Report of the Commercial and Federal Litigation Section[1]

USE OF EXPERT AFFIDAVITS IN SUMMARY JUDGMENT MOTIONS

On December 11, 2015, Governor Cuomo signed into law an amendment to CPLR 3212(b). This amendment expressly allows an expert's affidavit in support of, or in opposition to, summary judgment motions – whether or not the expert was disclosed prior to the submission of the affidavit. The measure was introduced at the request of Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. The amendment reads:

> Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of Section 3101 was not furnished prior to the submission of the affidavit.

Prior to this amendment, a line of First and Second Department cases had permitted trial judges to exercise their discretion in deciding whether to consider an expert affidavit submitted in support of or opposition to a summary judgment motion where the proponent of the affidavit did not serve a CPLR 3101(d)(1)(i) exchange prior to the filing of the note of issue. In *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008), for example, the Second Department stated that "[t]he Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe [on summary judgment], since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter." The court logically noted that the purpose of summary judgment is to determine whether there are genuine issues necessitating a trial, and that if the expert had not been named in pretrial disclosure as an expert to be called at trial, ", it was not an improvident exercise of discretion for the Supreme Court to have determined that the specific expert opinions set forth in the affidavits submitted in opposition to the motion for summary judgment could not be considered at trial."

The Second Department clarified its *Singletree* position in *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012), noting that CPLR 3101(d)(1)(i) requires a party to disclose its expert witnesses for trial, but also noting that such disclosure could happen shortly before trial, and the court recognized that frequently parties waited until it appeared that settlement was unlikely to retain an expert. On the other hand, the court further noted that courts retain discretion to appropriately sanction a party that failed to comply with a court-ordered deadline for expert disclosure. The *Rivers* court stated:

> "[T]he fact that the disclosure of an expert pursuant to CPLR 3101 (d) (1) (i) takes place after the filing of the note of issue and certificate of readiness does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101 (d) (1) (i) has been made after the

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> filing of the note of issue and certificate of readiness is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction."

The newly-amended CPLR 3212(b) overrules this line of cases and explicitly allows an affidavit to be submitted during summary judgment briefing by an expert that had not been disclosed pursuant to the expert disclosure rules. The Memorandum submitted in support of this legislation states that the rule is designed to aid in establishing uniformity in practice state-wide, reduce confusion among members of the bench and bar as to the timing of expert disclosure, and make certain that where expert testimony is required or desired in support of or opposition to summary judgment – the functional equivalent of a trial – that parties have the same latitude to utilize expert testimony as they do at trial.

Practitioners should note, however, that there is now a different practice for experts on summary judgment motion practice than there is from those experts testifying at trial.

Finally, practitioners should also keep in mind that the Commercial Division has its own rules on expert witness disclosure. *See* Commercial Division Rule 13(c). That rule requires that a party notify an opposing party of expert testimony it intends to introduce at trial at least 30 days before the end of fact discovery, and that the parties confer on a schedule for expert disclosure. It further requires that expert disclosure be accompanied by a written report by the expert, and that the note of issue and certificate of readiness may not be filed until the completion of expert disclosure. It concludes that "Expert disclosure provided after these dates without good cause will be precluded from use at trial." Commercial Division Rule 13(c).