court of claims was added by the legislature, contrary to the Advisory Committee's judgment, at the insistence of the Attorney General to protect the state from disclosure except on order of that court. Such disclosure on order of the court in the court of claims differs from the practice in the supreme court where disclosure may be had on mere notice to the adversary without resort to the court for an order.[165]

In the instant case disclosure against an agency of the state was denied by reliance upon the restrictive reasoning of prior case law[166] which disallowed such disclosure because of the absence

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[162] 42 Misc. 2d 1019, 249 N.Y.S.2d 626 (Sup. Ct. 1964).

[163] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.26 (1964).

[164] 1959 N.Y. LEG. DOC. NO. 17, THIRD PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 290.

[165] In the court of claims, the court on order may direct the use of any of article 31 disclosure devices. Peters v. State, 41 Misc. 2d 980, 247 N.Y.S.2d 811 (Ct. Cl. 1964); DiSanto v. State, 41 Misc. 2d 601, 245 N.Y.S.2d 234 (Ct. Cl. 1963). Section 17 of the Court of Claims Act deals only with depositions so that it does not exclude other disclosure devices under article 31.

[166] Carey v. Standard Brands, Inc., 12 App. Div. 2d 233, 210 N.Y.S.2d 849 (3d Dep't 1961), *aff'd,* 12 N.Y.2d 855, 187 N.E.2d 562, 236 N.Y.S.2d 962 (1962); People *ex rel.* Port Petroleum Corp. v. Atlantic Coast Terminals, Inc., 2 App. Div. 2d 153, 153 N.Y.S.2d 913 (3d Dep't 1956); Commissioners of State Ins. Fund v. Lapidus, 182 Misc. 368, 50 N.Y.S.2d 589 (Sup. Ct. 1943).

of express statutory authorization. This holding appears to conflict with the express intent of the Revisers and the provisions of the CPLR itself which, as already mentioned, sought to have the state treated in the same way as any other litigant, absent express provisions to the contrary. Since in the court of claims disclosure is fully applicable against the state, why deny it against the state or an agency of the state in the supreme court? If it is feared that such disclosure would unreasonably burden the state, the court could require that the disclosure may be had only on order as is the practice in the court of claims. However, there is no reason in logic or fairness to limit disclosure simply because it is sought against the state or a state agency.

An avowed purpose of the CPLR was to ease crowded and congested court calendars. The liberal use of disclosure devices not only expedites trials; in many instances, such devices are decisive in effecting a settlement of litigation out of court. It is unfortunate that a barrier to this process has been erected by the instant case. A construction of the CPLR which would have allowed the disclosure against the state agency in the supreme court would have more accurately reflected the aims of the Revisers.[167]

Statement of defendant-driver given to defendant's insurer held qualifiedly privileged against disclosure as "material prepared for litigation."

Plaintiff in a personal injury action moved for discovery of a statement made prior to the commencement of the action by the defendant truck driver to the insurance carrier covering defendants. Defendants resisted disclosure on the ground that the statement was work product and further that no special circumstances had been shown. The court held that the statement constitutes material prepared for litigation and is therefore qualifiedly privileged from disclosure under CPLR 3101(d). In order to obtain its disclosure, plaintiff must show that the report (used interchangeably with "statement") could not be duplicated and that injustice or hardship would result from its nondisclosure. The fact that plaintiff was five years of age at the time of the accident and was unable to recall how it occurred was not sufficient to compel disclosure in the absence of his showing an inability to obtain the report through other methods of disclosure, such as the taking of depositions.[168]

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[167] See CPLR 104.

[168] Maiden v. Aid Carpet Serv., Inc., 43 Misc. 2d 660, 251 N.Y.S.2d 987 (Sup. Ct. 1964).