INSURANCE LAW

Dan D. Kohane, Esq. & Audrey A. Seeley, Esq.†

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INTRODUCTION

During 2014, the Court of Appeals issued several significant decisions in insurance law. Those that follow insurance law were on edge in early 2014 awaiting the Court of Appeals' *K2 Investment*[1] decision on

† Dan D. Kohane, a senior member of the New York law firm of Hurwitz & Fine, P.C., is a nationally recognized insurance coverage counselor who serves as an expert witness and conducts extensive training, consultation, and in-house seminars on this highly specialized practice. Mr. Kohane is known in the industry for his comprehensive newsletter, Coverage Pointers, a bi-weekly publication summarizing important insurance coverage decisions. An accomplished trial lawyer and litigator, Mr. Kohane also has extensive experience mediating complex casualty and insurance coverage disputes. He teaches Insurance Law as an adjunct professor at the University at Buffalo Law School and heads the firm's Insurance Coverage practice group.

Audrey A. Seeley is a member of Hurwitz & Fine, P.C. in its Buffalo, New York office, where she focuses on insurance coverage and no-fault coverage. Ms. Seeley routinely provides counseling to insurers on a national basis for personal and advertising injury coverage issues and on primary and excess personal lines insurance policies. She also handles declaratory judgment actions across New York State. Ms. Seeley is the team leader of the firm's No-Fault practice group and also provides No-Fault insurance coverage advice to insurers. She is currently the Chair of the Insurance Law Committee of the Defense Research Institute (DRI). Ms. Seeley has been recognized in Best Lawyers of America, Who's Who In the Law, and has been named in the Upstate New York Super Lawyers list.

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1. K2 Inv. Grp., LLC v. Am. Guar. & Liab. Ins. Co. (*K2-1*), 21 N.Y.3d 384, 993 N.E.2d 1249, 971 N.Y.S.2d 229 (2013).

reargument. Ultimately, the second *K2 Investment* decision did not fundamentally change insurance law concepts that have been applied for nearly the past three decades. However, New York courts handed down numerous decisions, which will shape the practice of insurance law.

I. DUTY TO DEFEND

Last June, the Court of Appeals handed down a decision that sent shock waves throughout the insurance industry. The Court's decision in *K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co.* ("*K2-I*") created, for the first time, a rule that would preclude a carrier from raising policy defenses if it breached its duty to defend.[2] *K2-I* was an evisceration of common law, created by the Court of Appeals, that existed for nearly three decades. The Court of Appeals granted reargument in the fall of 2013 and in early 2014, the Court of Appeals decided *K2 Investment Group, LLC v. American Guarantee & Liability Insurance Co.* ("*K2-II*").[3]

Judge Smith wasted little time in describing the motivations for granting reargument. Indeed, in the first paragraph of his decision, Judge Smith stated:

> American Guarantee & Liability Insurance Company contends, on reargument, that our prior decision in this case, *K2 Inv. Group, LLC v Am. Guar. & Liab. Ins. Co.* (*K2-I*), erred by failing to take account of a controlling precedent, *Servidone Constr. Corp. v Security Ins. Co. of Hartford*. We hold that American Guarantee is correct.[4]

Judge Smith then, very briefly, recited the underlying facts of this claim, which involved Jeffrey Daniels's activities in real estate with Goldan.[5] The Court directed its audience to review *K2-I* for a more in-depth review of the facts of this case,[6] and following Judge Smith's lead, we will do the same.

The Court, as it had in *K2-I*, ruled that American Guarantee breached its duty to defend Mr. Daniels in the underlying action.[7] Notably, this was not a finding that American Guarantee had previously acknowledged at oral argument before the Court.[8]

2. *Id.* at 387, 993 N.E.2d at 1251, 971 N.Y.S.2d at 230-31.

3. 22 N.Y.3d 578, 6 N.E.3d 1117, 983 N.Y.S.2d 761 (*K2-11*), *reargument denied*, 23 N.Y.3d 939, 10 N.E.3d 1146, 987 N.Y.S.2d 591 (2014).

4. *Id.* at 584, 6 N.E.3d at 1118, 983 N.Y.S.2d at 762 (internal citations omitted).

5. *Id*. at 584, 587, 6 N.E.3d at 1119, 1121, 983 N.Y.S.2d at 763, 765.

6. *Id*. at 584, 6 N.E.3d at 1119, 983 N.Y.S.2d at 763.

7. *Id*.

8. *K2-I*, 21 N.Y.3d 384, 389, 993 N.E.2d 1249, 1252, 971 N.Y.S.2d 229, 232 (2013).

Despite its breach of the duty to defend, American Guarantee contended that *Servidone* protected and secured its ultimate right to rely upon policy defenses (e.g., exclusions) in a later coverage action.[9] Unlike *K2-I*, Judge Smith's decision in *K2-II* addressed *Servidone* head on.[10] To remove all doubt as to the Court's direction on this issue, Judge Smith noted, "In short, to decide this case we must either overrule *Servidone* or follow it. We choose to follow it."[11]

In reaching this decision, the Court rejected the plaintiffs' argument that *Servidone* and *K2-I* were distinguishable.[12] According to the plaintiffs' argument, the decisions could, and should, be reconciled because one involved a settlement (*Servidone*) and one involved a default judgment (*K2-I*).[13] Because American Guarantee's failure to defend resulted in a default being entered against its insured, the plaintiffs argued that coverage defenses were likewise lost.[14]

The Court disagreed, stating unequivocally that a carrier's "duty to indemnify . . . does not depend on whether the insured settles or loses the case."[15] While the default judgment may preclude the company from re-litigating issues that were decided in the underlying action, it has no impact on the insurer's ability to assert policy defenses that were preserved by their incorporation into the insuring contract by way of exclusions.[16]

The plaintiffs also argued that the Court's decision in *Lang v. Hanover Insurance Co.*[17] provided a basis for overturning *Servidone*.[18] To support their argument, the plaintiffs referenced the famous line in *Lang* wherein the Court advised, "[A]n 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."[19] That passage, the plaintiffs surmised, tacitly

9. *See K2-II*, 22 N.Y.3d at 584-85, 6 N.E.3d at 1118-19, 983 N.Y.S.2d at 762-63 (citing *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139 (1985)).

10. *Id*. at 585-87, 6 N.E.3d at 1119-20, 983 N.Y.S.2d at 763-64 (citing *Servidone Constr. Corp.*, 64 N.Y.2d at 421-22, 477 N.E.2d at 442-43, 488 N.Y.S.2d at 140-41).

11. *Id*. at 586, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764.

12. *Id*. at 585, 6 N.E.3d at 1119, 983 N.Y.S.2d at 763.

13. *Id*.

14. *K2-II*, 22 N.Y.3d at 585, 6 N.E.3d at 1119, 983 N.Y.S.2d at 763.

15. *Id*.

16. *Id*.

17. 3 N.Y.3d 350, 820 N.E.2d 855, 787 N.Y.S.2d 211 (2004).

18. *K2-II*, 22 N.Y.3d at 585-86, 6 N.E.3d at 1119-20, 983 N.Y.S.2d at 763-64.

19. *Id*. at 586, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764. (quoting *Lang*, 3 N.Y.3d at 356, 820 N.E.2d at 858-59, 787 N.Y.S.2d at 214-15).

overturned the Court's previous ruling in *Servidone*.[20] The Court also rejected this argument.[21] While the Court commented that its holding in *Lang* was "sound advice," that decision did not inhibit an insurer from asserting coverage defenses based upon policy exclusions.[22]

Judge Smith then addressed the dissent's position that the Court should adopt a hybrid rule that would treat coverage positions based upon issues of "noncoverage" differently than those positions focused on exclusions.[23] In contrast with the dissent's view, Judge Smith noted that *Servidone*, and now *K2-II*, stood for the proposition that a failure to defend will not result in the carrier losing the right to assert non-coverage defenses and exclusions alike.[24]

The Court also noted that the plaintiffs had failed to present compelling evidence that the standard created by *Servidone* had become "unworkable, or caused significant injustice or hardship . . . [.]"[25] Rather, over the past thirty years, a majority of other states, as well as a majority of federal courts, have adopted the *Servidone* standard.[26] As such, Judge Smith opined:

> When our Court decides a question of insurance law, insurers and insureds alike should ordinarily be entitled to assume that the decision will remain unchanged unless or until the legislature decides otherwise. In other words, the rule of *stare decisis*, while it is not inexorable, is strong enough to govern this case.[27]

Having reinvigorated American Guarantee's coverage defenses, the Court then addressed the actual sufficiency of their denial.[28] American Guarantee's disclaimer was premised on two exclusions: "the so-called 'insured's status'" exclusion and the "business enterprise" exclusion.[29] On the record before it, the Court could not discern whether the exclusions were applicable.[30] Accordingly, the Court agreed with the dissenting opinion of the Second Department, and remanded the matter to the trial court on a question of fact.[31]

20. *See id.*
21. *Id.*
22. *Id.* at 585-86, 6 N.E.3d at 1119-20, 983 N.Y.S.2d at 763-64.
23. *K2-II*, 22 N.Y.3d at 586, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764.
24. *Id.*
25. *Id.* at 586-87, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764.
26. *Id.* at 586, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764.
27. *Id.* at 587, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764 (emphasis added).
28. *K2-II*, 22 N.Y.3d at 587, 6 N.E.3d at 1120, 983 N.Y.S.2d at 764
29. *Id.*
30. *Id*. at 587-88, 6 N.E.3d at 1121, 983 N.Y.S.2d at 765.
31. *Id.*

In her dissent, Judge Graffeo, joined by Judge Pigott, argued that the Court's holding in *K2-I* was an appropriate restriction on the *Servidone* standard discussed above.[32] Judge Graffeo noted, initially, that a carrier who breaches its fundamental duty to defend ought to be forced to suffer "some legal consequence[s]."[33] That, she opined, should be the loss of the ability to rely on exclusions as coverage defenses.[34]

Judge Graffeo also argued that adopting the rule enunciated in *K2-I* would properly incentivize insurers to honor their duty to defend.[35] The dissent referenced the Court's previous position that liability policies are, at a most basic level, "litigation insurance," and as such, the duty to defend must be protected to ensure insureds are provided with timely representation.[36]

The dissent also noted that the *K2-I* holding also created a system that would resolve coverage issues more expeditiously.[37] The commencement of a declaratory judgment early in the litigation would, in her words, "contribute[] to the efficient resolution of factual issues for the benefit of litigants without unduly burdening the ability of injured parties to obtain recovery for covered losses."[38]

Despite the arguments in support of the dissent's position, Judge Graffeo also spent a considerable amount of time seeking to reconcile the holding of *K2-I* with a previous decision from the High Court.[39] To reconcile *K2-I* with *Servidone*, the dissent noted that *Servidone* addressed the fundamental issue of whether the claim at issue triggered the insuring agreement.[40] Thus, in contrast to *K2-I*, which was premised upon the application of two exclusions, the threshold question of *Servidone* was whether the loss actually fell within the scope of coverage anticipated by the policy.[41]

The dissent then referenced the Court's traditional rule in applying New York Insurance Law section 3420(d)(2) as further support for its

32. *Id*. at 588, 6 N.E.3d at 1121, 983 N.Y.S.2d at 765 (Graffeo, J., dissenting).

33. *K2-II*, 22 N.Y.3d at 588, 6 N.E.3d at 1121, 983 N.Y.S.2d at 765 (Graffeo, J., dissenting).

34. *Id*. (Graffeo, J., dissenting).

35. *Id*. (Graffeo, J., dissenting).

36. *Id.* at 588-89, 6 N.E.3d at 1122, 983 N.Y.S.2d at 766 (Graffeo, J., dissenting).

37. *Id*. at 588, 6 N.E.3d at 1121, 983 N.Y.S.2d at 765 (Graffeo, J., dissenting).

38. *K2-II*, 22 N.Y.3d at 588, 6 N.E.3d at 1121, 983 N.Y.S.2d at 765 (Graffeo, J., dissenting).

39. *Id.* at 589, 6 N.E.3d at 1122, 983 N.Y.S.2d at 766 (Graffeo, J., dissenting).

40. *Id*. (Graffeo, J., dissenting) (citing *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139 (1985)).

41. *Id.* at 589-90, 6 N.E.3d at 1122-23, 983 N.Y.S.2d at 766-67 (Graffeo, J., dissenting) (citing *Servidone Constr. Corp.*, 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139).

position.[42] To that end, it has long been established that section 3420(d)(2) does not apply coverage defenses that are based upon the carrier arguing that the policy does not anticipate coverage for the claimed loss.[43] On the contrary, section 3420(d)(2) would preclude a carrier from relying upon exclusions if the denial letter was in violation of the Insurance Law.[44]

Judge Graffeo argued that the rule for breach of the duty to defend should mirror the long-accepted rule for violations of the Insurance Law.[45] That is to say where, as here, the decision to deny coverage is premised upon the application of an exclusion, a carrier's breach of the duty to defend will destroy the coverage defense as a matter of law.[46] On the other hand, where the carrier is challenging its indemnity obligations on the basis of "non-coverage," the carrier's failure to defend should not apply.[47]

In reaching this conclusion, the dissent acknowledges that *Servidone*, by its plain language, applied to policy defenses based upon both non-coverage and exclusions.[48] However, the dissent argues that it was *Servidone*, and not *K2-I*, that was not in congruence with New York precedent.[49] As such, the dissent would have affirmed *K2-I* as an appropriate restriction to *Servidone*.[50]

The result of all of this places insurers back in the position they were in post-*Lang*. That is to say, if an insurer elects not to defend its insured, it will not have the opportunity to re-litigate issues of fact and damages decided in the underlying action. However, in line with the Court's ruling in *Lang* and *Servidone*, respectively, the Court reaffirmed the long-standing principle that a carrier will not lose its right to assert coverage defenses when challenging its indemnity obligations.

The Second Circuit also issued an important decision regarding an insurance carrier's duty to defend its insured. In *Euchner-USA, Inc. v.*

42. *Id.* at 589, 6 N.E.3d at 1122, 983 N.Y.S.2d at 766 (Graffeo, J., dissenting) (citing N.Y. INS. LAW § 3420(d)(2) (McKinney 2014)).

43. *K2-II*, 22 N.Y.3d at 589, 6 N.E.3d at 1122, 983 N.Y.S.2d at 766 (Graffeo, J., dissenting) (citing N.Y. INS. LAW § 3420(d)(2)).

44. *Id*. (Graffeo, J., dissenting) (citing N.Y. INS. LAW § 3420(d)(2)).

45. *Id*. at 590, 6 N.E.3d at 1123, 983 N.Y.S.2d at 767 (Graffeo, J., dissenting).

46. *Id.* (Graffeo, J., dissenting).

47. *Id.* (Graffeo, J., dissenting).

48. *K2-II*, 22 N.Y.2d at 590, 6 N.E.3d at 1123, 983 N.Y.S.2d at 767 (Graffeo, J., dissenting) (citing *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139 (1985)).

49. *Id*. (Graffeo, J., dissenting) (citing *Servidone Constr. Corp.*, 64 N.Y.2d 419, 477 N.E.2d 441, 488 N.Y.S.2d 139).

50. *Id*. at 591, 6 N.E.3d at 1123, 983 N.Y.S.2d at 767 (Graffeo, J., dissenting).

Hartford Casualty Insurance Co., Jada Scali filed suit against her former employer, Euchner-USA, Inc. ("Euchner").[51] In her initial complaint, Scali alleged that she was sexually harassed by a senior executive and, after she confronted the executive about his conduct, "she was coerced into accepting an independent sales position" which disqualified her from receiving employee benefits.[52] Her complaint also "characterized Euchner's conduct as 'unlawful,' 'fraudulent,' 'discriminatory,' and 'wrongful coercion.'"[53]

After receiving the complaint, Euchner forwarded a copy to its insurance carrier, defendant Hartford Casualty Insurance Company ("Hartford").[54] Euchner carried a comprehensive general liability policy that "excluded coverage for employment-related practices," but the policy contained an endorsement to cover the employee benefits program.[55] Specifically, the endorsement provided that "Hartford would pay 'those sums that the insured becomes legally obligated to pay as "damages" because of "employee benefits injury" to which this insurance applies.'"[56] The policy defined an "employee benefits injury" "as an 'injury that arises out of any negligent act, error or omission in the "administration" of your "employee benefits programs."[57] The endorsement did not cover "civil or criminal liability arising out of '[a]ny dishonest, fraudulent, criminal or malicious act.'"[58]

In May 2011, Hartford disclaimed coverage based on the exclusion for employment related practices.[59] In October 2011, Scali filed an amended complaint, maintaining the same factual allegations, but "add[ing] the Euchner 401-k Plan as a defendant and includ[ing] causes of action under the Employee Retirement Income Security Act of 1974 ("ERISA")."[60] Under ERISA, Scali "alleged that Euchner [had] 'improperly classified' [her] as an independent contractor rather than as an employee" and caused her to be "deprived of benefits under Euchner's 401(k) Plan."[61]

51. 754 F.3d 136, 139 (2d Cir. 2014).
52. *Id.*
53. *Id*.
54. *Id*.
55. *Id*.
56. *Euchner-USA, Inc*., 754 F.3d at 139.
57. *Id.*
58. *Id*.
59. *Id*.
60. *Id*.
61. *Eucher-USA, Inc*., 754 F.3d at 139.

Euchner forwarded the amended complaint to Hartford.[62] Although Hartford's litigation consultant determined that the new "ERISA claims triggered Hartford's coverage under the employee benefits liability endorsement[,] [h]is supervisor disagreed."[63] Hartford again disclaimed coverage and refused to defend Euchner on two grounds:

> (1) the policy only covered employee claims, whereas Scali's Independent Sales Management Agreement established that she had become an independent contractor; and (2) in any event, there was an exclusion for any liability arising out of a failure by Euchner to comply with regulatory reporting requirements associated with an employee benefits program.[64]

After the second disclaimer, Euchner retained counsel to continue coverage discussions with Hartford and to defend it against Scali's lawsuit.[65] Later, Euchner notified Hartford of a forthcoming settlement with Scali.[66] Hartford responded with another disclaimer based "on the exclusion for wrongful conduct."[67] Euchner settled with Scali in April 2012 and then brought an action against Hartford to determine each party's rights and obligations under the policy.[68]

"The district court ruled that Hartford had no duty to defend because the policy excluded the intentional conduct alleged in Scali's amended complaint, and granted summary judgment in favor of Hartford."[69] Euchner appealed.[70]

The United Stated Court of Appeals for the Second Circuit affirmed in part and vacated and remanded in part.[71] First, the court determined "that Scali's ERISA claims raised a reasonable possibility of negligence on Euchner's part."[72] Scali "alleged only that Euchner misclassified her position, . . . not . . . whether this misclassification was done intentionally or [merely] negligently."[73] The court noted that the complaint contained allegations implying malice, "but none of Scali's ERISA claims alleged that Euchner improperly classified her with the *purpose* of interfering

62. *Id*.
63. *Id*.
64. *Id*. at 139-40.
65. *Id.* at 140.
66. *Euchner-USA, Inc*., 754 F.3d at 140.
67. *Id.*
68. *Id*.
69. *Id*.
70. *Id*.
71. *Euchner-USA, Inc*., 754 F.3d at 143.
72. *Id.* at 141.
73. *Id*.

with her retirement benefits."[74] Further, "Scali's ERISA claims [did not] require a showing of intent; they stood or fell on whether, notwithstanding the classification as an independent contractor, Euchner so controlled Scali's activities that she came within the common-law definition of an employee."[75]

Hartford argued "that its policy contained an exclusion for wrongful, unlawful, intentional, or fraudulent conduct."[76] The court determined, however, that the ERISA classification was only alleged to have been done "improperly and unlawfully," which was a legal conclusion rather than a factual allegation.[77] Thus, the court concluded that Hartford could not show that the ERISA allegations fell entirely within the exclusion.[78]

The court also found "that there [was] a reasonable possibility that the ERISA claims arose from the 'administration' of Euchner's benefit plan."[79] "Hartford's argument that 'administration' encompasse[d] only ministerial acts [wa]s unavailing," as the classification of someone either as an independent contractor or as an employee for purposes of plan eligibility [wa]s not a matter of discretion."[80]

Accordingly, the court held that "there was a reasonable possibility of coverage under Hartford's policy as to Scali's ERISA claims," and "Hartford therefore had a duty to defend Euchner" in that action.[81] On remand, the court instructed the district court to "consider Euchner's other arguments in the first instance, [i.e.,] whether Hartford breached a duty to indemnify . . . and whether Euchner [wa]s entitled to attorney's fees in this action due to Hartford's breach of [its] duty to defend."[82]

II. DISCLAIMERS VERSUS RESERVATION OF RIGHTS

In December 2007, a customer filed suit against Jinx-Proof for injuries she allegedly sustained after a Jinx-Proof employee threw a glass at her face.[83] Jinx-Proof notified its liability insurance carrier, the plaintiff QBE Insurance Corp. ("QBE"), of the action, which included claims for

74. *Id*.
75. *Id*.
76. *Euchner-USA, Inc.*, 754 F.3d at 142.
77. *Id*.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Euchner-USA, Inc.*, 754 F.3d at 142-43.
82. *Id.* at 143.
83. QBE Ins. Corp. v. Jinx-Proof Inc., 22 N.Y.3d 1105, 1106, 6 N.E.3d 583, 583, 983 N.Y.S.2d 465, 465 (2014).

negligence and intentional acts.[84] However, the liability policy contained an exclusion for assault and battery.[85] QBE responded to Jinx-Proof via two letters.[86] The first letter "stated that QBE would not defend or indemnify Jinx-Proof 'under the General Liability portion of the policy for the assault and battery allegations' and that Jinx-Proof did not have liquor liability coverage."[87] "The second letter stated that Jinx-Proof *did* [in fact] have liquor liability coverage but that the policy excludes coverage for assault and battery claims."[88]

In an unsigned decision, the New York Court of Appeals "determined that QBE effectively disclaimed coverage for the assault and battery claims asserted in the underlying action."[89] Although the letters were somewhat inconsistent with one another, the Court found that any resulting "confusion was not relevant to the issue in this case."[90] Notably, the Court upheld the disclaimer in spite of the "reservation of rights" language.[91]

> The letters specifically and consistently stated that Jinx-Proof's insurance policy excludes coverage for assault and battery claims. These statements were sufficient to apprise Jinx-Proof that QBE was disclaiming coverage on the ground of the exclusion for assault and battery, and this disclaimer was effective even though the letters also contained "reservation of rights" language.[92]

The two-judge dissent argued that QBE's letters did not unequivocally and unambiguously disclaim coverage.[93] Furthermore, the dissent contended that "QBE was required to advise Jinx-Proof that . . . it was entitled to" choose its own defense counsel, whose reasonable fees would be paid for by QBE, as established in *Public Service Mutual Insurance Co. v. Goldfarb*.[94] As QBE did not advise Jinx-Proof of its right to select independent counsel, it should have been estopped from

84. *Id.* at 1106-07, 6 N.E.3d at 583, 983 N.Y.S.2d at 465.
85. *Id.* at 1107, 6 N.E.3d at 583, 983 N.Y.S.2d at 465.
86. *Id.*
87. *Id.* at 1107, 6 N.E.3d at 584, 983 N.Y.S.2d at 466.
88. *QBE Ins. Corp.*, 22 N.Y.3d at 1107, 6 N.E.3d at 584, 983 N.Y.S.2d at 466.
89. *Id.*
90. *Id.*
91. *Id.* at 1107-08, 6 N.E.3d at 584, 983 N.Y.S.2d at 466.
92. *Id*.
93. *QBE Ins. Corp.*, 22 N.Y.3d at 1108, 6 N.E.3d at 584, 983 N.Y.S.2d at 466.
94. *Id.* at 1109-10, 6 N.E.3d at 585-86, 983 N.Y.S.2d at 467-68 (citing Elacqua v. Physicians' Reciprocal Insurers, 52 A.D.3d 886, 888-89, 860 N.Y.S.2d 229, 232 (3d Dep't 2008); Pub. Serv. Mut. Ins. Co. v. Goldfarb, 58 N.Y.2d 392, 401, 425 N.E.2d 810, 815, 442 N.Y.S.2d 422, 427 (1981)).

disclaiming.[95] "An insurer that arranges matters so that it exclusively controls its insured's defense, preventing the insured from retaining its own counsel at the insurer's expense, and possibly acting directly against the interests of the insured, cannot now assert that the policy does not cover the claim."[96]

III. INSURER'S OBLIGATION TO DISCLAIM

The plaintiff Long Island Lighting Company ("LILCO") was a self-insured company that carried excess insurance policies through the defendants Munich Reinsurance of America, Inc., Century Indemnity Company, and Northern Assurance Company of America.[97] "In October and November 1994, LILCO notified [the carriers] by letter about 'environmental concerns' at [its] retired" manufacturer gas plant ("MGP") sites on Long Island.[98] Although no regulatory agencies were formally investigating at that time, LILCO expressed concern that "agency action would be 'forthcoming' and that the extent of its potential liability 'if any' could not yet be determined."[99] "LILCO also notified defendants that a neighboring property owner had [filed] a property damage claim against the company for environmental contamination . . . [and] asked defendants to 'acknowledge their duty to indemnify LILCO for any damages that it may incur within the policy limits.'"[100]

The carriers requested additional information about the MGPs and sent reservation of rights letters on several coverage defenses, including late notice.[101] LILCO provided various disclosures, but the defendants did not respond.[102] In September 1997, LILCO brought a declaratory judgment action.[103] The defendants answered and "asserted late notice as an affirmative defense, then moved for summary judgment for denial of coverage.[104] (KeySpan Gas East Co. was later "assigned the right to pursue LILCO's claims and added [to the case] as a new party plaintiff.")[105]

95. *Id.* at 1110, 6 N.E.3d at 586, 983 N.Y.S.2d at 468.

96. *Id.*

97. KeySpan Gas E. Corp. v. Munich Reins. Am., Inc., 23 N.Y.3d 583, 587-88, 15 N.E.3d 1194, 1196, 992 N.Y.S.2d 185, 187 (2014).

98. *Id.* at 587, 15 N.E.3d at 1196, 992 N.YS.2d at 187.

99. *Id.*

100. *Id.* at 587-88, 15 N.E.3d at 1196, 992 N.YS.2d at 187.

101. *Id.* at 588, 15 N.E.3d at 1196, 992 N.YS.2d at 187.

102. *KeySpan Gas E. Corp.*, 23 N.Y.3d at 588, 15 N.E.3d at 1196, 992 N.YS.2d at 187.

103. *Id.*

104. *Id.*

105. *Id.* at 588-89, 15 N.E.3d at 1197, 992 N.YS.2d at 188.

The appellate division "held that LILCO failed, as a matter of law, to provide timely notice under the policies of environmental contamination at" two of its MGP sites, but refused to grant the insurers' summary judgment motion "'because issues of fact remain[ed] as to whether defendants waived their right to disclaim coverage based on late notice' by 'failing to timely issue a disclaimer.'"[106]

On appeal, the defendants cited Insurance Law section 3420(d)(2), which provides:

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.[107]

The Court noted that "[b]y its plain terms, section 3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy."[108] If one of those factors is not present, an "insurer will not be barred from disclaiming coverage 'simply as a result of the passage of time,' and its delay in giving notice of disclaimer should be considered under common-law waiver and/or estoppel principles."[109] Thus, the Court of Appeals reversed and remanded the case to the appellate division to determine whether the defendants clearly intended to abandon their late notice defense as a triable issue of fact.[110]

IV. THE DUTY TO COOPERATE

Filippo Gallina was injured while unloading a vehicle owned by Preferred Trucking Services Corp. ("Preferred Trucking").[111] Gallina filed suit against Preferred Trucking, the vehicle operator Carlos Arias, and other defendants in March 2007.[112] Preferred Trucking carried a standard business auto policy through Country-Wide Insurance Company ("Country-Wide"), which "required that t[he] insureds cooperate with Country-Wide in its investigation or settlement of a claim or defense

106. *Id.* at 589, 15 N.E.3d at 1197, 992 N.YS.2d at 188.

107. *KeySpan Gas E. Corp.*, 23 N.Y.3d at 589-90, 15 N.E.3d at 1197, 992 N.YS.2d at 188 (internal quotation marks omitted) (citing N.Y. INS. LAW § 3420(d)(2) (McKinney 2014)).

108. *Id.* at 590, 15 N.E.3d at 1198, 992 N.YS.2d at 189.

109. *Id.* at 590-91, 15 N.E.3d at 1198, 992 N.YS.2d at 189.

110. *Id.* at 591, 15 N.E.3d at 1198, 992 N.YS.2d at 189.

111. Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp., 22 N.Y.3d 571, 573, 6 N.E.3d 578, 579, 983 N.Y.S.2d 460, 461 (2014).

112. *Id.*

against a lawsuit."[113] "Country-Wide made numerous attempts" throughout 2007 and 2008 to contact Arias and the president of Preferred Trucking, Andrew Markos, but neither party responded.[114] Thus, "[o]n November 6, 2008, Country-Wide disclaimed its obligation to defend and indemnify Preferred Trucking and Arias, based upon refusal to cooperate in the defense."[115] Country-Wide then sought a declaratory judgment that it was "not obligated to defend and indemnify Preferred Trucking and Arias."[116]

The issue in this case was whether Country-Wide's disclaimer was timely as a matter of law.[117] Under New York law, an insurer is required to disclaim, "as soon as is reasonably possible,"

> "once the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage . . . . [T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage . . . ."[118]

The insurer has the burden to justify any delay.[119]

"Country-Wide [did] not dispute that it knew or should have known in July 2008 that *Markos*, the president of Preferred Trucking, would not cooperate."[120] Instead, Country-Wide contended that it did not know that *Arias* would not cooperate until October 2008, when Arias stated "he did not 'care about the EBT date.'"[121]

The Court found that "[t]he question whether an insurer disclaimed as soon as reasonably possible is necessarily case- [and fact-]specific."[122] "In these circumstances, [where] Arias 'punctuated periods of noncompliance with sporadic cooperation or promises to cooperate,' [the Court] h[e]ld that Country-Wide established as a matter of law that its delay was reasonable."[123]

113. *Id.*
114. *Id.* at 573, 6 N.E.3d at 579-80, 983 N.Y.S.2d at 461-64.
115. *Id.* at 574, 6 N.E.3d at 580, 983 N.Y.S.2d at 462.
116. *Country-Wide Ins. Co.*, 22 N.Y.3d at 574, 6 N.E.3d at 580, 983 N.Y.S.2d at 462.
117. *Id.* at 575, 6 N.E.3d at 580, 983 N.Y.S.2d at 462.
118. *Id.* at 575, 6 N.E.3d at 581, 983 N.Y.S.2d at 463 (citing First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 66, 68-69, 801 N.E.2d 835, 837, 838-39, 769 N.Y.S.2d 459, 461, 462-63 (2003)).
119. *Id.* at 576, 6 N.E.3d at 581, 983 N.Y.S.2d at 463 (citing *First Fin. Ins. Co.*, 1 N.Y.3d at 69, 801 N.E.2d at 839, 769 N.Y.S.2d at 463).
120. *Id.* at 576, 6 N.E.3d at 582, 983 N.Y.S.2d at 464.
121. *Country-Wide Ins. Co.*, 22 N.Y.3d at 576, 6 N.E.3d at 582, 983 N.Y.S.2d at 464.
122. *Id.* at 576, 6 N.E.3d at 581, 983 N.Y.S.2d at 463.
123. *Id.* at 577, 6 N.E.3d at 582, 983 N.Y.S.2d at 464.

V. EXCESS INSURANCE

The plaintiff Ragins brought an action against the defendant Hospitals Insurance Company ("HIC"), his excess professional liability insurance carrier, on the theory that HIC was required to pay interest on a $1,100,000 judgment against him for medical malpractice.[124] The plaintiff's now defunct primary carrier had paid the limit of that policy ($1,000,000) through the liquidator shortly after the judgment was entered.[125] However, the primary policy's "supplementary payments" section specifically excluded payment of post-judgment interest after that carrier had remitted its policy limits in satisfaction of a judgment.[126]

In contrast, the excess policy authored by HIC provided coverage for "all sums" in excess of the underlying insurance.[127] The Court of Appeals interpreted the undefined term "sums" broadly to mean any amount of any loss attributable to an otherwise covered claim.[128] This included both pre-judgment and post-judgment interest.[129] Thus, because the primary policy specifically excluded interest after it had paid its portion of the judgment, any interest, along with any other unpaid portion of the judgment, fell within the terms of the excess policy issued by HIC.[130]

VI. PROPERTY INSURANCE

The plaintiff Executive Plaza owned an office building that sustained extensive damage in a fire on February 23, 2007.[131] The plaintiff filed a claim with its carrier, the defendant Peerless, for damages, and Peerless agreed to pay the "actual cash value" of the loss ($757,812.50).[132] The plaintiff then notified Peerless that it would submit a claim for full replacement costs upon completion of the building repairs, up to the policy limit.[133] Under the policy (as with most insurance policies), Peerless did not owe replacement costs until the premises were

124. Ragins v. Hosps. Ins. Co., 22 N.Y.3d 1019, 1021, 4 N.E.3d 941, 941, 981 N.Y.S.2d 640, 640 (2013).

125. *Id.*

126. *Id.* at 1021, 4 N.E.3d at 942, 981 N.Y.S.2d at 641.

127. *Id.* at 1022, 4 N.E.3d at 942, 981 N.Y.S.2d at 641.

128. *Id.*

129. *Ragins*, 22 N.Y.3d at 1022, 4 N.E.3d at 942, 981 N.Y.S.2d at 641.

130. *Id.*

131. Exec. Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511, 516, 5 N.E.3d 989, 990, 982 N.Y.S.2d 826, 827 (2014).

132. *Id.* at 516-17, 5 N.E.3d at 990, 982 N.Y.S.2d at 827.

133. *Id.* at 517, 5 N.E.3d at 990, 982 N.Y.S.2d at 827.

actually repaired.[134] The policy also required any actions against Peerless to be brought within two years of the date of loss.[135]

Although the repairs were not yet complete, the plaintiff filed suit against Peerless in the supreme court on February 23, 2009.[136] The plaintiff sought "a declaratory judgment that [Peerless] was liable for replacement costs up to the policy limit."[137] In response, Peerless removed the case to federal court and then moved to dismiss it as premature.[138] Peerless argued that its replacement cost obligations did not trigger until the premises had been repaired, and since the plaintiff had not finished the repairs, the matter was not ripe for litigation.[139] The court agreed with the defendant and dismissed the case.[140]

The plaintiff completed the building repairs in October 2010 and submitted another claim for replacement cost payments to Peerless.[141] Peerless denied this claim on the basis that it was submitted outside of the two-year limitation clause.[142] The plaintiff again filed suit, arguing that the clause should not be enforceable because the repairs could not feasibly be completed within two years of the loss.[143] The district court upheld the clause as "reasonable," and the plaintiff appealed.[144]

The Court of Appeals granted certiorari on request from the Second Circuit and answered in favor of the plaintiff.[145] The Court noted "that there [wa]s nothing inherently unreasonable" in establishing a two-year statute of limitations and that shorter time frames had previously been upheld by the courts.[146] However, the Court found that in this case, it was not reasonably possible to complete the repairs within the two years.[147] Thus, fairness dictated that the clause should be relaxed.[148] Writing for a unanimous Court, Judge Smith commented:

> It is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit–in

134. *Id.* at 516, 5 N.E.3d at 990, 982 N.Y.S.2d at 827.
135. *Id.*
136. *Exec. Plaza, LLC*, 22 N.Y.3d at 517, 5 N.E.3d at 991, 982 N.Y.S.2d at 828.
137. *Id.*
138. *Id.*
139. *Id.* at 517, 5 N.E.3d at 990-91, 982 N.Y.S.2d at 827-28.
140. *Id.* at 517, 5 N.E.3d at 991, 982 N.Y.S.2d at 828.
141. *Exec. Plaza, LLC*, 22 N.Y.3d at 517, 5 N.E.3d at 991, 982 N.Y.S.2d at 828.
142. *Id.*
143. *See id.*
144. *Id.*
145. *Id.* at 517-18, 5 N.E.3d at 991, 982 N.Y.S.2d at 828.
146. *Exec. Plaza, LLC*, 22 N.Y.3d at 518, 5 N.E.3d at 991, 982 N.Y.S.2d at 828.
147. *Id.* at 518, 5 N.E.3d at 992, 982, N.Y.S.2d at 829.
148. *See id.*

> this case, completion of replacement of the property–that cannot be met within that two-year period. A "limitation period" that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim. It is true that nothing required defendant to insure plaintiff for replacement cost in excess of actual cash value, but having chosen to do so defendant may not insist on a "limitation period" that renders the coverage valueless when the repairs are time-consuming.[149]

In *Georgitsi Realty, LLC v. Penn-Star Insurance Co.*, the plaintiff Georgitsi Realty, LLC ("Georgitsi") "owned an apartment building in Brooklyn, New York."[150] In 2007, the building sustained extensive damage due to excavation and construction work performed on the adjacent property.[151] Georgitsi had previously notified the property owner about the damage to its building and obtained "numerous 'stop work' orders from the New York City Department of Buildings," but the construction continued.[152] In December 2007, Georgitsi filed a claim for damages through its insurance carrier, Penn-Star Insurance Co. ("Penn-Star").[153]

Georgitsi carried a broad form policy which covered a variety of perils, including vandalism.[154] "[T]he [po]licy defined vandalism as 'willful and malicious damage to, or destruction of, the described property.'"[155] Penn-Star denied coverage on the ground that excavation damage did not constitute vandalism under the policy.[156] Georgitsi filed suit against Penn-Star in state court, and Penn-Star had the case removed to the United States District Court for the Eastern District of New York.[157]

The magistrate judge, in his report to the district court, found that the excavators had not committed vandalism within the meaning of the policy because their actions were directed only to the adjacent property, not Georgitsi's building, and that proof of recklessness would not satisfy the malice requirement of the policy as a matter of law.[158] The district court adopted his recommendations and held for Penn-Star, and Georgitsi appealed.[159]

149. *Id.*
150. 745 F.3d 617, 617 (2d Cir. 2014).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 618.
155. *Georgitsi Realty, LLC*, 745 F.3d at 618.
156. *Id.* at 617.
157. *Id.* at 617-18.
158. *Id.* at 618.
159. *Id.*

The United States Court of Appeals for the Second Circuit found that the appeal turned on the "unsettled and important" question of New York law as to whether "malicious damage" within the meaning of an insurance policy covering vandalism may be found to result from an act not directed at the policyholder's property but causing damage thereto and undertaken with knowing disregard for the policyholder's rights.[160] Thus, it certified these questions to the New York Court of Appeals: "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?"[161]

The Court of Appeals answered the first question in the affirmative, stating that "malicious damage within the coverage of such a policy may be found to result from acts not directed specifically at the covered property."[162] As to the second question of what state of mind is required, the Court stated that "to obtain coverage under such a policy the insured must show malice, defined as such a conscious and deliberate disregard of the interests of others that the conduct in question may be called willful or wanton."[163]

Accordingly, the United States Court of Appeals for the Second Circuit vacated the judgment of the district court and remanded the matter to the district court for further proceedings.[164]

VII. UM/SUM INSURANCE

Fitzgerald, a police officer, was a passenger in a police vehicle driven by fellow officer Knauss "when he was injured in an automobile accident."[165] The other vehicle was underinsured.[166] Fitzgerald filed a claim with State Farm for Supplementary Uninsured/Underinsured Motorist ("SUM") benefits under the carrier's SUM endorsement.[167] The endorsement defined an "insured" "as the named insured (i.e., Knauss) and 'any other person while occupying . . . any other *motor vehicle* . . .

160. Georgitsi Realty, LLC v. Penn-Star Ins. Co., 702 F.3d 152, 159 (2d Cir. 2012).

161. *Id.*

162. Georgitsi Realty, LLC v. Penn-Star Ins. Co., 21 N.Y.3d 606, 608, 999 N.E.2d 520, 521, 977 N.Y.S.2d 157, 158 (2013).

163. *Id.*

164. Georgitsi Realty, LLC v. Penn-Star Ins. Co., 745 F.3d 617, 618 (2d Cir. 2014).

165. *In re* State Farm Mut. Auto. Ins. Co. v. Fitzgerald, 112 A.D.3d 166, 167, 973 N.Y.S.2d 801, 802 (2d Dep't 2013), *leave to appeal granted by* 22 N.Y.3d 1168, 8 N.E.3d 846, 985 N.Y.S.2d 469 (2014).

166. *Fitzgerald*, 112 A.D.3d at 167, 973 N.Y.S.2d at 802.

167. *Id.*

being operated by [Knauss].'"[168]

"State Farm filed a petition to permanently stay the arbitration, arguing that Fitzgerald was not an 'insured' under the . . . endorsement. State Farm contended, *inter alia*, that the police vehicle involved in the accident was not a 'motor vehicle' for purposes of the endorsement."[169]

An interesting question of first impression came before the court.[170] Vehicle and Traffic Law section 125 provides the general definition of "motor vehicle" for the purposes of the statute, and the term includes police vehicles.[171] However, Vehicle and Traffic Law section 388(2), which imposes derivative liability on the owner of a vehicle for the negligence of a permissive user, specifically excludes police vehicles from the definition of a "motor vehicle."[172]

The court held that section 125, not section 388(2), "should be used to define the term 'motor vehicle,' as it appear[ed] in the uninsured/underinsured motorist endorsement."[173] The court further explained:

> Police vehicles fall within the definition of a "motor vehicle" under Vehicle and Traffic Law § 125 because they constitute a "vehicle operated or driven upon a public highway which is propelled by any power other than muscular power," and they do not fall within any of the exclusions provided in the statute.[174]

The court reasoned that section 125 was "a general provision" and thus "define[d] the relevant terminology for the entire" statute.[175] Additionally, the court found this interpretation to be consistent with policyholders' reasonable expectations and experiences.[176] Lastly, Fitzgerald was an "insured" under the SUM endorsement because he was occupying a vehicle driven by Knauss at the time of the accident.[177]

VIII. PERSONAL INJURY PROTECTION BENEFITS (NO-FAULT BENEFITS)

The defendants, David Mun, M.D. and Nara Rehab Medical, P.C., billed Allstate approximately $500,000 for "Electrodiagnostic Testing" allegedly performed between October 2007 and October 2011 on various

168. *Id.* (alterations in original).
169. *Id.*
170. *See id.*
171. N.Y. VEH. & TRAF. LAW § 125 (McKinney 2014).
172. *Id.* § 388(2).
173. *Fitzgerald*, 112 A.D.3d at 169, 973 N.Y.S.2d at 803.
174. *Id.* at 170, 973 N.Y.S.2d at 804.
175. *Id.* at 169, 973 N.Y.S.2d at 803.
176. *Id.* at 170, 973 N.Y.S.2d at 804.
177. *Id.*

covered persons.[178] Allstate, which was required to pay or deny claims within thirty days under New York Insurance Law section 5106, relied on the defendants' documentation and timely paid the claims.[179] In August 2012, Allstate filed suit against the defendants for allegedly fabricating testing or performing tests with no diagnostic value, then fraudulently billing Allstate.[180] Allstate sought to recover damages on "theories of common law fraud and unjust enrichment, and under the Racketeer Influenced and Corrupt Organizations Act ("RICO")."[181] The "[d]efendants moved to compel Allstate to arbitrate pursuant to the Federal Arbitration Act ("FAA"); the New York Insurance Law; and the arbitration provision included in Allstate policies."[182] The United States District Court for the Eastern District of New York denied the defendants' motion, "citing the [court's] consensus view . . . that medical providers have a right to arbitrate as-yet unpaid claims, but not claims that were timely paid."[183] The defendants appealed.[184]

The Court of Appeals for the Second Circuit affirmed and provided a detailed review of New York Insurance Law section 5106 and the FAA in its analysis as to whether Allstate's policies, which implemented the requirements imposed by New York law, granted the defendants the right to arbitrate fraud claims.[185] Although the arbitration provision in the Allstate policies allowed "arbitration if the claimant and [Allstate] 'do not agree regarding any matter relating to the claim,'" the court noted that under section 5106(b), "[an] arbitrable dispute is one between the insur[er] and a 'person making a claim for first-party benefits.'"[186] The defendants had already made their claims and been paid timely.[187] Therefore, the lawsuit did not involve a person "making" a claim for first-party benefits, but rather concerned "the medical provider[s'] liability to

178. Allstate Ins. Co. v. Mun, 751 F.3d 94, 95-96 (2d Cir. 2014).

179. *Id.* (citing N.Y. INS. LAW § 5106(a) (McKinney 2014); Hosp. for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 317-18, 879 N.E.2d 1291, 1294, 849 N.Y.S.2d 473, 475 (2007)).

180. *Id.*

181. *Id.*

182. *Id.* (internal citation omitted).

183. *Mun*, 751 F.3d at 96 (citing Allstate Ins. Co. v. Mun, No. 12-cv-3791 (CBA) (RLM), 2013 U.S. Dist. LEXIS 50421, at *1-2, *3-4 (E.D.N.Y. Apr. 8, 2013)).

184. *Id.* at 95.

185. *Id.* at 96-100, 101 (discussing N.Y. INS. LAW §§ 5106(a), (b), 5103(h) (McKinney 2014); 9 U.S.C. § 2 (2012)).

186. *Id.* at 97-98 (quoting N.Y. COMP. CODES R. & REGS. tit. 11, § 65.1-1(d) (2014)).

187. *Id.* at 98.

the insurer."[188] As such, the arbitration provision did not apply.[189] The court also found that the arbitration right under section 5106(b) only applied "to disputes arising from the insurer's non-payment during the initial 30-day" pay or deny period, not to suits brought later by an insurer to recover for fraud.[190]

The court further noted that no-fault arbitration is an expedited process where "[d]iscovery is limited or non-existent."[191] In contrast, "[c]omplex fraud and RICO claims" may take years to discover and "cannot be shoehorned into this system."[192] "Allowing the providers to elect arbitration . . . would also undercut [New York's] anti-fraud measures," which "require insurers to file plans 'for the detection, investigation and prevention of fraudulent insurance activities.'"[193] These plans must include coordination of units within the insurance company to recover fraudulent payments.[194] For these reasons, the court held that medical providers do not have the right to elect arbitration of an insurance carrier's fraud claims.[195]

IX. CLAIMS AGAINST INSURANCE BROKERS/AGENTS

The plaintiff Deborah Voss sustained property damage and consequential business interruption as a result of water damage from three separate roof failures in 2007 and 2008.[196] Voss filed claims with her insurance carrier, Netherlands Insurance Co. ("Netherlands"), which allegedly delayed payment on the first two losses.[197] While the third claim was pending, Voss brought action against the roofing contractor, Netherlands, and her insurance broker, CH Insurance Brokerage Services, Co., Inc. ("CHI").[198] CHI was the only defendant on this appeal.[199]

"Voss began her relationship with CHI in 2004," prior to the purchase of the property at issue here.[200] Initially, she met with

188. *Mun*, 751 F.3d at 98.
189. *Id.*
190. *Id.* at 99.
191. *Id*.
192. *Id.*
193. *Mun*, 751 F.3d at 99 (quoting N.Y. INS. LAW § 409(a) (McKinney 2014)).
194. *Id.* at 99 (quoting N.Y. INS. LAW § 409(c)).
195. *Id.* at 101.
196. Voss v. Neth. Ins. Co., 22 N.Y.3d 728, 730-31, 8 N.E.3d 823, 825, 985 N.Y.S.2d 448, 450 (2014).
197. *Id.* at 732, 8 N.E.3d at 826, 985 N.Y.S.2d at 451.
198. *Id.* at 731, 733, 8 N.E.3d at 825, 827, 985 N.Y.S.2d at 450, 451.
199. *Id.* at 731, 8 N.E.3d at 825, 985 N.Y.S.2d at 450.
200. *Id.*

broker/agent Joe Convertino, Jr., to discuss insurance coverage for the two companies Voss operated at that time and the premises.[201] "[T]hey discussed property insurance, professional liability coverage and business interruption insurance."[202] Convertino requested Voss's "sales figures and other pertinent information to enable him to calculate an appropriate level of business interruption coverage for her companies."[203] Voss testified that "Convertino also represented that CHI would reassess and revisit the coverage needs as her businesses grew."[204] Convertino recommended a policy through Netherlands which included $75,000 of business interruption coverage, and reassured Voss that the limit was sufficient based on the size of her businesses and the property's condition.[205] Voss accepted his recommendation and purchased the policy.[206]

In April 2006, the plaintiff purchased a new building that had more than double the square footage of the previous location with the intent to relocate one of her companies and open two more businesses.[207] Voss discussed her plans with Convertino, and CHI subsequently renewed the Netherlands policy for the new location and entities with the same business interruption limit of $75,000.[208]

In March 2007, Voss discovered multiple leaks in the roof and hired a contractor to replace it.[209] The new roof failed the following month, causing significantly more damage to the premises.[210] Netherlands treated these losses as two separate occurrences under the policy, and issued payments to the plaintiff in the amounts of "$3,197 for the first loss and $30,000 for the second loss."[211]

While dealing with these losses, "Voss met with another CHI representative, Carrie Allen, to discuss the renewal of the Netherlands policy."[212] Shortly thereafter, "Voss received a proposal indicating that the business interruption coverage would be reduced from $75,000 to $30,000."[213] Voss testified that she questioned this reduction and that

201. *Voss*, 22 N.Y.3d at 731, 8 N.E.3d at 825, 985 N.Y.S.2d at 450.
202. *Id.*
203. *Id.* at 731, 8 N.E.3d at 825-26, 985 N.Y.S.2d at 450.
204. *Id.* at 731, 8 N.E.3d at 826, 985 N.Y.S.2d at 450.
205. *Id.*
206. *Voss*, 22 N.Y.3d at 731-32, 8 N.E.3d at 826, 985 N.Y.S.2d at 450.
207. *Id.* at 732, 8 N.E.3d at 826, 985 N.Y.S.2d at 450.
208. *Id.*
209. *Id.* at 732, 8 N.E.3d at 826, 985 N.Y.S.2d at 451.
210. *Id.*
211. *Voss*, 22 N.Y.3d at 732, 8 N.E.3d at 826, 985 N.Y.S.2d at 451.
212. *Id.*
213. *Id.*

Allen advised "that she 'would take a look at it.'"[214] "Voss did not follow up," and in April 2007, the policy renewed with the reduced $30,000 limit.[215]

The roof failed for the third time in February 2008, causing extensive damage to the premises and further disrupting the plaintiff's businesses.[216] The plaintiff then brought the action, alleging, *inter alia*, that CHI had a special relationship with the plaintiff and had negligently failed to secure adequate levels of business interruption coverage for all three losses.[217]

After "discovery, CHI moved for summary judgment" based on three arguments: (1) no special relationship existed and in the absence of a specific request for higher limits, CHI could not be held liable; (2) Voss read her policies which showed the coverage limits; and (3) even if a special relationship existed, negligence on the part of CHI was not the proximate cause of Voss's loss—rather, Voss's damages resulted from Netherlands' failure "to timely pay the policy limits."[218] The supreme court agreed with CHI's contentions and granted the motion, and the appellate division affirmed with one justice dissenting.[219] The Court of Appeals reversed.[220]

"As a general principle, insurance brokers 'have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage.'"[221] Thus, in an ordinary broker-client relationship, "the client may prevail in a negligence action only where it can establish that it made a particular request to the broker and the requested coverage was not procured."[222] However, where a special relationship develops between the broker and the client, a broker may be liable "for failing to advise or direct the client to obtain additional coverage," even in the absence of a specific request.[223] The Court cited prior precedent where it had "recognized that 'particularized situations may arise in which insurance

214. *Id.*
215. *Id.* at 732, 8 N.E.3d at 826-27, 985 N.Y.S.2d at 451.
216. *Voss*, 22 N.Y.3d at 733, 8 N.E.3d at 827, 985 N.Y.S.2d at 451.
217. *Id.*
218. *Id.*
219. *Id.* at 733, 8 N.E.3d at 827, 985 N.Y.S.2d at 451-52.
220. *Id.* at 734, 8 N.E.3d at 827, 985 N.Y.S.2d at 452.
221. *Voss*, 22 N.Y.3d at 734, 8 N.E.3d at 828, 985 N.Y.S.2d at 452 (quoting Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc., 19 N.Y.3d 730, 735, 979 N.E.2d 1181, 1184, 955 N.Y.S.2d 854, 857 (2012)).
222. *Id.*
223. *Id.* at 735, 8 N.E.3d at 828, 985 N.Y.S.2d at 452.

agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law.'"[224]

Here, the Court found that CHI "did not satisfy its initial burden of establishing the absence of a material issue of fact as to the existence of a special relationship."[225] Rather, "the evidence suggest[ed] that 'there was some interaction regarding a question of . . . coverage with the insured relying on the expertise of the agent,'" and therefore the complaint could not be dismissed on those grounds.[226] However, the Court also stated: "[W]e reiterate that special relationships in the insurance brokerage context are the exception, not the norm, and we emphasize that it remains to be determined whether a special relationship existed here."[227] The plaintiff had the ultimate burden of proving the existence of a special relationship with CHI and that she relied on CHI's expertise to calculate the proper amount of coverage.[228]

With regard to CHI's second argument, the Court determined "that Voss's awareness of the business interruption limits d[id] not defeat her cause of action as a matter of law."[229] The plaintiff's claim was "predicated on the alleged special relationship with CHI," and thus it was "irrelevant whether [she] w[as] aware of the limits that were actually procured."[230] Lastly, the contention that Netherlands' alleged failure to timely pay the claims, not CHI's negligence, was the proximate cause of the plaintiff's damages was a question of fact to be resolved by the jury.[231] Accordingly, the order of the appellate division was reversed.[232]

The dissent argued that Voss's own testimony showed that she did not have a special relationship with CHI.[233] Although she may have relied on Convertino's expertise in 2004 when the policy was procured, by the time of the third loss, Voss's business had changed and she herself questioned whether the coverage limits would still suffice.[234] Voss did request advice from another CHI representative, Allen, but she did not

224. *Id.* at 735, 8 N.E.3d at 828, 985 N.Y.S.2d at 453 (citing Murphy v. Kuhn, 90 N.Y.2d 266, 272, 682 N.E.2d 972, 975, 660 N.Y.S.2d 371, 374 (1997)).

225. *Id.* at 735, 8 N.E.3d at 829, 985 N.Y.S.2d at 453.

226. *Voss*, 22 N.Y.3d at 735-36, 8 N.E.3d at 828-29, 985 N.Y.S.2d at 453 (citing *Murphy*, 90 N.Y.2d at 272, 682 N.E.2d at 975, 660 N.Y.S.2d at 374).

227. *Id.* at 736, 8 N.E.3d at 829, 985 N.Y.S.2d at 453.

228. *Id.*

229. *Id.* at 736, 8 N.E.3d at 829, 985 N.Y.S.2d at 454.

230. *Id.*

231. *Voss*, 22 N.Y.3d at 736-37, 8 N.E.3d at 829-30, 985 N.Y.S.2d 454.

232. *Id.* at 737, 8 N.E.3d at 830, 985 N.Y.S.2d at 454.

233. *Id.* (Smith, J., dissenting).

234. *Id.* at 737-38, 8 N.E.3d at 830, 985 N.Y.S.2d at 455 (Smith, J., dissenting).

receive any.[235] "CHI had no duty to follow through" on Convertino's promise from 2004 to reevaluate Voss's coverage as it was not legally binding.[236] Agents are not insurance companies and as such, are not required "'to advise, guide or direct a client' in acquiring insurance coverage."[237] "[A] 'duty of advisement' may exist where 'the agent receives compensation for consultation apart from payment of the premiums.' But there is no authority for finding a special relationship based on a gratuitous promise to consult, where no consultation takes place."[238]

Furthermore, the dissent pointed out that clients naturally tend to blame their agents when their insurance company does not cover the loss.[239] If the courts allowed clients to sue their agents, agents could be made "into a kind of back up insurer."[240] This result, the dissent argued, would be "neither sensible nor fair."[241]

CONCLUSION

In 2014, the New York Court of Appeals issued more significant decisions in insurance law than it had in decades. It will be interesting to see how carriers and insureds alike incorporate these holdings in future litigation.

235. *Id.* at 738, 8 N.E.3d at 830, 985 N.Y.S.2d at 455 (Smith, J., dissenting).

236. *Voss*, 22 N.Y.3d at 738, 8 N.E.3d at 831, 985 N.Y.S.2d at 455 (Smith, J., dissenting).

237. *Id.* (Smith, J., dissenting) (citing Murphy v. Kuhn, 90 N.Y.2d 266, 269, 682 N.E.2d 972, 973, 660 N.Y.S.2d 371, 372 (1997)).

238. *Id.* (Smith, J., dissenting) (citing *Murphy*, 90 N.Y.2d at 272, 682 N.E.2d at 975, 660 N.Y.S.2d at 374).

239. *Id.* at 738, 8 N.E.3d at 831, 985 N.Y.S.2d at 455 (Smith, J., dissenting).

240. *Id.* at 738-39, 8 N.E.3d at 831, 985 N.Y.S.2d at 455 (Smith, J., dissenting).

241. *Voss*, 22 N.Y.3d at 739, 8 N.E.3d at 831, 985 N.Y.S.2d at 455 (Smith, J., dissenting).