INSURANCE LAW

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INTRODUCTION

In 2016 the New York State Court of Appeals issued an unusually large number of decisions with regard to a wide range of insurance coverage. The Court opined on issues such as notice, policy exhaustion

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and allocation, no-fault, and anti-subrogation. The Court of Appeals and the appellate divisions' 2016 decisions have provided much to review and assess amongst the policyholder and defense bar.

I. TIMELY NOTICE

Last March, the Court of Appeals unanimously affirmed a divided Fourth Department decision that denied an insurer's motion to dismiss a coverage action based on insufficient notice of an "occurrence" under the insured's policy.[1] In *Spoleta Construction, LLC v. Aspen Insurance UK Ltd.*, the Court considered whether a letter requesting contractual indemnity was sufficient to notify an insurer of a claim for coverage by an additional insured.[2]

The relevant facts in the underlying action are laid out in the Fourth Department's 2014 opinion.[3] VanDerwall was hurt while working on a construction project in October 2008.[4] Spoleta Construction was the general contractor, and VanDerwall worked for a subcontractor, Hub-Langie ("Hub").[5] Under the trade contract, Hub, a paving company, agreed to defend and indemnify Spoleta for all claims arising out of Hub's work and to name the plaintiff on its general liability policy.[6] Hub secured a policy from Aspen Insurance, which provided blanket additional insured coverage for "any person or organization . . . when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy."[7]

In late December 2009, Spoleta learned of the accident for the first time in a letter from VanDerwall's attorney.[8] "On January 27, 2010, [Spoleta's] liability carrier sent a letter to [Hub] with notice of VanDerwall's 'claim,' noting [Hub's] contractual agreement to defend

1. Spoleta Constr., LLC v. Aspen Ins. UK Ltd. (*Spoleta II*), 27 N.Y.3d 933, 934–36, 50 N.E.3d 222, 222–23, 30 N.Y.S.3d 598, 598–99 (2016), *aff'g* 119 A.D.3d 1391, 991 N.Y.S.2d 183 (4th Dep't 2014); Spoleta Constr., LLC v. Aspen Ins. UK Ltd. (*Spoleta I*), 119 A.D.3d 1391, 1391–94, 991 N.Y.S.2d 183, 184–86 (4th Dep't 2014) (first citing Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324, 865 N.E.2d 1210, 1213, 834 N.Y.S.2d 44, 47 (2007); and then citing Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994)).

2. *Id.* at 935, 50 N.E.3d at 223, 30 N.Y.S.3d at 599.

3. *Spoleta I*, 119 A.D.3d at 1391–92, 991 N.Y.S.2d at 184.

4. *Id.* at 1391, 991 N.Y.S.2d at 184.

5. *Id.*

6. *Id.*

7. *Id.* at 1392, 991 N.Y.S.2d at 184.

8. *Spoleta I*, 119 A.D.3d at 1392, 991 N.Y.S.2d at 184.

and indemnify [Spoleta], and requesting that [Hub] put its own insurance carrier on notice."[9]

On February 9, 2010, Hub sent Aspen a "General Liability Notice of Occurrence/Claim" form regarding VanDerwall's injury, with Spoleta's January letter attached.[10] On February 22, Aspen "received a copy of the contract between [Hub] and [Spoleta] containing the defense, indemnification and additional insured requirements."[11] VanDerwall commenced the underlying action on April 15.[12] On May 27, Spoleta's counsel demanded that Aspen "defend and indemnify it in the underlying action," and Aspen disclaimed by reason of late notice on June 2.[13] Spoleta then initiated a declaratory judgment action for coverage under the additional insured policy.[14]

After the lower court granted Aspen's motion to dismiss, the Fourth Department reversed, concluding that the January 2010 letter from Spoleta to Hub, as forwarded to Aspen, was sufficient to constitute notice of an "occurrence" under the terms of the policy, inasmuch as the documentary evidence did not conclusively establish a defense to Spoleta's claim as a matter of law.[15] The majority stated that "the policy did not require that written notice of an occurrence come directly from [the] plaintiff; it simply required that [the] plaintiff 'see to it' that [the] defendant was 'notified.'"[16]

Two justices strongly dissented, and posited that the January 2010 letter from Spoleta's liability carrier to Hub, which was subsequently sent to Aspen by Hub, could not serve as notice of an occurrence by the additional insured under the terms of the policy[17]: "As an additional insured under the policy issued by [the] defendant, [the] plaintiff had, in the absence of an express duty, an implied duty, independent of the named insured's obligation, to provide [the] defendant with timely notice

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Spoleta I*, 119 A.D.3d at 1392, 991 N.Y.S.2d at 184.
14. *Id.*
15. *Id.* at 1394, 991 N.Y.S.2d at 186 (first citing Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324, 865 N.E.2d 1210, 1213, 834 N.Y.S.2d 44, 47 (2007); and then citing Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 51, 513, 614 N.Y.S.2d 972, 974 (1994)).
16. *Id.* at 1394, 991 N.Y.S.2d at 185 (quoting U.S. Underwriters Ins. v. Falcon Constr. Corp., No. 02 Civ. 4182 (LTS)(GWG), 2003 U.S. Dist. LEXIS 14817, at *15 (S.D.N.Y. Aug. 28, 2003)).
17. *Id.* at 1395, 991 N.Y.S.2d at 186–87 (Lindley and Valentino, J.J., dissenting).

of the occurrence for which it [sought] coverage."[18] According to the dissent, the letter "merely stated that [the] plaintiff sought defense and indemnification from Hub pursuant to the indemnification provision of the subcontract and did not seek coverage."[19]

The Court of Appeals affirmed,[20] holding that the documentary evidence did not establish as a matter of law that Spoleta failed to provide timely notice of an occurrence.[21]

Aspen argued that it interpreted the January "letter as seeking only defense and indemnity from [Hub] pursuant to the indemnification provision of the subcontract because Spoleta did not expressly state that it was seeking coverage as an additional insured."[22] The Court of Appeals rejected this premise, and stated that "the letter itself did not identify the indemnification provision of the subcontract as the basis for the communication—it simply requested a defense and indemnity under the contract without specifically invoking either the indemnification or additional insurance provisions."[23]

The Court emphasized that Spoleta's letter requested that Hub "place [its] insurance carrier on notice of *this claim*,"[24] and also "provided information about the identity of the injured employee, [and] the date, location and general nature of the accident."[25] That is, in addition to requesting that the insurer be put on notice, the letter provided the occurrence details as required by the Aspen policy:

> "You must see to it that [Aspen is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Notice was to include, to the extent possible: "(1) How, when and where the 'occurrence' or offense took place; (2) The names and addresses of any injured persons and witnesses; and (3) The nature and location of any

18. *Spoleta I*, 119 A.D.3d at 1394, 991 N.Y.S.2d at 186 (Lindley and Valentino, J.J., dissenting) (quoting City of New York v. Inv'rs Ins. of Am., 89 A.D.3d 489, 489, 932 N.Y.S.2d 459, 460 (1st Dep't 2011)) (first citing Jackson Realty Assocs. v. Nationwide Mut. Ins., 53 A.D.3d 541, 542, 863 N.Y.S.2d 35, 36 (2d Dep't 2008); and then citing Structure Tone v. Burgess Steel Prods. Corp., 249 A.D.2d 144, 145, 672 N.Y.S.2d 33, 34 (1st Dep't 1998)).

19. *Id.* at 1395, 991 N.Y.S.2d at 187.

20. *Spoleta II*, 27 N.Y.3d 933, 934, 50 N.E.3d 222, 222, 30 N.Y.S.3d 598, 598 (2016).

21. *Id.* at 936, 50 N.E.3d at 224, 30 N.Y.S.3d at 600 (first citing Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324, 865 N.E.2d 1210, 1213, 834 N.Y.S.2d 44, 47 (2007); and then citing Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 51, 513, 614 N.Y.S.2d 972, 974 (1994)).

22. *Id.* at 936, 50 N.E.3d at 223, 30 N.Y.S.3d at 599.

23. *Id.* at 936, 50 N.E.3d at 223–24, 30 N.Y.S.3d at 599–600.

24. *Id.* at 936, 50 N.E.3d at 224, 30 N.Y.S.3d at 600.

25. *Spoleta II*, 27 N.Y.3d at 936, 50 N.E.3d at 224, 30 N.Y.S.3d at 600.

injury or damage arising out of the 'occurrence' or offense."[26]

The Court thus concluded that there was insufficient evidence to dismiss Spoleta's claim as a matter of law.[27] As the dissenting Fourth Department judges noted, a party seeking additional insured status traditionally has an independent obligation to give notice to the insurer.[28] That did not occur here.[29] Of course, this was on a motion to dismiss based on the pleadings, and the Court may have thought that Aspen was playing "gotcha" (i.e., even if the January 2010 letter did not explicitly request additional insured coverage, it should have been clear enough to the insurer that coverage was sought).

In a case of likely first impression, the First Department held in *Castlepoint Insurance Co. v. Hilmand Realty, LLC* that a late notice disclaimer did not estop an insurer from defending and seeking declaratory relief.[30] According to the court, the insurer "did not take factually inconsistent positions in hiring counsel to represent its insureds in vacating [a] default [judgment] in the [underlying] personal injury action," while simultaneously "moving for a declaration that coverage under the policy was vitiated by untimely notice of claim in the event coverage was triggered."[31]

This holding is important, because insurers have been understandably hesitant to undertake the defense of a case when there is a late notice coverage defense for fear that the insured would argue, as was done here, that it is inconsistent to do so.[32] However, since the Court of Appeals' decision in *Lang v. Hanover Insurance Co.* suggested the defend-and-declaratory-judgment protocol,[33] insurers have been more optimistic that this approach would be sustained with notice defenses.

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26. *Id.* at 935, 50 N.E.3d at 223, 30 N.Y.S.3d at 599 (alteration in original).

27. *Id.* at 936, 50 N.E.3d at 224, 30 N.Y.S.3d at 600.

28. *Spoleta I*, 119 A.D.3d 1391, 1394, 991 N.Y.S.2d 183, 186 (4th Dep't 2014) (Lindley and Valentino, J.J., dissenting) (quoting City of New York v. Inv'rs Ins. of Am., 89 A.D.3d 489, 489, 932 N.Y.S.2d 459, 460 (1st Dep't 2011)) (first citing Jackson Realty Assocs. v. Nationwide Mut. Ins., 53 A.D.3d 541, 542, 863 N.Y.S.2d 35, 36 (2d Dep't 2008); and then citing Structure Tone v. Burgess Steel Prods. Corp., 249 A.D.2d 144, 145, 672 N.Y.S.2d 33, 34 (1st Dep't 1998)).

29. *Id.* at 1392, 991 N.Y.S.2d at 184 (majority opinion).

30. 130 A.D.3d 475, 476, 13 N.Y.S.3d 406, 407 (1st Dep't 2015).

31. *Id.* at 476, 13 N.Y.S.3d at 406.

32. *But see id.* (holding a lack of estoppel despite undertaking defense).

33. 3 N.Y.3d 350, 356, 820 N.E.3d 855, 858–59, 787 N.Y.S.2d 211, 214–15 (2004) ("[A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment . . . . 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 against the purported insured . . . .").

In *Endurance America Specialty Insurance Co. v. Utica First Insurance Co.*, the First Department faulted a carrier for not including a party in its initial disclaimer of coverage to the named insured.[34] The carrier's letter to the named insured disclaimed on the basis of an employee exclusion which would have precluded coverage for all parties involved.[35] Citing Insurance Law § 3420(d), the court held that the carrier could not use an investigation into the party's additional insured status as an excuse, because "an insurer [is precluded] from delaying issuance of a disclaimer on a ground that the insurer knows to be valid."[36]

II. POLICY EXHAUSTION

In one of the most significant insurance coverage cases of the year, the Court of Appeals ruled that for excess policies containing non-cumulation or anti-stacking provisions, *all sums* is the proper allocation method, rather than pro rata allocation.[37] The Court also determined that, with such policies, vertical exhaustion should be applied—rather than relying on "other insurance" provisions to compel horizontal exhaustion of underlying policies.[38] The Court's decision in the case of *In re Viking Pump, Inc.* indicates that excess layers may be liable for an entire excess environmental loss, even where not all underlying policies are exhausted.

This case stemmed from the acquisition of pump manufacturing businesses by insured parties Viking Pumps, Inc. and Warren Pumps, Inc. in the 1980s.[39] As it happened, "[t]hose acquisitions resulted in significant potential liability [exposure] in connection with asbestos-related claims."[40] Houdaille Industries, who sold the manufacturing businesses, "had extensive multi-year insurance from 1972 to 1985," which Viking and Warren inherited.[41] Liberty Mutual provided about

34. 132 A.D.3d 434, 436, 17 N.Y.S.3d 401, 403 (1st Dep't 2015), *lv. denied*, 27 N.Y.3d 1119, 57 N.E.3d 66, 36 N.Y.S.3d 874 (2016).

35. *Id.* at 435, 17 N.Y.S.3d at 403.

36. *Id.* at 436, 17 N.Y.S.3d at 403 (quoting George Campbell Painting v. Nat'l Union Fire Ins. of Pittsburgh, 92 A.D.3d 104, 106, 937 N.Y.S.2d 164, 167 (1st Dep't 2012)) (first citing N.Y. INS. LAW § 3420(d)(1)(B) (McKinney 2015); and then citing City of New York v. N. Ins. of N.Y., 284 A.D.2d 291, 292, 725 N.Y.S.2d 374, 375 (2d Dep't 2001)).

37. *In re* Viking Pump, Inc., 27 N.Y.3d 244, 250, 52 N.E.3d 1144, 1146, 33 N.Y.S.3d 118, 120 (2016).

38. *Id.* at 265–67, 52 N.E.3d at 1157–58, 33 N.Y.S.3d at 131–32 (citing U.S. Fid. & Guar. Co. v. Am. Re-Ins., 20 N.Y.3d 407, 428, 985 N.E.2d 867, 888, N.Y.S.2d 566, 576 (2013)).

39. *Id.* at 251, 52 N.E.3d at 1146, 33 N.Y.S.3d at 120.

40. *Id.*

41. *Id.*

$17.5 million in primary coverage and about $42 million in umbrella excess coverage "through successive annual policies."[42] Houdaille also had a number of additional excess layers totaling over $400 million in coverage from what the Court called the "Excess Insurers" layers.[43] As the Liberty layers neared exhaustion and the Excess Insurers approached exposure, this litigation ensued to determine whether the excess policies were implicated "and, if so, how indemnity should be allocated across the triggered policy periods."[44]

Since the majority of the Excess Insurers' layers contained follow-form provisions, the language of the Liberty policies became critical.[45] The umbrella policies provided the following:

> [The insurer] will pay on behalf of the insured *all sums* in excess of the retained limit which the insured shall become legally obligated to pay, or with the consent of [the Insurer], agrees to pay, as damages, direct or consequential, because of: (a) personal injury . . . with respect to which this policy applies and caused by an occurrence.
>
> "Occurrence" is defined . . . as "injurious exposure to conditions, which results in personal injury" which is defined as "personal injury or bodily injury which occurs *during the policy period*."[46]

Further, the Liberty policies contained the following "non-cumulation" or "anti-stacking" provisions:

> "[I]f the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, the [sic] each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [Liberty Mutual] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof."[47]

The Court stated, "Those excess policies that do not follow form . . . contain a similar two-part 'Prior Insurance and Non[-]Cumulation of Liability' provisions."[48]

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42. *In re Viking Pump*, 27 N.Y.3d at 251, 52 N.E.3d at 1146, 33 N.Y.S.3d at 120.
43. *Id.* at 251, 52 N.E.3d at 1146–47, 33 N.Y.S.3d at 120–21.
44. *Id.* at 251, 52 N.E.3d at 1147, 33 N.Y.S.3d at 121.
45. *See id.*
46. *Id.* at 251–52, 52 N.E.3d at 1147, 33 N.Y.S.3d at 121 (second alteration in original) (first omission in original).
47. *In re Viking Pump*, 27 N.Y.3d at 251–52, 52 N.E.3d at 1147, 33 N.Y.S.3d at 121 (second alteration in original).
48. *Id.* (alteration in original).

Prior to the Court of Appeals ruling, the *Viking Pump* litigation stretched across a series of Delaware State court decisions.[49] As an initial matter, the Delaware Court of Chancery found that New York law applied to the insurer's claim, and determined that the non-cumulation and prior insurance provisions in the policies "evinced a clear and unambiguous intent to use all sums allocation."[50] Upon transfer to Delaware Superior Court and after trial, the court was unable to reconcile its conclusion—that the policy's language dictated vertical exhaustion—with New York precedent requiring horizontal exhaustion with respect to primary and umbrella policies.[51] The Delaware Supreme Court certified those questions to the Court of Appeals.[52]

Repeatedly referencing the policy language and emphasizing general principles of contract interpretation, the Court of Appeals held that the policy was unambiguous—the presence of the non-cumulation clause mandated an *all sums* approach.[53] Citing persuasive authority from around the country,[54] the Court determined it would be contrary to "the

49. *Id.* at 251, 52 N.E.3d at 1146, 33 N.Y.S.3d at 120 (first citing *In re* Viking Pump, Inc. (*Viking Pump, Inc. IV*), 146 A.3d 1046 (Del. 2015); then citing Viking Pump, Inc. v. Century Indem. Co. (*Viking Pump, Inc. III*), No. 10C-06-141 FSS CCLD, 2014 Del. Super. LEXIS 707 (Del. Super. Ct. Feb. 28, 2014); then citing Viking Pump, Inc. v. Century Indem. Co. (*Viking Pump, Inc. II*), No. 10C-06-141 FSS CCLD, 2013 Del. Super. LEXIS 615 (Del. Super. Ct. Oct. 31, 2013); and then citing Viking Pump, Inc. v. Century Indem. Co. (*Viking Pump, Inc. I*), 2 A.3d 76 (Del. Ch. 2009)).

50. *Viking Pump, Inc. I*, 2 A.3d at 119–27.

51. *Viking Pump, Inc. III*, 2014 Del. Super. LEXIS 707, at *13.

52. *Viking Pump, Inc. IV*, 146 A.3d 1046 (Del. 2015).

53. *In re Viking Pump*, 27 N.Y.3d at 260–61, 52 N.E.3d at 1153, 33 N.Y.S.3d at 127.

54. *See id.* at 264, 52 N.E.3d at 1156, 33 N.Y.S.3d at 130 (first citing 12 COUCH ON INSURANCE § 169:5 (3d ed. 2008); then citing 2 BARRY R. OSTRANGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 11.02(e) (16th ed. 2013); then citing Jan Michaels et al., *The "Non-Cumulation" Clause: Policyholders Cannot Have Their Cake and Eat It Too*, 61 U. KAN. L. REV. 701, 717 (2013); then citing Chi. Bridge & Iron Co. v. Certain Underwriters at Lloyd's London, 797 N.E.2d 434, 441 (Mass. App. Ct. 2003); then citing Plastics Eng'g Co. v. Liberty Mut. Ins., 759 N.W.2d 613, 626 (Wis. 2009); then citing Riley v. United Services Auto. Ass'n., 871 A.2d 599, 611 (Md. Ct. Spec. App. 2005); then citing Spaulding Composites v. Aetna Cas. & Sur. Co., 819 A.2d 410, 422–23 (N.J. 2003); then citing Outboard Marine Corp. v. Liberty Mut. Ins., 670 N.E.2d 740 (Ill. 1996); then citing Jan M. Michaels et al., *The Avoidable Evils of "All Sums" Liability for Long-Tail Insurance Coverage Claims*, 64 U. KAN. L. REV. 467, 489 (2015); then citing Hercules, Ins. V. AIU Ins., 784 A.2d 481, 493–94 (Del. 2000); then citing Dow Corning Corp. v. Cont'l Cas. Co., Inc., 1999 Mich. App. LEXIS 2920, at *23–24 (Mich. Ct. App. 1999); then citing Bos. Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 309 (Mass. 2009); then citing Liberty Mut. Ins. v. Those Certain Underwriters at Lloyd's London, 650 F. Supp. 1553, 1559 (W.D. Pa. 1987); then citing Olin Corp. v. Am. Home Assurance Co., 704 F.3d 89, 95 (2d. Cir. 2012); then citing Liberty Mut. Ins. v. Fairbanks Co., 2016 U.S. Dist. LEXIS 36662, at *7 (S.D.N.Y. Mar. 22, 2016); then citing Olin Corp. Ins. of N. Am., 221 F.3d 307 (2d Cir. 2000); and then citing

language of the non-cumulation clauses to use pro rata allocation."[55] The Court stated that the provisions "plainly contemplate" *all sums* allocation, quoting language that acknowledged a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [Insured] prior to the inception date" of the policy.[56]

The Court reasoned that this provision negated the essence of pro rata allocation (i.e., "that the insurance policy language limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence").[57] For the Court of Appeals, this policy language clearly evidenced an intent to use *all sums*.[58]

With respect to exhaustion, the insurers argued that the "other insurance" clauses mandated that horizontal exhaustion must apply.[59] The Court rejected this premise, because "the other insurance" clause does not apply to successive insurance policies.[60] Indeed, the Court reasoned, vertical exhaustion better comports with the policy language here, where the excess policies span the same policy periods.[61] The Court stated that vertical exhaustion is "conceptually consistent" with *all sums* allocation,[62] and because there was no policy language suggesting a contrary intent, the Court concluded "that the excess policies [were] triggered by vertical exhaustion of the underlying available coverage with

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Olin Corp. v. Certain Underwriters at Lloyd's London, 468 F.3d 120, 127 (2d Cir. 2006)).

55. *See id.* at 261, 52 N.E.3d at 1153, 33 N.Y.S.3d at 127.

56. *Id.* at 261, 52 N.E.3d at 1153, 33 N.Y.S.3d at 127 (alterations in original).

57. *Id.*

58. *In re Viking Pump*, 27 N.Y.3d at 262, 52 N.E.3d at 1154, 33 N.Y.S.3d at 128 (first citing *Hercules, Inc.*, 784 A.2d at 493–93; then citing *Bos. Gas Co.*, 910 N.E.2d at 309; and then citing *Liberty Mut. Ins.*, 650 F. Supp. at 1559).

59. *Id.* at 266, 52 N.E.3d at 1157, 33 N.Y.S.3d at 131.

60. *Id.* (citing Consol. Edison Co. of N.Y. v. Allstate Ins., 98 N.Y.2d 208, 223, 774 N.E.2d 687, 694, 746 N.Y.S.2d 622, 629 (2002)).

61. *Id.* (first citing Am. Home Assurance Co. v. Int'l Ins., 90 N.Y.2d 433, 437, 684 N.E.2d 14, 15, 661 N.Y.S.2d 584, 585 (1997); then citing State Farm Fire & Cas. Co. v. LiMauro, 65 N.Y.2d 369, 372, 482 N.E.2d 13, 16, 492 N.Y.S.2d 534, 537 (1985); then citing Lumbermens Mut. Cas. Co. v. Allstate Ins., 51 N.Y.2d 651, 656, 417 N.E.2d 66, 68, 435 N.Y.S.2d 953, 956 (1980); and then citing Bovis Lend Lease LMB, Inc. v. Great Am. Ins., 53 A.D. 3d 140, 141, 855 N.Y.S.2d 459, 461–62 (1st Dep't 2008)).

62. *Id.* at 265, 52 N.E.3d at 1156, 33 N.Y.S.3d at 130 (first citing Westport Ins. Corp. v. Appleton Papers Inc., 787 N.W.2d 894, 919 (Wis. Ct. App. 2010); then citing Cadet Mfg. Co. v. Am. Ins., 391 F. Supp. 2d 884, 892 (W.D. Wash. 2005); and then citing J. Stephen Berry & Jerry B. McNally, *Allocation of Insurance Coverage: Prevailing Theories and Practical Applications*, 42 TORT TRIAL & INS. PRAC. L.J. 999, 1015–10 (2007)).

the same policy period."[63]

III. ANTI-SUBROGATION RULE

The Court of Appeals held in *Millennium Holdings, LLC v. Glidden Co.* that the anti-subrogation rule did not bar a claim against a corporate successor where the policies in question had been transferred from the assets of a predecessor corporation years earlier.[64]

The origins of this litigation trace back to the formation of Glidden Paints in 1917.[65] Glidden operated as an independent company until 1967 when it was acquired by the SCM Corporation (SCM).[66] Of relevance to the present litigation, Certain Lloyd's Underwriters and Northern Assurance both underwrote policy terms from 1963 through 1968.[67]

SCM operated the company until 1986, when its assets were acquired in a hostile takeover by Hanson Trust PLC.[68] As part of the acquisition, SCM was split into twenty different "fan" companies, including "HSCM-6," which was given the assets and liabilities of the previous Glidden operations.[69] Importantly, HSCM-6 was then placed into the portfolio of "HSCM-20."[70] The Court of Appeals noted that in addition to HSCM-6, HSCM-20 also obtained, through a separate corporate transaction, the insurance policies issued to Glidden/SCM.[71]

In 1986—the "critical moment in the corporate history of the parties"—HSCM-20 sold all of its rights in HSCM-6 to ICI American Holdings (ICI).[72] Under the terms of that transaction, HSCM-20 agreed that it would indemnify ICI for any losses or claims arising out of HSCM-6's products, including Glidden Paints, from 1986 through 1994.[73] In 1994, the agreement stated that the roles of the parties would switch, and ICI would thereafter indemnify HSCM-20.[74] Eventually, after another

63. *In re Viking Pump*, 27 N.Y.3d at 267, 52 N.E.3d at 1157–58, 33 N.Y.S.3d at 131–32 (citing U.S. Fid. & Guar. Co. v. Am. Re-Ins., 20 N.Y.3d 407, 429, 985 N.E.2d 876, 888, 962 N.Y.S.2d 566, 578 (2013)).

64. (*Millennium III*), 27 N.Y.3d 406, 417, 53 N.E.3d 723, 730, 33 N.Y.S.3d 846, 853 (2016).

65. *Id.* at 409, 53 N.E.3d at 724, 33 N.Y.S.3d at 847.

66. *Id.*

67. *Id.* at 409–10, 53 N.E.3d at 724, 33 N.Y.S.3d at 847.

68. *Id.* at 410, 53 N.E.3d at 724, 33 N.Y.S.3d at 847.

69. *Millennium III*, 27 N.Y.3d at 410, 53 N.E.3d at 724–25, 33 N.Y.S.3d at 847–48.

70. *Id.* at 410, 53 N.E.3d at 725, 33 N.Y.S.3d at 848.

71. *Id.*

72. *Id.*

73. *Id.* at 410–11, 53 N.E.3d at 725, 33 N.Y.S.3d at 848.

74. *See Millennium III*, 22 N.Y.3d at 411, 53 N.E.3d at 725, 33 N.Y.S.3d at 848.

series of corporate transactions, HSCM-20 became Millennium Holdings LLC, and ICI assigned the original HSCM-6 assets and liabilities to an entity that became Akzo Nobel Paints (ANP).[75]

Beginning in 1987, a number of lawsuits were filed across the nation that would test the indemnity arrangement.[76] Pursuant to the agreement, Millennium/HSCM-20 indemnified ANP/ICI during the 1987–1994 period.[77] However, in 1994, ANP/ICI refused to honor the swapped obligations, and Millennium/HSCM-20 commenced a suit against ANP/ICI in Ohio and New York that eventually settled in 2000.[78] Throughout the Ohio litigation, Lloyd's continued to defend the underlying tort cases, which involved lead paint exposure.[79]

In 2000, Lloyd's commenced its own declaratory judgment action in Ohio seeking judicial confirmation that it did not owe coverage to ANP/ICI.[80] The insurer's position was likely that the policies from 1963–1968 were always in the possession of, and for the protection of, Millennium/HSCM-20. Lloyd's declaratory judgment action was successful—the court ruled that ANP/ICI did not qualify as an insured under the Lloyd's policies.[81]

In 2008, Millennium sought indemnification from ANP for losses related to the previous decades of claims.[82] Lloyd's, having no insurance obligations to ANP per the 2006 decision from Ohio, sought to intervene in that case.[83] Eventually, ANP settled with Millennium, and ANP then moved to dismiss Lloyd's claim on the basis that it was barred by the anti-subrogation rule.[84] The supreme court ruled that although ANP was not insured under the Lloyd's policies, the anti-subrogation rule nevertheless applied because Lloyd's underwrote the very risk that they

75. *Id.*

76. *Id.* at 411–12, 53 N.E.3d at 726, 33 N.Y.S.3d at 849.

77. *Id.* at 412, 53 N.E.3d at 726, 33 N.Y.S.3d at 849.

78. *See* Glidden Co. v Lumbermens Mut. Cas. Co., 861 N.E.2d 109, 112 (Ohio 2006); *see also Millennium III*, 27 N.Y.3d at 412, 53 N.E.3d at 726, 33 N.Y.S.3d at 849.

79. *Millennium III*, 27 N.Y.3d at 412, 53 N.E.3d at 726, 33 N.Y.S.3d at 849; *see also Lumbermens Mut. Cas. Co.*, 861 N.E.2d at 112.

80. *Lumbermens Mut. Cas. Co.*, 861 N.E.2d at 112; *see also Millennium III*, 27 N.Y.3d at 412, 53 N.E.3d at 726, 33 N.Y.S.3d at 849.

81. *Lumbermens Mut. Cas. Co.*, 861 N.E.2d at 112.

82. *Millennium III*, 27 N.Y.3d at 413, 53 N.E.3d at 726–27, 33 N.Y.S.3d at 849–50.

83. *Id.* at 413, 53 N.E.3d at 727, 33 N.Y.S.3d at 850.

84. *Id.* at 413–14, 53 N.E.3d at 727, 33 N.Y.S.3d at 850.

sought to recover indemnity.[85] The appellate division affirmed.[86]

On appeal, the Court of Appeals began its discussion by advising that a party need not be a named insured, nor an additional insured, to qualify for anti-subrogation protection.[87] Rather, a party need only be "an insured."[88] The Court analogized the issue to permissive users of automobiles, who are entitled to anti-subrogation protections even though they only qualify as an insured because they happened to be driving the covered vehicle at the time of the incident.[89]

Nonetheless, here there was a judicial determination that ANP was not an insured under the Lloyd's policies.[90] Therefore, the Court reasoned, there was nothing barring Lloyd's from prosecuting its claims for subrogation.[91] As a result of this decision, the precise liability that Lloyd's underwrote is not subject to the anti-subrogation rule, even though the parties from whom subrogation was sought were liable solely because they purchased the liability from the original party insured by Lloyd's. In short, if a party is not an insured, the anti-subrogation does not apply.[92]

IV. NO-FAULT

In *Aetna Health Plans v. Hanover Insurance Co.*, the Court of Appeals considered "whether a health insurer who pays for medical treatment that should have been covered by the insured's no-fault automobile insurance carrier, may maintain a reimbursement claim

85. Millennium Holdings LLC v. Glidden Co. (*Millennium I*), No. 600920/2008, 2013 N.Y. Slip Op. 51947(U), at 10 (Sup. Ct. N.Y. Cty. Nov. 25, 2013), *aff'd*, 121 A.D.3d 444, 995 N.Y.S.2d 533 (1st Dep't 2014), *rev'd*, 27 N.Y.3d 406, 53 N.E.3d 723, 33 N.Y.S.3d 846 (2016).

86. Millennium Holdings LLC v. Glidden Co. (*Millennium II*), 121 A.D.3d 444, 445, 995 N.Y.S.2d 533, 533 (1st Dep't 2014), *rev'd*, 27 N.Y.3d 406, 53 N.E.3d 723, 33 N.Y.S.3d 846 (2016).

87. *Millennium III*, 27 N.Y.3d at 415, 53 N.E.3d at 728, 33 N.Y.S.3d at 851.

88. *Id.* at 415–16, 53 N.E.3d at 729, 33 N.Y.S.3d at 852 (quoting Jefferson Ins. v. Travelers Indem. Co., 92 N.Y.2d 363, 375, 703 N.E.2d 1221, 1228, 681 N.Y.S.2d 208, 215 (1998)).

89. *Id.* (quoting *Jefferson Ins.*, 92 N.Y.2d at 375, 703 N.E.2d at 1228, 681 N.Y.S.2d at 215).

90. *Id.* at 416, 53 N.E.3d at 729, 33 N.Y.S.3d at 852.

91. *Id.* at 417, 53 N.E.3d at 730, 33 N.Y.S.3d at 853.

92. For those not familiar with anti-subrogation concepts, reference is made to *Pennsylvania General Insurance Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 502 N.E.2d 982, 510 N.Y.S.2d 67 (1986), and the cases cited therein.

against the no-fault insurer."[93] Over a two-judge dissent,[94] the majority held that regulations pursuant to New York's No-Fault Law did not contemplate such a claim and affirmed the dismissal of the health insurer's complaint.[95]

Herrera sustained injuries "while operating a vehicle insured a policy issued by [the] defendant, Hanover Insurance Company" which contained statutory no-fault coverage.[96] "At the time of the accident, Herrera also had private health insurance through [the] plaintiff Aetna Health Plans," and Herrera's "medical providers submitted some of the bills directly to Aetna."[97] After the bills were paid, Aetna wrote to Hanover seeking reimbursement, "but Hanover did not respond."[98]

"Aetna commenced [the] action against Hanover" and "moved for summary judgment," claiming that Hanover breached its contract of insurance with Herrera.[99] "Aetna claimed that as the assignee of Herrera's claim for no-fault benefits, it stood in the insured's shoes and was entitled to reimbursement . . . ."[100]

Hanover argued that Aetna was not entitled to direct reimbursement because it was an insurance company and not a health care services provider, the only type of assignee permitted by New York no-fault regulation.[101] Hanover also argued that Aetna was not in privity of contract with Hanover.[102] The supreme court agreed, and concluded that Aetna could not sustain a cause of action under subrogation principles because there was "no authority permitting a health insurer to bring a subrogation action against a no-fault insurer for sums the health insurer was contractually obligated to pay its insured."[103] The appellate division unanimously affirmed.[104]

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93. (*Aetna III*), 27 N.Y.3d 577, 579, 56 N.E.2d 213, 214, 36 N.Y.S.3d 431, 432 (2016).

94. *Id.* at 587–90, 56 N.E.2d at 219–22, 36 N.Y.S.3d at 437–40 (Fahey, J., dissenting).

95. *Id.* at 579, 56 N.E.2d at 214, 36 N.Y.S.3d at 432 (majority opinion) (citing N.Y. INS. LAW § 5101 (McKinney 2016)).

96. *Id.*

97. *Id.* at 579–80, 56 N.E.2d at 214, 36 N.Y.S.3d at 432.

98. *Aetna III*, 27 N.Y.3d at 580, 56 N.E.2d at 214, 36 N.Y.S.3d at 432.

99. *Id.* at 580–81, 56 N.E.2d at 215, 36 N.Y.S.3d at 433.

100. *Id.* at 581, 56 N.E.2d at 215, 36 N.Y.S.3d at 433.

101. *Id.*; 11 N.Y.C.R.R. § 65-3.11(a) (2016).

102. Aetna Health Plans v. Hanover Ins. (*Aetna I*), No. 303241/12, 2013 N.Y. Slip Op. 33221(U), at 6 (Sup. Ct. Bronx Cty. Jan. 3, 2013), *aff'd*, 116 A.D.3d 538, 538, 983 N.Y.S.2d 560, 561 (1st Dep't 2014), *aff'd*, 27 N.Y.3d 577, 56 N.E.2d 213, 36 N.Y.S.3d 431 (2016).

103. *Aetna I*, 2013 N.Y. Slip Op. 33221(U), at 6 (citing Health Ins. Plan of Greater N.Y. v. Allstate Ins., No. 0106881/06, 2007 N.Y. Slip Op. 33925(U), at 4 (Sup. Ct. N.Y. Cty. Nov. 20, 2007)).

104. Aetna Health Plans v. Hanover Ins. (*Aetna II*), 116 A.D.3d 538, 538, 983 N.Y.S.2d

The Court of Appeals upheld the lower courts' rulings, and rejected Aetna's argument that it stood in Herrera's shoes because Herrera assigned her no-fault rights to the health insurer.[105] The Court's decision in favor of Hanover was based on two independent concepts.[106] "First, since Herrera's health care providers were able to bill and recoup payment from Aetna, an assignment by Herrera of her no-fault rights had already been made, leaving her with no rights to assign to Aetna."[107] Second, the court concluded that under a plain language reading of New York's no-fault regulation,[108] only the insured—or providers of health care services by an assignment from the insured—could bring a claim to receive direct no-fault benefits.[109] "Because Aetna [did] not fall under the term 'health care provider,' Herrera could not assign her rights to it."[110]

The Fourth Department also delivered an intriguing no-fault opinion in November 2015.[111] *Martin v. Lancer Insurance Co.* turned on the question of just who owned a vehicle at the moment it was rear-ended—the driver, the passenger, or D&M Collision Inc. ("D&M"), whose no-fault policy covered all vehicles "owned" by the auto-shop.[112]

Martin, a passenger injured in the accident, had a business relationship with D&M's owner, whereby he would use D&M's dealer credentials to buy used vehicles at auction.[113] In June 2012, Martin used his own money to purchase the accident vehicle.[114] In mid-August 2012, Martin agreed to sell the vehicle to Hardy, driver during the accident, but title could not transfer until the vehicle passed inspection, which required the vehicle to be driven a certain distance in order for computer codes to clear.[115] The accident took place on August 31.[116] Martin suffered injury and brought a claim for no-fault benefits under D&M's policy, and D&M's insurer moved for summary judgment on the grounds that the

560, 561 (1st Dep't 2014).

105. *Aetna III*, 27 N.Y.3d at 582, 56 N.E.2d at 216, 36 N.Y.S.3d at 434.

106. *Id.*

107. *Id.*

108. *Id.* at 582–83, 56 N.E.2d at 216, 36 N.Y.S.3d at 434; *see also* 11 N.Y.C.R.R. § 65-3.11(a) (2016).

109. *Aetna III*, 27 N.Y.3d at 582−83, 56 N.E.2d at 216, 36 N.Y.S.3d at 434.

110. *Id.* at 583, 56 N.E.2d at 216, 36 N.Y.S.3d at 434.

111. Martin v. Lancer Ins., 133 A.D.3d 1219, 1219, 19 N.Y.S.3d 638, 639 (4th Dep't 2015).

112. *Id.*

113. *Id.* at 1219–20, 19 N.Y.S.3d at 639–40.

114. *Id.* at 1219–20, 19 N.Y.S.3d at 640.

115. *Id.* at 1220, 19 N.Y.S.3d at 639–40.

116. *Martin*, 133 A.D.3d at 1220, 19 N.Y.S.3d at 640.

insured did not own the vehicle.[117]

The Fourth Department affirmed the lower court's denial of the insurer's motion, noting that "the vehicle was purchased with D&M's dealer credentials and, at the time of the accident, D&M had title to the vehicle, and its dealer plates were on the vehicle."[118] The Court quoted Vehicle and Traffic Law § 128,[119] which defines "owner" as "[a] person, other than a lien holder, having the property in or title to a vehicle," and also cited case law for the proposition that title possession is sufficient for a rebuttable inference of ownership.[120] Here, D&M's insurer failed to provide adequate evidence to overcome the presumption, so the question was properly left to the trier of fact.[121]

V. DIRECT ACTION AGAINST INSURER

Insurance Law § 3420(a)(2) allows a party—now a judgment creditor—that successfully prosecuted a lawsuit, formerly a plaintiff or third-party plaintiff,[122] to bring a direct action against an insurer to enforce a judgment against the insured.[123] In *Spencer v. Tower Insurance Group Corp.*, the Second Department ruled that the injured plaintiff in such a direct action suit has no greater rights than the insured.[124]

The plaintiff was injured when she slipped and fell, and commenced an action against Zacharia, owner of the premises.[125] Tower had previously issued a homeowner's insurance policy to Zacharia.[126] While the plaintiff's negligence action was pending, Tower successfully brought a declaratory judgment action against the insured, disclaiming coverage because Zacharia never resided at the premises as required by

117. *Id.*

118. *Id.*

119. *Id.* (quoting N.Y. VEH. & TRAF. LAW § 128 (McKinney 2005)).

120. VEH. & TRAF. § 128; *see also Martin*, 133 A.D.3d at 1220, 19 N.Y.S.3d at 640 (first citing Fulater v. Palmer's Granite Garage, Inc., 1982 A.D.2d 685, 685, 456 N.Y.S.2d 289, 290 (4th Dep't 1982); and then citing Zegarowicz v. Ripatti, 77 A.D.3d 650, 653, 911 N.Y.S.2d 69, 72 (2d Dep't 2010)).

121. *Martin*, 133 A.D.3d at 1220–21, 19 N.Y.S.3d at 640 (first citing Aronov v. Bruins Transp., Inc., 294 A.D.2d 523, 524, 743 N.Y.S.2d 131, 133 (2d Dep't 2002); and then citing Sosnowski v. Kolovas, 127 A.D.2d 756, 758, 512 N.Y.S.2d 148, 150 (2d Dep't 1987)).

122. *See* N.Y. INS. LAW § 3420(a)(2) (McKinney 2015).

123. *See, e.g.*, Friedlander Org., LLC v. Liberty Ins. Underwriters, Inc., 131 A.D.3d 1005, 1005, 16 N.Y.S.3d 467, 468 (2d Dep't 2015).

124. 130 A.D.3d 709, 709, 13 N.Y.S.3d 492, 493 (2d Dep't 2015) (citing D'Arata v. N.Y. Cent. Mut. Fire Ins., 76 N.Y.2d 659, 665, 564 N.E.2d 634, 637, 563 N.Y.S.2d 24, 27 (1990)).

125. *Id.*

126. *Id.*

the policy.[127] After the plaintiff secured a judgment against Zacharia in the underlying litigation, she brought a direct action against Tower to enforce the judgment.[128]

The Second Department ruled that the "plaintiff, by proceeding directly against Tower, [did] so as subrogee of Zacharia's rights and [was] subject to whatever rules of estoppel would apply to Zacharia," and because Tower had established that it had no duty to indemnify Zacharia, the plaintiff was precluded from relitigating that issue in the instant action.[129] This decision raises the question of whether the injured party in a tort action needs to be a necessary party in earlier-commenced declaratory judgment action or will be nonetheless bound by an unfavorable coverage determination.

In *Carlson v. American International Group*, the Fourth Department sustained an insurer's motion to dismiss a direct action on the ground that the policy was not "issued or delivered in New York," as required by the statute.[130] The *Carlson* plaintiff's alternative argument—that the insurer was liable for the judgment under the federal MCS-90 endorsement—was also rejected.[131]

VI. ADDITIONAL INSURED COVERAGE

The First Department continued to expand additional insured coverage this year by holding that a policy endorsement covering the insured's "acts or omissions" triggered without negligence by the named insured.[132]

In *Burlington Insurance Co. v. New York City Transit Authority* the underlying personal injury action arose from a subway construction project in Brooklyn, for which the New York City Transit Authority (NYCTA) and Metropolitan Transit Authority (MTA) engaged Breaking Solutions to supply excavation machines and personnel to operate the

127. *Id.*

128. *Id.* at 709–10, 13 N.Y.S.3d at 493.

129. *Spencer*, at 709–10, 13 N.Y.S.3d at 493–94 (first citing *D'Arata*, 76 N.Y.2d at 665, 564 N.E.2d at 637, 563 N.Y.S.2d at 27; and then citing River View at Patchogue, LLC v. Hudson Ins., 122 A.D.3d 826, 826, 998 N.Y.S.2d 55, 57–58 (2d Dep't 2014)).

130. 130 A.D.3d 1477, 1478, 16 N.Y.S.3d 637, 639 (4th Dep't 2015) (citing Am. Cont'l Props. v. Nat'l Union Fire Ins., 200 A.D.2d 443, 446–47, 608 N.Y.S.2d 807, 809 (1st Dep't 1994)).

131. *Id.* at 1478, 16 N.Y.S.3d at 638–39 (first citing Parochial Bus. Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 545–46, 458 N.E.2d 1241, 1244, 470 N.Y.S.2d 564, 567 (1983); and then citing Armstrong v. U.S. Fire Ins., 606 F. Supp. 2d 794, 825–26 (E.D. Tenn. 2009)).

132. Burlington Ins. v. N.Y.C. Transit Auth., 132 A.D.3d 127, 129, 14 N.Y.S.3d 377, 378–79 (1st Dep't 2015).

machines under NYCTA's direction.[133]

> Pursuant to the insurance requirements of its contract, Breaking Solutions obtained a commercial general liability policy from Burlington. . . includ[ing] endorsements designating NYCTA, MTA, and the City. . . as additional insureds, with such additional insured coverage restricted to, in pertinent part, liability for bodily injury "caused, in whole or in part," by "acts or omissions" of Breaking Solutions.
>
> . . . .
>
> . . . On February 14, 2009, an explosion occurred in the Brooklyn subway tunnel that was being excavated by a Breaking Solutions machine.[134]

A NYCTA employee "was injured when he fell from an elevated work platform as a result of the explosion," which was triggered "when the excavator came into contact with an energized electrical cable buried below the concrete."[135] It was undisputed that it had been NYCTA's responsibility to warn of this type of hazard in advance.[136] The employee brought a Labor Law suit against Breaking Solutions and the City, as owner of the subway property.[137] "NYCTA was not named in the . . . action, presumably because [the employee's claim] was barred . . . under the Workers' Compensation Law."[138]

It was undisputed that the named insured, Breaking Solutions, was not negligent.[139] However, there was also no doubt that Breaking Solution's non-negligent "act"—hitting the unmarked cable with the excavator—led to the explosion.[140]

The question before the court was whether NYCTA and MTA were entitled to additional insured protection from Burlington, even if (1) the injured worker was not an employee of the named insured, and (2) it was undisputed that the named insured was not negligent.[141] The First Department found that coverage extended to NYCTA and MTA,

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133. *Id.* at 129, 14 N.Y.S.3d at 379.
134. *Id.* at 129–30, 14 N.Y.S.3d at 379–80.
135. *Id.*
136. *Id.* at 130.
137. *Burlington Ins.*, 132 A.D.3d at 131, 14 N.Y.S.3d at 380 (first citing N.Y. LABOR LAW § 240(1) (McKinney 2015); and then citing N.Y. LABOR LAW § 241(6) (McKinney 2015)).
138. *Id.*
139. *Id.* at 134–35, 14 N.Y.S.3d at 382.
140. *Id.* at 134, 14 N.Y.S.3d at 382.
141. *Id.* at 128–29, 14 N.Y.S.3d at 378.

nevertheless.[142]

The court, after reviewing recent First Department decisions construing additional "insured endorsements containing substantially the same 'acts and omissions' language" as the policy did here, concluded that such coverage exists "where there is a causal link between the named insured's conduct and the injury, regardless of whether the named insured was negligent or otherwise at fault for causing the accident."[143]

The court rejected an argument that the "acts or omissions" language contained in the endorsement was intended to contain a fault requirement: "[T]he fact remains that no words referring to the negligence or fault of the named insured were included in the endorsement itself. We construe only the actual language used in the policy forms itself . . . ."[144] Finally, because the City, NYCTA, and MTA were all insureds under the same Burlington Policy, anti-subrogation principles precluded cross-claims for indemnity to the extent of policy coverage.[145]

The Fourth Department broadly interpreted additional insured coverage in *Engasser Construction Corp. v. Dryden Mutual Insurance Co.*[146] An employee of a contractor fell from a roof and brought a negligence and Labor Law claim against the owner of the building.[147] That owner, the plaintiff in the *Engasser* action, sought a defense and indemnification from the contractor's insurer in the underlying action.[148] "At the time of the accident, the contractor was insured under a general liability policy issued by [Dryden Mutual] and an endorsement to that policy named [the] plaintiff as an additional insured."[149] The Fourth Department quoted the relevant language:

> The additional insured endorsement states that the insured provision of the general liability coverage "is amended to include as an *insured* the [plaintiff] BUT only with respect to . . . its liability for activities of the *named insured* or activities performed by [the plaintiff] on behalf of the

142. *Burlington Ins.*, 132 A.D.3d at 129, 14 N.Y.S.3d at 378–79.

143. *Id.* at 129, 14 N.Y.S.3d at 378; *see generally id.* (discussing Kel-Mar Designs, Inc. v. Harleysville Ins. of N.Y., 127 A.D.3d 662, 8 N.Y.S.3d 304 (1st Dep't 2015); Strauss Painting, Inc. v. Mt. Hawley Ins., 105 A.D.3d 512, 963 N.Y.S.2d 197 (1st Dep't 2013); Nat'l Union Fire Ins. of Pittsburgh, Pa. v. Greenwich Ins., 103 A.D.3d 473, 962 N.Y.S.2d 9 (1st Dep't 2013); W&W Glass Sys. Inc. v. Admiral Ins., 91 A.D.3d 530, 937 N.Y.S.2d 28 (1st Dep't 2012)).

144. *Id.* at 138, 14 N.Y.S.3d at 385.

145. *Id.*

146. 134 A.D.3d 1516, 22 N.Y.S.3d 785 (4th Dep't 2015).

147. *Id.* at 1516–17, 22 N.Y.S.3d at 786.

148. *Id.* at 1517, 22 N.Y.S.3d at 786.

149. *Id.*

named insured."[150]

The court, while interpreting the provision "according to common speech," concluded that the building owner reasonably expected coverage under the endorsement for Labor Law liability of the "*named insured*," the injured worker's employer.[151] Thus, the plaintiff was entitled to a defense and indemnification.[152]

As of this writing, the *Burlington Insurance Co.* case is on its way to the Court of Appeals for review.[153]

VII. EXCESS / UMBRELLA INSURANCE

In a cautionary tale for insurers, the Second Department held that Allstate failed to provide proper statutory notice when it changed an insured's umbrella policy, even though the insured renewed the policy for five consecutive years after the policy alteration was made.[154]

The court in *Gotkin v. Allstate Insurance Co.* analyzed Insurance Law § 3425(d)(1), "which requires an insurer to notify a policyholder at least forty-five days before the end of the coverage period of its intention to condition renewal 'upon change of limits or elimination of any coverages,' and to provide a specific reason for doing so."[155]

Starting in 1990, Gotkin's umbrella policy with Allstate required an underlying policy with limits at $100,000 per claimant and $300,000 per occurrence.[156] Gotkin previously had primary and umbrella policies with Allstate, but he switched his primary policy in 2004 to another carrier (while keeping the underlying limits required).[157] In February 2005, Allstate sent Gotkin a letter informing him that he had been overbilled an increased premium for the umbrella policy.[158] Enclosed with the letter was an amended policy declarations page, which upped the underlying policy limits required to "$250,000 per claimant and $500,000 per

150. *Id.* (omission in original).

151. *Engasser Constr. Corp.*, 134 A.D.3d at 1516, 22 N.Y.S.3d at 786.

152. *Id.* (citing to Burlington Ins. v. N.Y.C. Transit Auth., 132 A.D.3d 127, 138, 14 N.Y.S.3d 377, 385 (1st Dep't 2015)).

153. *Burlington Ins.*, 132 A.D.3d at 129, 14 N.Y.S.3d at 378–79, *appeal docketed*, No. APL-2016-00096 (N.Y. filed July 6, 2016).

154. Gotkin v. Allstate Ins. (*Gotkin II*), 142 A.D.3d 17, 35 N.Y.S.3d 223 (2d Dep't 2016).

155. *Id.* at 19, 35 N.Y.S.3d at 224 (citing N.Y. INS. LAW § 3425(d)(1) (McKinney 2015)).

156. *Id.*

157. *Id.*

158. *Id.*

occurrence" for the period starting October 14, 2004.[159] According to the court

> there was no language in the February 2005 letter notifying the plaintiff of this change. Rather, the only indication of this change was in an enclosed amended declarations page. Also enclosed with the February 2005 letter was an "Important Notice Concerning the Insurance You Must Maintain (Not a part of the Policy)," advising the plaintiff, among other things, to carefully read the provisions concerning the "Required Underlying Insurance."[160]

A renewal policy for the period of October 14, 2005 through October 14, 2006 was sent without specific mention of the increased primary coverage requirement, and Gotkin renewed his umbrella policy with Allstate each year through 2009.[161] In July 2009, Gotkin was involved in an auto accident, and Allstate denied coverage for any damages within the "gap" between $100,000 and $250,000, but extended coverage for any damages over $250,000.[162] Gotkin commenced an action against Allstate in 2012 seeking, inter alia, declaratory relief compelling Allstate to reform the umbrella policy, based upon its failure to give him timely notice of the amended limits in violation of Insurance Law § 3425(d)(1).[163] After the parties cross-moved for summary judgment, the supreme court denied the plaintiff's motion and granted Allstate's, holding that the notice statute did not apply.[164]

The First Department reversed on the grounds that a "plain reading of Insurance Law § 3425(d)(1) supports the conclusion that a change of limits includes the umbrella policy's change of the required underlying limits in the primary automobile policy."[165] Because the "gap" between the primary and umbrella policy limits resulted in an "elimination of any coverages," written notice was required.[166] The court rejected Allstate's argument that the recipient of a policy is presumed to have read the policy's terms: "[I]f insurers were permitted to rely on this principle as a defense to claims pursuant to Insurance Law § 3425(d)(1), the protections

159. *Gotkin II*, 142 A.D.3d at 19–20, 35 N.Y.S.3d at 224.

160. *Id.* at 20, 35 N.Y.S.3d at 224–25.

161. *Id.* at 20, 35 N.Y.S.3d at 225.

162. *Id.*

163. *Id.* at 20–21, 35 N.Y.S.3d at 225 (citing N.Y. INS. LAW § 3425(d)(1) (McKinney 2015)).

164. Gotkin v. Allstate Ins. (*Gotkin I*), No. 0043302012, 2013 WL 12097065, at *3 (Sup. Ct. Orange Cty. Dec. 9, 2013), *rev'd*, 142 A.D.3d 17, 35 N.Y.S.3d 223 (2d Dep't 2015).

165. *Gotkin II*, 142 A.D.3d at 24, 35 N.Y.S.3d at 228 (citing INS. § 3425(d)(1)).

166. *Id.* at 25, 35 N.Y.S.3d at 228.

afforded thereunder to policyholders would be severely undermined, if not eviscerated."[167]

After establishing Allstate's violation of the notice statute, the First Department concluded that reformation of the policy was the appropriate remedy.[168]

In *Government Employees Insurance Co. v. RLI Insurance Co.*, the Second Department held that a primary carrier, who had paid monies in excess of the policy limits, had no standing to bring a claim against an excess carrier who had denied coverage for the underlying claim.[169] The court stated that the excess insurer's duty to indemnify did not trigger until the primary policy was exhausted, so the primary carrier did not stand to benefit from the excess policy and thus did not have standing to bring a declaratory action.[170] The Second Department also concluded that the doctrine of equitable subrogation could not be invoked, because "the payments sought to be recovered [were] voluntary."[171]

In another excess coverage decision, the Second Department held that an umbrella policy was never triggered, because the underlying Workers Compensation and Employers Liability policy, which contained a New York Limit of Liability Endorsement, was unlimited in nature.[172]

VIII. WORKERS' COMPENSATION EXCLUSION

In *Wilson v. A.H. Harris & Sons, Inc.*, the Second Department concluded that an employee of a temporary staffing agency was a "special employee" of the company where he was working during his injury, so his claim against the company was precluded under New York's Workers' Compensation Law.[173]

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167. *Id.* at 26, 35 N.Y.S.3d at 229 (citing INS. § 3425(d)(1)).

168. *Id.*

169. 133 A.D.3d 819, 820, 20 N.Y.S.3d 411, 412 (2d Dep't 2015).

170. *Id.*; *see also* Great N. Ins. v. Mount Vernon Fire Ins., 92 N.Y.2d 682, 687, 708 N.E.2d 167, 169, 685 N.Y.S.2d 411, 414 (1999); L&B Estates, LLC v. Allstate Ins., 71 A.D.3d 834, 837, 897 N.Y.S.2d 188, 190 (2d Dep't 2010).

171. 133 A.D.3d at 821, 20 N.Y.S.3d at 413 (quoting Broadway Hous. Mack Dev., LLC v. Kohl, 71 A.D.3d 937, 937, 897 N.Y.S.2d 505, 506 (2d Dep't 2010)); *see* Markel Ins. v. Am. Guar. & Liab. Ins., 111 A.D.3d 678, 681, 974 N.Y.S.2d 570, 572 (2d Dep't 2013); Berm. Tr. Co. v. Ameropan Oil Corp., 266 A.D.2d 251, 251, 698 N.Y.S.2d 691, 692 (2d Dep't 1999); Cohn v. Rothman-Goodman Mgmt. Corp., 155 A.D.2d 579, 580, 547 N.Y.S.2d 881, 882 (2d Dep't 1989); *see also* Dillon v. U-A Colom. Cablevision of Westchester, 100 N.Y.2d, 525, 526, 790 N.E.2d 1155, 1157, 760 N.Y.S.2d 726, 727 (2003).

172. Tully Constr. Co. v. Ill. Nat'l Ins., 131 A.D.3d 598, 599, 15 N.Y.S.3d 404, 406 (2d Dep't 2015) (citing Merchants Mut. Ins. v. N.Y. State Ins. Fund, 85 A.D.3d 1686, 1688, 926 N.Y.S.2d 783, 785 (4th Dep't 2011)).

173. 131 A.D.3d 1050, 1051, 16 N.Y.S.3d 589, 591 (2d Dep't 2015); *see also* N.Y.

Wilson was injured on A.H. Harris's premises.[174] He applied for and received workers' compensation benefits from his temp agency's insurance carrier, and also commenced a separate action against A.H. Harris for damages.[175] The defendant filed for summary judgment, citing the Workers' Compensation exclusivity rule.[176]

The court began its analysis by stating the basic premise of workers' compensation: "In general, workers compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the course of employment."[177] Although a person may be deemed to have both a general employer and a special employer, "the receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer."[178]

Here, then, if Wilson was a special employee of the company to which he was assigned by his temp agency, his claim would be precluded.[179] How did the court answer this question? "In determining whether a special employment relationship exists, a court should consider factors such as the right to control the employee's work, the method of payment, the furnishing of equipment, and the right to discharge."[180]

The Second Department concluded that the defendant's summary judgment motion was properly granted.[181] The court cited evidence establishing that A.H. Harris "controlled and directed the manner, details, and ultimate result of" Wilson's work.[182] For instance, the court noted that Wilson's injury occurred while he was "assisting a corporate operations manager as the defendant had trained him to do."[183]

WORKERS' COMP. LAW § 29(6) (McKinney 2015).

174. *Id.* at 1050, 16 N.Y.S.3d at 590.

175. *Id.*

176. *Id.* (citing WORKERS' COMP. § 29(6)).

177. *Id.* at 1051, 16 N.Y.S.3d at 590 (first quoting Matias v. City of New York, 127 A.D.3d 1145, 1146, 7 N.Y.S.3d 509, 510 (2d Dep't 2015); and then quoting Maropakis v. Stillwell Materials Corp., 38 A.D.3d 623, 623, 833 N.Y.S.2d 122, 123 (2d Dep't 2007)); *see* WORKERS' COMP. § 29(6).

178. *Wilson*, 131 A.D.3d at 1501, 16 N.Y.S.3d at 590 (quoting Pena v. Automatic Data Processing, 105 A.D.3d 924, 924, 963 N.Y.S.2d 357, 359 (2d Dep't 2013)).

179. *See id.* at 1501, 16 N.Y.S.3d at 590 (quoting *Pena*, 105 A.D.3d at 924, 963 N.Y.S.2d at 359).

180. *Id.* at 1501, 16 N.Y.S.3d at 590 (first citing Munion v. Trs. of Columbia Univ., 120 A.D.3d 779, 780, 991 N.Y.S.2d 460, 462 (2d Dep't 2014); and then citing Ugijanin v. 2 W. 45th St. Joint Venture, 43 A.D.3d 911, 913, 841 N.Y.S.2d 611, 613 (2d Dep't 2007)).

181. *Id.* at 1052, 16 N.Y.S.3d at 591.

182. *Id.* at 1051, 16 N.Y.S.3d at 590.

183. *Wilson*, 131 A.D.3d at 1050, 16 N.Y.S.3d at 590.

By contrast, in *Ugbomah v. Edison Parking Corp.*, the Second Department held that the defendant had not established workers' compensation exclusivity as a matter of law, although the court affirmed summary judgment on different grounds.[184]

After an employee suffered an injury at her employer's premises, she applied for and received Workers' Compensation benefits from her employer's insurance carrier.[185] She also brought an action against the property owner, the property manager, and Edison Parking Corporation, the alleged manager of other "Edison" entities, including the property owner and the plaintiff's non-party employer.[186]

The Second Department held that the defendants failed to establish, prima facie, that this action was barred by the exclusivity provisions of the Workers' Compensation Law.[187] The court cited a 1993 case where an action was brought against an officer of the corporation that employed the worker.[188] There, the action was dismissed, because any action in connection with "common employment" would be barred by the exclusivity rule.[189] Without discussion, the court's conclusion in *Ugbomah* suggested that no such proof was presented in this case (i.e., the defendants did not put forth evidence that the other "Edison" corporations were co-employees).[190]

IX. UM / SUM COVERAGE

In *Government Employees Insurance Co. v. Tramontozzi*, the Second Department stepped away from its own precedent on duplicated reimbursement of supplemental underinsured motorist (SUM) benefits for bodily injuries.[191]

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184. 131 A.D.3d 1231, 1232, 16 N.Y.S.3d 772, 772 (2d Dep't 2015) (first citing Druiett v. Brenner, 193 A.D.2d 644, 645, 598 N.Y.S.2d 3, 4 (2d Dep't 1993); and then citing Youseff v. Malik, 112 A.D.3d 617, 619, 977 N.Y.S.2d 53, 55 (2d Dep't 2013)).

185. *Id.* at 1231, 16 N.Y.S.3d at 772.

186. *Id.*

187. *Id.* at 1232, 16 N.Y.S.3d at 772 (first citing *Druiett*, 193 A.D.2d at 645, 598 N.Y.S.2d at 4; and then citing *Youseff*, 112 A.D.3d at 619, 977 N.Y.S.2d at 55).

188. *Id.* (citing *Druiett*, 193 A.D.2d at 645, 598 N.Y.S.2d at 4).

189. *Druiett*, 193 A.D.2d at 645, 598 N.Y.S.2d at 4 (first citing Heritage v. Van Patten, 59 N.Y.2d 1017, 1019, 453 N.E.2d 1247, 1248, 466 N.Y.S.2d 958, 959 (1983); and then citing N.Y. WORKERS' COMP. LAW § 29(6) (McKinney 2015)).

190. *Ugbomah*, 131 A.D.3d at 1232, 16 N.Y.S.3d at 772 (first citing *Druiett*, 193 A.D.2d at 645, 598 N.Y.S.2d at 4; and then citing *Youseff*, 112 A.D.3d at 619, 977 N.Y.S.2d at 55).

191. Gov't Emps. Ins. v. Sherlock, 140 A.D.3d 872, 875, 32 N.Y.S.3d 635, 638 (2d Dep't 2016) (citing Weiss v. Tri-State Consumer Ins., 98 A.D.3d 1107, 1110, 951 N.Y.S.2d 191, 194 (2d Dep't 2012)).

Sherlock was killed when his car was hit head-on by Maldonado, who was being pursued by the local police.[192] Sherlock was insured under a GEICO policy that provided SUM benefits with a per-person liability limit of $250,000.[193] Maldonado was covered by a liability policy issued by New York Central with a per-person liability limit of $50,000.[194] Tramontozzi, Sherlock's widow, commenced a personal injury action against Maldonado and the police department.[195] Maldonado's insurer offered to settle for the $50,000 policy limit.[196] Tramontozzi received GEICO's consent to the settlement.[197] After mediation, the police department offered to settle for $425,000, and Tramontozzi accepted.[198] She also sought benefits under the SUM endorsement of the GEICO policy.[199]

GEICO denied Tramontozzi the SUM benefits.[200] On what basis? GEICO cited *Weiss v. Tri-State Consumer Insurance Co.*, a 2012 Second Department decision,[201] and argued that under Conditions 6 and 11(e) of the SUM endorsement as interpreted in *Weiss*, SUM coverage here was reduced and then entirely offset by the $50,000 settlement from Maldonado's insurer and the $425,000 she received from the police department's insurer.[202]

After Tamontozzi received GEICO's denial of her claim, she filed a request for arbitration.[203] GEICO then commenced this action to permanently stay arbitration.[204] Under the constraint of *Weiss*, the motion court granted GEICO's petition and permanently stayed arbitration.[205]

In *Weiss*, the Second Department held that money received from parties apart from the tortfeasor's insurers reduced the plaintiff's available SUM benefits because a SUM reimbursement would duplicate

192. *Id.* at 873, 32 N.Y.S.3d at 636.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Gov't Emps. Ins.*, 140 A.D.3d at 873, 32 N.Y.S.3d at 636.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Gov't Emps. Ins.*, 140 A.D.3d at 873, 32 N.Y.S.3d at 636 (citing Weiss v. Tri-State Consumer Ins., 98 A.D.3d 1107, 1110, 951 N.Y.S.2d 191, 194 (2d Dep't 2012)).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

recovery for bodily injury.[206] As in *Sherlock*, the plaintiff in *Weiss* had received a settlement from the offending driver's insurer and a separate settlement from other parties.[207] The question presented was whether the "non-duplication" restrictions imposed by Condition 11 of the SUM endorsement similarly reduced the Tramontozzi's right to reimbursement.[208] The provision's language was quoted by the court:

> 11. Non-Duplication. This SUM coverage shall not duplicate any of the following:
>
> (a) benefits payable under workers' compensation or other similar laws;
>
> (b) non-occupational disability benefits under article nine of the Workers' Compensation Law or other similar law;
>
> (c) any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault;
>
> (d) any valid or collectible motor vehicle Medical payments insurance; or
>
> (e) any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds.[209]

The court reasoned that the key to a proper understanding of Condition 11 is the recognition that the non-duplication rule "is not aimed at preventing an insured from seeking full compensation by combining partial recoveries from several tortfeasors, but at preventing double recoveries for their bodily injuries."[210] The court stated that Tramontozzi's claim under the SUM endorsement was not a claim for double recovery—she only sought to be put in the same position she would have enjoyed had the Maldonado defendants not been underinsured relative to the GEICO policy.[211]

The Second Department then stepped back away from *Weiss*: "To the extent that *Weiss* can be interpreted to require that the amount of SUM

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206. *Weiss*, 98 A.D.3d at 1111, 951 N.Y.S.2d at 194 (first citing S'Dao v. Nat'l Grange Mut. Ins., 87 N.Y.2d 853, 854, 661 N.E.2d 1378, 1379, 638 N.Y.S.2d 597, 598 (1995); then citing Central Mut. Ins. v. Bemiss, 12 N.Y.3d 648, 657–59, 912 N.E.2d 54, 59–60, 884 N.Y.S.2d 222, 227–28 (2009); and then citing Liberty Mut. Ins. v. Walker, 84 A.D.3d 960, 961, 921 N.Y.S.2d 899, 900 (2d Dep't 2011)).

207. *Id.* at 1108–09, 951 N.Y.S.2d at 192–93.

208. *Gov't Emps. Ins.*, 140 A.D.3d at 874, 32 N.Y.S.3d at 637.

209. *Id.* at 875, 32 N.Y.S.3d at 637 (quoting 11 N.Y.C.R.R. § 60-2.3 (2016)).

210. *Id.*

211. *Id.* at 875, 32 N.Y.S.3d at 638.

coverage be reduced without regard to the actual amount of bodily injury damages suffered, it should no longer be followed."[212] Because the full amount of the Tramontozzi's bodily injury damages from the collision had not been determined, she was entitled to proceed to arbitration.[213] Although the *Tramontozzi* opinion did not acknowledge it, the Fourth Department recognized the *Weiss* holding in *Redeye v. Progressive Insurance Co.*[214]

In *Redeye*, the insured brought a lawsuit to recover SUM benefits from Progressive, his auto insurer.[215] While a pedestrian, he was injured when a drunk driver struck a car that was propelled into him.[216] Redeye sued the driver as well as a fire company that allegedly served the driver alcoholic beverages prior to the accident, and he received a settlement from both.[217] Progressive denied Redeye's claim for SUM benefits, on the grounds that coverage was exhausted by the recovery from both the driver and the fire company, prompting him to commence this action.[218]

Redeye conceded that the SUM coverage was properly reduced by the amount he recovered from the driver's insurer.[219] He contended, however, that it was improper to reduce the SUM coverage from the amount he received from the fire company's insurer.[220] The court rejected that argument, reading Condition 11's "shall not duplicate" language to foreclose the additional SUM recovery.[221] Nodding at *Weiss*, the Fourth Department concluded, "Here, the payment plaintiff received from the fire company's insurer was for bodily injury damages, and thus the amount of SUM benefits available to plaintiff was properly reduced by that amount."[222]

In *Slocum v. Progressive Northwestern Insurance Co.*, one of the first decisions interpreting Insurance Law § 3420(a)(5), the notice-prejudice statute adopted by the State Legislature in 2008,[223] the Fourth

212. *Id.*

213. *Gov't Emps. Ins.*, 140 A.D.3d at 875, 32 N.Y.S.3d at 638.

214. Redeye v. Progressive Ins., 133 A.D.3d 1261, 19 N.Y.S.3d 645 (4th Dep't 2015), *lv. denied*, 26 N.Y.3d 918, 918, 47 N.E.3d 94, 94, 26 N.Y.S.3d 764, 764 (2016).

215. *Id.*

216. *Id.*

217. *Id.* at 1261–62, 19 N.Y.S.3d at 646.

218. *Id.* at 1262, 19 N.Y.S.3d at 646.

219. *Redeye*, 133 A.D.3d at 1262, 19 N.Y.S.3d at 646.

220. *Id.*

221. *Id.*

222. *Id.* (citing Weiss v. Tri-State Consumer Ins., 98 A.D.3d 1107, 1110–11, 951 N.Y.S.2d 191, 194 (2d Dep't 2012)).

223. Act of July 21, 2008, 2008 McKinney's Sess. Laws of N.Y., ch. 388, at 1089

Department found no prejudice to the insurer due to late notice of a SUM claim.[224]

Slocum was hurt in a motor vehicle accident on July 29, 2012.[225] She was a named insured on an auto policy issued by Progressive to her mother.[226] On September 11, 2012, Slocum learned that the coverage limit on the tortfeasor's insurance policy was $50,000.[227] The following June, Slocum underwent cervical fusion surgery.[228] "In August 2014, more than two years after the accident," she first notified Progressive of the accident and sought coverage under the policy's SUM endorsement.[229] The "[d]efendant disclaimed coverage on the ground that [the] plaintiff failed to provide timely notice of [the] SUM claim pursuant to the terms of the policy," and that decision was challenged in this lawsuit.[230]

The Fourth Department agreed that Slocum's failure to notify Progressive was unreasonable, but reversed the supreme court and granted the plaintiff's motion for summary judgment[231]:

> We agree with plaintiff, however, that she is entitled to coverage based on Insurance Law § 3420(a)(5). Effective January 2009, an insurer may not deny coverage based on untimely notice "unless the failure to provide timely notice has prejudiced the insurer," and prejudice is not established "unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim."[232]

The court determined Slocum met her initial burden establishing that "[the] defendant was not prejudiced by the delay," and then held that Progressive failed to raise a triable issue of fact with an affidavit from one of its claims representatives.[233] The court rejected the representative's claim that the insurer was prejudiced by its inability to examine the vehicles involved, because "it is reasonable to conclude that

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(codified at N.Y. INS. LAW § 3420(a)(5) (McKinney 2015)).

224. 137 A.D.3d 1634, 1636, 28 N.Y.S.3d 181, 183 (4th Dep't 2016).

225. *Id.* at 1634, 28 N.Y.S.3d at 182.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Slocum*, 137 A.D.3d at 1634–35, 28 N.Y.S.3d at 182.

230. *Id.* at 1635, 28 N.Y.S.3d at 182.

231. *Id.* at 1635–36, 28 N.Y.S.3d at 182–83.

232. *Id.* at 1635, 28 N.Y.S.3d at 183 (first quoting N.Y. INS. LAW § 3420(a)(5) (McKinney 2015); then quoting INS. § 3420(c)(2)(C)).

233. *Id.* at 1636, 28 N.Y.S.3d at 183 (first citing INS. § 3420(c)(2)(C); then citing Atl. Cas. Ins. v. Value Waterproofing, Inc., 918 F. Supp. 2d 243, 254 (S.D.N.Y. 2013)).

the vehicles would have been repaired in the time between the accident and the date that [the] plaintiff was required to give notice under the policy."[234]

Importantly, under the notice statute, an insurer has the burden of demonstrating prejudice for the first two years following the "time required under the policy" to give notice.[235] After that period, the insured has the obligation to prove lack of prejudice.[236] The Fourth Department's decision found that the two-year period did not start on the date of the accident itself (July 29, 2012), but on the date when the insured knew enough about the tortfeasor's insurance to give notice of the SUM claim (September 11, 2012).[237] Under the court's reasoning, because Slocum gave notice less than two years later (August 2014), the burden was still on Progressive to prove the delay "materially impair[ed]" its ability to handle the claim.[238]

SUM payments were also at issue in *Gutierrez v. Government Employees Insurance Co.*, where the Second Department held that a plaintiff stated a valid claim for breach of the implied covenant of good faith and fair dealing, based on an insurer's refusal to provide benefits "within a reasonable time."[239]

The case arose from a claim for SUM benefits relating to a motor vehicle accident[240]:

> [T]he plaintiff was operating a vehicle insured by the defendant[,] [GEICO], with permission of the vehicle's owner. The vehicle collided with a vehicle insured by Allstate . . . , allegedly causing the plaintiff serious injuries as defined in Insurance Law § 5102(d), and property damage. The plaintiff alleged that he would incur future medical expenses "in any effort to be cured" and would be "unable to pursue [his] usual duties with the same degree of efficiency as prior to this accident."[241]

Allstate offered the plaintiff its policy limit of $50,000, which the

234. *Slocum*, 137 A.D.3d at 1636, 28 N.Y.S.3d at 183.

235. INS. § 3420(c)(2)(A).

236. *Id.*

237. *Slocum*, 137 A.D.3d at 1636, 28 N.Y.S.3d at 183 (first citing INS. § 3420(c)(2)(C); then citing Rekemeyer v. State Farm Mut. Auto. Ins., 4 N.Y.3d 468, 474, 828 N.E.2d 970, 973, 796 N.Y.S.2d 13, 16 (2005); and then citing Metro. Prop. & Cas. Ins. v. Mancuso, 93 N.Y.2d 487, 495, 715 N.E.2d 107, 111, 693 N.Y.S.2d 81, 85 (1999)).

238. INS. § 3420(c)(2)(C).

239. Gutierrez v. Gov't Emps. Ins., 136 A.D.3d 975, 975, 25 N.Y.S.3d 625, 626 (2d Dep't 2016).

240. *Id.*

241. *Id.* (last alteration in original) (quoting N.Y. INS. LAW § 5102(d) (McKinney 2016)).

plaintiff contended was insufficient to make him whole.[242] The plaintiff then brought a claim under the SUM endorsement.[243] When GEICO refused, the plaintiff commenced an action, asserting a breach of contract cause of action for payment of the SUM benefits and a cause of action seeking damages in tort for GEICO's breach of "its duty to act in good faith" by withholding payment of SUM benefits.[244] GEICO moved to dismiss, inter alia, because the cause of action for breach of the implied covenant of good faith and fair dealing was duplicative of the cause of action sounding in breach of contract.[245] The supreme court denied GEICO's motion on that ground.[246]

On appeal, the Second Department agreed with the lower court—even if the covenant of good faith and fair dealing was embedded in every contract, a cause of action on that basis was "not necessarily duplicative of a cause of action . . . [for] breach of contract itself."[247]

The court then analyzed whether the plaintiff stated a claim for breach of the implied covenant, and also articulated a rule for bad faith damages.[248] Damages in such an action

> include both the value of the claim, and consequential damages, which may exceed the limits of the policy, for failure to pay the claim within a reasonable time. . . . Such consequential damages may include loss of earnings not directly caused by the covered loss, but caused, instead, by the breach of the implied covenant of good faith and fair dealing.[249]

GEICO's motion to dismiss was denied.[250]

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242. *Id.* at 975, 25 N.Y.S.3d at 627.

243. *Id.*

244. *Gutierrez*, 136 A.D.3d at 976, 25 N.Y.S.3d at 627.

245. *Id.*

246. *Id.*

247. *Id.* (citing Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc., 97 A.D.3d 781, 784, 949 N.Y.S.2d 115, 118–19 (2d Dep't 2012)).

248. *Id.* at 976–77, 25 N.Y.S.3d at 627–28 (quoting Bi-Econ. Mkt. Inc. v. Harleysville Ins., 10 N.Y.3d 187, 195, 886 N.E.2d 127, 132, 856 N.Y.S.2d 505, 510 (2008)) (first citing Panasia Estates, Inc. v. Hudson Ins., 10 N.Y.3d 200, 203, 886 N.E.2d 135, 136–37, 856 N.Y.S.2d 513, 514–15 (2008); then citing *Bi-Econ. Mkt. Inc.*, 10 N.Y.3d at 195–96, 886 N.E.2d at 132, 856 N.Y.S.2d at 510; then citing Michaan v. Gazebo Horticulture Inc., 117 A.D.3d 692, 693, 985 N.Y.S.2d 601, 603 (2d Dep't 2014); then citing Genovese v. State Farm Mut. Auto. Ins., 106 A.D.3d 866, 868, 965 N.Y.S.2d 577, 580 (2d Dep't 2013); and then citing Mutual Ass'n Adm'r, Inc. v. Nat'l. Union Fire Ins., 118 A.D.3d 856, 857, 988 N.Y.S.2d 643, 644 (2d Dep't 2014)).

249. *Gutierrez*, 136 A.D.3d at 977, 25 N.Y.S.3d at 627–28 (first citing *Panasia*, 10 N.Y.3d at 203, 886 N.E.2d at 136–37, 856 N.Y.S.2d at 514–15; then citing *Bi-Econ.*, 10 N.Y.3d at 195, 886 N.E.2d at 132, 856 N.Y.S.2d at 510; and then citing *Mutual Ass'n Adm'r*, 118 A.D.3d at 857, 988 N.Y.S.2d at 644).

250. *Id.* at 977, 25 N.Y.S.3d at 628.

In *American Transit Insurance Co. v. Rosario*,[251] the First Department held that a claim for underinsured motorist benefits (UM) was governed by the six-year statute of limitations applicable to contract actions, and that "[t]he claim accrues . . . when the accident occurs or when subsequent events render the offending vehicle uninsured."[252] Here, because there was more than six years between the suit and the accident, the party seeking benefits had the burden of demonstrating that due diligence was used on the date of the accident to determine whether the offending vehicle had insurance.[253] The court concluded that the respondent failed to make that showing.[254]

The Second Department denied an application to stay arbitration of a SUM claim in *New York Schools Insurance Recripocal v. Staines*.[255] Although the insured failed to comply with a policy provision requiring him to "immediately" forward the summons and complaint in the underlying personal injury action, the insurer failed to demonstrate any prejudice as a result of the delay.[256]

X. Other Insurance Provisions

In *Travelers Insurance Co. v. Benderson Development Co.*, an insurer commenced an action seeking to recover under an excess commercial general liability policy issued to Benderson Development, a commercial property management company.[257] "The policy included a $100,000 Self-Insured Retention (SIR) Endorsement and a $100,000 Insured's Contribution (IC) Endorsement. Before the policy limits could be applied toward any covered event, Benderson was obligated to pay under each of the endorsements, for a total of $200,000."[258] Benderson was named as an additional insured on two policies that triggered during the 2003–2004 Travelers excess policy period—one with Lancer, a contractor retained by Benderson, the other with Sally Beauty, a tenant at a property managed by Benderson.[259]

In 2003, a Lancer employee suffered an injury and brought an action

251. 133 A.D.3d 503, 20 N.Y.S.3d 37 (1st Dep't 2015).
252. *Id.* at 504, 20 N.Y.S.3d at 38 (citing Allstate Ins. v. Morrison, 267 A.D.2d 381, 381, 700 N.Y.S.2d 74, 75 (2d Dep't 1999)).
253. *Id.*
254. *Id.* at 504, 20 N.Y.S.3d at 38.
255. 132 A.D.3d 874, 17 N.Y.S.3d 895 (2d Dep't 2015).
256. *Id.*
257. 133 A.D.3d 1361, 1361, 20 N.Y.S.3d 834, 835 (4th Dep't 2015).
258. *Id.*
259. *Id.* at 1361–62, 20 N.Y.S.3d at 835–36.

against Benderson, which settled for $1,800,000.[260] The Lancer policy provided $1,000,000 in primary coverage as well as $400,000 in excess coverage, and Travelers paid the remaining $400,000.[261] The insurer then demanded that Benderson reimburse $190,068.79, which represented the $100,000 obligation under both the SIR and IC endorsements, minus a credit owed to Benderson.[262] Benderson refused, contending that the additional insured coverage provided by Lancer's underlying policy satisfied Benderson's obligations under the SIR and IC endorsements.[263]

Similarly, a Sally Beauty employee was injured on the company's premises and brought an action against Benderson in 2003.[264] That claim settled for $1,600,000, and the underlying Sally Beauty policy paid $1,000,000.[265] Travelers paid $400,000 of the $600,000 balance, but refused to pay the remaining $200,000, citing Benderson's obligations under the endorsements.[266]

After Travelers commenced an action to compel Benderson to reimburse the insurer's payment for the Lancer litigation, Benderson cross-claimed for the $200,000 it eventually paid out for the Sally Beauty litigation.[267] The supreme court granted the insurer's motion for summary judgment, and the Fourth Department affirmed.[268]

Citing the plain and unambiguous language of the SIR endorsement, the court concluded that Benderson agreed "not to insure the 'self-insured retention' without [Travelers'] knowledge and permission."[269] The court stated that Benderson "failed even to contend that permission was granted" in either the Lancer or Sally Beauty litigation.[270] With regard to the IC endorsement, the court also held that the policy's plain language precluded any obligation prior to the exhaustion of additional insurance.[271]

260. *Id.* at 1361, 20 N.Y.S.3d at 835.
261. *Id.*
262. *Travelers Ins.*, 133 A.D.3d at 1361, 20 N.Y.S.3d at 835.
263. *Id.*
264. *Id.* at 1362, 20 N.Y.S.3d at 836.
265. *Id.*
266. *Id.*
267. *Travelers Ins.*, 133 A.D.3d at 1362, 20 N.Y.S.3d at 836.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

XI. STATUTORY WAIVER

In *Black Bull Contracting, LLC v. Indian Harbor Insurance Co.*, the First Department determined that a classification limitation was not an exclusion, so the insurer's failure to disclaim in a timely manner was not fatal to its denial of coverage.[272]

In August 2011, a Black Bull employee was injured by a piece of falling concrete while using a jackhammer to demolish a chimney.[273] The employee commenced an action against United, who had contracted with Black Bull on a project, and United brought a third-party claim against Black Bull.[274] Black Bull was the named insured under a commercial general liability policy issued by Indian Harbor covering March 2011 to March 2012.[275]

An endorsement to the policy provided, "This insurance applies only to operations that are classified or shown on the Declarations or specifically added by endorsement to this Policy."[276] Only four classifications were included: "Carpentry—interior"; "Dry Wall or Wallboard Installation"; "Contractors—subcontracted work—in connection with construction, reconstruction, repair or erection of buildings—Not Otherwise Classified"; and "Contractors—subcontracted work—in connection with construction, reconstruction, repair or erection of buildings—Not Otherwise Classified—uninsured/underinsured."[277]

After a delay of more than two months from its receipt of the notice of claim, Indian Harbor disclaimed coverage for the employee's jackhammer injury on the grounds that Black Bull's demolition work "was not within any of the four classifications of work covered by the policy."[278] Black Bull challenged the denial, and the supreme court granted Indian Harbor's motion to dismiss.[279]

The First Department affirmed and determined that the policy's classification limitations defined which activities were included "within the scope of coverage 'in the first instance' . . . and [did] not constitute

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272. (*Black Bull Contracting, LLC II*), 135 A.D.3d 401, 404, 23 N.Y.S.3d 59, 62 (1st Dep't 2016).

273. *Id.* at 402, 23 N.Y.S.3d at 60.

274. *Id.*

275. *Id.* at 401, 23 N.Y.S.3d at 60.

276. *Id.*

277. *Black Bull Contracting, LLC II*, 135 A.D.3d at 401–02, 23 N.Y.S.3d at 60.

278. *Id.*

279. Black Bull Contracting, LLC v. Indian Harbor Ins. (*Black Bull Contracting, LLC I*), No. 150120/13, 2013 N.Y. Slip Op. 33485(U), at 13 (Sup. Ct. N.Y. Cty. Dec. 31, 2013), *aff'd*, 135 A.D.3d 401, 23 N.Y.S.3d 59 (1st Dep't 2016).

exclusions from coverage that would otherwise exist."[280] The court did note that if Indian Harbor had relied on an exclusion, its delay would have been unreasonable as a matter of law—but because no coverage existed as a threshold matter, timeliness was a non-issue.[281] The court concluded that Black Bull's demolition work did not fall within one of the four classifications, so there was no coverage.[282]

In *Batista v. Global Liberty Insurance Co. of New York*, the Second Department held that an insurer's untimely disclaimer was grounds for summary judgment against the insurer.[283]

Global's insured failed to answer or appear in the underlying action, and the plaintiff brought a direct action under Insurance Law § 3420 to enforce the default judgment.[284] Global did not provide counsel to the insured until "[a]pproximately one year after receiving the default judgment with notice of entry, and nearly three years after learning of the subject claim."[285] After the lower court determined that the insured was properly served in the underlying action, Global "issued a letter disclaiming coverage on the basis of the insured's alleged failure to cooperate."[286]

The Second Department concluded that Global failed to adequately explain the delay in its disclaimer, and held that the plaintiff was entitled to $100,000, the limit of the subject policy.[287]

XII. BAD FAITH

The Court of Appeals held in *Selective Insurance Co. of America v. County of Rensselaer* that an insurer did not act in bad faith by reaching a settlement that made the insured liable for all damages recovered by

280. *Black Bull Contracting, LLC II*, 135 A.D.3d at 403, 23 N.Y.S.3d at 61 (quoting Worcester Ins. v. Bettenhauser, 95 N.Y.2d 185, 188, 734 N.E.2d 745, 747, 712 N.Y.S.2d 433, 435 (2000)).

281. *Id.* at 402, 23 N.Y.S.3d at 61 (citing N.Y. INS. LAW § 3420(d)(2) (McKinney 2015)).

282. *Id.* at 405, 23 N.Y.S.3d at 63.

283. 135 A.D.3d 797, 797–98, 23 N.Y.S.3d 367, 368 (2d Dep't 2016).

284. *Id.* at 797, 23 N.Y.S.3d at 368 (citing INS. § 3420(a)(2)).

285. *Id.*

286. *Id.*

287. *Id.* at 798, 23 N.Y.S.3d at 368 (first citing Darling Ferreira v. Glob. Liberty Ins., 119 A.D.3d 837, 838, 989 N.Y.S.2d 388, 389 (2d Dep't 2014); then citing Endurance Am. Specialty Ins. v. Utica First Ins., 132 A.D.3d 434, 436, 17 N.Y.S.3d 401, 403 (1st Dep't 2015); then citing Okumus v. Nat'l Specialty Ins., 112 A.D.3d 797, 798, 977 N.Y.S.2d 338, 339 (2d Dep't 2013); then citing INS. § 3420(a)(2); then citing Friedman v. Progressive Direct Ins., 100 A.D.3d 591, 592, 953 N.Y.S.2d 293, 295 (2d Dep't 2012); and then citing Giraldo v. Wash. Int'l Ins., 103 A.D.3d 775, 775–76, 962 N.Y.S.2d 171, 171 (2d Dep't 2013)).

class action members.[288]

This suit arose out of the County of Rensselaer's "policy of strip-searching all people who were admitted into its jail, regardless of the type of crime the person was alleged to have committed."[289] Believing the County's policy was unconstitutional, a group of arrestees commenced a class action suit in 2002 against the County in federal court.[290] Selective issued a liability insurance policy to the County from 1999–2002.[291]

The Court noted that the policy defined personal injury as "injury . . . arising out of . . . [h]umiliation or mental anguish [or] . . . [v]iolation of civil rights protected under [42 U.S.C. § 1981]."[292] The policy also defined an occurrence as an "event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in . . . 'personal injury' . . . by any person or organization and arising out of the insured's law enforcement duties."[293]

Importantly, Selective's obligation to pay damages only applied to the amount of damages in excess of any deductible.[294] "The deductible was $10,000 per claim [in] 1999, 2000, and 2001 policies and $15,000 [in] 2002."[295]

The County tendered its defense in the class action to Selective, and the insurer retained counsel who purportedly were experts in class action suits.[296] Ultimately, Selective's counsel and the County "agreed to settle the case instead of challenging class certification, [after] Selective's counsel informed the County that there were no viable defenses."[297] However, the plaintiffs "missed several filing deadlines, and . . . [the] case was dismissed on those procedural grounds."[298] The arrestees appealed, and their counsel filed a second, similar class action soon thereafter.[299] After the two actions were consolidated in federal court,

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288. (*Selective Ins. III*), 26 N.Y.3d 649, 657, 47 N.E.3d 458, 462, 27 N.Y.S.3d 92, 96 (2016).

289. *Id.* at 653, 47 N.E.3d at 459, 27 N.Y.S.3d at 93.

290. *Id.* at 653, 47 N.E.3d at 459–60, 27 N.Y.S.3d at 93–94.

291. *Id.* at 653, 47 N.E.3d at 460, 27 N.Y.S.3d at 94.

292. *Id.* (first three alterations in original) (first and third omissions in original).

293. *Selective Ins. III*, 26 N.Y.3d at 653–54, 47 N.E.3d at 460, 27 N.Y.S.3d at 94 (omissions in original).

294. *Id.* at 653, 47 N.E.3d at 460, 27 N.Y.S.3d at 94.

295. *Id.*

296. *Id.* at 654, 47 N.E.3d at 460, 27 N.Y.S.3d at 94.

297. *Id.*

298. *Selective Ins. III*, 26 N.Y.3d at 654, 47 N.E.3d at 460, 27 N.Y.S.3d at 94.

299. *Id.*

Selective's counsel and the County agreed to settle both actions.[300]

Nathaniel Bruce, the lead plaintiff, received $5000, and all other class members received $1000.[301] When the County refused to pay Selective anything more than a single deductible payment, Selective commenced this action, arguing that each class member was subject to a separate deductible.[302] The County moved to dismiss, arguing that the single deductible payment was the only amount due.[303] Selective cross-moved for summary judgment and the County opposed.[304] The County "also asserted that Selective exercised bad faith by settling the underlying action without challenging class certification and then contending that . . . the County [was] responsible for a deductible payment for each class member."[305]

The supreme court determined that a separate deductible applied,[306] and the Third Department affirmed.[307] The Court of Appeals, in a unanimous decision authored by Justice Abdus-Salaam, first held that the improper strip searches of the arrestees over a four-year period constituted separate occurrences under the unambiguous definition of occurrence in the policy.[308]

Turning to the bad faith claim, Justice Abdus-Salaam concluded that the County "failed to meet [its] high burden of demonstrating that Selective acted in bad faith in negotiating the underlying settlement."[309] The Court recited the standard for bad faith in New York: an insured "must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interest—that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer."[310] The Court concluded that the County

300. *Id.*

301. *Id.*

302. *Id.*

303. *Selective Ins. III*, 26 N.Y.3d at 654, 47 N.E.3d at 460–61, 27 N.Y.S.3d at 94–95.

304. *Id.* at 655, 47 N.E.3d at 461, 27 N.Y.S.3d at 95.

305. *Id.*

306. Selective Ins. v. County of Rensselaer (*Selective Ins. I*), 51 Misc. 3d 255, 272, 27 N.Y.S.3d 316, 329 (Sup. Ct. Rensselaer Cty. 2011), *aff'd*, 113 A.D.3d 974, 979 N.Y.S.2d 550 (3d Dep't 2014), *aff'd in part, rev'd in part*, 26 N.Y.3d 649, 47 N.E.3d 458, 27 N.Y.S.3d 92 (2016).

307. Selective Ins. v. County of Rensselaer (*Selective Ins. II*), 113 A.D.3d 974, 975, 979 N.Y.S.2d 550, 550 (3d Dep't 2014), *aff'd in part, rev'd in part*, 26 N.Y.3d 649, 47 N.E.3d 458, 27 N.Y.S.3d 92 (2016).

308. *Selective Ins. III*, 26 N.Y.3d at 656, 47 N.E.3d at 461, 27 N.Y.S.3d at 95.

309. *Id.* at 657, 47 N.E.3d at 462, 27 N.Y.S.3d at 96.

310. *Id.* (quoting Pavia v. State Farm Mut. Auto. Ins., 82 N.Y.2d 445, 453, 626 N.E.2d 24, 27, 605 N.Y.S.2d 208, 211 (1993)).

did not meet this standard, because Selective hired competent attorneys to defend it and played an active role in the negotiation.[311]

The last time a New York State appellate court upheld a bad faith verdict against any insurer in New York State was in 1998.[312] That streak continues.[313]

CONCLUSION

The New York appellate courts continue to demonstrate an abiding interest and engagement in insurance law questions. In 2016, there were an unusually large number of decisions from the Court of Appeals, in particular, in insurance law which demonstrates the courts' interest is not yet waning.

311. *Id.*

312. *See generally* Smith v. Gen. Accident Ins., 91 N.Y.2d 648, 69 N.E.2d 168 (1998) (reinstating a bad faith jury verdict).

313. *See, e.g.*, *Selective Ins. III*, 26 N.Y.3d at 657, 47 N.E.3d at 462, 27 N.Y.S.3d at 96 (dismissing the County's bad faith argument).