INSURANCE LAW

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INTRODUCTION

The year 2013 will be long remembered by those who follow insurance law as the year of the *K2* decision. No case has so dominated the attention of the insurance industry and legal profession as this one. The *K2* decision was accepted by the Court of Appeals for reconsideration and in early 2014 the Court of Appeals issued a decision modifying its initial decision reaffirming the long standing principle that

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an insurer does not lose the right to assert coverage defenses when challenging its indemnity obligations. Beyond the *K2* decision, several other significant decisions were announced in 2013 or are under active consideration by appellate courts.

I. DUTY TO DEFEND / PRECLUSION OF EXCLUSIONS

K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co.[1] is the most significant insurance coverage case from the Court of Appeals in several years. The Court granted leave to reargue, and oral argument was held in early 2014. The Court's decision on reargument is one the insurance industry is intently waiting for.

In this case, the plaintiffs were limited liability companies that made multiple loans totaling approximately $3 million to Goldan, LLC.[2] Jeffrey Daniels, an attorney, was a member of Goldan and was an American Guarantee and Liability Insurance Company ("American") insured under a malpractice or Errors & Omissions ("E&O") insurance policy ("the policy").[3] Daniels was sued for legal malpractice.[4] He, as K2 Investment Group, LLC's ("K2") attorney, allegedly failed to record mortgages and obtain title insurance, and thus committed malpractice.[5]

K2 demanded $450,000 from Daniels in full settlement of its claims under the policy.[6] American evaluated the pleadings and the claim and decided that two exclusions in the policy removed the claim from coverage.[7] One exclusion was based on the insured's capacity or status as an officer, director, etc., of a business enterprise.[8] The other removed coverage for any claim arising out of the alleged acts or omissions of the insured for any business enterprise in which he had a controlling interest.[9] In addition, American asserted that the allegations against Daniels were not based on the rendering or failing to render legal services for others.[10] American advised Daniels that it would neither defend nor indemnify him in the malpractice action.[11] After American's disclaimer, K2 issued a settlement demand to Daniels for

1. 21 N.Y.3d 384, 993 N.E.2d 1249, 971 N.Y.S.2d 229 (2013).
2. *Id.* at 387, 993 N.E.2d at 1251, 971 N.Y.S.2d at 231.
3. *Id.*
4. *Id.*
5. *Id.*
6. *K2 Inv. Grp.*, 21 N.Y.3d at 387, 993 N.E.2d at 1251, 971 N.Y.S.2d at 231.
7. *Id.* at 388, 993 N.E.2d at 1252, 971 N.Y.S.2d at 231.
8. *Id.*
9. *Id.*
10. *Id.* at 387, 993 N.E.2d at 1251, 971 N.Y.S.2d at 231.
11. *K2 Inv. Grp.*, 21 N.Y.3d at 387, 993 N.E.2d at 1251, 971 N.Y.S.2d at 231.

$450,000, significantly less than the $2 million limit of the policy.[12] Daniels transmitted the demand to American, which rejected it for the reasons it had previously given for denying coverage.[13]

Without insurer-funded counsel, Daniels defaulted in the malpractice action after the disclaimer and judgments totaling more than $3 million were entered against him, substantially in excess of the policy limit.[14] He then assigned to K2 all his claims against American, including bad faith claims.[15]

In the declaratory judgment action, K2 sought the policy limits for the judgment and extra-contractual coverage for bad faith.[16] American argued, consistent with its denial letters, that the claims against Daniels arose out of his "capacity or status" as a member and owner—and thus presumably at least a "manager"—of Goldan and out of his "acts or omissions" on Goldan's behalf.[17]

The appellate division held that the exclusions American relied on were inapplicable to the malpractice claim on which the default judgment against Daniels was based.[18] The dissent found that there was an issue whether the exclusions applied.[19] The bad faith claims were dismissed.[20]

The Court of Appeals took an entirely different approach. It held that, in breaching its duty to defend Daniels, which the Court felt was quite obvious even though American never conceded the point, American lost its right to rely on these exclusions in litigation over its indemnity obligation.[21]

The Court noted in *Lang v. Hanover Insurance Co.* that[22]

> an insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment

12. *Id.*
13. *Id.*
14. *Id.* at 388, 993 N.E.2d at 1251, 971 N.Y.S.2d at 231.
15. *Id.*
16. *K2 Inv. Grp.*, 21 N.Y.3d at 388, 993 N.E.2d at 1252, 971 N.Y.S.2d at 231.
17. *Id.*
18. *Id*. at 388-89, 993 N.E.2d at 1252, 971 N.Y.S.2d at 232.
19. *Id.* at 389, 993 N.E.2d at 1252, 971 N.Y.S.2d at 232.
20. *Id.* at 388, 993 N.E.2d at 1252, 971 N.Y.S.2d at 231.
21. *K2 Inv. Grp.*, 21 N.Y.3d at 389, 993 N.E.2d at 1252, 971 N.Y.S.2d at 232.
22. *Id.* at 390, 993 N.E.2d at 1253, 971 N.Y.S.2d at 233 (quoting Lang v. Hanover Ins. Co., 3 N.Y.3d 350, 356, 820 N.E.2d 855, 858-59, 787 N.Y.S.2d 211, 214-15 (2004)).

> against the purported insured and then seek payment . . . Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment.[23]

The Court then stated that if the insurer refused to defend when it had an obligation to do so, and a judgment was entered against the insured, then a liability insurer must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify.[24] The Court held that this rule is meant to provide insurers an incentive to defend the cases they are bound by law to defend and thus to give insureds the full benefit of their bargain.[25] The Court reasoned that it would be unfair to insureds, and promote unnecessary and wasteful litigation, if an insurer, having wrongfully abandoned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify.[26]

It is noted that K2's claims based on American's alleged bad faith failure to settle the malpractice claim against Daniels for a sum lower than the policy limit were properly dismissed.[27]

On reconsideration, the Court of Appeals examined, among other questions, whether its decision in *K2* implicitly overturned its prior 1985 decision in *Servidone Construction Corp. v. Security Insurance Co. of Hartford*.[28] *Servidone* held that an insurer retained the right to litigate the applicability of exclusions, even if it failed to undertake or improperly truncated its defense obligation:

> We agree with the dissent that an insurer's breach of duty to defend does not create coverage and that, even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss. Since the loss compromised by Servidone was not determined to be within the covered risks, we reverse the order awarding Servidone the full settlement amount and remit the case for

23. *K2 Inv. Grp.*, 21 N.Y.3d at 390, 993 N.E.2d at 1253, 971 N.Y.S.2d at 233 (quoting *Lang*, 3 N.Y.3d at 356, 820 N.E.2d at 858-59, 787 N.Y.S.2d at 214-15).

24. *K2 Inv. Grp.*, at 390-91, 993 N.E.2d at 1253-54, 971 N.Y.S.2d at 232-33.

25. *Id.* at 391, 993 N.E.2d at 1254, 971 N.Y.S.2d at 233.

26. *Id.*

27. *Id.*

28. K2 Inv. Grp., LLC v. Am. Guar. & Liab. Ins. Co., 22 N.Y.3d 578, 585-87, --- N.E.3d ---, 2014 N.Y. Slip Op. 01102(U), at 2-4 (2014); 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139 (1985).

further proceedings.[29]

The Court endorsed the *Servidone* doctrine because the plaintiffs failed to show that it was "unworkable, or caused significant injustice or hardship."[30] The Court ultimately vacated *K2-1*.[31]

II. NUMBER OF OCCURRENCES

In *Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, PA*,[32] the Court of Appeals was presented with an ongoing coverage dispute between the Roman Catholic Diocese of Brooklyn ("Diocese") and its insurers over the apportionment of liability for a settlement reached between a minor plaintiff and the Diocese in a civil action charging sexual molestation by a priest.[33] Only five judges took part in the decision, with a three-judge majority finding that each incident of sexual abuse constituted a separate occurrence and that any potential liability should be apportioned pro rata among the several insurance policies.[34]

In November 2003, Alexandra, a minor, through her mother, sued the Diocese and one of its priests, alleging sexual abuse on several occasions from August 1996 through May 2002 in a variety of geographical locations.[35] The Diocese settled the action for an amount in excess of $2 million.[36] National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), one of the insurance carriers for the Diocese, provided three consecutive one-year Commercial General Liability ("CGL") policies from August 31, 1995-1996, 1996-1997, and 1997-1998.[37] For each occurrence, the National Union CGL policy was endorsed with a $250,000 self-insured retention ("SIR"), and the liability limit of each policy was $750,000.[38] Thus, for each occurrence, National Union's coverage would trigger after $250,000 was paid by the Diocese, but the coverage was capped at $750,000.[39]

29. *Servidone Constr. Corp.*, 64 N.Y.2d at 423, 477 N.E.2d at 444, 488 N.Y.S.2d at 142

30. *K2 Inv. Grp.*, 22 N.Y.3d at 586-87, --- N.E.3d ---, 2014 N.Y. Slip Op. 01102(U), at 4.

31. *Id.* at 584, 588, --- N.E.3d ---, 2014 N.Y. Slip Op. 01102(U), at 2, 5.

32. *See generally* 21 N.Y.3d 139, 991 N.E.2d 666, 969 N.Y.S.2d 808 (2013).

33. *Id.* at 143, 991 N.E.2d at 668, 969 N.Y.S.2d at 810.

34. *Id.* at 143, 165, 991 N.E.2d at 668, 684, 969 N.Y.S.2d at 810, 826.

35. *Id.* at 143, 991 N.E.2d at 668, 969 N.Y.S.2d at 810.

36. *Id.*

37. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 143, 991 N.E.2d at 668, 969 N.Y.S.2d at 810.

38. *Id.* at 144, 991 N.E.2d at 669, 969 N.Y.S.2d at 811.

39. *Id.*

National Union disclaimed coverage based on, *inter alia*, two exclusionary provisions referring to sexual abuse, and also asserted that the "policies have $750,000 policy limits over a $250,000 self-insured retention."[40]

When the Diocese sought declaratory relief, with respect to the coverage under the 1995-1996 and 1996-1997 CGL policies, National Union claimed that the individual occurrences were subject to multiple self-insured retentions under the CGL policies and limited by the availability of other "valid and collectible" insurance.[41] The Diocese argued that the sexual abuse was one occurrence and that allocation of liability should be pursuant to a joint-and-several allocation method, so that the entire amount could be paid out of the CGL policies.[42] The Diocese also cross-moved for partial summary judgment, seeking a declaration that National Union waived the two affirmative defenses by failing to timely include those bases in its disclaimer of insurance coverage.[43]

The Court held that National Union's failure to raise SIR or multiple occurrences in the disclaimer letter does not waive those defenses under Insurance Law section 3420(d)(2).[44] It reasoned that coverage limitations are not exclusions that are waived by failure to raise them in a coverage position letter.[45]

The Court further held that each act of sexual abuse is a separate occurrence.[46] The CGL policies defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[47] They defined "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time," and limited liability to bodily injury that "occurs during the policy period."[48]

The Court, in applying the "unfortunate event" test due to the absence of policy language indicating an intent to aggregate separate

40. *Id.* at 144-45, 991 N.E.2d at 669, 969 N.Y.S.2d at 811.

41. *Id.* at 145, 991 N.E.2d at 669, 969 N.Y.S.2d at 811.

42. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 145, 991 N.E.2d at 670, 969 N.Y.S.2d at 812.

43. *Id.*

44. *Id.* at 146-47, 991 N.E.2d at 670-71, 969 N.Y.S.2d at 812-13 (citing N.Y. INS. LAW § 3420(d)(2) (McKinney 2013)).

45. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 147, 991 N.E.2d at 671, 969 N.Y.S.2d at 813.

46. *Id.* at 149, 991 N.E.2d at 673, 969 N.Y.S.2d at 815.

47. *Id.* at 148, 991 N.E.2d at 672, 969 N.Y.S.2d at 814.

48. *Id.*

incidents into one occurrence, held that separate incidents are separate occurrences.[49] This test requires consideration of "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors."[50] The incidents of sexual abuse within the underlying civil action constituted multiple occurrences over six years in multiple locations.[51] They were not part of a singular causal continuum, such as a chain reaction auto accident.[52]

The Court also compared the language in the CGL policies to that in a California case, *State Farm Fire & Casualty Co. v. Elizabeth N.*,[53] where multiple occasions of sexual abuse were considered one occurrence.[54] In that case, the policy's insuring grant was different as it provided: "[a]ll bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the same general conditions *shall be considered to be the result of one occurrence*."[55] No such language existed in this case.[56]

Also, the parties in *Elizabeth N.* "agree[d] that the number of occurrences depends on the cause of injury rather than the number of injurious effects."[57] Consequently, the Court determined that the Diocese must exhaust the SIR for each occurrence that transpires within an implicated CGL policy from which it seeks coverage.[58] When multiple policies are triggered and liability is allocated to each, then the individual CGL policy's deductible is applicable.[59]

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49. *Id.* at 148-49, 991 N.E.2d at 672, 969 N.Y.S.2d at 814.

50. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 148, 991 N.E.2d at 672, 969 N.Y.S.2d at 814.

51. *Id.*

52. *Id.* at 149-50, 991 N.E.2d at 673, 969 N.Y.S.2d at 815 (citing Hartford Accident & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 170, 173-74, 305 N.E.2d 907, 908, 910-11, 350 N.Y.S.2d 895, 897, 899-900 (1973) (holding a three-car collision is a single occurrence where the insured person's car ricocheted off one car into a second over 100 feet away; the continuum was unbroken "with no intervening agent or operative factor," and the two collisions occurred "but an instant apart")).

53. 12 Cal. Rptr. 2d 327 (Cal. Ct. App. 1992).

54. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 152-53, 991 N.E.2d at 674, 969 N.Y.S.2d at 816.

55. *Elizabeth N.*, 12 Cal. Rptr. 2d at 329 (emphasis added).

56. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 152, 991 N.E.2d at 675, 969 N.Y.S.2d at 817.

57. *Elizabeth N.*, 12 Cal. Rptr. 2d at 329.

58. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 153, 991 N.E.2d at 675, 969 N.Y.S.2d at 817.

59. *Id.*

Further, the Court held allocation is to be pro-rated, not joint and several.[60] A joint and several allocation permits the insured to "'collect its total liability . . . under a[ny] policy in effect during' the periods that the damage occurred, whereas a pro rata allocation 'limits an insurer's liability to all sums incurred by the insured during the policy period.'"[61]

The Court reasoned that pro rata allocation is consistent with the language of the policies at issue here.[62] By example, there was no indication that the parties intended that the Diocese's total liability for bodily injuries sustained from 1996 to 2002 would be assumed by a single insurer.[63]

Yet a joint and several allocation was not applicable, as the Diocese could not precisely identify the particular policy period in which each sexual abuse incident occurred.[64] This was because the minor plaintiff in the underlying civil action could only give a broad time-frame in which the sexual abuse was perpetrated and conceded in her complaint that she was "unable in good faith . . . to state the exact date(s), time(s), [and] place(s) of each and every assault."[65] Thus, "proration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period."[66]

III. RECOUPMENT OF DEFENSE COSTS

This year resulted in an insurer obtaining one of the first appellate division decisions sanctioning recoupment of defense costs when the insurer reserved the right in its insurance coverage position letter.

In *Certain Underwriters at Lloyd's London Subscribing to Policy Number SYN-1000263 v. Lacher & Lovell-Taylor, P.C.*,[67] a claim solely for reimbursement of legal fees was not covered under an E&O policy, but the court sanctioned the insurer's claim for recoupment of legal fees.[68] Importantly, the insurer reserved its right to seek reimbursement

60. *Id.* at 154, 991 N.E.2d at 676, 969 N.Y.S.2d at 818.

63. *Id.* (quoting Consol. Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208, 222-23, 774 N.E.2d 687, 693-94, 746 N.Y.S.2d 622, 628-29 (2002)).

62. *Roman Catholic Diocese of Brooklyn*, 21 N.Y.3d at 154, 991 N.E.2d at 676, 969 N.Y.S.2d at 818.

63. *Id.*

64. *Id.*

65. *Id.* at 154-55, 991 N.E.2d at 676-77, 969 N.Y.S.2d at 818-19.

66. *Id.* at 155, 991 N.E.2d at 677, 969 N.Y.S.2d at 819 (citing *Consol. Edison Co. of N.Y.*, 98 N.Y.2d at 224, 774 N.E.2d at 695, 746 N.Y.S.2d at 630).

67. 112 A.D.3d 434, 975 N.Y.S.2d 870 (1st Dep't 2013).

68. *Id.*

of its defense costs in the event of a finding of no coverage, which was awarded.[69]

Yet again, the same appellate division addressed an insurer's attempt to recoup defense costs incurred in defending an insured. In *BX Third Avenue Partners, LLC v. Fidelity National Title Insurance Co.*,[70] the insurer's attempt to recoup defense costs was denied as it failed to reserve its right to recoupment at the time it assumed the defense of the insured.[71]

IV. ADDITIONAL INSURED COVERAGE

AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.[72] held that an owner does not qualify as an additional insured under a blanket additional insured endorsement when the owner did not have a direct contractual promise from the named insured to be given that status.[73]

In *AB Green*, Juan Vargas was injured at a construction site and sued AB Green Gansevoort, LLC ("AB Green").[74] AB Green was alleged to be the property owner.[75] Pavarini McGovern, LLC ("Pavarini") was the general contractor that retained Peter Scalamandre & Sons, Inc. ("Scalamandre") as a subcontractor.[76] Scalamandre then purchased concrete from Ferrara Brothers Building Materials Corp. ("Ferrara") pursuant to an unsigned purchase order.[77]

Ferrara was insured by Liberty Mutual Insurance Company ("Liberty Mutual") under a Commercial General Liability Policy ("the Policy"). The Policy was endorsed with a Blanket Additional Insured Endorsement that added an additional insured "when you and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy."[78] The term "you" was defined in the policy as the named insured, Ferrara.

Liberty Mutual argued that since AB Green did not produce any written agreement between itself and Ferrara naming AB Green as an

69. *Id.*
70. 112 A.D.3d 430, 977 N.Y.S.2d 9 (1st Dep't 2013).
71. *Id.* at 430, 977 N.Y.S.2d at 10.
72. 102 A.D.3d 425, 961 N.Y.S.2d 3 (1st Dep't 2013).
73. *Id.* at 426, 961 N.Y.S.2d at 4.
74. *Id.*
75. *Id.*
76. *Id.*
77. *AB Green Gansevoort, LLC*, 102 A.D.3d at 426, 961 N.Y.S.2d at 4.
78. *Id.*

additional insured, under the plain language of the policy, there was no question of fact that an agreement did not exist between Ferrara and AB Green.[79] Thus, AB Green was not an additional insured under the policy.[80]

The court found Liberty Mutual's argument persuasive.[81] Without a written agreement between Ferrara and AB Green that the latter be named an additional insured, AB Green did not qualify as an additional insured under the policy.[82] This is because the additional insured endorsement specifically provided that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured.[83] No such agreement existed here.[84]

AB Green argued that the title of the endorsement, "Additional Insured—Owners, Lessees or Contractors—Automatic status when required in construction agreement with you," automatically conferred additional insured status upon AB Green when Ferrara entered into the purchase order with Scalamandre.[85] The court rejected this argument reasoning that the title does not alter the substance of the endorsement.[86] AB Green argued, in the alternative, that the terms of the policy itself are ambiguous because the policy can be read to mean that the named insured and the party seeking to be an additional insured only need enter into written agreements *with another party*, not necessarily with each other.[87] Similarly, the court rejected this argument, as that is not what the blanket endorsement provided.[88]

One of the great insurance debates not yet to reach the New York Court of Appeals surrounds the breadth of commonly used blanket additional insured endorsements. In 2010, the Court of Appeals, in *Regal Construction Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA*,[89] gave a sweepingly broad interpretation to additional

79. *Id.*
80. *Id.* at 426, 961 N.Y.S.2d at 5.
81. *Id.* at 426, 961 N.Y.S.2d at 4.
82. *AB Green Gansevoort, LLC*, 102 A.D.3d at 426, 961 N.Y.S.2d at 5.
83. *Id.*
84. *Id.*
85. *Id*. at 427, 961 N.Y.S.2d at 5.
86. *Id.* (citing Albany Med. Ctr. v. Preferred Life Ins. Co. of N.Y., 19 Misc. 3d 209, 851 N.Y.S.2d 843 (Sup. Ct. Albany Cnty. 2008)).
87. *AB Green Gansevoort, LLC*, 102 A.D.3d at 427, 961 N.Y.S.2d at 5 (emphasis added).
88. *Id*.
89. 15 N.Y.3d 34, 930 N.E.2d 259, 904 N.Y.S.2d 338 (2010).

insured endorsements that were in regular use at the time.[90] The endorsement in *Regal* provided that the coverage would be extended to a party "only with respect to liability arising out of [Regal's] ongoing operations."[91]

The Court held that it has "interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with.'" [92] It required "only that there be some causal relationship between the injury and the risk for which coverage is provided."[93] The Court then went on to find that an accident involving the named insured's employee arose of out that company's "ongoing operations."[94]

In *National Union Fire Insurance Co. of Pittsburgh, PA v. Greenwich Insurance Co.*,[95] the First Department held that the phrase "*caused by*" the named insured's operations in an additional insured endorsement was as broad as the phrase "*arising out of"* the named insured's operations.[96]

The additional insured endorsement in the Greenwich policy applied to bodily injury caused, in whole or in part, by Associated's acts or omissions or the acts or omissions of those acting on Associated's behalf in the performance of Associated's ongoing operations for plaintiff, NVR, Inc.[97] The phrase "caused by" "does not materially differ from the . . . phrase, 'arising out of'"[98] In turn, the phrase "arising out of" focuses "not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained."[99] This is an issue that will eventually reach the high court and is of tremendous significance to the construction trade. If the "caused by operations" language was intended to mean the same thing as "arising out of ongoing operations," then the drafters would not have changed the policy terms to use more limiting language. Clearly, from the insurance industry's perspective, the intention was to limit the breadth of additional insured coverage.

90. *Id.* at 37-39, 930 N.E.2d at 261, 904 N.Y.S.2d at 340.

91. *Id.* at 36, 930 N.E.2d at 261, 904 N.Y.S.2d at 340.

92. *Id.* at 38, 930 N.E.2d at 262, 904 N.Y.S.2d at 341 (quoting Maroney v. N.Y. Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 839 N.E.2d 886, 889, 805 N.Y.S.2d 533, 536 (2005) (citations omitted)).

93. *Id*.

94. *Regal Constr. Corp.*, 15 N.Y.3d at 39, 930 N.E.2d at 263, 904 N.Y.S.2d at 342.

95. 103 A.D.3d 473, 962 N.Y.S.2d 9 (1st Dep't 2013).

96. *Id.* at 474, 962 N.Y.S.2d at 10 (emphasis added).

97. *Id.*

98. *Id.* (citations omitted).

99. *Id.* (citations omitted).

V. UM/SUM COVERAGE

The Appellate Division, Second Department, did not preclude a supplemental underinsured motorist ("SUM") claimant from making a bad faith claim after executing a release and trust agreement. In *Desiderio v. Geico General Insurance Co.*,[100] the court found that the Release and Trust Agreement did not contain broad, all-encompassing language but, rather contained language limiting its reach to compensation for personal injuries under the SUM Endorsement.[101]

On April 19, 2010, a car struck the applicant's, John Desiderio's, house, crashed through the bedroom wall and came to rest upon him.[102] Desiderio was insured by GEICO General Insurance Company ("GEICO") with a SUM policy.[103] In June of the same year, he filed a claim seeking SUM benefits. The matter went to arbitration in August, and he was awarded $100,000, the full amount of the available benefits.[104]

On September 9, 2011, Desiderio executed a Release and Trust Agreement, releasing GEICO from liability in exchange for the SUM payment.[105] In April 2012, Desiderio commenced this action against GEICO, alleging that GEICO breached the insurance contract by failing to investigate, bargain for, and settle his claims for SUM benefits in good faith.[106] GEICO moved to dismiss the lawsuit based on the Release and Trust Agreement.[107]

GEICO contended that this action was barred by the Release and Trust Agreement because it arose out of Desiderio's claim for compensation under the SUM Endorsement.[108] However, the court held that it could not be definitively determined at this juncture whether the scope of the Release and Trust Agreement was intended to cover the allegations in the complaint, or whether its purpose was, among other things, to protect GEICO's subrogation rights.[109]

In *Kesick v. New York Central Mutual Fire Insurance Co.*,[110] the "danger invites rescue" doctrine held to apply to claims for

100. 107 A.D.3d 662, 967 N.Y.S.2d 392 (2d Dep't 2013).
101. *Id.* at 663, 967 N.Y.S.2d at 394.
102. *Id.* at 662, 967 N.Y.S.2d at 393.
103. *Id.*
104. *Id.*
105. *Desiderio*, 107 A.D.3d at 662, 967 N.Y.S.2d at 393.
106. *Id.*
107. *Id.*
108. *Id.* at 663, 967 N.Y.S.2d at 394.
109. *Id*.
110. 106 A.D.3d 1219, 964 N.Y.S.2d 216 (3d Dep't 2013).

underinsured motorists benefits.[111] Thus, a first responder may be entitled to SUM benefits for injuries sustained when removing a victim from his car after an accident.

In June 2007, Kesick, a State Trooper, licensed registered nurse, and paramedic, responded to a 911 call for assistance following a two-vehicle accident.[112] Ralph Williams was trapped inside his vehicle and complained of pain in his chest, hip, and neck.[113] Once the fire department arrived and removed the roof of Williams' vehicle with the Jaws of Life, Kesick entered the vehicle and stabilized Williams' neck.[114] While Kesick and two other individuals were lifting Williams out of the vehicle, Kesick injured his right shoulder.[115]

Kesick sued Williams and Prindle, the operator of the other motor vehicle involved in the accident.[116] The claim against Williams was dismissed based upon an absence of his negligence, and Prindle settled the claim against him for the $25,000 limit of his automobile insurance policy.[117] Kesick then sought underinsured benefits (hereinafter SUM) under a policy, which he held with New York Central Mutual Fire Insurance Company ("NYCM").[118]

NYCM denied coverage on two grounds.[119] First, Kesick was not injured as a result of a motor vehicle accident and, second, that the SUM policy prohibited duplicative awards, and Kesick had received benefits under the Workers' Compensation Law.[120]

The court ruled that there were questions of fact as to whether Kesick's injury was caused by the use of Prindle's underinsured vehicle.[121] It rejected NYCM's view that Kesick's injuries must be directly caused by an accident that arose out of the use of a vehicle and NYCM's related assertion that the accident complained of here occurred only at the time of Kesick's injury.[122]

Kesick's claims that Williams was injured as a result of the accident caused by Prindle's negligent operation of his vehicle and that Kesick was injured in the process of rescuing him were

111. *Id.* at 1222, 964 N.Y.S.2d at 219.
112. *Id.* at 1220, 964 N.Y.S.2d at 218.
113. *Id.*
114. *Id.*
115. *Kesick*, 106 A.D.3d at 1220, 964 N.Y.S.2d at 218.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Kesick*, 106 A.D.3d at 1220, 964 N.Y.S.2d at 218.
121. *Id.* at 1220-21, 964 N.Y.S.2d at 218.
122. *Id.* at 1221, 964 N.Y.S.2d at 218.

uncontroverted.[123] Kesick's affidavit established that he was directed to respond to the accident and was the first responder on the scene with medical training.[124] When Kesick spoke to Williams, he complained of extreme pain in his hip, chest, and neck.[125] Based upon his medical training, Kesick knew the importance of stabilizing Williams' neck to prevent further injury.[126] Following the long-recognized tort theory that "danger invites rescue," the court held that if the facts here warrant application of the danger invites rescue doctrine, Kesick's injuries were not so remote in either time or space to the use of Prindle's automobile as to preclude a finding of proximate cause as a matter of law.[127]

In *In re State Farm Mutual Auto Insurance Co. v. Fitzgerald*,[128] a case of first impression, the Appellate Division, Second Department, held that a police car is a "motor vehicle" for the purposes of underinsured motorists coverage.[129] Fitzgerald, a police officer, was a passenger in a police cruiser driven by fellow officer Knauss.[130] That car was involved in an accident with another uninsured vehicle.[131] Fitzgerald submitted a claim for SUM benefits with State Farm Insurance Company ("State Farm"), Knauss' personal automobile insurer.[132] The policy's SUM endorsement defined "insured" as the named insured (i.e., Knauss) and "any other person while occupying . . . any other motor vehicle . . . being operated by [Knauss]."[133]

State Farm filed a petition to permanently stay the arbitration, arguing that Fitzgerald was not an "insured" under the endorsement because the police cruiser involved in the accident was not a "motor vehicle" for purposes of the endorsement.[134]

An interesting question of first impression came before the court. Under the Vehicle & Traffic Law section 388(2) ("VTL § 388"),[135] the section which imposes derivative liability on the owner of a vehicle for the negligence of a permissive user, a police vehicle is specifically

123. *Id.*
124. *Id*. at 1221, 964 N.Y.S.2d at 219.
125. *Kesick*, 106 A.D.3d at 1221, 964 N.Y.S.2d at 219.
126. *Id.*
127. *Id.*
128. 112 A.D.3d 166, 973 N.Y.S.2d 801 (2d Dep't 2013).
129. *Id.* at 167, 973 N.Y.S.2d at 802.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Fitzgerald*, 112 A.D.3d at 167, 973 N.Y.S.2d at 802.
134. *Id.*
135. N.Y. VEH. & TRAF. LAW § 388(2) (McKinney 2013).

excluded from the definition of "motor vehicle,"[136] yet under the Vehicle & Traffic Law section 125 ("VTL § 125"),[137] which provides the general definition of "motor vehicle" for the purposes of the statute, the term includes police vehicles.[138] The court held that VTL § 125, rather than VTL § 388(2), should be used to define the term "motor vehicle," as it appears in the SUM endorsement.[139] This is because VTL § 125 is a general provision that defines the relevant terminology for the entire Vehicle & Traffic Law.[140]

VI. EMPLOYER LIABILITY COVERAGE

In *American Home Assurance Co. v. Rent A Unit NY, Inc.*,[141] a non-employer afforded coverage under an employer's liability policy even though the policy only covered employers.[142] It is noted that employer's liability coverage is usually a separate part of a Workers' Compensation Policy and provides coverage for direct or third-party claims against an employer arising out of employee injuries. It is most often triggered in third-party actions for contribution against employers where the plaintiff has sustained a "grave injury," as defined under Workers' Compensation Law section11.[143]

Adolfo Estrada, while employed by Amost Dry Wall, Inc. ("Amost"), was injured during the course of his employment.[144] He sued Amoco Construction Corporation ("Amoco") and Rent A Unit NY, Inc. ("Rent A Unit"), among others, in an underlying personal injury action.[145] Amoco sought insurance coverage from its insurer, American Home Assurance Company ("American"), in the underlying personal injury action.[146] The American workers' compensation/employer's liability policy afforded coverage where the insured is the injured worker's *employer*.[147] The policy defined the insured, "you," as both Amost and Amoco.[148] It certainly is not unusual for a policy to include as insureds two companies with similar or

136. *Id.*
137. *Id.* § 125.
138. *Id.*
139. *Fitzgerald*, 112 A.D.3d at 169, 973 N.Y.S.2d at 803.
140. *Id.*
141. 105 A.D.3d 635, 964 N.Y.S.2d 124 (1st Dep't 2013).
142. *Id.* at 635-36, 964 N.Y.S.2d at 125.
143. N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013).
144. *Am. Home Assurance Co.*, 105 A.D.3d at 635, 964 N.Y.S.2d at 125.
145. *Id.*
146. *Id.*
147. *Id.* (emphasis added).
148. *Id.*

common ownership, even though they are separate and distinct entities.[149]

Rent A Unit, not aware of which of the two companies employed Estrada, commenced third-party actions against both Amost and Amoco alleging employment.[150] The papers were turned over to American and the insurer provided them both with a defense.

When it became clear that Amoco was not Estrada's employer, and therefore was not permitted to claim the exclusivity of worker compensation, Estrada appropriately brought a direct claim against Amoco, alleging its negligence.[151]

American then took the position, understandably so, that it no longer had an obligation to defend Amoco since Amoco was no longer alleged to be Estrada's employer. Simply stated, a company not alleged to be an employer should not be able to look to its employer's liability policy for protection. Amoco had commercial general liability coverage which would be (and was) available for the claim,[152] since the employee and workers' compensation exclusions were no longer available.

The court held that American still had such a duty, with this rather unique explanation:

> We reject [American's] contention that because Amoco is not Estrada's direct employer, it need not provide coverage to Amoco under the policy. Defendants Amoco and Amost Drywall Inc. jointly purchased insurance for a joint work site, and the two companies have the same owner and management, and worked together on the same covered location where Estrada was injured. Further, the plain and ordinary meaning of the provisions of the insurance contract clearly cover Amoco with respect to Estrada's claims because the policy combines Amoco and Amost for purposes of coverage . . . [.][153]

The decision raises some questions. While Amoco and Amost were both insureds and had common ownership, that commonality did not turn Amoco into an employer (and nobody contended it was any longer), and if Amoco was not the employer, Amoco does not deserve coverage under the employer's liability policy.[154]

149. *Am. Home Assurrance Co.*, 105 A.D.3d at 635, 964 N.Y.S.2d at 125.

150. *Id.*

151. *Id.*

152. *Id.* at 635-36, 964 N.Y.S.2d at 125.

153. *Id.* (citing White v. Cont'l Cas. Co., 9 N.Y.3d 264, 878 N.E.2d 1019, 848 N.Y.S.2d 603 (2007)).

154. *Am. Home Assurance Co.*, 105 A.D.3d at 635, 964 N.Y.S.2d at 125.

VII. VANDALISM COVERAGE

The Court of Appeals in *Georgitsi Realty, LLC v. Penn-Star Insurance Co.*[155] was presented with the following questions by the Second Circuit: "For purposes of construing a property insurance policy covering acts of vandalism, may malicious damage be found to result from an act not directed specifically at the covered property? If so, what state of mind is required?"[156]

The insured, Georgitsi Realty, LLC ("Georgitsi"), owned an apartment building that was covered under a "named perils" policy of property insurance issued by Penn-Star Insurance Co. ("Penn-Star").[157] The coverage applied to "direct physical loss or damage . . . caused by or resulting from" any of fourteen kinds of events, including vandalism.[158]

The owner of the adjacent lot decided to construct a new building that would include an underground parking garage.[159] The excavation for this garage caused cracks in the wall and foundation of the apartment.[160] As the apartment building began to settle, Georgitisi feared the building would collapse.[161] The New York City Department of Buildings issued a series of violations and "stop work" orders, and Georgitisi obtained a temporary restraining order.[162] All of this was ignored, and excavation continued.[163] Georgitsi submitted a claim to Penn-Star as a result of the damage.[164]

The district court granted summary judgment for Penn-Starr "holding that the alleged conduct of [the adjacent owner] and its contractors was not 'vandalism' within the meaning of the policy."[165] The Second Circuit certified the case.[166]

In response to the first question, the Court of Appeals answered "yes."[167] It relied largely on the Sixth Circuit decision in *Louisville & Jefferson County Metropolitan Sewer District v. Travelers Insurance*

155. 21 N.Y.3d 606, 999 N.E.2d 520, 977 N.Y.S.2d 157 (2013).
156. *Id.* at 609, 999 N.E.2d at 522, 977 N.Y.S.2d at 159.
157. *Id.* at 608, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
158. *Id.*
159. *Id.*
160. *Georgitsi Realty*, 21 N.Y.3d at 608, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
161. *Id.*
162. *Id.* at 608-09, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
163. *Id.*
164. *Id.* at 609, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
165. *Georgitsi Realty*, 21 N.Y.3d at 609, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
166. *Id.* at 609, 999 N.E.2d at 521, 977 N.Y.S.2d at 158.
167. *Id.* at 609, 999 N.E.2d at 522, 977 N.Y.S.2d at 159.

Co.[168] in which a sewage treatment plant sustained damage when the owner of a recycling company began storing toxic waste in a public sewer.[169] The plant owner was allowed to recover the damage to the plant under a policy insuring against vandalism and malicious mischief.[170]

The Court of Appeals agreed with the logic in the Sixth Circuit decision.[171] The Court of Appeals found no reason why the term "vandalism" should be limited to acts directed specifically at the covered property.[172] "Vandalism, as the term is ordinarily understood, need not imply a specific intent to accomplish any particular result; vandals may act simply out of love of excitement, or an unfocused desire to do harm."[173]

The Court noted that while the term "vandalism, which derives from the sack of Rome by the . . . Vandals . . . , more readily brings to mind people who smash and loot than business owners who seek their own profit in disregard of the injury they do to the property of others[,]" the Court found no principled distinction between the two.[174]

With regard to the second question, the Court elected to apply the actual malice standard.[175] "Conduct is 'malicious' for these purposes when it reflects 'such a conscious and deliberate disregard of the interest of others that [it] may be called willful or wanton.'"[176] This standard is meant "to distinguish between acts that may fairly be called vandalism and ordinary tortious conduct."[177] The Court was clear that "vandalism should not be converted into something approaching general coverage for property damage."[178]

VIII. REINSURANCE

In *United States Fidelity & Guaranty Co. v. American Re-*

168. 753 F.2d 533 (6th Cir. 1985).

169. *Georgitsi Realty*, 21 N.Y.3d at 610-11, 999 N.E.2d at 522-23, 977 N.Y.S.2d at 159-60 (citing *Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 753 F.2d at 535).

170. *Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 753 F.2d at 535, 538.

171. *Georgitsi Realty*, 21 N.Y.3d at 610, 999 N.E.2d at 522-23, 977 N.Y.S.2d at 159-60.

172. *Id.* at 610, 999 N.E.2d at 523, 977 N.Y.S.2d at 160.

173. *Id.* at 610-11, 999 N.E.2d at 523, 977 N.Y.S.2d at 160.

174. *Id.* at 611, 999 N.E.2d at 523, 977 N.Y.S.2d at 160.

175. *Id.*

176. *Georgitsi Realty*, 21 N.Y.3d at 611, 999 N.E.2d at 523, 977 N.Y.S.2d at 160 (quoting Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 511, 986 N.E.2d 903, 906, 964 N.Y.S.2d 69, 72 (2013)).

177. *Id.* at 611-12, 999 N.E.2d at 523, 977 N.Y.S.2d at 160.

178. *Id.* at 612, 999 N.E.2d at 523, 977 N.Y.S.2d at 160.

Insurance Co.,[179] questions of fact existed concerning cedent's allocation decisions in settlement of asbestos claims.[180]

The plaintiff, United States Fidelity & Guaranty Co. ("USF&G"), settled asbestos claims on behalf of its insured for nearly a billion dollars.[181] After the settlement was complete, it ceded a share of the payment to its reinsurers including defendant, American Re-Insurance Co. ("American").[182]

The reinsurance treaty at issue contained what is often referred to as a "follow the fortunes" clause.[183] This clause ordinarily bars challenge by a reinsurer to the decision of the ceding company in settling a claim.[184] This usually creates little risk of unfairness because the interests of the cedent and reinsurer are normally aligned, as both want the best settlement possible.[185]

However, there are exceptions. Here, American asserted that the way the settlement was allocated was unfair.[186] "Under the reinsurance treaty, the first $100,000 of every loss must be borne by USF&G, and the second $100,000 by the reinsurers."[187] Notably, the policy USF&G issued had a $200,000 per claimant limit.[188]

The Court held that while "a cedent's allocation decisions are entitled to deference, [this] is not to say that they are immune from scrutiny."[189] Thus, the Court held that, "a reinsurer is bound only by a cedent's 'good faith' decisions."[190] In other words, objective reasonableness should determine the validity of an allocation. The Court made a point of noting that reasonableness does not imply disregard of a cedent's own interest as it is not a fiduciary of the reinsurer; rather, a cedent's allocation must only have been legitimate.[191]

Here, the Court found questions of fact concerning whether two of

179. 20 N.Y.3d 407, 985 N.E.2d 876, 962 N.Y.S.2d 566 (2013).
180. *Id.* at 415, 985 N.E.2d at 878, 962 N.Y.S.2d at 568.
181. *Id.* at 414-15, 985 N.E.2d at 878, 962 N.Y.S.2d at 568.
182. *Id.* at 417-18, 985 N.E.2d at 880-81, 962 N.Y.S.2d at 570-71.
183. *Id.* at 418, 985 N.E.2d at 880, 962 N.Y.S.2d at 570 (citations omitted).
184. *U.S. Fid. & Guar. Co.*, 20 N.Y.3d at 418, 985 N.E.2d at 881, 962 N.Y.S.2d at 571 (citations omitted).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 417, 985 N.E.2d at 880, 962 N.Y.S.2d at 570.
189. *U.S. Fid. & Guar. Co.*, 20 N.Y.3d at 420, 985 N.E.2d at 882, 962 N.Y.S.2d at 572.
190. *Id.*
191. *Id.*

USF&G's allocation decisions were reasonable: "(1) that all of the settlement amount was attributable to claims within the [scope] of USF&G's policies, and none of it to the claims that USF&G acted in bad faith; . . . [and] (2) that claims by claimants suffering from lung cancer had a value of $200,000 each, while certain other claims had values of $50,000 or less."[192]

With regard to the bad faith claims, the decision to allocate nothing to these claims was beneficial to USF&G, as bad faith claims were not covered by reinsurance.[193] In the Court's opinion, this decision was potentially unreasonable in light of evidence that USF&G had "taken a very aggressive [stance] in refusing to admit, for almost a decade, that it had ever written liability insurance that covered the asbestos claimants' claims—a position . . . it abandoned at a late stage of the coverage litigation, in the face of strong proof that coverage existed."[194] Further, the evidence tended to show the USF&G knew, well before it admitted, that it owed coverage.[195] With this evidence, there was a possibility that when the coverage case went to trial, USF&G could face a large verdict on these claims.[196]

Also, the Court noted that in allocating the settlement, "it could be found that USF&G . . . assigned inflated values to claims other than the bad faith claims" (i.e., to claims covered by reinsurance).[197] Specifically, "[i]n allocating its settlement payments, USF&G classified the claims according to the disease from which [a] claimant suffered."[198] The most serious diseases, such as mesothelioma, were allocated above the $200,000 cap, but lung cancer was valued at that cap; yet, at early stages of litigation, an expert retained by the asbestos claimants estimated liability for each lung cancer claim at under $100,000.[199] The Court felt that it could be found that "lung cancer claims were priced at an unreasonably high level, and included value that should have been attributed to the bad faith claims."[200]

On this same line of thought, the Court noted that some of the "claims falling below the reinsurers' $100,000 retention amount were

192. *Id.* at 422, 985 N.E.2d at 883, 962 N.Y.S.2d at 573.
193. *Id.* at 422, 985 N.E.2d at 884, 962 N.Y.S.2d at 573.
194. *U.S. Fid. & Guar. Co.*, 20 N.Y.3d at 422-23, 985 N.E.2d at 884, 962 N.Y.S.2d at 574.
195. *Id.* at 423, 985 N.E.2d at 884, 962 N.Y.S.2d at 574.
196. *Id.*
197. *Id.* at 424, 985 N.E.2d at 885, 962 N.Y.S.2d at 574.
198. *Id.* at 424, 985 N.E.2d at 885, 962 N.Y.S.2d at 575.
199. *U.S. Fid. & Guar. Co.*, 20 N.Y.3d at 424, 985 N.E.2d at 885, 962 N.Y.S.2d at 575.
200. *Id.*

undervalued."[201] For example, USF&G assigned value of "$50,000, $20,000 and $20,000 to the claims of sufferers from asbestosis, pleural thickening and 'other cancer,' respectively."[202] "If some of the value [of] the lung cancer claims were reassigned to these less serious claims, the result would be to decrease the reinsurers' liability."[203]

IX. CLAIMS AGAINST INSURANCE AGENTS

In *South Bay Cardiovascular Associates, P.C. v. SCS Agency, Inc.*,[204] a policyholder's decision not to read a notice of change to policy coverage did not preclude a claim against its insurance agent.[205] South Bay Cardiovascular Associates, P.C. ("South Bay") purchased commercial insurance policies covering property and liability coverages through SCS Agency, Inc. ("SCS"), its insurance agent.[206] "Beginning in 2001, . . . Schmurr, a partner in SCS, handled the South Bay account."[207] A policy through Travelers Indemnity Company of Connecticut ("Travelers") was acquired for South Bay.[208] Under the agency agreement between SCS and Travelers, there was "an indemnity provision whereby Travelers agreed to indemnify SCS for liability arising out of . . . the failure of a policyholder to receive notice affecting coverage."[209]

The policies in effect from 2002 to 2005 issued to South Bay included $250,000 limits for employee dishonesty.[210] In 2005, however, Travelers merged with another insurance company, changed its policy, and reduced the employee dishonesty limit to $25,000.[211] When it did so, "Travelers sent to South Bay an [eleven]-page notice indicating the relevant policy changes."[212] The South Bay employee, who admitted receiving the notice, conceded she never read it and testified that she relied upon SCS to inform her about "anything that I needed to know, any change [or] updated information."[213]

In 2006, "South Bay discovered that one of its employees had

201. *Id.* at 425, 985 N.E.2d at 886, 962 N.Y.S.2d at 576.
202. *Id.*
203. *Id.*
204. 105 A.D.3d 939, 963 N.Y.S.2d 688 (2d Dep't 2013).
205. *Id.* at 941-42, 963 N.Y.S.2d at 691 (citations omitted).
206. *Id.* at 940, 963 N.Y.S.2d at 690.
207. *Id.*
208. *Id.*
209. *S. Bay Cardiovascular Assocs., P.C.*, 105 A.D.3d at 940, 963 N.Y.S.2d at 690.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

misappropriated funds over the course of several years."[214] "It submitted a claim to Travelers and learned that the coverage for employee dishonesty was limited to $25,000."[215] "South Bay agreed to release Travelers in exchange for a $25,000 payment under the policy" and then sued "SCS and Schmurr . . . alleging negligence, breach of contract, and breach of fiduciary duty, on the ground that the SCS . . . failed to inform South Bay of the change in coverage for employee dishonesty."[216] SCS "commenced a third-party action against Travelers seeking contractual and common-law indemnification."[217]

Under the precedent established by the recent Court of Appeals decision in *American Building Supply Corp. v. Petrocelli Group, Inc.*,[218] the Court refused to dismiss the case against SCS.[219] The Court reasoned that "'[w]hile it is certainly better practice for an insured to read its policy, an insured should have the right to look to the expertise of its broker with respect to insurance matters.'"[220]

> Additionally, where the insured relied on the expertise of the agent, or there was a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on, the agent could be found to have a duty to advise because of a special relationship with the insured.[221]

Travelers was properly dismissed from the lawsuit.[222] While the agency agreement called for indemnity where the insured failed to receive notice of changes affecting coverage, here, the insured did in fact receive it.[223]

X. CASES TO WATCH FOR 2014

We complete this year's review by highlighting two other important cases that are currently before the New York Court of

214. *S. Bay Cardiovascular Assocs., P.C.*, 105 A.D.3d at 940-41, 963 N.Y.S.2d at 690.

215. *Id.* at 941, 963 N.Y.S.2d at 690.

216. *Id.*

217. *Id.*

218. 19 N.Y.3d 730, 979 N.E.2d 1181, 955 N.Y.S.2d 854 (2012).

219. *S. Bay Cardiovascular Assocs., P.C.*, 105 A.D.3d at 941, 963 N.Y.S.2d at 690 (citing *Am. Bldg. Supply Corp.*, 19 N.Y.3d at 736, 979 N.E.2d at 1185, 955 N.Y.S.2d at 858).

220. *Id*. at 941, 963 N.Y.S.2d at 691 (quoting *Am. Bldg. Supply Corp.*, 19 N.Y.3d at 736, 979 N.E.2d at 1185, 955 N.Y.S.2d at 858).

221. *Id*. at 941-42, 963 N.Y.S.2d at 691 (citations omitted).

222. *Id*. at 942, 963 N.Y.S.2d at 691.

223. *Id*. at 942-43, 963 N.Y.S.2d at 691-92.

Appeals and were argued in the January 2014 term. These decisions may have a significant impact on insurance practitioners in the near future and long term.

A. Disclaimers Versus Reservation of Rights Letters

Under well-established New York law, a reservation of rights letter is not a substitute for a disclaimer letter.[224] That rule differs significantly from the practice in virtually every other state. The decision in *QBE Insurance Corp. v. Jinx-Proof Inc*. was an affirmation of that rule.[225] An insurer that wishes to deny coverage, even when it has to defend the insured in the tort action because of covered causes of action, must deny in unequivocal language.[226] Here, the insurer did just what it had to do. It denied coverage (rather than reserve its rights), but defended.[227]

The Appellate Division, First Department, in a 2-2-1 opinion declared that the insurer had no duty to defend.[228] The court focused on the language of the coverage position letter in relation to an assault and battery claim at a bar.[229] The policy included an "assault and battery" exclusion, similar to the exclusion in *Mount Vernon Fire Insurance Co. v. Creative Housing Ltd.*[230] Four of the Justices agreed that the disclaimer letter was sufficiently clear to constitute a disclaimer letter, despite reservation language contained within it.[231] Justice Andrias dissented.[232]

On January 15, 2014, the Court held oral argument on the matter. This decision may well help define the style and substance of disclaimer letters in the future. The questions raised by the judges during oral argument were broad and policy-oriented. This decision may serve as a framework for a more sweeping approach to claims handling and coverage responses.

224. QBE Ins. Corp. v. Jinx-Proof Inc., 102 A.D.3d 508, 514, 959 N.Y.S.2d 19, 25 (1st Dep't 2013) (Andrias, J., dissenting) (citations omitted).

225. *Id.* at 513, 959 N.Y.S.2d at 24 (Manzanet-Daniels, J., concurring).

226. *Id.* at 514, 959 N.Y.S.2d at 25 (Andrias, J., dissenting) (citations omitted).

227. *Id.* at 512, 959 N.Y.S.2d at 23 (Manzanet-Daniels, J., concurring) (citations omitted).

228. *QBE Ins. Corp.*, 102 A.D.3d at 508, 959 N.Y.S.2d at 20.

229. *Id.* at 509-11, 959 N.Y.S.2d at 20-22 (Manzanet-Daniels & Friedman, JJ., concurring).

230. *Id.* at 511, 959 N.Y.S.2d at 22; Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd., 88 N.Y.2d 347, 349, 668 N.E.2d 404, 405, 645 N.Y.S.2d 433, 434 (1996).

231. *QBE Ins. Corp.*, 102 A.D.3d at 509, 512, 959 N.Y.S.2d at 21, 23.

232. *Id.* at 513-16, 959 N.Y.S.2d 19, 24-26 (Andrias, J., dissenting).

B. The Duty to Cooperate

Every insured has a contractual duty and obligation to cooperate with a liability insurer in the defense of a lawsuit in which the insured is a party. A breach of the cooperation clause in a policy can lead to a loss of coverage. In *Thrasher v. United States Liability Insurance C*o.,[233] the New York Court of Appeals noted that since the defense of lack of cooperation penalizes the injured party for the action of the insured over whom he has no control, courts have consistently held that the burden of proving the lack of cooperation is a heavy one.[234] The Court set out a three prong test to determine whether the cooperation clause was breached. First, an insurer must demonstrate that it acted diligently in seeking to bring about the insured's cooperation.[235] Second, it must demonstrate that the efforts employed by the insurer were reasonably calculated to obtain the insurer's cooperation.[236] Finally, it must prove that the attitude of the insured, after his cooperation was sought, was one of "willful and avowed obstruction."[237]

How does an insurer know when its efforts to secure cooperation have, indeed, failed? That was the subject of *Country-Wide Insurance Co. v. Preferred Trucking Services Corp.*[238] In an interesting twist, the insurer argued that it continued to try to secure the insured's cooperation and therefore withheld denying coverage.[239] The argument was rejected and the court stated that the insurer should have reached that conclusion earlier, and since it did not disclaim promptly enough, the insurer should be denied the opportunity to raise this coverage defense.[240]

While technically a 2012 decision, the case did not reach the Court of Appeals until early 2014. In October 2012, the Appellate Division, First Department, held that the insurer's disclaimer of coverage was untimely since the disclaimer was issued approximately four months after it learned of the ground for the disclaimer, that being the insured's lack of cooperation.[241] The carrier argued that as the disclaimer was

233. 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967).

234. *Id.* at 168, 225 N.E.2d at 508, 278 N.Y.S.2d at 800 (citations omitted).

235. *Id.* (citations omitted).

236. *Id.* (citations omitted).

237. *Thrasher*, 19 N.Y.2d at 168, 225 N.E.2d at 508, 278 N.Y.S.2d at 800 (citations omitted).

238. Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp., 99 A.D.3d 582, 952 N.Y.S.2d 539 (1st Dep't 2012), *leave to appeal granted*, 21 N.Y.3d 854 (2013).

239. *Id.* at 582, 952 N.Y.S.2d at 540.

240. *Id.* at 582, 952 N.Y.S.2d at 539 (citations omitted).

241. *Id*.

timely, it had no basis for disclaiming coverage until it became apparent that the operator of the truck would not cooperate with the defense of the underlying personal injury action.[242]

The Court of Appeals heard oral argument on January 15, 2014. The focus of the argument was how an insurance carrier knows that there has been a breach of the cooperation clause. When does an insurer know that the insured has crossed the line? The policyholder argued that the insurer should have known earlier, and the failure to disclaim promptly was a waiver. The insurer argued that it did not want to disclaim precipitously and tried its hardest to secure the insured's cooperation. Thus, it should not be penalized for continuing in its efforts to secure cooperation. The anticipated decision from the Court of Appeals should be instructive on this issue.

CONCLUSION

It is rare that so many insurance coverage cases reach the Court of Appeals in one term, but there is the potential for even more significant decisions from the high court in 2014.

242. *Id.* at 582, 952 N.Y.S.2d at 540.