

Full Disclosure: The Insurance Disclosure Act of 2022

Materials by
Rosa Feeney, Esq.

==New York State==
ACADEMY
OF TRIAL LAWYERS

PRESENTED LIVE
JULY 13, 2023
1PM VIA ZOOM

NEW YORK'S GRIEVING FAMILIES ACT

HOW YOU CAN HELP

The Academy worked tirelessly with our coalition partners, advocates, and Academy members to achieve passage of the Grieving Families Act by the Senate and Assembly last legislative session. While Gov. Hochul ultimately vetoed the bill, we have never been closer to updating NY's 175 year-old Wrongful Death Law. Act now to help us pass the Grieving Families Act this legislative session!

SPREAD THE WORD

Tell your friends & colleagues to join over 5,000 Academy members in amplifying our message to the Governor to take action to support Grieving Families.



EMAIL THE GOVERNOR

Visit [HopeForNYFamilies.org](https://www.HopeForNYFamilies.org) to email Gov. Hochul and voice your support for the GFA.



DONATE

We need your support to protect, preserve and enhance the civil justice system. Make a donation to our [Access to Justice Campaign](#) or [Political Action Committee](#).



Donate Now
[trialacademy.org/donate](https://www.trialacademy.org/donate)



more info visit
[HopeForNYFamilies.org](https://www.HopeForNYFamilies.org)



JOIN THE ACADEMY FOR FREE CLE

**Academy members now get FREE access to
all live AND on-demand CLE courses!**

- ▶ The Academy presents CLE webinars providing CLE credits in all categories, including Diversity, Inclusion and Elimination of Bias.
- ▶ All of our courses are video recorded and made available to view on-demand on our website.

Interested in joining? Contact us for more information



518-364-4044



info@trialacademy.org



FULL DISCLOSURE: THE INSURANCE DISCLOSURE ACT OF 2022

Overview: CPLR Amendments to §3101(f) and New §3122-b Insurance Disclosure Laws

By: Rosa M. Feeney, Esq., Smiley & Smiley, LLP

July 2023

On February 24, 2022, the Governor of New York signed into law an amendment to New York Civil Practice Law and Rules (CPLR) §3101(f), known as the Comprehensive Insurance Disclosure Act (CIDA), which applies to all civil litigation filed on or after January 1, 2022.

There was a previous version of this amendment, which was revised to minimize the burden that the previous legislation imposed on the defendants and insurance carriers.

Four key points from the legislation are:

- 1- The amendment mandates disclosure of applicable insurance policies that may be liable to satisfy all or part of a judgment and information about the “total limits” available under the policies, after accounting for any erosion of available policy limits.
- 2- The new CPLR §3122-b requires written certification of the disclosures by counsel of record and the named client/party.
- 3- The new disclosure rules require that the information be updated at specified times during the litigation.
- 4- This mandatory disclosure must be done in all new matters (lawsuits commenced after December 31, 2021) and within 90 days of filing an Answer.

CPLR §3101(f) (as amended), which provides what must be disclosed, sets forth as follows:

(f) Contents of insurance agreement. (1) No later than ninety days after service of an answer pursuant to rule three hundred twenty or section three thousand eleven or three thousand nineteen of this chapter, any defendant, third-party defendant, or defendant on a cross-claim or counter-claim shall provide to the plaintiff, third-party plaintiff, plaintiff on counter-claim, and any other party in the action proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss or, if agreed to by such plaintiff or party in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment. A plaintiff or party who agrees to accept a declaration page in lieu of a copy of any insurance policy does not waive the right to receive any other information required to be provided under this subdivision, and may revoke such agreement at any time, and upon notice to an applicable defendant of such



revocation, shall be provided with the full copy of the insurance policy in place at the time of the loss. Information and documentation, as evidenced in the form of a copy of the insurance policy in place at the time of the loss or the declaration page, pursuant to this subdivision shall include:

- (i) all primary, excess and umbrella policies, contracts or agreements issued by private or publicly traded stock companies, mutual insurance companies, captive insurance entities, risk retention groups, reciprocal insurance exchanges, syndicates, including, but not limited to, Lloyd's Underwriters as defined in section six thousand one hundred sixteen of the insurance law, surplus line insurers and self-insurance programs insofar as such documents relate to the claim being litigated;*
- (ii) if the insurance policy in place is provided, a complete copy of any policy, contract or agreement under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment as referred to in this paragraph, including, but not limited to, declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions;*
- (iii) the contact information, including the name and e-mail address, of an assigned individual responsible for adjusting the claim at issue; and*
- (iv) the total limits available under any policy, contract or agreement, which shall mean the actual funds, after taking into account erosion and any other offsets, that can be used to satisfy a judgment described in this subdivision or to reimburse for payments made to satisfy the judgment.*

(2) A defendant, third-party defendant, or defendant on a cross-claim or counter-claim required to produce to a plaintiff or third-party plaintiff or plaintiff on a counter-claim all information set forth in paragraph one of this subdivision must make reasonable efforts to ensure that the information remains accurate and complete, and provide updated information to any party to whom this information has been provided at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial, and for sixty days after any settlement or entry of final judgment in the case inclusive of all appeals.

(3) For purposes of this subdivision, an application for insurance shall not be treated as part of an insurance agreement. Disclosure of policy limits under this section shall not constitute an admission that an alleged injury or damage is covered by the policy.

(4) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

(5) The requirements of this subdivision shall not apply to actions brought to recover motor vehicle insurance personal injury protection benefits under article fifty-one of the insurance law or regulation sixty-eight of title eleven of the New York codes, rules and regulations.

CPLR §3122-b sets forth the requirements for certification of the disclosure and provides as follows:

CPLR §3122-b. Certification of Insurance Disclosure:

Information provided pursuant to subdivision (f) of section thirty-one hundred one of this article shall be accompanied by a certification by the defendant, third-party defendant, or defendant on a cross-claim or counter-claim and a certification by any attorney appearing for the defendant, third-party defendant, or defendant on a cross-claim or counter-claim, sworn in the form of an affidavit or affirmation where appropriate, stating that the information is accurate and complete,



and that reasonable efforts have been undertaken, and in accordance with paragraph two of subdivision (f) of section thirty-one hundred one of this article will be undertaken, to ensure that this information remains accurate and complete.

What Is Required?

CIDA, modifies CPLR §3101(f) to mandate that the following items to be disclosed within 90 days of filing an Answer for all matters commenced after December 31, 2021:

- All primary, excess and umbrella policies that may be liable to satisfy part or all of a judgment shall be disclosed;
- A complete copy of all identified policies (including declarations, endorsements and exclusions);
- The contact information (name, email address) of the matter's adjuster(s);
- The "total limits" amounts still available under the insurance policy to satisfy, or reimburse for, a judgment, which means "the actual funds after taking into account erosion and other offsets."

NOTE: A plaintiff can agree in writing to accept a Declarations Page of a policy in lieu of the entire policy, but in doing so does not waive the right to later receive any other information required under the statute.

The law also provides:

- The new obligations apply to any defendant, third-party defendant or defendant on a cross-claim or counter-claim.
- These requirements do not apply to No-Fault claims.
- The disclosure required is not an admission that the alleged damages or injuries are covered by the disclosed policies.
- The new statute requires that the defendant must make "reasonable efforts" to ensure that the information remains accurate and complete by providing "updated information at the filing of the Note of Issue, when entering into formal settlement negotiations conducted or supervised by the Court, at a voluntary mediation, and when the case is called for trial"
- The above "ongoing" obligations exist during the entire pendency of the litigation and for 60 days after any settlement or entry of final judgment, including any appeal.

Under the newly created §3122-b of the CPLR, disclosure under the Act must be accompanied by two forms of "certification": one in the form of an affidavit from the named party defendant and one from the defendant's attorney in the form of an affirmation.



Which Insurance Policies Should Be Identified?

CIDA, as amended, requires disclosure of any and all policies that “*may* be liable to satisfy part or all of a judgment that may be entered ...” (italics added).

The term “may” will undoubtedly result in future litigation. Whose obligation is it to determine what insurance policies may or may not apply. That phrase arguably leaves it up to the defense counsel, who is presumably not insurance coverage counsel, to disclose any policies it believes will apply.

As of this writing no cases appear to exist interpreting the new provision, however, in Khadjeturian v Servidone, 2021 NY Slip Op 33582[U], (Sup Ct, Westchester County 2021), the court ordered additional discovery concerning a possible excess policy and in doing so stated:

It is generally reasonable for plaintiffs to rely on an insurance disclosure served by defendant's counsel. Without accurate insurance information plaintiffs cannot fully evaluate a matter and determine the best litigation strategy, including whether to pursue settlement or trial. Pursuant to CPLR 3101(f), a party may obtain the contents of any insurance agreement. In an action to recover damages for personal injuries, defendant should disclose all insurance policies that *might* potentially provide coverage to him for the incident (see McKiernan v Vaccaro, 168 AD3d 827, 91 N.Y.S.3d 478 [2d Dept 2019]; Keenan v Harbor View Health & Beauty Spa, 205 AD2d 589, 613 N.Y.S.2d 419 [2d Dept 1994]). Furthermore, plaintiff has a right to the disclosure of documentation that is material and necessary to the prosecution of the action (CPLR §3101[a]). (emphasis supplied)

What insurance policies need to be disclosed is up for debate.

Insurer Obligations

Notably, CIDA, does not specifically require anything from the insurer. It places the obligation and the certification requirement on the defendant and its counsel.

Penalty for Non-Compliance

CIDA does not set forth any penalty for failure to comply. Since it is a discovery provision under the CPLR, it provides for the same relief and penalties as with any other unanswered demand for disclosure.

However, defense counsel should be careful to disclose any possibly applicable policies of insurance and not just those the insurer is telling them apply.



A review of the Federal Court decisions on disclosure of insurance policies is instructive.

See Bouchard v United States Tennis Assn., 2017 US Dist LEXIS 230196, (EDNY 2017), where the court held:

...the Court finds that defendants' **failure to disclose** the full amount of their **insurance policy** until almost eighteen months after this litigation was commenced is sanctionable conduct and a violation of defendants' obligations under Rule 26. Fed R. Civ. P. 26(a)(1)(A)(iv); 26(e)(1). Under Rule 26(a)(1)(A)(iv), defendants are obligated to **disclose** the applicable **insurance policies** without prompting. Fed. R. Civ. P. 26(a)(1)(A)(iv). Rule 26(e)(1) obligates any party to supplement any prior responses to document requests and interrogatories that are deficient. Fed. R. Civ. P. 26(e)(1). Where a Court finds that a party **failed to disclose** information that should have been turned over pursuant to Rule 26(a) or 26(e), the Court may impose sanctions including the "payment of the reasonable expenses, including attorney's fees, caused by the **failure**." Fed. R. Civ. P. 37(c)(1)(A). "Rule 37 sanctions are intended to restore the parties to the position they would have occupied but for the breach of discovery obligations." In re September 11th Liability Insurance Coverage Cases, 243 F.R.D. 114, 132 (S.D.N.Y. 2007). Defendants purportedly turned over the information regarding the applicable **insurance policies** that could contribute to resolving plaintiff's claims in their initial disclosures. The parties commenced discovery, and over the next eighteen months, the parties engaged in two day-long mediation sessions with a private mediator. Plaintiff reports, and defendants do not deny, that defendants only **disclosed** the significantly larger **insurance policies** at the second private mediation on March 29, 2017, almost eighteen months after this suit was commenced. (Response Pg. 27.)

In their response, defendants maintain that their **failure** to turn over the applicable **insurance policies** was due to misinformation conveyed by the **insurance** carrier. This is plainly unacceptable. Defendants' **failure to disclose** what is a routine discovery obligation frustrated the parties' opportunity to potentially resolve this case before the costs of discovery and litigation mounted. Defendants' counsel states that they were unaware that plaintiff's counsel did not know of the larger **insurance policies**, but upon realizing their error, defendants' counsel immediately **disclosed** that information to plaintiff's counsel and the mediator during the second mediation session. Given the timing of the supplemental disclosure, the Court credits that defendants' counsel was not intentionally trying to withhold the applicable **policies**. Nevertheless, plaintiff could not have known what defendants' counsel did not **disclose**. Defendants' lack of intent does not excuse their highly unprofessional **failure to disclose**. Plaintiff is entitled to be returned to the position she would have been in had she received accurate information relating to defendants' **insurance policies** in defendants' initial disclosures. See In re September 11th Liability, 243 F.R.D. at 131-132 ("[T]he court should endeavor to impose a sanction that will restore the parties to the position they would have occupied but for the breach of discovery obligations and deter future misconduct.") (citing Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422, 437 (S.D.N.Y. 2004)).



SAMPLE CIDA DISCOVERY DEMAND

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

-----X
[]

Plaintiff,

-against

[]
Defendants.

Index #:

DEMAND FOR INSURANCE
DISCLOSURE PURSUANT TO
INSURANCE LAW 3101(F)

-----X

PLEASE TAKE NOTICE, that pursuant to CPLR §3101(f) and §3122-b, the Plaintiff's
demand as follows:

(1) All defendants, shall, within ninety days after serving an answer, serve proof of the existence
and contents of any insurance agreements as follows:

(i) All primary, excess, and umbrella policies.¹

(ii) A complete copy of any policy, contract, or agreement, including, but not limited to,
declarations, insuring agreements, conditions, exclusions, endorsements.

(iv) Insurance claims handler's name and e-mail address;

¹ This demand also includes all contracts or agreements issued by private or publicly-traded stock companies, mutual insurance companies, captive insurance entities, risk retention groups, reciprocal insurance exchanges, syndicates, including, but not limited to, Lloyd's Underwriters as defined in section six thousand one hundred sixteen of the insurance law, surplus line insurers, and self-insurance programs sold or delivered within the state of New York insofar as such documents relate to the claim being litigated.

(v) The total limits available under any policy, taking into account any erosion or offsets to the limits; and

(vi) Ongoing obligation to ensure the information remains accurate. Any revisions or updates must be disclosed:

- a. At the filing of the note of issue;
- b. When entering into any formal settlement negotiations conducted or supervised by the court;
- c. At voluntary mediation;
- d. When the case is called for trial; and
- e. For sixty days after any settlement or entry of final judgment in the case ,inclusive of all appeals.

Pursuant to §3122-b, the defendant and the defendant's attorney must provide a Certification in the form of an Affidavit or Affirmation, stating that the information provided is accurate and complete and that reasonable efforts have been undertaken to ensure that the information provided is accurate.

All demands are continuing in nature and must be supplemented and provided accordingly throughout the course of this litigation.

Dated: New York, New York

_____, 20____

By: _____

TO:



SPECIAL THANKS TO ACADEMY SPONSORS



NAM (National Arbitration and Mediation) is consistently recognized by the legal community for its superb customer service and exceptional panel of arbitrators and mediators.



Your comprehensive plaintiff-loyal settlement planning firm. Negotiation and mediation support, lien resolution and structured settlement plans.



Attorney operated Medicare, Medicaid, ERISA and other healthcare lien resolution, and MSA allocation firm. Precision resolves liens so that trial attorneys can focus on the task at hand: winning the case.



A podcast for lawyers and aspiring lawyers hosted by Andrew J. Smiley, Esq.



Assists attorneys in all 50 states with expert assistance in preparing, filing, and serving appeals in any state or federal appellate court nationwide and several international tribunals.



Physician life care planners, vocational assessment specialists, professional economists, Medicare secondary payer compliance experts, and neuropsychologists.



A full service lien resolution company that comes at no cost to law firms and is reducing liens for clients by an average of over 50%.



A team of award-winning economists and analysts that provides high-quality economic consulting services in a wide variety of litigated matters.

SPECIAL THANKS TO ACADEMY SPONSORS

SmartAdvocate®

A better way to manage personal injury cases.

A fully-integrated case management system designed exclusively for personal injury and mass tort litigation practice.

Creative Capital
INCORPORATED
STRUCTURED SETTLEMENTS

The attorney's comprehensive resource for structured settlement annuities, consulting and negotiation services.

 **Expert
Institute**

The leading expert witness service offering custom expert recruiting and high-touch consulting in every specialty.

FIRMPRO™
From C&R Insurance Services, LLC

Professional liability insurance that helps protect law firms with 1-9 attorneys, including attorneys billing less than 26 hours per week.


MediVisuals™
INC

America's leading medical exhibit specialist offering products such as Animations, Interactive Presentations and Timelines, 3-D Models and Exhibit Boards.

MEDQUEST®

A medical expert search firm for malpractice, PI and product liability litigation. Record Reform a division of medQuest, will review and retrieve digital medical records.

RECORD REFORM
A MEDQUEST COMPANY

Providing physician assistance in reducing, organizing and reviewing digital files.


CYPRESS GROVE
TECHNOLOGIES

Provides managed IT services to customers, including proactive support, live monitoring, management and maintenance for their systems.

SPECIAL THANKS TO ACADEMY SPONSORS



With 40 plus years of investigative experience, the firm offers professional investigative services for civil and criminal cases before both state and federal courts.

Robson Forensic

Engineers, Architects, Scientists & Fire Investigators

A highly credentialed group of engineers, architects, scientists and fire investigators who assist in disputes and litigation through investigations, reports and testimony.



Nota is M&T Bank's trust accounting and banking solution for law firms. It is designed with attorney insights - for lawyers, by lawyers - and is a no-cost, cloud-based platform for those of you managing solo and small law firms.



One of the foremost companies providing Vocational Expert and Life Care Planning Services to law firms throughout the country.

Judgment Enforcement **Law Offices of** **LAURENCE J. SASS**

Helping New York attorneys recover on judgments for their clients against uninsured and defaulted defendants by using innovative investigative and legal strategies and dogged persistence.



The leader in personal injury technology, CloudLex® is more than just a case management system. Designed exclusively for plaintiff personal injury law firms, it allows you to take control of your practice from intake to closure and beyond.



Full-service deposition centers plus interpreters, videographers, video conferencing, an online transcript repository, and more.

SPECIAL THANKS TO ACADEMY SPONSORS



Court reporting and videography services since 1989, as well as litigation support, online document management and protected file storage.



EXECUTIVE ATTORNEY SERVICE, INC.

Offering a variety of attorney services including process serving in all states for all kinds of legal documents, going to courts and providing filings of all legal documents, court retrievals and research, international cases and matrimonial and family law.

HART SETTLEMENT
GROUP

PARTNERED WITH



SAGE
SETTLEMENT CONSULTING

Hart Settlement Group's focus centers around assisting attorneys as well as individuals and their families with the evaluation design and negotiation of structured settlements.



IME COMPANIONS

Providing companions who are qualified and trained to witness DME's, prevent claimants from being deposed by DME Physicians, and ensure plaintiff attorneys have an independent record of what transpired in the event that the DME Physician's reports are inaccurate.



Offers an array of services including local and national court reporting, medical record retrieval, process service, registered agent services and legal talent outsourcing.



New York's premier full-service process serving agency, providing unparalleled process serving and court services to countless litigation clients.

SPECIAL THANKS TO ACADEMY SPONSORS



Providing concise summaries of all torts decisions from the 1st and 2nd Departments and Court of Appeal every week by email, their website, or the NYTW ANYWHERE app.



As a provider of payroll, human resource solutions, and tax service, Reliable Payroll offers a wide range of services.



The nation's largest online deposition bank, exclusively for plaintiff lawyers.