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# The **Timing** and the **Traps** Of CPLR 3101(d) Expert Disclosure

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**T**HE TIMING of expert disclosure pursuant to CPLR 3101(d) has long been a controversial topic. The statute does not set forth a deadline by which expert disclosure must be made, and the courts have been given significant latitude in determining whether to accept such disclosures even after the unwritten, but widely accepted, deadline of 30 days before trial has passed.

In *Construction by Singletree Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dept. 2008), the Appellate Division, Second Department spoke to the issue of untimely expert disclosure and issued a decision that should be carefully heeded by plaintiffs and defendants alike. In that case, the Appellate Division upheld the IAS Court's rejection of a plaintiff's expert affidavit submitted in opposition to the defendant's motion for summary judgment because the expert was not identified until after the note of issue and certificate of readiness were filed, and the plaintiff offered no valid excuse for its failure to give notice of the expert prior to completion of discovery.

Since *Singletree*, the Second Department has addressed the timing of expert disclosure several times. In *Yax v. Development Team Inc.*, 67 A.D.3d 1003, 893 N.Y.S.2d 554 (2d Dept. 2009), the court found that the Supreme Court erred in considering the affidavit of the defendant's expert submitted in opposition to the plaintiff's motion for summary judgment: the defendant did not provide an excuse for failing to identify



the expert in response to the plaintiff's discovery demands, and the plaintiff was unaware of the expert until the latter's affirmation was served in opposition to the motion.

Despite this finding, however, the defendant was able to raise an issue of fact sufficient to defeat the plaintiff's motion for summary judgment by submitting a witness affidavit.

In *Gerardi v. Verizon New York*, 66 A.D.3d 960, 888 N.Y.S.2d 136 (2d Dept. 2009), the Appellate Division held that the affirmation of the plaintiff's expert should not have been considered in determining the defendant's motion for summary judgment since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for the delay.

In *Wartski v. C.W. Post Campus of L.I. Univ.*, 63 A.D. 3916, 882 N.Y.S.2d 192 (2d Dept., 2009), the court found that the plaintiff's expert affidavit should not have been considered in determining the defendant's motion for summary judgment, again since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery and the plaintiff offered no excuse for the delays in identifying the expert.

In *Mauro v. Rosedale Enterprises*, 60 A.D.3d 401, 873 N.Y. S.2d 627 (1st Dept. 2009), the First Department held that there was no need for it to determine whether the affidavit of the plaintiff's expert should have been considered in light of the plaintiff's failure to identify the expert during pretrial discovery, despite repeated court orders to do so.<sup>1</sup>

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## The Defense Perspective

Although *Singletree* does not specifically hold that the filing of the note of issue officially terminates expert disclosure, it certainly suggests that it does.

While the facts of that case involved a motion for summary judgment, defense counsel seeking to preclude a plaintiff's post note of issue expert exchange should assert that the holding is applicable to any case in

which the plaintiff has filed a note of issue prior to responding to the defendant's demand for expert disclosure.

When defense counsel receives a note of issue and has not received a response to its demand for expert information, counsel should consider moving for summary judgment on this ground if the circumstances permit. For example, if the plaintiff's claim cannot be proven without

a liability expert, the defendant should seek dismissal on the ground that the plaintiff will not be able to prove his case.

Similarly, if the plaintiff needs an expert, such as an economist, to prove his damages, a motion should be made to preclude the economist and the damages sought to be proven by that expert.

—Jonathan A. Judd

## The Plaintiff's Perspective

Although the spectre of *Singletree* may be somewhat daunting, its holding cannot necessarily be read as a death knell for current practices regarding expert exchanges pursuant to CPLR 3101(d).

What is very real, though, is the cost to be imposed on plaintiffs if attorneys are required to adhere to the letter of the holding. The Second Department makes it clear that a party must not simply identify his or her expert pre-note, but must make a full expert disclosure in accordance with CPLR 3101(d).

The implication here is that plaintiffs will be required to retain experts and secure and exchange reports from such

experts before the note of issue is filed. This can add countless thousands of dollars in disbursements to a case, thus increasing settlement values.

Most personal injury cases require at least one expert on damages. As both the plaintiff's and the defense bars well know, the range of cost for the experts' time for testifying can be from \$2,500 to \$7,500, or more, if such things as animations and reconstructions are involved. The cost of securing an ordinary report to exchange with defendants may be less, but it adds significantly to the cost of settlement, nonetheless.

It is safe to say that the fair and equitable

resolution of disputes is the primary goal of our civil justice system. Adding substantially to the cost of prosecuting a case at a stage when it can be reasonably settled without an expert report does not seem to further this goal. Rather, by adding to the cost of litigation, the holding in *Singletree* burdens both parties with an increase in disbursements and unnecessarily enriches experts.

It does appear, though, that the Second Department sought to limit the application of its holding in *Singletree*, at least to some degree, in its decision in *Browne*.

—Andrew L. Weitz

The Second Department appears to have been a bit inconsistent in its decisions regarding expert disclosure. For example, in *Browne v. Smith*, 65 A.D.3d 996, 997, 886 N.Y.S.2d 696 (2d Dept. 2009), which was decided after *Singletree*, supra, the court opined that:

CPLR 3101 (d) (1) (i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (*Hernandez-Vega v. Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 710-711 [2007], quoting *Aversa v. Taubes*, 194 AD2d, 580, 582 [1993]).

The *Browne* court further held that:

the Supreme Court did not improvidently exercise its discretion in considering the expert materials submitted by the plaintiffs in opposition to the defendants' summary judgment motion since there was no evidence that the failure to disclose was intentional or willful, and there was no showing of

prejudice to the defendants (see *Hernandez-Vega v. Zwanger-Pesiri Radiology Group*, 39 AD3d 710; *Simpson v. Tenore & Guglielmo*, 287 AD2d 613 [2001]). Moreover, the defendants had sufficient time to respond to the plaintiffs' submissions.

*Browne v. Smith*, 65 A.D.3d at 997, 886 N.Y.S.2d at 696.

Thus, although the Second Department has upheld the preclusion of experts because they were not disclosed until after the filing of the note of issue, it has also held that such preclusion cannot occur without a showing of willfulness or intent.

### Conclusion

It will be interesting to see whether the courts take an expansive view of *Singletree*, applying it to situations other than where an expert affidavit surfaces in opposition to a motion for summary judgment. It will also be interesting to see the direction taken by the Second Department after its decision in *Browne*.

A significant development arising from *Singletree* and its progeny could be the inclusion in

preliminary conference orders of mandatory deadlines for expert exchanges. The authors have learned that this option is being considered by the judiciary in at least one county as a result of *Singletree*.

Despite its name, one thing about *Singletree* appears to be certain: it will ironically yield enough pages of case law to consume considerably more than one tree.

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1. This First Department case is different from *Singletree* because here, the IAS Court issued repeated orders directing the plaintiff to identify his expert before the note of issue was filed. Thus, this does not necessarily indicate that the First Department has adopted the Second Department's holding in *Singletree*.