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Party Obtaining a Copy of His Own Statement

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taking of statements.[152] An insured who fails to make full disclosure to his insurer runs the risk of forfeiting coverage by a breach of the policy's cooperation clause.[153] Therefore, the insured should be encouraged to make a full and complete statement to his insurer.[154]

Yet if the position of the court in the principal case is adopted, *i.e.*, affording no immunity to a statement made by an insured to his insurer, an insured in an automobile accident would have reason to withhold data from his insurer. It would seem, therefore, that some protection from inspection by a plaintiff should be accorded to a statement made by an insured to his insurer. That is not an extreme proposition and appears to be justified.

As to whether such a statement should be treated as a privileged communication under section 3101(b): such treatment would not appear to be warranted because a privileged communication (except for such as waiver and the like) enjoys an absolute immunity; injured victims may therefore not avail themselves of the contents of such statements, even if they show that hardship would result. The best approach would seem to be to consider such statements as material prepared for litigation under section 3101(d)(2). This would encourage an insured to make full disclosure to his insurer knowing that his statement is conditionally protected. This approach also takes into account the interests of an injured victim because he would be able to inspect the statement if he could show that undue hardship would result if the statement were withheld.

In *Durdovic v. Wisoff*,[155] the plaintiff moved to examine certain insurance company employees with respect to conversations of a physician with plaintiff's intestate prior to their respective deaths. The plaintiff relied on *Babcock v. Jackson* as the authority for his motion. The court distinguished *Babcock* on the ground that in *Babcock* the plaintiff knew the statement was in existence when the motion for disclosure was made. In *Durdovic* the court found that there was no evidence that there were any notes in existence or that the physician, before he died, signed a statement for the insurer.

Party Obtaining a Copy of His Own Statement

In *Briggs v. Spencerport Road Plaza, Inc.*,[156] plaintiffs' attorney obtained a statement from an employee of defendant

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[152] Cataldo v. County of Monroe, *supra* note 151, at 771, 238 N.Y.S.2d at 858.

[153] Schulgasser v. Young, *supra* note 151, at 792, 206 N.Y.S.2d at 85.

[154] Hollien v. Kaye, *supra* note 150, at 825, 87 N.Y.S.2d at 786.

[155] 41 Misc. 2d 639, 246 N.Y.S.2d 374 (Sup. Ct. 1964).

[156] 19 App. Div. 2d 943, 244 N.Y.S.2d 17 (4th Dep't 1963).

corporation who witnessed the accident. The court granted the defendant's motion for discovery and inspection of the statement on the ground that since a party may obtain a copy of his own statement,[157] the corporation is entitled to receive the statement made by its employee.

Section 3101(e) of the CPLR provides that "a party may obtain a copy of his own statement." While this subdivision had no counterpart in either the CPA or the RCP it was supported by case law.[158] It was the intent of the Revisers that a party be able to obtain a copy of his own statement upon request,[159] without the burden of proving special circumstances such as fraud or overreaching.[160] In *Sack v. All States Holding Corp.*,[161] a second department decision under the CPA, the court held that a party could not obtain a copy of his own statement unless special circumstances were shown.[162] The court in *Schumer v. Pearlman*,[163] a lower court case in the second department, indicated that the "special circumstance" test established in *Sack* would (even under the CPA) no longer be applied. In addition, neither the first nor the third departments required a showing of special circumstances.[164] At the time of the enactment of the CPLR, it appeared doubtful that a party was required to establish special circumstances to obtain a copy of his own statement.

Under section 3101(e) a party may by mere request obtain a copy of his own statement. In the present case, however, it was not a statement of a party that was involved but a statement of its employee. In permitting the corporation to obtain a copy of its employee's statement the court was obviously noting that when a corporation makes a statement it can do so only through one of its employees. Hence, when a corporation obtains a copy of one of its employee's statements it is, in effect, obtaining its own statement.[165]

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157 CPLR § 3101(e).

158 *E.g.*, Sacks v. Greyhound Corp., 18 App. Div. 2d 747, 235 N.Y.S.2d 669 (3d Dep't 1962); Totoritus v. Stefan, 6 App. Div. 2d 123, 175 N.Y.S.2d 802 (1st Dep't), *reargument and appeal denied*, 6 App. Div. 2d 1006, 178 N.Y.S.2d 213 (1958); Levey v. Hemme, 7 App. Div. 2d 646, 180 N.Y.S.2d 228 (2d Dep't 1958); Bassney v. Erie R.R., 24 Misc. 2d 350, 202 N.Y.S.2d 838 (Sup. Ct. 1960).

159 7B McKINNEY'S CPLR § 3101, commentary 7.

160 FIRST REP. 121, 475.

161 268 App. Div. 793, 49 N.Y.S.2d 148 (2d Dep't 1944).

162 This rule was followed in Hollien v. Kaye, *supra* note 150.

163 208 N.Y.S.2d 753 (N.Y. City Ct. 1960), citing Levey v. Hemme, *supra* note 158.

164 *E.g.*, Tortoritus v. Stefan, *supra* note 158; Holleran v. Kenna, 6 App. Div. 2d 740, 174 N.Y.S.2d 99 (3d Dep't 1958); Wilhelm v. Abel, 1 App. Div. 2d 55, 147 N.Y.S.2d 475 (3d Dep't 1955).

165 Compare CPLR § 3101(a)(1).

In *Beyer v. Keller*,[166] discovery and inspection of a statement made by the mother of an infant plaintiff was permitted. The basis of this decision was that "where there is a disability on the part of the injured person to testify and where there is such a close relationship between the witness whose statement was taken and the person injured" [167] such statement may be obtained. In the *Briggs* case, the court did not consider that "close relationship" should be restricted to blood relationships alone.

It has been suggested that "may obtain a copy of his own statement" may be susceptible of either of two constructions.[168] It could be construed to mean either that a party may do so by mere notice, or must first get a court order. If an order be deemed necessary, the scope of discovery and inspection would be more restrictive than it was under the CPA or RCP. As has been indicated previously, in the first and third departments it was unnecessary to show special circumstances and the second department, too, seemed to have abandoned the "special circumstance" test. Therefore, the law as it existed just prior to the enactment of the CPLR seemed to allow a party to obtain a copy of his own statement by mere notice. "[M]ay obtain a copy of his own statement" should be construed to permit a party to use the notice procedure under the CPLR as well.

Priority of Depositions

Rule 3106 of the CPLR deals with the priority of depositions. It in effect provides that a defendant shall have the initial opportunity to take testimony by deposition. This results because a defendant need only serve notice whereas a plaintiff must obtain leave of court in order to take testimony within twenty days after the service of the complaint. This advantage of the defendant is based on the theory that since he is blameless until proved liable he should, in the absence of special circumstances, be given priority in obtaining the first examination.[169] This provision appears to be an adoption of prior second department practice which permitted the party who first served notice to conduct the first examination.[170]

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[166] 11 App. Div. 2d 426, 207 N.Y.S.2d 591 (1st Dep't 1960), *reargument denied and appeal granted*, 12 App. Div. 2d 740, 210 N.Y.S.2d 965 (1961).

[167] *Id.* at 428, 207 N.Y.S.2d at 593.

[168] CARMODY-FORKOSCH, NEW YORK PRACTICE § 621, at 558 n.9 (8th ed. 1963).

[169] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3106.02 (1963).

[170] *E.g.*, Samuels v. Hirsch, 12 App. Div. 2d 823, 207 N.Y.S.2d 960 (2d Dep't 1961); Desiderio v. Gabrielli, 284 App. Div. 976, 135 N.Y.S.2d 1 (2d Dep't 1954).