Don't Get Lost in the *Singletree* Forest

Avoiding Expert Preclusion Under CPLR 3101(d)(1)(i)

By Patrick J. Brennan and Daniel I. Jedell

The Appellate Division, Second Department has finally shed light on the perplexing trend surrounding the timing of expert disclosure, which has plagued practitioners in recent years. New York courts long agreed that the identification and exchange of expert witnesses, pursuant to CPLR 3101(d)(1)(i), was permitted until near the time of trial. However, the Second Department's recent decisions dramatically departed from this understanding, seemingly requiring that expert disclosure be effectuated prior to the filing of the note of issue, the document that certifies the completion of discovery. And these decisions have increasingly been interpreted as creating a bright-line rule, warranting preclusion of summary judgment affidavits or trial testimony of experts who are not disclosed prior to the filing of the note of issue.

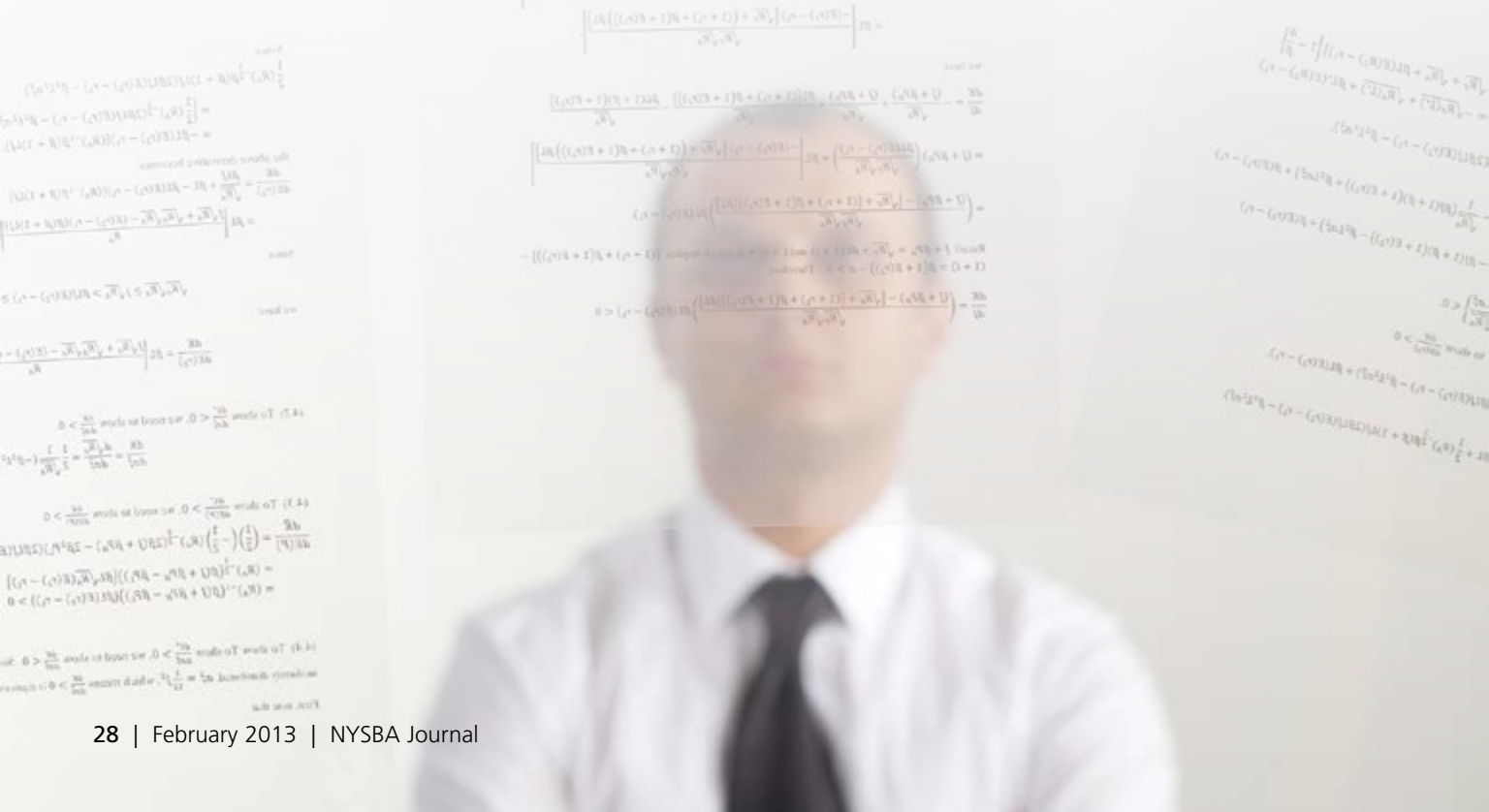
In 2012, however, the Second Department clarified this misconception, holding that a party's failure to disclose its experts prior to the filing of the note of issue is merely one factor a trial court may look to in considering preclusion.[1] While untimeliness alone will not be determinative, many rulings regarding preclusion have turned largely on whether the proponent's experts were disclosed during pre-trial discovery, making it clear that caution must be exercised.

The practical effect for litigants is two-fold: a party can be precluded from establishing prima facie entitlement to judgment as a matter of law and from offering expert testimony at trial, if that party fails to disclose his or her expert prior to the filing of the note of issue without "good cause" or a valid excuse. Accordingly, defendants should evaluate early in a litigation how they will handle the timing of expert disclosures. They are also encouraged to be aware of the evolution of CPLR 3101(d)(1)(i) – and the relevant case law – to avoid inadvertently waiving the right to obtain summary judgment or to defend the case at trial.

Expert Disclosure: A Brief Background

CPLR 3101(d)(1)(i), the only New York statute that addresses the timing of expert disclosure, provides in relevant part:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject



> matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

CPLR 3101(d)(1)(i) does not establish a specific time frame for expert disclosure and makes no mention of the filing of a note of issue in connection with identification of experts. In fact, the statute directs that preclusion should rarely be imposed as a sanction for late disclosure, providing that, "where a party for good cause shown 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 grounds of noncompliance with this paragraph." Because it is difficult to discern what the CPLR intends by "an insufficient period of time before the commencement of trial," such determination has been left to the discretion of the individual courts.

For many years, the First and Second Departments, although equally concerned with avoiding expert identification on the "eve of trial," applied discrete standards with respect to the timing of expert disclosure. The First Department imposed a challenging burden on the party opposing the expert testimony, requiring proof of the proponent's intentional or willful failure to disclose its expert and the existence of prejudice to the opposing party, in order to justify preclusion.[2] By contrast, the Second Department generally required the proponent of the expert testimony to show "good cause" for its own delay in disclosure.[3]

Singletree and Strictness in Summary Judgment

In 2008, the Second Department tightened its grip on expert disclosure, when it ruled that a trial court can preclude an expert's affidavit offered in opposition to a summary judgment motion where the expert was not disclosed prior to the filing of the note of issue.[4] The dissent questioned how an expert could be precluded on a summary judgment motion when expert disclosure is routinely permitted months after the filing of note of issue and where CPLR 3101(d)(1)(i) does not require disclosure of experts retained by a party for purposes other than providing trial testimony.

Despite these concerns, subsequent Second Department decisions continued to apply what has since been interpreted as a bright-line rule that expert disclosure made after the filing of the note of issue is untimely, and thus should not be considered.[5] In the context of summary judgment, preclusion was typically enforced to the detriment of plaintiffs until the Second Department expanded the reach of *Singletree* in 2011, by precluding an expert affidavit proffered by the defendant in support of its summary judgment motion.[6] The Second Department's decision in *Stolarski v. DeSimone* confirmed that *any* party's expert's testimony submitted in connection with a summary judgment motion would be subject to preclusion for failure to comply with CPLR 3101(d)(1)(i).

Now, after years of avoiding the Second Department's stricter approach, the First Department appears to embrace *Singletree.* In *Garcia v. City of New York*,[7] the First Department held that the trial court erred in not granting the defendant's summary judgment motion due to "plaintiff's failure to identify [its] expert during pretrial discovery as required by defendants' demand."

Trial Tribulations

In addition to the summary judgment context, the Second Department has routinely precluded experts from testifying at trial where expert disclosure was not exchanged prior to the filing of the note of issue.[8] Preclusion of experts is disastrous in medical malpractice actions, where expert testimony is necessary to prove or defend against an alleged deviation from the accepted standard of medical care and to establish or disprove causation. If the testimony of a party's expert is precluded, it will be virtually impossible for that party to make out a prima facie case (if the plaintiff's expert is precluded) or otherwise defend against the claims asserted (if the defendant's expert is precluded).

In one recent medical malpractice case, *Herrera v. Lever*,[9] the trial court determined it would be "inherently prejudicial" to permit the testimony of the plaintiff's expert at trial where the plaintiff failed to disclose the expert until 16 months after filing the note of issue. With Justice Battaglia qualifying the prejudice resulting from delay in expert disclosure as "inherent," the *Herrera* decision revealed just how far the preclusive principles of *Singletree* have been stretched.

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Reining in With *Rivers*

In October 2012, the Second Department dispelled the prevailing notion that expert disclosure is automatically rendered untimely if not effectuated during pre-trial discovery. In *Rivers v. Birnbaum*,[10] the appellate court "clarif[ied] that the 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."[11] Rather, a trial court retains discretion to consider an expert's affidavit, after considering all the relevant circumstances in a particular case, even where the court determines that expert disclosure was not made timely. The court noted that the fact that expert disclosure is made after the filing of the note of issue "is but one factor in determining whether disclosure is untimely."[12] While the majority decision does not identify what additional factors trial courts should consider, Justice Miller's concurrence offers some guidance:

> In considering whether preclusion is an appropriate penalty for noncompliance, a court should look to whether the party seeking to avoid preclusion has demonstrated good cause for its noncompliance, whether the noncompliance was willful or whether it served to prejudice the other party, and any other circumstances which may bear on the appropriateness of preclusion. These may include, but are not limited to, the length of time that has passed since the commencement of the litigation, the amount of time that has passed since expert disclosure was demanded, and the extent to which the nature of the case or the relevant theories asserted therein rendered it apparent that expert testimony would be necessary to prosecute or defend the matter.[13]

The *Rivers* decision calls for a return to the pre-*Singletree* First and Second Department standards governing the timeliness of expert disclosure. It appears likely that in re-applying those standards the courts will focus on the length of the delay and whether the need for disclosure was apparent from the nature of the case, to determine whether to preclude the parties' experts.

The Practical Effect for Litigants

The *Rivers* decision effectively restores the discretion of trial courts to determine, on a case-by-case basis, whether preclusion of expert testimony is warranted under CPLR 3101(d)(1)(i). Nonetheless, it would be imprudent to ignore the fact that in recent years both the First and Second Departments have seemingly favored preclusion of expert testimony where expert disclosure is made after the filing of the note of issue. As a general rule, it is wise to exchange expert disclosure with or before the filing of the note of issue. We are aware, however, that litigation strategy does not always permit for such a streamlined approach. In light of the foregoing decisions, a defendant would be prudent to arrange for the prompt exchange of its expert disclosure after service of the plaintiff's expert disclosure, particularly where the plaintiff files the note of issue immediately thereafter.

In addition, the *Rivers* court affirmed that a trial court has discretion, "under its general authority to supervise disclosure," to impose specific deadlines for disclosure of experts to be used in connection with summary judgment motions or who are expected to testify at trial.[14] As such, trial courts should set deadlines for the exchange of expert information and should enforce preclusion as a sanction where these deadlines are not met. However, in cases where no court-enforced timetable is set, parties facing a potential *Singletree/Garcia* objection to proffering the testimony of an expert who was not identified during pre-trial discovery must be proactive in offering a "valid excuse" for failure to identify the expert before the filing of the note of issue. Additionally, a defendant who proffers expert testimony in support of summary judgment after the note of issue has been filed should argue that automatic preclusion is clearly in contravention of CPLR 3101(d)(1)(i), particularly in light of *Rivers*.

The drastic penalty of preclusion of an expert can be fatal to a plaintiff's case or a defendant's ability to successfully challenge a lawsuit. Careful consideration and application of the limited guidance provided by the decisions discussed above are necessary to protect a client's vital interests. Special attention must be paid to this evolving area of law to avoid rulings with potentially disastrous consequences. ■

1. *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012).
2. *See Rojas v. Palese*, 94 A.D.3d 557 (1st Dep't 2012); *St. Hilaire v. White*, 305 A.D.2d 209 (1st Dep't 2003); *Downes v. Am. Monument Co.*, 283 A.D.2d 256 (1st Dep't 2001); *Flour City Architectural Metals, Inc. v. Sky-Lift Corp.*, 242 A.D.2d 471 (1st Dep't 1997); *McDermott v. Alvey, Inc.*, 198 A.D.2d 95 (1st Dep't 1993).
3. *See Lucian v. Schwartz*, 55 A.D.3d 687 (2d Dep't 2008); *Caccioppoli v. City of N.Y.*, 50 A.D.3d 1079 (2d Dep't 2008); *Hubbard v. Platzer*, 260 A.D.2d 605 (2d Dep't 1999); *Quinn v. Artcraft Constr., Inc.*, 203 A.D.2d 444 (2d Dep't 1994); *Corning v. Carlin*, 178 A.D.2d 576 (2d Dep't 1991).
4. *Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008).
5. *See Lombardi v Alpine Overhead Doors, Inc.*, 92 A.D.3d 921 (2d Dep't 2012); *Kopeloff v. Arctic Cat, Inc.*, 84 A.D.3d 890 (2d Dep't 2011); *Ehrenberg v. Starbucks Coffee Co.*, 82 A.D.3d 829 (2d Dep't 2011); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (2d Dep't 2009); *Wartski v. C.W. Post Campus of Long Island Univ.*, 63 A.D.3d 916 (2d Dep't 2009); *King v. Gregruss Mgmt. Corp.*, 57 A.D.3d 851 (2d Dep't 2008).
6. *Stolarski v. DeSimone*, 83 A.D.3d 1042 (2d Dep't 2011).
7. 98 A.D.3d 857, 858 (1st Dep't 2012).
8. *See Burnett v. Jeffers*, 90 A.D.3d 799 (2d Dep't 2011); *see Banister v. Marquis*, 87 A.D.3d 1046 (2d Dep't 2011); *Sushchenko v. Dyker Emergency Physicians Serv., P.C.*, 86 A.D.3d 638 (2d Dep't 2011).
9. 34 Misc. 3d 1239(A) (Sup. Ct., Kings Co. 2012).
10. 102 A.D.3d 26 (2d Dep't 2012).
11. *Id.* at 41.
12. *Id.*
13. *Id.* at 53.
14. *Id.* at 41.