

APPELLATE UPDATE

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AMENDMENT TO CPLR 3113(c) ON NON-PARTY DEPOSITIONS

By: Barbara D. Goldberg

Governor Cuomo has signed into law an amendment to CPLR 3113(c), which will permit attorneys for non-party witnesses to participate in their clients' depositions and make objections in the same manner as counsel for a party. The proposal to amend CPLR 3113(c) was introduced at the recommendation of the Office of Court Administration's Advisory Committee on Civil Practice. It came in response to *Thompson v. Mather*, 70 A.D.3d 1436 (4th Dept. 2010), in which the Appellate Division held that counsel for a non-party witness "does not have a right to object during or otherwise to participate in a pretrial deposition." The amendment is effective immediately.

Thompson was a medical malpractice action in which arrangements had been made for the videotaped depositions of the plaintiff's treating physicians for use at trial. The attorney for one of the witnesses objected to the form and relevance of certain questions. In holding that the attorney for the non-party had no right to object to the questions, the Appellate Division relied on the language of CPLR 3113(c) that the examination of witnesses at a deposition "shall proceed as permitted in the trial of actions in open court." The Court reasoned that since an attorney for a non-party had no right to object at trial, no such right existed at a deposition.

The Advisory Committee was concerned that the *Thompson* ruling left non-parties vulnerable at depositions since a non-party may not necessarily know whether a question invades a privilege, is plainly improper, or would, if answered, cause significant prejudice to any person. Although a subsequent trial court decision, *Sciara v. Surgical Associates of Western New York, P.C.*, 32 Misc.3d 904 (Sup. Ct., Erie County 2011), interpreted *Thompson* as being limited to objections to form and relevance, the Appellate Division in that case adhered to its determination in *Thompson* and held that

the attorney for a non-party could not participate in any manner. *Sciara v. Surgical Associates of Western New York, P.C.*, 104 A.D.3d 1256 (4th Dept. 2013). The Advisory Committee believed that legislative intervention was required so that an attorney representing a non-party witness would be able to protect all of the witness's interests and have the same right to object as an attorney for a party.

The amendment was informally known in the Committee as the "potted plant" bill, based on a comment by the trial court in *Sciara* that it was the tension between the trial procedures applicable to depositions and counsel's ethical obligation to represent a client competently that "undoubtedly causes lawyers to bristle at the perceived requirement that they sit by as a "potted plant." The amendment is of particular significance to the defense of physicians because non-party treating physicians are frequently deposed in medical malpractice actions. By enabling counsel for the non-party to interpose objections, it will eliminate the possibility of a plaintiff deposing a potential defendant before joining him or her as a party, so as to avoid the objections that defense counsel would be able to make at a deposition. This was one of the major concerns discussed by the Advisory Committee.

Barbara D. Goldberg is a Partner and Head of the Appellate Practice Group at Martin Clearwater & Bell LLP. Ms. Goldberg is well known for her appellate expertise in high exposure and complex cases and has handled hundreds of significant motions and appeals in state and federal courts. Ms. Goldberg is a member of the Office of Administration's Advisory Committee on Civil Practice, which introduced the proposal to amend CPLR 3113(c).

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