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The effects of untimely CPLR 3101[d] disclosures

Better Late than Never

By Hillary A. Frommer

Litigants very often attempt to bar either an expert's testimony at trial or the use of an expert's report on summary judgment based on a party's failure to timely give notice under CPLR § 3101[d].[1] However, a late disclosure does not automatically result in having the expert precluded. With respect to trial testimony, there are several factual questions that a court must resolve in determining whether the expert may testify. First, because the statute itself does not set forth the timing for the disclosures, the court in its discretion determines what constitutes an "untimely" notice.[2] Unfortunately, in this arena, there is no definition. Second, CPLR § 3101[d][1][i] expressly provides that "where a party for good cause retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on the grounds of noncompliance with this paragraph." Thus, on a motion to preclude, "good cause" is the central factual issue that the court will determine by considering the following: when the expert was retained; why the expert was retained at that particular stage in the litigation; when the disclosure was made vis-à-vis the retention and whether it was deliberately delayed; and what if any prejudice the movant will suffer if the expert testifies.

For example, in *Quinn v. Artcraft Construction, Inc.*[3] the Second Department affirmed the trial court's order precluding the plaintiff's expert from testifying, upon finding that the plaintiff failed to show good cause why she did not retain her expert until a few days before the trial began and three years after the defendant made a demand under CPLR § 3101[d].

Similarly, in *Corning v Carlin*,[4] the plaintiff's expert was barred from testifying because the plaintiff failed to show good cause why she did not retain an expert until the eve of trial and disclose his existence until after the parties made their opening statements.

In *Lissak v Cerabona*,[5] a medical malpractice action against a hospital and two physicians, the defendants served a series of expert notices over the course of four years of pre-trial litigation. The plaintiff rejected the first two disclosures as insufficient, but accepted the third notice which reflected the defense strategy that the care provided by all of the defendants was within the accepted standards of practice. Subsequently, the plaintiff settled with the hospital and one doctor, and proceeded to trial against the remaining physician.

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On the eve of trial, the lone defendant served yet another CPLR § 3101[d] notice which not only identified new testifying experts, but also raised a new legal theory: the doctor who had settled pre-trial was negligent. The trial court denied the plaintiff's motion to preclude the testimony, and that decision was reversed on appeal. The First Department found that the defendant's position that it could not assert a claim of negligence against one physician while simultaneously representing the hospital did not constitute "good cause" for failing to timely provide the expert notice. Rather, the court found, the defendant's notice constituted "inexcusable belated service" of new information which "amounted to a material alteration of the theory of defense."[6] Moreover, and contrary to the trial court's conclusion, the Appellate Division determined that the plaintiff was prejudiced because the defendant's last-minute expert designations and new legal theory interfered with the plaintiff's ability to prepare for trial.

However, in *Simpson v Bellew*,[7] a personal injury action stemming from an auto accident, the court rendered the opposite result. There, the court permitted the defendant's expert to testify despite the defendant's last-minute notice. The defendant initially served a CPLR § 3101[d] notice which stated that he did not intend to call an expert witness at trial. During the trial however, a key witness gave surprising testimony which, according to the defendant, required him to present an expert accident reconstructionist in rebuttal. Accepting the defense counsel's representation that he was not aware that the witness - who the defendant had called to testify - would give that new testimony, the trial court permitted the expert to testify. The jury returned a verdict in the defendant's favor, and in a unique turn of events, the trial court set aside the verdict and ordered a new trial based on its own error in allowing the expert to testify where timely notice was not given.

The Appellate Division reversed that decision, concluding that retaining the witness in light of the surprise trial testimony constituted "good cause," and the defendant's failure to give "appropriate notice" standing alone, did not warrant preclusion.

Similarly, in *Allen v Calleja*,[8] a medical malpractice action, the appellate division reversed the trial court's order of preclusion. Although the plaintiff failed to produce his CPLR notice in accordance with the trial court's schedule, he argued that he needed to depose certain treating physicians and review a CT scan in order to comply with CPLR § 3101[d] and provide the substance of the facts and opinions on which the expert would testify.[9] The defendant hospital however, did not provide the names of the treating physicians until after the plaintiff's deadline for expert disclosures passed. The Second Department thus found that "it cannot be said that the plaintiff's failure to disclose the expert witness information was willful or contumacious."[10] Additionally, in *SCG Architects v Smith, Buss & Jacobs, LLP*,[11] the plaintiff also did not succeed in moving to preclude the defendant's expert from testifying. The court found that while the defendant's CPLR § 3101[d] notice was not detailed, it was not inadequate to warrant preclusion, and the plaintiff failed to establish that it was prejudiced by the disclosure.

This case law certainly teaches us that there is no hard and fast rule, and certainly no certainty in precluding the testimony based on the failure to timely serve a CPLR § 3101[d] notice. And, as with most aspects of litigation, this is yet another area of fact-driven unpredictability.

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1. *See e.g., Quinn v Artcraft Construction, Inc.,* 203 AD2d 444 [2d Dept 1994].
2. *See Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788 [3d Dept 2002] [noting that the trial court has discretion to preclude expert testimony].
3. *See Quinn*, *supra* at 445.
4. 178 AD2d 576 [2d Dept 1991]; *see also Liang v Yi Jing Tan*, 98 AD3d 653 [2d Dept 2102] [affirming the trial court's order precluding the defendant's expert from testifying where the defendant refused to comply with the notice requirements].
5. 10 AD3d 308 [1st Dept 2004].
6. *Id.* at 309.
7. 161 AD2d 693 [2d Dept 1990].
8. 56 AD3d 497 [2d Dept 2008].
9. *Id.*
10. *Id.*
11. 100 AD3d 619 [2d Dept 2012].